1992 (2)

Zimbabwe Law Reports [Part 2]

VARETA v VARETA & ORS 1992 (2) ZLR 1 (HC)

Court **High Court, Harare**

Hwacha AJ

Civil application

2 April & 1 July 1992

Flynote

Customary law - heir to immovable property - duty to care for deceased's dependants - not necessarily duty to accommodate them

Headnote

Applicant was heir to his father's estate at customary law. This estate included a house. The applicant sought to oblige to oblige his stepmother to evict lodgers which she had staying at this house and to account for all rentals received by her from the lodgers. In a separate action in the magistrates court, the applicant was seeking the eviction of his stepmother from the premises.

Held, that although the applicant had a duty under customary law to support his father's dependants, this duty did not necessarily include a duty to provide accommodation for those dependants, especially if there was a separate home in the communal lands where the dependants could live. The stepmother had no right to have lodgers or to keep their rentals as her own support and she was ordered to eject them and to account for past rentals received.

PC Paul for the applicant

Judgment

Hwacha AJ: This is an application on a notice of motion in which the applicant seeks the following order:

> "1. That Prisca Vareta take all necessary steps to remove the lodgers which she has installed in Stand 3394 Mbare forthwith and in any event within thirty (30) days from the date of service of this Order and should she

HWACHA AJ

> fail to do so the Sheriff or his lawful Deputy be and is hereby authorised to evict such lodgers.

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2. that Prisca Vareta lodge an account with Applicant within thirty (30) days from the date of service of this Order reflecting all rentals received by her in respect of the property.

3. That Prisca Vareta pay the costs of this application."

The facts of this case which are largely common cause are these. The applicant's father who was a Mozambican national died in Zimbabwe in June 1984, when the applicant was still a small boy. Facts indicate that he died intestate. The applicant was his father's eldest son. On this basis he was declared by the Supreme Court of Zimbabwe to be the heir to his father's estate at customary law. The respondent is the applicant's stepmother.

In his lifetime, the applicant's father entered into a deed of sale agreement with the City of Harare whereby he was purchasing Stand 3394 Mbare Township, Harare also known as No. 87, 5th Avenue, Mbare ("the property") which is the subject of these proceedings.

In consequence of this becoming heir to his father's estate, all the rights, title and interest in respect of the aforesaid deed of sale agreement were passed onto (devolved upon) the applicant. The result of this situation was that once the full purchase price under the said deed of sale agreement had been paid, the property would be registered in the name of the applicant. It is worth noting that the property would be registered in the applicant's name in his own personal capacity and not in a representative capacity. In recognition of this situation the City of Harare has now ceded to the applicant all the rights and interest in respect of the property and in consequence, the applicant has now been issued with a rent card in terms of which he is obliged to pay the rental for the property.

Before the death of the applicant's father the family, including the applicant, lived in the house on the property. According to the applicant, following the death of his father, the respondent, with the assistance of her boyfriend, chased him away from the house. The respondent denies this allegation.

On 25 March 1991 the applicant visited the property and informed the respondent that he wished to move back into his house. The respondent refused to discuss the matter. Before departing the property the applicant noticed that there were lodgers both in the main house and in the outbuildings. The applicant raised this aspect with the respondent and again the respondent refused to discuss the matter, preferring the matter to be discussed between the legal

practitioners of both parties. On 2 April 1992, the applicant's legal practitioners addressed a letter to the respondent's legal practitioners making two requests. The first was that the lodgers be immediately removed from the house. The second was that the respondent account to the applicant in respect of all rentals previously received by her from all the lodgers ie rentals received since the death of her husband. The respondent complied with neither request. This is what gave rise to these proceedings.

In her opposing affidavit, the respondent vehemently and strenuously denied the existence of

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any lodgers in the house and in the outbuildings. In para 3 of her opposing affidavit, the respondent deposes that:

> "... There is not a single lodger in the house and I challenge the applicant to name these persons. If I was to have lodgers where would I be staying."

Commenting on the applicant's visit to the property on 25 March 1991 when the applicant saw lodgers at the house, the respondent disputes that the applicant had or could have seen any lodgers since none existed. And commenting on the applicant's demand on 25 March 1991 that she had given an undertaking that she would arrange for the lodgers to be removed from the property the respondent deposed that:

> "It is correct that I did not give an undertaking. I could not have given an undertaking to remove no-existing lodgers and in any case to what the applicant is alleging he never asked for it since he never saw lodgers."

Thus the respondent maintained that there were no lodgers in the main house and in the outbuildings. It is on the basis that there were no lodgers on the property and that it, therefore, followed that she did not receive any rentals, that the respondent argued that she was unable to lodge an account with the applicant. Put in other words, there was nothing for which the respondent could account.

Before me, Mr *Paul* for the applicant wanted it to be noted that the applicant admitted that under customary law he had a duty to support his deceased father's dependants. I did not however, understand Mr *Paul* to go so far as to say that thereby the applicant accepted a duty to provide the respondent with a shelter. Incidentally, prior to the institution of these proceedings, the applicant instituted proceedings in the magistrates court for the eviction of the respondent. This aspect has been pending now for some time. In this connection, on 4 October 1991, GREENLAND J, by consent, ordered as follows:

HWACHA AJ

> "That the applicant and the respondent have each an exclusive right to occupying *(sic)* and possession of residential premises being No. 87, 5th Avenue, Mbare, and;
>
> That *pendente lite* the parties exercise their rights therein equally **to the exclusion of others** as joint occupants and in particular respondent shall continue in undisturbed and peaceful occupancy of **the room thereafter which she presently occupies"** (my emphasis).

I understand the import or purport of the *pendent lite* order to be that no lodgers were allowed on the property and that the respondent was entitled to occupy one room as had been the case hitherto.

In a complete about-turn, before me, the respondent admitted that there were lodgers on the property and went further to say that they had always been there but that they should not be removed because rentals from lodgers were her only source of income. How much better it would have been if this concession had been made right at the outset! In the circumstances I must agree with Mr *Paul*'s submission that the respondent had all along been lying. I further say that in all probability, she was lying when she disputed the applicant's allegation that his late

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father had built her a house in Wedza where she could go and live.

In conclusion Mr *Paul* submitted that the respondent was called upon to account for rentals received from when the applicant's father died, ie June 1984. In response to this submission the respondent submitted that the request was unfair because receiving rentals from lodgers had been her responsibility even when applicant's father was still alive. In my view this does not make the request unfair. Rather it makes the respondent well qualified to account for all the rentals she received. As Mr *Paul* submitted, she must do her very best to account for all the rentals she received from June 1984.

In all the circumstances of this case I am satisfied that the applicant is entitled to the relief he is seeking and have no hesitation in making an order in terms of the draft order.

Winterton, Holmes & Hill, applicant's legal practitioners

Stumbles & Rowe, respondent's legal practitioners

IN RE MASENDEKE 1992 (2) ZLR 5 (SC)

Court **Supreme Court, Harare**

McNally JA

Chamber application, in terms of s 24(2) of the Constitution of Zimbabwe

2 July 1992

Flynote

Constitutional law - s 24(3) - delay in hearing case - delay not attributable to accused

Headnote

There had been seven years' delay in a case involving a policeman who was on two simple charges of taking bribes. The magistrate referred the case to the Supreme Court under s 24(2) of the Constitution. There was no justification for such a protracted delay and it was not suggested that the accused was to blame for the delay.

The Supreme Court Ordered a permanent stay of proceedings.

Case cited:

In re *Mlambo* 1991 (2) ZLR 339 (S); 1992 (2) SACR 245

Judgment

McNally JA: This is a matter in which the criminal proceedings have been referred to this court in terms of s 24(2) of the Constitution, by the magistrate presiding at the trial of the accused.

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The accused has protested that his right to a "fair bearing within a reasonable time" in terms of s 28(2) of the Constitution has been infringed.

The Attorney-General has conceded that this is a proper case for the granting of an order for a permanent stay of proceedings. Accordingly it is unnecessary to go into great detail.

The delays in this very simple case have been inordinate. The accused was first charged on 13 July 1985 with soliciting and accepting two $50 bribes as a

member of the Zimbabwe Republic Police. He was summoned to appear in court on 7 January 1988.

The undated record of his trial shows that the complainant and one witness on count one were called. Then the complainant on count two was found to be in default, so the matter was postponed to 21 October 1988.

The next document on the docket shows that he was summonsed to appear on 22 May 1991 and then on 15 August 1991. He was now being charged under the new Prevention of Corruption Act which was not even in force when he allegedly offended.

Then comes, unexplained, a High Court order for a trial *de novo*, dated 8 August 1991.

In consequence of that order he appeared in the magistrates court on 11 June 1992 - seven years after the alleged offences. The prosecutor, unaware of the history of the matter, had no witnesses. He asked for a postponement.

Counsel, citing In re *Mlambo* 1991 (2) ZLR 339 (S), asked that the matter be referred to this court. The magistrate agreed to do so.

It appears that the accused was in custody for more than a month when first arrested. He has been on suspension from the Zimbabwe Republic Police since then, and has not been allowed to write promotion examinations. He has been to court innumerable times. He was on the last occasion legally represented. He has at all times pleaded not guilty.

The evidence in the case was very simple. Two "pirate" taxi drivers alleged that he offered to withdraw charges of driving without a Road Service Permit (deposit fine $100) if they paid trim $50 Bach. One of them arranged a trap with the police and he was caught. There is no possible justification for such a delay, nor is it suggested that the accused is to blame for the delay.

As in *Mlambo supra* I would accordingly order, with the consent of the Attorney-General, that the proceedings *de novo* in the magistrates court in the case of *State* v *Same Jerry Masendeke*, case number unrecorded, be and are hereby permanently stayed.

The CHEF JUSTICE has authorised me to say that he is in agreement with this Judgment.

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S v MASIWA 1992 (2) ZLR 7 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Criminal appeal

7 July 1992

Flynote

Criminal procedure (sentence) - culpable homicide - victim brutally beaten to death at election time because had made derogatory remarks about the government - 7 years' imprisonment appropriate

Headnote

The deceased at election time had made derogatory remarks about the then Prime Minister and the Government. In order to punish him for this, the appellant and four other men had brutally beaten the deceased for several hours with fists, a stick and a fan belt. The deceased was tied to a pole during most of the time that the assault was taking place. The deceased was beaten until he lost consciousness and appeared to have died. The body was then stripped and buried, and his clothes and identity card burned.

The appellant had two previous convictions, one for assault with intent to do grievous bodily harm.

In upholding the seven-year term of imprisonment imposed upon the appellant by the trial magistrate, the court pointed out that the appellant's own counsel had called the attack a murderous assault and the magistrate, after noting that the appellant was lucky that the State had levelled a charge of culpable homicide and not murder against the accused, had convicted him of culpable homicide and had referred the case to the Attorney-General for transfer to the High Court for sentence, but the Attorney-General had declined to transfer it. The sentence of seven years' imprisonment was the maximum sentence which the magistrate could impose within his sentencing jurisdiction.

GUBBAY CJ

WT Manase for the appellant

Mrs *J Zindi* for the respondent

Judgment

Gubbay CJ: The appellant and four other co-accused (hereafter referred to as the second, third and fourth accused) were jointly charged with the crime of culpable homicide, it being alleged that on 17 February 1985 they had beaten to death one Abel Karimanzira. Apart from the fifth

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accused, who absconded after having testified in chief and was not re-arrested prior to the termination of the trial, they were all convicted. Each was ordered by the presiding regional magistrate to undergo seven years' imprisonment with labour - the maximum of his custodial jurisdiction. It is only the appellant who now appeals against both conviction and sentence.

On 29 January 1985 the appellant, who was employed by Zimbabwe Mining Development Corporation, was transferred to its KY Mine at Nyamapanda in the capacity of senior general supervisor. He was to be in charge of six permanent employees and about twenty-two casual labourers. The deceased and the four accused were such permanent employees and had been working at the mine fairly harmoniously with one another before the appellant's arrival, with the deceased unofficially in charge. The second accused was a member of the Special Constabulary.

It would appear that on the afternoon of Monday, 11 February 1985, the deceased was heard to make some derogatory remarks against the Government and the then Prime Minister, Robert Mugabe. Having caused offence, he was handcuffed, a rope placed around his neck, and put under guard in the appellant's quarters. The next day he was escorted by the appellant and the second accused to Mtoko Police Station where a complaint was laid against him. He was held there in custody.

On Wednesday, 13 February 1985, the appellant travelled to the head office of the Mining Corporation in Harare where he reported to Dr Kanyangarara, who was the official in charge of the KY Mine projects, and to other executive personnel, that the deceased had been arrested and was being detained at Mtoko Police Station.

The deceased remained in police custody until the late afternoon of Sunday 17 February 1985. There had been some difficulty in arranging his transfer to the police station at Nyamapanda so it was decided to release him, if only temporarily. Thereupon he made his way back to KY Mine.

GUBBAY CJ

Soon after the deceased returned, at about 8 pm, he was apprehended and taken in handcuffs to the quarters of the appellant, where he was most brutally beaten to death. Present were the appellant and the four other accused. While handcuffed with his legs tied together the deceased was struck with fists, a stick, a fan belt and a piece of rope. The assault upon him was protracted and continued until he lost consciousness and was pronounced dead. His body was then stripped of its clothes, placed into a wheelbarrow and conveyed to a spot in the bush, where it was buried in a shallow grave. All this occurred in the presence of the appellant. The deceased's clothes and identity card were later burnt.

The following morning the appellant and the second accused went to Nyamapanda Policed Station professedly to make enquiries about what the police intended to do with the deceased. As no one was there to enlighten them, they went to the Nyamauyaruka Business Centre where they met Constable Moyo from Nyamapanda Police Station. They told him that they had been waiting for him at the police station, and that they were the persons who had arrested Karimanzira and had taken him to Mtoko Police Station. They asked about his whereabouts

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and urged that he be dealt with severely because he was preaching that Abel Muzorewa should be the Prime Minister of Zimbabwe. The appellant and the second accused appeared to Constable Moyo to be very friendly towards one another. He told them that he would come to the mine the next morning.

On 18 February 1985 Constable Moyo and Sergeant Mutsairo went to KY Mine. They spoke to the appellant. He informed them that Karimanzira had not, as yet, returned and handed to them a typed written report which he said he had submitted to head office. As the police officers were about to depart the appellant asked them to take possession of a spear which belonged to the deceased. He said he was afraid that on his return the deceased might kill someone with it. Sergeant Mutsairo took the spear from the appellant.

On 20 February 1985 the appellant again went to the head office of the Mining Corporation where he informed the executive personnel that the four accused had beaten the accused to death in his presence while he had sat drinking beer, and had then buried the body at KY Mine. He claimed that the four accused were ex-combatants and that he had been threatened by them and was powerless to intervene. He said that he could not leave the mine before this day, when he had managed to escape on his motor-cycle.

The police were duly informed of the fate of the deceased and on 22 February 1985, upon the applicant's indications, the deceased's badly decomposed body was exhumed from the shallow grave. On the same day the four accused were

arrested. The fan belt used in the assault was recovered as well as the charred remains of the deceased's clothing and the identification card. The appellant's arrest followed three days later.

All these factors were not seriously placed in issue by the appellant. His defence was simply that when the four accused were beating the deceased there was nothing he could have done to avert the tragedy. He had been warned of the consequences were he to try to stop them. He was told that if he reported the incident they would lay all the blame for the killing upon him. Nonetheless he had reported as soon as he felt it safe to do so.

The four accused admitted to having beaten the deceased on the night in question. They adamantly denied, however, that the appellant was a mere passive onlooker. To the contrary, he, as their superior at the mine, was the one who had participated to the greatest extent in the beating; they had employed minimal force. From the time of his arrival at the mine, barely three weeks before the fatality, the appellant had had trouble with the deceased and wanted to have him removed from the mine. The appellant made it clear that he would dismiss anyone who dared reveal what had occurred.

The regional magistrate delivered a lengthy, well constructed and closely reasoned Judgment. He warned himself of the dangers inherent in the acceptance of the evidence of accomplices and appreciated that the four accused had a real motive to shift most of the blame for the killing on to the appellant and to minimise their individual roles. Accordingly, he sought material corroboration for their incrimination of the appellant in order to be satisfied beyond any

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reasonable doubt that the appellant was not, as he protested, an innocent, unwilling spectator. Taking account of the cumulative effect of several aspects of the appellant's conduct, which were either established by the State or admitted to by him, the regional magistrate held that there was no cause to disbelieve the assertions of the four accused that the appellant had willingly taken part in beating the deceased. The relevant features are these.

First, there was a relationship of animosity between the appellant and the deceased. Disagreements had arisen between them over work matters and the appellant regarded the deceased as being insubordinate. This emerged clearly from the appellant's written reports to head office. Furthermore, the appellant on his own admission was incensed at the disparaging remarks made by the deceased. His claim that the deceased was removed to Mtoko Police Station, at least partly, for his own safety because he feared that were the deceased to remain at the mine his life would be put at risk by the other workers, was not

GUBBAY CJ

borne out by either the content of his written reports or what he informed Constable Dzingi at Mtoko Police Station when handing the deceased over to him. In his first reports of 11 February 1985 the appellant alleged that the deceased had been arrested in order to ensure the safety of the workers at KY Mine. He omitted mention of the fact that the deceased had been conveyed to him in handcuffs with a stout rope around his neck.

Second, it is significant that on the evening of 17 February 1985, the deceased was brought to the appellant's quarters and that the assault took place there. There was no suggestion that the appellant attempted to persuade the four accused to take the deceased somewhere else. During the course of the bearing, which lasted several hours, the appellant, according to what he subsequently informed the Mining Corporation's Secretary, Peter Moyo, sat drinking a bottle of beer. That he did so is indicative only of his completely callous and inhuman attitude towards the deceased and one inconsistent with any personal opposition to the assault.

Third, the appellant testified that after the deceased had been placed in the wheelbarrow, about to be conveyed to the burial site he had, on his own instigation, fetched a torch from his quarters. He had then walked in front of the wheel barrow with the third accused. The excuse he proffered in cross-examination for lighting the way was that he hoped that by doing so he might attract the attention of a passer-by. This was totally absurd. Moreover, while at the burial site, the appellant made no effort to run off in the dark and summon help.

Fourth, on the morning of 18 February 1985, the appellant did not avail himself of the opportunity to inform Constable Moyo that the four accused had beaten the deceased to death and had then buried the body. His explanation that he feared to reveal the crime because of the presence of the second accused, is totally unconvincing. Constable Moyo was there to offer his protection and, in any event, according to him, there was an attitude of cordiality between the appellant and the second accused. What the appellant and the second accused did was to pretend, by their enquiries, that the deceased was still to be dealt with by the police.

Fifth, the next day the appellant deliberately misled Constable Moyo and Sergeant Mutsairo by

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telling them that the deceased had not returned to the mine and that he was unaware of his whereabouts. Yet again the appellant failed to avail himself of the protection the police would have afforded him against suffering any harm at the hands of the four accused, were he to have revealed

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the deceased's fate. If he had spoken out and taken the police to the burial site, the inevitable consequence would have been the arrest of the four accused. This is precisely what occurred on 25 February 1985, when the appellant indicated where the deceased had been buried.

Sixth, on 20 February 1985, the appellant left the mine on his motor-cycle for Harare where he reported that the deceased had been killed by the four accused. He said that this was the first chance he had to escape the attention of the four accused. This claim was utterly far-fetched, for there had been nothing to prevent the appellant, if so minded, from leaving the mine on his motor-cycle late at night.

Seventh, according to Peter Moyo, the appellant told him on 20 February 1985, that he had consulted a legal practitioner. If, as the appellant claimed, he had no hand in the killing, what was he fearful of? Many people witness crimes being committed and report to the authorities without first consulting a lawyer.

I have no doubt that the only reasonable inference to be drawn from these features is one of guilt; and this quite apart from the implicating testimonies of the four accused.

I entirely agree with the regional magistrate that when the deceased returned to the mine on the evening of 17 February 1985, there was consternation and rage over his release by the police. This led to the appellant and the four accused deciding to take the law into their own hands, and punishing the deceased themselves. What ensued was a particularly savage beating upon a defenceless man, with all those present participating. The ordeal must have been absolutely terrifying for the deceased.

With regard to the propriety of the sentence imposed upon the appellant, I would point out that he was not a first offender. I think he should consider himself fortunate that he did not face a charge of murder with constructive intent to kill, in which even he would have received, in all probability, an even longer term of imprisonment.

One simply has no sympathy for the appellant. By virtue of his position he ought to have controlled his indignation and protected the deceased from the desire of the others to exact punishment. His failure to do so, and the web of deception that he wove after the killing served, if anything, to aggravate his moral culpability.

GUBBAY CJ

It was for these reasons that this court dismissed the appeal in its entirety without finding it

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necessary to call upon the State's representative in argument.

McNally JA: I agree.

Korsha JA: I agree

W T Manase, appellant's legal practitioner.

EDWARDS v CHIZEMA 1992 (2) ZLR 14 (SC)

Court **Supreme Court, Bulawayo**

Gubbay CJ, McNally JA & Ebrahim JA

Civil appeal

25 June & 9 July 1992

Flynote

Family law - maintenance - when appeal court will interfere with maintenance award - child cannot be deprived of necessary support because person paying maintenance is also supporting elderly mother

Headnote

An appeal court will not interfere with the determination of a maintenance court unless it misdirected itself or made an award such as no reasonable court would have made.

The appellant was ordered by the maintenance court to pay an increased amount of maintenance for his illegitimate child.

On appeal the appellant argued that the maintenance court had paid insufficient regard, amongst other things, to the fact that he was supporting his aged mother.

The appeal court held that his obligation to maintain his illegitimate child took precedence over that of his mother and accordingly he was not entitled to deprive the former in order to provide for the latter.

The appellant in person

The respondent in person

Judgment

Gubbay CJ: On 1 November 1985 the respondent gave birth to a male infant who was named Simbarashe. The appellant is the father of that child. Until October 1986, when he ceased to associate with the respondent, the appellant had provided clothing for the child and paid the respondent $50 per month for its other requirements.

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GUBBAY CJ

On 8 June 1987 the respondent obtained an order from the maintenance court, in terms of which the appellant was to pay her an amount of $60 per month for Simbarashe, with effect from 30 June 1987. There is no complaint that such order was not faithfully complied with. At that time the respondent was unemployed, but she earned some income from the sale of garments which she knitted.

Nearly four years later, on 19 February 1991, maintenance court for a variation of the existing order. She sought an increase to an amount of $200 per month. The appellant, a captain in the Zimbabwe National Army, opposed the extent of the increase. He acknowledged that by virtue of the sharp rise in the cost of living the $60 per month he was paying was inadequate, but averred that he could not afford more than $85 per month.

Having carefully weighed the respective financial standing of each party, the magistrate presiding ordered that the maintenance be increased to $120 per month, to commence on 30 April 1991.

Before this court the appellant protested that the magistrate had paid insufficient regard to the fact that he was a married man with four children and an aged mother to support.

There can be little doubt that the appellant had heavy financial commitments. He was in receipt of a monthly salary of $1 758, but his take home pay was only $821. I suspect that at least some of the deductions made were non-recurring or related to unessential expenditure. The appellant's wife was also employed and earning a nett salary of $300 per month.

The respondent was employed in a lowly capacity at a salary of $210 per month. Simbarashe was four years older and his needs that much greater, especially as he had commenced to attend school. Moreover, the cost of essential commodities since 1987 had risen dramatically.

It was explained to the appellant that his obligation to maintain his child took precedence over that of his mother and that accordingly he was not entitled to deprive the former in order to provide, however inadequately, for the latter. This he recognised.

Although I have sympathy for the appellant's predicament and might even have awarded a slightly lower figure had I been hearing the application at first instance, an appeal court will not interfere with the determination of a main-

GUBBAY CJ

tenance court unless it misdirected itself or made an award such as no reasonable court would have have made. I can find no basis for interferering.

All in all, I am not persuaded that the maintenance court was wrong.

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I would dismiss the appeal.

McNally JA: I agree.

Ebrahim JA: I agree.

S v KAPURIRA 1992 (2) ZLR 17 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Criminal appeal

18 June & 13 July, 1992

Flynote

Jurisdiction - murder - alleged murderer and victim both Zimbabwean citizens - fatal blow struck when parties in foreign country - but victim brought back to Zimbabwe and dying there - whether Zimbabwean courts have jurisdiction to try case

Headnote

The appellant and another person, who were both Zimbabwean citizens, had crossed into Mocambique in order to attend a beer drink there. The appellant had allegedly attacked his fellow Zimbabwean and had fatally wounded him. The victim had been taken back to Zimbabwean where he died of bleeding from the wound. When the appellant returned to Zimbabwe he was arrested and charged with murder. The High Court decided that it had jurisdiction to try this case and the appellant appealed against this decision.

Held that generally the courts favoured the approach of basing jurisdiction upon place of impact or intended impact.

Held, further, that the courts would not readily surrender their jurisdiction especially where the principles of comity and effectiveness were satisfied. The comity principle would be satisfied where there was no danger of offending another state by exercising jurisdiction in the matter and the effectiveness principle would be satisfied where the court is able to reach the people involved and so give effect to its Judgment.

Held, further, that in the present case jurisdiction had been properly assumed. Although the murderous attack had taken place in Mocambique, a substantial and essential element of the crime, namely the death of the victim, had taken place in Zimbabwe. Both parties involved were

McNALLY JA

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Zimbabweans so Zimbabwe was the country most interested in taking action. The principle of comity was satisfied as there was no risk of offending the Mocambican authorities, courts or people as the crime was of minimal interest to them. The principle of effectiveness was also satisfied because the appellant was under arrest in Zimbabwe.

Case cited:

S v *Mhararpara* 1985 (2) ZLR 211 (S)

GS Wernberg for the appellant

CT Mantsebo for the respondent

Judgment

McNally JA: This case raises a question of jurisdiction. The JUDGE PRESIDENT decided that the High Court of Zimbabwe had jurisdiction to try the appellant for murder. The appellant now appeals against that decision, as he is entitled to do - see *S* v *Mharapara* 1985 (2) ZLR 211 (S).

The facts of the case are simple. Two villagers from a remote area of Zimbabwe near the Mocambican border decided to go to a beer-drink just across the border in Mocambique. There are no border posts there and people move back and forth at will.

The appellant became involved in an argument with his fellow drinker and, it is alleged, struck him on the neck with a bottle. This caused bleeding which ultimately caused the death of the victim. But his death did not occur in Mocambique. He was brought home to Zimbabwe before he died. The appellant also returned home, where he was arrested and charged with murder.

Before I consider the jurisprudential complexities of the law of jurisdiction, I think it is important to make some general observations. In doing so, I endorse, with respect, the remark made by the present CHIEF JUSTICE in *Mharapara* (*supra*,) where he said: "A more flexible and realistic approach (to the question of jurisdiction) based on the place of impact, or of intended impact, of the crime must be favoured" (p 222B).

Courts should not be astute to surrender their jurisdiction at any time, but more especially where two basic principles are satisfied - the principle of comity and the principle of effectiveness. By the principle of comity I mean simply that there should be no danger of offending the authorities of another state. By the principle of effectiveness I mean simply that the court will need

to be sure that the person or persons against whom it wishes to make an order can be reached and dealt with by the appropriate authorities.

There is another consideration which seems to me to be relevant, though not conclusive. Where a crime is committed outside our borders which is of minimal interest to the other country (by which I mean its Government, its courts and its people), but where the people involved and the

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impact resulting are all in a broad sense Zimbabwean, then again, it seems to me, we should think long and hard before accepting that our courts have no jurisdiction. I appreciate, however, and do not intend to contradict, the cautionary remarks made by the CHIEF JUSTICE in *Mharapara supra* at 216C.

I have phrased these remarks broadly and without citing authority because I do not intend them as statements of law but merely as indications of the frame of mind with which one should approach the law on the subject. I now turn to deal with that law.

In the first place, it must be observed that the indictment does not say anything about Mocambique. It reads:

> "That SANDAS KAPURURIRA of Chikafa Village, Chief Chitsungo, Guruve in Zimbabwe (hereinafter called the accused) is guilty of the crime of MURDER.
>
> In that on or about the 2nd day of August, 1990 and at or near Chikafa Village, Chief Chitsungo, Guruve, the accused did unlawfully and maliciously kill and murder CHENGETAI ZVARE by striking him on the neck with a bottle."

The exception to the charge therefore is to the charge as particularised by the State Outline, and no technical point has been raised in this connection. The basic facts are agreed. But it raises the interesting point that the crime was completed in Zimbabwe although all the necessary acts by the appellant were done in Mocambique.

It is obvious that the death of the victim is an essential, indeed the essential, element in the crime of murder, as it is in the crime of culpable homicide which is a possible alternative verdict in this case. Therefore the crime was not completed until the victim died. Does that mean that the crime was committed in Zimbabwe, simply because the victim died in Zimbabwe? It offends against commonsense to say so when the acts done by the appellant which caused the death of the victim were done in Mocambique.

McNALLY JA

I would say there is no simple answer to the question: "Where was the crime committed?". One would have to answer: "The assault was committed in Mocambique, and the consequent death took place in Zimbabwe, so the crime was completed in Zimbabwe". In the same way, there is no simple answer to the question: "When was he killed?". One would have to answer: "He was assaulted on the one day and he died on the next".

It seems to me therefore that it is not necessary to go into the question of what would have happened if:

a. The victim had died on the spot;

b. The victim had recovered;

c. The victim had been a Mocambican; or

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d. The appellant had remained in Mocambique.

I am content to accept and apply the test laid down by the CHIEF JUSTICE in *Mharapara supra* when he said, at p 217C-D:

> ". . . the underlying *ratio* was that a court may exercise jurisdiction where either a substantial element of the offence or the harmful effect thereof occurred within its territorial boundaries."

This approach is entirely supported by the extracts cited at p 221 from Lansdown & Campbell *South African Criminal Law and Procedure* vol 5 at pp 9 and 11.

Of the two bases set out by the CHIEF JUSTICE, I think it might be straining the bounds of language to say in this case that the harmful effect of the offence was felt in Zimbabwe. I will, however, leave that aspect open, because it seems to me indisputable that a substantial element of the offence (ie the death of the victim) took place in this country.

It follows that I do not accept the suggestion by Mr *Wernberg*, who appeared for the appellant, that the dictum of the CHIEF JUSTICE was too widely stated. He argued that the occurrence of the harmful effects in Zimbabwe must have been within the contemplation of the appellant and not merely a fortuitous occurrence. My answer is that it is unnecessary in this case to rely on the "harmful effects" doctrine. Nor do I accept the proposition that death is merely a consequence of murder and not an element of the offence. It is an essential element of the offence. The assault was no more than an assault until the death took place.

McNALLY JA

I have read the article by Professor Glanville Williams in 81 LQR at page 518, upon which Mr *Wernberg* placed much reliance. The learned author speaks of the initiatory and terminatory theories of jurisprudence. The one allocates jurisdiction to the country in which the acts were initiated (ie in this case Mocambique) and the other to the country in which the consequence took place (ie in this case Zimbabwe). He appears to favour the former, but he concedes that "the current of authority is now set against it" (p 519).

I appreciate that to claim jurisdiction where this country's involvement is based upon a fortuitous crossing of the border by the victim before his death may seem highly technical. But the fact is that that fortuitous crossing resulted in an essential element of the offence (ie death) occurring in Zimbabwe. That provided a basis for the exercise of jurisdiction. One then considers all the other factors, namely:

1. Zimbabwe is the jurisdiction most interested in taking action;
2. The victim and the accused are both Zimbabweans;
3. There is no problem of comity; and
4. The principle of effectiveness is satisfied.

The total situation is such that, in the words of Lansdown & Campbell *op cit*, "our courts may

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find themselves not compelled to disclaim jurisdiction".

I am wary of attempts to tie down too closely the criteria by which the decision to assume or not to assume jurisdiction is taken. I am satisfied that in our law jurisdiction may be assumed, and in this case was properly assumed, on the ground that an essential element of the crime occurred in Zimbabwe and because of the other supporting factors to which I have referred.

Accordingly I am satisfied that the decision of the JUDGE PRESIDENT was right. The appeal is dismissed.

Korsah JA: I agree.

Ebrahim JA: I agree.

Pro Deo

BOADI v BOADI & ANOR 1992 (2) ZLR 22 (HC)

Court **High Court, Harare**

Smith J

Civil action

19 May & 15 July 1992

Flynote

Civil procedure - interim interdict - when court will grant

Headnote

The applicant and the first respondent had been married. Whilst they were married the first respondent acquired certain property in Zimbabwe and the property was registered in the name of the first respondent. The parties subsequently got divorced. The applicant claimed that he was entitled to a division of or share in the matrimonial property, including the property acquired by the first respondent in Zimbabwe.

The applicant sought a permanent interdict against the first respondent to prevent her from disposing of the property in Zimbabwe without his consent.

Held, that a final interdict could only be ordered if the applicant has a clear right, there had been actual injury or there is reasonable apprehension of injury and there is no other remedy available. For a final interdict it is not sufficient to establish merely a *prima facie* right unless there is a likelihood of irreparable harm being suffered if relief is not granted.

Held, further, that the court has a discretion to grant the extraordinary remedy of an interim interdict. In deciding whether to grant this remedy, the court will balance the prejudice to the

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applicant if the interdict is withheld against the prejudice to the respondent if it is granted.

Held, that in the present case the applicant had established a *prima facie* right to a share in the property concerned and a well-grounded apprehension of irreparable injury. On the other hand, the first respondent would suffer no prejudice if the interdict were granted for a limited period. The balance was therefore in favour of granting the interim interdict and thus the court ordered accordingly.

SMITH J

Held, as to the costs, that each party should bear its own costs as the first respondent may well not have opposed the application if the applicant had sought only an interim interdict instead of a permanent interdict.

Cases cited:

Setlogelo v Setlogelo 1913 AD 221

Flame Lily Invtmt Co (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd & Anor 1980 ZLR 378 (G)

Molteno Bros & Ors v SA Rlys & Ors 1936 AD 321

Eriksen Motors (Welkom) Ltd v Protea Motors & Anor 1973 (3) SA 685 (A)

K Ncube for the applicant

H Thompson for the first respondent

Judgment

Smith J: The applicant and the first respondent were married to each other on 11 January 1983 and were divorced by order of the General Division of the Ontario Court at Toronto on 11 February 1991. The applicant alleges that in terms of the laws of Canada the parties are entitled to obtain a division of family assets within two years after the date of divorce. During the first few years of their marriage the parties both worked in Botswana and acquired various assets. They agreed that the first respondent would return to Zimbabwe with certain assets, sell them and purchase immovable property which would be registered in the names of both parties. Thereafter the first respondent was to rejoin the applicant in Canada. He further alleged that the first respondent did sell the assets in Zimbabwe and purchased Stand 971, Marlborough Township 14 (hereinafter referred to as "the Marlborough property") but she registered it in her maiden name - Virginia Mpandare - on 12 April 1989. Then she joined the applicant in Canada. Thereafter differences arose between the parties culminating in their divorce on 11 February 1991. The applicant is entitled to require a division of the joint assets within a period of two years from the date of divorce and wishes to protect his position with regard to the Marlborough property. Since the Marlborough property is registered in the name of the first respondent she will be able to sell it whenever she wants to and so he has instituted this application to obtain an interdict preventing her from disposing of the Marlborough property without his written consent.

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The first respondent admits purchasing the Marlborough property but says that she used the proceeds from the sale of her own motor vehicle to pay for it and that the applicant knew that she was buying the Marlborough property and was going to register it in her own name. She denied that the assets referred to by the applicant had been sold in order to pay for the Marlborough property. She also

denied that the applicant had any interest in he Marlborough property. She said that she had no intention of selling the Marlborough property and so opposed the application.

Both Mr *Ncube* and Mr *Thompson* referred to *Setlogelo v Setlogelo* 1913 AD 221 at 227 in submitting that the requirements to be satisfied before a final interdict could be ordered were, firstly, a clear right, secondly, an actual or a reasonably apprehended injury and, thirdly, absence of any other remedy. Mr *Ncube*, however, argued that it would be sufficient if the applicant established a *prima facie* right, not necessarily an incontrovertible one - *Flame Lily Invtm Co (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378 (G) at 383.

I agree with Mr *Thompson* that the applicant has established a *prima facie* right to some sort of apportionment of the matrimonial property, including the Marlborough property. I also agree with his submission that in a claim for a final interdict it is not sufficient to established a *prima facie* right unless there is a likelihood of irreparable harm being suffered if the relief is not granted - *Molteno Bros & Ors v SA Rlys & Ors* 1936 AD 321 at 332.

Having decided that the applicant has established a *prima facie* right, does he have a well-grounded apprehension of irreparable injury? The first respondent says that she has no intention of selling the Marlborough property. However, he alleges that the Marlborough property should, as they agreed, have been registered in both their names. The fact that it was registered in the first respondent's name only would give him grounds for some apprehension that the first respondent intended to keep the Marlborough property for herself and to put herself in a position where she could dispose of it without his concurrence or knowledge. It is clear, moreover, that an interdict is the only remedy that can protect the applicant from the harm that he apprehends may be inflicted.

In *Eriksen Motors (Welkom) Ltd v Protea Motors & Anor* 1973 (3) SA 685 (A) at 691 HOLMES JA said that the granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the court. After referring to the requisites laid down by INNES JA in *Setlogelo's* case *supra* he said:

> "In exercising its discretion the court weighs, *inter alia*, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience."

In this case, it would appear that the applicant has two years from the date of divorce to claim a division of or share in the matrimonial assets. If the interdict

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is not granted and the Marlborough property were to be sold, he might well suffer prejudice. On the other hand, the first respondent has said that she has no present intention of selling the Marlborough property. On that basis, if the interdict is granted for a limited period she would suffer no prejudice. On the balance of convenience, I consider that the court should exercise its discretion in favour of the applicant and grant an interim interdict for a limited period. The applicant has said that he is entitled, under the laws of Canada, to obtain a division of family assets within a period of two years from the date of the divorce. I consider that that period would be a reasonable period for the operation of the interim interdict.

The applicant has been successful in that he has been granted an interdict but it is an interim one, not a permanent one. Had he claimed an interim interdict it may well be that the first respondent would not have opposed this application. She was justified in opposing the claim for a permanent interdict. Accordingly I consider that it would be appropriate for each party to bear his or her own costs.

It is ordered -

1) That the first respondent is interdicted from selling or otherwise disposing of Stand 971, Marlborough Township 14 of Marlborough held under Deed of Transfer No. 3958/89, dated 12 April 1989, before 11 February 1993 without the consent in writing of the applicant;

2) That the second respondent is interdicted from registering the transfer of the said property before 11 February 1993 without the consent in writing of the applicant.

There is no order as to costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Winterton, Holmes & Hill, first respondent's legal practitioners

GOMBA v MAKWARIMBA 1992 (2) ZLR 26 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Civil appeal

25 June & 20 July 1992

Flynote

Property - distinctions between sale and cession of rights in immovable property

Headnote

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Despite the many distinctions between them, lawyers unfortunately persist in ignoring the difference between a sale of immovable property and "lease-to-buy" arrangement where the seller, who is not the owner of the property, has ceded to the buyer his rights to occupy immovable property.

Where a seller in a lease to buy arrangement seeks the eviction of the buyer the contract defining the terms of the agreement should be placed before the court and the owner may need to be cited as a party.

Even assuming that the seller had *locus standi* to bring an action for the eviction of the buyer without obtaining cession of action from the owner, the pleadings in the present case were inadequate to found a claim for cancellation.

- There was no express term of the agreement entitling the seller to cancel the contract upon failure to pay one instalment of the purchase price or the balance of the purchase price, and the seller had not attempted to establish a factual foundation for a claim that there was an implied term to that effect.
- Even if the seller could establish that the buyer's breach was sufficient to entitle her to cancel, she had to make election to cancel within a reasonable time and it had not been alleged that she had exercised her election within a reasonable time despite the fact that a lengthy period of time had elapsed since the alleged breach.
- There was no allegation by the seller that he had made a demand for

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the payment of the alleged outstanding instalments or that he had tendered to return the amount admittedly paid.

- The buyer had not repudiated the agreement but was disputing the terms of the agreement.
- There was no allegation that the seller had performed her part of the bargain. It must have been an implied term of the contract that the seller would do all things necessary to obtain the consent of the owner to the cession of rights and no allegation had been made that the seller had taken these steps.

The court left open the controversial question of whether the lessee-to-buy has a right to evict a person in occupation without cession of action from the owner.

Cases cited:

Majuru v Maposa S-172-91

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Zimbabwe Granite Quarries (Pvt) Ltd v Gillespie's Monumental Works (Pvt) Ltd & Anor S-177-91

Bodasingh's Est v Suleman 1960 (1) SA 288 (N)

Vumane & Anor v Mkize 1990 (1) SA 465 (W)

Motloung v Rokhoeane 1991 (1) SA 708 (W)

Walters v Andre 1934 TPD 341

Custom Credit Corp (Pty) Ltd v Shembe 1972 (3) SA 462 (A)

C Mupame for the appellant

I J Muvingi for the respondent

Judgment

McNally JA: The respondent sued the appellant in the magistrates court claiming eviction of the appellant from a house in Seke known as 5342 Unit E The basis of the claim was that she had "sold" him the house for $1 400 in terms of an oral agreement some time in 1984. The alleged terms of the agreement were that the purchase price was payable as to $700 immediately and as to the balance in monthly instalments of $80. He was given occupation on payment of the deposit but failed to make any of the subsequent payments.

There was a further dispute over certain sewing machines, but the appeal is not concerned with them.

As so often happens, the parties have used the word "sale" to describe what is in reality a cession of rights, since the house actually belongs to the Chitungwiza Town Council. Compare *Majuru v Maposa* S-172-91 (not reported).

McNALLY JA

It is unfortunate that legal practitioners persist in ignoring the distinctions between sale and cession of rights in these cases, both because there are many such cases and because there are many such distinctions.

In this case the respondent was not the owner of the disputed immovable property but merely a "lessee-to-buy". The contract in terms of which the respondent acquired and held her rights in the property, and which defined her rights in the property, was not before the Court. Nor was the owner cited as a party.

The right of the lessee-to-buy to evict a person in occupation without cession of action from the owner is a matter of some controversy. In *Majuru v Maposa* S-172-91 (not reported) and again in *Zimbabwe Granite Quarries (Pvt) Ltd v Gillespie's Monumental Works (Pvt) Ltd & Granite Extraction Co (Pvt) Ltd* S-177-91 (not reported) reference was made to the line of authorities, based on *Bodasingh's Estate v Suleman* 1960 (1) SA 288 (N), which lay down that: "a contract

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of lease without delivery of possession does no more than entitle the lessee to claim possession from the lessor, and from no-one else except under cession of action from the lessor".

It may be that that statement of the law (which, it may be noted, was not applied in the *Majuru* case *supra*, nor in the *Zimbabwe Granite Quarries* case *supra* because they were capable of resolution on a different basis) needs reconsideration. It has been criticised by Cooper *The South African Law of Landlord and Tenant* (1973) at 248-52, and was distinguished in *Vumane & Anor v Mkize* 1990 (1) SA 465 (W) and in *Motloung v Rekhoeane* 1991 (1) SA 708 (W).

In the present case, without the benefit of argument, I prefer to leave the point open, because there is a further basis upon which the appeal must succeed, even without going into the merits. There was no express agreement that failure to pay any one instalment of the purchase price, or the balance of the purchase price, would entitle the "seller" to cancellation as opposed to simply claiming the balance. Nor was there any attempt to establish a factual foundation for a claim that there was an implied agreement to that effect.

The general rule, as stated in Wille & Millin's *Mercantile Law of South Africa* 17 ed at p 184, is:

> "Once delivery has been taken by the buyer, the seller has an action to recover the purchase price, if and when this is due. But the seller is not confined, after delivery, to an action for the price. He may **in the alterna -**

> **tive** (my emphasis) claim that failing payment by a day to be fixed by the court, the contract be rescinded, and the thing sold redelivered to him: *Walters v Andre* 1934 TPD 341."

And in any event, even if in law the "seller" could establish that the "purchaser's" breach was sufficient to entitle her to cancel, she had to make her election to cancel within a reasonable time, and in the circumstances of this case the reasonableness of the delay of over two years should have been alleged.

Nowhere in the respondent's particulars of claim is there a demand for payment of the allegedly outstanding instalments, or a statement that such demand has been made (see Christie *Business Law in Zimbabwe* p 122) or a tender to return the amount admittedly paid (as to which see Mackeurtan *Sale of Goods in South Africa* 5 ed p 229 and *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 471F).

Moreover this is not a case in which the "purchaser" has simply failed to pay the instalments. He has denied that they are due. His case has been that the $750 he paid (and despite the pleadings the "seller" admits that $750, not $700, was paid) was the full amount due. Therefore he has clearly not repudiated the agreement. He simply disputed the terms of it.

And finally a party claiming cancellation must normally allege and prove that she has performed her part of the agreement or at least is willing and able to do so. It must have been an implied term of the contract in this case that the "seller" would do all things necessary to obtain the consent of the Chitungwiza Town Council to the cession of rights. No such allegation was made, and indeed it appears from the evidence that it may have been the fault of the "seller"

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that the Town Council's consent was not forthcoming.

The pleadings therefore are wholly inadequate to found a claim for cancellation *simpliciter*. I should stress that had the case been properly pleaded most if not all of these difficulties might have been overcome. I need not express an opinion on that. It is arguable that other considerations might have been raised by the "purchaser", such as the surprising delay between the "sale" in 1984 and the institution of proceedings in November 1987, or the expenditure by the "purchaser" between 1984 and 1987 of some $15 000 in developing the property. But it is enough to say that the "seller's" case for cancellation was inadequately pleaded even if one assumed she had *locus standi*.

McNALLY JA

In the circumstances therefore the appeal must be allowed with costs. The order as to eviction cannot stand. Nor can the order of costs in relation to the claim, although because the respondent was successful in her claim for the return of the sewing machine, it will be appropriate to make no order as to the costs of the claim in convention in the Magistrates court.

Accordingly the following order is made:

1. The appeal is allowed with costs.
2. The orders marked a) and c) in the magistrates court are set aside and in their place the following orders are substituted:

   "a) Defendant is granted absolution from the instance in relation to the claim for his eviction from 5342 Unit E, Seke, Chitungwiza;

   c) There will be no order as to costs in relation to the plaintiff's claim."

Gubbay CJ: I agree.

Ebrahim JA: I agree.

Sawyer & Mkushi, appellant's legal practitioners

Muvingi & Machaya, respondent's legal practitioners

MUNYAI v CHIKASHA 1992 (2) ZLR 31 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Civil appeal

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25 June & 20 July 1992

Flynote

Delict - defamation - exact defamatory words do not have to be pleaded or proved - sufficient to plead and prove substance and effect of defamatory statement

Headnote

In the declaration in a defamation action the exact defamatory words allegedly uttered had been quoted and no attempt had been made to qualify this averment in any way by the use of a phrase such as "or words to that effect." In an appeal against the dismissal of claim for defamation it was argued by the respondent that the appellant had to prove the very words which he alleged had been uttered had been actually uttered and it was insufficient for him to prove that substantially similar words were uttered.

Held, that, although it would have been advisable for the phrase "or words to that effect" to have been added, the failure to do so did not render the appellant's case fatally defective. It would be wrong to oblige the claimant to have to prove the exact words pleaded as a witness can often only recollect the substance and effect of the words uttered and not the exact words and the versions of two or more witnesses may differ in detail but not in relation to the substance and effect of the words.

Case cited:

Intl Tobacco Co v Wollheim 1953 (2) SA 603

A J Dyke for the appellant

E W W Morris for the respondent

EBRAHIM JA

In an appeal against the dismissal of a claim for defamation this ruling was made:

Judgment

Ebrahim JA: It has been submitted on behalf of the respondent that the appellant pleaded the exact words used and did not attempt to qualify his averments in any way by the use of such phrases as "words to that effect". It was submitted that it was therefore incumbent upon the appellant to prove that those words were uttered and it was not sufficient merely to show that words substantially similar were uttered. It was submitted that the appellant's declaration did not allow him to depart from the *ipsissima verba rule.* The case of *International Tobacco Co v Wollheim* 1953 (2) SA 603 was cited in support of this proposition. If anything, this case is authority for the opposite position, that is to say, what is required is to show that substantially the same words were used. It is therefore now no longer necessary to plead the *ipsissima verba.* All that is necessary is to plead the substance and effect of the words.

Although it would have been advisable for the appellant's legal practitioners to have included

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the words "or words to that effect", the failure to do so did not render the appellant's case fatally defective. Indeed, as was said in the case of *International Tobacco Co* v *Wollheim supra* at 604G:

> "The pleading of *ipsissima verba* leads to artificiality and disingenuousness in pleading because a witness can rarely recollect the *ipsissima verba* but only the substance or effect of the words spoken, and the versions of two or more witnesses as to the *ipsissima verba* may differ in detail but not the substance or effect thereof."

Having found for the appellant, what then falls to be decided is the *quantum* of damages due to the appellant. Because of the decision taken by the court below, the issue of *quantum* was not canvassed and this court would be at large as to the amount to be set, although it has been said for the appellant that he now seeks to claim $6 000. This issue, however, does not appear to have been adequately canvassed before the trial court, and I am of the view that we do not have sufficient information before us to make an adequate assessment at this stage.

In the result, it is for this reason that, whilst the appeal is allowed with costs, the matter is remitted to the judge *a quo* for a determination as to the *quantum* of damages to be made.

EBRAHIM JA

Gubbay CJ: I agree.

McNally JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Chirunda, Chihambakwe & Partners, respondent's legal practitioners

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SEVA & ORS v DZUDA 1992 (2) ZLR 34 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

7 & 21 July 1992

Flynote

> Succession - s 7 of African Wills Act [Chapter 240] and s 24(a) of Wills Act 12 of 1987 - rights of heir at customary law to immovable property not devised by will

Headnote

A man died intestate. He was survived by two wives to whom he was married according to customary law and had four children. The wives and children had lived in the deceased's house

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in Mbare and they continued to live in his house after his death. The eldest son of the deceased was declared heir to his father's estate and thus inherited his father's house in Mbare. He then sold the property to the respondent. When the wives and children refused to vacate the premises, the buyer sought a court order of eviction.

Held, that the former African Wills Act governed the situation at the time of the deceased's death. In terms of s 7 of the that Act the heir at customary law of any deceased person to whom customary law was applicable inherited any immovable property not devised by will **in his individual capacity**. (Section 24(a) of the Wills Act repealed s 7 of the African Wills Act and introduced s 6A into the Primary Courts Act. However under s 6A the heir still inherits in his personal capacity.) Under s 7 the heir does not hold such property in trust for any members of the family of the deceased. He succeeds to it as if it were his own property and is entitled to exercise all the rights of an absolute owner in respect thereof.

Held, further, that as the concept of private ownership of immovable property was alien to African customary law, questions relative to such immovable property fell to be determined by the general law and if an African male

KORSAH JA

dies intestate his immovable property devolves on his heir as determined by general law.

Held, further, that as the eldest son had inherited this house in his personal capacity, he had the right to dispose of it as he wished. He was entitled to sell it to the buyer, as he had done. The wife and remaining children had no enforceable rights against the buyer. The only rights they had, if any, were against the eldest son. They therefore had no defence to the action for eviction brought by the buyer.

Cases cited:

Dokotera v The Master & Ors 1957 (4) SA 468 (SR)

Masango v Masango S-66-86

R Harvey for the appellant

Judgment

Korsah JA: The appellants applied to have a judgment entered in default of their appearance at the trial of this matter set aside by the trial court to enable them to contest the respondent's claim. The learned trial magistrate, accepting, however, that the appellants were not in wilful default, nonetheless dismissed the appellants' application for rescission of the default judgment on the ground that the appellants had no reasonable defence to the respondent's claim. It is against that order of the learned trial magistrate dismissing the application for rescission with costs that the appellants now appeal. The facts are as follows.

The late Vale Zhuwawu was the registered owner of House No. 20 Chimutenga Close, Mbare, also known as Stand 4052 Mbare (the property). The first and second appellants were married

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to the deceased according to customary law. The third, fourth and fifth appellants are all children of the deceased. All the appellants were resident at the property during the lifetime of Vale Zhuwawu (deceased) and continued their occupation of the property up to the time of this appeal.

The late Mr Zhuwawu, who was a Malawian by birth, died intestate on 14 April 1987. It was common cause that Peter Chakoloma, the eldest son and next of kin of the deceased, was declared heir to the estate of his deceased father on 27 June 1987. Thereafter, Peter Chakoloma sold the property to the respondent and the respondent took delivery thereof by registration of cession of rights to the ownership, registered at the City of Harare on 2 September 1987. The appellants who, as intimated earlier were living at the property, refused to vacate the property. Wherefore the respondent claimed

KORSAH JA

an order of ejectment of the appellants and all persons claiming occupation of the property through them together with costs of suit.

Now, the sole question for determination was whether or not Peter Chakoloma had a legal right to dispose of the property which he had inherited. If he had, then the respondent has a legal right of ownership and is entitled to his relief.

The former African Wills Act [*Chapter 240*] governed the situation at the time of the deceased's death on 14 April 1987, and when Peter Chakoloma was declared heir on 24 June 1987. Section 7 of the said Act provided that:

> "The heir at African law of any deceased African shall succeed **in his individual capacity to any immovable property** or any rights attaching thereto forming part of the estate of such deceased African and **not devised by will**" (emphasis supplied).

This provision, in my view, is self-evident and beyond question and requires no interpretation or explanation. It states in unambiguous language that where there is an intestacy, the heir at African law of any deceased African succeeds to any immovable property of the deceased in his individual capacity. The heir does not hold such property in trust for any member or members of the family of the deceased. He succeeds to it as if the property were his own and is entitled to exercise all the rights of an absolute owner in respect thereof.

It was explained in *Dokotera v The Master & Ors* 1957 (4) SA 468 (SR) at 470C-E that the private ownership of immovable property was a concept alien to native law and custom, and succession to such property on the death of the owner was likewise not regulated by native law and custom. As a result, questions relative to such immovable property fell to be determined by the ordinary law of the land. If, therefore, an African male died intestate his immovable property devolved on his heir as determined, not by native custom, but by the ordinary law of the land. See also *Masango v Masango* S-66-86 at p 2. While not suggesting that there is here a conflict between the common law and the African Wills Act, it is well to bear in mind that there is a canon of construction that where there is a conflict between the common law and statute law

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the former must yield to the latter.

The legal position then is that the appellants inherited no legal interest in the property which they could protect in law against third parties. Peter Chakoloma may owe a duty to support his father's wives and half siblings, and that

obligation could be enforced in law if Peter Chakoloma had himself sought to evict the appellants with a view of occupying the property himself without providing alternative shelter for them. See the *Masango* case *supra*, at p 3.

The respondent, who is a third party to the obligations between Peter Chakoloma and the appellants, owes no duty of support to the appellants. He acquired the property which Peter Chakoloma had succeeded to in his individual capacity and was thus entitled to dispose of as he wished. As the owner of the property, the respondent is entitled to evict the appellants therefrom. The only rights that the appellants have, if any, are against Peter Chakoloma. As against the respondent they have no legal rights which are enforceable by law.

It is also worthy of note that although s 24(a) of the Wills Act 13 of 1987, which came into effect on 11 December 1987, repealed s 7 of the African Wills Act, the same Wills Act 13 of 1987 introduced s 6A into the Primary Courts Act 6 of 1981. That section reads:

> "6A. The heir at customary law of any deceased person to whom customary law was applicable **shall succeed in his individual capacity to any immovable property** or any rights attaching thereto forming part of the estate of such deceased person and **not devised by will**" (emphasis supplied).

The legal position thus remains the same now as when the respondent acquired his rights to the property from Peter Chakoloma.

The learned trial magistrate cannot be faulted for holding that the appellants had no reasonable or *bona fide* defence to the respondent's claim and for that reason refusing to rescind the default judgment entered against them.

Accordingly the appeal is dismissed with costs.

Gubbay CJ: I agree

McNally JA: I agree

Granger & Harvey, respondent's legal practitioners

S v CHAITEZVI 1992 (2) ZLR 38 (SC)

Court **Supreme Court, Harare**

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Annotations **Link to Case Annotations**

Gubbay CJ, Manyarara JA & Ebrahim JA

Criminal appeal

12 & 21 July 1992

Flynote

Criminal law - fraud - attempt - false document prepared but not yet presented - whether amounts to attempted fraud - potential prejudice - circumstances in which attempted fraud committed.

Headnote

The appellant was a credit controller in a company. A customer owed money to the company. The appellant contacted the customer and told him that if the customer paid him a certain sum of money he would make out a credit note falsely stating that he was owed a certain amount by the company for purchased goods he had returned. The customer said he would consider this proposition. He then contacted the general manager of the company and informed him what had happened. The customer agreed to help trap the appellant. He contacted the appellant and pretended to agree to his proposition. Using money given to him by the general manager, he handed over to the appellant the sum asked for by him. The customer was handed a false credit note by the appellant. As the appellant did not have the necessary authority to compile this credit note under the computerised accounting system of the company, this note would have been rejected by the computer. However, the appellant informed the customer that he had a friend in the computer department who would process the false note in return for money. The appellant was arrested soon after this transaction was completed. The appellant appealed against his conviction for fraud. It was held that on these facts the correct verdict was that of attempted fraud. Attempted fraud is a competent verdict on a charge of fraud and the conviction was altered accordingly to one of attempted fraud. In reaching this conclusion the court decided that:

GUBBAY CJ

1. Although the trapping of the appellant had forestalled the plan before the misrepresentation contained in the credit note was actually communicated to the company, the appellant had compiled the credit note with the intention that it be acted upon by the company to its prejudice. The fact that the customer only obtained the credit note in order to trap the appellant and had no intention of presenting the false credit note was immaterial as it is the intention of the deceiver which must be looked at.

2. Where the representee finds out about the intended fraud and sets a trap, if the representor does the act with the intention of defrauding, the crime of attempted fraud is still committed despite the fact that when the trap is sprung there is no risk at all that the representee could be misled.

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3. The appellant had gone beyond the stage of mere preparation.

In the process of reaching this conclusion the court pointed out that:

a) For the element of potential prejudice to be satisfied there must be a **risk** that prejudice could be caused. It is not required that there has to be a probability of harm, nor that prejudice **would** be caused.

b) The question whether a person's conduct, as a whole, is sufficiently proximate to the commission of an offence as to have gone beyond the stage of mere preparation calls for a value judgment of a practical nature and is not determinable by the application of any hard and fast rule.

Cases cited:

S v Francis 1980 ZLR 368 (A)

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

R v John 1943 SR 29

S v Harper & Anor 1981 (2) SA 638 (D)

S v Dormehl 1966 (1) PH H 223 (A)

S v Ostilly & Ors (1) 1977 (4) SA 699 (D)

S v Isaacs 1968 (2) SA 187 (D)

S v Kruger 1950 (1) SA 591 (O)

S v Campbell 1991 (1) SACR 503 (Nm)

R v Dyonta & Anor 1935 AD 52

R v Kritzinger 1971 (2) SA 57 (A)

Mrs *JB Wood* for the appellant

J T Manokore for the respondent

Judgment

Gubbay CJ: The appellant was charged with the crime of fraud in that on 15 February 1991, and at Harare, he unlawfully and with intent to defraud, misrepresented to GR van Tonder of Fruit and Vegetable Co-operative

GUBBAY CJ

Company Limited (hereinafter referred to as "Favco"), that one David Wilson was entitled to receive a credit note in the sum of $4 000 in respect of produce returned by him, whereas in fact

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he was not due such refund as nothing had been returned, to the potential prejudice of Favco. He pleaded not guilty, but was convicted and sentenced to a fine of $1 000 or, in default of payment, five months' imprisonment with labour. His appeal to this court is concerned solely with the propriety of the conviction.

The appellant, who was unrepresented at the trial, put up a factual defence which cannot by any stretch of the imagination be described as reasonably possibly true. The magistrate could not but reject it as false. He furnished cogent reasons for doing so and it would serve no purpose to repeat them. If the conviction is to be disturbed at all it can only be upon the facts disclosed in the State's case, which were to this effect.

The appellant was employed by Favco as a credit controller, his main duty being to deal with debtors and ensure that their accounts did not fall too far in arrear.

At 9.30 am on 15 February 1991 the appellant telephoned to David Wilson, a customer of Favco, who was indebted for fruit and vegetables purchased in an amount of $8 758. The appellant suggested that if Wilson were to pay him $2 000 in cash he would arrange for a credit note to be passed by Favco in Wilson's favour in an amount of $4 000. In other words, each would benefit to the extent of $2 000. The appellant was persistent. Appreciating that the proposal would make him a party to the commission of a fraud, Wilson decided to reveal the nefarious plot to Favco. He told the appellant he required more time to consider his position and asked him to telephone again a little later that morning. Wilson then contacted Gerald van Tonder, the general manager of Favco, and it was decided that a trap should be laid for the appellant.

When the appellant next telephoned, Wilson gave him an affirmative answer. It was arranged that they would meet at 3.15 pm at the appellant's office, at which stage Wilson was to pay the $2 000 in cash and the appellant to hand him the promised credit note.

Wilson kept the appointment having in the meantime been provided with $2 000 by van Tonder. He was directed to the appellant's office where he was handed a credit note which recorded that poor quality fruit, to the value of $4 000, had been returned by him. The appellant advised him that another

person, who was employed in the computer department of Favco, was also involved in the scheme, and that it was necessary to pay him $600 for his services. Wilson agreed to this. He handed the appellant an envelope containing $2 000 in notes and they parted. Wilson immediately alerted van Tonder who accosted the appellant and took possession of the envelope, which happened to be sticking out of the appellant's trouser pocket. The arrest of the appellant followed.

The appellant admitted that he had made out a credit note in triplicate and that it was the top copy he had handed to Wilson. However, as Favco's accounting system was totally computerised the credit note compiled by the appellant, who lacked the necessary authority, would in the normal course have been rejected by the computer, as it did not bear the official

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signature of the accountant.

It was conceded by Mr *Manokore,* properly in my view, that on the facts as I have recounted them, the magistrate had erred in convicting the appellant of the sve offence. This was because although the appellant had made the misrepresentation by reflecting in the credit note that Wilson was entitled to receive payment of $4 000 in respect of poor quality produce which had been returned, he was intercepted and apprehended before he had the opportunity to communicate such misrepresentation to any of the personnel of Favco; in particular, to the computer department where all credit notes were received for processing. Simply put, there was no completed representation in the sense of a communication to the representee.

The point of some difficulty is whether the appellant's actions made him guilty of attempting to commit fraud, a crime now recognised in our law and a competent verdict on a charge of fraud. See *S v Francis* 1980 ZLR 368 (A) at 370H-372A, following *R v Heyne &Ors 1956* (3) SA 604 (A) at 622A-B and overruling *R v John* 1943 SR 29.

In Hunt *South African Criminal Law and Procedure* 2 ed vol 2 at p 778 it is suggested that in determining whether an attempt to commit fraud has been established, regard should be had to at least five situations. Some of these overlap. The most important are as follows:

(1) Where the misrepresentation is not communicated to the representee, as for instance, the letter containing it is lost in the post. See *S v Harper & Anor* 1981 (2) SA 638 (D).

GUBBAY CJ

(2) Where the misrepresentation is communicated, but it causes no actual prejudice and because it is so patently ridiculous it is not such as could reasonably harm anyone and there is, therefore, no potential prejudice either. See *S v Dormehl* 1966 (1) PH H223 (A).

(3) Where as a result of a mistake of fact the accused believes his representation is false, whereas it is actually true.

(4) Where the misrepresentation, though communicated, was not such as could have caused prejudice. It must invoke some risk of harm to some person, but must not be "remote or fanciful". See *S v Ostilly & Ors* (1) 1977 (4) SA 699 (D) at 715D.

This case falls within the first situation.

In *S v Francis supra* FIELDSEND CJ said at 372B:

> "A conviction for attempt to commit fraud is competent where a misrepresentation, which would cause actual or potential prejudice were it made, is prevented from being made, provided always the facts established that there was an attempt to make the misrepresentation with the requisite intent."

It is abundantly clear to me that the appellant intended to defraud Favco. He falsified a credit note for payment by Favco, the top copy of which he handed to Wilson. He informed Wilson that he had a colleague in the computer department who was prepared to process the false credit note for payment provided he received $600. In short, the appellant intended the

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misrepresentation he made to be acted upon by Favco but was frustrated by the premature interception of van Tonder from communicating it to any official of Favco. The fact that the appellant required the co-operation of Wilson, which was only forthcoming on the basis that a trap was to be set for him, in my opinion, is immaterial. It is to the mind of the deceiver that one must look. See *S* v *Isaacs* 1968 (2) SA 187 (D) at 191A.

For the element of potential prejudice to be satisfied there must be a risk that prejudice **could** be caused. It is not required that there has to be a probability of harm, nor that prejudice **would** be caused. See *R* v *Kruger* 1950 (1) SA 591 (O) at 596; *R* v *Heyne &Ors supra*, at 622E-H; *S* v *Campbell* 1991 (1) SACR 503 (Nm) at 507d.

GUBBAY CJ

It was submitted by counsel for the appellant that the setting up of the trap ensured that no prejudice could be caused to the intended victim, Favco, and, therefore, no crime was committed. This is a proposition to which I cannot accede.

The existence of prejudice must be looked at objectively in the sense that it is irrelevant that there was no possibility that the actual representee could be misled. The law approaches the matter from the wrong-doer's point of view. If he intended to deceive and makes a misrepresentation, it is of no consequence that the representee was not in fact deceived. See *R* v *Dyonta & Another* 1935 AD 52 at 57; *R* v *Persotam* 1938 AD 92 at 97; *R* v *Kritzinger* 1971 (2) SA 57 (A) at 60E-F. There is a passage in Snyman *Criminal Law* 2 ed at 508 which vividly illustrates this principle. It reads:

> "What is the position if the proposed victim is aware of the fact that the representation is false? Y, a police trap, represents to X that he wishes to buy diamonds from him. X offers Y 'diamonds' which are in fact pieces of glass. Both X and Y are aware of this. Is X guilty of fraud? It would seem that Y has consented to the misrepresentation and that consent ought to operate as a ground of justification, as it does in theft. However, our courts do not regard the situation in this light; in their view a completed fraud is committed even in these 'police trap' cases."

Accordingly, I am satisfied that the elements of requisite intent and prejudice were proved.

It remains to consider whether the appellant's conduct, regarded as a whole, was sufficiently proximate to the commission of the offence as to have gone beyond the stage of mere preparation. This calls for a value judgment of a practical nature and is not determinable by the application of any hard and fast rule. See *S* v *Francis supra* at 374G.

The various aspects of the appellant's conduct viewed as a whole - the telephone calls made to Wilson, the compilation of the credit note and copies, the information that a colleague in the computer department to which the credit note had to be submitted for processing, was also involved, the acceptance of the envelope containing the cash - satisfy me that the appellant had advanced beyond mere preparation. There was an attempt to make the misrepresentation.

In the result, the appeal is allowed to the extent that the conviction is altered

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to one of attempting to commit fraud. This alteration does not, however, justify any reduction of the sentence imposed.

Manyarara JA: I agree

Ebrahim JA: I agree

Pro Deo

CHIMHOSVA & ORS v VICE-CHANCELLOR (UNIVERSITY OF ZIMBABWE) & ANOR 1992 (2) ZLR 45 (HC)

Court **High Court, Harare**

Sandura JP

Civil action

24, 25 June & 22 July 1992

Flynote

Administrative law - whether university authorities had power to take and had followed the correct procedures in taking certain disciplinary action

Headnote

Following student demonstrations on the university campus which had resulted in damage to university property, the University Council purported to suspend the Students' Representative Council and to impose a surcharge of $80 on all students. Subsequently the Vice-Chancellor himself ordered the suspension of the Students' Representative Council (SRC).

The applicants sought a provisional order calling on the respondents to show cause why a final order should not be issued setting aside the surcharge on the students and the decision suspending the SRC. The court granted the provisional order, holding that the applicants had made out a *prima facie* case for the granting of the order.

As regards the surcharge, the court found that there was no evidence on the papers to show that the respondents had the power to impose the surcharge. With regard to the suspension of the SRC, the court found that the provisions of the University of Zimbabwe Act 1982 had not been complied with. Section 8(3)(f) vests the power to suspend the SRC in the Vice-Chancellor. Such action is subject to ratification by the University Council. Instead of following this procedure, it appeared that the University Council suspended the SRC and then instructed the Vice-Chancellor to enforce its decision.

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SANDURA JP

The applicants had also sought a temporary order restraining the respondents from giving effect to the decisions complained of, pending the final determination of the application,. The court refused to grant this order because it was not satisfied that the requisites for the grant of an interdict were present, namely a clear right of the applicants, a violation of the right and the absence of any other satisfactory remedy.

S V Hwacha for the applicants

A P de Bourbon SC for the respondents

Judgment

Sandura JP: In this matter the applicants sought a provisional order calling upon the respondents to show cause to this court why a final order should not be made setting aside:

(a) the second respondent's decision to expel all the students of the University of Zimbabwe from the university;

(b) the first and or second respondent's decision to suspend the Students' Representative Council; and

(c) the second respondent's decision requiring all the students to pay a surcharge of $80,00 upon admission to the university for the second term.

The applicants also sought a temporary order restraining the respondents from giving effect to the decisions complained of pending the final determination of the application. The application was opposed by the respondents.

After hearing counsel's arguments I issued a provisional order calling upon the respondents to show cause to this Honourable Court why a final order should not be made in the following terms:

"1 . That the decision of second respondent requiring all full time students to pay a surcharge of $80,00 upon admission to the university for the second term be and is hereby set aside.

2. That the decision of the first and or second respondent suspending the Students Representative Council be and is hereby set aside.

3. That the respondents pay the costs of this application."

I indicated at the time that the reasons for granting the provisional order would be handed down in due course. Those reasons now follow.

SANDURA JP

The background to this matter is set out in the opposing affidavit, paras 15 to 19 of which read

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as follows:

"15. Briefly, the background to this matter is that the first applicant and the now suspended Student's Representative Council organised a boycott of classes at the University. This had lasted for four weeks and the first applicant had made it known that when the second term began the boycott would continue. Intimidation against students who did not comply with the class boycott was rife.

16. There were a series of demonstrations at the University organised by the Students' Representative Council. During these demonstrations a considerable amount of food and property belonging to the University were destroyed. The total value of these amounted to $511365,41.

17. People who were going about their business on the campus were being molested by certain students. The staff were being besieged and were being refused to leave the campus by certain students.

18. The Students' Representative Council had led a demonstration in town and, as a result, much damage was done to property and people were injured, some seriously.

19. In that, the administration of the University had broken down and law and order had also broken down. The respondents considered that this had been caused by members of the Students' Representative Council and their supporters."

In the light of the situation outlined above, the Council of the University of Zimbabwe held a meeting on 6 June 1992. After the meeting, the following statement was issued by the University Information Office:

"At a meeting that lasted for more than five hours this morning, the Council of the University of Zimbabwe, the supreme governing body of the University, reviewed the situation at the University following the recent disturbances on and off campus and made the following resolutions:

1. The Council of the University of Zimbabwe suspended the Student Representative Council indefinitely with immediate effect.

2. All students presently registered at the University of Zimbabwe are required to re-apply for admission in order to re-register for the second term.

SANDURA JP

3. ...

4. The Council directed that the Finance Committee of the University should meet urgently to determine the amount that must be paid by each student re-admitted into the University, as a condition of re-admission, to defray the costs of damages caused to property in the University during the recent student disturbances.

5. ...

6. The Council directed that the Vice-Chancellor of the University of Zimbabwe, Professor GL Chavunduka, should move swiftly to ensure that Council's resolutions were effected without delay."

Subsequently, on 15 June 1992, the lawyers acting for the applicants wrote a letter to the Registrar of the University of Zimbabwe informing him that the purported expulsion of the students and suspension of the Students' Representative Council were of no force or effect. One reason given was that in terms of the University of Zimbabwe Act the University Council did not have the powers to do what it had purported to do. However, on the next day, 16 June 1992, the Vice-Chancellor wrote a letter to the first applicant. The first paragraph of that letter

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reads as follows:

> "In terms of the authority vested in me as Vice-Chancellor of the University of Zimbabwe, I hereby suspend the Student Representative Council of the Students Union with effect from 6 June 1992 for an indefinite period.,"

About a week later the present application was filed in this court.

The issue which I had to determine was whether the applicants had made out a *prima facie* case for the provisional order sought. As far as the alleged expulsion of the students is concerned I did not understand Mr *Hwacha*, who appeared for the applicants, to persist with the allegation that the students had in fact been expelled from the University. In any event, my own view of the evidence before me was that no student had been expelled. Consequently, the provisional order which I granted made no reference to the setting aside of the expulsion order. In the end I had to determine whether a *prima facie* case had been made out for the setting aside of the decision requiring the students to pay a surcharge of $80 upon admission to the University for the second term, as well as the decision suspending the Students' Representative Council.

SANDURA JP

As far as the surcharge of $80 was concerned there was no evidence in the papers placed before me to show that the respondents had the power to impose the surcharge. I was, therefore, satisfied that the applicants had made out a *prima facie* case for the setting aside of the requirement to pay the surcharge.

With regard to the suspension of the Students' Representative Council (SRC) the question was whether the provisions of the University of Zimbabwe Act 27 of 1982, as amended, had been complied with. In terms of s 8(3)(f) the power to suspend the Students' Representative Council is vested in the Vice-Chancellor. However, in terms of s 8(5) such action is subject to ratification by the University Council. The position, therefore, is that it is the Vice-Chancellor who should have decided to suspend the SRC and that having done that he should have asked the University Council to ratify his action. On the papers before me I was not satisfied that that procedure had been followed in suspending the SRC, because it appeared as if it was the University Council which suspended the SRC and then instructed the Vice-Chancellor to enforce its decision. In the circumstances I was satisfied that a *prima facie* case had been made out for the setting aside of the suspension of the SRC.

Finally, I would like to deal with the applicants' request for a temporary order restraining the respondents from giving effect to the decisions complained of pending the final determination of the application. I refused to grant this because I was not satisfied that the requisites for the grant of an interdict were present (ie a clear right on the part of the applicants, a violation of the applicants' rights and the absence of any other satisfactory remedy).

It was for these reasons that after hearing counsel's submissions I granted the provisional order.

Kantor & Immerman, applicants' legal practitioners

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Scanlen & Holderness respondents' legal practitioners

ROTHMANS OF PALL MALL (ZIMBABWE) LIMITED v JACKSON 1992 (2) ZLR 50 (HC)

Court **High Court, Harare**

Chambakare J

Civil application

27 May & 29 July 1992

Flynote

Insolvency - locus standi of creditor who has damages claim arising from theft to petition for insolvency of debtor - locus standi of spouse to intervene to oppose petition

Headnote

The petitioner was the ex-employer of the respondent. The respondent had stolen an unknown amount of money from the petitioner and had then fled the country. The petitioner had then applied for the sequestration of the respondent's estate. The husband of the respondent, who was married to her out of community of property, also sought to intervene in the case to oppose the petition declaring his wife insolvent. He did so without seeking to be joined as a party. He sought discharge of the provisional order of sequestration, claiming that some of the property attached belonged to him.

Held, that although the petitioner's claim was founded in delict and the full amount of the claim was unknown, a portion of it was proved and was therefore a liquid claim. This was sufficient to give the petitioner the right to petition for insolvency.

Held, further, that the husband was entitled to file affidavits and to be heard as an interested party to oppose the petition of the creditor to have his wife's estate declared insolvent. He could do this without seeking to be joined as a party in the case. However, this would have entitled him only to an order staying or excluding the vesting of his property in the trustee but not to discharge of the provisional insolvency order against her.

Held, further, that the respondent's flight constituted an act of insolvency and the provisional sequestration order was confirmed with costs against the intervening spouse.

CHAMBAKARE J

Cases cited:

Hertz v *Empire Auctioneers & Est Agents* 1962 (1) SA 558 (T)

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de Jager Invtms (Pty) Ltd v *Mark* 1952 (3) SA 471 (W)

Irvin & Johnson Ltd v *Basson* 1977 (3) SA 1067 (T)

Salzman's Est v *van Rooyen* 1944 OPD 1

Kleynhans v *van der Westhuizen NO* 1970 (2) SA 742 (A)

CC Seddon for the applicant

MP Malangu for the respondent

Judgment

Chambakare J: This is an application for a final order of sequestration of the respondent's estate. A provisional order was granted by this court on 20 March 1992. It required the respondent, and all interested parties to show cause, if any, why the same should not be confirmed. The opposing parties were to file notices of opposition in Form No. 29A, together with one or more opposing affidavits with the Registrar of the High Court within 10 days after the date of publication of the provisional order. The respondent failed to file any opposing affidavits. Her husband, however, has filed opposing affidavits as an interested party to the proceedings. In turn the applicant filed his answering affidavit on 13 May 1992. There are two main issues to be determined in this matter. The first issue is Mr *Colegrave's* submission that the intervening spouse has no *locus standi* in these proceedings in terms of s 16 of the Insolvency Act [*Chapter 303*]. It was his submission that in terms of that section it was only the debtor who was empowered to oppose the grant of the final order and it was only the respondent who might anticipate the return day of the rule.

Section 16(1) states that when the court grants an order of provisional sequestration of the estate of a debtor, it shall at the same time issue a rule *nisi* calling upon the debtor to appear and to show cause on the day specified in the rule *nisi* why his estate should not be sequestrated finally.

If the intervening spouse is held to be entitled to appear whether the applicant has shown a liquidated claim of not less than $100,00 in terms of s 14(1)(a) of the Act.

The evidence in the applicant's affidavit, and the annexure thereto, as to the nature of the applicant's claim is broadly stated to the following effect.

The respondent was employed as a cashier by the applicant from 1 September 1987 until 20 February 1992 when she failed to return to her place of

employment without explanation. Prior to her absconding from her place of work she was aware of the investigations being conducted by the applicant's Senior Staff into possible embezzlement of funds.

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The respondent held the position of sole cashier at the applicant's head office at its premises at Manchester Road, Industrial Sites, Harare. As such she was responsible for the receipt of all moneys known as "sundry receipts" which was all money received by the head office in payment mainly for non tobacco products except payments which were made by mail which were received at head office. Payments for the general sales of the applicant's principal tobacco products are made to the applicant's Harare depot who prepared their own banking and particularly their own bank deposit slips. The respondent was responsible for preparing the receipts and bank deposit slips and cash summary and preparing the banking of sundry receipts and also the bank deposit slips in respect of the applicant's debtors who paid by mail for tobacco products. These latter payments were receipted by a debtor's clerk who would thereafter send the cheques to the respondent to make out the bank deposit slips and prepare the banking of those cheques. The respondent would then return a bank deposit duplicate copy for the mail debtors receipts to the data processing unit after banking.

The applicant's banking was done in Harare collectively for all departments, including that of the respondent on a daily basis on every business day and it was done physically at its bank account at Barclays Bank of Zimbabwe Ltd, Robert Mugabe Way, Harare, in the company of the security guard from the Security firm employed by the applicant and by a member of the applicant's accounting staff on a roster system drawn from about 16 members of staff so that a different person accompanied the banking every day and no member of staff was to bank on more than two days in every month except in exceptional circumstances.

Investigations into the financial affairs of the respondent were carried out by both the applicant's senior staff and a firm of chartered accountants, Coopers and Lybrand. Their task was to investigate what appeared to be shortages of cash from sales effected by the applicant. They investigated and produced a report, annexure A of the applicant supporting affidavit. It concluded that preliminary results indicated that the company had been prejudiced by at least $500,000 over a period of approximately 3 years by the fraudulent acts of the company's cashier, Mrs Elizabeth Jackson (the respondent). The methods she used to misappropriate the funds were as follows:

CHAMBAKARE J

1. Cash received was not banked and deposit slips were altered subsequent to banking.

2. Cheques received were receipted and then exchanged for cash at the company's sales kiosk where they were banked. Mrs Jackson retained the cash and subsequently altered or destroyed the head office deposit slips.

The Group Company Secretary of the applicant, Mr Oosthuizen, analysed the micro acts of the respondent which enabled her to steal the money. His evidence was that the respondent would :

(1) enter only a portion of the monies received on the top copy of the bank deposit slips and thereafter, with the aid of carbon paper and a substitute top sheet of paper, the duplicate deposit slip set out the total monies received and receipted. The receipts reflecting that the money that had actually been received by the applicant, the original deposit slip and the

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duplicate amended deposit slip were all in the respondent's handwriting and signed by her.

(2) The duplicate deposit slips and cash deposit summary form would then be passed to the data processing department for projection and entering into the cash box.

(3) Where the cash shortfall was represented by notes or coins the conversion of that money to the respondent's use would have provided no problem. Where the shortfall consisted of cheques that were excluded from the original bank deposit slip but included upon the duplicate the respondent would send these cheques to the Harare depot for exchange for cash. These cheques would then be included in the Harare depot banking and bank deposit slips. Such cheques would be endorsed with the respondent's signature which enabled her to obtain cash in exchange for cheques from the Harare depot. The cheques from head office and the depot were all stamped "Rothmans", meaning that they were from the same drawer and were for the same amounts. They therefore would, according to the duplicate and amended deposit slips for head office banking, falsely be reflected to have been deposited by the head office, whereas in fact they were deposited with the Harare depot banking although not necessarily on the same day but within a short time of receipt. As the cheques still bore an endorsement of the Rothmans stamp and were deposited to Rothmans bank account, this did not excite any query from the payer of the cheque.

Mr Oosthuizen gave a number of examples and attached a number of annexures to illustrate how the respondent stole the money. Annexures "C",

CHAMBAKARE J

"D", "E", "F", "G", "H", "I", "J", "K", "L", "M" and "N" show that out of $9490,58 as a deposit to the bank was accounted for cash book purposes only $490,49 was banked with the head office banking. A total of $9000 was not banked.

The intervening spouse could not dispute this since he was not responsible. As indicated earlier, the respondent did not dispute the above facts and I have no reason to disbelieve them. In my view these facts show that the behaviour of the respondent caused the loss of at least $9000. Coopers and Lybrand put the figure at about $500 000. The various annexures show that the figure of $500 000 is less than the amount allegedly stolen by the respondent.

The conduct of the respondent when investigations were being carried out tends to support the contention that she is involved in the loss. She abruptly absconded from her place of employment and has never been traced since. This disappearance is supported by her husband, the intervening spouse. The provisional order was published in both the Government *Gazette* and the local newspaper, *The Herald*, but no response was forthcoming.

I do not understand how a report to the police by the intervening spouse on the disappearance would justify a discharge of the order.

I now come to the legal issues raised in this matter. As stated above, Mr *Colegrave* submitted that the intervening spouse has no *locus standi* in the matter. In terms of s 16(1), it was the

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respondent who was supposed to oppose this application.

Mr *Gillespie*, on the other hand, submitted that any interested person in the matter was permitted to intervene and that the court has power under common law to permit him. He referred the court to *Hertz* v *Empire Auctioneers & Estate Agents* 1962 (1) SA 558 (T); Smith Law of Insolvency 3 ed 109 and *de Jager Investments (Pty) Ltd* v *Mark* 1952 (3) SA 471 (W).

I will start with Mr *Colegrave's* submission that s 16(1) of the Act requires the respondent to appear and to show cause on a date specified in the rule *nisi* why his estate should not be sequestrated finally. This means that the debtor in this case ought to have appeared and showed cause but she did not. Instead her husband, the intervening spouse, appeared and filed an affidavit which in many respects appeared to substitute the affidavit of the respondent. The affidavit attacks the applicant's averments and the findings of auditors. It calls upon the court to discharge the provisional order with costs. In my view

CHAMBAKARE J

there is no provision in the Act which allows a substitution of the respondent with another person. An interested party, however, can intervene at the discretion of the court. In allowing the intervention, the intervening party should show that he is specially concerned in the issue, and that the matter is of common interest to himself and the party who desires to join and that the issues are the same. The matter raised should be relevant to the question whether a final order should be granted. See *Hertz supra*. In that case the applicants, who were creditors of the respondent company in which its director Hertz petitioned the court for its liquidation, successfully applied for leave to intervene in the liquidation proceedings. This was because it was an intervening creditor and therefore wanted to safeguard its interest. However an application for substitution as petitioning creditors was left open.

In *De Jager's case supra* NESER J held that a spouse in a marriage out of community of property is entitled, as is any other interested party, to file affidavits setting out the facts material to the issue and is entitled to be heard without any necessity to join her as a party to the proceedings. In this case the nature of the marriage was not stated by the spouse. I however take it that it is out of community of property for the purposes of this case. In that respect the intervening spouse is entitled to file affidavits and to oppose the application.

The intervening party contends that the applicant has not proved a liquid claim. In his answering affidavit Mr Oosthuizen detailed how the respondent operated in effecting the theft of the money and he attached various affidavits. The sum total then is found in Annexure "A". In para 4(b) he stated:

> "I accept that at the time of my founding affidavit and at present the final sum established to have been stolen and converted by the respondent to her own use has not been finally determined, involving as it does hundreds of receipts and deposits over the period 1988-1992. I annex hereto an eleven page schedule marked "A" setting out monthly sums that have been stolen by the respondent over the period September, 1988 to February, 1992 and a summary thereof which reflects a total of $1040615,00 marked B which I am satisfied, has been stolen by the respondent."

Mr *Colegrave* submitted that with that evidence the applicant has demonstrated that its claim is

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capable of easy and speedy proof. Further that the documents spoke for themselves and the fact that the respondent had not chosen to deny

CHAMBAKARE J

her indebtedness. He referred the court to the following authorities *Irvin & Johnson Ltd* v *Basson* 1977 (3) SA 1067 (T) at pp 1070 to 1072; *Estate Salzman* v *Van Rooyen* 1944 OPD 1 at 5 and *Kleynhans* v *Van der Westhuizen NO* 1970 (2) SA 742 (A).

The facts in *Irvin & Johnson supra* were analogous to those in the instant case. One of the questions for consideration in that case was the contention that the applicant's claim could not be regarded as a liquid claim because the full extent of the theft had not been finally determined or established. The facts in that case were that the applicant discovered irregularities at the branch where the respondent was working. The affidavits showed that the respondent had been defrauding the applicant over a considerable period of time. Although the investigations had not yet been completed it was established, according to the affidavits, that the respondent misappropriated at least R16 000 while in applicant's employ. This was supported by a description of how the respondent stole the money. TRENGROVE J at p 1070D found that the applicant's claim was a claim in damages founded in delict because it was in respect of monies which were alleged to have been stolen from the applicant and that although the full extent of the theft had not yet been established, the evidence disclosed *prima facie* that the respondent had misappropriated a fixed sum of R95 534,27. The other case referred to is *Estate Salzman* v *Van Rooyen , supra*. The essence of *Estate Salzman* is first, that where the books of accounts disclose a debt and the respondent does not dispute it, the claim is enforceable and secondly, that in order to bring the conduct of a debtor within the scope of the words "or otherwise absents himself with intent, by so doing to erode or delay the payment of debts", as an act of insolvency in terms of s 8(a) of Act 24 of 1936 of South Africa, which is equivalent to s 13(a) of our Insolvency Act [*Chapter 303*], the onus is on the petitioning creditor to establish this intent to justify the court in granting a final order of sequestration. In *Van der Westhuizen's* case, *supra*, it was held that when a court considers a petition it may, in terms of s 10 of the South African Insolvency Act which is equivalent to our section, grant a provisional order for sequestration if it is of the opinion, *inter alia*, that *prima facie* proof that applicant is the holder of a liquidated claim has been adduced. On the return day the court may sequestrate the debtor's estate if it is satisfied, *inter alia*, that the applicant has proved a liquidated claim against the debtor. This is where the claim involves theft of monies. WESSELS JA held that in such cases the claim is one for damages.

In this case it is not disputed that when investigations started the respondent absented herself from her place of employment and has never been traced.

CHAMBAKARE J

The intervening spouse admits that she abandoned her motor vehicle along the Harare/Masvingo road and he had to report her missing to the police. The provisional order was

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published both in the Government *Gazette* and *The Herald* and there was no response. In the applicant's replying affidavit he has annexed an eleven page schedule marked "A" which sets out monthly sums that have been stolen by the respondent. Annexure marked "B" reflects total loss of $1 040 615. As indicated earlier this is a claim in damages against the respondent who has not disputed it.

This evidence is not disputed. It shows that the respondent absconded and cannot be found. A search at her home was unsuccessful. Section 13 of the Act provides that if the debtor absents himself and departs from his dwelling home with the intention by so doing to evade or delay the payment of a debt he shall be deemed to have committed an act of insolvency. In this case it is not disputed that the respondent has done that and I am satisfied that she committed an act of insolvency.

A further requirement in an application of this nature is for the creditor to show that he has a liquidated claim of not less than one hundred dollars. See s 14(1)(a) of the Act. In *Basson's* case *supra* it was held that where there are financial irregularities amounting to theft the claim is one in damages founded on delict. In this case the evidence shows that at least $9 000 has been proved and not disputed. Therefore I find that the applicant has proved a liquidated claim.

The next issue to be considered is whether the court should stay or exclude vesting of the property of the respondent temporarily in the Master of the trustee as a result of the intervention of the husband in terms of s 27 of the Act. To start with the intervening spouse has not sought such an order. He has sought the discharge of the order.

Secondly, the intervening spouse has not isolated any property as solely belonging to him except a general averment to the effect that the property attached included his motor vehicle. The rest of his evidence shows that nearly all properties attached were either in the respondent's name or were jointly owned by the spouse and the respondent.

I have weighed the evidence and submissions made and have come to the conclusion that the provisional sequestration order should be confirmed. It is ordered as follows:

CHAMBAKARE J

The provisional sequestration order is confirmed with costs against the intervening spouse.

Coghlan, Welsh & Guest, applicant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

VUNDU v COMMISSIONER OF TAXES 1992 (2) ZLR 59 (HC)

Court **High Court, Harare**

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Smith J

Income tax appeal

23 October 1991 & 29 July 1992

Flynote

Revenue and public finance - income tax - abatement for family taxpayer - whether child of unregistered customary union recognised for purposes of abatement

Headnote

The children of an unregistered customary law union are not "lawful" children for the purposes of para (b) of the definition of a family taxpayer in s 2 of the Income Tax Act [*Chapter 181*]. "Lawful" means legitimate and as the children were not the progeny of a valid marriage they were not legitimate, even though *lobola* had been paid and the taxpayer had been awarded custody by the court. In 1988 the Income Tax Act was amended to give recognition to the spouse in any customary marriage, whether registered or not, but no amendment was made to give recognition to the children of an unregistered customary law union. There is no equity in tax laws and the anomaly of the inclusion of the spouse but exclusion of the children of a customary law union could only be corrected by the Legislature. Therefore, as the appellant had only children but no spouse from his unregistered customary law union, he was not a family taxpayer in terms of the Income Tax Act [*Chapter 181*].

Cases cited:

ITC No 1044 (1964) 26 SATC 210

ITC No 1438 (1988) 50 SATC 171

MJ Gillespie for the respondent

Appellant in person

1992 (2) ZLR p60

SMITH J

Judgment

Smith J: The appellant was "married" to Alice Mlazo in terms of an unregistered customary law union. There are three children of the union, all of whom are still minors. The union broke up in July 1985. The Chibi Community Court awarded the appellant custody of the three children if he paid the outstanding marriage consideration. He paid and obtained custody in 1988. By assessment No. 4/86951/88 the respondent assessed the appellant to tax and allowed him the abatement due to a single taxpayer. The appellant objected to the assessment on the ground that he claimed to be a family taxpayer as defined in s 2(1) of the Income Tax Act [*Chapter 181*] (hereinafter referred to as "Chapter 181"). The respondent disallowed the objection on the grounds that the children of the appellant were not "lawful" children as required by the definition of "family taxpayer" in s 2(1) of Chapter 181 and there was no other basis on which the

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appellant could claim to qualify as a family taxpayer. Since the children were not the progeny of a valid marriage they were illegitimate and therefore not "lawful minor children" for the purposes of the definition of a family taxpayer. The appellant appealed to the High Court.

The appellant gave evidence to support his case. His evidence merely reiterated what has been set out above. He submitted that his children were not illegitimate. He considered that it was only if the father was not known or the parents could not marry each other because they were too closely related or one or both of them were already married that a child could be termed illegitimate. He felt strongly that his children were entitled to be called legitimate and to be supported by him. Mr *Gillespie* agreed with the spirit of what the appellant said but submitted that the provisions of Chapter 181 had to be applied. Section 4 of the Finance Act 4 of 1988 amended the definition of "marriage" in s 2 of Chapter 181 by including para (c) which reads as follows:

> "(c) a marriage contracted according to the customary law of the indigenous people of Zimbabwe or any section or community thereof, notwithstanding that the marriage may not have been celebrated or solemnized in terms of any law relating to marriage."

It also amended the definition of "spouse" in s 2 of Chapter 181 so as to include, in the case of a polygamous marriage, a wife, other than the first wife, who is living with and wholly maintained by her husband. However, there was no amendment to the definition of "family taxpayer" in s 2 of Chapter 181 so as to include the children of a customary union. The customary union of the appellant terminated before the year of assessment to which this appeal

relates and so he is not covered by para (a) of the definition of "family taxpayer" in s 2 of Chapter 181. He submits that he should be covered by para (b) of that definition which reads as follows:

> "(b) has the custody of and maintains an unmarried lawful minor child during more than half of the year of assessment."

That would only be the case if his minor children were "lawful". In *ITC No 1044* (1964) 26 SATC 210 at 212 the President of the Court, HE DAVIES, considered that the word "lawful" was equivalent to "legitimate". He held that the illegitimate child of a female taxpayer was not her lawful child for the purposes of determining whether or not she was a "married person" in terms of the Federal Taxes Charging Act 25 of 1959. The views of HE Davies as to the meaning of the word "lawful" were cited with approval in *ITC No 1438* (1988) 50 SATC 171 at 174. I can see no basis for departing from the conclusions arrived at in those two cases.

As Mr *Gillespie* said, it has been held in numerous cases that there is no equity in tax laws. The court is obliged to interpret the legislation concerned strictly and to give each word its proper meaning in the context in which it is used. Any anomalies can only be corrected by the Legislature. In interpreting a tax law the court cannot introduce changes which it considers desirable in the light of changing sociological attitudes. It would seem to be desirable that Chapter 181 be amended so as to recognize children of customary unions in the same way that spouses of such unions have been recognized. However, that would have to be done by the

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Legislature. The court can merely make suggestions and recommendations.

The appeal is dismissed.

Civil Division of Attorney General Office respondent's legal practitioners

S v MUSHAYANDEBVU 1992 (2) ZLR 62 (SC)

Court **Supreme Court, Harare**

Manyarara JA**:** In Chambers, in terms of s 9A of the Supreme Court of Zimbabwe Act

Criminal appeal

29 July 1992

Flynote

Constitutional law - right to be legally represented - s 18(2)(c) & (d) of Constitution - prosecutor not informing court that accused has engaged lawyer but lawyer unavailable - unsophisticated accused not telling court about this - breach of right to be legally represented at own expense

Criminal procedure - trial a "travesty of justice" - prosecutor not informing magistrate that accused's lawyer not available - prosecutor withholding evidence favourable to accused - magistrate convicting on basis of guilty plea even though clear from State outline that accused raising defence to charge.

Headnote

The appellant, an unsophisticated woman, had pleaded guilty to contravening s 39 (c) of the Firearms Act [*Chapter 308*]. The basis of the charge was that she had shot at and wounded the complainant. She had engaged a lawyer to defend her but he was unavailable on the day of the trial due to previous commitments. The appellant had received only a few days' notice of the trial. The prosecutor knew that the appellant had engaged a lawyer who was unavailable for the trial but did not inform the court about this. The appellant herself did not tell the court about the position with her lawyer. The prosecutor also failed to disclose to the court certain facts favourable to the appellant of which he was aware. It was clear from the facts in the State outline that the appellant had maintained that she was acting in self-defence.

MANYARARA JA

The trial court convicted the appellant on the basis of her guilty plea and sentenced her to an effective term of imprisonment of six months. On appeal the court set aside the conviction and sentence and remitted the case for trial *de novo*. The court found that the trial was a "travesty of justice" because of a number of fatal defects in the proceedings. These were

i) The appellant's constitutional right to be represented by a lawyer at her own

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expense had been breached, as the prosecutor should have told the court that she had engaged a lawyer who was unavailable on the day of the trial; it was unfair to expect an unsophisticated accused to realise that she could bring to the court's attention this matter.

ii) The prosecutor had acted improperly in withholding certain evidence from the court which was favourable to the appellant and which would have precluded the magistrate from accepting the guilty plea.

iii) It was clear from the State outline that the appellant was claiming to have acted in self-defence and the magistrate had therefore misdirected himself in accepting the guilty plea.

Cases cited:

S v Khanyile & Anor 1988 (3) SA 795 (N)

Williams v Twomey (1975) 510 F 2d 634

Judgment

Manyarara JA: This criminal appeal is being dealt with in Chambers following a concession by the State that the trial was "unfair". In my view, the trial was worse than that - it was a travesty of justice.

The appellant, a businesswoman aged about 57 years, who was not legally represented, pleaded guilty in the magistrate's court to contravening s 39(c) of the Firearms Act [*Chapter 308*] and was sentenced to twelve months' imprisonment with labour, of which six months were conditionally suspended. She appealed against the conviction and sentence and was granted bail pending the appeal.

The appellant was not legally represented at the trial because the public prosecutor failed to inform the magistrate that her legal practitioner had contacted him, requesting a postponement due to prior commitments, his client having received only five days' notice of the trial.

The magistrate commented as follows in his ruling on the bail application:

"It has not been denied that the accused had sought legal representation

prior to the date of the hearing. The State confirmed that it was advised by Mr *Craig* that he was going to be representing the accused. On the date of the trial the State overlooked this fact. That oversight has, however, necessitated this application. It is understandable in that should there be truth in it, the whole trial could be grossly unfair. We have to accept that the accused is an unsophisticated old woman who might not realise after being called upon to plead, that she had the right to draw the court's attention to the fact that she had sought the services of a legal practitioner.

She might have thought that since she fired a weapon and injured someone she was automatically at fault despite

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the circumstances under which she did so."

The magistrate referred to *S* v *Khanyile & Anor* 1988 (3) SA 795 (N), in which DIDCOTT J considered the plight of an unrepresented accused person. Although the learned judge was there dealing with lack of legal representation due to poverty, the Judgment applies *mutatis mutandis* to the denial of legal representation to an unsophisticated accused who can afford to pay for the services of a legal practitioner.

The relevant passage reads as follows at pp 812G to 813A of the Judgment:

> "All this is likewise beyond your average layman. On top of everything else, he labours throughout under the disadvantage of an environment that cows him, an atmosphere that chills him. It saps his self-confidence. And any prospect he had of presenting his defence in a calm, clear and orderly way may well be ruined. No wonder it is that combat so unequal was deplored by WYZANSKI J in another American case, *Williams* v *Twomey* (1975) 510 F 2d 634, when he observed (at 640):
>
> > 'While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.'
>
> Nor am I done yet with all the tribulations undergone by people defending themselves. Additional and grave hardships are suffered in this land by those who happen to be black, as the great majority do indeed. Many are illiterate or barely literate. Few speak or understand either official language, or cope well enough to hold their own in a tongue that remains foreign to them. What is said in our court-rooms to each of the rest, what he in turn says there, must therefore be interpreted,

MANYARARA JA

> word by word. But still he is not orientated. For much of our jurisprudence is alien to the culture and traditions of the society from which he springs. So are some of our procedures. Entangled in the workings of a legal machinery that bewilders him, he has the most to gain from a lawyer's help and the most to lose from the lack of it."

The magistrate's criticism of the appellant for not telling him that she had engaged the services of a legal practitioner to defend her is most unfair. The prosecutor knew and it was his duty as an officer of the court to inform the magistrate of this when the case was called. Therefore, the prosecutor neglected his duty and the appellant's fundamental right to be given adequate time for the preparation of her defence and to be legally represented at her own expense was violated: see ss 18(2)(c) and (d) of the Constitution of Zimbabwe. This rendered the trial incurably defective and condonation was out of place.

There was a second and equally fatal defect in the trial. The prosecutor withheld evidence which was within his knowledge and which precluded the appellant from pleading guilty and the magistrate from entering such a plea.

It was not denied that the police had recorded statements from two State witnesses, to the effect that the appellant shot at the complainant when he followed her from the bottle store to the supermarket (both of which she owned and operated), threatening "to assault her and destroy her property". The prosecutor acted improperly in not disclosing the existence of the statements.

However, he was not the only one to blame for this failure of justice. The facts outlined by the

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State, by which the trial proceeded in terms of s 255(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*], disclosed the existence of the evidence referred to clearly as follows:

> "3. On the 16th November 1990 the complainant was drinking beer with his friends at the accused's bottle store.
>
> 4. At one stage (the) complainant fell into an argument with his friends when they refused to accept his offer to buy them beer.
>
> 5. During the argument with his friends, (the) complainant banged the counter to emphasise his intention to buy beer for his friends who insisted on wanting to buy for themselves.

MANYARARA JA

> 6. (The) accused who was in the supermarket was attracted by the noise and went to find out what was happening in the bottle store.
>
> 7. On finding the complainant banging the counter, (the) accused told him not to bang the counter. When (the) complainant did not listen (the) accused ordered him out of the bottle store, resulting in an altercation taking place between the two.
>
> 8. The accused left the bottle store and went into the supermarket where she was followed by the complainant who appeared to be still angry with what (the) accused had said to him in the bottle store.
>
> 9. The accused took a pistol, a .38 Colt, and loaded three live rounds of ammunition into it.
>
> 10. (The) accused discharged the pistol in the general direction of the complainant and shot him on the right thigh giving him some injuries.
>
> 11. After being shot, (the) complainant walked away from the supermarket."

It cannot be seriously suggested that any criminal tribunal would fail to appreciate that the State outline itself pointed unmistakably to justification being the appellant's defence to the offence charged. See, for example, Snyman *Criminal Law* 2 ed p 97, which explains the position as follows:

> "The first ground of justification, private defence, has ancient roots, and throughout the historical development of criminal law it has always remained firmly entrenched as one of the best-established defences an accused can raise. A person acts in private defence if he defends himself or somebody else against an unlawful attack upon life, limb, property or dignity, . . . In daily parlance this ground of justification is often referred to as 'self defence', but this description is too narrow, since it is not only persons who defend themselves but also those who defend others who can rely upon this ground of justification."

The text continues at p 98 as follows:

> "If the possibility of private defence is raised in the evidence, the onus is on the State to prove beyond reasonable doubt that X did not act in private defence."

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MANYARARA JA

It will be seen that the prosecutor was most ill-advised to seek a conviction on the State outline and that the magistrate misdirected himself seriously on convicting in the face of evidence which exculpated the appellant.

The State has asked that the conviction and sentence be set aside and the case remitted to the magistrate's court for a trial *de novo* or for the appellant to be allowed to change her plea. Only the first prayer is feasible in my judgement.

It was the State itself which alleged justification for the shooting, that the appellant "was followed by the complainant who appeared to be still angry ..." and she took a pistol and shot at him. I fail to see how the State could possibly discharge the *onus* resting on it to prove otherwise even if a re-trial was ordered.

I can only allow the appeal and set aside the conviction and sentence.

My brother EBRAHIM agrees with this Judgment.

S v MPOFU 1992 (2) ZLR 68 (HC)

Court **High Court, Bulawayo**

Blackie J & Cheda J

Criminal appeal

31 July 1992

Flynote

Criminal procedure - unrepresented accused - - duty of court to investigate possible mitigatory factors.

Criminal procedure (sentence) - pregnant woman - undesirability of sentencing to imprisonment - imprisonment not invariable sentence for assault with intent to do grievous bodily harm

Headnote

A married woman pleaded guilty to a charge of assault with intent to do grievous bodily harm. She had seriously injured a woman whom her husband had brought home as a second wife by pouring boiling water onto her face and arm. She was eight months pregnant at the time of her trial. On appeal:

Held, that the trial court had misdirected itself by failing to investigate the possibility that the complainant's behaviour had been provocative. Although the onus is on the accused to establish mitigatory features, where the accused is unrepresented, the trial magistrate should

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ensure that he has the correct facts before him to make a proper assessment of sentence.

Held, further, that the trial court had also misdirected itself by paying no regard to the fact that the appellant was pregnant. It is not desirable to imprison a pregnant woman even where a term of imprisonment may be otherwise appropriate for the offence in question.

Held, further, even had there been no misdirection the sentence imposed was unduly harsh. Although assault with intent to do grievous bodily harm, especially where it results in serious consequences, often attracts a term

BLACKIE J

of imprisonment, even for first offenders, this is not invariably the position. In the present case a fine and a suspended prison sentence was appropriate. Apart from her pregnancy, the appellant has six children and is the breadwinner for the children. She acted on impulse and without premeditation. Even if the complainant's behaviour had not been provocative, the appellant had been put under strain by her husband without any forewarning bringing another woman into the house.

Case cited:

S v Samuel 1976 (1) ZLR 222 (G)

J Makowane for the respondent

Judgment

Blackie J: The appellant was convicted on her plea of guilty on one count of assault with intent to do grievous bodily harm. She was sentenced to 9 months' imprisonment with labour, of which 5 months were suspended for 5 years on condition of good behaviour. The appellant was given leave by this court to appeal in person against that sentence.

The facts are that the appellant is married. Her husband brought the complainant home as a second wife. The agreed facts state that the appellant "demanded to know why she was not informed of the affair between the complainant and her husband before the complainant came to her house. The appellant became bitter about the action taken and she took a tin which was on a hot plate and splashed water on the complainant". The medical report states that complainant sustained burns on 10% of her right arm and on the right side of her face. The injury was severe and permanent disfigurement might result. The complainant spent two weeks in hospital.

The appellant is a first offender. She has 6 living children and she was 8 months pregnant at the time of her trial. She had no assets and no savings.

In sentencing the appellant, the trial magistrate held that the appellant had no cause of complaint against the complainant. Her grievance, he said, was against the husband and so her action against the complainant was entirely unjustified. I do not think that the agreed facts make this point clear. The appellant was unrepresented and the magistrate should, in fairness

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to the appellant, have investigated this point further if he intended to use it, as he did, as a point in aggravation against the appellant. It is not impossible in the circumstances, that the complainant's behaviour was provocative and, although the onus in mitigation is on the accused, where the accused is

BLACKIE J

unrepresented, the trial magistrate should ensure that he has the correct facts before him to make a proper assessment of sentence. In proceeding as he did the trial magistrate did not follow proper procedure and misdirected himself on sentence.

The magistrate further misdirected himself by paying no regard to the fact that the appellant was pregnant. It is not desirable to imprison a pregnant woman even where a term of imprisonment might otherwise be imposed.

Because of the woman's condition, the suspension of any otherwise justifiable sentence of imprisonment is usually rendered just and necessary: *S* v *Samuel* 1976 (1) ZLR 222 (G) at 223C-D.

Even if there had been no misdirection by the magistrate in this matter we would still have interfered with the sentence imposed by the magistrate as being unduly harsh. Although a conviction for assault with intent to do grievous bodily harm, particularly where the assault is severe or has serious consequences, often attracts a term of imprisonment even for first offenders that is not invariably the position. The courts, in many such cases, have sentenced an accused to a fine and a suspended period of imprisonment. This case is one where such a penalty was justified. Apart from her pregnancy, the appellant has 6 children. Her uncontradicted evidence is that her husband fails to maintain them and she is the bread winner for them. She clearly acted on impulse and without premeditation. Even if the complainant's personal behaviour was not provocative to her, the appellant was suddenly confronted with her husband bringing another woman into the house. That can only have put her under considerable strain.

When this appeal came to be heard, the appellant had already served her sentence of imprisonment. That cannot be altered now. However, it is important that the sentence imposed on the appellant be set aside so that it does not form the basis of any form of precedent for future sentencing. In particular, it is important that the following facts be emphasized: the duty of judicial officer to ascertain the correct facts in mitigation from an unrepresented accused and the proper approach to sentence in regard to pregnant women. In the result the sentence of the magistrate is set aside and there is substituted for it a fine of $300 (or in default of payment 4 months' imprisonment with labour). As the appellant has already served 4 months' imprisonment with labour, the fine is not to be paid.

Cheda J: I agree.

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CARINUS v DU TOIT 1992 (2) ZLR 71 (HC)

Court **High Court, Harare**

Smith J

Civil action

4 June & 5 August 1992

Flynote

Prescription - action withdrawn and then reinstated with consent of other party - original summons had interrupted prescription - claim had not prescribed

Headnote

Plaintiff's action against the defendant had been withdrawn after summons had been issued because the plaintiff's lawyers had a conflict of interests. The plaintiff then took the case to another firm of lawyers. The original action was then reinstated or resuscitated with the express consent of the defendant. The consent to the reinstatement signed by the lawyers of both parties was filed.

The defendant pleaded that the action had prescribed between the withdrawal of the action and its reinstatement.

The court dismissed this plea. As the original action had been reinstated the present action was simply a continuation of the original action under the process previously issued. In terms of s 18(2)(a) of the Prescription Act, 1975 prescription had been interrupted by the issuing of the original summons and therefore the claim was not prescribed.

Cases cited:

Mukotakwa v *Zimbabwe Tpt Co-op Soc Ltd* HH-245-90 (unreported)

Crook v *Dir of C & E* HH-104-89 (unreported)

Sadomba v *Farai Uzumba (Pvt) Ltd* 1982 (2) ZLR 142 (H)

AJ Dyke for the applicant

GS Wernberg for the respondent

SMITH J

Judgment

Smith J: In January 1991 the plaintiff issued a summons claiming $78078 from the defendant in respect of damage allegedly caused by cattle belonging to the defendant to cotton plants in

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the plaintiff's lands. The damage was allegedly caused between March and June 1988. The plaintiff's lawyers, because of a conflict of interests in that they also represented the defendant, withdrew their services and the action was withdrawn in February 1991. The plaintiff then approached another firm of lawyers who wrote to the defendant's lawyers, who had started the action on behalf of the plaintiff, and suggested that in order to obviate the need for the proceedings to be reinstated, with further attendant costs, the action be reinstated, with the *dies induciae* commencing to run from the date the action was reinstated. The defendant's lawyers concurred with the suggestion, saying that the defendant had expressly agreed that the action could be resuscitated. Therefore, on 7 June 1991, the plaintiff's former lawyers filed a notice of renunciation of agency and on 27 June the plaintiff's present lawyers filed a notice of assumption of agency and a consent to reinstatement of the action signed by the lawyers of both parties. The action was not given a new High Court reference number - the original number was retained.

On 4 September the defendant filed a plea in abatement to the plaintiff's summons and declaration claiming that since the alleged damages were suffered between March and June 1988 and the plaintiff's action was reinstated on 27 June 1991, more than three years later, the action was prescribed in terms of s 14 of the Prescription Act 31 of 1975. In his replication the plaintiff averred that the reinstatement of the action in June had the effect of restoring the action as though it had not been withdrawn. Alternatively he averred that by consenting to reinstatement the defendant waived the defence of prescription.

Mr *Wernberg* accepted that in terms of rule 119 of the Rules of the High Court, the plea in abatement should have been filed within 12 days of the service of the plaintiff's declaration. Accordingly it should have been filed on or before 15 July 1991. It was not filed until 4 September. He submitted that this was because of correspondence between the parties' lawyers, presumably on the merits of the plea. In any event, he continued, the plaintiff's lawyers consented to the set down of the matter without objection so in effect they consented to the matter being heard, notwithstanding the late filing. The factors to be taken into consideration in determining an application for condonation were set out in *Mukotakwa* v *Zimbabwe Transport Co-operative Society Ltd* HH-245-90. They are-

(a) the degree of non-compliance with the rules;

(b) the explanation therefor;

(c) the prospects of success;

(d) the opposite party's interest in finalizing the matter;

(e) the convenience of the court.

He relied on *Crook* v *Director of Customs and Excise* HH-104-89 for his submission that in this

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case condonation should be granted where the failure to do so would or might result in the court hearing the trial indulging in an expensive academic exercise. Although Mr *Dyke* attempted to distinguish Crook's case, I consider that the attitude adopted by the learned judge in that case should be followed *in casu*. Prescription can be raised at any stage of an action. It is obviously preferable that before the trial action is started the parties should know whether or not any claims arising before 27 June 1991 were actionable and should be inquired into. Accordingly I condone the late filing of the plea.

With regard to the merits of the plea, Mr *Wernberg* submitted that the plaintiff's claim was prescribed by virtue of s 14 of the Prescription Act 1975. It is not saved by s 18 of that Act because subs (2) of that section provides -

> "(2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse and the running of prescription shall be deemed not to have been interrupted if the creditor -
>
> (a) **does not successfully prosecute his claim under the process in question** to final Judgment ..." (emphasis supplied).

He went on to argue that the withdrawal of the plaintiff's claim initially had the effect that prescription was never interrupted - *Sadomba* v *Farai Uzumba (Pvt) Ltd* 1982 (2) ZLR 142 (H) at 148 G *et seq*. Mr *Dyke*, on the other hand, argued that the reinstatement of the plaintiff's summons, as opposed to the reinstitution of his claim, had the effect of restoring the claim as though it had not been withdrawn. Therefore the interruption of prescription by the summons issued in January 1991 lapsed when the action was withdrawn but then when the action was reinstated, it revived and continued as though it had not lapsed.

It seems to me that in this case the plaintiff must succeed. His former lawyers had withdrawn his action. When his present lawyers wrote to his former lawyers (now representing the defendant) and asked whether the action could be **reinstated**, the former lawyers said they wanted to obtain their client's

(the defendants) specific instructions. Thereafter they wrote to say that they had their client's express instructions to allow the proceedings instituted against him by the plaintiff to be **resuscitated**. According to the Shorter Oxford English Dictionary, resuscitate means "to revive, renew, restore (a thing)". In accordance with that agreement, the plaintiff did not issue a new summons and declaration. The reinstatement or resuscitation of his action made that unnecessary and the defendant and his lawyers accepted that position. They pleaded to the original declaration. The action retained the High Court number that had been allocated to it in January 1991. The plaintiff's summons and declaration interrupted prescription in terms of subs (1) of s 18 of the Prescription Act 1975 and that interruption of prescription, whilst it may have lapsed when the plaintiff's former lawyers withdrew the action, was restored to life and full vigour once the parties agreed to the resuscitation of the proceedings. When the defendant agreed to the resuscitation of the proceedings he must have intended the effect that the proceedings would carry on as though they had not been withdrawn. What else could have been intended? Accordingly, in my view the plaintiff is prosecuting his claim "**under the**

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process in question" as referred to in para (a) of s 18(2) of the Prescription Act 1975 and therefore the interruption of prescription has not lapsed.

The plea in abatement is dismissed with costs.

Atherstone & Cook, plaintiff's legal practitioners

Coghlan Welsh &Guest, defendant's legal practitioners

MAYOR OF THE CITY OF HARARE & ANOR v MAGAMA & ANOR 1992 (2) ZLR 75 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Civil Appeal

20 July & 6 August 1992

Flynote

Administrative law - bias - whether delivery of wrong forms to objectors amounted to bias or whether simply negligence

Elections - municipal elections - correction of voters' roll - difference between objection by candidate that persons had been wrongly included in voters' roll and claim by voter that his name had been wrongly omitted from voters' roll

Locus standi - whether candidate in municipal election had locus standi to bring proceedings concerning the wrongful omission of voters' names from the voters' roll

Headnote

The respondents had obtained an order in the High Court that certain municipal elections be postponed until the relevant voters' roll had been "corrected". After the election had been postponed at the respondents' instance and objections to the roll had been formally invited, the municipal authorities had given the respondents, who were candidates in the election, the wrong forms for completion. In an appeal against the High Court decision:

Held, allowing the appeal and overturning the decision in the High Court, that a distinction had to be made between an objection that persons' names had been wrongly included in a municipal voters' roll and a claim that voters' names had been wrongly omitted from the roll. A candidate in the municipal election was entitled to object to the wrongful inclusion of names in the voters' roll but only aggrieved voters were entitled to to lodge claims that their names had been wrongly omitted from the voters'

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roll. A candidate would only have *locus standi* to bring legal proceedings for an an order that that voters' names should be included in the voters rolls (or to object to the proceedings of the voters' roll board) if he had obtained a power of attorney from the aggrieved voters who had duly filed their registration papers and had had their names omitted from the voters' roll.

Held, further, that had an aggrieved voter been handed the wrong form to fill in when that voter was seeking to lodge his claim for the inclusion of his name and he had been prejudiced thereby, he would have been able to have made a court application concerning this matter. The handing of the wrong form to the respondents could have been the result of negligence rather than bias and, if it was due to negligence, the negligence was "negligence in the air" as there was no complaint from a specific voter that his name had been wrongly omitted.

Cases cited:

PF-ZAPU v *Min of Justice* 1985 (1) ZLR 305 (S)

S v *Zemura* 1973 (2) RLR 357 (A)

JS Sayce, for the appellants

No appearance for the respondents

Judgment

McNally JA: On 2 August 1991 the present respondents, whom I will call "the candidates", obtained High Court orders against the second appellant, whom I will call "the Town Clerk". The effect of the orders was that the Town Clerk was required to postpone the municipal elections for Wards 31 and 32 until the relevant voters' rolls had been "corrected". The respondents were independent candidates in those wards. Their contention was that:

> "(1) There were persons then registered on the voters rolls who, in terms of the Urban Councils Act, were not supposed to be registered thereon;
>
> (2) There were a lot of persons who had been left out who should have been registered on the voters rolls."

It is necessary, before going further, to clarify a point which was not properly understood during the subsequent proceedings.

The point is this. There are two different kinds of application which can be made by persons who wish to vote in a municipal election. The first is an

application which is made by a person who has not previously been registered as a voter and now wishes to be so registered. Such a person makes an application in terms of s 23 of the Urban Councils Act, and he applies using the prescribed form, which is Form A (or Form B if he is an artificial person) set out in RGN 148/1979.

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The second is an application by a person who has already applied and set out his qualifications for entitlement to a vote, but who finds, when the roll is published, that his name has been omitted. Whether that omission was deliberate or due to clerical error is immaterial. Such a person applies in terms of s 25(1)(b) of the Act, and his application is required to be made on Form D, which is also annexed to RGN 148 of 1979. Form D bears the heading "Claim for Inclusion of Name Omitted from Voters' Roll".

The distinction between the two types of application is fundamental, particularly in this instance, because it is clear to me that the orders made on 2 August 1991, though not expressed as carefully as I think they should have been, were ordering "corrections" in terms of s 25 of the Act. The court was not ordering a wholesale re-registration of voters. It was not giving an opportunity to all those people who had forgotten to register in time, or who had been too lazy or too uncivic-minded, to come forward and be registered.

It was simply ordering, in accordance with the provisions of s 25 of the Act, that a proper opportunity be given to those persons, if any, who had already applied, but whose names for whatever reason, did not appear on the roll, to apply for that omission to be corrected.

This was patently not understood by the candidates or by their legal adviser.

I should also say, in passing, that it is unnecessary in this case to consider the other leg of the application concerning voters whose names appeared on the roll, but whose names should not (because they had died or in some other way become disqualified) have been on the roll. I say this simply because the candidates put forward no such names. Their entire effort was concentrated on putting forward the names of persons that they claimed should have been on the roll.

In consequence of and in compliance with the orders made on 2 August, the Town Clerk proceeded to act as directed. At this point it is convenient to set out the relevant parts of s 25 of the Act. It reads as follows:

McNALLY JA

> "25. (1) Immediately after preparing the voters' roll in terms of section *twenty-four* the town clerk shall, by notice published in two issues of a newspaper and posted at the office of the council concerned -
>
> (a) notify that a copy of the voters' roll is open for inspection...
>
> (b) call upon any person who claims that he should be enrolled as a voter or who has any objection to the enrolment of a person whose name appears on the voters' roll to lodge his claim or objection in the form prescribed with the town clerk within the appropriate period referred to in paragraph (a); and
>
> (c) fix a date, being not less than seven days after the expiration of the appropriate period referred to in paragraph (a) and the hour and place for the sitting of the voters' roll board to hear all claims and objections lodged in terms of paragraph (b)."

It is not disputed that the Town Clerk did all this. At the expiry of the appropriate period the Town Clerk had received no "notices of objection to retention of name on voters' roll" in terms of Form E of RGN 148 of 1979. Nor had he received any applications in terms of Form D from

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individuals making a "claim for inclusion of name omitted from voters' roll".

What he did receive, from each of the two candidates, was a long list of names and addresses compiled apparently by the candidates and listed on Form F of RGN 148 of 1979.

Now Form F was, quite obviously, the wrong form. It is a form which is supposed to be compiled by the Town Clerk himself. There is a space at the bottom of the form for the Town Clerk to sign it. It is a form which he, the Town Clerk, is required to compile for publication in terms of s 25 (2) of the Act. It is merely intended to be a list of the persons who have applied to him on Form D This is obvious from the form itself which contains a reference to s 25(2) of the Act. Reference to that subsection, and to s 6(1) of RGN 148 of 1979 puts the matter beyond doubt.

Moreover, we are not simply dealing with a situation in which an applicant has used a wrong form. In a proper case no doubt such an error could be condoned. We are dealing with a situation in which no applications had been made. Not one of the persons whose names and addresses were listed had himself made an application or lodged a claim as required by the Act and as

McNALLY JA

invited by the notices published in the Herald on 27 August and 6 September 1991, and posted at the office of the Council.

Obviously it was essential that anyone who contends that his name has been erroneously omitted from the voters' roll, should himself make and sign an application setting out the facts on which he bases his claim. None of the person whose names were listed by the candidates did so. Therefore, there were in fact no applications which needed to be considered by the voters' roll board.

What followed may be described as an exercise in formalistic futility. The Town Clerk placed these lists before the voters' roll board, chaired by the Mayor in compliance with the provisions of s 26(1)(b) of the Act. He advised that board, perfectly correctly, that these lists were no more than lists, and were not individual claims for inclusion of names omitted from the voters' roll as required by the Act and as called for in the notices in the newspaper. The board then rejected these "applications". Strictly it was not necessary to reject them because they were not applications at all.

It was this state of affairs which gave rise to the court proceedings with which we are now concerned.

The two candidates objected to the refusal of the voter's roll board to include on the voters' roll, the names of the persons whom they had listed. They also objected to the action of the voters' roll board in agreeing to consider, along with their lists, another list belatedly put forward by another candidate. There was merit in this second objection, but it is irrelevant because the board, again quite properly, ultimately rejected this other list as well.

In these proceedings they sought an order against the Mayor, in his capacity as the chairman

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of the voters' roll board, and against the Town Clerk. They sought, and obtained, the following relief: (I summarise it for convenience)

1. That the Mayor and the Town Clerk be directed forthwith to convene a voters' roll board meeting to consider only their "objections" (they mean "claims").

2. That the Town Clerk be interdicted from proceeding with the elections in Wards 31 and 32 until the voters' rolls for the wards "have been properly considered by the voters' roll board and properly certified".

McNALLY JA

3. That the Town Clerk be directed forthwith to comply fully with the court order of August 2, 1991 wherein he was directed to correct the voters' rolls for wards 31 and 32.

4. Costs.

5. That this order operate as a temporary interdict restraining the Town Clerk from proceeding with the elections in the wards, until the voters' rolls for the two wards have been corrected and properly certified in terms of s 28 of the Urban Councils Act [*Chapter 214*].

The learned judge who made this order on 18 October, 1991, and handed down reasons later, was working under extreme pressure because of the urgency of the matter.

The reasons for the court's decision may be summarised as follows. In making this summary I will not deal with the court's finding, which, with respect, was perfectly correct, as to the illegality of the boards agreeing to consider another list of names which was submitted out of time. That list of names, as I have noted, was ultimately rejected by the board. Thus it does not matter that the board was wrong even to consider it.

The court found that the board acted irrationally (compare *PF-ZAPU* v *Minister of Justice* 1985 (1) ZLR 305 at 327C) in rejecting their list of applicants but accepting the list of objections. The short answer to this, as Mr *Sayce* for the appellants pointed out, is that there was no list of objections. The candidates confused the issue by using the expression "objections" when they meant "claims". They were not in fact objecting to the inclusion of names which ought to have been excluded. There were no objections, properly so called, and the board therefore did not accept any objections. The ground of irrationality therefore falls away.

The court next found that the appellants had acted in bad faith. This finding was based upon the allegation that when the candidates asked the Town Clerk's department for the appropriate forms they were given the forms which they used - the wrong forms.

It seems probable that this allegation must be factually correct. From what other source would they have obtained these forms? And indeed there is a letter on the record from the Town Clerk to the candidate's legal representative stating that the forms requested are enclosed. It is overwhelmingly probable that those forms were the wrong forms, the forms that were used.

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McNALLY JA

But several points must be considered. First, it cannot be assumed that the Town Clerk sent the wrong forms with malevolent intent. Simple negligence is an equally possible explanation. Moreover, because of the great haste in which papers were filed, no opportunity was given to the Town Clerk to explain how he came to send the wrong forms. He may have been able to deny the allegation or to excuse the apparent error. And it must be said that the candidates' legal adviser was equally at fault. How could he have thought that these were the proper forms? A brief check of the provisions of the Act, the provisions of the regulations, and the wording of the form itself would have made it obvious that this was the wrong form.

The court's reliance on the decision in *S* v *Zemura* 1973 (2) RLR 357 was misplaced. That was a criminal case. This is a civil matter. It is one thing to say that a person should not be held criminally liable for doing something which the appropriate official tells him to do. It is another matter in a civil case to say that when an official sends you the wrong form, which is not even an application form, and when you unreasonably complete that form, you must in some way be deemed to have completed the correct form.

But however that may be, the facts in this case are quite different. The facts are that it was for those individuals whose names had been incorrectly left off the roll to apply for the inclusion of their names. The applications had to be made by the individuals, not by the candidates. There is no evidence at all that the individuals whose names were on the lists had constituted one or other of the candidates as their agent. Indeed, in the light of what I said earlier, it is quite likely that many if not most of the persons named in the lists were not people whose names had erroneously been left off the rolls, but people who had never applied to be voters. We simply do not know, because we have no statements from those individuals.

This leads to the final point. I have the strongest doubts as to the candidates *locus standi* to bring these proceedings before the court. They may have been entitled to bring the original proceedings before CHEDA J But surely it was for the individual aggrieved voters (if there were indeed any such persons), whose names had wrongly been omitted from the rolls, to bring these present proceedings. They were invited in terms of the Act, and by public advertisement, to come forward. They have not done so. Had they, or their duly authorised agent, asked for the appropriate form and been given the wrong one, different considerations might arise. But in the circumstances of this case I find myself unable to understand on what basis the candidates considered they had the right or authority to make this application.

McNALLY JA

It is understandable and praiseworthy that candidates for election, whether municipal or national, should undertake a voters' registration drive. But they should do so in good time before an election, and they should follow the proper procedures. In this case they did neither. And they confused a registration campaign in terms of s 23 of the Act with a voters' roll correction exercise in terms of s 25 of the Act. But most importantly of all they forgot that it is the voter

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himself (or herself) who must insist on his or her rights. The role of the candidate is to encourage voters to exercise their rights, to assist them in applying for their rights, but not to apply on their behalf (except perhaps in rare cases under power of attorney).

I do not think it necessary in this case to make a formal ruling on the *locus standi* of the two candidates. Nor is it desirable to do so in the absence of any argument before us on their behalf. It is simpler to base the decision on the fact that no voter came forward to assert that his or her name had wrongly been omitted from the roll. No voter came forward to assert that, but for the misleading action of the Town Clerk or his minions, he or she would have completed a Form D The negligence of the Town Clerk in providing the wrong forms (and I am only assuming that it was negligence, having already noted that he was not given an opportunity to explain away his apparent negligence) was what in law is called "negligence in the air". In other words his negligence has not been shown to have led any interested and affected voter to act to his or her detriment.

This case, in short, should have been brought by an aggrieved voter claiming "I registered in due form but my name was omitted from the roll. I attempted to apply for the roll to be corrected in response to the advertisement, but I was given the wrong form. My application was then rejected because I used the wrong form".

Had even one such person filed an affidavit in support of the present application, the outcome might have been different. But in the absence of any averment of injury by any injured party, it does not seem to me that the application should have been entertained.

Before I conclude I must draw attention to the fact that the legal representative of the respondents (the candidates), Mr *Mararike* of Mararike and Partners, filed no heads of argument and did not appear to oppose the appeal. We were advised at the last minute by letter from his office that he had been taken ill two days before the case was to be heard. That, of course, does not excuse his failure to file heads of argument, which should have been lodged some weeks

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McNALLY JA

earlier, or alternatively to advise the court that he was withdrawing from the case.

Such conduct is not acceptable, more particularly in a matter of public interest.

The appeal is allowed with costs. The order in the court a quo dated 18 October 1991 in Case HC 4687/81 is set aside. In its place the following order is made:

> "The application is dismissed with costs."

Korsah JA: I agree

Ebrahim JA: I agree

Honey & Blanckenberg, appellants' legal practitioners

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S v AITKEN 1992 (2) ZLR 84 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Manyarara JA & Ebrahim JA

Criminal appeal

6 & 10 August 1992

Flynote

Criminal procedure - bail - appeal against refusal by High Court to grant bail - proper construction of s 44(5a) of the Criminal Procedure and Evidence Act [Chapter 59]

Interpretation of statutes - intention of legislature - approach to be adopted where legislature did not intend to use word to bear the meaning that it properly bears

Headnote

The word "interlocutory" in s 44(5a) of the High Court of Zimbabwe Amendment Act 1989 could not possibly have been intended to have its normal limited and technical meaning. It should therefore be given its widest possible meaning. It is to be construed to refer to any order made incidental to any stage between the inception and the conclusion of litigation, upon any incidental matters which does not finally determine the original dispute. This includes pre-trial orders, such as a decision relating to bail.

Previously there was an automatic right of appeal to the Supreme Court against a High Court decision regarding bail, but any appeal against conviction or sentence required leave to appeal. The amendment repealed the clause giving that automatic right of appeal against bail. The intention was not to remove a right of appeal against bail altogether, but to rationalise the right of appeal by requiring leave in all cases. The right given to appeal with leave against interlocutory orders therefore also included the right to appeal, with leave, against a refusal of bail.

The appeal court went on to say that even if it was wrong in ascribing this meaning to the word "interlocutory" it had to give effect to the intention

GUBBAY JA

of the legislature. Where the legislature could not possibly have intended the word to signify what the word properly signifies, the court will modify its meaning and give it the meaning that the legislature intended. It will not allow the intention of the legislature to be nullified by the draftsman's unskilfulness or ignorance of the law.

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Cases cited:

Aitken & Anor v *A-G* 1992 (1) ZLR 249 (S)

S v *Hussey* 1991 (2) ZLR 187 (S)

S v *Murambiwa* S-62-92 (unreported)

Paweni & Anor v A-G 1984 (2) ZLR 39 (S)

S v *Chikumbirike* 1986 (2) ZLR 145 (S)

S v *Chiadzwa* 1988 (2) ZLR 19 (S)

Bell v *Bell* 1908 TS 857

Blaaubosch Diamonds Ltd v *Union Govt (Min of Finance)* 1915 AD 599

Globe & Phoenix Mining Co Ltd v *Rhodesian Corp Ltd* 1932 AD 146

South Cape Corp (Pty) Ltd v *Engng Mgmt Svcs (Pty) Ltd* 1977 (3) SA 534 (A) *Pretoria Garrison Institutes* v *Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A)

Acutt v *Acutt* 1990 (2) ZLR 220 (S)

Seaford Court Ests Ltd v *Asher* [1949] 2 All ER 155 (CA)

Ex parte Min of Justice: In re *Jasobson & Levy* 1931 AD 466

A P de Bourbon SC & J B Colegrave for the appellant

R H Goba for the respondent

Judgment

Gubbay CJ: On 5 June 1992 Mr Aitken applied to a judge of the High Court, in terms of s 106(1)(a) of the Criminal Procedure and Evidence Act [*Chapter 59*], to be admitted to bail. This was his second application, for the first had been decided against him in an appeal brought before this court on 6 April 1992. (See *Aitken & Anor* v *Attorney-General* 1992 (1) ZLR 249 (S)). It was dismissed by the learned judge on the ground that the requirement in para (ii) of the proviso to s 106(1)(a) had not been met, in that no new facts had arisen or been discovered since the determination of the previous application which permitted a reconsideration of the issue. An appeal was noted to this court against that Judgment.

At the commencement of the hearing, this court queried with counsel whether, notwithstanding that an appeal as of right from a judge of the High Court had been entertained in *S* v *Hussey* 1991 (2) ZLR 187 (S), *S* v

GUBBAY CJ

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Murambiwa S-62-92 and *Aitken & Anor* v *Attorney-General supra*, an appeal lay at all to the Supreme Court. It was pointed out that the High Court of Zimbabwe Amendment Act 1989 had repealed subs (1) of s 44 of the High Court of Zimbabwe Act 1981 and at the same time had introduced subs (5a) into s 44, which only allows an appeal with leave against an interlocutory order or interlocutory Judgment in relation to any criminal proceedings before the High Court. It therefore seemed to this court that, at best, Mr Aitken had a qualified right of appeal, but as leave had not been sought the matter ought not to have been enrolled and had to be struck off. Counsel were granted an adjournment so as to be in a position to properly address argument to the court. That argument has now taken place and proved of much assistance.

Counsel for Mr Aitken submitted that where a judge has dismissed either an application for bail or an appeal from a decision of a magistrate, brought before him, pursuant to ss 106(1)(a) and 111(1) of the Criminal Procedure and Evidence Act, respectively, the ensuing order or Judgment is "an interlocutory order or interlocutory Judgment" within the meaning of subs (5a) of s 44 of the High Court of Zimbabwe Act. They urged that, taking account of the background against which subs (1) of s 44 was repealed and subs (5a) thereof introduced, the law-maker must have intended to ascribe to the word "interlocutory" the widest possible meaning in order to ensure that the highest court of the land was not precluded, where admission to bail had been improperly denied or granted by a judge, from protecting the liberty of the individual or the interests of the State. Stated otherwise, that to construe "interlocutory" in the sense of the order or Judgment not having a direct bearing upon, or in any way affecting, the decision in the pending criminal trial, would be contrary to the scheme of s 44.

Subsection (5a) reads:

> "(5a) Subject to rules of court, where a judge of the High Court has made an interlocutory order or given an interlocutory Judgment in relation to any criminal proceedings before the High Court -
>
> (a) the person against whom the criminal proceedings are being or will be brought; or
>
> (b) the Attorney-General;
>
> may, with the leave of a judge of the High Court or, if a judge of that court refuses to grant leave, with the leave of a judge of the Supreme Court, appeal to the Supreme Court against the interlocutory order or interlocutory Judgment."

GUBBAY JA

This provision was introduced to replace the repealed subs (1) which, in any criminal case not being a criminal trial, had given an unfettered right of appeal from any Judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction. I am satisfied that in enacting these changes to s 44 the Legislature was reacting to the decisions of this court in *Paweni & Anor* v *A-G* 1984 (2) ZLR 39 (S), *S* v *Chikumbirike* 1986 (2) ZLR 145 (S) and *S* v *Chiadzwa* 1988 (2) ZLR 19 (S); the first being an appeal from the High Court against a refusal to grant a postponement of the trial, and the second and third being appeals from the High Court against the denial of bail.

Obviously it was appreciated as anomalous that an appeal to the Supreme Court should lie as

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of right against orders or Judgments relating, for instance, to postponements, or bail hearings or requests for particulars to an indictment; whereas an appeal only lay with leave against:

(i) save for certain exceptions, conviction and sentence in a criminal trial held in the High Court (see subs (2));

(ii) a Judgment of the High Court on an appeal against a conviction and sentence passed by an inferior court; and

(iii) the Judgment of the High Court on review (see subs (5)).

What the Legislature aimed to achieve by subs (5a) was rational conformity with the provisions of the existing subsections (2) and (5). It could not have been its intention by the use of the word "interlocutory" to completely nullify the jurisdiction of the Supreme Court with regard to those matters which previously fell under subsection (1). In short, the intention was to curtail the right of appeal by requiring leave in advance; not to entirely deprive a person of that right. Any other construction would lead, in my opinion, to a manifest contradiction of the apparent purpose of the amending Act.

Quite apart from the guidance derived from the background against which the amending legislation was passed, there are other significant features in the relevant provisions of the High Court of Zimbabwe Act, as now amended, which indicate that the intendment was to use the term "interlocutory" in a non-technical sense - rather in the way Roman-Dutch lawyers did. "They", so we are told by INNES CJ in *Bell* v *Bell* 1908 TS 857 at 890, "applied it to any order made at any stage between the inception and the conclusion of the litigation upon any incidental matter which did not finally determine the original dispute".

In the first place, there is a presumption that enactments relating to the appealability of orders or Judgments which use the word "interlocutory", or

other words of similar import, are taken to refer to simple interlocutory orders. See *Blaaubosch Diamonds Ltd* v *Union Govt (Minister of Finance)* 1915 AD 599 at 601; *Globe and Phoenix Gold Mining Co Ltd* v *Rhodesian Corp Ltd* 1932 AD 146 at 159-160; *South Cape Corp (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 549 *in fine*-550A.

Secondly, if an appeal against an order or Judgment relating to a postponement, bail or a request for further particulars to the indictment, were to be excluded in toto from the provisions of subs (5a) on the ground that by nature they do not bear directly upon, or in any way affect, the decision in the main dispute, that is, the trial (as to which see *Pretoria Garrison Institutes* v *Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 870; *Acutt* v *Acutt* 1990 (2) ZLR 220 (SC) at 222D), there would be little if anything left upon which the provision could function.

Thirdly, the use of the phrase "criminal proceedings" in subs (5a), in contradistinction to "criminal trial" in subs (2), is suggestive of an intention to embrace matters which could fall outside the trial hearing - those which do not necessarily arise during the course of a criminal

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trial.

Fourthly, subs (5a) envisages as well a situation in which criminal proceedings "will be brought" in the High Court. It recognises that a person who has not yet been indicted for trial before the High Court could still, with leave, bring an appeal against the court's order or Judgment, to the Supreme Court. Bail apart, it is difficult to perceive of any other matter which a person against whom criminal proceedings have yet to be brought would wish to appeal against any order or Judgment of the High Court.

Finally, s 43(1)(d) gives an absolute right of appeal from the High Court in a civil case where the liberty of the subject is concerned. To construe subs (5a) as denying even a qualified right of appeal where the High Court has deprived the accused of his liberty by refusing to admit him to bail, would be to attribute to the law-maker inconsistent logic and active injustice.

Even if I am wrong in ascribing the meaning I do to the term "interlocutory", I am nonetheless convinced that the Legislature could not possibly have intended what that word signifies. On that ground alone this court would be justified in modifying the meaning. For to stand aside where the object and intention of the enactment are clear would be to allow it, contrary to good sense, to be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law. In this connection I can do no better than to echo, with approval,

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GUBBAY CJ

the observations by DENNING LJ (as he then was) in *Seaford Court Estates Ltd* v *Asher* [1949] 2 All ER 155 (CA) at 164 E-H:

> "Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature."

To much the same effect are the remarks of WESSELS ACJ in Ex parte *Minister of Justice:* In re *Jacobson & Levy* 1931 AD 466 at 476 *in fine*-477.

It was for these reasons that at the conclusion of the arguments, while ordering that the appeal be struck off the roll, this court issued the following declaration:

> "Subject to the provisions of subsection (2) of s 44 of the High Court of Zimbabwe Act, 1981, subsection (5a) of s 44 thereof is to be construed as allowing an appeal to the Supreme Court with leave of a judge of the High Court or, if a judge of that court refuses to grant leave, with leave of a judge of the Supreme Court, against any order or Judgment of the High Court in any criminal proceedings."

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Manyarara JA: I agree.

Ebrahim JA: I agree.

Atherstone & Cook, appellant's legal practitioners

MANDUNA v MUTIZWA 1992 (2) ZLR 90 (SC)

Court **Supreme Court, Bulawayo**

Gubbay CJ, Manyarara JA & Ebrahim JA

Civil appeal

4 & 13 August 1992

Flynote

Spoliation order - couple living together - one moving out and taking items away without other's consent - claiming that had retained sole possession and control of items

Headnote

A man and woman had lived together for some time. The woman then moved out taking with her several items without the man's consent. The man applied for a spoliation order. The woman claimed that these items had been under her sole possession and control whilst they lived together and the man had never used the items and derived benefit from them. The man disputed this.

Held, that if the woman's claim was correct the man would not be entitled to a spoliation order and as the dispute about this matter could not be resolved on the papers, his application for a spoliation order had rightly been rejected.

Cases cited:

Manga v Manga 1991 (2) ZLR 251 (S)

Bennett Pringle (Pty) Ltd v *Adelaide Municipality* 1977 (1) SA 230 (E)

Nino Bonino v *de Lange* 1906 TS 120

J Moyo for the appellant

R Moyo-Majwabu for the respondent

Judgment

Gubbay CJ: The parties to this appeal lived together in a flat rented by the appellant in

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Bulawayo, from early in 1990 until 14 November 1991.

GUBBAY CJ

According to the appellant they were married by customary law and not simply cohabiting under a promise to marry as alleged by the respondent. Their relationship proved to be somewhat tempestuous and on the aforementioned date the respondent finally left the flat to live elsewhere. She took with her, without the appellant's prior knowledge or consent, certain furniture and household effects.

Considering himself aggrieved by the respondent's action the appellant instituted proceedings in the High Court for a spoliation order. He claimed ownership in all the items of property removed by the respondent but acknowledged that both he and the respondent had shared peaceful possession of the property since they lived together under the same roof.

In opposing the relief sought the respondent deposed that, save for certain items (referred to hereafter) which had been jointly possessed, the property belonged to her and had never been placed under the control or possession of the appellant. She justified the removal in these words:

> "I deny that I have taken the law into my own hands as all I have done is to take those things which have always been in my sole possession with me. I never surrendered possession of those items to the (appellant) and by mere co-habiting with him did not remove from me to him my sole possession of my personal property. Just like I did not surrender my possession of my other personal property which (the appellant) has not claimed, for example, my dresses, I did not surrender the property in question to him by merely moving in with him."

And further:

> "... our relationship was that of co-habitation where each party retained control of his/her personal property with the exception of those things which were bought jointly which fell under our joint possession."

On 15 December 1991 the respondent returned the four poster bed, the lounge suite, the television set, the food mixer, the food processor and suitcases, being the effects she admitted the parties had enjoyed joint possession of.

The learned judge who heard the application dismissed it with costs on the ground that it was not possible to reject as untrue the respondent's claim that the items of property she retained subsequent to 5 December 1991, had always remained under her sole possession and had never been possessed jointly with the appellant.

GUBBAY CJ

At the outset it is important to distinguish the situation which gave rise to the dispute in *Manga* v *Manga* 1991 (2) ZLR 251 (S). There it was common cause that the parties jointly possessed all the furniture and household effects. Thus both enjoyed peaceful possession thereof and the action of the one, which deprived the other of his share of the possession, was held by this court to justify the remedy of *mandament van spolie*. But in this case the respondent, perhaps

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mindful of that principle, was careful to differentiate between the property she jointly possessed with the appellant and that which she claimed had always been under her exclusive possession during the period they resided together.

Counsel for the appellant strove to avoid the consequences of the unresolvable disputes of fact emerging from the affidavits filed with the court *a quo,* by submitting that the only reasonable inference to be drawn from the respondent's own allegations was that she had unlawfully dispossessed the appellant.

The two elements which combine in the notion of possession are *detentio* (the physical holding of and control over the thing) and *animus* (the intention of securing some benefit for one's self). As observed by ADDLESON J *in Bennett Pringle (Pty) Ltd* v *Adelaide Municipality* 1977 (1) SA 230 (E) at 233G-H:

> "... both these elements, and especially the *detentio*, will be held to exist despite the fact that the claimant may not possess the whole property or may not possess it continuously. If one has regard to the purpose of this possessory remedy, namely to prevent persons taking the law into their own hands, it is my view that a spoliation order is available at least to any person who is (a) making physical use of property to the extent that he derives a benefit from such use; (b) intends by such use to secure that benefit to himself; and (c) is deprived of such use and benefit by a third person."

It is only necessary to add that whether possession was acquired secretly, or even fraudulently, is not the enquiry. Injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he was a thief or a robber. The remedy is aimed at the involuntary loss of possession and its object is no more than the restoration of the *status quo ante* as a preliminary to any investigation into the merits of the respective claims of the parties to the thing in question. See *Nino Bonino* v *De Lange* 1906 TS 120 at 122.

An enquiry as to whether the respondent's own case reveals the exercise by

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GUBBAY CJ

the appellant of the type of possession essential to found a spoliation claim, faces the insuperable difficulty of her categoric allegations that the items of property still in issue always remained under her sole control and possession; and that it was understood, that she retained the right to deal with them in any manner she deemed fit without the appellant's consent.

There are no undisputed or indisputable *indicia* which on the papers show that the appellant exercised some measure of control over the disputed property or that the respondent intended to, and did, transfer some measure of control to him. Put differently, there is no acceptance by the respondent that the appellant ever made physical use of the items of property to the extent that he derived any benefit from such use.

It necessarily follows, in my view, that the appeal fails and must be dismissed with costs.

Manyarara JA: I agree

Ebrahim JA: I agree

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

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

MAVROS v PACHYDAKIS 1992 (2) ZLR 94 (SC)

Court **Supreme Court, Harare**

Manyarara JA, Korsah JA & Ebrahim JA

Civil appeal

29 June & 13 August 1992

Flynote

Succession - lost will - presumption that will destroyed with intention of revoking - presumption not rebutted

Headnote

The respondent's late husband had executed a will ten years prior to his death by suicide. All parties accepted that the testator had, in this will left his entire estate to his wife. On the death of the husband, his will could not be found despite a thorough search. The respondent instituted proceedings in the High Court to have this will accepted by the Master.

The High Court ruled the presumption that the testator had destroyed the will with the intention of revoking had been rebutted and ordered that the Master accept the will as reflecting the testamentary intention of the deceased. (The High Court decision is reported as *Pachydakis* v *The Master of the High Court & Ors* 1991 (1) ZLR 95 (H).)

Overturning the decision of the High Court, the Supreme Court reiterated that when a will which was last known to have been in the possession of the testator cannot be found after his death, it raises a rebuttable presumption that the testator destroyed it with the intention of revoking it. On the facts, that presumption had not been rebutted. The inescapable inference from the facts was that the testator must have destroyed the will. He committed suicide in a state of emotional turmoil. His wife wanted him to leave her and neither his family or friends would take him in. The deceased was in possession of the will shortly before his death. He was a tidy and methodical man. He had put all other important documents in his wife's wardrobe. Statements made by him some two weeks before he took his life that he did not intend to change his will could not be taken as evidence of an immutable intention because he was in a state of emotional turmoil.

KORSAH J

Cases cited:

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In re *Beresford;* ex parte *Graham* (1883) 2 SC 303

Nelson v *Currey & Ors* (1886) 4 SC 355

Wynne v *Est Wynne & Anor* (1908) 25 SC 951

Ex parte *Slade* 1922 TPD 220

Davis v *Steel & Anor* 1949 (3) SA 177 (W)

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

Ex parte *Redgrove* 1941 (2) PH G50 (N)

MJ Gillespie for the appellant

AP de Bourbon SC for the respondent

Judgment

Korsah JA: This is an appeal from a decision of the High Court, Harare, handed down on 13 February 1991. It is a sad case about the testamentary affairs of a suicide, Emmanuel Peter Pachydakis, who died on 26 June 1986.

During his lifetime the deceased and his wife, the respondent, had executed mutual wills, in which each spouse left his or her entire estate to the surviving spouse unless the surviving spouse predeceased the testator or died within thirty days after the death of the testator, in which case the testator's estate was left to the respondent's elder brother. The backdrop to this matter is stated succinctly in the Judgment appealed, as follows:

> "On 13 April 1986 the respondent entered into a deed of separation with the deceased. In terms of the typed document the deceased was to leave the matrimonial home within seven days from the date of signature of the agreement. That provision was however altered in manuscript so as to provide that the deceased was to vacate the matrimonial home on or before 30 September 1986."

A diligent search conducted by the respondent after the demise of the deceased could not unearth his will. The Master of the High Court and the National Executor and Trust (Pvt) Ltd, who is the executor of the deceased, were in doubt as to whether the respondent was the surviving spouse of the deceased because of the absence of proof that the parish priest, who conducted the nuptials of the deceased and the respondent, was a properly appointed marriage officer. The National Executor and Trust (Pvt) Ltd, however, accepted that the appellant and Maria Papadopoulo, who were sisters of the deceased, were beneficiaries of his estate.

Following the wrangle, a consent order was entered by the High Court on 16

November 1989, declaring that:

(a) the respondent and the deceased were lawfully married to each other according to the

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laws of Southern Rhodesia on 22 September 1962 and remained so married at the time of the death of the deceased; and

(b) the terms of the last will of the deceased were as claimed by the respondent, which will had been duly executed by the deceased on 12 May 1976.

In terms of the order, the issue of whether or not the deceased had revoked the above-mentioned will was referred to be established by oral evidence, and the costs reserved for determination by the trial court.

The appeal is against the determination of the trial court that the lost will of the deceased was not destroyed by the testator *animo revocandi.*

The fourth ground of appeal raised against the decision appealed was that: "In view of the unstinting search conducted for the will the learned judge misdirected himself in finding that it was probably mislaid and still in existence".

The evidence of Dr Hercher was to the effect that both the deceased and the respondent had been his patients since he set up his practice in Shurugwi in 1974. He heard of the separation of the respondent and the deceased, but was of the impression that relations between the two remained good. He said the deceased had developed a heart disturbance in 1986, the year of his separation from the respondent. The deceased was put on valium. Some five to six weeks before his death, the deceased had, in response to a request by Dr Hercher, attended the doctor's surgery for an electrocardiogram which had shown that the deceased was under enormous tension and also had high blood pressure. Dr Hercher was of the view that the separation procedures were a contributory factor to his emotional tension.

Dr Hercher testified that some four to six weeks prior to his death the deceased had visited him at home after working hours. The deceased professed his love for his wife and his desire to stay with her. He was against the separation and could not understand why the respondent was persisting with it. The deceased had produced his will from a black folder and shown it to Dr Hercher to demonstrate that he still loved her to the extent that he was leaving everything to her. After showing Dr Hercher his will and talking about his health, he put the will back in the black folder and left.

KORSAH JA

The day before his death the deceased visited Dr Hercher again, this time to ask him for accommodation. Dr Hercher informed him that the flat he owned was already occupied and that he could not oblige him. The deceased intimated that he would approach his sister, the appellant, in Gweru for accommodation, but said he did not hold out much hope because his said sister did not like him and did not care about him. The doctor noticed that, on the occasion of this visit, the deceased had been relatively quiet. He said when he heard that the deceased had taken his own life he formed the impression that it was a panic reaction on the part of the deceased because he could not face up to the factual impending separation from the respondent.

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Mrs Carlsson, who also lived in Shurugwi, had known the deceased and the respondent for some six years prior to his death. She became aware of the impending separation of the deceased and the respondent through the deceased. She did not observe any change in the attitude of the deceased towards the respondent and it appeared to her that the separation did not breed acrimony between the two. This is understandable, having regard to the fact that the separation was at the instance of the respondent and unwelcome to the deceased. It is not unreasonable to expect a man in the shoes of the deceased to put on his best behaviour in an endeavour to woo back the woman he loved and did not want to part with. He would in such circumstances attempt at all costs to keep their relationship harmonious.

As with Dr Hercher, the deceased had discussed with Mrs Carlsson the issue of alternative accommodation. Like Dr Hercher, Mrs Carlsson suggested that the deceased should have no problem with accommodation since he had a sister in Gweru, to which the deceased remarked that the said sister was not interested in his story. She had seen the deceased about a week prior to his death and had not noticed any Change in his attitude towards the respondent.

The deceased and the respondent were married on 22 September 1962 and lived together until his death on 26 June 1986.

In 1976 they had executed mutual wills, both of which were kept by the deceased. On 13 April 1986 the respondent entered into a deed of separation with the deceased. This was at the instance of the respondent, who was of the view that communication between them had broken down to the extent that such a step was warranted. The execution of the deed of separation was against the wishes of the deceased, but who nonetheless complied with the demands of the respondent.

KORSAH JA

The respondent testified that even at the time of the signing of the deed of separation there was no animosity between them. However, the deceased often appealed to her mother to speak to her about a reconciliation, and that he kept alive hopes of reconciliation, but the respondent was opposed to the idea.

Notwithstanding the execution of the deed of separation, the deceased and the respondent continued living under the same roof. The deceased also used to call at the respondent's shop to ask whether there were any deliveries which he could make to customers for her, or whether she wanted him to fetch anything from Gweru for the shop.

On a social level, so testified the respondent, never was a table set in the house without a place being reserved for the deceased. However, they did not attend any social functions together. With regard to the appellant, the respondent said the deceased and the appellant did not see eye to eye and that they argued interminably over everything when they were in the company of each other.

I find it surprising that, mindful of the disenchantment between the deceased and the appellant, the respondent had the nerve to advise the deceased to approach the appellant for accommodation; and I am not in the least bit surprised that, having regard to their relationship,

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when the deceased complied with the respondent's advice the appellant turned him down.

The respondent said two weeks before his death the deceased called her into his room one evening before supper and told her that he wanted to give her her will. He handed her will to her and said: "If you want to change your will you can do so". She in turn replied that she had no reason to change her will and that whatever they had achieved they had done so together and she had no intention of changing her will, but if the deceased so wished he was at liberty to change his will. The deceased suggested changing the clause dealing with the bequest to the respondent's brother, should they both die within the stipulated period, to a bequest to the respondent's brother's children instead. The respondent rejected the suggestion by the deceased and the deceased opened the drawer to the desk and put his will back in the drawer.

Now, upon his death no will has been found embodying the changes suggested by the deceased. In fact, a most exhaustive search in the house has not brought to light the existence of the will of the deceased. Neither the deceased's lawyers nor bankers are possessed of his will.

KORSAH JA

According to the respondent, one evening when she was conducting a search in her bedroom, she found in her wardrobe some title deeds to the family home and one or two other title deeds to other properties that the deceased owned in Shurugwi. Those documents had not been in her wardrobe before and she suspected that the deceased must have placed them there. In my view, the probabilities are that the only person who could have placed those documents in the respondent's wardrobe must have been the deceased, who had possession of them. Who else?

The question then arises: Why did the deceased place all these important documents, except his will, in the respondent's wardrobe? The probabilities are that either the will did not exist anymore or he left to her all the documents he was in possession of, which comes to the same thing - that at the time of placing those very important documents in the respondent's wardrobe the deceased was no longer in possession of his will. Well, if he was in possession thereof, it has not been found.

It is clear to me from the evidence of these witnesses that the deceased was not only averse to the separation from the respondent, he was devastated by the thought of it. He was a man in desperate need of a place to live as well as companionship. The respondent, whom he dearly loved, was demanding a separation and also that he should move out of the matrimonial home which, incidentally, they had acquired together by their joint labours. His own kith and kin, the appellant, was refusing to take him in. None of the friends he approached could offer him what he most needed in his old age - accommodation and companionship. To him, his world had collapsed about him with the separation and he had no friend or relation to leave his property to. Is it any wonder that his will could not be found after his demise? Having regard to the totality of the evidence, I entertain no doubt that the learned trial judge misdirected himself in finding that the will was probably mislaid and is still in existence.

The law is clear that, where a will which was last known to have been in the possession of the

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testator cannot be found after his death, it raises the presumption that the testator destroyed it, with the intention of revocation; see In re *Beresford*; ex parte *Graham* (1883) 2 SC 303 at 305-6. Though this principle of law was acknowledged in In re *Beresford* , *supra*, the decision in that case went as it did because the will was not traced to the possession of the testator. But in the instant case it was. See the following cases where the principle was also acknowledged - *Nelson* v *Currey & Ors* 1886 (4) SC 355 at 356; *Wynne* v *Estate Wynne & Anor* (1908) 25 SC 951 at 960; Ex parte

KORSAH JA

Slade 1922 TPD 220 at 222 and 225; *Davis* v *Steel & Eriksen* 1949 (3) SA 177 (W) at 183; Ex parte *Warren* 1955 (4) SA 326 (W) at 327A-E.

The evidence adduced tended to prove that the lost will was in the possession of the deceased a mere two weeks before his death by his own hand. The presumption is, therefore, raised that: (a) there has been an act of destruction; and (b) that such destruction was done with an intention to revoke the will. As stated by MULLIN J in *Davis* v *Steel & Eriksen, supra*, the presumption: "... may be rebutted in either or both parts by direct evidence of the testator's conduct or intention or by inference from the circumstances of the case".

The respondent attempted to rebut the presumption by leading evidence to show continued good relations between herself and the deceased. But, to my mind, the fact that she mentioned the desire of the deceased to have a reconciliation which she was opposed to suggests an estrangement between the spouses. There can be no need for a reconciliation if there is no estrangement. Dr Hercher was of the view that the process of going through with the separation was a contributory factor or causative of the emotional tension which the deceased experienced. Yet the respondent appeared to have been oblivious of the effect that the separation was having on the deceased and was under the illusion that the relationship between herself and the deceased continued to be good, despite the fact that she said the deceased, towards the end, appeared to be depressed and very tired.

I am in agreement with Mr *Gillespie* that the lack of open animosity between the respondent and the deceased cannot be urged as showing the deceased's contentment with his lot. After all, he wanted a reconciliation and open animosity was not going to achieve that. And his own self-destruction puts an end to the suggestion that he was contented with his lot. The lack of open animosity, apart from achieving nothing, may also have been due to the deceased's reserve or introspection.

There was the evidence of Dr Hercher, alluded to above, as to how the deceased had been affected by the separation. Mrs Carlsson said the respondent and the deceased were not the type of people that would display in public whatever private feelings they had concerning their marriage and so she could not possibly have been aware of the inner feelings of the deceased regarding the estrangement between himself and the respondent.

The deceased's professed intentions, two weeks before his death, not to alter his will is not a reliable index to his subsequent intentions. It is not uncommon

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KORSAH JA

for testators to change provisions in wills because they had become displeased with a legatee or an heir. Two weeks prior to his death the deceased may have entertained hopes of a reconciliation, but as such hopes diminished with time he may have changed his mind. Two weeks before his death he had not manifested a desire to take his life. In the last two weeks of his life his attitude towards his world and his life changed so profoundly that he committed suicide. He did not leave a note to explain why he did so, but there is unmitigating evidence that he was a man in need of accommodation and companionship. He could get neither from the person he loved above all else, the respondent, or from his kith and kin, the appellant. He had lost everything he wanted. It is probable that he thought neither deserved anything from him after the way they had treated him - we are not to know. What is relevant is that he left all important documents which he wanted the respondent to have, except his will, in her wardrobe. Why?

Not much store can be set by the respondent's evidence regarding the intentions or likely behaviour of the deceased. Their separation was suggested by the respondent because they could not communicate. She at times found it difficult to understand him. The deceased became more depressed and grew quieter in the last few weeks of his life. It is reasonable to suppose that the respondent's understanding of the deceased during the last few weeks of his life would have diminished further with the deceased growing moodier and more introspective towards the end. Her suggestion that the deceased did not intend to kill himself, but only wanted to frighten her, is unsupported by the fact that the deceased hanged himself to end his own life. The respondent finds it difficult to accept that her insistence on a separation and the removal of the deceased from the matrimonial home may have contributed to the deceased taking his own life.

As Mr *Gillespie* rightly submitted, the facts of this case differ from those matters where the presumption was successfully rebutted. Here, the deceased was portrayed as a careful and methodical man. There was no slovenliness which might account for the loss of the will as in *Slade's* case, *supra*. There was no later will giving rise to the idea that the revocation was conditional as in *Davis*, *supra*. No reliable evidence to establish an immutable or unchanged intention not to alter his will was adduced as in Ex parte *Redgrove* 1941 (2) PH G50 (N). He submitted further that, to the contrary:

> "... there is every indication of a desperately unhappy man in such straits that to him the linden tree of suicide appears to offer sweeter rest in its shade; and that such a man is not to be accounted as immune from impulsive action. *Warren, supra*, at 329D- E "

KORSAH JA

It seems to me, however, that the knell these cases really toll is that the rebuttal of the presumption must depend on the peculiar circumstances in each case. The persuasive factors in the instant case are these: The deceased was known to be in possession of his will shortly before his death. He was by habit a tidy man. He was under severe emotional stress when he took his own life. He felt abandoned by both the appellant and the respondent. He placed all

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other important documents, except his will, in the respondent's wardrobe before committing suicide - Why? A thorough search has been conducted without result. The will is not lying undiscovered somewhere. The inescapable presumption must be that it has been destroyed.

I am persuaded by the above to agree with Mr *Gillespie* that the presumed fate of his testamentary document is not to be judged as if the sober habits of a lifetime, rather than the emotional turmoil of the last weeks of his life, dictated the reason for its absence.

Perusing the record as I have, my decided impression is that all the witnesses called were witnesses of truth and we are not disadvantaged in any way in assessing their credibility than the trial court was. The deceased showed his will to Dr Hercher to illustrate to him his love for the respondent and his inability to comprehend why the respondent wanted a separation which entailed him being ejected from the matrimonial home. This was not an indication of the expression of an intention not to revoke his will. In that regard it was colourless. A few weeks later he discussed the will with his wife and suggested nothing of revocation of his will, but before he took his life he placed in her wardrobe all other important documents, except his will. This appears to be evidence of a preparation by the deceased to take his own life. It suggests that his death was not sudden and impulsive, but a calculated and preplanned act. The will, after persistent search after this act of suicide, cannot be found.

I am of the view that the totality of the evidence supports the presumption that the deceased destroyed his will with the intention of revoking it, and that that presumption was not rebutted by the evidence on record.

Accordingly, the appeal is allowed with costs. The order of the High Court is altered to read:

"(1) The application is refused with costs."

The order of the High Court regarding the payment of the costs of the

KORSAH JA

applicant and the respondent out of the estate of the deceased is to stand. The costs of appeal are likewise to be borne by the estate of the deceased.

Manyarara JA: I agree.

Ebrahim JA: I agree.

Atherstone & Cook, appellant's legal practitioners

Condy, Chadwick & Elliot, respondent's legal practitioners

S v MTOMBENI 1992 (2) ZLR 104 (SC)

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Court **Supreme Court, Bulawayo**

Gubbay CJ, Manyarara JA & Ebrahim JA

Criminal appeal

14 & 13 August 1992

Flynote

Criminal law - murder - murderous assault - victim only killed later by appellant trying to dispose of body - whether affects liability for murder

Headnote

The appellant and his accomplice went to a house in order to steal property. A female employee of the owner who knew the two men admitted them to the house. The two men set upon the woman and with actual intention to kill tried to strangle her with a belt. Thinking that they had killed the woman they proceeded to steal property from the house.

Some time later the the appellant returned without his accomplice and set fire to the house in order to destroy the body so that there would be no evidence of the murder.

The appellant was convicted of murder by the trial court. On appeal, counsel for appellant argued that the appellant should not have been convicted of murder as at the time that death was caused by him he had no intention to kill.

Held, the appellant had been correctly convicted of murder, as there had been no snap in the chain of causation.

Held, the reasons why there is no snap in the causal chain in this situation are these:

Firstly, whether or not a person has decided in advance of a murderous attack that after the attack the person will dispose of the body, there is no question of the second act or event being treated as a new and independent act which snaps the chain of causation, provided that the two acts are so closely connected to each other as regards duration and method of performance that for all practical purposes they constitute a single transaction. Secondly, to find a person guilty of murder where he kills by the act of disposal of the

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body does not amount to an exception to the the principle that the *mens rea* must be contemporaneous with the *actus reus.* This is because the initial *actus* which was accompanied by *mens rea* operates as a *sine qua non* of the victim's death and the subsequent act does not break the chain of causation arising from the initial murderous assault.

Cases cited:

R v *Shorty & Ors* 1950 SR 280

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R v *Khandu* (1890) ILR 15 (Bombay)

R v *Thabo Meli & Ors* [1954] 1 All ER 373 (PC)

S v *Masilela & Anor* 1968 (2) SA 558 (A)

S v *Muchimbi & Anor* 1972 (1) RLR 234 (G)

S v *Nyangano & Anor* 1974 (2) RLR 155 (G)

R v *Chiswibo* 1961 (2) SA 714 (FS)

Judgment

Gubbay CJ: The appellant was charged before GIBSON J, sitting with assessors in the High Court at Bulawayo, with having murdered one Twin Ngwenya during the night of 1-2 October 1990, in the circumstances outlined below. He was convicted and, no extenuating circumstances being found, was sentenced to death.

The deceased, a young woman aged eighteen years, was employed as a domestic servant in the high density suburb of Mpopoma in Bulawayo. She and the appellant were known to one another. Aware that the employer of the deceased would be away on the night in question, the appellant and a colleague, Kisimusi Ndlovu, plotted to steal property from his residence. They made their way there, arriving at about 7.45 pm, and, upon the pretext of paying a social visit, were admitted to the house by the unwitting deceased. For about three hours they sat in the lounge and engaged in conversation with her. Then, confident after this lapse of time that it was safe to execute their plan, the appellant removed the leather belt from his trousers, grabbed hold of the defenceless deceased and, placing the belt around her neck, proceeded to strangle her. Assured that she had ceased to breathe and was dead, the appellant and Ndlovu carried her to a spare room and laid her on a bed. They covered her body with a blanket. That done, the two commenced to remove from the house various valuable items of property which, ultimately, were conveyed to the premises of Ndlovu's girlfriend in Mzilikazi.

In the early hours of the morning the appellant returned alone to the house of the deceased. He entered and, with the use of oil and paper, set the premises on fire. He departed, leaving the front door open. At about 4 am a next door

neighbour noticed the billowing smoke and summoned the Fire Brigade. The fire was extinguished but the deceased was long since dead, her body being extensively burnt.

The evidence of the medical practitioner who carried out the post mortem examination, which was accepted in the court below, was to the effect that the actual cause of the deceased's death was asphyxia due to the inhalation of carbon monoxide fumes, and that the strangling had merely rendered the deceased insensible.

The trial court found, with ample justification, that the appellant and Ndlovu had concerted a

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plan to kill the deceased before they went to the house, her death being necessary to facilitate the theft of the property and to prevent her identification of them as the perpetrators. It held the appellant guilty of murder with an actual intent to kill, notwithstanding that the cause of death was asphyxia and that when setting the house on fire, which action was embarked upon several hours later as a "tidying-up operation", he genuinely and reasonably believed that the deceased was dead.

Ndlovu was convicted of attempted murder, on the basis that but for the fire, for which action it was not proved that he was a party or even that he was aware of the appellant's intention in that regard, the deceased may well have survived the assault upon her. He was sentenced to life imprisonment.

Counsel for the appellant advanced the contention that the State had failed to establish the *mens rea* essential to support a conviction for murder and that on the facts found it was at best entitled to a verdict of attempted murder. The gist of the argument was that the appellant's intention to kill by strangulation did not achieve its object and that, inasmuch as the actual cause of death was asphyxia due to the inhalation of carbon monoxide fumes, no intention may be attributed to the appellant because when he lit the fire he erroneously yet reasonably believed the deceased to be already dead.

This argument, which derives support solely from the cases of *R* v *Shorty & Ors* 1950 SR 280 and *R* v *Khandu* (1890) ILR 15 (Bombay) 194, was firmly rejected on comparable facts in R v Thabo Meli & Ors [1954] 1 All ER 373 (PC), *S* v *Masilela & Anor* 1968 (2) SA 558 (A), *S* v *Muchimbi & Anor* 1972 (1) RLR 234 (G), and *S* v *Nyongano & Anor* 1974 (2) RLR 155 (G); and runs counter to the dicta in *R* v *Chiswibo* 1961 (2) SA 714 (FS). In these cases, save for the last cited, the offenders were proved to have harboured an actual intent to kill their victims as opposed to a constructive intent.

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In *R* v *Shorty & Others*, the first accused violently assaulted the deceased with a large stone with intent to kill him. The assault took place suddenly and without provocation. Thereafter, and not in accordance with an antecedent plan, the first accused, assisted by the second and third accused, disposed of the deceased, whom all mistakenly believed to be already dead, by putting him down a sewer where he died of drowning. The first accused was held by TREDGOLD J to be guilty, not of murder, but of attempted murder, and the second and third accused to be accessories after the fact to attempted murder.

In *Khandu's* case the accused assaulted his victim with intent to kill him. In the mistaken belief that his unconscious victim was dead, he set fire to the hut wherein he lay, hoping by that means to efface the evidence of his crime. The High Court of Bombay held the accused to be guilty of attempted murder.

I do not propose to deal in any more detail with these two Judgments. I find myself unable to agree with them. It is my view that the situation under consideration in the present case is governed by the later decisions in *R* v *Thabo Meli &Ors* and *R* v *Masilela & Anor,* the reasoning

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in which I very much prefer.

The first-named case was an appeal from the High Court of Basutuland (now Lesotho) which applied Roman-Dutch common law. The appellants, in execution of a pre-conceived plan to murder the deceased, made him drunk, struck him over the head and then, erroneously thinking him dead, rolled him over a cliff, where he died of exposure. Giving the Judgment of the Privy Council, LORD REID dealt with the submission that the initial act, the assault, was accompanied by *mens rea* but was not the cause of death, whereas the second act, which was the cause of death, was not accompanied by *mens rea*. He observed at 374C-D:

> "It appears to their Lordships impossible to divide up what was really one series of acts in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan, and as parts of their plan; and it is much too refined a ground of Judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before, in fact, it was achieved, therefore they are to escape the penalties of the law."

In *S* v *Masilela & Anor* the appellants, whose intention to kill had been conceived, not previously as in *R* v *Thabo Meli*, but as a matter of improvisation in the course of the execution of the robbery, had assaulted the

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deceased by hitting him over the head and throttling him, before throwing him onto a bed. The deceased sustained serious head, neck and throat injuries which rendered him unconscious but did not kill him. After ransacking his house the appellants, believing their victim was dead, set fire to the bed and the house and made off. The deceased died as a result of carbon monoxide gas derived from the fumes of the fire. The convictions for murder were upheld. OGILVIE THOMPSON JA (as he then was) refused to regard the assault and the subsequent burning as two separate and disconnected acts. In his opinion they were closely allied in time and place and constituted subsidiary but integral parts of the appellants' overall plan to steal from the deceased's house and to conceal their crime in the burnt shes of that dwelling. In that sense the conduct of the appellants formed a single course of conduct (see at 571E-F). The learned JUDGE OF APPEAL went on to say at 572A -B:

> "To accede, on the facts of the present case, to the contention advanced on behalf of the appellants that, once they erroneously believed that they had achieved their object by strangling the deceased, their proved intention to kill him fell away and can no longer support a charge of murder, would, in my opinion, be wholly unrealistic."

In a concurring Judgment, RUMPFF JA (as he then was) took the view that in this kind of situation, where the accused and no-one else causes the death, his mistake as to the precise manner in which and time when death occurred is not a factor upon which he can rely, for the initial *actus* which was accompanied by *mens rea* had indeed caused death. It operated as a *sine qua non* of the victim's demise; accordingly, the second act, the disposal of the supposed corpse cannot rank as a *novus actus interveniens* such as to break the chain of causation started by the initial act (see at 573 in fine-574A).

To much the same effect are these well expressed remarks of BECK J (as he then was) in *S* v

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Nyongano and Anor at 158H-159A:

> "When a victim's death is intended throughout and when, believing death to have been achieved, that victim is thereupon consigned, not dead, but unconscious, to the muddy waters of a fast-flowing and possibly crocodile inhabited river at a deserted place at night, with arms bound together behind the back, and with a stone weighed to the chest, it is quite irrelevant that his inevitable demise might have been brought about by these supervening means and not by the means originally selected. In the final result **the victim's death, which was the intended goal of the murderer's conduct from the outset, is unerringly achieved."** (My emphasis).

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Finally, mention must be made, in this review of the leading authorities, of *R* v *Chiswibo, supra*, lest it be thought to afford some support for the appellant's contention. In that case, unlike this one, there was no express intention to kill the deceased. The constructive intention found related only to the blow on the head of the deceased with the blunt side of an axe, committed on the spur of the moment, and not to anything done thereafter. The subsequent burial of the live deceased in the ant-bear hole was done as an afterthought. It was upon these special facts that the Federal Supreme Court held that, at the stage of the interment, the constructive intent to kill had already exhausted itself, and so confirmed the verdict of attempted murder. Whether it was correct in doing so need not be debated. Suffice it to point out that the decision has attracted criticism. OGILVIE THOMPSON JA in *Masilela's* case at 572B and F thought it "wholly unrealistic" insofar, at least, as it restricted liability for murder tothe pre-conceived plan situation. See also Burchell (1961) 78 SALJ 239 at 240-241; van der Walt (1962) 25 THRHR 70 at 74. What is important, however, is that the *ratio decidendi* in the *Thabo Meli* case was not dissented from (see at 715D, 717G and 719D). It was considered to be binding but distinguishable on the facts.

The law then, to my understanding, provides two grounds for a conviction for murder in this type of situation. First, whether or not there is a pre-conceived plan to murder and then to conceal the supposed corpse, or to try to erase the evidence of the evil deed, there is no question of the second act or event being treated as a *novus actus*, provided that the two are so closely connected to each other as regards duration and method of performance that for all practical purposes they constitute a single transaction. Second, and in any event, no exception to the principle of contemporaneity need be made, for the offender's initial actus (which was accompanied by *mens rea*) is indeed the cause of the death, for it operates as a *sine qua non* of the victim's demise, the subsequent act not being such as to break the chain of causation arising from the first.

An application of either of these approaches to the facts of this case leaves me in no doubt that the appellant was rightly convicted of murder.

The finding of an absence of extenuating circumstances is unassailable and, indeed, was not challenged. In the result, I would dismiss the appeal in its entirety.

Manyarara JA: I agree.

Ebrahim JA: I agree.

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S v SITHOLE 1992 (2) ZLR 110 (HC)

Court **High Court, Harare**

Smith J & Chambakare J

Criminal appeal

27 July & 19 August 1992

Flynote

Criminal procedure (sentence) - bribery - when fine appropriate

Headnote

Although bribery is a serious offence which as a general rule warrants a custodial sentence, the general rule is subject to exceptions. Custodial sentences must not be imposed for this offence without any regard to the extent of moral blameworthiness of the offender.

In the present case the appellant had offered a $20 bribe to a policeman to release him when he was caught driving at night without a headlight and was suspected of drunken driving. After reviewing the relevant case law on sentencing for this offence, the court decided to substitute a fine for a short prison term because the appellant was a first offender and the offer of the bribe had been a spontaneous one made when the appellant was in a drunken condition. The bribe was not persisted in and was not enough to tempt an honest policeman.

Cases cited:

S v *Chirisa* 1989 (2) ZLR 102 (S)

S v *Nyakatawa* HH-288-91 (unreported)

S v *Matombo* S-181-89 (unreported)

S v *Pandukai* HH-269-90 (unreported)

S v *Bere* HH-88-90 (unreported)

S v *Phiri* HB-5-91 (unreported)

S v *Fahy* HB-25-88 (unreported)

S v *Makurumidze* HH-105-90 (unreported)

S v *Murumbi* HH-449-87 (unreported)

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SMITH J

S v *Masamvu* A-143-79 (unreported)

S v *Muduwuri* HH-270-90 (unreported)

A-G v *Chinyere* S-123-83 (unreported)

J B Zowa for the appellant

Ms *T F Searl* for the respondent

Judgment

Smith J: The appellant was charged with bribery. He pleaded not guilty but was convicted and sentenced to 7 months' imprisonment of which 2 months were suspended. He appealed against sentence. The court upheld his appeal and substituted a fine of $400 or, in default of payment, 2 months' imprisonment, and in addition 3 months' imprisonment wholly suspended for 5 years. We intimated that our reasons would be handed down in due course. They are as follows:

In the early hours of 15 March 1992 a constable in the Zimbabwe Republic Police arrested the appellant and told him that he was taking him to the police station because he, the appellant, was riding a motor cycle which did not have a headlight. The constable said that the appellant was drunk because he smelt alcohol on his breath. The appellant produced a $20 note and asked to be released. Instead he was taken to the police station and told that he would be charged with bribery. In passing sentence the magistrate said that bribery had become so prevalent that deterrent sentences were called for and that as the bribe was offered to a police officer who was on duty and in uniform it was imperative that public officers be protected from the likes of the appellant. Also she said, the public outcry against such offences was high, hence no leniency should be exercised.

In an appeal against sentence this court must decide whether, in assessing the sentence the magistrate misdirected himself or whether the sentence is so high as to induce a sense of shock - see *S* v *Chirisa* 1989 (2) ZLR 102 (S). As MTAMBANENGWE J expressed it in *S* v *Nyakatawa* HH-288-91 at p 4 of the cyclostyled Judgment -

> "it is trite that a sentence will be interfered with if the court comes to the conclusion that it is so excessive as to induce a sense of shock and also if it is so out of conformity with sentences usually passed for offences in similar circumstances."

In *S* v *Matombo* S-181-89 the appellant, a person of good character and of some standing in the community, had been arrested for urinating in a public

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place. He did not have any money on him to pay the deposit fine of $25. To avoid being detained in police cells overnight he offered the policeman who arrested him a bribe of $2 to

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release him out of custody. He was convicted of offering a bribe in contravention of s 3(1)(b)(i) of the Prevention of Corruption Act 40 of 1975 and sentenced to 5 months' imprisonment. On appeal GUBBAY CJ (as he then was) at p 2-3 of the cyclostyled Judgment said:

> "I agree with the trial court that the crime of corruption is to be viewed seriously and, as a general rule, warrants a custodial sentence. This is because it is aimed at depriving society of a good, fair and orderly administration, and if allowed to go unchecked or inadequately punished would lead to an erosion of confidence on the part of the public. It is, after all, an insidious evil. Certainly, therefore, it is correct to approach such cases on the basis that imprisonment is appropriate unless there are circumstances which indicate the contrary. One must never convert the general rule into a rule of thumb, for to do so would be to assess sentence arbitrarily and to lose sight of the true extent of the offender's moral blameworthiness."

The learned CHIEF JUSTICE found that the magistrate had paid insufficient regard to several mitigating factors, which included lack of premeditation or persistence, the character and standing in the community of the appellant and the fact that he was intoxicated and may not have fully appreciated the inherent seriousness of his action. The court held that in the circumstances of that case the imposition of a fine rather than imprisonment would have adequately met the justice of the case. It accordingly set aside the sentence of imprisonment and, as the appellant had been in prison for five days before being released on bail, substituted a fine of $25.

In *S* v *Pandukai* HH-269-90 the court was considering an appeal against a sentence of 14 months' imprisonment for a contravention of s 3(1)(b) of the Prevention of Corruption Act 1985. The appellant had pleaded guilty. He had offered a bribe of $10 to a policeman to induce him to release a motor vehicle which the latter had taken for inspection at the Vehicle Inspection Depot. The State conceded that the sentence was excessive and induced a sense of shock. GIBSON J, after referring to *Matombo's* case, *supra*, found that the mitigating factors were such that a fine plus a suspended sentence of imprisonment would meet the justice of the case. The mitigating factors were:

(a) the attempted inducement was to secure the release of a motor vehicle, not to conceal a crime or withdraw charges;

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(b) there was no suggestion of premeditation or persistence, the money was produced on the spur of the moment;

(c) the appellant was a respectable person in steady employment and had been co-operative;

(d) the small amount tendered showed that there was no serious corrupt purpose in his mind.

The court accordingly set aside the sentence of imprisonment and substituted a fine of $250

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and additionally 4 months' imprisonment wholly suspended.

In *S* v *Bere* HB-88-90 the court considered an appeal against sentence by a middle-aged, married man. He took a girl-friend into his quarters and, because she was not authorized to enter the premises, she was about to be arrested by a security guard. The appellant offered the guard $10 to let her go free. He pleaded guilty to a charge of contravening s 3(1)(b) of the Prevention of Corruption Act, 1985 and was convicted and sentenced to 7 months' imprisonment. The court held that although very severe maximum penalties were understandably prescribed in the Act because corruption can infect and destroy the whole administration of justice, in that case the offence was not a particularly serious one. The wrong done by the appellant and his girl-friend was more civil than criminal and the trifling bribe was unlikely to corrupt an otherwise honest man. The sentence of imprisonment was set aside and substituted by a fine of $150 and a wholly suspended term of 3 months' imprisonment.

Likewise in *S* v *Phiri* HB-5-91 the court set aside a sentence of imprisonment and substituted a fine imposed on a person convicted of contravening s 3(1)(b) of the Prevention of Corruption Act 1985. The appellant in that case was arrested for urinating in public and he offered the two policemen $6 to induce them to release him. The factors which the court found militating against the sentence of imprisonment were as follows: the initial offence committed by the appellant for which the bribe was offered was not of a serious criminal nature, the amount offered as a bribe was trifling and, in itself, not likely to tempt an honest man, no direct harm (except to the appellant himself) had resulted from his actions, he was a first offender, married, with family responsibilities and would lose his employment if sent to prison. The sentence of 6 months' imprisonment imposed by the magistrate was set aside and substituted by a fine of $150 and a wholly suspended term of 3 months' imprisonment.

In the cases of *S* v *Fahy* HB-25-88 and *S* v *Makurumidze* HH-105-90 the appellants had been convicted of contravening s 3(1)(b) of the Prevention of

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Corruption Act 1985 and bribery, respectively, and sentenced to a term of imprisonment. In *Fahy's* case the appellant had offered a bribe of $100 to a municipal official to induce him to give the appellant a blank car registration book and had been sentenced to 4 months' imprisonment. In *Makurumidze's* case the appellant had offered a special constable $4 to induce him to abstain from carrying out his duties and had been sentenced to 7 months' imprisonment. In both cases the State conceded that the sentences imposed were excessive and induced a sense of shock. In *Fahy's* case a fine of $350 coupled with a wholly suspended sentence of 2 months' imprisonment was substituted and in *Makurumidze's* case a fine of $75 coupled with a wholly suspended sentence of 1 month's imprisonment.

Other cases where the court considered that the circumstances were not sufficiently serious to warrant imprisonment are *S* v *Murumbi* HH 449-87 (a bribe of $2 offered spontaneously) and *S* v *Masamvu* A-143-79 (a bribe of $6 offered on the spur of the moment).

Ms *Searl* relied on *S* v *Muduwuri* HH 270-90 to support the respondent's opposition to the

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appeal in this case. In that case, the appellant offered a bribe of $30 to a security guard on duty at a brewery to induce him to allow the appellant to remove 20 extra crates of beer in addition to those he had paid for. The appellant had pleaded guilty to contravening s 3(1)(b) of the Prevention of Corruption Act 1985 and was convicted and sentenced to 9 months' imprisonment, of which 3 months were suspended. The court dismissed the appeal because it agreed with the magistrate that a custodial sentence was called for. It was of the view that that particular scheme had ugly features in that the appellant was bribing a person who was on guard to prevent stealing, the very crime the appellant was wanting to commit. The appellant was acting out of greed in seeking to acquire additional stock through dishonest means. The bribe was offered after careful premeditation and not on the spur of the moment. Because of those factors, *Matombo's* case, *supra*, was distinguishable and the views expressed by GEORGES JA in *Attorney-General* v *Chinyere* S-123-83 were more apposite.

In this case, I consider that the circumstances are more analogous to those in the cases of *Matombo*, *Pandukai, Bere* and *Phiri, supra*, than to the circumstances in *Muduwuri's* case, *supra*. The appellant is a first offender, the offence he committed - driving a motor cycle without a headlight - was not a serious one, he was under the influence of alcohol, he produced the money spontaneously, on the spur of the moment, and did not persist with his offer and the amount he offered would not be sufficient to tempt an honest policeman.

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The abovementioned factors led us to conclude that the sentence of 7 months' imprisonment was excessive and induced a sense of shock.

Chambakarare J: I agrees.

S v KEARNS 1992 (2) ZLR 116 (SC)

Court **Supreme Court, Harare**

Manyarara JA, Korsah JA & Ebrahim JA

Criminal appeal

27 July & 21 August 1992

Flynote

Criminal procedure (sentence) - Firearms Act [Chapter 308] - s 39(b) - pointing firearm at policeman - firearm unloaded - whether mitigates offence

Headnote

The appellant pointed a firearm at a police officer who had come to arrest him. The fact that it

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was unloaded did not mitigate the offence. Only the restraint of the police officer prevented a disaster. The appellant's criminal record over many years showed a general disregard for the law. The police must be protected from the such threats. The Supreme Court confirmed the effective prison sentence of three months imposed by the trial court.

Cases cited:

R v *Dhlumayo* 1948 (2) SA 677 (A)

S v *de Lange* 1983 (2) ZLR 9 (S)

S v *Gororo* S-37-85 (unreported)

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

MJ Gillespie for the appellant

Mrs *LR Goredema* for the respondent

Judgment

Manyarara JA: The appellant was convicted in the magistrate's court of the crime of knowingly and without lawful excuse pointing a firearm at any other person. He was sentenced to six months' imprisonment with labour, of which three months' imprisonment was suspended on appropriate conditions. He appeals against the conviction and sentence.

MANYARARA JA

I should perhaps begin by pointing out that the offence is: "Contravening s 39(b) of the Firearms Act [*Chapter 308*]". See *The Revised Specimen Indictment Book* (Legal Resources Foundation) 1988 p 47. This follows the repeal of ss 39 and 40 of the Act and their substitution by a new section enacted by the Firearms Amendment Act 37 of 1981.

Mr *Gillespie*, who appeared for the appellant, argued strenuously on his client's behalf. But the facts fall within a very narrow ambit and hardly any law is involved.

The main submission is that the firearm was "shown" to the complainant, a policeman, and not pointed at him to constitute the offence charged. The alternative argument is that, if there was a pointing (which was denied), lawful excuse was established to exonerate the appellant from conviction. Although the alternative argument had not been raised in the grounds of appeal, Mrs *Goredema*, who represented the State, consented to leave being granted to argue the point and the hearing proceeded on that basis.

Both issues are factual and the facts are these.

On 8 December 1987 three policemen arrived at the appellant's farm in the Mount Darwin District in broad daylight and in uniform, driving a police vehicle. Section Officer Bvuma, who led the team, intended to execute a warrant of arrest on the appellant. He alighted from the vehicle and approached the appellant, unarmed. A second member of the team followed him, whilst

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Patrol Officer Gwanyanya reversed and parked the vehicle.

It must be mentioned here that the occasion had not come as any surprise to the appellant. About four days prior to the visit he had defaulted on a summons to appear in a magistrate's court. He said that he had instructed his legal practitioner to prevent the issuing of a warrant against him or see to its cancellation if it had already been issued. But the appellant had not again contacted his practitioner or the court to ascertain whether his instructions had been carried out. Bvuma certainly had no knowledge of the matter when he called at the farm.

The appellant lost his temper when the attempt to serve the warrant was made. He remonstrated with Bvuma. In the course of doing so he produced a revolver and thereby effectively prevented Bvuma from executing the process. The appellant disappeared into his house, revolver in hand, saying he wanted to telephone his lawyer.

MANYARARA JA

Reinforcements were summoned whilst Bvuma remained on guard outside the house. Armed Police Support Unit details came. They, together with Bvuma and his colleagues who had also armed themselves, surrounded the house. They ordered the appellant to surrender himself, which he did after a while. His firearm was not loaded when he handed it to the police.

The magistrate in his Judgment refused to consider the validity or otherwise of the warrant. It is my view that he was not called upon to do so, for the reasons I shall give when I reach Mr *Gillespie's* alternative argument. The magistrate found Bvuma's account to be satisfactory and that there was corroboration from Gwanyanya.

The brief Judgment reads as follows:

> "Did the accused point the firearm at one Bvuma? The accused denied doing so. He told the court that he only produced the weapon and showed it to the police officer. He said the police officers were threatening him, and that he only produced his weapon because he wanted to make a telephone call. Bvuma and Gwanyanya corroborated each other on the pointing of the firearm. They also corroborated each other on the point that (the) accused told Bvuma that he was 'going to meet Jesus'. They both stated that the accused refused to accompany them to the police station. Admittedly, the accused said he produced the firearm but did not point it at Bvuma. So why did he produce it? I am satisfied that Bvuma and Gwanyanya told the truth on that point. They have no reason to lie whatsoever in my view. The accused is found guilty as charged."

It will be seen that the verdict turned on credibility and it is trite that this court cannot interfere unless the evidence clearly shows that the magistrate's conclusion is wrong: *R* v *Dhlumayo* 1948 (2) SA 677 (A), which has been followed since. Bvuma's account of the incident was as follows:

> "I greeted (the) accused. He did not answer me. I told him that I had come to execute (a) warrant of arrest and produced it. (The) accused said to me: 'You people have no work to do. You come to arrest me instead of people who steal my property'. I asked (the) accused whether he meant to resist arrest and I moved forward to touch his shoulder. (The) accused retreated and clutched his fists and warned me that if I got near he would knock me down. (The) accused then turned to walk to his house. I followed him. He turned around and saw me following. He stopped and drew a revolver from under his shorts. He pointed (the) revolver at my face and said: 'If

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MANYARARA JA

you come I will knock you senseless'. I was standing five metres away. (The) accused appeared very angry and (was) speaking (at the) top of his voice. He then went to his house. My two colleagues arrived and we walked to his house. (The) accused was still holding the revolver and was pointing (it) down. When he saw me at (the) gate he stopped again and again pointed it at my face with (his) hand stretched. He said: 'If you go through (the) gate you will meet Jesus tonight'. (The) accused then went into (the) house and I did not go through (the) gate but sent Gwanyanya to summon assistance."

And Gwanyanya testified as follows:

"(The) first witness and a constable proceeded to (the) main gate. I remained, reversing (the) vehicle. I then saw (the) first witness talk to (the) accused who was very aggressive. I alighted from (the) vehicle. (The) accused was saying: 'You will meet Jesus tonight'.

(The) accused then took out a revolver and pointed it at Bvuma who then retreated and told me to come and assist. As I walked towards (the) accused, he walked towards (the) gate of his house. Bvuma was following. (The) accused said: 'If you go through (the) gate I will shoot you'. This time (the) accused again pointed (the) weapon at Bvuma. Bvuma gave me instructions to summon other details. I returned with other details. That time (the) details shouted for (the) accused to come out. (The) accused shouted through (a) window that he was speaking to a lawyer. After about thirty minutes (the) accused came out and we arrested him.

When we first approached (the) accused our firearms were in our vehicle. Bvuma was not armed when (he) first approached (the) accused. Neither was I (The) weapons were behind (the) seat of (the) Rover."

This was very strong evidence against the appellant. Although the magistrate has not returned any findings on demeanour, it is evident that he was impressed by the two witnesses and he took the view -

(a) that they told the truth as they had not been shown to have had any reason to wish to falsely incriminate the appellant; and

(b) that the appellant produced the firearm and pointed it at Bvuma, thereby preventing the execution of the warrant on him.

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The appellant did not seriously challenge the police evidence, save in relation to the alleged pointing. His version was as follows:

"I met (the) police outside and I told them that there must have been (an) error. I told him to give me (an) opportunity to telephone my lawyer and he refused. We then exchanged (a) few heated words. His Landrover, which was parked a few metres away, he then ordered his colleagues to bring the firearms. The other detail brought (an) uzi. I realised he could call (kill?) me. So in defence I removed (a) .23 revolver (from) my shorts not a .22. I then merely showed this to Bvuma and said if you enter, I am armed, I only wish to make a 'phone call. I then turned my back (on) Bvuma and showed him I had a weapon. It was not pointed at him. I then proceeded into my house and telephoned my lawyer. The gun was not loaded."

A comparison of the evidence on both sides shows that there were three stages in the

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confrontation between the appellant and Bvuma: The first was when he berated Bvuma for coming to arrest him and not the thieves to which he referred and when no-one produced a firearm. The second was when the appellant started to walk away from Bvuma. The State's version is that, on being followed, the appellant produced a firearm and pointed it at Bvuma. The appellant does not really deny being followed but says that Bvuma "ordered his colleague to bring the firearms", and he produced his firearm to defend himself. The third stage was when the appellant saw Bvuma at the gate and threatened to unite him with Jesus if he went through the gate. The State says that he again pointed his firearm at Bvuma. The appellant's version is that he merely "showed" the firearm to Bvuma, warned him that he was armed and entered his house.

Gwanyanya also testified to three stages in the encounter between Bvuma and the appellant. The first occurred as he was reversing his vehicle, which would explain why he did not hear the threat by the appellant to "knock (Bvuma) senseless". The second stage was when he alighted from the vehicle and heard the appellant tell Bvuma that he would "meet Jesus tonight". And the third when Bvuma asked for his assistance in apprehending the appellant. He says that it was during the second stage that the appellant produced a firearm and uttered the threat to unite Bvuma with Jesus. This was followed by a further threat to shoot Bvuma if he went through the gate. The threats had been accompanied by a pointing of the firearm at Bvuma.

It will be seen that any discrepancies in the evidence of the two police

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witnesses were insignificant, for instance, whether the word "shoot" was uttered. The crucial issue is whether either or both of them might have been mistaken or were being untruthful in their evidence that there was a pointing of the firearm at Bvuma. I suggest not. Their evidence reads well and accords with the probabilities.

Both witnesses were very experienced police officers, with nearly thirty-two years of service divided about equally between them. They were familiar with firearms and their handling. They had a good opportunity of observing the appellant and every conceivable reason to focus their attention on the firearm. They had not come to engage the appellant in a gun battle. If so, they would have taken the precaution of arming themselves with the automatic weapons at their disposal before venturing into his lair.

I am satisfied, therefore, that the magistrate was right in concluding that the appellant pointed his firearm at Bvuma at least once and probably twice.

The appellant himself volunteered the information that when he produced the firearm he said to Bvuma: "If you enter, I am armed". The overwhelming probability is that he used the more forceful language to which the police testified: "You will meet Jesus tonight". The police could not have invented the expression. It must have come from the appellant. The threat uttered by the appellant that he was armed could not possibly have prevented Bvuma from executing the warrant unless it was accompanied by a pointing of the firearm at him.

Much was sought to be made of the appellant's evidence that his firearm was unloaded. I find

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no substance in the argument. The offence is not one of pointing a **loaded** firearm at any other person or s 39(b) would say so. The provisions of s 39 prohibit the **improper use of firearms**, one of which is the unlawful pointing of a firearm at any other person. "Firearm" is defined by the Act as any lethal barrelled weapon from which a bullet or other missile **can be** (not will be) discharged. Bvuma, not unnaturally, makes the following confession: "When (the) accused pointed the firearm at me I became terrified because I felt that he meant to shoot at me".

Indeed, it is evident that the decision to charge this offence was based on Bvuma's and Gwanyanya's statements of the manner in which the appellant resisted arrest. But this point must be left open, as it is not germane to my Judgment.

MANYARARA JA

At best for the appellant, his recollection of the incident was muddled, precisely because he went berserk when the police "darkened his door", as it was put, and he acted completely irrationally. His avowed aim was to prevent the execution of the warrant and because Bvuma persisted he threatened him by producing a firearm and pointing it at him.

I would respectfully suggest in passing that the members of our Police Force should sometimes be credited with a measure of patience and courage in the execution of their duties. If Bvuma or Gwanyanya had acted impatiently there might have been a gun battle. Instead, they chose to act with circumspection and their discretion proved to be the better part of valour. People have killed or been killed in precisely the sort of situation created by the appellant in this case.

I am satisfied, therefore, that the magistrate correctly rejected the appellant's story and accepted the police version.

I proceed to consider the alternative argument, that, if there was a pointing of the firearm at Bvuma, lawful excuse was established. The foundation on which it was sought to base the argument is the appellant's evidence that he had instructed his lawyer to attend to the cancellation of the warrant. We were told from the bar that the appellant's understanding was that the instruction had been carried out and he was entitled therefore to resist execution of the warrant.

The argument is ingenious but lacks merit, simply because the lawyer concerned was not called as a witness. It is trite that the *onus* of establishing lawful excuse was on the appellant. His evidence that the lawyer told him that the process had been cancelled is inadmissible hearsay. Therefore the appellant did not even begin to discharge the *onus* resting on him.

An illuminating discussion of the topic is to be found in Smith *Offences Against Public Order* pp 183 *et seq*. The passage at p 185 reads as follows:

> "Where the defendant does realise that he is confronted by a policeman, it is not necessary for the prosecutor to show that he is aware that the latter is acting in the execution of his duty. This means that it is no defence that the defendant believes that the policeman is acting outside the scope of his duty, even if he reasonably so thought. ... If a person knows that he is confronted by a policeman and comes to the conclusion, wrongly, that the policeman is acting outside the scope of his duty, he acts at his peril if he chooses to use force to escape from his

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predicament."

MANYARARA JA

The learned author cites authority for his proposition and continues at p 186 as follows:

> "... common sense dictates that there can be very few police actions which a person would be entitled to resist at all costs ... The law therefore sets a point ... at which the citizen is not entitled to resist further, and must be expected to endure the indignity or invasion, seeking relief subsequently when he can substantiate that he has been the victim of a police mistake."

The passages effectively dispose of the alternative argument advanced on the present appellant's behalf.

In any event, if the appellant were as concerned about his right to protection from "unlawful arrest" as Mr *Gillespie* would have us believe, he did absolutely nothing to protect that right. He waited for about four days for the police to come to him, as he expected them to do, instead of him going to the police to inform them of his position. And when the police came he was obstreperous with them and went to the extreme length of unlawfully pointing a firearm at them to prevent them from carrying out their lawful duty.

Therefore lawful excuse for resisting the execution of the warrant by force of arms was not established and the alternative argument fails.

I shall now consider the question of sentence.

The magistrate is attacked for not giving sufficient weight to the appellant's evidence that the firearm was not loaded. Therefore, so the argument continues, "there was no imminent threat" to life or limb.

I have in effect already dealt with the argument when considering conviction. I have said that I do not believe that much weight, if any, should be attached to the point. We were not referred to any authority for the submission, and I do not believe that such authority exists. The mitigatory quality of pointing a firearm at any other person which turns out to be unloaded must remain doubtful until a precedent is set, and this is not an appropriate occasion for doing so.

The principle of sentencing for this offence is laid down in *S* v *de Lange* 1983 (2) ZLR 9 (S). There, GEORGES JA (as he then was) (BARON ACJ and GUBBAY CJ, as they then were, concurring) made the following statement at 16 C-G:

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> "The conduct on the part of the appellant which in my view called for the severest censure is the threat with the pointed gun. In the ensuing struggle the gun may well have been fired with real risk to life of the appellant, the complainant and bystanders. The use of guns must be sternly discouraged. The view which the Legislature takes of the matter has been recently made clear. Sections 39 and 40 of the Firearms Act [*Chapter 308*] were repealed by the Firearms Amendment Act No 37 of 1981. The penalty for knowingly and without lawful excuse pointing a firearm at any other person was increased tenfold from a fine not exceeding $100 or to imprisonment for a period

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not exceeding six months to a fine not exceeding $1 000 and a period of imprisonment not exceeding five years.

Mr *de Bourbon* properly points out that a fine had been provided as well as imprisonment so that the Legislature did contemplate that there might be circumstances in which a fine might be adequate. The point is well taken. But there are gradations of moral blameworthiness. A gun may be pointed in circumstances in which it is evident that no harm is meant. In this case there was an intention to intimidate. That type of aggressive conduct is properly punished by a short sharp period of imprisonment.

A sentence of four months' imprisonment two months of which are suspended meets the justice of the case. ..."

The statement applies to the present case. As I have said, it was the calm confidence with which the police handled the situation which averted the consequences postulated in de *Lange's* case. There is nothing to suggest that the appellant would not have loaded his firearm (if it was not already loaded) and shot it out with the police, as the saying goes, had they acted rashly. They are in fact to be commended for apprehending the appellant without firing a single shot, which would probably have been quite justifiable under s 12(2)(b) of the Constitution and s 46(1) of the Criminal Procedure and Evidence Act [*Chapter 59*]. See *S* v *Gororo* S-37-85 (not reported) at p 4.

The next point is that the magistrate wrongly took into account a very old previous conviction for a similar offence. The remarks on which the submission is based appear in the following passage:

"The accused pointed a firearm at a policeman who was in uniform. In fact the officer was carrying out his lawful duties. This is in my view a very serious offence. Members of the Police Force must be free to carry out their lawful duties without any fear. Therefore, if deterrent sentences are

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not imposed for such offences, the police would fear to carry out their duties and there would be lawlessness in the country.

Lastly, from the accused's record it is apparent the accused does not wish to respect the law.

On three occasions he has taken the law into his own hands."

I do not read the passage as showing that it was the previous conviction referred to which determined the sentence. What seems to have influenced the magistrate's mind was the appellant's record, which spans the years 1964 to 1987. The firearms offence referred to was committed in 1965 and he was fined. Thereafter he committed various other unrelated offences in 1966, 1967, 1971 and the last one in 1987, only a few months before the present offence.

In my view, such a record justified the magistrate's remark that the appellant has "no respect for the law" and one should not read any more than that into the remark. Further, the appellant has previously been incarcerated upon conviction on two counts of crimes of violence, but he does not appear to have learnt his lesson.

Before concluding this Judgment, I should mention that the members of this court expressed their surprise that it has taken more than four years to finalise this case, when the length of the record is barely twenty pages. This prompted Mr *Gillespie* to seek to argue that the delay

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should be taken as a mitigatory factor. He is not correct. The point is not one which can be raised from the bar just because the court has asked for some explanation of the delay. A proper foundation for the submission should be laid. See *S* v *Ruzario* 1990 (1) ZLR 359 (S). As this had not happened, the court declined to hear argument on the point.

I emphasise that this court's hands are tied by the undeniable fact that the mitigatory factors, if any, are far outweighed by the aggravating features stated by the magistrate as the sentencing tribunal. It cannot properly be said that the magistrate exercised his discretion incorrectly.

The appeal against conviction and sentence is dismissed.

Korsah JA: I agree.

Ebrahim JA: I agree.

Byron Venturas & Partners, appellant's legal practitioners

S v STOUYANNIDES 1992 (2) ZLR 126 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Manyarara JA & Ebrahim JA

Criminal appeal

6 & 21 August 1992

Flynote

Criminal procedure - bail - originally refused but considerable time elapsing without progress in investigation - bail now granted

Headnote

The appellant had been arrested on charges involving illegal dealing in large amounts of foreign currency. He was refused bail originally and the appeal against this refusal was unsuccessful. After a futher ten weeks had elapsed, he re-applied for bail. This further application for bail was also unsucessful. On appeal against this refusal of bail,

Held, that the amount of time which had elapsed had to be considered together with the crucial factor of the lack of any proven progress in the investigations in this case. The Attorney-General acts at his peril if he fails to put before the court specific facts which show that the State case has been strengthened after a long time has elapsed.

Held, further, that the appellant had shown on a balance of probabilities that the interests of justice now required that he be freed on bail, subject to extremely onerous conditions. The numerous offers by prominent people to stand surety for the appellant were held to be of

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particular sigificance.

Cases cited:

Aitken & Anor v *A-G* 1992 (1) ZLR 249 (S)

S v *Aitken* 1992 (2) ZLR 84 (S)

A-G v *Blumears & Anor* 1991 (1) ZLR 118 (S)

S v *Murambiwa* S-62-92 (unreported)

AP de Bourbon SC for the appellant

RH Goba for the respondent

MANYARARA JA

Judgment

Manyarara JA: The appellant is a permanent resident of Zimbabwe and a prominent businessman. He is the Managing Director of S & T Import and Export (Pvt) Ltd and a director of several locally registered companies. He and David William Aitken, a legal practitioner of fairly long standing, were on 11 March last arrested on suspicion of contravening s 3(1)(a) of the Exchange Control Regulations 1977 (unlawfully dealing in foreign currency) and contravening s 63 of the Serious Offences (Confiscation of Profits) Act 1990 (money laundering). They were brought before a magistrate, who refused bail and remanded them in custody.

The subsequent events may be summarised as follows.

A joint appeal was dismissed by SANDURA JP on 25 March 1992. The same fate befell a similar appeal to this court on 6 April 1992 in *Aitken & Anor* v *Attorney-General* 1992 (1) ZLR 249 (S). On 5 June 1992 Aitken made a separate application to SMITH J, which again failed, as did the appellant's own application to Adam J on 19 June 1992.

Separate appeals to this court were set down for hearing on 6 August 1992. But these were struck off the roll and reinstated, after SMITH J and ADAM J granted leave to appeal against their respective Judgments, for the reasons explained in *S* v *Aitken* 1992 (2) ZLR 84 (S)

The allegations faced by the appellant are adequately summarised in the *Aitken & Anor* Judgment *supra* firstly at p 6 as follows:

> "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 (Aitken), 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 (Stouyannides) and $13 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."

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Secondly at pp 7 to 8 as follows:

> "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 H first search of the offices of the first appellant. They, as well as others,

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> 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. ..... Recovered from the second appellant was a written agreement in terms of 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."

And finally at pp 8 to 9 as follows:

> "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 appellant in his application to Adam J averred that he was being prejudiced in the following respects:

1. The linking of his case with that of Aitken, who was previously unknown to him and with whom he had not previously dealt;

2. That the State did not appear to have any case against him or, at least, one that warranted his incarceration in that -

    (a) the police had had a further twelve weeks (actually ten weeks) to carry out their investigations but did not appear to be any nearer to formulating specific charges against him;

    (b) he had not been questioned, nor had a warned and cautioned statement been recorded from him; and

    (c) documents seized by the Police as being of probative value had since been returned to his office, indicating that the investigations pertaining thereto had been completed;

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3. That his business interests were suffering because he was the only person able to operate S & T Import and Export (Pvt) Ltd profitably; and

4. That his incarceration was a cause of unnecessary suffering, discomfort and humiliation to

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him.

The State in its response alleged that the appellant had been linked with Aitken because both were involved with others (Howlin, the Coxs, Peter Smith and Van Oudtshoorn) in a conspiracy to externalize currency. Foreign currency had been sold on the black market and the proceeds paid to the trust account of DW Aitken & Company for subsequent payment to the owners of the foreign currency. Some of the money represented the proceeds of smuggled goods. Howlin and Cox had fled the jurisdiction soon after a search of Aitken's offices

The response continued as follows:

"1 . It is submitted that it must be accepted that the Supreme Court did find the information placed before itself and before this court sufficiently detailed and articulated to found a reasonable suspicion that the accused had committed an offence to warrant placing him on remand in custody - see *A*-Gv *Blumears & Anor* 1991 (1) ZLR 118 (S).

2. It is further submitted that the question of how much information should be revealed at an early stage of an investigation has to be assessed in the light of the real risk of prejudicing that investigation by giving the suspect an indication of the progress, extent, detail and direction of that investigation. The risk of aborting the investigation is thus enhanced if the State shows too much or all of its hand. This risk notwithstanding, the State was forthright and provided sufficient details of the allegations levelled against the accused - *Blumears* case , *supra* at p 10 para 2.

3. It is also submitted the present application does not satisfy the requirements of s 106(1) proviso (ii) of the Criminal Procedure and Evidence Act [*Chapter 59*] in that apart from the element of time, being the time period which has elapsed since the Supreme Court's ruling, no facts which were not placed before this court or the Supreme Court because of non-availability at the time have now been produced. The hardships being experienced by the accused were certainly reasonably within the contemplation of the courts.

MANYARARA JA

To that extent this factor is not a new one - see *S* v *Murambiwa* S-62-92.

4. Again it is submitted that the facts contemplated in s 106(1) proviso (ii) must relate to the reasons why bail was denied. They must be material to the issue in the sense that they must militate the grounds upon which bail was refused.

5. Accordingly the only issue before this court is whether in the circumstances of this matter, the nature of the allegations, the complexity of the investigations considered in the light of the length of time which has elapsed since 6 April 1992, this court can now rule that the administration of justice will not be prejudiced by the accused's admission to bail."

The response concluded as follows:

"State Counsel is fully aware of the progress of this investigation as he is briefed regularly on the issues involved. Tremendous progress has been made largely due to the fact the accused and his accomplice are at present in no position to interfere with investigations. The Attorney-General is reasonably confident that the accused will be indicted for trial once investigations are complete."

The learned judge decided against granting bail. He reasoned as follows:

"The submissions on behalf of the applicant were that circumstances have altered in that the police had a further

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twelve weeks to carry on their investigations, that they have returned his documents, that he is suffering financial prejudice and that features of his incarceration constituted suffering and humiliation for him. . . . The passage of some weeks, according to McNALLY JA: 'was at least potentially a fact "which was not placed" before' SANDURA JP and the Supreme Court and which had arisen after those determinations. The State's submission is that the applicant has not discharged the onus placed on him and that the Attorney-General was aware of the progress in the investigations and is reasonably confident that the applicant will be indicted once the investigations are complete. This court has to attach 'not conclusive weight, but proper weight' to the assurances of the Attorney-General - S v *Chikumbirike* 1986 (2) ZLR 145 (S) at 147. Further, the State maintains that the financial prejudice being suffered by the applicant was certainly reasonably within the contemplation of SANDURA JP and the Supreme

MANYARARA JA

Court. Although the applicant indicates that the assets he has outside of Zimbabwe are of little value, he does not give any explanation as to why the Attorney-General's belief that he possessed substantial wealth outside this country was not countered by him in the previous application and on appeal. The Supreme Court upheld this court's refusal of bail on the ground that there was risk of abscondment which meant that the applicant had to show that the new circumstances relied upon by him have diminished that risk of abscondment. In my view the change of circumstances relied upon (by) him have not altered that risk."

Mr *de Bourbon*, for the appellant, takes issues with the Judgment. He submits, firstly, that the allegations concerning his client's involvement in a conspiracy were considerably less serious than those made against Aitken and that in any case they did not form the basis for originally holding his client in custody on remand. He is correct in the second part of his submission, but wrong in suggesting that the appellant's role is any less serious than the role allegedly played by Aitken.

Mr *de Bourbon*'s substantive argument was that the learned judge erred in paying lip service to the time factor and failing to link it with the lack of progress in the investigation of the alleged offence.

I find merit in the argument. It cannot be denied that the State has not heeded the warning sounded in *Attorney-General* v *Blumears & Anor supra* and repeated in *Aitken & Anor supra* that the Attorney-General and his representatives act at their peril if they fail to put before a court facts which tend to strengthen the State's case after a considerable period of further investigation by the police.

The appellant was arrested on 11 March 1992, as I have said, and SANDURA JP denied him bail on 25 March 1992 without comment on the strength or otherwise of the State case. The appeal to this court failed on the grounds, *inter alia*, that it was inadvisable at that early 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" but the State case was "neither obviously strong nor obviously weak": *Aitken &Anor* v *AG* , *supra*, at p 256 per GUBBAY CJ.

Ten weeks had elapsed when the present application was made and it was evident that the State case had remained "neither obviously strong nor obviously weak".

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MANYARARA JA

ADAM J correctly accepted that the passage of time was a new factor in the application. But, in my respectful view, he failed to take the time factor in conjunction with the crucial factor of lack of progress in the police investigations. Therefore, the learned judge has misdirected himself, and because of the misdirection this court is at large.

The appellant has strongly disclaimed an intention to abscond once freed on bail. His subjective assessment of the investigation must be that the case had weakened, reducing the chances of conviction on the original allegations which were very serious or at least the impact on him of any consequences of conviction. He says that he will lose everything he has achieved if he absconds. He has lived in this country for some thirty years, sunk his roots and built his fortune here.

The appellant has backed his disclaimer of any inducement to abscond by offering to submit himself to stringent bail conditions. He has little or no ready cash, due to the constraints which he says that his business operations have suffered during his involuntary absence therefrom. But he has valuable assets in his and his company's name within the jurisdiction which can provide a substantial recognisance that he will remain within the jurisdiction to stand his trial.

Of particular significance is the readiness of eleven persons of some prominence in the community to stand surety for him in the considerable sum of $50 000 each. The loss of public esteem and personal integrity which these persons will suffer if the appellant were to abscond far exceeds any monetary loss they would suffer thereby.

On the principles enunciated in *Aitken & Anor* v *A-G supra* the appellant can be said to have shown on a balance of probabilities that the interests of justice require that he be freed on bail. The delicate balance is tipped in his favour and the State's objection "can be obviated by the imposition of appropriate conditions pertaining to release": *Aitken & Anor* v *A-G*, *supra*,.

It is that course which I would adopt.

The result is as follows:

The appeal is allowed. The order of Adam J is set aside and the following order is made:

MANYARARA JA

Bail is granted upon the following conditions -

1. The provision of recognisances to the Criminal Registrar of the High Court in an amount of $1 000 000 (one million dollars) against, *inter alia* -

   (a) the security of the immovable property known as No. 1 Pendennis Road, Mount Pleasant, Harare, which is registered in the name of the appellant;

   (b) the security of the immovable property known as No. 5 Carnac Close, Gunhill, Harare,

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which is registered in the name of S & T Import and Export (Pvt) Ltd;

(c) the two Mercedes Benz motor vehicles registered in the name of the appellant; and

(d) the aeroplane registered in the name of the appellant;

2. The provision to the Criminal Registrar of the High Court of the eleven sureties, listed on the document dated 13 August 1992 filed of record by the appellant's legal practitioners, in the sum of $50 000 (fifty thousand dollars) each;

3. The surrender of all travel documents either to the CID at Harrob House, Robson Manyika Avenue, Harare, or to the Criminal Registrar of the High Court;

4. The appellant is to remain within the confines of the Harare municipal area at all times and he is to report to the Harare Central Police Station daily as follows -

(a) once between the hours of 8.00 am and 9.00 am, and

(b) once between the hours of 5.00 pm and 6.00 pm.

Gubbay CJ: I agree.

Ebrahim JA: I agree.

Atherstone & Cook, appellant's legal practitioners

SHAW v SHAW & ANOR 1992 (2) ZLR 134 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Manyarara JA & Ebrahim JA

Civil appeal

13 July & 27 August 1992

Flynote

Family law - Deceased Persons Family Maintenance Act 1978 - purpose of legislation - factors to be taken into account when deciding whether to award - meaning of maintenance

Headnote

Under the common law, with the dubious exception relating to a minor child, the duty of support owed by a person to another was not transmissible to his estate after he had died. The Deceased Persons Family Maintenance Act 1978 was passed to remedy this position and to ensure that the obligation to support dependents owed during lifetime would not terminate upon death. The policy underlying the legislation is that people who are owed a duty of support *ex lege* but have either been disinherited or not adequately provided for by the deceased in his will

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should derive support from the estate of the deceased rather than possibly becoming a charge upon the State. Maintenance for a wife does not mean the provision of mere subsistence; it means providing her with necessaries and conveniences in accordance with the social and economic environment of the previous marriage. The legislation provides for maintenance to be awarded from the estate only to dependents who are in need of such maintenance.

Mrs Shaw had been married to her late husband for thirty-four years and had helped him during his final illness. Nonetheless it was decided that she was not entitled to anything more than the six-month usufruct on a house which the heirs had offered her because she had a sufficient independent income and substantial assets and she had not shown that she had a need for maintenance.

1992 (2) ZLR p135

GUBBAY CJ

Cases cited:

Glazer v *Glazer* 1963 (4) SA 694 (A)

Carelse v *Est de Vries* (1906) 23 SC 532

Spies' Exors v *Beyers* 1908 TS 473

Davis' Tutor v *Est Davis* 1925 WLD 168

Re Borthwick, Borthwick & Anor v *Beauvais & Ors* [1949] 1 All ER 472 (Ch)

Kallin v *Kallin* 1944 SASR 73

Acworth v *Acworth* [1942] 2 All ER 704 (CA)

Hawthorne v *Hawthorne* 1950 (3) SA 299 (C)

EWW Morris for the appellants

JS Sayce for the respondent

Judgment

Gubbay CJ: Frederick Shaw ("the deceased") died at Victoria Falls on 16 June 1990. He was survived by his widow, the present respondent, and three major children, two of whom, Stuart and Elizabeth, are the first and second appellants.

On 29 April 1990 the deceased executed a last will and testament, in terms whereof he bequeathed his entire estate to the respondent and nominated her as executrix. Within a month, however, he had a change of heart. On 23 May 1990 he executed another will, followed by a codicil dated 30 May 1990. Under this will the deceased bequeathed the matrimonial home, being Stand 171 Victoria Falls, ("the house"), to Elizabeth and all the household contents to Stuart, and made certain other bequests which are of no relevance. He nominated Stuart and Elizabeth to be the heir and heiress in equal shares of the remainder of his estate, included in

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which was a warehouse on Stand 280 Victoria Falls. No provision whatsoever was made for the respondent or the eldest child, a son. This will and codicil was accepted by the Master of the High Court as the deceased's final testamentary disposition.

Much aggrieved by the unexpected disherison, the respondent applied to the Master pursuant to s 3(1) of the Deceased Persons Family Maintenance Act 1978, for an award from the net estate of the deceased. She sought the grant of a usufruct over the house and contents until death, and the payment for her lifetime of the income derived from the leasing of the warehouse.

After preparing a report, the Master, as he was entitled to do, submitted the application, together with the written opposition expressed on behalf of Stuart and Elizabeth, to the High Court for its determination.

GUBBAY CJ

The learned judge who heard the matter was of the opinion that the respondent had established a need of maintenance from the estate of the deceased and so awarded her a usufruct over the house and contents, but limited her occupation to a period of five years with effect from 1 July 1991. He dismissed her claim in respect of the income from the warehouse, and made no order as to costs.

An appeal was noted by Stuart and Elizabeth to this court against the Judgment, their substantive objection being that:

> "The learned judge erred, on the uncontroverted (and accepted) evidence that the respondent is possessed of assets in value at least $800 000, in finding that she has a need for maintenance as defined in the Deceased Persons Family Maintenance Act to any extent greater than that generously conceded by the respondents (ie a six month usufruct over the house in contention and the furniture situate in it)."

There is no cross-appeal by the respondent.

Section 7(1) of the Act reads:

> "After due inquiry into an application, the appropriate court may, subject to the provisions of this Act, if it considers that a dependant who has made an application is in need of maintenance from the estate of the deceased concerned and that it is just and equitable that an award should be made, make an award against the net estate of the deceased in favour of such dependant."

A surviving wife falls within the meaning of "dependant" as defined in s 2(1) of the Act.

The trigger for an award is plainly two-fold. The dependant must be in need of maintenance from the estate of the deceased and, in addition, it must be just and equitable that an award be made. But in the determination as to whether both requirements have been met, the court must have regard to the factors specified in ss 7(2) and (3), besides any other which in its opinion is relevant. The factors, as they pertain to a widow whose husband died leaving a will, are:

(i) the benefits, if any, to which she will be entitled under the will;

(ii) the period for which maintenance is required;

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GUBBAY CJ

(iii) her ability to maintain herself and whether or not it is desirable that she should work;

(iv) her general standard of living and that of the deceased during his lifetime;

(v) the reason for the deceased failing to make provision for her maintenance and whether her behaviour was responsible in any way for such failure;

(vi) the interests of the beneficiaries under the will of the deceased in respect of whom provision has been made;

(vii) the size and nature of the net estate;

(viii) her age and the nature and duration of the marriage;

(ix) the contribution made by her to the welfare of the family of the deceased, including any contribution made in looking after the home and caring for the family; and

(x) the provision she might reasonably have expected to receive if, on the day the deceased died, the marriage, instead of being terminated by death, had been terminated by divorce.

Particularly applicable to the enquiry into the need of maintenance are (i), (iii), (iv), (vii), (viii) and (x) above. Section 7(5) provides that in considering these matters the court must take into account the facts as known to it at the date of the hearing; and under s 7(6), in considering the ability of any person to maintain himself, or the financial needs of any person, account must be taken, respectively, of his earning capacity and his financial obligations and responsibilities.

Once a determination favourable to the dependant is reached, the court is empowered under s 8 to make an award in a form other than by way of the payment of money. It may, for instance, under subs (2)(e) confer upon the dependant a usufruct in any asset of the net estate of the deceased.

Finally, in terms of s 11(1):

> "An award shall have the effect and be deemed to have had the effect from the date of death of the deceased."

GUBBAY CJ

Thus the award made in favour of the respondent ought to have been ordered to take effect from 16 June 1990 and not from 1 July 1991.

This, then, is the scheme of the Act as it relates to this appeal.

Mr *Morris*, who appeared for the appellants, accepted that the respondent had proved the justice and equity of her claim for an award. In the light of that concession, which I regard as properly made, it is unnecessary to refer to the detailed evidence adduced before the court a quo. Suffice to state that in failing to bequeath the house to the respondent or, at least, to

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provide for her right to reside there until death or remarriage, the deceased revealed himself to be an ingrate. The marriage had endured for thirty-four years (albeit not happily) and the respondent had done much for him, especially during the months of his final illness.

The sole contention advanced on the appellants' behalf was that, on a conspectus of the evidence, the respondent was not in need of any maintenance from the estate of the deceased.

I believe it of importance in construing the word "maintenance" to have regard to the obvious purpose of the Legislature in passing the Deceased Persons Family Maintenance Act. It was designed to remedy the position under the common law which, save in the dubious case of a minor child, disallowed transmissibility of the duty of support to the estate of the person who, when alive, owed such duty.

In *Glazer* v *Glazer* 1963 (4) SA 694 (A) it was pointed out by STEYN CJ that the long line of cases in South Africa which held a child entitled to maintenance out of the estate of a deceased parent were founded mainly upon an erroneous but fortunate misapplication of a text of Groenewegen *De Legibus abrogatis, ad Dig.* 34.1.15. See, for instance, *Carelse* v *Estate de Vries* (1906) 23 SC 532 at 539; Spies' *Executors* v *Beyers* 1908 TS 473 at 480; *Davis' Tutor* v *Estate Davis* 1925 WLD 168. The learned Chief Justice considered the opinion of Voet *Commentaries* 23.2.82 that the duty of maintenance terminated with the death of the parent, to be correctly expressed. Although prepared to assume, the error notwithstanding, that the previous authorities had passed into settled law in South Africa, he declined to extend the principle stated therein so as to embrace the situation of an indigent widow, saying at 707A that:

> "It would be an innovation by way of the extension of an union which

> could, by parity of reasoning, not be limited to the case of a widow. No person entitled to maintenance by the deceased could on that basis be excluded."

See, generally, Boberg *The Law of Persons and the Family* at pp 279-281. Legislative intervention ultimately emerged in South Africa in the form of the Maintenance of Surviving Spouses Act 27 of 1990, in terms of which a surviving spouse will, insofar as he or she is not able to provide therefor from his or her own means and earnings, have a claim against the deceased spouse's estate for the provision of his or her reasonable maintenance needs until death or remarriage.

In this country the law-maker went further, for included in the definition of "dependant in relation to a deceased" is not only the surviving spouse, but a minor child as well as other persons - a divorced wife or husband, a major child and a father or mother, who were being maintained by the deceased at the time of death. It was recognised that social policy requires that persons, who had been either disinherited or not adequately provided for by the deceased and who before his death were owed a duty of support *ex lege,* should be able to derive such support from the deceased estate rather than possibly become a charge upon the State. In short, it was the aim of the law-maker to ensure that the obligation to support dependants during lifetime

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should not terminate upon death.

Against this background, the word "maintenance" in s 7(1) of the Act, which in any event is of wide meaning, should be read to convey:

> ". . . not only the food a wife puts in her mouth (but) her clothes, the house in which she lives and the money which she is to have in her pocket, all of which vary according to the means of her husband. Maintenance cannot mean only mere subsistence.":

per Harman J in Re *Borthwick, Borthwick & Anor* v *Beauvais & Ors* [1949] 1 All ER 472 (Ch) at 475 *in fine*-476A. In *Words and Phrases* 2 ed vol 3 at p 194, reference is made to the Australian case of *Kallin* v *Kallin* 1944 SASR 73 at 75, where MAYO J said to similar effect:

> "'Maintenance' means the act of maintaining, and denotes the regular supply of food, clothing and lodging; the provision of the necessaries and of the conveniences of life. The quality and quantity of wearing apparel, and to a lesser degree the amount and nature of food, as well as the size,

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> situation and furnishing of the place of abode, will in each case depend in part on the standing of the parties, their wealth, and the environment to which they in their married state have been accustomed."

See also *Acworth* v *Acworth* [1942] 2 All ER 704 (CA) at 707C; *Hawthorne* v *Hawthorne* 1950 (3) SA 299 (C) at 304F; *Black's Law Dictionary, Abridged* 5 ed at p 490.

It is in this broad sense that the need must be established by the dependant.

It was conceded by the appellants in the court below (whether correctly or not is not now open for debate) that the respondent had shown a need of maintenance in the form of a six month usufruct over the house and contents. In granting a far longer period of occupation, the learned judge was influenced mainly by the critical shortage of residential accommodation at Victoria Falls; the great demand for the comparatively few developed or undeveloped stands for sale in the town; and the insecurity of the respondent's monthly tenancy of a flat leased from Air Zimbabwe, a corporation which is expanding its operation at Victoria Falls and may in the near future require that accommodation for its staff.

Against these features, which appear to me to be directed more towards the personal inconvenience the respondent would be likely to suffer if compelled to vacate the house than to a need of maintenance, were others material to the determination of whether the award of a usufruct beyond the period offered was justifiable. These were that the respondent owned a commercial property, the value of which was at least $800 000, and that she could enjoy an income from leasing it of between $7 000 and $16 000 per month, so that if she chose to sell or lease she would be very comfortably off; that at the time of death the deceased's assets, inclusive of the house and warehouse, were worth $300 000; that in the abandoned divorce proceedings the respondent had not claimed personal maintenance, but only a division of the joint estate; and that throughout the marriage the respondent had shown herself to be a resourceful woman who, as found by the learned judge, "has an adequate present income from her work as a photographer". She is also in receipt of a monthly pension of $240.

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Taking account of the respondent's situation as a whole, it is my view that the learned judge erred in extending the usufruct beyond the precise term conceded by the appellants.

GUBBAY CJ

For the reasons given, I would allow the appeal with costs and amend the order of the court a quo by substituting "six months" for the words "five years with effect from the 1st of July 1991".

Manyarara JA: I agree

Ebrahim JA: I agree.

Webb, Low & Barry, appellants' legal practitioners

Lazarus & Sarif, respondent's legal practitioners

GOUS v THE MINISTER OF HOME AFFAIRS & ORS 1992 (2) ZLR 142 (HC)

Court **High Court, Harare**

Chidyausiku J

Civil action

26 May & 2 September 1992

Flynote

Delict - unlawful arrest - whether arrest unlawful in the circumstances

Headnote

Acting on a report, the police visited the plaintiff's house in Chirundu to investigate a gathering that was taking place there. At the time the security situation was unsettled and the investigation had been made for security reasons. The police received a hostile and aggressive reception from the plaintiff. He refused to answer questions about the purpose of the gathering at his house. The plaintiff finally boarded a police vehicle and insisted that he be taken to the charge office. At the police station he threatened to use his connections to have the arresting policemen sacked and also threatened to assault a policeman. At this stage he was arrested. The court dismissed the plaintiff's claim for unlawful arrest, finding that the police details had more than reasonable grounds for believing the plaintiff had committed an offence of obstructing the police in the course of their duties and/ or of assault by gesture. The offences were committed in their presence and therefore they were entitled in law to arrest and detain the plaintiff as they did.

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R Ford for the plaintiff

DP Carter for the respondents

Judgment

Chidyausiku J : The plaintiff in this case seeks damages in the amount of $15 000. The action arises from the arrest and detention of the plaintiff at Chirundu Police Station on the night of 23-24 July 1988. It is common cause that the second, third and fourth defendants were members of the Police

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Force at the material time and that they were acting within the scope of their employment in arresting and detaining the plaintiff.

The plaintiff's case is that he was wrongfully arrested and thereafter unlawfully detained and imprisoned on the night in question. He alleges that he suffered injuries and affronts to his dignity as a result of the defendants' actions.

It is the defendants' case that the arrest and detention was lawful. They allege that the plaintiff hindered or obstructed them in the course of their duties and, accordingly, committed an offence in their presence, in respect of which the plaintiff was arrested and detained.

The arrest and detention of the plaintiff is common cause. It is the legality of such arrest and detention that is at issue. Despite this, the plaintiff elected to give evidence first. In this Judgment I intend to deal with the defendants' case first as it is more logical to deal with the matter that way.

The fourth defendant, Sgt Murombo, was the only witness called for the defence and gave evidence. His evidence was as follows. He is a sergeant in the police force but was a patrol officer at the time of this incident. He was stationed at Chirundu. On 23 July 1988 he was the acting Member-in-Charge of Chirundu Police Station and had been so acting for the previous six days. He received a report from a game scout regarding a gathering of a group of white people at a cottage on the banks of the Zambezi. He received the report at the charge office between 5 and 6 o'clock in the evening. He discussed the report with a Sgt Tianani, his immediate subordinate, and one Cst Kunzi. As a result of the discussion the three decided to proceed to the place of the reported gathering to investigate. The three police details then proceeded to a cottage which, as it turned out, belonged to the plaintiff. The three officers went to the cottage in a police Landrover. Upon arrival they went to the servants' quarters and enquired f the servants if they knew what was going on at their employer's quarters. The servants did not know. The police then proceeded to the plaintiff's cottage and upon arrival identified themselves to the plaintiff's son-in-law and indicated their desire to see the owner of the cottage. The son-in-law took the officers to Mrs Gous, the plaintiff's wife. She was taken aback by the presence of the three and shouted words to the effect "You have been invited to the party!" PO Murombo identified himself to Mrs Gous and told her that he wished to speak to Mr Gous. Her reply was to the effect that the police officer could only see Mr Gous the following morning as he was having

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a bath. She then disappeared into the house from

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whence he heard her call out to Mr Gous words to the effect "Have you invited these black police officers?" His evidence was that Mrs Gous was hostile or aggressive towards them. Mr Gous emerged from within one of the rooms in the house. He asked the police officers what they wanted and whether it was illegal to hold a private party at his house. Before the police officers could reply he went up to Sgt Tianani and said "You, you come and enquire what is happening at my house yet I have been giving you hooks at my fishing camp!" At that stage both Murombo and Tianani advised Mr Gous that they wanted to know the purpose of the gathering and the identity of those present. This angered the plaintiff further and he ordered the people gathered to disperse. The plaintiff left the house and went outside. They followed and found him standing by the police Landrover. The plaintiff continued shouting at Sgt Tianani. The witness tried to calm him to no avail. Cst Kunzi reported to the witness that he had observed three people disappear in the direction of the river. He enquired of Mr Gous who these people were. He responded by jumping onto the back of the police truck and invited the police officers to arrest him and take him to the charge office. PO Murombo tried to calm him down and told him to get off the police truck. The plaintiff refused to get off the truck, insisting that the police should take him to the charge office. The police then drove to the charge office with the plaintiff at the back of the Landrover. It was also PO Murombo's evidence that Mr Gous told Sgt Tianani that he was well connected to people in high places and that he would have his job on the plate.

Upon arrival at the charge office Mr Gous jumped off the Landrover and led the way into the charge office. While in the charge office he told the police officers that he was well connected to people in high places in Government and in the police force and that he would have their jobs on the plate. He also told Tianani that were they not in the charge office he would have fought him and as he said this he made a punching gesture at Sgt Tianani. Tianani then advised the plaintiff that he was arresting him. Murombo instructed Tianani to effect the arrest in a formal manner by placing his hand on the plaintiff's shoulder and advise him he was under arrest for obstructing the police and assault by gesture. The plaintiff was then arrested and placed in a cell for the night. His evidence was that food and medication was given to the plaintiff.

The following morning the plaintiff was released on the instructions of Chief Inspector Mabuto from Makuti Police Station. It would appear that he was acting on orders from someone senior to him.

It was also Sgt Murombo's evidence that he decided to investigate the purpose

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of the gathering and the identity of the people gathered because of the prevailing security situation at the time of the incident. It was his evidence that at the time South African commandos were entering Zimbabwe under one guise or another to carry out unlawful acts in

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Zimbabwe. In particular he was conscious of the fact that one Cane, who was associated with these commandos, had on a previous occasion flown his helicopter under the Otto Beit Bridge on the Zambezi causing what he termed an incident. It is common cause that a signal to all stations and all Commands had been transmitted from Police General Headquarters in Harare. The signal was to the effect that all police officers should exercise particular vigilance and watch out for strangers, particularly in remote areas. At least this was the evidence of Sgt Murombo, which the plaintiff's witness Chief Inspector Mabuto corroborated.

The fourth defendant, Sgt Murombo was very impressive as a witness. He gave his evidence well and his evidence had a ring of truth. His demeanour was good and he was not shaken in cross-examination. As I said, no one else gave evidence for the defence. The defendants closed their cases after this evidence.

The plaintiff gave evidence on his own behalf. His evidence was that the three police defendants visited his holiday cottage at Chirundu on the evening in question. When they arrived a roof wetting party was underway. When the police arrived they accused him of holding an illegal gathering. The police were drunk and unruly and indicated that they would not arrest him for the illegal meeting if he were to invite them to join the party. Under cross-examination the plaintiff accepted the defence version as to what occurred as the correct version. In particular he accepted that it was he who insisted on being arrested and being taken to the charge office. He jumped onto the police Landrover on his own, refused to get off and insisted that the police take him to the charge office. He admits that he was given food, his medication and coffee. He, however, insists that he was denied the use of a telephone to phone a high ranking minister to whom he was well connected. He accepted that when the police arrived at his cottage they enquired of him the purpose of the gathering and the identity of those gathered. He further accepted that, rather than answer police enquiries, he demanded to know what law he had broken and stood by his rights. He also conceded that apart from refusing to tell the police the purpose of the gathering and the names of those present he told the police he would have their jobs on the plate or have them dismissed from the police through his connections to high ranking officials. He insisted on being arrested and refused to get out of the police vehicle.

CHIDYAUSIKU J

The plaintiff was a poor witness. His evidence under cross-examination contradicted his evidence-in-chief in many material respects. Not only was his evidence contradictory, it also contradicted his pleadings. For instance, according to plaintiff's declaration the plaintiff was arrested at his house in the midst of a gathering of family and friends and in return for immunity from unlawful arrest the defendants demanded hospitality of the plaintiff. The plaintiff's evidence is that he went to the police station at his own insistence and against the orders of the police.

Again in his pleadings he alleges that he was denied food and medication.

In his evidence he admits being given food, medication, coffee and blankets. There was no satisfactory explanation for the contradictions between the pleadings and the plaintiff's evidence. The inference that the court draws from these discrepancies, in the absence of a satisfactory explanation for the discrepancies, is that the witness's instructions to his legal

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practitioners is at variance with his evidence. This no doubt leads me to the conclusion that Mr Gous is not an entirely honest witness. In any event, a comparison of Mr Gous and Sgt Murombo as witnesses reveals the latter was by far a better witness. I have no hesitation in accepting Sgt Murombo's evidence in preference to that of Mr Gous where their evidence is at variance.

I am satisfied on the evidence before me that the probabilities in this case are that the three police officers did receive a report of a gathering at the plaintiff's cottage. The three police officers, having regard to the prevailing security situation, decided to investigate the purpose of the gathering and the identity of the people gathered. The police having decided to investigate and, as I said, that decision cannot be faulted. The next issue that falls for consideration is how the police conducted themselves during that investigation. According to Mr Gous, the plaintiff, when the police arrived at the cottage they declared that the gathering was illegal and demanded to be given beer if plaintiff were to avoid arrest for convening an illegal gathering. This is his stance according to the pleadings. This stance was not adopted in its entirety in his evidence. He conceded under cross-examination that the police did ask the purpose of the gathering. Instead of attending to those queries Mr Gous decided to and on his rights and demanded to know if holding a party was illegal. In the light of the concession of the plaintiff under cross-examination the defendants' version of what happened is most probably true.

It would also appear that those present at the party assumed the police were after or wanted beer or liquor. This is clear from the tenor of their evidence. I am satisfied that the police explained to the plaintiff the nature of their

enquiry after identifying themselves. Mr Gous considered the police visit as an unwarranted intrusion on his private party and property. He took offence at the police presence or visit and was unco-operative with the police in their enquiries. In his own words he decided to stand on his rights. He admits telling the police officers that he was well connected to politicians and police officers in high places and that he was going to use these connections to secure the dismissal of the three officers from their jobs. I am satisfied that the plaintiff climbed on the police vehicle against the police orders and insisted on being taken to the charge office. I accept the evidence of Sgt Murombo that at the charge office the plaintiff assaulted Sgt Tianani by gesture. From the above, I am satisfied that the police details had more than reasonable grounds for believing the plaintiff had committed an offence of obstructing the police in the course of their duties and/or of assault by gesture. The offences were committed in their presence and therefore they were entitled in law to arrest and detain the plaintiff as they did.

The plaintiff led the evidence of several witnesses. The evidence of these witnesses is of very little relevance, if any. The arrest and detention took place at the police station. None of the witnesses called was present when that happened. It would appear the main purport of these witnesses' evidence was that the police visited the party looking for beer. As I said earlier I do not accept this to be the case. I accept Sergeant Murombo's evidence that they visited the cottage in response to a report from a game scout.

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Chief Inspector Mabuto is the officer who ordered the release of the plaintiff. It is quite clear from his evidence and demeanour that he was acting on instruction from someone above him. He denied this but the court was not impressed with him as a witness for a number of reasons. He was unable to explain why such a very senior officer of his rank should have travelled over 60 km at first light in order to secure the release of the plaintiff. It is also clear that he exceeded his power or authority in ordering the release of the plaintiff. On the evidence before me, I have no doubt that, had the docket been placed before the Attorney-General or the public prosecutor, a decision to prosecute the plaintiff would have been taken. Plaintiff had a case to answer and the prospects for a conviction on prosecution were good. The fact that plaintiff was not prosecuted is not indicative of the plaintiff's innocence. If anything, it shows his connections served him well.

In the result the plaintiff's case is dismissed with costs.

Gill Godlonton & Gerrans, plaintiff's legal practitioners

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

CHIPFUYAMITI v NYAJINA & ANOR 1992 (2) ZLR 148 (HC)

Court **High Court, Harare**

Smith J

Civil action

16 June & 2 September 1992

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - s 111 - appointment of chiefs Customary law - Chiefs and Headmen Act 1982 - s 3 - appointment of chief - entirely at discretion of President - courts will neither investigate nor recommend

Headnote

Section 111 of the Constitution provides that there shall be chiefs. However, the Chiefs and Headmen Act 1982 governs the appointment of a person to a particular chieftainship and the recognition and establishment or abolition of any particular chieftainship. Under this statute these functions are vested in the President. In exercising these powers the President has an absolute discretion, unfettered by any statutory shackles other than the duty to give due consideration to the customary principles, if any, applicable to the community over which such chief is to preside. It is only the President who can determine who shall be appointed as chief. The court has no power to investigate, determine or even recommend to the President who should be appointed as the chief in the area.

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Cases cited:

Mutandwa v *Min for Native Affairs* 1937 SR 134

Muwuungani v *Min of Native Affairs* 1957 R&N 298; 1957 (2) SA 544 (FS)

Ruzane v *Paradzai & Anor* 1991 (1) ZLR 273 (S)

E Chatikobo for the plaintiff

R Ford for the defendants

SMITH

Judgment

Smith J: The plaintiff instituted this claim in his personal capacity and in his capacity as a representative of the Hombiro clan of Svoti Kraal, Nyajina, Murewa. It is brought against the first defendant in his capacity as Chief Nyajina, Uzumba Communal Lands, Murewa and against the second defendant in his capacity as the Minister of Local Government, Rural and Urban Development. The plaintiff alleges that in the 18th and 19th centuries the Hombiro clan were the chiefs over part of the area now occupied by and forming the land of the first defendant's chieftainship. In or about 1898 one William Edwards, the then native commissioner for the area, abolished the plaintiff's chieftainship over the area in question. This resulted in the plaintiff's clan being deprived of its chieftainship and being put under the chieftainship of the first defendant's clan. At all material times William Edwards was acting in his capacity as native commissioner and in the course of his employment with the ministry or department of Native Affairs and was about the affairs of the Government. By reason of such employment of William Edwards, the second defendant became vicariously liable to the plaintiff in his capacity as Minister for the above-mentioned wrongful and unlawful actions of William Edwards. The plaintiff accordingly seeks an order re-instating the Hombiro clan's chieftainship, appointing the plaintiff as Chief Chipfuyamiti, returning the land which used to belong to the Hombiro clan to Chief Chipfuyamiti and generally doing all things necessary to return to the *status quo ante* the abovementioned actions of William Edwards.

The first defendant maintains that his tribe, Vazumba, has always had chieftainship over the area claimed by the plaintiff (Uzumba) even before the advent of colonialism, dating back to about the 15th century. He denies that the plaintiff's clan had any chieftainship rights over the Uzumba area. The second defendant avers that the first defendant's clan was the first to settle in the area in question and when the plaintiff's clan arrived it was given land to stay by the chief of the first defendant's clan. The area still occupied by the first defendant's chieftainship was never occupied by the Hombiro clan since the latter had been given its own small area of land to occupy.

The court ordered, in terms of rule 200 of the High Court Rules 1971, that before any evidence was given in the matter there was a question of law which should be decided. That question is whether or not the court can lawfully issue the declaratory order sought.

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Mr *Ford* submitted that since 1898 questions of chieftainship and succession thereto have been controlled by statute and not by custom. As long ago as 1937, in *Mutandwa* v *Minister for Native Affairs* 1937 SR 134, it was held that

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in terms of the law then in force - the Native Affairs Act 1927 - the Governor-in- Council had "an unqualified right to appoint whomsoever he considers suitable to a chieftainship. It may well be, as indicated in s 9 of the Act, that in selecting a claimant to the office consideration is given to the native view of succession, but this does not in any way derogate from the Governor's absolute discretion in making an appointment".

The chieftainship claimed by the applicant has never existed in terms of the law, in that it has never been recognized by the Executive, and therefore it cannot be recognized by the courts.

Mr *Chatikobo* submitted that the President had the power to put right the alleged unlawful action by Mr William Edwards. He agreed that the President had complete discretion with regard to the appointment of chiefs and said that this included a power to create a chieftainship which had not been recognized under previous statutes. He submitted that if the plaintiff were to be allowed to go to trial and could establish that the conduct of Mr William Edwards, in abolishing the chieftainship in question, was unlawful, the appointment of the second defendant could be set aside and the President could be directed to find a suitable candidate from the community.

I cannot agree with Mr *Chatikobo's* submissions, however much I admire his ingenuity in formulating his arguments.

In Palley's *Constitutional History and Law of Southern Rhodesia* at p 476 the learned author states:

> "The Chiefs are Government officials, appointed in terms of sections 4 and 17 of the African Affairs Act by the Governor. They hold office during pleasure, and contingent upon good behaviour and general fitness. Although Chiefs are envisaged as hereditary holders of the office, it is only official recognition that carries with it the title of Chief. In practice the Governor frequently appoints the person holding traditional title to the chieftainship, but this is not always done. In other cases where the tribe (reference is here to the Mashona, who have a complicated system of collateral succession) have been unable to agree on a successor, the Government have made the decisions and in the last ten years have on twelve occasions arranged for some form of election. Furthermore, not all traditional chieftainships are recognized as from time to time Government has carried out a general re-organization of chieftainships reducing the number of recognized Chiefs".

SMITH

In *Muwuungani* v *Minister of Native Affairs* 1957 R&N 298; 1957(2) SA 544 (FS), TREDGOLD CJ said that in terms of the Native Affairs Act [*Chapter 72 of 1939*] the Governor was entitled to exercise an unfettered Judgment in the creation, amalgamation or subdivision of tribes. He was obliged to have regard to native opinion and native customary succession, as investigated by the Chief Native Commissioner, but once the investigation had been made he was free to act as he thought best in the interests of the good government of the natives. At p 301-2 of the R&N

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reports he said -

> "By 1927 the old native tribal system had long since disappeared, except in so far as it had been recognised and adopted in Government appointed chieftainships. From a very early stage the power of appointment had been vested in the Administrator. In 1910 a statute was passed, which was, in general effect, much the same as the present Act, and which obviously contemplated a situation in which all chiefs would be Government appointed and the whole country organised into tribes by administrative order. (Southern Rhodesia Native Regulations Proclamation, 1910). It may safely be assumed that, when the present Act was passed, the Legislature thought only in terms of 'chiefs' and 'tribes' as contemplated by the existing law, and not of chiefs and tribes that were part of a superseded regime.'

The views of TREDGOLD CJ were cited with approval in *Ruzane* v *Paradzai & Anor* 1991 (1) ZLR 273 (S).

The Chiefs and Headmen Act 29 of 1982 is the statute presently in force governing the appointment of chiefs. Section 3(1) and (2) thereof provides:

> "3. (1) The President shall appoint chiefs to preside over communities.
>
> (2) In appointing a chief in terms of subsection (1) the President shall give due consideration to customary principles of succession, if any, applicable to the community over which such chief is to preside."

The Act merely restates in slightly different form the provisions that have been in force since the turn of the century relating to the appointment of chiefs. It is not disputed that the office of chief has been in existence in this part of Africa for hundreds of years and our Constitution specifically provides that there shall be Chiefs - see s 111 thereof. However, the appointment of individuals to a particular chieftainship and the recognition and establishment or the abolition of any particular chieftainship is a function which, by statute, is vested in the President and previously was vested in the

Governor or the Chief Native Commissioner. In exercising his powers in this regard the President, as was the case with his predecessors, has an absolute discretion unfettered by any statutory shackles other than the duty to give due consideration to the customary principles, if any, applicable to the community over which such chief is to preside. The law does not give any person the right to claim that he shall be appointed a chief. It is only the President who can determine who shall be appointed. Therefore the application must be dismissed. I would add, however, that there is nothing in the Chiefs and Headmen Act, 1982, which would preclude or prevent the President from resuscitating the chieftainship claimed by the applicant. That, however, is a matter which can only be decided by the President. The court has no say in such a matter and should not, in my view, even venture to make a recommendation.

With regard to costs, Mr *Chatikobo* submitted that the defendant should have excepted to the application. That would have terminated the action at an early stage and would have saved costs considerably. As the law on this subject is so clear, I agree that the defendant should have excepted to the claim. However I do not consider that his failure to do so must mean that he should lose some of his costs. The plaintiff persisted with his action until the matter of the law was argued in accordance with rule 200. It seems that he was prepared to lead evidence

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and incur even more costs had it not been ordered that the question of law be determined first.

The application is dismissed with costs.

Chirunda, Chihambakwe & Chikumbirike, plaintiff's legal practitioners

Honey & Blanckenberg, first defendant's legal practitioners

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

S v JUMBE 1992 (2) ZLR 153 (HC)

Court **High Court Harare**

Smith J

Criminal review

September 1992

Flynote

Criminal law - fraud - using false educational certificate to obtain employment - prejudice when accused has worked satisfactorily

Criminal procedure (sentence) - appropriate sentence where accused has obtained job by using false educational certificate but has performed work satisfactorily

Headnote

Where the accused is charged with fraud on the basis that he has used a false educational certificate to obtain employment but once employed he has apparently performed the work satisfactorily, it is a misdirection to find that the accused has defrauded the employer of the amount of salary he has received and that the employer has suffered prejudice to that extent.

In such a case a fine will usually be an appropriate sentence and there should be no condition imposed relating to the restitution of wages as the accused will have worked for his wages. In the present case the review court substituted a fine and a wholly suspended prison sentence for the effective sentence imprisonment imposed by the trial court.

Cases cited:

S v *Makina* HH-124-83 (unreported)

S v *Kaziboni* HH-256-84 (unreported)

S v *Chatumbira* HH-119-85 (unreported)

S v *Zhanje* HH-5-88 (unreported)

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Judgment

Smith J: The accused used a certificate showing good O-level passes to get

SMITH J

a job as a teacher. The certificate had been issued to his elder brother. On the basis of his representation that he had gained the passes shown in the certificate, he was employed as a teacher for 3 months before his fraudulent act was discovered. During that period he was paid a salary of $2031,00. He was charged with fraud. He pleaded guilty and was duly convicted. He was sentenced, on the basis that he had defrauded the State of $2031,00, to 12 months' imprisonment of which 9 months were suspended, 3 months on condition of good conduct and 6 months on condition of repayment of $2031,00.

In my view the magistrate misdirected himself in finding that the accused had defrauded the State of $2031,00. In *S* v *Makina* HH-124-83 the accused had got a job using someone else's qualifications and he worked in the job for 2 and half months, being paid $501,60 in salary. Without those qualifications he would not have been engaged. He was fined $500,00. In reviewing the case McNALLY J (as he then was), who had sought the views of the magistrate, set out the magistrate's reasoning, which included the statement that the prejudice was $501,00, and then said at p 2 of the cyclostyled Judgment -

> "The flaw in this reasoning, as it applies to the facts of this case, is that the magistrate is assuming that the prejudice was $501. It was not. The accused gave 2 and a half months' labour in exchange for that money. His labour was not worth $501. But it was worth something.
>
> To that extent the prejudice was considerably less than $501."

Makina's case has been cited with approval in a number of other cases. In *S* v *Kaziboni* HH-256-84 SAMATTHA J set aside a sentence of 7 months' imprisonment and substituted a fine of $500,00 and 6 months' imprisonment wholly suspended. The appellant in that case had used a Grade II certificate awarded to her sister to obtain enrolment as a medical assistant trainee and worked for 19 months before her "trick" was discovered. During that period she was paid $2242,00. SAMATTA J adopted the reasoning of McNALLY J saying that the fact that the appellant's fraud was not discovered for more than a year would tend to suggest that, while she may not have had the paper qualifications, nevertheless her ability and general aptitude were such that she gave a reasonably satisfactory service during the period.

In *S* v *Chatumbira* HH-119-85 the appellant was convicted of fraud and sentenced to 8 months' imprisonment, half of which was suspended. He falsely claimed that he had certain O-level and A-level passes and other

SMITH J

qualifications as a result of which he was employed by the Railways and paid $8680,57 - being paid at the rate of $247,83 for 26 months. McNALLY J pointed out in his Judgment at p 2 that

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the appellant did not defraud the Railways of $8680,57 or, as far as the record goes, of any sum at all since he worked apparently satisfactorily for a period of over 2 years and was paid therefor. There was nothing to show that he did not earn his salary. It must be assumed that he gave value for money. The learned judge set aside the sentence of imprisonment and substituted a fine of $100,00.

Finally I would refer to *S* v *Zhanje* HH-5-86 which concerned a young man, 20 years old, who had misrepresented his O-level results to the Posts and Telecommunications Corporation in order to get a job as a postal clerk. He was employed for slightly over 2 years during which he was paid a total of $10470,38. He was charged with fraud, convicted and sentenced to 12 months' imprisonment. On appeal SAMATTA J, after referring to *Makina* and *Kaziboni, supra*, set aside the sentence and substituted a fine of $300,00.

In this case, I consider that the sentence imposed is manifestly excessive. For the reasons set out in the cases mentioned above, I do not think that it is correct to say that the accused defrauded the Ministry of Education of $2031,00. The conviction is confirmed but the sentence is set aside and the following is substituted -

Accused is sentenced to a fine of $300,00 or, in default of payment, one month's imprisonment and, in addition, to 3 months' imprisonment wholly suspended for 4 years on condition that he is not convicted of any offence involving dishonesty committed within that period for which he is sentenced to imprisonment without the option of a fine.

As the accused has served the alternative period of imprisonment he does not have to pay the fine. Arrangements have been made for his release from prison.

Robinson J: I agrees.

S v MLAMBO 1992 (2) ZLR 156 (SC)

Court **Supreme Court, Bulawayo**

Ebrahim JA, Gubbay CJ & Ebrahim JA

Criminal appeal

4 August & 4 September 1992

Flynote

Criminal procedure - improper to produce record of previous convictions of accused if court finds that no extenuating circumstances

Criminal procedure (sentence) - murder - extenuating circumstances - court must arrive at proper Judgment on issue of extenuation - intoxication - evidence of intoxication despite accused's denial that he was drunk - concession by inexperienced defence counsel that no extenuating circumstances not decisive

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Headnote

In a murder case there was evidence from State witnesses that the appellant was moderately drunk when he struck an old lady on the head with a log, thereby killing her. The trial court found that the accused was not intoxicated when he fatally assaulted the old woman because in his evidence he had denied that he was drunk.

The trial judge had given no Judgment on the issue of extenuating circumstances. After an inexperienced legal counsel representing the accused had conceded to the trial judge that there the accused's intoxication did not amount to an extenunating circumstance, the judge had simply stated that he agreed that there were no extenuating circumstances. After the court had stated that there were no extenuating circumstances the State had led evidence of the accused's previous convictions. On appeal:

Held, that a trial court should not conclude that the accused was not drunk simply because in his evidence he denies that he was drunk. For one reason or another accused often deny that they were drunk when the contrary is true. The trial court must carefully examine whether, despite

EBRAHIM JA

such a denial, there is evidence of drunkenness. In the present case there was evidence from the State witnesses that he was moderately drunk and the irrational way in which he acted suggested that he was acting under the influence of liquor and that his passions may have been inflamed by drink.

Held, further, that a trial judge must always give a proper Judgment on the issue of extentuating circumstances. Despite the concession on the defence counsel concession, trial judge should have considered the whole background of the case, and balanced the mitigatory features against the aggravating features in order to arrive at a reasoned conclusion.

Held, further, that it had been highly improper for the State to produce the record of the previous convictions of the accused after a brief adjournment following the judge's statement that there were no extenuating circumstances because once the trial court had ruled that there were no extenuating circumstances the only penalty it could impose was the death penalty. However, if the Appeal Court overturns the finding of the trial court that there were no extenuating circumstances, the prosecutor is then entitled to place the record of the accused's previous convictions before the Appeal Court.

Held, further that on balance there were extenuating circumstances in the present case. He had acted in an irrational way because he was moderately drunk. The fatal assault was not premeditated but rather an impulsive, spontaneous one. The appellant was in a rage and his passions were possibly inflamed by drink. He had delivered one blow and had attempted to revive the deceased when he realise the enormity of his folly. On the other hand, he had, without any provocation, killed an elderly lady who was trying to calm him down.

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M L Perry for the appellant

K Hodzi for the respondent

Judgment

Ebrahim JA: The appellant was convicted of murder with an actual intent to kill. The court found no extenuating circumstances and the appellant was sentenced to death. Mr Perry, who represented the appellant in this court, whilst not challenging the validity of the conviction of murder, submitted that on the evidence a verdict on the basis of a constructive intent to kill was more appropriate. Mr Hodzi, representing the Attorney-General, conceded that a proper verdict on the facts of the present case is one of murder with a constructive intent to kill.

The facts of the case which are beyond dispute are that on 17 April 1991 the

appellant arrived at the Makurucho Village in the Mberengwa Communal Lands where there was a beerdrink in progress. This was the village in which Leonard Bhebhe, his brother-in-law, resided, as did the deceased, who was his mother-in- law. An argument developed between the appellant and one Thobias Zhou because their respective dogs became embroiled in a confrontation with each other. Leonard Bhebhe intervened in the altercation which developed between the appellant and Thobias, and requested the appellant to leave the area since he was disturbing the peace. This infuriated the appellant and he attempted to assault him. Leonard Bhebhe fled and was chased by the appellant. Bhebhe entered a hut and locked himself in. He emerged a short time later but was seen by the appellant, who armed himself with a log and ran towards him uttering threats. Bhebhe ran into a kitchen hut and prevented the appellant from entering by closing the door. B this stage the deceased had intervened and attempted to stop the appellant from assaulting Bhebhe. The appellant then turned on her and struck her with the log on her head, killing her instantly.

The deceased was seventy years of age, and the log used to inflict the fatal assault on her weighed in excess of five pounds. It was approximately two inches in diameter. There was no clear evidence on the extent of the force used by the appellant, but it did emerge that he used a two-handed blow in assaulting her.

On these uncontraverted facts there can be no doubt that the appellant was responsible for the unlawful killing of the deceased. Counsel are agreed that the appellant should only have been convicted of murder on the basis of a constructive intent to kill. It is not suggested that the appellant's action called for no more than a verdict of culpable homicide.

I turn now to consider this concession:

In analysing the facts summarised above, it is apparent that the appellant delivered one heavy blow to the head of the deceased. The assault, furthermore, appears to have been an impulsive, spontaneous act and cannot be said to have been premeditated. The incident took place at a beerdrink and it is difficult not to conclude that this was no more than a typical beerdrink fracas.

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The appellant had partaken of alcohol that day, although he said in his evidence in court that he was not drunk. This, to my mind, is neither surprising nor unusual, as accused persons often for some reason or other deny that they were intoxicated.

EBRAHIM JA

There was no evidence led before the trial court to indicate the thickness of the skull of the elderly deceased. Her skull may have been thin due to her advanced years. This aspect was never adequately canvassed. The appellant, furthermore, immediately on assaulting the deceased attempted to assist in reviving the deceased.

All the above factors, looked at cumulatively, do not reflect the conduct of a person who actually intended to kill. It is my view that Mr *Hodzi* was therefore entirely justified in making the concession that the appellant should only have been convicted of murder with a constructive intent to kill.

In view of our finding in this regard, we are at large on the question of sentence, as the trial court misdirected itself in concluding that an actual intent to kill rather than a constructive intent to kill had been established.

Mr *Hodzi* very fairly and properly conceded that there were other misdirections apparent in the approach of the trial court. He pointed to the fact that when the appellant's counsel addressed the trial court on extenuating circumstances the following exchange took place between the trial judge and counsel:

> "My Lord, I feel there are no extenuating circumstances in this matter. Perhaps it would have been alleged that the accused was drunk but from the evidence before the court he was moderately drunk and ...
>
> MR JUSTICE CHEDA: He denies that, have you forgotten his evidence? A I mean from the State witnesses he was moderately drunk and according to him he denies that.
>
> MR MUTSOYOLWA: And for that reason I am unable to submit intoxication as an extenuating circumstance."

The learned judge appears to have fallen into the error of concluding that the appellant was not intoxicated purely because that is what he said in his evidence. I have stated earlier in this Judgment that accused persons frequently say that they are not intoxicated when the contrary is true. On the facts of the present case, there was evidence on record which put the appellant's state of sobriety as being that he was moderately drunk. The learned judge must therefore be taken to have misdirected himself in finding that he was not.

A further misdirection which is apparent from the evidence is that the learned judge gave no Judgment on the issue of extenuating circumstances. Defence

EBRAHIM JA

counsel conceded that there were no extenuating circumstances and the trial judge responded by saying: "Yes, we agree we are unable to find any extenuating circumstances in this case".

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What he should have done, despite the concession of the defence counsel, who was an inexperienced practitioner, was to consider the whole background of this case, balancing the mitigatory features against the aggravating features, and then to arrive at a moral Judgment. This he did not do.

It is on this basis that I approach the question of extenuating circumstances in this case.

On the evidence, it must be held that the appellant had been drinking. He acted in such an irrational way that he must have been influenced by drink. The assault was not premeditated but rather an impulsive, spontaneous one. The appellant was in a rage and it is possible that his passions had been inflamed by drink.

He only delivered one blow and attempted to revive the deceased when he realised the enormity of his folly. The aggravating features are that the appellant, without any provocation, killed an elderly lady who was trying to calm things down.

It seems to me, weighing all the factors, that the scale must come down in favour of a finding of extenuating circumstances.

Before I deal with what I consider to be an appropriate sentence in this case, I wish to highlight another procedural irregularity which took place during the course of this trial:

As soon as the trial judge stated that there were no extenuating circumstances in this case State counsel, following a brief adjournment, produced the appellant's record of previous convictions to the court. This is highly improper and should not have been permitted by the court. Once the trial court had ruled that there were no extenuating circumstances the only penalty it could impose was the death penalty. It was improper, therefore, for the appellant's previous convictions to be placed before the court.

In this court, in view of our ruling that there are extenuating circumstances on the facts of this case, the appellant's record of previous convictions are relevant and must be taken into consideration in determining an appropriate penalty to be imposed on the appellant. In passing sentence we would be entitled to impose the death sentence if his previous convictions were of such a serious nature as

to justify the imposition of such a penalty. State counsel should always be prepared when appearing in this court to place an accused person's previous convictions before us when the need arises, as is the case in the present matter, always making allowance for the fact that in the event of this court overturning a finding of no extenuating circumstances of the lower court an accused person's previous convictions might be a factor to be taken into account in considering what is an appropriate sentence to be imposed.

We requested that counsel for both parties in this matter produce the appellant's record of previous convictions and to provide this court with a summary of the facts pertaining to those convictions.

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I am informed that it has not been possible to obtain factual details of the appellant's previous conviction on the assault charge as the trial record has been destroyed. Suffice it to say that in connexion with that conviction he was sentenced to pay a fine of $50 or, in default of payment, fifty days' imprisonment with labour, which would indicate that the offence he committed was of a relatively minor nature. It is also possible that his previous conviction was not put before the trial court on that occasion.

As regards the murder conviction for which he was convicted in 1974 he was sentenced to four years' imprisonment with labour. He was eighteen years old at the time and the allegation was that he had struck his brother with an axe. It was alleged that his deceased brother had threatened to kill him and to burn his property. The accused was very frightened of his brother and waylaid him and killed him.

The appellant is therefore clearly not a first offender and appears to be violent by nature. He caused the death of an elderly lady by brutally killing her. He appears to be a bully.

In the result, I would substitute the finding of murder with an actual intent to kill with murder with a constructive intent to kill and set aside the death sentence and substitute a sentence of twelve years' imprisonment with labour. To that extent the appeal succeeds.

Gubbay CJ: I agree.

Manyarara JA: I agree.

Pro Deo

S v CHARUMA 1992 (2) ZLR 162 (HC)

Court **High Court, Harare**

Chinengundu J & Mtambanengwe J

Criminal review

16 September 1992

Flynote

Criminal procedure - errors in record - correct procedure to follow

Headnote

A trial magistrate has no right to tamper with the record of proceedings if he realises that he has made a mistake. He should simply draw his mistake to the attention of the scrutinising magistrate for corrective measures to be taken or seek advice from more senior members of the bench on the proper course to follow. Because of the magistrate's unwarranted interference with the record, the proceedings were set aside and sent for trial *de novo* before a different

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magistrate.

Judgment

Chinengundu J: In this matter the scrutinising magistrate has requested that the proceedings be set aside and the matter remitted to the magistrates court for a trial *de novo* before a different magistrate. I agree that this is the only proper course to adopt because of the irregularities found in the proceedings.

The trial magistrate has admitted tearing and replacing some papers in the record for reasons which are not very clear from his explanation. When the record was first submitted for scrutiny to Regional Magistrate Mr Bhunu, there is evidence that Mr Bhunu's letter was destroyed. He sent the record back for filing but since the proceedings had not been confirmed the Clerk sent it back for scrutiny. The matter was taken up by another scrutinizing Regional Magistrate, Mr Uchena who raised certain issues with the trial magistrate who apparently got confused and decided to destroy the original

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CHINENGUNDU J

charge sheet and replace it with another one containing information completely different from that which was in the original charge sheet.

The trial magistrate should have known that he had no right to tamper with the record of proceedings by destroying certain papers and replacing them with others as he did in this case. He cannot just tamper with the record of proceedings as he wishes. If he had realized later that he had made a mistake he should have drawn this to the attention of the Regional Scrutinizing Magistrate for corrective measures to be taken. Alternatively he should have sought advice and guidance from other senior members of the bench which is the normal course to follow when in doubt.

There is no way one can say that justice has been done in this matter and the only course to follow is for these proceedings to be set aside and the matter sent back for a trial *de novo*. In the result the proceedings are set aside and the matter is sent back to the court *a quo*, for a trial *de novo* before a different magistrate in respect of the original indictment as reflected in the original Charge Sheet.

Mtambanengwe J: I agrees.

TOFF'S RESTAURANT (PVT) LTD v PROMAVEN PROPERTIES (PVT) LTD 1992 (2) ZLR 164 (SC)

Court **Supreme Court, Harare**

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Manyarara JA, Korsah JA & Ebrahim JA

Civil appeal

14 & 21 September 1992

Flynote

Lease - fixing of fair rental for commercial premises by Rent Board - whether tenant lessee under tacit lease or statutory tenant

Rent Control - Commercial Premises (Rent) Regulations 1983 - s 10 - whether applicable

Headnote

The respondent owned certain premises which had been occupied by the appellant under a lease. In 1990 the respondent applied to the Rent Board to determine and fix a fair rental for the premises. In terms of s 10 of the Commercial Premises (Rent) Regulations 1983, the Rent Board was empowered to fix a fair rental. If the parties had agreed to a rental amount, the Board was to fix this amount as the fair rental, unless there was some justification for altering it. If the parties had not agreed on the amount of rent, the Board was to fix a fair rental based on the lower of two amounts, namely, either the recurrent expenditure plus a reasonable return on value or the open market rental. It fixed the rental on the latter basis because it found that the parties had not agreed on a rental. The appellant maintained that he was in fact occupying the premises under a tacit lease and that under that lease the rent had been agreed at an amount lower than that fixed by the Rent Board. He argued that the rent should have been fixed by the Rent Board on the basis of this lower amount.

Held, that the Rent Board had fixed the rent on the correct basis. There had been a tacit lease but this had expired and no new rent had been agreed.

1992 (2) ZLR p165

MANYARARA JA

The tenant had continued in occupancy only as a statutory tenant.

Held, further, that the Rent Board was entitled to rely on the written opinion as to a fair rent by the expert valuer engaged by the respondent in the absence of any evidence to challenge the opinions of that valuer.

MJ Gillespie for the appellant

AJ Dyke for the respondent

Judgment

Manyarara JA: The appellant occupies certain business premises situated at No. 28 Baker Avenue, Harare which are registered in the respondent's name. In about February 1990 the latter applied to the Rent Board for a determination of a fair rent for the premises. There was a hearing of the application after which the board fixed the rental as the sum of $6 611,00 per

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month payable with effect from 1 March 1990. The Administrative Court upheld the determination on appeal by the appellant, which has further appealed to this court.

The main issue is whether the appellant is a statutory tenant as the Board and the Administrative Court found, or a tenant in terms of a lease agreement as the appellant itself contends. It is this issue which determined which of the following provisions of the Commercial Premises (Rent) Regulations 1983 was applicable:

> "10. (1) A board shall fix as the fair rent of commercial premises -
>
> (a) a rent which will provide the lessor with a reasonable return on the depreciated replacement value of the premises, after allowing for recurrent expenditure by the lessor in respect of the premises; or
>
> (b) the open market rental;
>
> whichever is the lower:
>
> Provided that -
>
> (i) where the rent of the premises has been agreed between the parties, and the board is satisfied that no alteration of the agreement is justified, the board shall fix as the fair rent the rent so agreed;
>
> (ii) where, in the circumstances of any case it is not possible to have regard to any open market rental, and the board has not acted in terms of proviso (i), the board shall fix the fair rent in terms of paragraph (a)."

MANYARARA JA

The appellant's case was that there was a subsisting lease to which the respondent adverted in its application to the board. Mr *Gillespie*, for the appellant relied on the summary of the grounds of the application which read as follows:

> "There is no written lease agreement between the parties. The applicant avers that the respondent merely moved to the premises without the authority of the applicant but purported to pay rental to the applicant which the applicant accepted. The current rental being paid is the sum of $1 620,00 per month so that a tacit lease agreement between the parties at this rental could be said to exist."

Mr *Gillespie* relied on the words "tacit lease agreement" as binding on the respondent. As such a lease had not expired or been terminated by notice, so the argument continued, there could be no statutory tenancy and therein lay a misdirection expressed by the President of the Administrative Court as follows:

> "I consider that by retaining possession of the premises after expiry of the lease and continuing to pay rent in terms of that expired lease the appellant *ipso facto* became a statutory tenant as defined in Part IV of the Regulations."

There would be merit in Mr *Gillespie's* submission if the President went merely by the summary of the respondent's case to the board, but this is not so. The President referred to the letter on which the summary was based and that letter gave a different complexion to the matter. It is dated 13 November 1986 and addressed to the company managing the premises by the

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appellant's legal practitioners in the following terms:

> "In your letter you refer to the Lease Agreement over the property. There is no written Agreement between our client and yours, and we presume that you are referring to the Lease Agreement between your client and Kitchen Restaurant, the previous occupant of the property. For the last year or more we have been trying to obtain a copy of that Lease Agreement in order to formalise its cession to our client. The Lease Agreement has never been referred to us, and we were led to believe that all copies had been lost by Mr Miller of Promaven Properties (Pvt) Ltd Our client has, however, now obtained from you an unsigned copy of the Lease. **From the contents of previous correspondence it appears that your client accepts that ours is entitled to occupy the premises in**

MANYARARA JA

> **terms of that unsigned copy lease although the Lease has not been formally ceded to ours.**
>
> Our client is concerned as to its security of tenure over the property. Its concern covers the present time as well as the period after June 30 1987 when the present lease is to expire .... It would seem to us that it is in the interests of your client and of ours that the present Lease be formally ceded to our client, or better still, that a completely new Lease Agreement be entered into between our respective clients covering a substantial period of time. Our client envisages a Lease covering a 4 year period from July l 1986 at the following rental:

Year to June 30 1987	$1 850,00 per month
Year to June 30 1988	$2 127,00 per month
Year to June 30 1989	$2 446,00 per month
Year to June 30 1990	$2 814,00 per month"

(The emphasis is mine).

As it happened, the proposed negotiations did not take place. The reasons appear in the passage out of which Mr *Gillespie* has lifted the "misdirection" he alleged. The full context is as follows:

> "However, some six days before the expiry of the lease Government introduced a rent freeze under the provisions of SI 252A of 1987 effectively precluding respondent negotiating an increase of rent, increasing the rent or recovering possession of the premises until the lifting of the rent freeze sometime later. I consider that by retaining possession of the premises after the expiry of the lease and continuing to pay rent in terms of that expired lease the appellant *ipso facto* became a statutory tenant as defined in Part IV of the Regulations. There was certainly no evidence or submission made to the Board that the parties had entered into a new lease agreement at the existing rent. The fact that respondent did nothing is because it was precluded from doing anything until the freeze was lifted whereupon it immediately applied for a rent determination. In my opinion it is fanciful for the appellant to claim (that) there was an agreement between the parties or that such an agreement should subsist after the application submitted by the respondent to the board."

As Mr *Dyke* for the respondent pointed out, the words "the rent so agreed" appearing in proviso (i) to subs (1) of s 10 do cover the "tacit agreement" on which Mr *Gillespie* sought to rely, and it is that "tacit agreement" to which

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MANYARARA JA

the President of the Administrative Court referred in his Judgment as having expired on 30 June 1987.

To compound its confusion over the issues before the rent board, the appellant has made no attempt whatsoever to withdraw or explain away the self-contradictory letter from its legal practitioner which also contradicts all of Mr *Gillespie's* submissions unequivocally as follows:

> "There is a factual error in the applicant's contention that the respondent Toffs Restaurant (Pvt) Ltd merely moved onto the premises without authority of the applicant and purported to pay rental to the applicant which the applicant accepted. This is indeed surprising since I enclose herewith a photostat copy of a letter from Mr Ridgway of Jacaranda Management Services (Pvt) Ltd which clearly indicates the existence of a lease agreement. The allegation that the respondent merely moved into the premises is therefore without foundation and equally the allegation that a tacit lease agreement exists is equally without foundation."

The writer was referring to the same letter as that to which the appellant's legal practitioners had replied in their letter dated 13 November 1986 which has already been quoted.

It will be recalled that the 13 November letter denied the existence of any lease agreement between the parties and continued as follows:

> "From the contents of previous correspondence it appears that your client (the respondent) accepts that ours is entitled to occupy the premises in terms of that unsigned copy lease although the lease has not been formally ceded to ours."

The unsigned copy lease was between the respondent and the previous occupant of the premises and it expired on 30 June 1987. There can be no doubt, therefore, that on the appellant's own version what arose by operation of law upon the expiry of that lease was a statutory tenancy in terms of s 23 of the Regulations. To put the matter beyond doubt, the appellant itself did nothing during the rent freeze which had been introduced by SI 252A of 1987 to safeguard itself by concluding a new lease agreement on its own proposals for a higher rental (though only marginally) than the rental payable under the expired lease agreement. The advantage of the suggested course is obvious as SI 252A of 1987 prohibited the respondent from seeking a higher rental than the rent due under the expired lease.

MANYARARA JA

As it happened, it was the respondent which got in first after the revocation of the rent freeze by relying on the existing status of the appellant as a statutory tenant in its application for the determination of a fair rent. It was after having found the appellant to be a statutory tenant, quite correctly in my view, that the Administrative Court concluded that proviso (i) to subs (1) of s 10 of the Regulations was inapplicable as no rent could be said to have been agreed between the parties. It followed that the board had been right in relying on the written opinions of an expert valuer engaged by the respondent "with nothing to gainsay the reasonableness or otherwise of these opinions", as the Administrative Court put it.

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All the same, the Administrative Court took the trouble of conducting its own cursory inspection of the premises in the light of the appellant's contention that in any event no justification for an increase in rent existed because, *inter alia*, "the premises are exceedingly old and have reached the end of their useful life".

The Administrative Court found otherwise and concluded as follows:

> "In our experience of such things we would not disagree with the submission that the useful life of the building is sixty years, and of that twenty years remain. In the ultimate result we can only go on the information placed before us and we believe that there is no justification for us to interfere with the determination of the board which we think is consistent with the expert advice given to the respondent. With due deference to the arguments advanced before us it seems to us the formulae set out in the regulations are intended to take due account of the age (of the) premises. Accordingly we would dismiss the appeal against the quantum of the determination."

I agree with the conclusion.

The Administrative Court also found, again quite correctly, that the board's order directing that the determination take effect from 1 March 1990 was a perfectly competent order. The provisions of s 13 of the Regulations specifying the date from which the board may direct that its order take effect do not apply to statutory tenancies. Even if they did, the present order was to take effect on a date permitted by the section, being a date after which the board's secretary received the application. Therefore, the question of retrospectivity in the board's direction raised by Mr *Gillespie* was a red herring which need not be considered.

MANYARARA JA

The appeal is dismissed with costs.

Korsah JA: I agree

Ebrahim JA: I agree

Ali Ebrahim, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

CONJWAYO & ORS v MNANGAGWA & ORS 1992 (2) ZLR 171 (HC)

Court **High Court, Harare**

Adam J

Civil action

3 June & 23 September 1992

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Flynote

Civil procedure - pending civil case - court has no power to order dismissal of pending civil case if litigant in contempt - can only refuse to hear case until litigant has purged his contempt

Criminal law - contempt of court - civil action and criminal appeal case pending - whether real risk that judges hearing these cases would be prejudiced by what had been done - litigant in pending civil case entitled to interview the witnesses of the other side and actions in so doing were not calculated to prejudice the outcome of trial

Delict - injuria - invasion of privacy - requirements of action for injuria and limitations on right to protection

Intellectual property - copyright - who holds copyright in film made about a person in absence of contract with that person

Headnote

The four applicants were all being held in a maximum security prison. Three of them had been convicted in the High Court of murder and had been sentenced to death. Their appeals against their convictions and sentence had yet to be heard by the Supreme Court. The third respondent had previously instituted civil proceedings against three of these men. He was suing them for damages for injuries he had received in a car bomb explosion. The hearing of this civil action was still pending. A film company from the United Kingdom had been commissioned by a television company in the United Kingdom to make a film about South

African destabilisation in Southern Africa. The third respondent was to be in this film. The company sought and obtained permission from first respondent, the Minister of Justice and the second respondent, the Director of Prisons to interview the four applicants in prison and to film the interview. When this filming was done the questioner at the interview was the third respondent. After saying that he was no longer interested in pursuing his civil claim against the applicants, he interviewed each of the men about their role in South Africa's destabilisation campaign. This questioning was filmed by a film crew who had been allowed to set up their equipment in the prison interview room. The men answered some questions but declined to answer certain questions. Short extracts of the responses to questions at this filmed interview were incorporated into the film made by the film company, which film was later screened on British television.

The four men brought an action in the High Court in which they sought a declaratory order against the three respondents that

- their actions constituted contempt of court as they would prejudice both the pending criminal appeal and the pending civil action being brought by the third respondent;
- their actions constituted a wrongful invasion of their privacy; and
- copyright in the filmed interview belonged to the applicants and that the film must be handed over to them.

They also sought

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- dismissal of the third respondent's pending civil action against the applicants on the grounds either of his contempt or that he had abandoned his claim;

- an interdict restraining the respondents from committing any further invasions of the applicants' privacy and from screening the film containing the interviews with the applicants.

There was a dispute as to whether the applicants were put under pressure to participate in the interview. The applicants claimed that they were not told in advance about this interview. They were simply taken into the interview room at the prison and were confronted by the third respondent. They did not freely participate in this interview because they were under constraint and had also been given false promises of release. The respondents maintained that the men had been free to refuse to participate in the interview and that no pressure had been placed upon them to participate.

Held, that the onus was on the applicants to prove that they were entitled to the various remedies sought by them.

Held, regarding the contempt of court issue, that where the basis of the

contempt is an alleged prejudice to a pending criminal or civil case caused by publication of material, it must be proved that the person who published the material intended to prejudice the pending case and that his action created a real risk that that the outcome of the case would be prejudiced in the sense that it would create the risk that there would not be a fair trial of the case. No contempt of court was committed in the present case because:

1. There was no real risk that a fair trial of the criminal appeal would be prejudiced as the appeal would be decided on the basis of the transcript of the evidence in the High Court trial.

2. There was no real risk that the screening of the film would prejudice the fair hearing of the civil case. Even if perchance the High Court judge who was to hear that case happened to have seen the television film in question it would be highly unlikely that he would be so influenced by this that this would jeopardise the chances of a fair hearing. Judges can certainly be credited with being more critical than to accept and to be influenced by whatever they see or read.

3. The third respondent had not committed a contempt in relation to the civil case because a litigant in civil proceedings is entitled to interview the other side's witnesses in order to gather evidence in support of his claim, although on ethical grounds he should notify the other side of his intention to do do. Even if the witnesses were interviewed in order to obtain evidence in support of the third respondent's impending civil claim against the applicants, which was denied by the third respondent, the third respondent did no more than what the law allows him to do and thus his actions were not calculated to prejudice the outcome of the trial.

4. The first and second respondents had no interest in the impending cases and therefore

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could not have been seeking to prejudice the outcome of those cases.

5. If the subjects who were filmed had expressly or impliedly consented to the publication of this film, there could be no contempt but this issue was in dispute and it could not be settled on the papers placed before the court.

Held, as regards the application to have the impending civil claim by the third respondent dismissed, that it had not been proved that he had abandoned his claim and, even if the third respondent's actions did amount to contempt of court, the court had no power to order the dismissal of the action on the basis of his contempt; the only power it had was to order that the contempt be purged by the litigant before his claim was heard.

Held, as regards the issue of invasion of privacy, that an invasion of privacy

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can constitute an *injuria* for which damages can be sought. In order to constitute an *injuria* the act complained of must be intentional, wrongful and a violation of a right. Although persons have a right to the protection of their privacy, this right is subject to limitations and the court must decide whether the particular intrusion upon privacy was contrary to contemporary *boni mores*. As the applicants had been catapulted into the public limelight and had clearly participated in the interviews no *injuria* was established in the circumstances. As there was no *injuria*, the respondents could not be interdicted from committing further invasions of privacy.

Held, as regards the copyright issue, that, unless there is a contract between the subject and the photographer, copyright lies with the photographer. In addition, as the film was already outside the country, the court could not make an order which would simply be a *brutum fulmen.*

Cases cited:

S v *Conjwayo* S-17-91 (unreported)

S v *Hartmann & Anor* 1983 (2) ZLR 186 (S)

Intl Tobacco Co (SA) Ltd v *United Tobacco Co (South) Ltd* 1955 (2) SA 1 (W)

Mr & Mrs 'X' v *Rhodesian P & P Co Ltd* 1974 (4) SA 508 (R)

Rhodesian P & P Co Ltd v *Duggan & Anor* 1975 (1) SA 590 (RA)

Sage Hldgs Ltd & Anor v *Finance Mail* (Pty) Ltd & Ors 1991 (2) SA 117 (W)

Pollard v *Photographic Co* [1889] 40 Ch D 345

Boucas v *Cook & Anor* [1903] 2 KB 227 (CA)

Moothoosamy v *Murugan* (1919) 40 NLR 40

Jackman v *Jackman* 1969 (2) RLR 534 (G)

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R v *Duffy* [1960] 2 All ER 891 (QB)

R v *Umfaan* 1908 TS 62

O'Keeffe v *Argus P & P Co Ltd & Anor* 1954 (3) SA 244 (C)

S v *I & Anor* 1976 (1) SA 781 (RA)

Graham v *Ker* (1892) 9 SC 185

Mhlongo v *Bailey & Anor* 1958 (1) SA 370 (W)

La Grange v *Schoeman & Ors* 1980 (1) SA 885 (E)

Henry Graves & Co Ltd v *Gorrie* [1903] AC 496 (PC)

A P De Bourbon SC for the applicants

E Chatikobo for the respondents

Judgment

Adam J: The third respondent instituted proceedings in this court against

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the first, second and third applicants (Case No HC-2827/90) and in the plaintiff's declaration filed on 11 September 1990 he claims from them jointly and severally damages of $420 000, to which those three applicants have entered an appearance to defend. Prior to this application on 29 August 1991 the applicants' legal practitioners wrote to the Minister of Justice, Legal and Parliamentary Affairs (the "Minister"), the Director of Prisons and the third respondent's legal practitioners in virtually identical terms. In the second paragraph of those letters the legal practitioners wrote that on the evening of 28 August 1991 **"you arranged with the Director of Prisons"** for the third respondent to have access to each of the applicants individually, with video cameras and screen, a camera operator, a sound engineer and lighting expert with a photographer. The third paragraph states that each of them, without warning, were taken individually into a room and confronted by the third respondent, who informed them that he had withdrawn the action in Case No. HC 2827/90 (which is not correct) and that he was seeking evidence from them for the conduct of legal proceedings he proposes to commence against the South African Government. The fourth paragraph states that such conduct was a blatant and deliberate breach of their clients' rights in terms of the Zimbabwe Constitution as well as civil laws of Zimbabwe and such flagrant breach entitles them to damages from the respondents personally and the Zimbabwe Government for such misconduct. The fifth paragraph states that filming them without their consent or approval as well as recording their answers was a further breach and any use of that material will be illegal and will expose the user to a claim for damages based on their invasion of privacy and the defamation that will occur as a consequence of publication and that the copyright in the film and sound recording has been illegally acquired, use of which will also be illegal. The sixth paragraph states that copyright will

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vest in their clients and that no use of that material may be made without their prior approval. On 6 September 1991, the third respondent's legal practitioners in their letter advised the applicant's legal practitioners that they themselves refute making the arrangement referred to in the 29 August 1991 letter. On 9 September 1991 the Attorney-General wrote in reply to the letters to the Minister and the Director of Prisons and in the second paragraph informed the applicants' legal practitioners that they had no interest whatsoever in Case No. HC 2827/90. The third paragraph states that **"they are at a complete loss to understand the legal basis upon which their clients seek to claim"** against the Minister and the Director and that visitors, relatives and legal practitioners who wish to see prisoners are allowed to do so at the discretion of the Director and subject to Prison regulations governing such visits and where members of the public during visits see prisoners, what transpires between them is of no

concern to the Director nor the Minister and it is entirely up to the prisoner and within his rights to refuse to see visitors, let alone to allow visitors to take photographs. The fourth paragraph states that the third respondent requested to see the applicants; that the Director used his discretion to allow it but this was subject to the rights of their client to refuse to meet the third respondent and refuse to be photographed; that with regard to the particular incident the applicants were told of the identity of the visitor, informed of the purpose of his visit in that the third respondent wanted to interview them and that he had video cameras and screen and all the equipment necessary for the production of the film; that the applicants were free to refuse both the interview and the photographic sessions but they did not; instead they seemed to relish the opportunity of meeting the third respondent and the opportunity for publicity which the production of a film would bestow and that the interviews were conducted without protest. The fifth paragraph states that their clients freely co-operated with the efforts at film production and the Attorney-General had difficulty in understanding in what respects their clients' rights, if any, would have been breached; that the permission granted by the Director to the third respondent to visit and talk to their clients was lawfully granted, there is therefore no substance whatsoever to the applicants claims against the Minister and the Director and going by the lack of specificity of the alleged breaches of the Constitution their clients claims and complaints are frivolous and vexatious. The sixth paragraph reiterates that what transpires during a visit is of no concern to the Director or the Minister unless there is a risk to security. The seventh paragraph states that their clients' claim to copyright to the film and sound recording is clearly a matter between them and the producers, that the Zimbabwe Government claims no copyright and that by claiming copyright their clients are blowing hot and cold as the applicants cannot on the one hand declare the film and sound recording is illegal and on the other hand claim copyright in an illegal production.

In a further response to the applicants' legal practitioners letter of 6 September 1991 to the Minister, the Attorney-General on 12 September 1991 wrote that the Director's role was limited to the granting of permission to the third respondent and his crew as he was entitled to and that the applicants were not denied the right to refuse the interviews and to be photographed.

In a further letter of 11 September 1991 the third respondent's legal practitioners advised the

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applicants' legal practitioners that the third respondent acted in a lawful manner in obtaining interviews with the applicants, who voluntarily participated in those interviews and there is no question of their rights being breached in any way.

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In this application filed on 7 October 1991 the order sought by applicants is that the respondents are held to be in contempt of court and in breach of the applicants' right to privacy; that the respondents be interdicted from committing any further invasion of the applicants' privacy; that the third respondent's proceedings in Case No. HC 2827/90 be dismissed with costs; that the respondents be interdicted from making use or publishing in any respect whatsoever any material recorded at Chikurubi Prison on 28 August 1991 which involves the applicants; that copyright in the said video tapes, sound recordings and photographs is declared to vest in and belong to each applicant; that the third respondent deliver to the applicants' legal practitioners the video tape recordings, sound recording and photographs made at the interview between himself and each of the applicants at Chikurubi Prison; and that the respondents pay the applicants' costs of these proceedings jointly and severally on the legal practitioner and client scale.

In the founding affidavit the first applicant states that the whole interview that took place was clearly set up and arranged with the approval and authority of the first respondent who was present, (having been seen by him) in a separate office throughout the proceedings. He, as well as the third and fourth applicants, in their affidavits aver that after 4 pm all the applicants were taken to the Administrative Centre from their cells in handcuffs without any official indication as to what the reason was for their movement and kept in separate offices. The applicants state that the statements annexed as "H1 to H4" though brief represents to the best of their recollections the main points at their interview and they request that this court have access to and view of the video tapes. They state that the interview was clearly designed by the third respondent with the active participation, authority of the other two respondents with a view to the third respondent gathering evidence for an action which the third respondent intends to institute against the South African Government. They indicate the contents of the interview clearly relate to and could well prejudice both the appeals against their High Court convictions and sentences of all the applicants in the Supreme Court and in the civil proceedings in Case No. HC 2827/90. They note that each was taken without handcuffs and then returned when the handcuffs were replaced and no indication was made what the interview was about save that the Prison Officer said it was associated with their release. They indicate that they were in no position to disobey or refuse the requirement to attend the Administrative Offices. The applicants state that the second respondent was present in the interview room throughout the time and was the controlling authority. The third applicant states that immediately he walked into the room and was being filmed and the third respondent told him who he was, the third applicant got up and walked back

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to the door but was stopped by the second respondent and other prison officers who took hold of him and informed him that there was nothing to worry about as they just wanted a few questions answered. They indicated that their interview was filmed and sound recorded by the team from either Cable News Network or Channel 4 News Team from Independent Television of Britain (who were not identified to them) and that they only saw on the side of the cameras the letters CNN or C4N. They maintain filming commenced from the moment they entered the room and that they were given no warning that the interview was to be filmed or recorded and they did not know the reason for them being taken to the office. They were completely taken by surprise when they found the third respondent conducting the interview. They were in no position to refuse to answer except the second and third applicants refused to answer certain questions. They object strongly to this invasion of their privacy, which was occasioned by the prison officer under the direction of the first and second respondents. Had they been given any forewarning of what was in store for them they would have objected and refused to attend. They were very annoyed and distressed that they were (except the second applicant who was not) tricked into believing it related to their release. They thought the interview could somehow affect their appeal which they had in some way prejudiced but at the same time they did not want to affect their chances of obtaining clemency from the President and release. They could not refuse to answer the questions put to them because of their present circumstances in which they cannot disobey those in authority over them. They also feared that they could prejudice their position and prospects of early release if they refused to answer when suddenly confronted by the third respondent. The interview lasted between 30 and 45 minutes and as soon as they could on the following day they asked to see their legal practitioners. They duly instructed their legal practitioners to write to the respondents They have seen the replies from the Attorney-General and the third respondent's legal practitioners and deny emphatically that at any time they agreed or freely co-operated to the interview or knew or agreed to it being recorded on film or sound or to photographs to be taken. They state that copyright in the recordings cannot vest in any of the respondents, in particular the third respondent, due to the lack of their consent or agreement to the filming, recording or photographing that took place and therefore such copyright remains vested in each of them. They indicate that had the second respondent informed them who wanted to see them they would have refused the interview and such non-disclosure is a clear breach of their rights and they were entitled to the redress they seek. They did not want such an invasion of their privacy to occur again. They do not wish to have the material recorded in films, videos, photographs and sound recordings to be used in any way

whatsoever and publication of any sort of the interview could well prejudice their position and they think it unfair and unjust that they should be compelled to undergo such an interview for dissemination to the public, particularly while their appeal is still pending and they are in prison and even publication in Britain could still be felt and have its impact in Zimbabwe.

In the opposing affidavit for the first and second respondent, the second respondent states that only part of the order sought affects them; that none of the applicants' affidavit show how they have been in contempt of court nor show any unlawful act on his part resulting in breach of the applicants' rights to privacy; that none aver that there is reasonable apprehension that the

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breach complained of will recur; that none allege that either himself or the first respondent has any of the recorded materials or that they have any interest or participated in making of the materials, in that event he does not understand how they can comply with an order in relation to materials in the possession of some other parties. The second respondent avers that although the first respondent was at the time at the prison he was in a different section and in a separate room and had nothing to do with what actually transpired; that permission was granted for the interview to be conducted on condition that the materials would no be seditious or of such nature as to give the applicants an opportunity to utter scurrilous remarks against the Zimbabwe Government, that the first respondent did not speak to the applicants and did not enter the interview room; that his interest was to view the films to ensure that they did not breach the security laws of Zimbabwe and had nothing to do with the actual interviews or filming; that they claim no interest in the video tapes and that they do not object to the video tapes being made available to this court save the video tapes have to be obtained from the makers over whom they have no control and that he is not aware of the existence of any copies in Zimbabwe. He states he does not know in what manner the contents of the interviews may influence any appeal or court proceedings, the contents of annexure "H1" of the first applicant on the events that took place is exculpatory in nature and in no manner does he implicate himself or another person. He indicates that from what the second applicant avered it shows that the second applicant was acting freely and voluntarily, for if he was under compulsion he could not have refused to answer certain questions as he claims he did; that this is exactly what he should have done if he did not wish to be questioned and filmed; that he should not have chosen to answer those questions which were less embarrassing; and that the second applicant was *compos mentis*. The second respondent indicates that he did not state to any of the applicants that the interview was associated with their release and he put them to the proof thereof. He states that it cannot be correct to say the

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applicants were in no position to disobey or refuse the requirement to attend to the Administration Office and interview; that there was no compulsion and the applicants could easily have refused to answer any questions; that they answered voluntarily; that the nature of their answers as contained in annexure "H1 to H4" are inconsistent with answers obtained otherwise than voluntarily, in any event their affidavits do not contain any allegation of compulsion and if there was any inducement, it did not operate on their minds at that time as they did not say anything incriminating. He avers that the interview proceedings were done under his authority in terms of powers vested in him under the Prisons Act and the first respondent who has overall authority over him had no objection as long as the video tapes did not contain remarks which were seditious. He mentions the facts summarized in *S* v *Conjwayo* S-17-91 and indicates that this crime invited a lot of publicity locally and internationally; that the first applicant's arrest and subsequent trial attracted a lot of publicity, his photographs appeared in the newspapers and he was filmed by both local and foreign reporters on his way to and from the cells at the High Court. In short all of a sudden, and because of his acts of sabotage, the first applicant had become "news item". He states that the nature of the first applicant's crimes has catapulted him into the public arena; that his matter is now of public interest. He indicates that the first applicant's claim to the right of privacy is subordinate to the public interest. The

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second respondent avers that it was after such considerations that his powers of authorising any person to have access to a condemned prisoner were involved, that if the applicants were not happy with the procedures they could have stood mute or expressed unwillingness, instead they got involved into voluntary discourse. He asserts that the applicants contradict themselves when on one hand they state in their affidavits that they were in no position to refuse to answer questions put to them and then they state they were annoyed and distressed that they were tricked into believing that the interviews were about their release. He maintains that the former assertion by the applicants presupposes an element of compulsion whereas the latter indicates they spoke voluntarily although under a misconception. The second respondent avers that the applicants further contradict themselves where they state that they could not refuse to answer questions put to them because of their present circumstances in which they cannot disobey those in authority over them, so if they had been aware in advance about the interview the applicants would not have objected because they could not "disobey those in authority". The second respondent asserts that the applicants voluntarily participated and, had they refused the applicants would have been returned to their cells. He states that the Prisons Act in s 111 gives right of access to persons authorised by the Director who, in terms of that Act, has the

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administrative command, superintendency, control and direction of all prisons subject to any order or directions of the Minister. He states that the Director has discretion and certainly there is nothing he did which is contrary to the Prisons Act or the Prisons Regulations. The second respondent indicates that whereas the applicants say that they did not freely participate, they admit taking part, do not allege that anyone compelled them, they did not protest, they had every right to insist on their right to privacy but they did not. He states that the photographer and himself are different people there is nothing that could have made the photographer think that the applicants were not voluntary participants in the absence of any indications from the applicants. He asserts that the first and second respondent do not claim any interest in the copyright and he has always thought that copyright in a film vests in the maker of the film and that if any person was filmed contrary to any law he could claim damages. The second respondent states that he is under no obligation to inform a prisoner what his visitor has come for and it is up to the prisoner and the visitor; that he is not aware of any law that requires him as Director to advise a prisoner as such, neither is he aware of a prisoner's right to be informed as such and that it is up to the prisoner to speak to his visitor or not. He states that now that the applicants have informed him of their attitude through their legal practitioners, any request to visit the applicants will be treated in light of their protestation; that in view of the fact that he now knows that the applicants do not want any kind of interviews referred to, he obviously will not authorise any; that if the applicants had indicated the same attitude instead of talking for about 30 to 40 minutes he would have directed that they be returned to their cells and that he was sure that no reporter would be interested in taking photographs of a person protesting and covering themselves from his camera without communicating with the interviewer. He points out that although in terms of s 189 of the Prison Regulations 1956 he can give authority for photographs to be taken in prison and under s 140 to allow any person to communicate with a prisoner, he does not intend to exercise any such powers in cases where he has notice that prisoners do not wish to see their visitors or in cases where prisoners verbally indicate their

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unwillingness, as opposed to where prisoners do not speak out but acquiesce.

In his opposing affidavit the third respondent states on 13 October 1987 at Avondale Shopping Centre, he was the object of a bomb attack, from which he received serious injuries and shortly thereafter he left for Britain for medical attention and also to read for a doctorate in Modern African History at Oxford University. He instituted in October 1990 proceedings in the Supreme Court of South Africa against the South African Government and

others, including Guy and Kit Bawden, claiming damages for the bomb attack. He states that since April 1990 he has been researching the subject of South African destabilization in the 1980s in order to publish a book, for which he has acquired a large amount of information on the South African military and intelligence network. In April 1991, he discussed his research with Nicholas Claxton of Goldhawk Film and Television Productions Ltd in Britain. In May 1991 an agreement was concluded between Goldhawk and Channel Four Television of Britain whereby Goldhawk was commission to make a film which explored some aspects of South African destabilization in a historical context using the third respondent's personal experience as a victim of destabilisation as a vehicle to personalise the story. Claxton was the director of the film and the third respondent wrote the script and would be the presenter. Filming began on 29 July 1991 in Zimbabwe and continued until 28 August 1991 in three countries, South Africa, Mozambique and Zimbabwe and he conducted the film interviews. He states that he was present when Claxton requested approval from the Minister to interview the applicants; that he said that this request was acceptable on condition that the first respondent was able to view the resulting tapes and could remove any remarks which prejudiced the security of Zimbabwe, that the Minister's instructions were that no filming could take place in areas of the prison other than those stipulated by the Director who would be present during the films; that the Minister pointed out that the applicants may refuse to answer questions put to them in which case there was nothing which the Minister could do and that it was the third respondent's understanding that the Director had agreed to what the Minister had told them. He indicates that on 28 August 1991 at Chikurubi Prison they were shown to an interview room where preparations for filming were made and the Director took no further part and facilities were set up to enable the Minister to view completed tapes on a monitor in a separate room. He states that each applicant was brought in turn and as each entered the third respondent introduced himself and asked them to take a seat, when he proceeded to interview each of them. He avers that in the final version of the film, which has been broadcast on Channel Four Television in Britain, short excerpts of the four interviews were screened and most of what the applicants said was omitted. He states that at all material times he was acting as an employee of Goldhawk and he therefore does not own the material produced for the film and furthermore he has no right to it and he does not in fact have it in his possession. The third respondent maintains that it was Goldhawk which made the film and therefore they would normally have copyright in it but in terms of the agreement between Goldhawk and Channel Four Television Goldhawk have ceded their copyright to Channel Four Television, which now have the copyright in it and

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furthermore they are in possession of the full tapes including the interviews at Chikurubi Prison. The third respondent agreed with the applicants that the whole of the interview that took place was set up and arranged with the approval and authority of the first respondent and that with reference to video tapes he should emphasize that it would be necessary to view the full unedited video tapes which the applicants would have to obtain from Channel Four Television. He states that parts of annexure"H1" of the first applicant are inaccurate in certain material respects and they are by no means a full account of what was said. The third respondent denies that the interviews were conducted with a view to gathering evidence in relation to the civil action and he made it clear to the applicants that he was not interested in pursuing them but in unlocking the secrets behind the destabilisation. He indicates that the first and second respondents had no part in deciding how he conducted the interviews or what the contents would be. The third respondent states he did not threaten to institute proceedings in South Africa but told them that he had already done so because he was interested in revealing the secrets of destabilisation. He denied that the interviews could prejudice the applicants' appeals or the civil proceedings. He asserts that there was no compulsion on the applicants to be interviewed by him; that they were at liberty to terminate them at any time and were also at liberty to answer or to decline to answer any questions put to them. Goldhawk conducted the filming and it was not subject to the control of the first and second respondents. He reiterates that, as explained by the second respondent in his affidavit, what the applicants had been convicted of is a matter of great public interest and so in the public limelight, whether they like it or not, and it is therefore denied that the applicants' rights were infringed in any way. He states that he carried out the interviews in terms of generally accepted principles of journalistic enquiry; that none of them kept silent or were forced to answer the questions they answered, which turned out to be most questions but refused to answer others. He maintains that at no time did he say or give any indication to the applicants that he had anything to do with their possible release or he had the power to do so or arrange it and in fact he did not have such power. He denies that he acted contrary to s 111 of the Prisons Act; he says he was at all times acting lawfully. He denies that the copyright in the films vests in either the applicants or the respondents but does in fact vest in Channel Four Television in Britain. He agreed that it was correct that the second applicant answered some questions but refused to answer others; that he was not forced to answer which shows that he would decide what questions to answer and there was in fact no compulsion put on him. As for the third applicant's allegation that the second respondent wanted to leave the room, he disputes that this occurred and put him to proof thereof. He asserts that no grounds of

complaints have been set out by the applicants in seeking a contempt order against him and therefore the applicants have not discharged the onus cast upon them. He strongly denied he acted in contempt of this court in breach of the applicants' rights of privacy. He maintains that the applicants are quite able to refuse to see people or to refuse to answer questions put to them without any specific order from this court. In light of their present attitude, he confirms that he will not be seeking any further interviews with them a this stage. He states that the applicants

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do not set out in their affidavits any grounds as to why his action in Case No. HC 2827/90 should be dismissed with costs and he disputes that there is in fact any basis for such an order. He did indicate to them that he had no wish to proceed against them as they were simply pawns in a bigger game whose objectives they were ignorant of and he still retains this view but in light of their extraordinary behaviour in bringing this application against him, he will not relinquish his rights to proceed against them. He states that he has no control over the use of the recorded materials; that he was employed by Goldhawk; that he has completed his contractual obligations and retains no rights whatsoever over the sale or use of the materials; that he has no copyright of that material and the applicants would have to seek the declaration they want from Channel Four Television in Britain. He cannot comply that he deliver the video tape records to the applicants' legal practitioners as he had no control or custody over them.

In their answering affidavit, the applicants indicate that they are unaware who possesses the recorded materials now; that the first respondent clearly had an interest in the materials because he viewed them, that they are unaware whether all the respondents made copies or not at that time or later and they must be called upon to account for what occurred to the materials. The applicants state that they are dismayed to hear that the copies of the videotapes are no longer in Zimbabwe and can only point to the fact that such recording was clearly with the authority, direction and co-operation of the first and second respondents. The applicants assert that whether or not the third respondent made the films for his own purposes or for other persons does not affect the fact that the third respondent did not have their authority, consent or approval to the interrogation nor to filming of it. The applicants state that if the tapes were shown extensively on television it would influence people and may influence the appeal and are certainly designed to influence the pending civil proceedings in Case No. HC 2827/90. The applicants assert that they never gave their consent in making of this material and in such circumstances they are most particularly aware that the material would prejudice legal proceedings. The applicants state that it is the practice of the

officers in charge of Chikurubi Prison to advise them who wishes to see them and on occasions the third and fourth applicants have declined to accept the opportunity to see a visitor.

I should point out that it is not disputed in all the affidavits filed that the applicants were aware when they were being taken from their cells that they were being taken for an interview.

In his heads of argument, the applicants' legal practitioner submits that the second respondent, in his personal capacity, acting on the instructions and directions of the first respondent in his personal capacity, had no right to authorise access by a litigant in a civil action against those applicants in Case No. HC 2827/90 in terms of s 111 and that the actions of the respondents were clearly a contempt of court and satisfies the test in *S* v *Hartmann & Anor* 1983 (2) ZLR 186 (S). It is furthermore argued that the interviewing of those applicants in Case No. HC 2827/90 was a breach of the well-known rule laid down in *International Tobacco Co (SA) Ltd* v *United Tobacco Co (South) Ltd* 1953 (2) SA 1 (W) at 11-13. It is also submitted that the making of the film was itself a breach of the rights to applicants' privacy and that the attempted justification by the second respondent that it was in the public interest to invade their privacy is without legal

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foundation. Reference was made to *Mr & Mrs 'X'* v *Rhodesian Printing & Publishing Co Ltd* 1974 (4) SA 508(R) and *Rhodesian Printing & Publishing Co Ltd* v *Duggan & Anor* 1975 (1) SA 590 (RA) as establishing a right to privacy and to *Sage Holdings Ltd & Anor* v *Finance Mail (Pty) Ltd &Ors* 1991 (2) SA 117(W) at 134-136 as to public interest. It is also maintained on their behalf that the applicants have right under the law relating to copyright to restrain the publication of their images and photographs without their consent: *Pollard* v *Photographic Co* (1889) 40 ChD 345 and *Boucas* v *Cooke & Anor* [1903] 2 KB 227 (CA).

In their heads of argument, the respondents' legal practitioners submit that the test as to whether or not a publication is contemptuous is that there must be proved that there was a real risk of the publication prejudicing a fair trial of the action dealt with in the publication: *S* v *Hartmann & Anor* *supra* at 195. The applicants have not proved this since there is no contempt where the subject of the publication, with full knowledge of their rights, agree to the interviews which is what the respondents aver but this admittedly is denied by the applicants. Therefore, it is argued, this conflict cannot be resolved on the papers. Further, the applicants must prove that the respondents acted with a common purpose and with *mens rea*. As far as the first respondent is concerned, it is not disputed that he was in a separate room from the interview

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room to ensure, in his capacity as the Minister responsible for the prisons, that nothing detrimental to State security was going to occur. The applicants' assertion that he first respondent acted in concert with the other respondents is based on nothing more than his presence at the prison and it is not suggested that he had any interest in the civil proceedings and in the appeal. The second respondent was present in his capacity as the Director and can have no possible interest in the outcome of the proceedings. It is true that third respondent did ask the applicants about the bomb attack on himself but there is no proof whatsoever that he did so in order to influence the court proceedings and he told the applicants he had no wish to proceed against them and so he could not have intended to prejudice the applicants in Case No. HC 2827/90. As far as the criminal appeal is concerned, he is not a party to it, so publication of the interviews is not likely to influence the outcome of that criminal appeal. It is also argued that it must be borne in mind that a litigant in civil proceedings is entitled to interview the other side's witnesses. This rule is laid down in *Internationl Tobacco Co (SA) Ltd* v *United Tobacco Co (South) Ltd, supra*, at 112, part of that rule being that the other side must be notified as a rider intended to encourage etiquette between litigants and no more. There is nothing wrong in a litigant interviewing his opponents to obtain evidence to support his claim: *Moothoosamy* v *Murugan* (1919) 40 NLR 402. It must follow, then, that even if the third respondent intended to gather evidence to support his claim, which is denied by him, he did no more than what the law allows him and thus his actions were not calculated to prejudice the outcome of the trial. However, there is a dispute of fact concerning what was said during the interviews which cannot be resolved on the papers.

It is also submitted that there is clearly no legal basis for the relief sought against the third respondent that Case No. HC 2827/90 be dismissed. Where a party is in contempt, the court can in an appropriate case refuse to hear him until he has purged his contempt but it cannot

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(before the matter even comes to trial) dismiss the action on account of contempt: *Jackman* v *Jackman* 1969 (2) RLR 534 (G).

It is also argued that the respondents have demonstrated that they do not have in their possession and it is not within their power to stop the broadcast of the recordings and therefore the relief sought by the applicants that they be interdicted from making use of or in any way publishing the recordings; that the copyright be declared to vest in and belong to the applicants and that the third respondent deliver the recordings cannot be made against them. Similarly, the relief that the respondents be held in contempt of court and in

breach of the applicants' right to privacy is a *brutum fulmen* as it would seem that the contempt order was intended to act as a basis upon which the other reliefs could be granted and if the other reliefs cannot be granted then the above relief sought cannot also be made.

It is further submitted that so far as the rights of privacy are concerned this court can only grant it if it finds that there was an unwarranted invasion of the applicants' rights to privacy. The passage from the American Restatement, cited by DAVIES J (as he then was) in *X & Anor* v *Rhodesian Printing & Publishing Co Ltd*, *supra*, is most appropriate.

The onus is on the applicants to show that the respondents are to be held in contempt of court; that they are in breach of the applicants' rights to privacy; and that copyright in the recordings should be declared to vest in and belong to them. In *S* v *Hartmann* & Anor, *supra*, GEORGES CJ adopted Lord Parker's approach in *R* v *Duffy* [1960] 2 All ER 891 at 895, that the real risk test

> "... is the proper test to be applied in deciding whether or not a publication is a contempt of court. It must be examined objectively to determine whether there can be said to be a real risk that it was likely to prejudice the fair trial of the action discussed."

In *R* v *Duffy*, *supra*, at 896 LORD PARKER CJ said:

> "The question always is whether a judge would be so influenced by the article that his impartiality might well be consciously, or even unconsciously, affected. In other words, was there a real risk, as opposed to a remote possibility, that the article was calculated to prejudice a fair hearing?"

In this context it must not be forgotten that judges "can certainly be credited with being somewhat more critical than to accept whatever may appear" in the press.

It is accepted that there cannot be a contempt of court where the subject of the publication impliedly or expressly consents to the publication. The respondents state there is a conflict on the issue of consent which cannot be resolved on the papers. Even if this court were to take a robust view of this, as correctly submitted by the respondent's counsel, the applicants have not even suggested in their affidavits that the first and second respondents had

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any interest in the pending criminal appeal in the Supreme Court and civil proceedings in this court. According to annexures "H1 to H4", (which the applicants say represents the main points that were raised during the interview), the pertinent subject-matter concerned the following: surveillance at the house in Avondale; working in the pay of the South African Government; people who were trying to kill the third respondent; Kit and Guy Bawden; bombing of the third respondent and information to use against South African Government.

In light of the foregoing, the applicants have not established how showing the video tapes extensively in Britain, South Africa and Zimbabwe posed a real risk that was calculated to prejudice the criminal appeal before the Supreme Court and the civil proceedings before this court. The criminal appeal would be disposed of on the basis of the transcript of the evidence in the High Court trial. They do not give any details as to what evidence would be led at the civil proceedings and it seems highly unlikely that a judge of a High Court would be so influenced by the showing of the video tapes (that is perchance that particular High Court judge were to see such a television programme) as to pose a real risk that the trial in Case No HC 2827/90 would be prejudiced. I am satisfied that there is no real risk that the recording of the interviews conducted by the third respondent is likely to prejudice a fair hearing in the Supreme Court and this Court.

Now in *R* v *Umfaan* 1908 TS 62 INNES CJ at 66 said -

> "If we look at the essentials of *injuria* we find ... that they are three. The act complained of must be wrongful; it must be intentional; and it must violate one or other of those real rights, those rights in rem, related to personality, which every free man is entitled to enjoy. CHIEF JUSTICE DE VILLIERS *Laws of Injuries* says (p 27): 'With these ingredients to hand it will be found that there are three essential requisites to establish an action of injury. They are as follows - (1) an intention on the part of the offender to produce the effect of his act; (2) an overt act which the person doing it is not legally competent to do; and which at the same time is (3) an aggression upon the right of another, by which aggression the other is aggrieved and which constitutes an impairment of the person, dignity or reputation of the other'
>
> ...
>
> Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against aggression upon his person, against the impairment of that character for moral and social worth to which he may rightly

> lay claim, and of that respect and esteem of his fellow-men of which he is deserving, and against degrading and humiliating treatment; and there is a corresponding obligation incumbent on all others to refrain from assailing that to which he has such a right."

Turning to *O'Keeffe* v *Argus Printing and Publishing Co Ltd & Anor* 1954(3) SA 244(C), WATERMEYER AJ (as he then was) stated at 248-249:

> "In this regard de Villiers [*Injuries*] says (p 83):
>
> > 'Whether an act is to be placed amongst those that involve an insult, indignity, humiliation or vexation depends to a great extent upon the modes of thought prevalent amongst any particular community or at any period of time or upon those of different classes or grades of society, and the question must to a great

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extent therefore be left to the discretion of the court where an action on account of the alleged injury is brought.' ...

It seems to me that to use a person's photograph and name, without his consent, for advertising purposes may reasonably constitute offensive conduct on the part of the user.

...

The unauthorized publication of a person's photograph and name for advertising purposes is in my view capable of constituting an aggression upon that person's *dignitas*. It is not necessary for me in the present case to hold, and I do not hold, that this is always so. Much must depend upon the circumstances of each particular case, the nature of the photograph, the personality of the plaintiff, his station of life, his previous habits with reference to publicity and the like."

Again, in *Mr & Mrs "X"* v *Rhodesian Printing and Publishing Co Ltd*, *supra*, at 512-513 DAVIES J (as he then was) observed:

"I return now to paragraph 867 of the *American Restatement of the Law* [of Torts]. The Rule there put forward is that -

'A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other'

And in the comment of this Rule, the following statements are made:

At p 399 -

'The rule stated in this section gives protection to the interest which a person has in living with some privacy, but this protection is relative to the customs of the time and place and to the habits and occupation of the plaintiff'.

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At p 400 -

'One who unwillingly comes into the public eye because of his own fault, as in the case of a criminal, is subject to the same limitations upon his right to be let alone. Community custom achieves the same result with reference to one unjustly charged with crime or the subject of a striking catastrophe. Both groups of persons are the object of legitimate public interest during a period of time after their conduct of misfortune has brought them to public attention; until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims.'

And:

'On the other hand, liability exists only if the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability accrues. These limits are exceeded where intimate details of the life of one who has never manifested a desire to have publicity are exposed to the public, or where photographs of a person in an embarrassing pose are surreptitiously taken and published. On the other hand, there is no invasion of a right of privacy in the description of the ordinary goings and comings of a person or of weddings, even though intended to be entirely private, or of other publications to which people do not ordinarily seriously object. In determining liability, the knowledge and motives of the defendant, the sex, station in life, previous habits of the plaintiff with reference to publicity, and other similar matters are considered. A distinction can be made in favour of news items as against advertising use. It is only when

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the defendant should know that the plaintiff would be justified in feeling seriously hurt by the conduct that a cause of action exists.'

In my view, very much the same considerations apply in our law. It is clear that there is a qualified right to privacy, the extent and nature of such right depending in each case upon the kind of factors referred to in the *American Restatement*. Moreover, in deciding whether or not to afford relief in any particular case, a court will often have to steer a middle course between apparently conflicting interests. As is said by Professor Winfield in an article in 47 LQR 23, at p 41 -

> 'The difficulty is to select a test which will not unduly hamper the freedom of the press or of harmless if somewhat trivial comment, but which will put a stop to outrages on the respect of a man and his friends for himself'."

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Also, in *S* v *I & Anor* 1976 (1) SA 781 (RA)at 783E-786 BEADLE ACJ said:

"The sole issue in the case is whether, in these circumstances, the first and second appellants were rightly convicted of the crime of criminal *injuria* for peeping through the bedroom window ...

There is no doubt, on the facts of the instant case, that the privacy of the complainant was invaded and that that invasion injured her dignity. BOTHA AJ in the case of *S* v *A and Anor* 1971(2) SA 293 (T) lays down clearly (see pp 396-397) that an invasion of privacy is an injury to dignitas and not a separate injury to a personality right distinct from an injury to *dignitas* ... BOTHA AJ, in coming to this conclusion, relies on such time-honoured authorities as Melius de Villiers' work, *The Roman and Roman-Dutch Law of Injuries*, and the Judgment of INNES CJ in *R* v *Umfaan* 1908 TS 62 ... Hunt *South African Criminal Law and Procedure* Vol 2 p 495 also expresses the same view as BOTHA AJ

...

In this case, as I see it, ... peeping ... through her window was clearly an invasion of her privacy. Put another way, her *dignitas* was injured by the invasion of her privacy. The sole issue in this case, as I have said, is whether in the circumstances, the appellants were justified in ... invading the complainant's privacy in the manner in which they did? If they were so justified, the fact that as a necessary consequence of this invasion of privacy the complainant's *dignitas* was injured is an irrelevant consideration ...

The circumstances in which privacy of the individual may be invaded without incurring legal responsibility were considered recently by this court in the case of *Rhodesian Printing and Publishing Co Ltd* v *Duggan & Anor* 1975(1) SA 590 (RA) ... laid down that while every person has an inborn right to the tranquil enjoyment of his peace of mind and to have his privacy respected, this rule is subject to many limitations. What the limitations are, in any particular case, must depend on a variety of circumstances. The limitations are, however, largely governed by 'the mode of thought prevalent amongst any particular community at any period of time'. Do the modes of thought prevalent in the community consider the invasion of privacy in a particular case to be sufficiently serious to warrant a criminal prosecution?

But the *Rhodesian Printing and Publishing Co* case, *supra*, also points out that there may be other circumstances, such as reprehensible conduct of the complainant, which the modes of thought prevalent in the community might consider sufficient to justify the invasion of privacy even where that invasion was not a trivial one. Hunt *loc cit* sums up the

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matter well when he says (see p 490):

> 'The basis for judging the gravity is, therefore, largely the court's conception of contemporary *boni mores*. This does not mean that contemporary social attitudes inevitably prevail. The courts rightly only give effect to *mores* which they consider *boni*. The public interest has to be taken into account, and the courts are usually a better judge of that than public opinion which is in any event neither organised nor, on many matters, readily and reliably ascertainable. It is inevitable (and desirable) that the courts should, in this limited sense, be *custodes morum*...'

It is true that Hunt is dealing only with the case where the modes of thought of the community consider the invasion of privacy to be too trivial ... but the same principles also apply to the second type of case dealt with in the *Rhodesian Printing and Publishing* case, *supra* ... which lay down this principle ... that precisely the same invasion of privacy may be justified in one case and not in another depending upon the conduct of the particular complainant ...

The complainant, acting on his own behalf and also as the representative of the minor children, moved the court for an interdict restraining the publication ... It was held that the complainant, because of his unlawful conduct, was not entitled to any protection from this invasion of his privacy and if the court were concerned with his interests alone, the interdict would be refused ... the privacy of the children stood on an entirely different footing. They were not wrong-doers. The mode of thought of our community, influenced by our statute law, protected children from undue publicity and the interdict was granted ...

Reference might also usefully be made to sec 2(2) of the Privacy Act, 1968, of British Columbia, referred to in the Canadian case of *Davis* v *McArthur* (1970) 17 DLR (3d) 760 at p 761.

That section reads:

' (2) The nature and degree of privacy to which a person is entitled in any situation or in relation to any matter is that which is reasonable in the circumstances, due regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a violation of the privacy of another, regard shall be given to the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties.'

It is true that this is a statutory provision dealing with the civil law, but that section seems to me to sum up very well the factors a court will consider in deciding whether or not any particular invasion of privacy should be regarded as contrary to contemporary *boni mores*.

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> In making this decision, the court will often have to reconcile what, on the face of them, appear to be conflicting legal principles."

The *American Restatement of the Law of Torts* made reference to disclosures concerning celebrities, public figures and persons that have been thrust into the public eye becoming objects of legitimate public interest. There the issue always concerns when should publication about them be regarded as of public interest and newsworthy. The disclosure surely must be in regard to aspects pertaining to their public life and related by reason of some conduct directly involving them whilst in the public limelight. Prosser *Law of Torts* (4 ed) suggests that the reasons why they forfeit their right to privacy are because: (1) such persons have sought publicity and consented to it, therefore they cannot object; (2) their personalities and affairs have already become public so can no longer be treated as their own private business and (3) the media has a privilege to inform the public about them.

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It should not be forgotten as correctly pointed out in *Graham* v *Ker* (1892) 9 SC 185 at 187 by DE VILIERS CJ:

> "As a general principle, I take it to be for the public benefit that the truth as to the character or conduct of individuals should be known. But the worst characters sometimes reform, and some of the inducements to reformation would be removed if stories as to past transgressions could with impunity be raked up after a long lapse of time. Public interest, as I conceive it, would suffer rather than benefit from any unnecessary reviving of forgotten scandals. But the commission of recent offences against the law or against society stands on a different footing. It is generally for the public interest that others who might have any dealings ... be informed ..."

In *Mhlongo* v *Bailey and Anor* 1958(1) SA 370 (W) KUPER J summed up the position succinctly when he said at 371-372:

> "The mere unauthorised publication of a photograph does not necessarily in itself entitle the aggrieved party to damages, and the question whether such publication constitutes an aggression upon a person's *dignitas* will depend upon the circumstances of each case ... (*O'Keeffe* v *Argus Printing & Publishing Co Ltd & Anor* 1954 (3) SA 244 (C)). The remedy should be given only when the words or conduct complained of involve an element of degradation, insult or *contumelia.*"

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Apart from the disputes of fact concerning consent to the recording and the third respondent's challenge to the first applicant's summary in annexure "H1", there is little doubt that the applicants did participate in the interviews conducted by the third respondent as their own answers in annexures "H1 to H4" clearly reveal. There was nothing to prevent the applicants from refusing to answer questions or from avoiding being filmed by shielding their faces with their hands or turning away from the camera. The applicants do not in their affidavits even allege that the second respondent compelled them or threatened sanctions of dire consequences if they did not answer the questions put to them by the third respondent. The second respondent sums up their position admirably when he observes they were *compos mentis.*

Also, in *La Grange* v *Schoeman and Ors* 1980(1) SA 885 (E) KANNEMEYR J at 895F-G recognised:

> "It may be that to publish a photograph of a person which is taken against the person's will would not ... ground an action for *injuria* if that person had been 'catapulted into the public eye' against his will. This, however, does not mean that a photographer can compel such an one to submit to being photographed or require him not to take steps to prevent such a photograph being taken."

The respondents have alluded to the applicants having been catapulted into public limelight, which they have not refuted. In light of the foregoing, the applicants have not established that the recordings of the interviews conducted by the third respondent would ground an action for *injuria* against the respondents.

As for the applicants' allegation that the third respondent was seeking evidence from them for the pending civil proceedings in this court, the third respondent has vehemently refuted this. In fact the fourth applicant, in annexure "H4", explicitly asserts that the third respondent's main aim was to get information to use in his legal proceedings against the South African Government. In *International Tobacco Co (SA) Ltd* v *United Tobacco Co (South) Ltd supra*, at 12 CLAYDEN J

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(as he then was) spoke about litigants being entitled to interview anyone who is in possession of information that would assist the litigant, which also applied to the witnesses on the other side against the litigant and it was felt that to avoid any suggestion of impropriety notification should be given to the other side before the interview. In that case, no notification was given but CLAYDEN J thought it would have been proper if notification had been given but as there was in fact no impropriety

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in the conduct of the interview, it was unnecessary to say more on this. CLAYDEN J was concerned with the conduct of the interview being held in a properly fair manner.

The applicants do not in their affidavit make any complaint about the manner in which the third respondent conducted the interviews. Even if the third respondent intended to gather evidence from the applicants for the civil proceedings in this court, which was denied by the third respondent, it cannot be maintained by the applicants that he acted contrary to the rule laid down by CLAYDEN J

I turn to the applicant's argument that they have a right to restrain publication of their images and photographs without their consent under copyright law. In Pollard v Photographic Company , *supra*, where the plaintiff in August paid for photographs to be taken by the defendant, from which in November the defendant made copies for sale on a Christmas card. The question there was whether the photographer was justified in making copies for his own use without the express or implied authority of the plaintiff. The Fine Arts Copyright Act 1862 gave the copyright to the plaintiff customer and no owner of the copyright was entitled to the benefit of that Act until registration. It was accepted that ownership in the negative remained with the photographer. North J held that the plaintiff's claim for an injunction could be granted both on the ground that there was a breach of contract by the making of the Christmas card and on the ground that such use of the Christmas card was a breach of confidence. In *Boucas v Cooke Anor* , *supra*, Collins MR, in summarising the law, indicated in the case of photographs taken for a paying customer the photographer will be restrained from the use of the photographs on the ground of copyright, but where the photographer asks to take the photograph or is not paid for the photograph, the copyright will be in the photographer.

In *Henry Graves & Co Ltd v Gorrie* [1903] AC 496 (PC) Lord Lindley held that the provisions of the Fine Arts Copyright Act 1862 did not extend outside Britain.

The applicants are in any case not covered by what was laid down in Pollard v Photographic Company , *supra*, since they do not allege any agreement between themselves and the makers of the videotapes in question. Further, they have not countered the third respondents averments that he was employed by Goldhawk and has completed his contractual obligations; that he has no control over or custody of the recorded materials which are with

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Channel Four Television in Britain. It follows this court cannot make an order which is a *brutum fulmen.*

In all the circumstances the application is dismissed and the applicants are to pay the respondents costs jointly and severally.

Coghlan, *Welsh & Guest,* applicants' legal practitioners

Scanlen & Holderness, third respondent's legal practitioners

CHIOMBA v CHIOMBA 1992 (2) ZLR 197 (SC)

Court **Supreme Court, Harare**

Manyarara JA, Korsah JA & Ebrahim JA

Civil appeal

12 & 24 September 1992

Flynote

Family law - maintenance after divorce - whether wife entitled to maintenance until death or remarriage if able to work and support herself

Headnote

When a woman applies for maintenance at the time of divorce in terms of s 7(1)(b) of the Matrimonial Causes Act 1985 the criteria to be applied are set out in s 7(3) of the Act. It used to be thought that the where an "innocent" woman divorced her husband on the ground of his misconduct she was entitled to maintenance until her death or remarriage, whether or not she was able to work and support herself. This is not the position today. The changed attitude of the court has been brought about by the emergence of the working wife and "woman's liberation".

When deciding upon the issue of maintenance for women who are able to work these general guidelines, enunciated by Professor Hahlo concerning South African law, may be used in Zimbabwe as they are in accordance with the intention underlying the provisions relating to maintenance in the Matrimonial Causes Act:

- Marriage can no longer be seen as providing a woman a bread ticket for life. A marriage certificate is not a guarantee of maintenance after the marriage has been dissolved.

- Young women who worked before marriage and are able to work and support themselves after divorce will not be awarded maintenance if they have no young children. If a young woman has given up work she will be awarded short term maintenance to tide her over until she finds a new job.

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- Middle-aged women who have devoted themselves for years to the management of the household and care of the children should be given "rehabilitative" maintenance for a period long enough to enable them to be trained or retrained for a job or a profession.
- Elderly women who have been married for a long time and are too old to now go out an earn a living and are unlikely to remarry will require permanent maintenance.

In the present case the court held that the wife was not entitled to be maintained because there was an even balance between the parties regarding their responsibilities, prospects, youth and income after the payment of maintenance.

Case cited:

Gwachiwa v Gwachiwa S-134-86 (unreported)

E Chatikobo for the appellant

R Harvey for the respondent

Judgment

Manyarara JA: This is a matrimonial cause in which the High Court (Mtambanengwe J) granted the respondent a decree of divorce against the appellant and certain ancillary relief with costs on the legal practitioner and client scale. An appeal was noted against the whole Judgment. But Mr *Chatikobo* (who had not represented the appellant below) confined the heads of argument he filed and his address to the question of maintenance.

In the trial, the learned judge ordered the appellant to maintain the minor child of the marriage in the sum of $100 per month and the respondent $125 per month with effect from 1 August 1991 on the usual terms. It is the order made in favour of the respondent alone which is disputed.

It is common cause that in terms of s 7(1)(b) of the Matrimonial Causes Act 1985 the learned judge had a discretion to make the disputed order in granting the decree of divorce or at any time thereafter. Mr *Chatikobo's* contention is that in this case the exercise of the discretion was premature in that the facts showed that the respondent was well able to maintain herself after the divorce.

Mr *Chatikobo* relied on a statement made in Hahlo *South African Law of Husband and Wife* 5 ed at pp 363-4 which is to the following effect:

> "It remains to be said that with the emergence of the 'working wife' and

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> 'woman's liberation', the attitude of the courts towards the award of maintenance has been changing the world

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over. Cases where maintenance is awarded to the husband, while still rare, are no longer unknown. The idea that marriage ought to provide the wife with a 'bread ticket for life' is on its way out. Not long ago, an 'innocent' wife who obtained a divorce on the ground of her husband's misconduct could count on being awarded maintenance until death or remarriage almost as a matter of course. Today, the courts are no longer prepared to award maintenance to a young woman who has been working before marriage, and can be expected to work again after the divorce, at least if there are no young children of the marriage. At most, if she has given up her job, she will be awarded a few months' maintenance to tide her over until she finds a new one. Middle aged women who have for years devoted themselves full-time to the management of the household and care of the children of the marriage, are awarded 'rehabilitative maintenance' for a period sufficient to enable them to be trained or retrained for a job or profession. 'Permanent maintenance' is reserved for the elderly wife who has been married to her husband for a long time and is too old to earn her own living and unlikely to remarry. As Mr Justice Moorhouse remarked in the Canadian case of Knoll [(1969) 2 QR 580 at 584; 6 DLR (3d) 201 at 205]

> 'In this day and age the doctrine of assumed dependence of a wife is in many instances quite out of keeping with the times. . . . The marriage certificate is not a guarantee of maintenance.'

At present, these trends may be more pronounced in Europe and America than in South Africa, but with the replacement of the 'guilt' with the 'marriage breakdown' principle they are likely to become more marked in South Africa, too."

Mr *Chatikobo* submitted that there is much in common between South African jurisprudence and our own and Hahlo's statement therefore applies to this case. The submission is valid in view of the well known provisions of subs (3) of s 7 of the Matrimonial Causes Act 1985.

The facts are these.

The parties were married at Rusape on 17 August 1984 in terms of the Marriage Act [*Chapter 37*] and there is the one minor child of the dissolved marriage, born on 6 November 1984. It was the appellant who sued for the divorce in 1991 and the respondent defended the proceedings in *forma pauperis.*

MANYARARA JA

The parties were then aged about thirty years and twenty five years respectively. The appellant was employed as a school teacher at Nyazura earning a nett salary of $577,21 per month, with the respondent and the minor child to support. However, the respondent, though a student teacher in Harare, said in her evidence that she was by then receiving a salary of $412 per month. An out of date pay slip produced in the trial which reflected her salary as $325,70 per month must therefore be ignored.

Whilst the marriage subsisted, the spouses naturally pooled their incomes. But after divorce the means of each spouse were to be assessed on his or her separate income and the other factors set out in s 7(3) of the Act.

It will be immediately evident, as Mr *Chatikobo* argued, that the difference between the incomes of the former spouses was $577,21 less $412 which is $165,21. Taking into account the $100 per month payable to the respondent by the appellant for the maintenance of the minor child, that difference is further reduced to $65,21.

It followed therefore that, financially at least, each spouse would be in roughly the same

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position after divorce as he or she would have been in had the marriage relationship continued between them. On this preliminary basis, the order that the appellant should pay the respondent $125 per month from his salary for her maintenance placed her in a more favourable position than the appellant. The result cannot be said to be "reasonable and practicable", as provided by the Act, for the reasons submitted by Mr *Chatikobo*, to which I proceed.

The respondent listed her monthly expenses as follows:

Rental	$40
Lights and water	$ 40
Groceries and meat	$200
Medical bills	$120
Clothing	$100
Transport	$ 40
Total	$540

It will be immediately evident that the item relating to medical bills is unrealistic. The respondent can place both herself and the minor child on a medical aid scheme and drastically reduce the expenses related thereto,

MANYARARA JA

whilst $100 per month on clothing alone can be said to be exorbitant without giving any reasons.

The transport costs of $40 per month were to enable the respondent to visit the minor child at Marondera where the child was in boarding school. However, those visits were to cease within a few months as the respondent, upon winning custody of the child, planned to withdraw the child from the school and to reside with the child in her rented home.

Linked to this development was an imminent improvement in the respondent's financial resources upon her qualification as a teacher when she would receive an undisclosed increment in salary. We are told, and it was not disputed, that this happened shortly after the conclusion of the proceedings.

Mr *Chatikobo* has argued that the learned judge took none of these factors into account and thereby misdirected himself. Mr *Chatikobo* is on firm ground, as his submission is supported by the record and the misdirection puts this court at large to re-assess the maintenance which the learned judge should have ordered in favour of the respondent.

In re-assessing the amount referred to, it is unnecessary to consider the appellant's

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circumstances in any detail. As I have said, he is in receipt of a net salary of $577,21 per month, less the $100 per month he pays to the respondent for the minor child's maintenance. He has a house subject to a mortgage, whilst the respondent rents the accommodation she occupies. That he owns a car is of no consequence as it is only an added expense to him as is his mistress and her natural child by him.

It seems to me, therefore, that the case falls squarely within the statement contained in Hahlo's text, *supra*, which I suggest accords with the intendment of s 7(3) of the Matrimonial Causes Act. The present financial circumstances of the spouses and the prospects of financial improvement in the foreseeable future are evenly balanced by each such spouse's academic qualification and relative youth. So are their financial needs, obligations and responsibilities. In the result, the respondent is not entitled to be maintained by the appellant and the appeal must succeed to that very limited extent only. See also *Gwachiwa v Gwachiwa* S-134-86. Costs will be determined accordingly.

There were several grounds of appeal, which in sum prayed for the reversal of the whole of the learned judge's Judgment. Mr *Chatikobo* has not covered these in his heads of argument or address. But he made it clear that he "had

no instructions to abandon any of the grounds (referred to)". The correct position in my view is to determine the costs of the appeal on the basis that the bulk of it has failed and the respondent has been substantially successful in opposing the appeal.

Mr *Chatikobo* sought to rely on the new Rules which require the appellant's heads of argument to be filed within fifteen days of the preparation of the record as an excuse for the course he adopted. With respect, my understanding of the reason for the Rule referred to is to ensure that an appeal, once noted, will be prosecuted as has happened in this case. Therefore, costs must follow the event regardless of the course which the event has taken. It is the appellant who brought the respondent to this court and the loss must be left where it fell.

Here I may usefully quote from the Judgment appealed against in which the learned judge says:

> "It remains to consider the question of costs. Mr *Harvey*, whom I commend for doing his work thoroughly on behalf of his in *forma pauperis* client, and for leaving no stone unturned to make sure the truth was told, asked that due to plaintiff's conduct costs should be awarded on an attorney and client scale. Certainly had the plaintiff come to court with clean hands, had he not strenuously tried to deny and hide the truth, this matter would not have assumed the complexities that it involved. It would most probably have lasted at most two days instead of the five days it took to complete. The conduct of the plaintiff bordered on perjury and subornation and in the circumstances the court will indicate its displeasure accordingly."

It was on such a basis that in granting Judgment for the respondent under all six heads of the relief she claimed the appellant was ordered to pay her costs on the higher scale.

In my view, that reasoning applies mutatis mutandis to the appeal and the respondent's measure of success must be reflected in the award of costs. These will be awarded on the normal scale as Mr *Chatikobo* who did not represent the appellant below wisely curtailed the

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hearing by not advancing any argument on the bulk of the appeal which was devoid of merit. This will ameliorate the financial loss which Mr *Harvey* will otherwise suffer when his client has achieved substantial success and he voluntarily represented her for no fee in the firm belief that her cause was just.

MANYARARA JA

The following order is therefore made:

1. The appeal against the maintenance order made in favour of the respondent in the sum of $125 per month until her death or remarriage is allowed and the order is set aside.
2. The rest of the appeal is dismissed.
3. The appellant shall pay two-thirds of the respondent's costs.

Korsah JA: I agree

Ebrahim JA: I agree

Muvingi & Machaya, appellant's legal practitioners

Granger & Harvey, respondent's legal practitioners

S v SHAVA 1992 (2) ZLR 204 (HC)

Court **High Court, Harare**

Chinengundu J

Criminal review

7 October 1992

Flynote

Criminal procedure (sentence) - infanticide - killing of baby by young woman - woman employed and able to look after child - wholly suspended prison sentence inappropriate

Headnote

An 18-year-old unmarried woman had given birth and then killed her newly born child by throwing it into an ant-bear hole. A few years previously she had given birth to another child which was being looked after by her brother. She was a first offender and pleaded guilty to the charge. The trial magistrate imposed a wholly suspended prison sentence upon her. The review court stated that the prison sentence should not have been wholly suspended. Despite the mitigating factors, infanticide is a serious crime and the accused was not a stranger to the

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process of giving birth and her fear of not being able to look after the second child was lessened by the fact that she was employed and her first child was being looked after by her brother.

Judgment

Chinegundu J: The accused in this case was charged with the crime of contravening s 2(1) of the Infanticide Act 27 of 1990. She pleaded guilty to the charge, was duly and correctly convicted. She was sentenced to 3 years' imprisonment with labour, the whole of which was suspended for 5 years on conditions of future good behaviour. It is my view that the sentence is unduly lenient and this view is shared by other members of the Bench whom I have had the opportunity to consult.

The facts of the case as stated in the outline of the State case are these.

CHINEGUNDU J

The accused, who was aged 18 years at the time of the offence, gave birth to a live child on the 4th January 1992, at a village in the Sanyati Communal Lands. Soon after giving birth she took the baby and threw it into an ant-hill hole which was some 350 metres from the toilet in which she had given birth. The remains of the baby were discovered 4 days later, when they were brought to a neighbour's homestead by dogs. The accused who had been observed to be pregnant was questioned and admitted responsibility to the crime.

The magistrate took into account properly the fact that she was a first offender, had pleaded guilty and was a young female aged 18 years.

The aggravating features were stated as being that infanticide was a serious evil crime and that it was a violation of the principle of the sanctity of human life.

In my view, the trial magistrate misdirected himself by ignoring the fact that the accused was not a newcomer to the fact of giving birth because in mitigation, and this was not challenged by the State, she said that she already had another child who was 2 years 8 months old. She also revealed that her first child was being looked after by her brother. According to the outline of the State case, the accused was employed at the time of the commission of this offence. The fear of having to look after this particular child was therefore lessened by the fact that she was employed and her other child was being looked after by her brother. Although a wholly suspended prison sentence may be appropriate in certain circumstances in infanticide cases, it is my view that in this case a wholly suspended prison sentence was not appropriate. A sentence of 3 years' imprisonment with labour with 2 years suspended on conditions would have met the justice of the case. MTAMBANENGWE J, GIBSON J and CHIDYAUSIKU J agree with the views expressed above. In the result I decline to confirm these proceedings as being in accordance with real and substantial justice.

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S v CHIGOVA 1992 (2) ZLR 206 (HC)

Court **Supreme Court, Harare**

Annotations **Link to Case Annotations**

Gubbay CJ, McNally JA & Korsah JA

Criminal appeal

15 June & 8 October 1992

Flynote

Evidence - rape - discrepancies between the complainant's testimony and the State outline and between the complainant's evidence - in - chief and her testimony under cross-examination - effect of these discrepancies - lies by accused - when can be taken to be corroborative of complainant's allegations

Headnote

In an appeal against a conviction for rape counsel for the appellant sought to cast doubt upon the credibility of the complainant's testimony by pointing to discrepancies between the complainant's testimony and the contents of the summary of the State case and between the complainant's evidence - in - chief and her testimony under cross-examination. Particular stress was laid on a discrepancy regarding whether the complainant had personally made an arrangement to collect a letter from the accused or whether her sister had made this arrangement. Other minor discrepancies were also pointed out.

Held, that a summary of the State case is different from an outline of defence. A defence outline is prepared on the instructions of the accused and is usually read over by, or to, him and then signed by him or on his behalf. Because of this, doubt may be cast on the credibility of the accused if his testimony is at variance with categorical statements contained in his defence outline. On the other hand, the complainant has no control over what a policeman decides is relevant to include in the State summary. The summary has not been compiled on the basis of her instructions. The complainant's credibility should not to be assessed on the basis of apparent conflicts on non-essential points between her viva voce testimony

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KORSAH JA

and a summary of the case prepared by someone else. To discredit the complainant because of discrepancies between the State outline and her testimony, the divergence between the two must be so gross as to be utterly irreconcilable, or her testimony must be patently false.

Held, further, persons unacquainted with rules of evidence who had not been warned to testify only on matters within their own personal experience and not to testify about matters reported to them not infrequently testified about matters reported to them by others as if they had personally experienced these matters. The discrepancy in the present case relating to the arrangement over the letter was explicable on this basis.

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Held, further, that the trial court had rightly found that the complainant was a credible witness, despite minor discrepancies in her testimony.

Held, further, that lies told by an accused in his defence may be of such a character as to be indicative of a guilty mind and these lies could be taken as corroborative of the complainant's allegations.

Held, further, that in the present case corroboration of the complainant's evidence was to be found in the perjorative character of the appellant's testimony and the evidence of his witnesses who had obviously been suborned to support his false testimony.

Cases cited:

Cornfield v Hodgson [1966] 2 All ER 205 (QB)

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

S v Mabinya S-16-91 (unreported)

S v Chigwada S-206-88 (unreported)

S v Katerere S-55-91(unreported)

E Chatikobo for the appellant

Mrs J Zindi for the respondent

Judgment

Korsah JA: The appellant is aggrieved and dissatisfied with his conviction on 14 June 1991 for rape, by the Regional Magistrate's Court sitting at Gweru and appeals against the same. The sentence of six years' imprisonment with labour imposed by the trial court, half of which was suspended on conditions, was not appealed against.

The defence set up by the appellant, being one that calls into question the credibility of the witnesses, compels me to set out in some detail the testimony of the complainant as well as that of the appellant and, after a careful scrutiny of the evidence, to determine whether his conviction by the learned trial magistrate was justified.

KORSAH JA

The complainant was seventeen years of age and the appellant thirty-one at the time of the alleged rape. The complainant resided with her father, a security officer, at Munyati. Her testimony was that some time between December 1986 and January 1987 she went to stay for a while with her sister, who was a school teacher, at Wha Wha. It was during this period that she first met the appellant. She had not passed her "O" Levels well enough and wished to repeat it to improve her grades.

In evidence-in-chief the complainant said she was told by the appellant to return to Wha Wha in

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May 1987 to collect a letter of introduction to the Headmaster of Regina Mundi School, whom he knew very well, to secure her a place at the school to enable her to repeat her "O" Levels.

On 4 May 1987 the complainant informed her father, who had been apprised of the reason for her journey to Wha Wha, that she was travelling to Wha Wha to collect the promised letter of introduction from the appellant. Her father gave her the return fare to travel to Wha Wha. And thither she travelled without a bag containing any change of clothes but only a handbag. Her father was expecting her back on the same day. She was in her menstrual period when she left home.

Upon her arrival at Wha Wha, the complainant went to the prison gate and asked for the appellant. The appellant was called to the prison gate. He told the complainant that people were not supposed to wait at the gate and so he took her to his house to wait for him while he got the promised letter of introduction. Some prisoners were working outside the appellant's home when they arrived. The appellant told the prisoners to take care of the complainant while he was at work, because of the dogs outside his house which would bite her if she stepped out of the house.

After waiting in the house for a while, the complainant was telephoned by the appellant who told her that he had telephoned the Headmaster of Regina Mundi School and spoken to his wife, who had told him that her husband was not in but would be returning shortly. The complainant told the appellant that it was getting late and that if it got dark she would be unable to get a bus to Munyati. The appellant then said that if she had come because she wanted a place at Regina Mundi School then she had better wait. And wait she did, as she was anxious to secure a place at the school.

After a lapse of some time, the appellant telephoned the complainant to inform her that he was returning from work. At about 5 pm the appellant

arrived at the house, carrying some suitcases and in the company of some children whom she greeted. After that the appellant went and stood by a door and called the complainant. When the complainant realised that he was calling her into his bedroom she went back into the sitting-room and sat on a chair.

The appellant then told the complainant that he had been in love with her, but had not had the opportunity to express his emotions for her and that he was doing so then. At that time all the children were washing or outside the house. The appellant then entered the bedroom and called to the complainant to come in. The complainant refused to do so, saying that she was not prepared to enter a bedroom which the appellant shared with his wife. The appellant then told the complainant that he was a divorcee and the complainant retorted that if that was the position then she was going away. The appellant told the complainant that if she stepped outside his dogs would attack her. Afraid of being set upon by the appellant's dogs, the complainant remained in the house.

After a while the children came to invite their father to partake of sadza, which they had

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prepared. The appellant declined, but insisted that the complainant should eat the meal which the children had prepared for him. It was when the complainant was eating that the appellant locked the door to the kitchen. The complainant thereupon stopped eating. The appellant ordered the complainant to get into the bedroom. The complainant refused to do so and told the appellant that she thought that he was going to help her to get a place to go to school and that she now realised that his promise was a ruse.

The appellant then grabbed hold of the complainant by her jersey and dragged her into his bedroom. Her jersey and the yellow dress which she wore underneath the jersey were torn in the process. The appellant overpowered the complainant, locked the bedroom door and removed the key. He forcibly kissed the complainant. The complainant then tried to jump out through a window, but the appellant caught her and slapped her so hard on the cheek that she fell to the floor. The appellant then pinned the complainant to the floor with his right hand while removing his trousers with his other hand. He told the complainant that there was nowhere she could go to.

The complainant informed the appellant that she was in her menstrual period and did not want to have sexual intercourse with him. Whereupon the appellant insulted her, saying "Are you trying to tell me you are not a

KORSAH JA

prostitute when you are a prostitute?". This hurt the complainant very much and she requested the appellant to open the door so that she could go home, but the appellant would not. At this stage the complainant was crying and complaining of a headache. The appellant offered her some tablets which the complainant accepted but did not swallow.

After that the appellant grabbed the complainant and a struggle ensued with the appellant attempting to remove the complainant's pants. When the complainant screamed the appellant covered her mouth with his hand to muffle the sound.

This struggle occurred near the head of the appellant's bed where there was a small table. The appellant succeeded in removing the complainant's underpants, threw her on the bed, fell upon her and penetrated her from a dorsal position. As the complainant struggled to get free, the appellant ejaculated and semen ran down the complainant's thighs. The appellant laughed at the complainant and said that if she had been a nice or good prostitute he would have given her $3.00 for her services. He told her that if she wanted to go through the window or open the door and go out she was free to do so now, but warned her that the dogs would bite her if she did. She said the houses nearby were not occupied and so calling for help would have been futile. A locked door also separated her from the telephone in the sitting-room and she could not summon assistance by telephoning, that is, if the appellant would have permitted her to use it.

After this act of intercourse the complainant refused to share the appellant's bed with him and, while lying on the floor without a blanket and crying, she fell asleep. At about 2.45 am on 5 May 1987 she was awakened by the appellant and, regardless of her protestations that she was menstruating, forced to stand and bend over and hold the table standing by the head of the bed

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while he penetrated her once again dorsally, against her expressed objection. After that the appellant went back to sleep.

In the morning, after cleaning herself, the complainant came out of the bedroom to find the appellant standing by the kitchen door. She was in a confused state of mind as this was her first experience of such a nature. She was told by the appellant to walk towards the tarmac. She thought of reporting the incident at the appellant's place of work, but the fear of receiving unsympathetic audience and the thought that she might possibly be killed by the appellant's workmates were she to make such a report, dissuaded her from reporting at the appellant's workplace.

KORSAH JA

Harbouring these fears, she decided that a report to her father would be the safest option.

Thither to Munyati then did the complainant travel. Her father was at work when she got home. She went and made a report of her arrival to the police officers at her father's place of work and went home. When her father arrived home she made a report of the incident of rape by the appellant to him. She informed her father that the appellant was being untruthful when he promised to get her a place at Regina Mundi School and that all the appellant wanted was to have sexual intercourse with her.

The complainant's father immediately took the complainant to ZISCO Steel at Kwekwe, where the complainant's brother who had a car was employed. They requested assistance from the complainant's brother to go and lodge a complaint with the police. A report of rape was thereafter made to the police at Lalapanzi.

The complainant denied that on her arrival at Wha Wha she told the man at the prison gate that she wanted to see her boyfriend. She was insistent that when the appellant returned home on this fateful evening with his children at about 6 pm she was sitting in the lounge where the appellant had left her and that she was not playing records on his radiogram. She denied ever having been plagued with ulcers. She denied cooking the evening meal for the appellant's family. She denied entering the appellant's bedroom willingly and being asked to sleep on the floor because she was in her menstrual period. She posed the rather poignant question that, if the appellant claimed that she was his girlfriend, would he have made her sleep on the floor overnight without blankets?

The complainant denied all knowledge of a prison officer by the name of Partera. She said she had never visited the Prison Mess in the company of the appellant. She said she had never been bought anything by the appellant, nor had she personally requested anything from the appellant, save that, at the behest of her sister, the appellant had promised to seek a place for her at Regina Mundi School. She said that, had she not made a report to him, her father would have had no means of knowing that she had been interfered with by the appellant.

The complainant's mother was dead. She was seventeen and lived alone with her father. With such a relationship, the reasonable and most likely expectation is that she would report such a

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traumatic experience to the person she

KORSAH JA

related to the closest - her father. And it was to her father that she made the earliest report.

The complainant admitted that, after writing her "O" Level examinations, she went to stay with her sister at Wha Wha in December of 1986. She said she first met the appellant either when he called as a visitor at the home of her sister and brother-in-law, or at the canteen in the company of her sister and brother-in-law, and he was introduced to her as Mr Chigova. She explained that it was the same day that the appellant called at the house that they met him at the canteen. She said she did not see the appellant again during the whole of her stay with her sister at Wha Wha, because she used to spend most of her days with her sister at school. However, her last meeting with the appellant, prior to the commission of the alleged offence, was at the canteen when she was in the company of her sister and brother-in-law and she did not speak to the appellant.

Much was made about where the complainant first met the appellant in cross- examination, and whether the complainant did not accept a proposal of love from the appellant at this meeting. Where they first met is, to my mind, of no consequence. What is of importance is that, through his acquaintanceship with the complainant's sister and brother-in-law, the appellant offered to seek a place for the complainant at Regina Mundi School. It is most unlikely that the appellant, a man some thirty-one years of age and married, would propose love to a girl of seventeen, on their first meeting, in the presence of her sister and brother-in-law. Courtesy alone forbids it, unless he is a man of exceptional depravity.

In this respect, I find the evidence of the complainant that on their introduction to one another they merely exchanged greetings more in accord with truth than the appellant's assertion that he proposed love to this youngster in the presence of her sister and brother-in-law at their first encounter, wherever that may have been. What is of moment is that the complainant averred that she never visited the prison canteen in the company of the appellant alone.

The complainant confessed that at no time was she interested in the marital status of the appellant, as all she was concerned with was securing a place at school to further her education and had no thought of entering into any sort of sexual or amorous relationship with him. She explained that the arrangement to collect a letter to the Headmaster of Regina Mundi School was made between her sister and the appellant and not with her (the complainant) personally.

KORSAH JA

Considerable play was made by defence counsel with a statement which appears in a "summary of case" prepared by the police at Lalapanzi dated 19 May 1987. The statement reads:

> "As the complainant was intending to further her studies, she was approached by the accused who informed her that he was going to talk to the headmaster of Regina Mundi Secondary School, Gweru for they were in good

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terms."

This statement, it was contended, shows that the complainant was not a witness of truth when she testified that the arrangement to collect a letter from the appellant to take to the Headmaster of Regina Mundi School was concluded between her sister and the appellant and relayed to her.

While I agree that the State is bound to prove the ingredients of the offence it alleges, a précis of a case by the State is not to be given equal weight with the outline of defence on behalf of the accused. The reason for this is simple. The complainant has no control over what a policeman may find relevant enough to include in a precis. The précis is not her word and deed. She is not to be taken as having made categorical statements on matters which, though relevant, are not essential to establish the offence alleged. The complainant's credibility is not to be assessed on apparent conflicts between her viva voce testimony and a summary of the case prepared by someone else.

The "defence outline", however, is prepared at the behest of the accused and usually read over by, or to, him and then signed by him or on his behalf. A complainant cannot be discredited because of discrepancies between a summary of the State case and her testimony, in the same way as an accused who, having made categorical statements in his "defence outline", testifies to something other than that which he has put his hand to or stated in his outline of defence, which may tend to underscore the veracity or otherwise of the accused. To discredit a complainant because of discrepancies between the State outline and her testimony, the divergence between the two must be so gross as to be utterly irreconcilable, or her testimony patently false.

The complainant, however, explained that the passage of time - four years between the incident and the trial - had blurred her memory of what to her was trivial and unimportant. She could only recall that the appellant told her sister about the letter and the information was relayed to her by her sister. The appointment to collect the letter on 4 May 1987 was made with her sister and relayed to the complainant by her sister in the presence of her father when her sister visited their father's home at Munyati in January 1987.

KORSAH JA

The complainant did not know when the appellant entered into that arrangement with her sister. To her any arrangement made with her sister by the appellant concerning securing her a place at Regina Mundi School was the same as if the appellant had personally made the arrangement with her. She was oblivious of the evidential strictures regarding hearsay evidence. She was not warned to testify on matters which were within her own personal knowledge, to the exclusion of reported speech, during her evidence-in-chief. It was only during cross- examination that she was compelled by the questions put to her to draw a distinction between facts within her own knowledge and information relayed to her by her sister. Is it any wonder that in the outline or summary of the State case it is recorded that she made arrangements to visit the appellant on 4 May 1987, to collect a letter for the Headmaster that would secure her a place at Regina Mundi School?

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The complainant did not know the appellant before her introduction to him by her sister. She could not have known his connection with the Headmaster of Regina Mundi School. The probabilities are that her sister, who was a teacher at Wha Wha, and her brother-in-law, both of whom were friendly with the appellant, would be the ones to know of the appellant's connection with the Headmaster and would be more likely to approach the appellant to seek his assistance in placing the complainant in that school. The appellant himself testified that the complainant's sister and himself attended a school at which the Headmaster of Regina Mundi School was their teacher.

There is a consistency which runs through the complainant's evidence under cross-examination, which is that she had the capacity, almost poetic, of presenting reported speech in the present tense as if she herself had lived through the events narrated to her. This is not uncommon with people who are not acquainted with the rules of evidence; even trained lawyers sometimes err against the rule excluding hearsay evidence. Once the complainant's instinct to present reported speech as if it were her own experience is unravelled and explained, the dichotomy between her evidence - in - chief and her testimony under cross-examination becomes more apparent than real, and the confusion in her testimony as a whole is placed in proper perspective. The effect that this has on the defence put up by the appellant will be considered later in this Judgment.

It is clear from her testimony that what the complainant considered to be of moment was not who had set up the arrangement to collect the letter, but that she had been sexually abused by the appellant.

KORSAH JA

The appellant alleged that the complainant was his girlfriend. In support of this allegation, it was put to the complainant that she herself had given out to the officer at the gate, and it had been recorded in the Prison Visitors' Book, that on 4 May 1987 she visited her boyfriend, the appellant, at Wha Wha Prison. This the complainant denied. The information in the Prison Visitors' Book was not recorded by the complainant personally. She neither read nor signed it. It is as such hearsay and inadmissible; and at any rate dubious and unreliable.

An attempt was made at the trial to exploit another error in the State outline to support the assertion by the appellant that the complainant was his girlfriend, because she knew her way to his house. It is recorded in the State outline that the appellant told the complainant to go and wait for him at home. If the complainant was the girlfriend of the appellant as alleged, one would expect her, at least, to know where the appellant lived. But she denied that she knew where the appellant resided and said, for that reason, the appellant had to accompany her to show her where he lived.

There is supportive evidence of the complainant's testimony from the appellant's extra-curial statement that he himself took the complainant to his house. The statement reads:

> "I called her and escorted her to my home where I stay and showed her the bathroom and toilet and served her with a glass of Fanta that was in the fridge."

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This is yet another example of the unreliability of the State outline on which it was sought to depend to challenge the credibility of the complainant as a witness. But what was in fact established was that the complainant was a witness of truth and that the summary of the State case was so inaccurate in detail as to be almost completely worthless, except for the allegation of rape therein contained.

It is pertinent to note that it was put to the complainant in cross-examination that:

> ". . . you are denying this because if you accept that you went [to the appellant's house] on your own it will suggest that you are familiar with the place and you were quite used to it."

But, as I have demonstrated, there was evidence supportive of the complainant's assertion to the contrary.

KORSAH JA

Again, there was supportive evidence of the complainant's testimony that the appellant telephoned her while she was waiting at his house, but a reason other than that alleged by the complainant was given. In this regard it was put to the complainant in cross-examination that: -

> "... in fact what the accused will say is that he phoned you advising you where you get the toilet, or since you wanted to bathe and he specifically advised you to get to his bedroom to get the towels and lotions when you bathe, after which you bathed."

But the appellant, according to his extra - curial statement, had already escorted the complainant home for the purpose of showing her the bathroom and the toilet. What then was the need to telephone her and advise her as to where the bathroom and toilet were situate? Set against the backdrop of the appellant's extra - curial statement, his reason for the telephone call is not only farcical, but must be deemed to be false. Given that it was common cause that the appellant had promised to get the complainant a place at school, one is inclined to accept as true the complainant's version of the telephone call.

Now, a lie told in such circumstances might be of a character which is capable of being corroboration, in the sense that it discloses a guilty mind. And the accused cannot be heard to complain if, because of his falsehood, the trier of fact does not accord him the benefit of the doubt: *Corfield v Hodgson* [1966] 2 All ER 205.

Virtually the whole of the cross-examination of the complainant was directed at getting the complainant to contradict herself on some minor detail in her evidence- in-chief, such as, whether the appellant first professed his love for her in the bedroom or in the sitting-room; whether she had supper before the appellant sexually molested her or she had no supper at all before she was sexually molested; and whether the doors were locked by the appellant while she was having her supper or after they had retired to bed. But throughout a gruelling cross-examination the complainant resolutely stuck to her story as to how she came to be tricked by the appellant into his home and subsequently ravished there by him.

These questions arose because of the manner in which the State outline was couched. Part of

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the State outline reads:

> "The accused came to the house at 1730 hours and told the complainant that he had talked to the headmaster. He proceeded into his bedroom.

KORSAH JA

> Whilst in the bedroom, he called the complainant to him. He proposed love to the complainant and at the same time locking the door from inside. He grabbed hold of the complainant. He pushed her to the bed. After some time, and after having been disturbed by his daughter, the accused eventually had the complainant lying on her stomach. He proceeded to remove her pants and effected penetration from the rear."

I have already mentioned in this Judgment that the State outline or summary of case was but a précis of the case against the appellant. It is pertinent to note in this regard that whereas the State outline, Exhibit Two, occupies a little more than half a page and the summary of case, Exhibit 4, likewise covers a little less than a page, the cross-examination alone of the complainant spans over 103 pages of the record. It is evident that the complainant, throughout her evidence, was expatiating on the meagre facts contained in the State outline and correcting, where inaccuracies had crept into the précis, such errors as were therein contained. Any disparity between her testimony and the State outline must be viewed against this background.

Confirmatory evidence was elicited from the complainant's father in cross-examination that the complainant's elder sister, who was teaching at Wha Wha at the time, had visited him at Munyati and informed him about a promise by the appellant to write a letter which was going to assist the complainant to get a place at Regina Mundi School and that the complainant was to go and collect the letter from the appellant.

The complainant's father also confirmed that on 4 May 1987, at the request of the complainant, he furnished the complainant with bus fare to Wha Wha and back to enable her to collect the said letter from the appellant to present to the Headmaster of Regina Mundi School. He said he was delighted his daughter was going to get a second opportunity at school. He said that he was expecting the complainant back the same day and that, though the complainant's failure to return made him a bit apprehensive, the thought that she had gone to spend the night with her sister at Ridgemont relaxed him.

The complainant's father said no-one informed him at work about his daughter's return. He said when he returned home from work in the evening the following day he found the complainant at home and noticed that she appeared to be angry and depressed. He greeted her and asked whether her mission had been successful. The complainant replied that it had not and made a report that she had been raped by the appellant. He was angered by this report and took his daughter to make a report to the police, as stated by the complainant.

KORSAH JA

The appellant testified that he met the complainant on 30 November 1986, in the company of her brother-in-law at the Junior Officers' Canteen at Wha Wha. He claimed the complainant was

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in the company of another girl by name Maggie, whom the complainant denies any knowledge of. He said it was at this chance meeting that his proposal of love was accepted by the complainant. Soon thereafter the complainant's sister joined them at the canteen with her child. The complainant left the canteen in the company of her sister and brother-in-law.

The appellant averred, contrary to the complainant's testimony, that during the complainant's sojourn with her sister he used to visit the complainant at her sister's residence after working hours and that the complainant also used to call at his place of work to purchase milk coupons. He said that on other occasions he took the complainant to the Officers' Club to while away the time partaking of soft drinks. As he lived with his wife at Wha Wha he could not take the complainant to his residence.

The appellant denied that he had promised to furnish the complainant with a letter to take to the Headmaster of Regina Mundi School, which letter would secure her a place to repeat her "O" Level examinations. He admitted, however, that he discussed the issue with the complainant's sister and alleged that the discussion took place in the presence of the complainant. He alleged that the complainant's sister requested him to telephone the Headmaster of Regina Mundi School to find out if the School would allow someone who had failed her "O" Levels to go back into Form III. He did so in the presence of the complainant and her sister, and the Headmaster told him that the School did not enrol repeaters. He relayed this information to the complainant and her sister there and then.

Now, this version of using his telephone to make enquiries from the Headmaster on behalf of the complainant, at the instance of her sister, does not accord with the reason the appellant assigned in his extra - curial statement for the allegation of rape levelled against him by the complainant. In his warned and cautioned statement he said:

> "It's only a question of the fact that I failed to buy her a dress she had asked for, and to secure her a repeating place at Regina since she had failed her 'O' Level. This I was asked to do by her sister."

This statement, confessing his inability to secure a place for the complainant, suggests that the appellant had promised the complainant's sister that he was

going to secure the complainant a place at Regina Mundi School to repeat her "O" Level examinations. And it is supportive of the complainant's testimony that it was on the strength of this promise that she travelled to Wha Wha to see the appellant.

The appellant alleged that the complainant was his girlfriend and they had arranged that the complainant would leave her home at Munyati to go and spend a week with him at his home at Wha Wha, while his wife was away at her communal lands. Such a clandestine arrangement will generally be entered into if the parties intend sex as their goal. And one would expect that a young girl proposing to go on a week's visit would naturally take a change of clothing. Yet it is common cause that the complainant was in her menstrual period when she set out for Wha Wha on 4 May 1987. This virtually rules out an assignation for the purpose of indulging in sexual intercourse. It is also common cause that the complainant took with her no change of

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clothes. This is evidence, contrary to what the appellant asserted, that the complainant set out from home with no intention of staying overnight at Wha Wha.

Having regard to the foregoing, and the totality of the evidence adduced, I have no difficulty in accepting the learned trial magistrate's finding that the complainant was a credible witness: *S v Mupfudza* 1982 (1) ZLR 271 at 273E; *S v Mabinya* S-16-91 pp 14-15.

Now, corroborative evidence, in my view, is evidence which, although not of itself sufficient to support a conviction, tended to show that the complainant was telling the truth and that she was not falsely implicating the accused. For instance, I have highlighted, in this judgment, some of the evidence which I have described as being supportive of the complainant's testimony to illustrate that the complainant was a credible witness. The word "supportive" was used advisedly, for the issue here is not whether or not the appellant is not being truthful in respect of some item of evidence, but whether or not he raped the complainant as alleged.

Whether an item of evidence, supportive of the complainant's testimony, and which it is sought to be relied on as corroboration, is material and implicates the accused depends on the circumstances of the particular case and frequently on the nature of the defence put forward. Where, for instance, on a charge of rape the defence is a total denial of all knowledge of the offence and an allegation of being falsely or mistakenly implicated, medical evidence that the complainant has been assaulted and forcibly ravished cannot be corroboration of her evidence that it was the accused who raped her. On the

other hand, if the defence alleges consensual intercourse, a medical report that the complainant was assaulted and forcibly ravished is corroboration of her testimony that the accused raped her.

In the instant case, the medical report, which noted that the complainant did not have an active sexual life but that the hymen was not intact and penetration was possible, in view of the denial by the appellant of any sexual intercourse with the complainant, cannot be corroborative of the complainant's testimony that she was ravished by the appellant. It only establishes that the complainant had, some time prior to the medical examination, probably indulged in sexual intercourse.

If corroboration of the complainant's testimony is required in this case, it is to be found in the perjorative character of the appellant's testimony - see *S v Chigwada* S-206-88; *S v Katerere* S-55-91 - and the evidence of his witnesses who had obviously been suborned to support his false testimony. It seems to me to be established that, because of the clandestine nature of the offence and the defence proffered herein, where an accused person charged with rape is found to be lying, evasive or inconsistent in his evidence, this may be taken as supportive of the complainant's allegations and the lie told in these circumstances may be considered as being of a character which was capable of being corroboration, in the sense that it disclosed a guilty mind: *Corfield's* case, *supra*.

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In any case, as this court stated in *Mabinya supra* at p 15:

> "The cautionary rule requires that the court should warn itself as to the dangers inherent in founding a conviction upon the uncorroborated evidence of a suspect witness. The rule does not say that a conviction cannot be founded on the uncorroborated evidence of a single suspect witness [if there is no danger of false incrimination]."

The complainant had nothing to gain by falsely implicating the appellant. I am satisfied that the learned trial magistrate applied the cautionary rule and satisfied himself that the danger of false incrimination had been excluded and that it was safe to rely on the evidence of the complainant.

Accordingly, the appeal is dismissed.

Gubbay CJ: I agree.

McNally JA: I agree.

Chirunda, Chihambakwe & Chikumbirike, appellant's legal practitioners

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S v MUNEMO 1992 (2) ZLR 222 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Ebrahim JA

Criminal appeal

5 & 8 October 1992

Flynote

Evidence - rape - young child complainant - child giving evidence well but warning signs present - need for corroboration or support for complainant's evidence in such cases - child complainant infected with gonorrhea - accused should have been told about this and invited to undergo medical examination.

Headnote

The appellant was convicted of rape. The State had alleged that when he was 16 years of age he had raped a 7-year-old girl. In setting aside the conviction:

Held, that although the complainant had given her evidence well and although there was medical evidence that someone had sexually interfered with her, there were warning signs arising out of her conduct after the rape which made it unsafe to convict the accused. She had not complained of rape to her parents and had not shown signs of distress. The sexual interference had only been discovered some time later when her mother had questioned because she had found stains on her underpants suggesting to her mother that she had a sexually transmitted infection and that she may have been raped. There was no assumption in

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our law that a girl of that age cannot possibly lie about such matters. There was a possibility that the complainant had been a willing party and there was a danger that she had falsely accused the appellant of rape in order to cover up some form of sexual experience with another child or adolescent. As there was no evidence to corroborate or support the evidence of the child pointing to the appellant as the culprit, the conviction and sentence had to be set aside.

McNALLY JA

Held, further, that had been a failure of justice in that the appellant had not been informed that the complainant had a sexually transmitted disease so that he had the chance to be medically examined and by doing so perhaps establish his innocence. The investigating officer had also lost a golden opportunity to test whether the appellant was the culprit by inviting him to undergo a medical examination. Had the appellant refused, an adverse inference might well have been drawn from his refusal. Had he agreed, the discovery of a similar infection would have enormously strengthened the case against him whereas had he been found not to be so infected, the case against him would have been considerably weakened.

Cases cited:

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

R v Judson 1965 RLR 501 (A)

S v Masango 1990 (1) ZLR 176 (S)

S v Santos S-138-85 (unreported)

S v Mabinya S-16-91 (unreported)

S v Gwanzura S-66-91 (unreported)

R M Fitches for the appellant

J T Manokore for the respondent

Judgment

McNally JA: This is a rape case. The alleged victim was seven years old at the time of the offence, December 1989. The trial began on 9 January 1992, two years after the event. The appellant was eighteen at the time of the trial and sixteen at the time of the alleged offence.

The main problem with the conviction is the lack of corroboration or support for the evidence of the complainant. The magistrate found her to be a good witness. There is no doubt that she knew the appellant well. There could be no question of a mistaken identification. The two families knew each other well, visited each other regularly, lived in close proximity.

I am satisfied that the magistrate was aware of the danger of relying on the evidence of a very young complainant. She warned herself properly in terms of the well-established first rule in *S v*

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Mupfudza 1982 (1) ZLR 271. She concluded that the child was a credible witness.

I do not dispute that the child gave her evidence well. But even at this stage of the enquiry there were warning signs. The one was that the child had not

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McNALLY JA

shown any signs of physical or emotional distress such as one might expect after such a traumatic experience. The other was that the child never complained or reported the matter to her parents.

What happened was that her mother was washing the child's underpants on the morning of Sunday 31 December 1989. (The calendar confirms that 31 December was a Sunday). She noticed stains of a yellowish nature which indicated that all was not well. She thought the child had an infection. She spoke to a nursing sister who examined the child and advised her to take the child to hospital because she suspected rape.

The evidence is not very clear as to when the incident would have taken place in relation to the washing on 31 December. At one stage it seemed the mother was saying that these were the pants worn by her daughter the previous day. But at another point the mother said she had asked her daughter when the incident occurred and the child could not remember. It cannot, however, have been more than a few days before 31 December 1989.

When questioned by her mother the child, after a little pressure to tell the truth and after assurances that she would not die or be killed, said that the appellant had done this to her. She explained that the appellant had told her that she should not report the incident because, if she did, her father would kill her. She said several times to her mother "I do not want to die". Only when reassured did she then point to the appellant as the perpetrator.

The medical examination was undertaken on 2 January 1990. The doctor, who was called to give evidence, testified that he found no injuries to the child's genitalia or breasts, but that the hymen was partially torn and the vagina admitted two fingers. He also observed a discharge which indicated an infection, probably (he said) gonorrhea. He concluded that penetration had been effected.

Unfortunately he was not questioned as to the length of time it would take for the infection (if it was sexually transmitted) to manifest itself after intercourse. Nor was he asked to comment on the fact that the mother, only forty-eight hours before, had noticed bruising.

Mr Fitches has pointed out, by reference to standard texts, that the symptoms of gonorrhea have a longer incubation period in women than in men, who normally show symptoms in under a week, but sometimes up to a month. So again there is a slight improbability that the symptoms would manifest

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McNALLY JA

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themselves on 2 January (a Tuesday) if the intercourse had taken place in the latter part of the previous week (as the bruising would suggest).

Moreover, the investigating officer missed a golden opportunity to clinch his case one way or the other. He should, on receiving the medical report, have invited the appellant to undergo a medical examination. Had the appellant refused, an adverse inference might well have been drawn. Had he agreed, and an identical infection found, the case against him would have been enormously strengthened. And if he had been found to be clean, the case against him would have been considerably weakened.

As it was, the appellant was able to claim, and did indeed put to the doctor, that he was gravely prejudiced by not being told of the result of the medical examination, and not being given an opportunity himself to undergo an examination.

It seems to me there is considerable force in this submission.

In the final analysis we have this situation:

1 Somebody interfered sexually with this seven year old girl. There was only partial penetration, although enough to warrant a finding of rape.

2 . She was not apparently hurt enough to complain or show signs of distress. Indeed in her childish ignorance she may not have objected, and may have remained quiet out of a vague sense of guilt. It is significant that she says that the threat was not that the rapist would kill her if she told, but that her father would kill her.

3. Her indication of the guilty party was neither immediate nor spontaneous. Both of these facts *prima facie* weaken the force of her evidence, although they can be explained away.

4. The appellant had no opportunity to establish an alibi, since the allegation as to date and time was so vague. In addition he was denied a powerful opportunity to prove his innocence (or his guilt) by undergoing a medical examination at a very early stage.

It is not our law that a little girl of seven years of age cannot possibly lie about such matters. An examination of some of the cases shows that there has always been something more to support the little girl's assertion where the court has convicted.

McNALLY JA

In *R v Judson* 1965 RLR 501 (A) at 507E-I, Lewis JA made the following remarks:

> "Again, the position might be similar in a case where, for example, the evidence showed that a child, even of the age of the present complainant, had only come out with an allegation of rape after her mother had accidentally discovered signs of sexual interference, of which the child had never complained, and after the mother had demanded an explanation from the child, Here, too, it might conceivably be said that there would be a potential danger that the child might have willingly indulged in some form of sexual experience with another child or adolescent of the opposite sex, and that when forced to explain away the physical evidence of it, she might endeavour to cover up the real truth by making a false allegation of rape against an innocent person.
>
> However, where it is proved beyond all reasonable doubt that a child has been raped by someone, with no

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> suggestion that she was a willing party at any stage, and where it is also established beyond question that the child makes an immediate complaint to her mother, that she is at that time in a genuine state of distress and shock, that she exhibits her injuries and names the accused as her assailant, and where, in addition, there is no reasonable possibility of mistaken identity, it is difficult to see how there remains any inherent potential danger of a false implication, requiring this special approach to the case as propounded by WATERMEYER CJ, before a conviction can result."

The first set of facts apply exactly in the present case. The second set of facts were those in the case with which His Lordship was dealing.

In *S v Masango* 1990 (1) ZLR 176 (S), the then Chief Justice relied on the untruthfulness of the appellant and the evidence of others, which he disputed, that he was at the complainant's hut on the night in question. This satisfied the Chief Justice that the danger of false incrimination had been eliminated. In the present case the appellant was not shown to be untruthful, indeed some of his allegations which were denied by the complainant and her mother were supported by other State witnesses.

In *S v Santos* S-138-85 at pp 9 and 10 of the unreported Judgment I referred to "a number of weighty considerations which support her identification of him (the appellant)". These do not exist in the present case. And in *S v Mabinya* S-16-91 and *S v Gwanzura* S-66-91 the court found factors which

McNALLY JA

supported the mere *ipse dixit* of the youthful complainant. In the former case the appellant was the father of the complainant child, and his own conduct proclaimed his guilt. In the latter case the child was invited to stay overnight at the appellant's house on the two occasions when she was interfered with sexually, and no other man could have been involved.

In my Judgment, and as a matter of law, the magistrate did not establish any facts which in any way corroborated or supported the evidence of the child pointing to the appellant as the culprit. Not only is there nothing in particular to support her identification of the culprit; there are several factors such as her lack of distress, her failure to report until challenged, and her rather early development of the infection, which raise question marks about the correctness of her identification. I do not say they were insuperable obstacles to a conviction. I say only that they highlighted the need for corroboration or support. That support being absent, I do not consider the court was entitled to convict. Moreover it seems to me there was a failure of justice when the appellant was not given the opportunity to be medically examined at a stage when such an examination might have gone a long way towards establishing his innocence.

I have therefore come to the conclusion that the conviction and sentence must be set aside, and it is so ordered.

Manyarara JA: I agree

Ebrahim JA: I agree

Pro Deo

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S v MOYO 1992 (2) ZLR 228 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Manyarara JA

Criminal appeal

12 October 1992

Flynote

Criminal procedure (sentence) - Mental Health Act 1976 - s 28 (1) - special verdict - appeal court requesting psychiatric investigation - inordinate delay by psychiatrists in complying with request.

Headnote

The appellant, without any motive, killed his wife whom he loved. The appellant had behaved in a strange manner. The Supreme Court ordered that the appellant be thoroughly examined by two qualified psychiatrists to determine the mental state of the appellant when he killed his wife and whether he suffered from a defect of mind or diminished responsibility at the time. On the basis of the psychiatrists' reports, the court returned a special verdict in terms of s 28 (1) of the Mental Health Act 1976. The court commented upon the inordinate delay in the mental examination being carried out. The request for the psychiatric report was made in late 1987 and the psychiatric reports were only compiled in mid-1992.

Miss S Ahmed for the appellant

Mrs LR Goredema for the respondent

Judgment

Gubbay CJ: In this appeal the conviction was set aside by this court on 7 December 1987 under Judgment No. S-148-87. The following order was then made:

> "Firstly, it is ordered that a thorough examination of the appellant be carried out by two qualified psychiatrists to determine as precisely as possible what his mental state was when he committed this crime. The

GUBBAY CJ

> examination should further establish whether the appellant suffers or suffered from some mental abnormality short of a defect of the mind or whether he suffered from a sense of diminished responsibility or personality defect.
>
> Secondly, it is ordered that in forming their opinions, the psychiatrists read the uncontradicted evidence of the appellant on his state of mind before and after committing the crime, as corroborated to some extent by the evidence of Mncedisi and Patrol Officer Chimombe.
>
> Thirdly, it is ordered that the documents containing the opinions of the psychiatrists be filed with the Registrar of

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> the Supreme Court for the consideration and determination by this court of the issues dealt with by the psychiatrists in relation to the conviction and sentence passed by the court a quo."

Separate examinations of the appellant by two qualified psychiatrists, Dr FB Chikara and Dr JW Vermeulen, have now been completed and the pertaining affidavits filed.

Dr Chikara, in his affidavit, having examined the appellant closely, concludes by stating:

> "In my opinion G Moyo suffered from paranoid psychosis, a mental disorder at the time of the crime".

Dr Vermeulen, on the other hand, seems to be less certain as to whether the appellant, at the time he committed the crime, was suffering from a state of diminished responsibility or from a mental disorder or defect. Paragraph 7 of his affidavit is in these words:

> "In my opinion there is a reasonable possibility that at the time of the alleged crime the appellant was in a state of diminished responsibility due to an acute organic mental disorder. In other words, he was suffering from a physical condition which directly or indirectly affected his brain function."

With due respect to Dr Vermeulen, it does seem to me that this conclusion is somewhat ambiguous. However, looking at the matter as a whole, with particular reference to the evidence led before the court a quo, which indicated the strange manner of the appellant's behaviour and the absolutely

GUBBAY CJ

motiveless nature of the offence, involving as it did the murder of a loved wife, this court is satisfied, as a matter of probability, that he was suffering from a mental disorder or defect at the critical time.

That view is shared by Miss Ahmed, who appeared for the appellant at the original hearing of the appeal and again today. Mrs Goredema, who represents the State, has also submitted that a special verdict should now be returned.

The following order will accordingly issue:

A special verdict is returned in this matter in terms of s 28(1) of the Mental Health Act 1976, namely, that the appellant is guilty of the act charged against him but he was mentally disordered or defective so as not to be responsible according to law for his action at the time when the act was done.

The order made is that the appellant be kept in custody at Harare Central Prison and that a certified copy of this order be transmitted by the Registrar of this court to the appropriate authority so that further administrative action may be taken in regard to the appellant.

There is one further matter upon which I wish to comment. It is the inordinate delay taken by the psychiatrists to comply with the request that an examination of the appellant be undertaken. The order was made, as I mentioned, on 7 December 1987. The affidavit of Dr Chikara is dated 15 July 1992 and that of Dr Vermeulen 18 August 1992. It does seem to me, even bearing in mind the heavy workload under which these two psychiatrists undoubtedly operate, that low

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priority was accorded by them to the situation of the appellant. The consequence of the delay is that the period of the appellant's incarceration in prison has been unfortunately extended.

McNally JA: I agree

Manyarara JA: I agree

Pro Deo

S v NDHLOVU 1992 (2) ZLR 231 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Criminal appeal

12 October 1992

Flynote

Criminal procedure - unrepresented accused - court's duty to put to State witnesses points in defence outline where accused does not put these to witnesses

Headnote

The court should ask State witnesses to comment on points clearly mentioned by the accused in his defence outline if a legally unrepresented accused does not put these points to the witnesses during cross-examination; the court should not simply draw an adverse inference from the accused's failure to raise these points in cross-examination. By doing this the court is not taking sides or entering the arena; it is simply ensuring that the accused's defence case is properly commented upon by the witnesses.

WP Makunike for the appellant

Mrs LR Goredema for the respondent

Judgment

McNally JA: The appellant was charged with attempted theft by pickpocketing and was convicted and sentenced on 6 April 1992 to four months' imprisonment with labour, of which two months were suspended on conditions relating to good behaviour.

On appeal we made an order upholding the conviction but reducing the sentence to a fine of $300 or, in default of payment, one month's imprisonment with labour and, in addition, two months' imprisonment with labour, the whole of which was suspended for three years on condition that the appellant is not convicted of theft or of any offence of which dishonesty is an

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McNALLY JA

element, committed within that period, and for which he is sentenced to imprisonment without the option of a fine.

What follow are our brief reasons for that decision.

The events took place at a nightclub in Gweru. The appellant is an employee of the Air Force of Zimbabwe, where he works as a motor mechanic. The acceptable and corroborated evidence is that he put his hand into the pocket of the complainant, was noticed by the complainant's friend, and was caught while his hand was still in the pocket. He had stolen nothing, but there was a packet of cigarettes and a handkerchief in the pocket. And, of course, a pickpocket does not usually know what he is stealing until he has stolen it.

The conviction was therefore in order. But, in our view, too severe a sentence was imposed. This was a man of twenty-six, with no previous convictions, with family responsibilities and a reasonably good job. He was in a nightclub and said he was moderately drunk. It was unnecessary to send him to prison. A substantial fine and a suspended sentence should be enough to stop him repeating the offence. That is why we intervened as detailed above.

One final point needs to be made. The magistrate held it against the appellant that he did not put it to the complainant in cross-examination that he never inserted his hand in the complainant's pocket. It is true that he did not put it to the complainant. But it was clearly stated in his defence outline. If the magistrate thought the point should have been put, he should have put it himself. He could easily have said to the complainant: "The accused has said in his defence outline that he did not put his hand in your pocket. What have you to say to that?". Such an intervention is not taking sides, or "entering into the arena". It is simply an attempt to ensure that the accused's case is properly commented on by the witness.

Gubbay CJ: I agree.

Korsah JA: I agree.

Hove, Mutasa & Associates, appellant's legal practitioners

S v NEMUTENZI 1992 (2) ZLR 233 (HC)

Court **High Court, Harare**

Adam J

Criminal review

14 October 1992

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Flynote

Constitutional law - Constitution of Zimbabwe 1980 - s 18(2) - right to trial within reasonable period of time - when right infringed

Human rights - right to be tried within reasonable period of time

Headnote

The accused was charged with culpable homicide, alternatively contravening s 43(1)(a) of the Road Traffic Act 1976, arising out of a motor accident in which he was involved on 20 July 1986. He appeared in court and pleaded not guilty to the charge in November 1987. The trial commenced but was stopped in early 1988 as the presiding officer became subject to an inquiry which led to his dismissal. On 19 December 1989 the Attorney-General's office sent the record of the proceedings in this case to the Registrar and requested him to place the case before a judge of the High Court so that the previous proceedings could be set aside and a trial *de novo* could be ordered. The case was not referred to a judge as requested. The Attorney-General had now written again to the Registrar enclosing another copy of the record and requesting him to have a judge set aside the previous proceedings and order a trial *de novo*.

On review, the High Court ordered a permanent stay of the criminal proceedings against the accused. It found that the accused's constitutional right to be tried within a reasonable period of time had been violated. The inordinate delay of four years and eleven months in this case was in no way attributable to the conduct of the accused but was entirely attributable to the inefficiency of the State machinery.

The State had argued that there had been no violation of the accused's

ADAM J

constitutional right as he had failed to assert his right to be tried within a reasonable time period and he had suffered no prejudice as a result of the protracted delay. On this issue, the court said that where the delay was entirely attributable to the State and the accused has done nothing to cause the delay, the focus should not be on the non-assertion of the right but rather on whether the accused voluntarily waived his right to be tried expeditiously. Only if he has voluntarily waived his right should he be precluded from arguing that his constitutional right has been violated. In the present case the accused had not voluntarily waived his right to be tried expeditiously.

On the issue of prejudice the court said that even where, as in the present case, there had been a lengthy delay, the court would presume that the accused had suffered prejudice in the form of anxiety and concern whilst awaiting trial unless the State could show that there was no prejudice. The State had not shown that no prejudice had been suffered in the present case. The fact that the accused had not complained about the delay in the case did not mean that he had not suffered anxiety and concern.

The court also pointed out that the longer the delay had been, the more difficult it would be for

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the State to justify it and for the court to excuse it.

Despite the seriousness of the charge against the accused, the court decided that there was no alternative but to order a permanent stay in the proceedings.

In reaching its conclusion the court reviewed local and foreign case law relating to this issue.

Case cited

In re *Mlambo* 1991 (2) ZLR 339 (S)

Fikilini v A-G 1990 (1) ZLR 105 (S)

Barker v Wingo 407 US 514 (1972)

Klopfer v North Carolina 386 US 213 (1967)

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

R v Rahey (1988) 33 CRR 275 (SCC)

Judgment

Adam J: On 20 July 1986 a collision occurred at the intersection of Glenara Avenue and Dieppe Road, Harare, involving a Mercedes Benz army truck being driven by the accused, a Peugeot 504 vehicle and a Mazda 323 vehicle which resulted in the death of two persons in the Mazda 323. The accused was charged with culpable homicide, alternatively, contravenings 43(1)(a) of the Road Traffic Act, to which he pleaded (in November 1987) not guilty. The trial was stopped in early 1988 as the presiding magistrate became a subject

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of an inquiry which resulted in 1989 with his removal. The Attorney-General has now written to the Registrar of this court requesting that the record of proceedings be placed before a judge of the High Court so that the previous proceedings be set aside and a trial de *novo* ordered. This letter indicates that according to their records on 19 December 1989 a copy of the record of proceedings was sent to the Registrar of this court with the same request. However, it does not enclose a copy of the accompanying letter of 19 December 1989. Nor does it state that the Registrar of this court acknowledged receipt of it. Neither the letter or the copy of the record of proceedings sent on 19 December 1989 was ever placed before a judge. The letter does not state that anything was done about this by the Attorney-General after December 1989. The letter says that in making his request, the Attorney-General is conscious of the Supreme Court's decision in In Re *Mlambo* 1991 (2) ZLR 339 (S) but in his view the facts and circumstances in that case differ from the present one. *Mlambo* was arrested in October 1986 and held in custody for 2 weeks before bail was granted; he was charged on 15 January 1987 and until 23 August 1987 appeared on remand on 12 occasions. On 23 August, 1987 when *Mlambo's* legal practitioner finally protested at the delay in bringing Mlambo to trial the prosecutor withdrew the charges before plea. On 28 August 1990 Mlambo was summoned to

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appear for trial on 5 November 1990, on which date the prosector failed to provide Mlambo's legal practitioners with the documents relevant to the trial, so he applied for and was granted a postponement to 2 April 1991. On that date an application was made by Mlambo's legal practitioner for a stay in the proceedings as Mlambo's rights under s 18(2) of the Zimbabwe Constitution had been infringed. On 3 April 1991 the matter was referred to the Supreme Court. GUBBAY CJ cited with approval *Fikilini v Attorney-General* 1990 (1) ZLR 105 (S), which had approved the factors that had been identified in *Barker v Wingo* 407 US 514 (1972) which had to be taken into account in determining whether there had been undue delay and which were: (1) the length of the delay; (2) reasons assigned by the State to justify the delay; (3) the accused's responsibility to assert his rights; (4) prejudice to the accused.

The Attorney-General accepted that there had been a lengthy delay caused by the removal of the trial magistrate, as well as by the failure of the State to ensure that the matter was brought before this court, which was not in any way due to the conduct of the accused. But as far as the other two factors are concerned, the Attorney-General maintains that the facts are distinguishable from *Mlambo's* case because, since the trial commenced in November 1987, neither the accused nor anyone on his behalf has queried the delay or pressed for the matter to be finalised and no complaints have been made about the

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accused's rights being infringed. The Attorney-General states that there has been a failure on the accused's part to assert his rights. Further, the Attorney-General asserts that there is nothing to indicate that the accused has suffered any prejudice as a result of the delay. Such prejudice has to be examined on the basis of the interests which the speedy trial right was designed to protect and identified (1) to prevent oppressive pre-trial incarceration; (2) to minimise anxiety and concern of the accused, and (3) to limit the possibility that the accused's defence may be impaired. The Attorney-General states that the accused has not been incarcerated and it cannot be maintained he has experienced anxiety and/or concern particularly in view of the accused's failure to assert his rights. Also, the accused was never led to believe, as in *Mlambo's* case, that the State would not proceed with the charges. The Attorney-General indicates that for the above reasons, together with the seriousness of the offence in this case, the proceedings should be set aside and a trial *de novo* ordered.

Klopfer v North Carolina 386 US 213 (1967) and *R v Askov* [1990] 2 SCR 1199 (SCC) were considered and applied in In Re *Mlambo supra*. In *Klopfer* v North Carolina , *supra* the accused was indicted in February 1964 by a grand jury on a charge of criminal trespass committed in January 1964 by the accused's participation in a civil rights demonstration in a restaurant. The trial commenced in 1964 and when the jury failed to reach a verdict the trial judge declared a mistrial and ordered the case to be continued. In April 1965 the trial judge continued the case once again, when in August 1965 the accused filed a motion to have the charge permanently concluded as 18 months had elapsed since the indictment had been entered. At the hearing in August 1965 the prosecutor moved that he be permitted to enter *nolle prosequi* with leave (that is leave of the trial judge to withdraw the charge) and no justification for the proposed entry was given by the prosecutor. The trial judge granted it. On appeal to the Supreme Court of North

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Carolina, the accused argued that entry of *nolle prosequi* with leave deprived him of his right to a speedy trial. The Supreme Court of North Carolina acknowledged that the entry of *nolle prosequi* with leave did not permanently discharge the indictment, but notwithstanding the accused's right to speedy trial, the Court affirmed that he had no right to compel the State to prosecute. Accordingly it was not prepared to set aside the judge's order. On appeal, the United States Supreme Court held that the petitioner's (accused's) right to speedy trial guaranteed in the Sixth Amendment (rendered applicable to the State through the due process clause of the Fourteenth Amendment) was denied to the accused by the procedure that had been adopted. WARREN CJ observed at 385-386:

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> "The North Carolina Supreme Court's conclusion - that the right to a speedy trial does not afford affirmative protection against unjustified postponement of trial for an accused discharged from custody - has been explicitly rejected by every other state court which has considered the question ...
>
> We, too, believe that the position taken by the court below was erroneous. The petitioner is not relieved of the limitations placed upon his liberty by this prosecution merely because its suspension permits him to go 'withersoever he will'. The pendency of the indictment may subject him to public scorn and deprive him of employment ... By indefinitely prolonging this oppression, as well as the 'anxiety and concern accompanying public accusation', the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States."

In *R v Askov supra* the accused with others was charged with extortion, as well as other offences, in November 1983 and was detained in custody for 6 months before being released on recognizances preliminary enquiry was held in July 1984 which was completed in September 1984 with a trial date set for October 1985. It could not be heard and so was put over to September 1986 when the trial began, at which time the accused applied for a stay of proceedings, on the ground that his right to be tried within a reasonable time, in terms of s 11(b) of the Canadian Charter of Rights and Freedoms, had been violated. The Supreme Court of Canada held that s 11(b) explicitly focuses upon the individual interest of liberty and security of the person and although its primary aim is the protection of the individual's rights and the provision of fundamental justice for the accused, nevertheless there is by inference a community or societal interest implicit in s 11(b). It held that the four factors to be taken into account in determining whether there has been an infringement of s 11(b) are: (1) the length of the delay; (2) the reasons for the delay, including limits on institutional resources and the inherent time requirements of the case; (3) waiver of time periods; and (4) prejudice to the accused. CORY J observed that, as far as the length of delay was concerned, the "longer the delay, the more difficult it should be for a court to excuse it. Very lengthy delays may be such that they cannot be justified for any reason". He looked at the reasons or explanation for delay on the basis whether the delays were delays attributable to the State, delays attributable to the accused or systemic or institutional delays. He concluded that delays attributable to the State and delays occasioned by inadequate resources, ie systemic delays, must weigh against the prosecution, while instances where it can be shown that the actions of the accused were for the furtherance of delay

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ADAM J

will weigh against him. As for waiver, the Supreme Court of Canada, unlike POWELL J in *Barker v Wingo supra*, did not talk about the accused's assertion of the right to speedy trial but focused on the accused waiving his right to a trial within a reasonable time and said that the accused should not be required to assert it. In fact, CORY J held that "for a waiver to be valid it must be informed, unequivocal and freely given", with the "burden of showing that a waiver should be inferred" falling on the prosecution. As for prejudice to the accused, he stated that there "is a general, and in the case of very long delays an often virtually irrebutable, presumption of prejudice to the accused"; but where the State can show that there was no prejudice to the accused, this may serve to excuse the delay. In *R v Askov supra* the Supreme Court of Canada came to the conclusion that there was no basis upon which the delay in that case could be justified, so it directed a stay of proceedings.

Although GUBBAY CJ did refer to *Barker v Wingo supra*, in In Re *Mlambo supra* he also approved of the approach of WILSON J in *Rahey v R* (1988) 33 CRR 275 (SCC) on the very relevance of prejudice, when WILSON J asserted that "water-tight" compartment approach was not acceptable to her. She believed "that the same factors which are relevant to an alleged violation of one's rights may also be relevant and entitled to consideration in relation to an alleged violation of another". GUBBAY CJ observed at 13-14:

> "What is emphasised in determining the cut-off point after which a delay becomes unreasonable is a 'balancing test, in which the conduct of both the prosecutor, and the defendant are weighed' ... The variety of factors to be considered may pull in opposite directions. In the absence of acquiescence, express or implied, a certain degree of prejudice resulting from a long delay may be inferred, if not rebutted by the State. Actual prejudice such as impairment of the right to a fair hearing due to the death or disappearance of witnesses, may further militate in favour of the accused. Against this must be weighed the factors related to the cause of the delay. Was it the responsibility of the State? If so, was the delay attributable to malice, negligence, mere inadvertence, or the inherently complex nature of the offence? Were there unavoidable factors, such as the death or unexpected ailment of an essential witness? Were there justifiable systemic delays?"

Further, GUBBAY CJ also considered the accused's omission to object on 5 November 1990, in the context of what had transpired before and after that date, by holding that this could not be viewed as a waiver of the accused's constitutional guarantee.

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It follows from the foregoing that the Supreme Court of Zimbabwe was not saying that failure on the part of an accused to assert his right did not mean that there was no infringement unless there was acquiescence, express or implied, on the accused's part or there was a waiver of his constitutional guarantee.

Now dealing with the applicable factors to the present case, the period of the delay is four years and eleven months. The Attorney-General has wisely conceded that this was an inordinate delay. The delay caused by the removal of the trial magistrate and the State's subsequent conduct was not in any way due to the accused. It would seem that the

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Attorney-General accepts that a satisfactory reason or explanation has not been given for this inordinate delay.

The Attorney-General contended that the accused has not experienced anxiety or concern, particularly as he has not asserted that his right has been violated. CORY J observed in *R v Askov supra* that this failure of the accused did not give the State licence to proceed with an unfair trial and such failure itself would not be sufficient to impugn the accused's motives.

Further, in *Barker v Wingo supra* POWELL J, when elaborating on the prejudice to the accused and how this has to be assessed, was not laying down that the accused had to demonstrate that he was suffering anxiety and concern. Rather, the right to a speedy trial existed to reduce the uneasiness and worry that was already there once the accused was indicted and put on trial. CORY J in *R v Askov supra* graphically spoke of the time awaiting trial as being "exquisite agony for the accused and his immediate family". Related to this is the maxim of our criminal law that every accused person is presumed to be innocent until proven guilty, which means that he must be given the opportunity of having a trial and to have his "name cleared and reputation re-established at the earliest possible time".

I am not persuaded by the Attorney-General that the present case can be distinguished in the manner suggested by him. It is not necessary in every case that the accused has to be led to believe that the State would not proceed with the charges against him before this court will find that there was prejudice. There is a certain degree of prejudice because of the inordinate delay in this case that can be inferred against the State, which it has not rebutted. The cause of delay can readily be attributable to the State, due to either negligence or inadvertence. In the present case the undefended accused appeared for his trial when it commenced in November 1987 and was present

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when in 1988, in the middle of his trial, it was stopped by the presiding magistrate. In such circumstances surely it is for the prosecution and those in the government responsible for the administration of justice to communicate with the accused. The Attorney-General most correctly concedes that "it is undesirable that there has been a delay in the finalization of this matter". As GUBBAY CJ stated, where the entire delay is due to the conduct of the State, unless "there is some strong basis to counter this ... it will not prove possible to tolerate it." Gubbay CJ also held in In re *Mlambo supra* that a delay of four years and seven months was a very long delay, giving rise to a strong presumption of prejudice.

The precept "justice delayed is justice denied" can be said to be an apt description of what transpired in the present case. In such a situation, despite the seriousness of the present case, there is no alternative for this court but to order a permanent stay of the proceedings.

Accordingly, it is ordered that the proceedings in the Magistrates Court Harare, in the case of S v *Nemutenzi*, Case CR No. 67/7/86 be and are hereby permanently stayed.

Smith J : I agrees.

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MATANGI v KUMBULA & ORS 1992 (2) ZLR 241 (HC)

Court **High Court, Harare**

Smith J

Civil application

16 September & 14 October 1992

Flynote

Delict - defamation - interdict to stop continued publication of defamatory information - when court will grant

Headnote

The applicant sought an order interdicting the respondents from publishing defamatory information about him and from entering his residential property without his express consent and threatening, abusing, insulting and assaulting him.

The applicant alleged that the respondents had published defamatory information about him to others. Despite the fact that the applicant had not attached to his founding affidavit any supporting affidavit from a person to whom the alleged defamatory statements had been published or copies of written material allegedly circulated by the respondents, the court found that, on the basis of the facts which were common cause or were not denied by the respondents, the applicant had established a sufficient basis for his application.

The court granted the interdict. It found that the applicant had a reasonable apprehension that his rights would be infringed and there was no other remedy reasonably available to the applicant to protect his rights. The remedy of damages was not an adequate alternative remedy. He did not have to wait for the damage to be done and then sue for compensation. Loss of reputation or *dignitas* or invasion of privacy cannot always be adequately compensated by the payment of damages.

Cases cited:

Bluebell Inc v Lennard Clothing Mfrs (Pvt) Ltd 1984 (1) ZLR 49 (H)

SMITH J

Philips Electrical (Pvt) *Ltd v Gwanzura* 1988 (2) ZLR 117 (H)

Heilbron v Blignaut 1931 WLD 167

S Moyo for the applicant

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D Kanokanga for four of the respondents

Judgment

Smith J: The applicant is claiming an order interdicting the respondents from publishing information that is defamatory of him and from entering his residential property without his express consent and threatening, abusing, assaulting and insulting him. Additionally he is claiming an order that the first, third, fourth and fifth respondents (hereinafter referred to as "the four respondents") refrain from applying pressure on the second respondent to enter his place of residence or publish defamatory information concerning him. He bases his claims on the following allegations. The first respondent is a pastor of a church and is married to the second respondent. The third and fourth respondents are married and are the parents of the first and fifth respondents. The fourth respondent is the applicant's sister. He and the respondents are all members of the same church. In November 1991 he learnt that the respondents were telling members of the church that he had committed adultery with the second respondent. The third respondent told the applicant's brother that the applicant was committing adultery with the second respondent. The first and fifth respondents lodged a formal complaint with the bishops of the church concerning the alleged adultery and the applicant was called, and appeared, before the bishops to answer the charge. At the hearing the second respondent initially repeated the allegation concerning the alleged adultery but then said her allegation was not true. She had been forced by the other respondents to make the allegation, failing which she would be divorced by the first respondent. At the hearing there were about 12 people in the room. When the second respondent changed her story the first respondent jumped up and shouted that the applicant was a crook and adulterer and must have winked at the second respondent to make her change her story. The following day the respondents came to his house. The four respondents shouted that he had committed adultery with the second respondent so she was now his wife and they were to live together. The second respondent started showing signs of heart palpitations and breathing difficulties and began to foam at the mouth and salivate. Soon after the four respondents left he took the second respondent to a clinic. She was referred to a psychiatrist and was thereafter hospitalised in a psychiatric ward for two weeks. When he and his wife visited the second respondent in hospital the second respondent apologised to his wife, saying that she had been forced by the four respondents to make the allegation. After her release from hospital

the second respondent was readmitted to the church bible college where she had been a student boarder. In January 1992 the four respondents came to Harare to see the Board of Bishops of the church. They complained about the admission of the second respondent to the bible college and said that she should live with the applicant. They spent the night at the college, saying that the applicant had committed adultery with the second respondent, and owed not to leave the college until the applicant had collected the second respondent and taken her to his home. Some bishops eventually took the second respondent to the senior bishop's home and she was finally accommodated by the applicant's brother. Subsequently the applicant went to Chipinge to see his sister, the fourth respondent, to discuss the matter and

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persuade her that he had not committed adultery with the second respondent. Her attitude was violent, insulting and abrasive so he left. As he was leaving, the first respondent, who happened to be nearby in the company of others, pointed to the applicant and shouted that the applicant had committed adultery with his wife. A week later the second respondent wrote a letter to the applicant and his brother in which she threatened to commit suicide and apologised for having submitted to pressure to admit falsely to the adultery. The four respondents have been demanding to know why the second respondent is not living with the applicant and his family and are threatening to bring her to his house. They have also been dispatching circulars to various branches of the church in which they say that the applicant has committed adultery with the second respondent.

The applicant says that he and his family live in continual fear that the respondents will come to his house and commit the acts of violence that they have threatened.

The four respondents oppose the application. They deny most of the charges and put the applicant to "strict proof" thereof. They admit that the applicant appeared before the Board of Bishops. The first respondent agrees that at the hearing the second respondent withdrew her allegation of adultery and that he "intervened". He denies that he did and said what the applicant alleges he did but he does not say what form his intervention took or what he actually said. He admits that he, together with the third and fifth respondents, visited the applicant's home without invitation or warning but says that the applicant had permitted them to enter and that he knew nothing about the second respondent's illness or admission to the psychiatric ward. He does not say why they visited the applicant's home. He does not deny that the second respondent was with them at the time or that she had been hospitalised. He admits that in January he, together with the third, fourth and fifth respond-

ents, travelled from Chipinge to Harre as they had made an appointment to see the archbishop of the church. However he does not say what the purpose of the trip was. He admits that on that visit the four of them went to the bible college and vowed not to leave until the applicant had fetched the second respondent. That was because they had been told by the bishops that the applicant had been told to take the second respondent to his house and had agreed to do so and they wanted to see him collect her. He does not explain why they should vow not to leave the college until the second respondent had been collected. He admits that the applicant later drove to Chipinge and "sought audience" with the fourth respondent but says that he knows nothing else because he was not present. It is strange that the fourth respondent, his mother, did not tell him why the applicant wanted to see her or what she did about it. The four respondents all deny having forcibly entered the applicant's residence or having been violent towards or threatened him. They also deny publishing any false or defamatory information about him. They all say that they have no reason to go to the applicant's residence as the matter is now *sub judice*. All they want is to have the matter decided by the"courts of law".

The requirements for the grant of an interdict are settled. The applicant must have a clear right which has been infringed or as to which he has a reasonable apprehension that it will be infringed, he must have no other remedy reasonably available to him and the balance of

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convenience must favour the grant of the interdict.

Mr Kanokanga has properly conceded that the applicant has a right not to be defamed but has argued that the applicant has not established that the four respondents have infringed that right or any other. He pointed out that the respondents have denied publishing any statements that are defamatory of the applicant and, furthermore, the applicant has not attached to his founding affidavit any supporting affidavit from a person to whom the alleged defamation has been published or any copy of the circular allegedly dispatched to other branches of the church. *Mr Kanokanga* further submitted that the applicant has not established any basis for a reasonable apprehension that his rights will be infringed, especially in view of the time that has elapsed since the first defamation was allegedly published, which was in November last year. *Mr Kanokanga* pointed out that the applicant has instituted a civil action against the respondents-case no. HH-586-92 - claiming damages for defamation and for *injuria* so he has a remedy available to him. Further submissions by *Mr Kanokanga* were as follows. The respondents deny forcibly entering the applicant's residence. There is nothing to show that they intend to do so in the future. If they enter his premises without his consent

they could be prosecuted for trespassing, so he has an alternative remedy. The applicant cannot sue on behalf of the second respondent asking that the other respondents be interdicted from applying pressure on her. The grant of the interdict would prejudice the respondent's position in case No HH 586/92. As the risk of harm is not apparent, the interdict should not be granted: *Bluebell Inc v Lennard Clothing Manufacturers* (Pvt) Ltd 1984 (1) ZLR 49 (H).

I accept as valid *Mr Kanokanga's* criticisms regarding the failure on the part of the applicant to file supporting affidavits or papers in relation to the allegations of defamation. However, as *Mr Moyo* has pointed out, there are significant facts which are common cause or are not denied by the four respondents. There were allegations that the applicant had committed adultery with the second respondent and that as a consequence the applicant appeared before the Board of Bishops. Some of the respondents went to the applicant's home, without invitation or warning. The first respondent, together with the third and fifth respondents, took the respondent to the applicant's home and left her there. The four respondents spent the whole night at the bible college and vowed not to leave until the applicant had taken the second respondent to his house.

There are some allegations made by the applicant which the respondents do not deny but merely assert that they are not aware of them and put the applicant to "strict proof" thereof. The four respondents deny making the alleged defamatory statements and invading the applicant's privacy.

In *Philips Electrical (Pvt) Ltd v Gwanzura* 1988 (2) ZLR 117 (H), REYNOLDS J dealt with an application for an interdict to restrain a person from publishing matter defamatory of the petitioner. In that case the respondent did not dispute publication of the defamatory matter but pleaded justification. At p 126 the learned judge dealt with the need to balance the interests of

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the applicant and of the respondent. He said at p 127A-B:

> "In balancing the interests of the parties in the present matter, those of the petitioner, in my view, far outweigh those of the respondent. Indeed, and as the respondent has said that he will not re-publish the allegedly defamatory material, his interest causes scarcely any perceptible movement in the scales at all."

In my opinion, the applicant has established that he has a clear right to his good name and reputation and peaceful occupation of his home and that he

has a "well-grounded apprehension of irreparable harm if the interim relief is not granted". I say that he has this apprehension because the four respondents, whilst denying the allegations, say they want to see the matter decided in court and have no reason to go to his home **now that** the matter is *sub judice*. Clearly, therefore, they do not regard the matter as settled. As far as the balance of convenience is concerned, there is no inconvenience to the four respondents because all they want is to see the matter decided by a court of law. The interdict will not prevent them going about their lawful business and will not intrude upon their way of life. The four respondents cannot be prejudiced in any way by the grant of an interdict. Finally, I accept that there is no other adequate remedy available to the applicant. In *Heilbron v Blignaut* 1931 WLD167 at 169, GREEBERG J (as he then was) said:

> "If an injury which could give rise to a claim in law is apprehended, then I think it is clear law that the person against whom the injury is about to be committed is not compelled to wait for the damage and sue afterwards for compensation, but can move the court to prevent any damage being done to him."

That statement applies equally to this case. Loss of reputation or *dignitas* and an invasion of *one's* privacy cannot always be adequately compensated by payment of damages.

I do not agree with *Mr Kanokanga's* submission that the grant of an interdict would prejudice the respondents' position in case no. HH 586/92. He is also wrong in his submission that if the respondents enter the applicant's premises without his consent they could be prosecuted for trespassing. There is no offence of trespassing in our law. I agree with him, however, that the applicant cannot make an application on behalf of the second respondent that the four respondents refrain from applying pressure on the second respondent to enter his home.

With regard to the costs of this application, the facts are entwined with those that stand for determination in case no. HH 586/92. It seems to me that *Mr Moyo* is correct in his submission that the costs should be dependent on the outcome of that case.

It is ordered:

1) That pending the determination of case no. HH 586/92, the respondents are interdicted from -

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(a) publishing any statement alleging that the applicant has committed or is committing adultery with the second respondent or any statement that is defamatory of the applicant, or

(b) entering, without the consent or permission of the applicant, his residence or place of business; or

(c) abusing, insulting or assaulting the applicant;

2) That the costs of this application are to be determined by the court that deals with case no. HH 586/92.

Scanlen & Holderness applicant's legal practitioners

Kanokanga & Partners first, third, fourth & fifth respondents' legal practitioners

DEAN & ANOR v CHRISTEN 1992 (2) ZLR 248 (HC)

Court **High Court, Harare**

Smith J

Civil application

16 September & 14 October 1992

Flynote

Town and country planning - title deed conditions - planning authority can permit use contrary to conditions

Headnote

A town planning authority can permit an owner of a stand to do something which is contrary to the conditions contained in his title deeds. This is so because s 27 of the Regional, Town and Country Planning Act 1976 requires it to notify the Registrar of Deeds so he can delete relevant conditions. But before the town planning authority authorises any use contrary to the title deed conditions it must comply with s 27(3) of the Act, that notice of the proposed use must be given to the neighbours.

JS Sayce for the applicants

JB Colegrave for the respondent

Judgment

Smith J: This is an application for rescission of a default Judgment given in case No HC 1450/92. The first applicant is the owner of Stand 3 in Rekodzi Township near Marondera (hereinafter referred to as "the Property") and intends to purchase the neighbouring stand. He

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keeps on the Property 6000 chickens, which he values at approximately $50 000, and has constructed 7 houses for them at a cost of approximately $250 000. The tile deed to the Property provides, *inter alia*, that ownership of the Property is subject to the conditions of establishment of Rakodzi Township contained in SRGN 577/1959 and to two specified special conditions. One of the special conditions is that no manufacturing, trading or business operations of any kind shall be conducted on the property. Schedule II of RGN No. 577 of 1959 contains the

SMITH J

following special conditions which are relevant to this application:

> "(a) no cattle, sheep, goats, swine or horses shall be kept on the stand;
>
> (b) the stand shall be used for residential purposes only and the only buildings which may be erected or used thereon shall consist of not more than one principal building being a house designed for use as a dwelling house for a single family, together with such outbuildings as are incidental to the permitted use of the land."

Lodged with the notice of opposition to the application in case no. HC 1450/92 was a letter dated 16 January 1991 from the Department of Physical Planning to the second applicant regarding "poultry farming" on Stand 3 in Rakodzi Township. In that letter the Acting Provincial Planning Officer, Mashonaland East advised the rural council as follows:

> "... keeping of chickens is normally considered ancillary to residential development unless the conditions of establishment specify otherwise. We note that the conditions of establishment of the township in question do not stipulate against the keeping of chickens. Nothing on the scale of such an activity is mentioned. Local Authority by-laws usually control the scale of this activity.
>
> Lastly your attention is drawn to the fact that development of chicken runs has to be permitted just like any other development in terms of section 27 of the Regional, Town and Country Planning Act (by the local authority). The Health Environmental section of the Ministry of Health has to be consulted. What is required in the case in question is that if the development has not been permitted in terms of section 27 then an application in terms of section 28 of the Regional, Town and Country Planning Act has to be made to regularise the development
>
> The application will give your council an opportunity to reduce the scale of the activity to a desirable level."

Acting on the advice referred to above, the second applicant, in its capacity as Marondera Rural Local Planning Authority, issued a development permit in terms of s 28 of the Regional, Town and Country Planning Act 22 of 1976 (hereinafter referred to as "the Planning Act") authorizing "the construction of a temporary residence, establishment of 7 chicken houses and keeping of about 6000 birds." The permit said that it was to regularise an existing situation and was granted in respect of a belated application dated 9 May 1991.

SMITH J

The respondent instituted an action - case no. HC1450/92 - against the applicants in which he sought an order declaring the above-mentioned development permit to be of no force and effect and ordering the first applicant to discontinue his poultry business on Stands 3 and 4 Rekodzi

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Township and remove all chicken houses on the said stands and also all buildings erected for employees in excess of those reasonably required for use by domestic employees. The applicants failed to file timeously appearance to defend in that case and accordingly default Judgment was granted in favour of the respondent. This application seeks the rescission of that Judgment.

To succeed, the applicants must persuade the court that good and sufficient cause exists for the relief sought. It has been settled in many cases that the applicants must satisfy the court on two issues. Firstly, they must give a reasonable explanation for the default, and, secondly, they must show a *bona fide* defence with some prospects of success. Mr *Colegrave* agreed that the applicants' failure to enter timeously appearance to defend the action may have been satisfactorily explained but made no concession in that regard. I am satisfied, however, that a reasonable explanation has been proffered. Therefore the only issue in dispute is whether or not the applicants have shown that they have a *bona fide* defence with some prospects of success. Both Mr *Colegrave* and Mr *Sayce* agree that this hinges on the validity of the development permit issued by the second applicant. The applicants are both *bona fide* in that they believe that the development permit is valid since it was issued on the basis of the advice received from the Acting Provincial Planning Officer. What the court has to decide is whether their belief is well founded.

In terms of the conditions of title of the Property, it is to be used for residential purposes only. That is the dominant use. Uses incidental to the enjoyment of a dwelling house are permitted excepting, however, the keeping of any cattle, sheep, goats, swine or horses, which is specifically prohibited. Thus the owner cannot keep a cow on the Property in order to produce milk for his domestic consumption. Such a use might well be regarded as incidental but it is prohibited. The keeping of fowls on the Property, on the other hand, is not prohibited and therefore the applicant may keep fowls but only as long as such use is incidental to his enjoyment of his dwelling-house on the Property. In A *Practical Approach to Planning Law* by Victor Moore 2 ed at p 77 the author states as follows in connection with the use of property incidental to the enjoyment of a dwelling-house:

SMITH J

> "The requirement is that use must be incidental to the enjoyment of the 'dwellinghouse as such'. Hence to use land within the curtilage of a dwellinghouse for the parking of a commercial vehicle used for business purposes is not within this provision, unless as a matter of fact and degree it is not considered to be material. This is an area of particular difficulty where a person uses outbuildings or a room in a dwellinghouse to carry on a hobby or an activity having a business or commercial element. Artists' studios and the giving of music lessons are classic examples of this problem. The use of outbuildings for mending cloth, carrying on a tailoring business or dog breeding, the use of a room for a nursing agency and the use of a kitchen to prepare sandwiches and salads for local firms, have all been held by the Secretary for State to constitute development.
>
> In all these cases it is necessary for the authority to look at the nature and scale of the hobby or non-domestic use being carried on, and then to judge whether as a matter of fact and degree a further use has been added to the existing dwellinghouse use."

In my view, the scale on which the applicant is keeping fowls on the Property is such as to constitute a further use which has been added to the existing dwelling-house. In fact the

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applicant himself agrees that the keeping of the fowls on the Property is ancillary to the business, called Marondera, Egg Supply, which he carries on in the town of Marondera, and not to his residing on the Property. In his opposing affidavit in case no. HC 1450/90 he says that the eggs, chickens and chicken manure produced by him on the Property are sold at that business outlet. He also says that no business whatsoever is conducted on the Property. However, even if it is accepted that the keeping of the fowls on the property does not constitute a business, there can be no doubt that such use is not ancillary to the enjoyment of a dwelling-house. Therefore, in my opinion, the applicant has altered the character of the use of the Property.

Part IV of the Planning Act provides for the control of development of land and buildings. Section 22 thereof defines what is meant by the term "development". In terms of subs (1)(b) thereof, the altering of the character of the use of any land constitutes development. Section 25 of the Planning Act provides that no person shall carry out any development unless it is permitted in terms of a development order or in accordance with a permit issued in terms of s 27.

The Marondera Rural Local Planning Authority has issued a permit authorizing the applicant to establish 7 chicken houses and keep 6000 birds on the Property.

SMITH J

It is clear that a permit may authorize development which conflicts with any condition registered against the title deed to the property concerned because subs (9) of s 27 provides that where there is such a conflict the local planning authority must submit a copy of the permit to the Registrar of Deeds and then, in terms of subs (10), the Registrar of Deeds must delete the relevant condition from the title deed. In my view no distinction can be drawn between conditions of title fixed by the appropriate Minister (eg as set out in RGN No. 577 of 1959) and other conditions of title. It could never have been the intention of the Legislature that conditions fixed by the appropriate Minister would be sacrosanct and immutable. I do not accept Mr *Colegrave's* submission that s 74A of the Deeds Registries Act **[***Chapter 139*] indicates that conditions in a title deed and conditions fixed by the appropriate Minister on the establishment of a township should be treated differently. In my opinion, the permit granted to the applicant to construct the chicken houses and keep 6000 birds is of no effect because the local planning authority failed to comply with the requirements of s 27 of the Planning Act. Its failure to do so was because of its misconception of the position, which was based on the advice it received in the letter from the Department of Physical Planning in which it was told that the keeping of chickens was incidental or ancillary to "residential development". On that advice it issued the permit to authorize the construction of the fowl runs and keeping of the fowls but, because it considered that the keeping of 6000 fowls conformed with the title deed of the Property, it did not comply with the provisions of subs (3) of s 27 of the Planning Act. That subsection provides in para (d) that where an application for a permit relates to development which conflicts with any condition which is registered against the title deed of the property concerned, the local planning authority must require the applicant to give public notice of the application and to serve notice of the application on the owners of adjacent properties. The giving of such notice is

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required so that objections and representations may be lodged and must be considered before the permit can be granted. In this case, no notice was given by the first applicant after he had applied for the permit. In his founding affidavit in case no. HC 1450/92 the respondent said that he was not given notice in terms of s 27(3) of the Planning Act and he was not aware of any public notice having been given. The first applicant's response to that was that he was not required to give such notice. Therefore the respondent had had no opportunity to object to the granting of the permit. The failure to comply with the provisions of s 27(3) of the Planning Act is so fundamental that it must invalidate the granting of the permit.

For the reasons set out above, I consider that the permit granted to the first applicant to keep 6000 chickens and to establish chicken runs for them and residential quarters for staff to look after the chickens is invalid. It must

SMITH J

follow that although the applicant's defence to the application in case no. HC 1450/92 is *bona fide*, it has no prospects of success.

The application for rescission is dismissed. The first applicant is to pay the respondent's costs.

Kavanagh Sakala & Co, applicant's legal practitioners

Stumbles & Rowe, respondent's legal practitioners

CITY OF HARARE v D & P INVESTMENTS (PVT) LTD & ANOR 1992 (2) ZLR 254 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Manyarara JA & Ebrahim JA

Civil appeal

6 & 15 October 1992

Flynote

Civil procedure - exception - purpose of - whether pleading and whether notice to bar must be given - error in notice - whether still valid despite error

Headnote

An exception is an answer to the plaintiff's claim or to a defence claimed. Its main purpose is to obtain a speedy decision upon a point of law apparent on the face of the pleading attacked and so settle the dispute in the most economical manner by having the faulty pleading set aside.

Rule 80 of the Rules of the High Court deals with "any pleading" and lays down the procedure

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for barring. An exception is a pleading as envisaged by Rule 80 and therefore the time allowed for filing of an exception specified in Rule 119 read with Rule 137(1)(b) of the Rules simply determines the time which must be allowed to expire before a notice of intention to bar must be given. An exception is not automatically barred if this time period has elapsed. Notice of bar must be given. The right to file an exception will only be lost when the bar period has expired. An excipient is allowed 16 days after filing the exception to set it down for hearing, failing which he has to plead over the merits and cannot have the exception heard before the trial. Appellant's notice of set down was timeous and valid despite its incorrect statement that the set-down was by consent. These objections in *limine* were dismissed with costs and the Registrar was ordered to set down the exception for hearing.

Cases cited:

Haarhoff v Wakefield 1955 (2) SA 425 (E)

GUBBAY CJ

Plascon-Evans Paints (Tvl) Ltd v Virginia Glass Works (*Pty) Ltd & Ors* 1983 (1) SA 465 (O)

Tyulu v Southern Ins Assoc Ltd 1974 (3) SA 726 (E)

MJ Gillespie for the appellants

AP de Bourbon SC for the respondents

Judgment

Gubbay CJ: The question for determination in this appeal is whether a party, who takes an exception to a pleading outside the time limit prescribed by the Rules of the High Court, is automatically barred and may only be heard thereon provided the court or judge has condoned the default in terms of Rule 4C(a).

The learned judge presiding, for reasons remarkable solely on account of their brevity, reached an affirmative answer. Accordingly, he dismissed with costs the exception of the first defendant (now the first appellant) to the plaintiffs' declaration. Leave to appeal against that order was, however, granted.

The controversy between the parties arose in this way. On 6 February 1990 the defendants served a request for further particulars to the plaintiffs' declaration, which had been filed with the summons on 25 September 1990. The particulars were provided by the plaintiffs on 14 March 1990. Thereafter on 3 April 1990 and 10 May 1990, respectively, the first defendant and the second defendant filed an exception to the declaration, the grounds set forth being expressed in identical terms.

The first defendant set down its exception for hearing on 20 June 1990, erroneously stating in the notice that this was "by the consent of all parties". The second defendant did not set down its exception, doubtless because it was appreciated that it would share inevitably in the fate of the first defendant's exception. Presumably it was at the direction of the Registrar that the date

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of hearing was altered to 21 June 1990 and a fresh notice of set down filed and delivered.

The argument advanced by counsel for the plaintiffs in support of the judgment *a quo* was to this effect. Under the Rules of the High Court an exception is not to be treated as a pleading and so is not subject to the procedure for barring provided for in Rule 80. If a party does not file an exception within the time limit specified in Rule 119, as read with Rule 137(1)(b) - as *in casu*, where the period expired on 30 March 1990 -he foregoes the absolute right to except and his remedy then is to plead over.

GUBBAY CJ

It is obvious that at the threshold of the argument is the contention that the term "any pleading" in Rule 80 (prior to its recent amendment by SI 43/92, with which I am not concerned) is to be read as excluding an exception. On the other hand, if an exception is a pleading, then a notice of intention to bar is required to be given and may be so given at any time after the expiration of the period specified in Rule 119.

At the outset, I must confess that, although no particular Rule specifically says so, it has always been my understanding that an exception falls within the classification of "any pleading". Certainly prior to the repeal of the Advocates Act [*Chapter 216*] by the Legal Practitioners Act 1981, unless a party to litigation in the High Court was acting in person, pleadings were required to be drafted and signed by advocates, and an exception was regarded as but one such pleading. Attorneys were accorded the same privilege in respect of further particulars, whether requested or furnished. This is apparent from Form 12(a) of the Rules, which exemplifies, apart from the grounds, the manner in which an exception is to be drafted. It indicates that it is to be signed by "Plaintiff's/Defendant's Counsel and Plaintiff's/Defendant's Attorneys". Form 12(d), which relates to an application for further particulars to either a declaration or a plea, signifies that it may be signed solely by "Plaintiff's/Defendant's Attorneys."

The same position obtains in the Republic of South Africa where the legal profession remains divided. In *Haarhoff v Wakefield* 1955 (2) SA 425 (E) the defendant filed an exception, signed by his attorney, to the plaintiff's declaration. An objection thereto was upheld on the ground that in terms of the then Rules of Court an exception, being a pleading, had to be signed by an advocate or by the litigant himself. See, also, *Plascon-Evans Paints (Transvaal) Ltd v Virginia Glass Works (Pty) Ltd and Ors* 1983 (1) SA 465 (O). Again, in *Tyulu v Southern Insurance Association Ltd* 1974 (3) SA 726 (E) the defendant filed an exception to the plaintiff's declaration two days later than the time set out in Rule 23(1) of the Uniform Rules of the Supreme Court of South Africa, 1965. EKSTEEN J held that, although Rule 23(1) determines the time within which an exception must be delivered, an exception, being a pleading, may, in those instances where the Rules require a notice of bar to be given, be delivered at any time before notice of bar is given and the bar period has expired. (See at 729A-C).

Quite apart from the persuasive nature of these decisions, dealing as they do with Rules *in pari materia* with our own, the issue, to my mind, is resolved by the clear implication arising from Rule 80. It provides that, where a party

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GUBBAY CJ

wishes to give a notice of intention to bar for the failure to file any pleading or request for further particulars, Form 9 is to be utilised for that purpose. The wording of Form 9 reads:-

> "Take notice that the plaintiff/defendant is hereby required to file and deliver his declaration/plea, **or other answer to the plaintiff's claim**, within four days, and in default it is the defendant's/plaintiff's intention to file a copy of this Notice with the Registrar as a bar." (My emphasis).

An exception is plainly an "answer to the plaintiff's claim" or, for that matter, to the defence raised. Its main purpose is to obtain a speedy decision upon a point of law apparent on the face of the pleading attacked and so settle the dispute in the most economical manner by having the faulty pleading set aside.

Viewed in the context of Rule 80, Rule 119 simply determines the time which must be allowed to expire before a notice of intention to bar may be given. It is not peremptory in the sense that non-compliance deprives a party of the right to file an exception. He loses that right when the bar period has expired.

A subsidiary objection raised by the plaintiffs was that, because the first defendant had set down the exception out of time, it was required by Rule 138(c) to plead over to the merits of the declaration and was not permitted to set down the exception for hearing before trial.

There is a short answer to this. Failing the withholding by the plaintiffs of consent, the first defendant was allowed, under Rule 138(b), sixteen days within which to set down the exception for hearing. The exception was filed on 3 April 1990. Excluding Saturdays, Sundays and the Easter public holidays, it was in fact set down on the sixteenth day, being 27 April 1990. The notice was not, in my opinion, rendered inoperative simply for incorrectly stating that the set down was by consent. The plaintiffs were not entitled to disregard it. They ought to have understood the reference to the consent of the parties as *"pro non scripto"*.

In the result, I would allow the appeal with costs and alter the order of the court a quo to read:

1. The objection *in limine* is dismissed with costs.
2. The Registrar is directed to set down the first defendant's exception for hearing on a date suitable to the parties.

GUBBAY CJ

Manyarara JA: I agree.

Ebrahim JA: I agree.

Honey & Blanckenberg, appellants' legal practitioners

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Atherstone & Cook, respondents' legal practitioners

IN RE NDIMANDE: ATTORNEY v GENERAL v NDIMANDE 1992 (2) ZLR 259 (SC)

Court **Supreme Court, Harare**

McNally JA (in Chambers in terms of s 23 of Supreme Court of Zimbabwe Act 1981)

15 October 1992

Flynote

Constitutional law - right to trial within a reasonable time - further criminal proceedings stayed because of delays in dealing with matter previously

Headnote

In 1986 the accused had been convicted of theft by conversion and theft by false pretences. He was sentenced to a term of imprisonment. He served part of this sentence before being released on bail pending appeal. In 1989 the accused successfully applied to have the convictions and sentence set aside so that the case could be remitted for the adduction of further evidence. The Attorney-General consented to this application. The order remitting it for the hearing of further evidence could not be complied with, however, as the trial magistrate had left the service. The trial could thus not be resumed but could only start afresh.

Held, that in view of the delay in the case it would be unfair to order that the trial start afresh. An order staying further proceedings in this matter was ordered by consent.

Cases cited:

In re *Mlambo* 1991 (2) ZLR 339 (S); 1992 (2) SACR 245

Mlauzi v A-G 1992 (1) ZLR 260 (S)

Judgment

McNally JA: The respondent in this application was originally convicted in the magistrates court, Bulawayo, on 22 August 1986 (not 1987 as stated in certain court papers) of eighteen counts of theft by conversion and by false pretences. He was sentenced to a total of twenty four months' imprisonment with labour, of which six were suspended. He spent three months and three

McNALLY JA

weeks in prison serving this sentence before being released on bail pending appeal.

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He then made an application to have his convictions and sentences set aside so that the matters might be remitted for the adduction of further evidence. This application was granted by me on 28 June 1989 on the basis that the Attorney-General consented to it. The order setting aside the convictions and sentences and remitting the matter to the trial magistrate was explicitly made "by consent".

It now appears that the order cannot be complied with because the trial magistrate is no longer in the service. Accordingly, the Attorney-General applied by notice of motion on 2 August 1990 to have the matter reviewed and for an order that the appeal be re-instated.

In addition, the application was made on the basis that the Attorney-General's representative had erred in consenting to the earlier order. In fact, so it is now alleged, the respondent should not have been granted the relief he was granted. The reasons for this are set out in some detail. The application by the Attorney-General is opposed by the present respondent.

These papers were then misfiled in the Supreme Court, so that the papers came before me only on 5 October 1992.

It seems to me that six years after the original conviction and three years after I set aside the convictions and sentences by consent, it would be unjust now to reverse that order, even if I have the jurisdiction to do so, which I doubt.

At best for the State I could vary the order by remitting the matter to a different magistrate but that would present intolerable problems since the prosecution would have to be started *de novo.*

It seems to me that this is a situation such as arose in In re *Mlambo* 1991 (2) ZLR 339 (S); 1992 (2) SACR 245 (*compare Mlauzi v A-G* 1992 (1) ZLR 260 (S)). The respondent was convicted and sentenced over six years ago; he served part of his sentence; he was released on bail and remained on bail until his convictions and sentences were set aside in June 1989; he has waited since then for the resumption of proceedings; and it now transpires that those proceedings cannot be resumed as envisaged. It would be an injustice to have him tried *de novo*.

McNALLY JA

In my view the only fair order would be one staying any further proceedings in the case. I have referred the matter to the Attorney-General to ascertain his reaction, and he has indicated that he would not oppose such an order.

I have shown the papers to my brother, KORSAH JA and with his concurrence I now order that further proceedings in this matter be stayed.

HAYNES v MINISTER OF DEFENCE & ANOR 1992 (2) ZLR 262 (HC)

Court **High Court, Harare**

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Robinson J

Civil action

12, 14 & 16 October 1992

Flynote

Costs - apportionment - costs not necessarily to be equally apportioned when court apportions liability in damages claim on equal basis

Delict - motor accident - negligence - robot controlled intersection - motorist turning right in front of oncoming vehicle when light turned to amber - other vehicle accelerating and going through late amber - apportionment of damages

Headnote

The plaintiff had entered a robot controlled intersection when the light was green in her favour. She had stopped in the right hand turning lane while waiting for traffic coming from the opposite direction to clear so she could safely negotiate her turn. When the robot changed to amber she had attempted to turn right but an army truck had come through the lights when they were on late amber and had collided with the plaintiff's vehicle.

The court held that the plaintiff had been negligent. Even if the lights had turned to red a motorist is not entitled to assume that the oncoming traffic will come to a stop but must judge from the speed and distance of an oncoming vehicle whether it will be safe to turn across the path of that vehicle. A party turning right across the path of another vehicle when the robot is on late amber must be even more careful than someone turning when the light has already turned red. Although the army vehicle should have stopped, there was no indication that it was going to do so. The plaintiff should therefore not have proceeded to turn, especially as she knew her vehicle was not able to accelerate fast from a stationary

1992 (2) ZLR p263

position. However, the driver of the army vehicle was also at fault. When approaching the intersection he had failed to drive at a speed which would have allowed him to stop if the lights changed but instead he had accelerated and gone through the lights when they were on late amber.

As regards the appointment of fault between the parties, the court apportioned on the 50/50 basis suggested by counsel for the defendants which the court said was more than fair and generous.

On the issue of costs, the court declined to apportion costs on a 50/50 basis. The court pointed out that, in seeking to have the plaintiff's claim dismissed with costs, the defendants had forced the plaintiff to come to court to obtain an award of damages. The plaintiff had succeeded in obtaining damages. If the defendants had wished to safeguard their position on the issue of costs in the event of an apportionment of damages, they should have made either a payment into court under the former Rules of Court governing such payments or a written offer of

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payment under the new Rules.

Cases cited

S v Penberthy 1967 (2) PH O 39 (N)

Norwich Union Fire Ins Soc Ltd v Chiduku 1971 (1) SA 599 (RA)

A Dyke for the plaintiff

D Carter for the defendants

Judgment

Robinson J: The plaintiff is suing the defendants jointly and severally, the one paying the other to be absolved, for damages arising out of a traffic collision which occurred between the plaintiff's Mercedes Benz 200D sedan motor vehicle and an Army Mercedes Benz armoured personnel carrier ("the Army vehicle") at the intersection of what was then North Avenue, now Josiah Tongogara Avenue (to which I shall refer as North Avenue) and what was then Moffat Street, now Leopold Takawira Street (to which I shall refer as Moffat Street), Harare at about 5 pm on Monday, 4 September 1989. The first defendant is cited in his capacity as the employer of the second defendant who, it is admitted, was driving the Army vehicle in the course and scope of his employment.

The plaintiff alleges that the collision was caused solely through the negligence of the second defendant in that -

"(a) he entered the intersection when the traffic light was red against him;

(b) he was travelling at an excessive speed in the circumstances;

ROBINSON J

(c) he failed to keep a proper lookout;

(d) he failed to stop or act reasonably when a collision seemed imminent."

The plaintiff claims damages in the sum of $7502, as being the fair and reasonable costs of repairing the plaintiff's vehicle, together with interest at 10% *per annum* from the date of service of summons, and costs of suit. The *quantum* of the plaintiff's damages is no longer in dispute.

The defendants deny that the collision was caused solely through the second defendant's negligence alternatively, if the second defendant was negligent, it is denied that the second defendant's negligence was the cause of the accident and it is alleged that the sole cause of the collision was the plaintiff's negligence in one or more of the following respects:

"(a) she failed to give way to the second defendant's vehicle which was on her right and going straight;

(b) she executed a right turn in front of on-coming vehicle when she knew that it was not safe to do so;

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(c) she was travelling at a speed which was excessive in the circumstances;

(d) she failed to keep a proper lookout;

(e) she failed to stop or act reasonably when an accident seemed imminent."

Further, alternatively, if the second defendant was negligent and such negligence was a cause of the collision, it is denied that such negligence was the sole cause of the collision and it is alleged that the plaintiff's negligence was a contributing cause of the collision, the plaintiff being negligent in one or more of the respects particularised *supra*, in which event the defendants deny that they are liable for the whole of the plaintiff's damages but only for such portion thereof as may be determined by this court.

At the conclusion of the trial, it was rightly accepted by both counsel that the damages sustained by the plaintiff were caused partly by her fault and partly by the fault of the second defendant and that the sole issue was for the court to determine the respective degrees of fault of the plaintiff and the second defendant in terms of s 4(1) of the Law Reform (Contributory Negligence) Act [*Chapter 45*].

The plaintiff's evidence was to the effect that as she approached the intersection coming along Milton Avenue, which merges into Moffat Street,

ROBINSON J

from Avondale towards the city, the robot showed green to her, whereupon she stopped momentarily at the intersection in the right hand turning lane; that she then entered the intersection and stopped in a position to turn right into North Avenue, while waiting for traffic coming from the opposite direction to clear the intersection; that the lights then changed to amber and upon observing a pause in the traffic coming from the opposite direction, the plaintiff eased forward but upon seeing the Army vehicle approaching in the centre lane with a car to its left, which overtook the Army vehicle a short distance from the intersection and which she could see was not going to stop, the plaintiff stopped and let the car come through the intersection; after which, thinking and assuming that the Army vehicle would stop because of the amber lights, the plaintiff proceeded to complete her turn to the right only to see the Army vehicle accelerate into the intersection when the lights must have been on a late amber and then swerve to its left so that it collided with the left rear door and the arch of the rear wheel of the plaintiff's vehicle while her vehicle was half way into the middle lane; at the time of the collision, the plaintiff observed that the lights had turned to red.

The plaintiff's evidence was largely corroborated by an independent witness, Gerald James Glanvill Walters, who was stationary in the centre lane at North Avenue, on the hospital side, waiting to proceed straight across Moffat Street, that is to say, in a westerly direction. However, it appears from the brief written statement of his observations with which he furnished the plaintiff's legal practitioners in November 1989 and which the plaintiff's counsel showed to the defendant's counsel during their pre-trial without prejudice discussions, that, when giving his evidence, Mr Walters might have been over- zealous in saying that the Army vehicle must have entered the intersection on a red light because he, Mr Walters, had already entered the

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intersection after the lights had turned green to him, following which he saw the Army vehicle collide with the plaintiff's vehicle. However, whereas the plaintiff said there was another vehicle behind her in the intersection also waiting to turn right, Mr Walters said that he clearly recalled the plaintiff's vehicle as being the only vehicle in the intersection turning right; and that whereas the plaintiff said the Army vehicle had swerved to its left before colliding with her vehicle, Mr Walters thought the Army vehicle had swerved to its right, hoping to miss the plaintiff and thereby endangering Mr Walters because his vehicle was in the intersection on the Army vehicle's right. On the other hand, it is difficult to see how Mr Walters' vehicle could have been thus endangered if, as he testified, his vehicle was only one half to three quarters of its body's length over the last white line of the intersection at the moment of the collision.

ROBINSON J

The second defendant's version was very different from the plaintiff's version, his evidence being that he had been travelling along Moffat Street from the city towards Avondale in the left hand lane at a speed of about 35-40 kilometres per hour and that as he entered the intersection on the green light just prior to its turning amber when he was in the intersection, the plaintiff's vehicle, which he had noticed before it entered the intersection from the right hand turning lane and which he thought was going straight, had come into the intersection without stopping and turned to its right across him when he was about 5 to 6 metres away, causing him to swerve to the right and collide with its rear.

I have no hesitation in accepting the plaintiff's version of the collision as being substantially the true version, indeed, so commendably honest was the plaintiff when she gave evidence that she did her case more harm than good. Clearly the second defendant was not being truthful in trying to make out that he had not "jumped" a late amber and his assertion that there had been two vehicles behind the plaintiff's vehicle in the right hand turning lane which had gone straight on, after the plaintiff, was quite ludicrous and demonstrated the falsity of his evidence. The second defendant's female passenger, who is married to a warrant officer, class 2, who works at Nkomo Barracks with the second defendant and with whom the second defendant is well acquainted, no doubt felt impelled to go along with the second defendant's version.

That being the position, I now turn to examine the law before applying it to the evidence.

In *S v Penberthy* 1967 (2) PH O39 (N), it was held that a motorist who intends to turn right at a robot controlled intersection may not assume that, because the robot has changed to red for oncoming traffic, such traffic will come to a stop. He should judge from the oncoming vehicle's speed and its distance from the stop line whether it will be safe for him to turn across the oncoming vehicle's path.

A fortiori, a motorist intending to turn right at a robot controlled intersection must be even more circumspect when the lights are on amber.

And in *Norwich Union Fire Insurance Society Ltd v Chiduku* 1971 (1) SA 599 (RA) at 601 C-D, Beadle CJ had this to say:

> "Where there is a fair amount of traffic using such an intersection, the normal and reasonable practice for a

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motorist who wishes to turn to his

ROBINSON J

right, is to enter the intersection when the lights are on green in his favour, then pause at the centre of the intersection and remain there until the lights change **and the traffic using the road he is in is stopped by the red light.** He then knows that the traffic which would normally cross his path is stopped by the red light from doing so and he can then safely proceed to execute his right-hand turn, and furthermore, in doing so, he turns into a green light and not into a red one. As I have said, though it is perfectly permissible for a motorist to execute this manoeuvre while the lights are still on green in the road from which he is turning, he must remember that, when he is doing this, the green lights are giving the traffic crossing his path a special right-of-way, and it is his duty, in these circumstances, to be particularly careful that he does not impede this traffic." (My emphasis)

On the other hand, s 48(4) of the Road Traffic (Traffic Signs) (Amendment) Regulations 1977 (No. 4) (RGN 444/77) provides:

"(4) When the amber lens of the signal-face of any robot is illuminated as part of the light - sequence prescribed by subsection 1 of section 47 -

(a) no vehicle facing such signal-face shall be driven across the stop-line :

Provided that, if, when the amber lens becomes illuminated, any such vehicle is so close to the stop-line that it cannot be brought to a halt safely behind the stop-line, it may be driven across the stop-line, subject to all due precautions being taken;"

Accordingly, it is unlawful for a motorist to go through a late amber light and so, if he "jumps" such a light and collides with a motorist in the intersection who proceeds to complete a right hand turn, he cannot be heard to cry that he was not at fault.

In this case, on the plaintiff's own evidence, allied to that of her witness, Mr Walters, it emerges -

(a) that at the material time the intersection was "very busy" with traffic;

(b) that when there was a pause in the approaching traffic coming from the city, the plaintiff began to case forward but upon seeing a car to the Army vehicle's left overtaking the Army vehicle a short distance before the

ROBINSON J

intersection and upon realising that the car intended to enter the intersection against the amber light, the plaintiff stopped and allowed the car to pass;

(c) that the Army vehicle was travelling at a fast speed and although it gave no indication that it was lessening speed as it approached a late amber light, the plaintiff nevertheless thought and assumed that it would stop at the intersection;

(d) that the plaintiff therefore commenced to complete her turn only to see the Army vehicle at that moment accelerate to"jump" the late amber light, with the result that the

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plaintiff was unable, in her Mercedes Benz 200D vehicle, which was slow off the mark, to clear the Army vehicle's path, with the result that the Army vehicle collided with the rear of the plaintiff's vehicle.

It is pertinent at this point to refer to the following remarks of FANNIN J in *Penberthy's* case , *supra* at 0. 39, pp 104 & 105:

> "The question is whether a reasonably prudent driver, in the position in which the appellant found himself, would have acted upon the assumption that the complainant could, and would pull up behind the stop line, in the absence of any indication that he intended to do so. Now, had he but waited a very short time after first seeing the complainant approaching, it would have become apparent that the latter was going to come on, for in half a second the complainant would have been only seven or eight paces from the stop line, still travelling at the same speed. The appellant was not entitled to move across the path of oncoming traffic until it was safe for him to do so, and, in this case, whether it was safe depended upon whether the complainant would stop at the stop line or, at the least, make way for the appellant to complete his right hand turn. Whether the complainant would do either of these things depended upon a number of factors over which the appellant had no control at all. The complainant might, delibrately or inadvertently, ignore the amber light and try to 'beat the red'. Every driver knows, and the appellant ought, in my opinion, to have known, that that is by no means an uncommon thing. On the other hand, the complainant might judge differently the question as to whether it was safe for him to stop. As I have said, at a distance of only about 15 yards from the stop line, the possibility of a wrong appreciation of the situation was a real one... . Nevertheless, I am of the opinion that a driver, finding himself in the position described by the appellant in his evidence, should do more than assume that the oncoming motor cyclist's

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> judgment of the situation will be the same as his and that the cyclist intends to pull up and let him through; he should, at least, pause a little longer in order to see whether his assumption is apparently justified. The decision of this case turns really upon two crucial points, namely, the speed of the oncoming vehicle and its distance from the stop line. The faster the former and the shorter the latter, the greater will be the awaiting motorist's duty to pause a little longer, and this is the only general principle that can, I think, be laid down. When the speed is as much as 44 feet per second and the distance as little as about 45 feet, the awaiting motorist is not entitled to assume that the oncoming motorist will not move on through the intersection, unless he receives some indication that he is going to stop."

Accordingly, in view of the fact that the Army vehicle was approaching the intersection at a fast speed when only a short distance from the intersection and that the plaintiff did not observe any slackening in its speed while the lights were still on amber and bearing in mind that the plaintiff was in a vehicle which, on her own admission, was slow to move off the mark, it is clear that the plaintiff should have remained in the intersection where she was and watched the passage of the approaching vehicle, all the more so where, in Zimbabwe, that vehicle is a large Army vehicle.

But the question of fault by no means ends here because the second defendant was also clearly at fault in that, with considerable traffic in the vicinity of the intersection, instead of travelling at a safe speed as he approached the robot - controlled intersection so that he could bring the Army vehicle to a halt if and when the lights changed to amber, he decided to accelerate and "jump" a late amber light regardless of the danger to any motorist in the intersection intending to make a right hand turn and thinking it was in order to do so

In these circumstances, the court is called upon to determine the degrees of fault between the

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plaintiff and the second defendant, not an easy or enviable task. However, in this respect the court is fortunate in having been largely assisted by counsel in that Mr *Dyke* invites the court to find that the degrees of fault are 40/60 in favour of the plaintiff whereas Mr *Carter* suggests that an apportionment on a 50/50 basis would be appropriate. In other words, there is only a difference of 10 per cent between the estimates of counsel in regard to the extent of the plaintiff's fault.

Let me say immediately that I consider Mr *Carter's* proposal that fault be apportioned on a 50/50 basis to be more than fair and generous to the plaintiff

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and, accordingly, I am relieved at not having to make a greater adverse finding against the plaintiff by readily accepting that there be a 50/50 apportionment of fault.

Mr *Carter* also asked the court to make a corresponding apportionment in respect of the costs of suit, but this I am not prepared to do. In seeking to have the plaintiff's claim dismissed with costs, the defendants have forced the plaintiff to come to court to obtain an award of damages, which she has succeeded in obtaining. If the defendants had wished to safeguard their position on the issue of costs in the event of an apportionment of damages, then they could and should have made either a payment into court under the former Rules of Court governing such payments or a written offer of payment under the new Rules.

Consequently, Judgment is entered for the plaintiff against the defendants jointly and severally, the one paying the other to be absolved, in the sum of $3751 with interest thereon at the prescribed legal rate of 12.5 *per centum per annum* from the date of Judgment to the date of payment, together with costs of suit.

In conclusion, I would like to say how indebted the court is to both counsel for arguing their clients' cases in a way which, while protecting the interests of their respective clients, was helpful to the court in coming to what it considers to be a satisfactory decision.

Byron Venturas & Partners, plaintiff's legal practitioners Civil Division of the *Attorney General's Office,* defendants' legal practitioners

CHAIRMAN PUBLIC SERVICE COMMISSION & ANOR v HALL 1992 (2) ZLR 271 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

Civil appeal

28 September & 19 October 1992

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Flynote

Constitutional law - Declaration of Rights - s 16 - protection against compulsory acquisition of property - the imposition of a fine by Public Service Commission in terms of Public Service misconduct regulations - whether in violation of s 16 of the Constitution

Employment - discipline of public service officers found guilty of misconduct - whether constitutional to impose fine upon such officers

Headnote

In a cross-appeal, the respondent argued that the Public Service (Officers) (Misconduct and Discharge) Regulations, 1986 (SI 161/86) are *ultra vires* the Constitution insofar as they purport to allow for a fine to be imposed upon a public officer found guilty of misconduct. It was argued that the imposition of such a fine under these regulations is in contravention of s 16(7) of the Constitution which prohibits the compulsory acquisition of property and it does not fall under any of the exceptions permitted, namely fining for a breach of law or for contempt of court or parliament.

Held, that the power to fine a public officer for misconduct was not in violation of the Constitution. In terms of s 75(1)(f) of the Constitution, the Public Service Commission is specifically empowered to "punish" members of the public service found guilty of misconduct. This is in addition to the power granted to the Commission by s 75(1)(d) to exercise disciplinary control over public officers and to remove them from office. As the Commission clearly cannot imprison or sentence to death public officials, the only power which remains to give a meaning to the Commission's constitutional power to punish, not already given

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McNALLY

by the other provisions, is the power to impose a financial penalty, either by way of a fine or by way of reducing the rank and salary of the officer or withholding an increment or promotion.

Held, further, that the decision of the Privy Council in the case of *Norton v Public Service Commission* [1988] LRC (Const) 944 that the fining of a Mauritian public servant for misconduct violated the provision in the Mauritian Constitution forbidding the deprivation of property was distinguishable. Under the Constitution of Zimbabwe the Public Service Commission was specifically empowered to "punish" public officials guilty of misconduct. Such a provision was absent from the Constitution of Mauritius.

Case cited:

Norton v PSC [1988] LRC (Const) 944

H Simpson for the appellants

A P de Bourbon SC for the respondent

Judgment

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McNally JA: [After summarising the facts, the learned judge continued:]

The cross-appeal raised the question whether the High Court was constitutionally empowered to substitute a fine of $400 for the misconduct involving the misuse of the government vehicle. His Lordship purported to act in terms of s 20(11)(e) of the Public Service (Officers) (Misconduct and Discharge) Regulations 1986 (SI 161/76). The contention is:

a) The regulations are *ultra vires* the Constitution;

b) The fine is excessive.

I would dismiss the second contention out of hand. There is simply no factual basis for it. The first contention is more difficult.

The argument is straightforward. The Commission's powers are derived from the Constitution, specifically ss 74 and 75. Section 75(1)(f) allows it to punish members of the public service found guilty of misconduct.

But the penalty of a fine, so it is contended, contravenes s 16 of the Constitution. It is compulsory acquisition of property. It is not excepted from the general prohibition by subs (7) because there has been no breach of a law. Insofar as it may be described as a forfeiture, such forfeiture did not occur in the circumstances described in s 13(2)(b) of the Constitution.

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The contention receives apparent support from the decision of the Privy Council in *Norton v Public Service Commission* [1988] LRC (Const) 944, a decision on appeal from the Supreme Court of Mauritius.

It is most unfortunate that despite the fact that Mr *de Bourbon*'s heads of argument containing this submission and referring to this decision were filed and served on the appellants more than six months before the hearing, not a word is said by the appellants as to the merits of the contention, although it must be of considerable importance to the Commission. We must do the best we can without the assistance of their submissions.

The speech of LORD ACKNER in the *Norton* matter was concurred in by the other members of the Board, LORD BRIDGE OF HARWICH, LORD ROSKILL, LORD GRIFFITHS and SIR JOHN STEPHENSON. The facts are very much on all fours with the present case. A member of the Public Service was fined for misconduct. The Constitution of Mauritius then had a provision enabling the Commission to "exercise disciplinary control over (public servants)". It also had a provision similar to ours about deprivation of property. And finally it had a power to make provision by regulation for "regulating and facilitating the performance by the Commission of its functions under this Constitution."

Finally it was provided by regulation, as in the case of Zimbabwe, that public officers may be punished, by way of discipline, in a number of ways, one of which is by fining them.

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The findings of the Privy Council were expressed at p 947g-948a as follows:

> "The powers of the Commission are derived, not from the regulations, but from the Constitution itself. The Public Service Commission has no more power than that conferred upon it by the Constitution. As was pointed out by AHNEE J in his dissenting Judgment, whatever in the past, when Mauritius was a British Colony, may have been the powers of the then Governor over Her Majesty's civil servants, cannot be of any assistance in defining the powers conferred upon the Public Service Commission by the Constitution. Section 8(1) and (4) of the Constitution make it clear that there is no power to fine, unless there exists a law which gives power to impose a fine for a breach of that law. Before such a fine can be enforced, the breach of that law has to be established in the courts. Accordingly, it must follow that the power given to the Public Service Commission to 'exercise disciplinary control' does not include the power to inflict a fine. In the result, regulation 41(1), in so far as it

> provides for punishment by the infliction of a 'fine', is *ultra vires* the Public Service Commission."

Mr *de Bourbon* contends that precisely the same reasoning applies in Zimbabwe. However, there is a difference in the two Constitutions. That of Mauritius allows the Commission merely to "exercise disciplinary control" (s 89(1)). That of Zimbabwe, in s 75(1)(f), provides as follows:

> "... to make regulations for the purposes stated in paragraph (e) and for the conditions of service of members of the Public Service and the Prison Service, **which may include provision for the punishment of members of the Public Service found guilty of misconduct** or of members of the Prison Service found guilty of offences against discipline" (my emphasis).

This provision is in addition to s 75(1)(d) which allows the Commission "to exercise disciplinary powers in relation to persons employed in the Public Service ... and to remove such persons from office."

So, in essence, our s 75(1)(d) is the same as Mauritius' s 89(1). Does it make a difference that we also have s 75(1)(f)? That sub-section makes specific provision for punishment, though not specifically for punishment by way of a fine.

It seems to me that it is necessary to give a meaning to the Constitutional power to punish, specifically granted to the Commission. The Commission clearly cannot imprison members guilty of misconduct, nor can it sentence them to death. It can hardly require constitutional authority to reprimand, and it already has, in s 75(1)(d), authority to remove persons from the service. All that remains is a power to impose a financial penalty, whether it be by way of a fine or a reduction in rank (and thus salary) or the withholding of an increment, or the postponement of promotion.

In my view, therefore, the power granted in the Constitution to the Commission to punish members found guilty of misconduct must be interpreted to mean a power to punish by the imposition of a financial penalty including a fine.

That power to impose a fine is therefore excluded from the provisions of s 16 of the Constitution under the provisions of subs (7)(b) of that section. It is a penalty for a breach of a law (ie the regulations) specifically provided for in

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McNALLY

the Constitution. The decision in *Norton , supra*, is distinguishable by reason of the difference in the wording of the two Constitutions.

In the premises the appeal is dismissed with costs and the cross-appeal is likewise dismissed with costs.

Manyarara JA: I agree

Korsah JA: I agree.

Civil Division of the Attorney-General's Office, appellants' legal practitioners *Winterton, Holmes &Hill*, respondent's legal practitioners

S v CHIPERE 1992 (2) ZLR 276 (SC)

Court **Supreme Court, Harare**

Gubbay CJ & McNally JA, Korsah JA

Criminal appeal

12 & 20 October 1992

Flynote

Criminal law - assault with intent to do grievous bodily harm - use of excessive force by policeman when arrest unlawful

Criminal procedure - arrest - by policeman in plain clothes - policeman asked to produce some identification to establish that he was a policeman - whether obliged to do so - policeman must not use excessive force when effecting an arrest

Criminal procedure (sentence) - assault with intent to do grievous bodily harm - policeman using excessive force when arresting person - seriousness of assaults committed by members of law enforcement agencies when executing their duties

Headnote

A policeman who was in plain clothes saw a group of persons drinking in a public place. He approached them, holding a spear, and informed them that he was a policeman and that they were breaking the law by drinking in a public place, and that they were under arrest.

The persons who were drinking did not dispute the appellant's claim to be a policeman, except that the complainant asked to see some identification to verify that he was a policeman saying that, for all he knew, he could be a criminal since he was holding a spear.

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The appellant apparently took this remark to be an affront to his authority and, without producing any identification, he grabbed the complainant. The complainant shrugged off his hold and started to walk away. The appellant felled him and stabbed him with his spear in the forehead. The

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complainant then fought back but the appellant got the upper hand. The complainant was stabbed in the hand as he attempted to ward off a blow with the spear aimed at his chest.

The appellant was convicted of assault with intent to do grievous bodily harm and sentenced to an effective term of imprisonment of five months. He appealed against both conviction and sentence.

Held, that although drinking in a public place is not an offence specified in the First Schedule of the Criminal Procedure and Evidence Act [*Chapter 59*], in terms of s 29(1) a policeman has the power to arrest without warrant any person who commits any offence in his presence.

Held, further, that the complainant was amply justified in asking to see identification as the policeman was not in uniform and was carrying a spear, a weapon more associated with criminals than policemen, and the appellant should not have refused to produce identification to establish that he was a policeman. Also sometimes criminals pretended to be policemen who were effecting an arrest.

Held, further, that the appellant was only entitled to use the degree of force which was necessary to effect the arrest and the appellant had used completely excessive force. The use of more force than necessary was thus unlawful.

Held, that although relatively minor injuries had been inflicted on the complainant that the appellant had had actual or legal intention to inflict grievous bodily harm and he had been correctly convicted of the crime charged.

Held, further, that the sentence imposed was appropriate as unlawful assaults by policemen committed while executing their duties were grave offences.

Cases cited:

R v Tsikayi A-160-66 (unreported)

S v Nyama S-75-82 (unreported)

S v Chidamoyo & Anor HH-75-83 (unreported)

S v Kawara & Ors A-133-80 (unreported)

G Mukwena for the appellant

Mrs LR Goredema for the respondent

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Judgment

Korsah JA: The appellant was convicted at the Magistrates' Court, Harare, on 10 July 1992 of assault with intent to cause grievous bodily harm and was sentenced to a custodial term of eight months' imprisonment with labour, three months' imprisonment with labour of which was suspended on conditions. He appeals against both conviction and sentence.

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The complainant, Robson Mapiru, is a gardener at a house on Epping Road in Mount Pleasant, Harare. The appellant is a constable in the Zimbabwe Republic Police, and was stationed at Marlborough Police Station.

At about 2.45 pm on 2 May 1992 the complainant was sitting under a tree opposite Mount Pleasant Clinic with three other persons. The other three persons were drinking clear beer from three Castle quart bottles. The complainant had beside him a plastic bag containing a sealed two litre opaque beer plastic container. The appellant, who was in plain clothes, approached the group of persons comprising the complainant and three others, holding a spear, and informed them that he was a policeman, that they were breaking the law by drinking in a public place, and that they were all under arrest.

Those who were drinking laid no challenge to the appellant's claim to be a law officer, but the complainant made bold to request identification of the appellant's acclaimed office, and remarked that, for all he knew, the appellant could be a criminal since he was holding a spear.

Regrettably, the appellant must have taken the complainant's remark as an affront to his authority. I say so because he did not attempt to physically arrest any of the others alleged to be drinking and, without establishing his identity as a police officer to the complainant, grabbed the complainant by the collar. The complainant shrugged off this hold on his collar and proceeded to walk away. The appellant followed him and got hold of the complainant's overalls from behind and felled him to the ground. The complainant pleaded with the appellant to let him go, but the appellant, brandishing his spear, sat on the complainant and stabbed him on the forehead with the spear. Whereupon the complainant, who was bleeding from this wound inflicted on him by the appellant, overpowered the appellant and felled the appellant to the ground.

One of those present went to call the police at the Mount Pleasant Police Base to come and intervene. Meanwhile the appellant had regained the upper hand and sat astride the stomach of the complainant, who was attempting to protect himself from being stabbed again by the appellant with the spear, when Patrick Magwagwa and Constable Kativhu of the Zimbabwe Republic Police, in answer to the call for assistance, arrived at the scene. By then the complainant had been stabbed in the hand as well by the appellant, and the appellant was pointing the spear at the complainant's face.

The appellant, who was still in possession of what Magwagwa described as an iron bar, ordered Magwagwa and Kativhu to handcuff the complainant.

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KORSAH JA

Magwagwa ignored this order and took the appellant and the complainant to the Charge Office. At the Charge Office, Magwagwa took the spear from the appellant and handed it to Constable Watsanka outside the office. The appellant, however, left the Charge Office and went to take the spear from Constable Watsanka. Magwagwa and Watsanka felt the appellant might become aggressive towards them if they tried to retake the spear away from him and so left it in the appellant's possession, but decided that the matter had to be reported at Marlborough Police Station.

The stab wound on the complainant's forehead required three stitches and the minor cut on his hand had to be bandaged.

It was contended before us that the appellant was executing a lawful arrest of the complainant, who had committed some infraction of the law by drinking in a public place. The complainant denies that he was drinking in a public place, and there was no evidence to contradict his assertion, save that of the appellant. But let us suppose, for the purposes of argument, that he had breached the law as contended.

Section 34 of the Criminal Procedure and Evidence Act [*Chapter 59*], which provides that:

> "Any private person may without warrant arrest any other person upon reasonable suspicion that such other person has committed any of the offences specified in the First Schedule"

does not authorise a private person to apprehend any person who is drinking beer in a public place, since that offence does not fall within the specified offences in relation to the powers of arrest under that Schedule. There are three groups of offences specified under the First Schedule. They are the following:

1. Any offence at common law, other than bigamy, blasphemy, compounding an offence, contempt of court, criminal defamation, incest, or violating a grave or dead body;

The offence, not being one founded in common law, does not fall within this first group.

2. Any offence in terms of any enactment in respect of which the legislation provides a maximum punishment of a period of imprisonment exceeding six months without the option of a fine; and

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The offence, not being punishable as prescribed, does not fall under this second category of offences.

3. A conspiracy, incitement or attempt to commit or being an accessory after the fact to any of the offences specified in paragraphs 1 or 2.

Here again, the offence alleged does not fit into this group. The offence alleged against the

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complainant was, therefore, not one for which a private person is authorised by law to apprehend a culprit.

On the other hand, s 29(1) of the said Act, which is in the following terms:

> "Every peace officer and every other officer empowered by law to execute criminal warrants is hereby authorised, subject to the general or specific directions of a superior officer or person placed in authority over him, to arrest without warrant -
>
> (a) every person who commits any offence in his presence;
>
> (b) every person whom he has reasonable grounds to suspect of having committed any of the offences mentioned in the First Schedule; and
>
> (c) every person whom he finds attempting to commit an offence, or clearly manifesting an intention to do so",

vests a police officer with the power to arrest the complainant for the offence alleged.

The question then arises: how is a person who is threatened with an arrest in such circumstances to know whether the person arresting him has the power to do so or not, if the arrester is in plain clothes and refuses to produce any identification that he is a policeman?

There was nothing to gainsay the complainant's testimony that he was not aware that the appellant was a policeman. And, judging by the fact that the appellant, who claimed to be a policeman, was not in uniform and was carrying a weapon (a spear) which is more associated with the criminal elements than the agents of law enforcement, the complainant was, in my view, amply justified in asking the appellant for some identification and resisting arrest by the appellant in the circumstances.

Though unusual, it is not unknown for persons masquerading as law enforcement agents to pretend to effect arrests and then proceed to lure their

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unsuspecting victims to a suitable place so as to rob, maim or even kill them. Nothing detracts from the dignity of a plain clothes policeman, when challenged, to exhibit proof of his identity. It was wrong of the appellant, in the circumstances of this case, where the complainant was acting with the prudence of a cautious man, to take umbrage when asked for identification and proceed to assault the complainant in the manner that he did.

Even if the appellant had disclosed his identity by exhibiting some form of identification and there had been some resistance by the complainant, neither an ordinary citizen nor a police officer is entitled in law to use more force than is requisite to secure the arrest of offenders or suspected offenders. In the instant case, the appellant, having failed to exhibit some proof of his authority, was acting in an arbitrary manner, and the challenge to his authority by the complainant was legitimate.

There was overwhelming evidence that the appellant assaulted the complainant with a dangerous weapon, whether it be a spear or an iron bar with a tapered edge. The assault was

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directed at a vulnerable part of the body, the head, as well as the chest. It was purely fortuitous that the complainant did not suffer more serious injuries. From the surrounding circumstances, there is no doubting the inference that the appellant knew that what he was doing was likely to cause grievous bodily harm or was reckless as to whether his actions would result in such harm. The appellant was, therefore, guilty of assault with intent to cause grievous bodily harm.

As regards sentence, Mrs *Goredema* cited the cases of *R v Tsikayi* A-160-66; *S v Nyama* S-75-82; *S v Chidamoyo & Anor* HH-75-83; and *S v Kawara & Ors* AD- 133-80, all of which reflect the seriousness with which the courts view assaults by the disciplined forces, in the professed performance of their duties, on the citizenry. Inasmuch as the law would consider as a very grave offence an assault by an ordinary person on a member of the disciplined forces in execution of his duties, so also does it consider assaults by law enforcement agents in the execution of their duties on the ordinary man. In such cases, unless there are exceptional mitigatory factors, custodial sentences are almost invariably imposed to deter both the offender as well as would-be offenders from creating animosity between the disciplined forces and the citizenry.

In all the circumstances, I can find no fault with the trial magistrate's approach to sentence.

KORSAH JA

The appeals against both conviction and sentence are accordingly dismissed.

Gubbay CJ: I agree.

McNally JA: I agree.

Mugabe, Mutezo & Partners, appellant's legal practitioners

S v MUKWEZVA 1992 (2) ZLR 283 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Criminal appeal

13 & 22 October 1992

Flynote

Criminal law - bribery - "official of the State" - when a person is an official of the State - whether employee of parastatal is official of the State

Criminal procedure (sentence) - bribery - deterrence and reflection of public indignation are predominant

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factors in assessing sentence

Headnote

Bribery can only committed where the bribee is an "official of the State". In deciding whether a person is an official of the State, emphasis is placed on the performance of governmental duties in the broadest sense. For a person to be an official of the State, he should have been

- engaged to perform some official, as opposed to a purely private, function; and
- paid out of a fund provided by public taxes and not by the private sector.

A person may be an official of the State even though

- he is only employed on a temporary basis and his employment is terminable at the will of the State;
- he is not a member of the public service as defined by the Public Service Act.

A person does not need to be a judicial officer to be an official of the State.

A person is an official of the State whether he is employed at central government level or some other level of the governmental system.

From decided cases examples of bribees who have been held to be officials of the State include the following:

an excise officer, an assistant stock inspector, an assistant in the office of the government printer, a court interpreter, a municipal constable, a price control inspector, the head of the transport's compulsory motor insurance section, an acting mining commissioner, an army officer commanding a salvage unit in the quarter-master's stores, a security guard employed by a Provincial Administration whose duties included the guarding of property at a hospital.

In the present case the appellant was an employee of a parastatal corporation, namely the Posts and Telecommunications Corporation. The issue which had to be decided was whether the appellant was an official of the State for the purposes of the common law crime of bribery. On an examination of the legislation relating to this parastatal at the time the alleged offence was committed, it was decided that he was. In terms of the legislative provisions, he was employed by a parastatal effectively headed by a Minister of State and under the control of a Government body, the Parastatals Commission. His remuneration was derived at least partly from State funding, and his conditions of service were subject to the approval of the Parastatals Commission. He was not engaged to perform a purely private function, but an official one, being responsible for awarding contracts for maintenance work relating to public institutions. He derived his authority from the public sector. *(1)

As regards the matter of sentence, the Supreme Court reiterated that deterrence and the reflection of public indignation are the predominant factors in assessing the penalty for this

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offence. Bribery is an insidious crime which undermines integrity and strikes at the roots of justice.

Cases cited:

S v Mzizi & Anor 1990 (1) SACR 503 (N)

S v Makhunga 1964 (3) SA 513 (C)

S v Ncube 1983 (1) ZLR 200 (S)

R v Kutboodien 1930 CPD 191

R v Muller 1934 NPD 140

R v Visser 1935 TPD 296

S v Jack 1963 (1) PH H86 (E)

R v Manilall 1944 NPD 32

GUBBAY

R v Christopher 1945 (2) PH H258 (N)

S v Gouws 1975 (1) SA 1 (A)

S v Aaron (1893) Hertzog 125; 1893 SAR 146

R v Sachs & Anor 1943 AD 413

R v Libala 1958 (2) PH H265 (E)

S v Ngara 1987 (1) ZLR 91 (S)

AJ Dyke for the appellant

Mrs *J Zindi* for the respondent

Judgment

Gubbay CJ: The appellant was charged in the court of the Regional Magistrate with six counts of common law bribery to which he pleaded guilty. It was alleged that on six occasions between 2 March 1990 and 4 May 1990 he unlawfully and corruptly offered to one Vitalis Jieman, an employee of the Posts and Telecommunications Corporation ("the Corporation"), and as such a State official, unauthorised payments of money amounting to $64 000 as free gifts or rewards to influence Jieman in the exercise of his official functions; that is to say, to induce him to award contracts for the maintenance of properties owned by the Corporation to Gothik Construction (Pvt) Ltd, a company of which he (the appellant) was the managing director. He was convicted in accordance with his pleas and on each count was sentenced to a specific term of

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imprisonment with labour, varying from one year to three, and totalling in all, ten years' imprisonment with labour. Of this period, three years was conditionally suspended for five years.

Before this court the propriety of the convictions was challenged on the short ground that, notwithstanding the appellant's admissions, the employee Jieman, to whom the monies were paid, was not at the material time a State official.

Although it is well established that the crime of bribery can be committed only where the bribee is an "official of the State", judicial decisions, and there are many of them, exhibit a marked disinclination to define precisely what is to be understood by the phrase. The approach, as correctly observed by ALEXANDER J in *S v Mzizi & Anor* 1990 (1) SACR 503 (N) at 506g-h, has rather been to opt for an *ad hoc* determination upon the particular facts, scrutinizing the nature and duties entrusted to the person bribed. See also *S v Makhunga* 1964 (3) SA 513 (C) at 515H.

Nonetheless, a number of negative criteria have been enunciated in the cases which have expanded the concept of "official of the State" by placing the emphasis on governmental duties in the broadest sense. These are:

(i) A person may be an official of the State, albeit not a member of the public service as defined in the Public Services Act.

(ii) He may be an official of the State, although his employment is temporary and even terminable at the will of the State.

(iii) He need not be a judicial official.

(iv) He should have been engaged to perform some official as opposed to a purely private function, as in *S v Ncube* 1983 (1) ZLR 200 (S).

(v) He should have been paid out of a fund provided by public taxes and not by the private sector.

See Snyman *Criminal Law* 2 ed at p 363.

Examples of bribees who have been held to be officials of the State are: an excise officer (see *R v Kutboodien* 1930 CPD 191); an assistant stock inspector (see *R v Muller* 1934 NPD 140); an assistant in the office of the government printer (see *R v Visser* 1935 TPD 296); a court interpreter (see *S v Jack* 1963 (1) PH H 86 (E)); a municipal constable (*R v Manilall* 1944 NPD 32); a price control inspector (*R v Christopher* 1945 (2) PH H 258 (N)); the head of the transport's compulsory motor vehicle insurance section (*S v Gouws* 1975 (1) SA 1 (A)); an acting mining commissioner (see *S v Aaron* (1893) Hertzog 125; 1893 SAR 146); an army officer commanding a "salvage unit" in the quarter-master's stores (see *R v Sacks & Anor* 1943 AD 413); a government headman (see *R v Libala* 1958 (2) PH H 265(E)). More recently, in *S v Mzizi*, *supra*, it was held that a security guard employed by the Natal Provincial Administration, with part of his function being to prevent the unauthorised removal of hospital property from Addington Hospital, Durban, was a State official, in that he derived both his employment and

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authority from the Provincial Administration and was performing in the broadest sense, government duties. ALEXANDER J (with whom Didcott J concurred) said at 507c-d:

> "It would, to my mind, be an artificial distinction to draw simply because the official in question is not employed by the central Government in the sense of making him something less than a State official. To my mind the concept of 'State official' is to be construed as an omnibus definition including within its parameters all officials who derive their authority from the public sector, whether it be at the one level or the other."

GUBBAY

I respectfully agree with these remarks.

In the present case the precise status of Jieman fell to be determined with reference to the Posts and Telecommunications Corporation Act [*Chapter 251*] and the Parastatals Commission Act 1987, the relevant provisions of which revealed that:

(a) Appointments to the Board of the Corporation are made by the Minister after consultation with the President. The Minister may, after consultation with the Board, give the Corporation such directions as to the exercise of its powers as appear to him to be requisite in the national interest.

(b) The Corporation is a parastatal body. In terms of Part V of the Parastatals Commission (repealed on 18 January 1991) the Corporation and its employees came under the control and supervision of the Parastatals Commission.

(c) The Parastatals Commission itself was a State body, its members being appointed by the President

(d) The approval of the Parastatals Commission had to be obtained before a parastatal could fix or alter the conditions of service of its employees.

(e) The Labour Relations Act 1985, dealing with conditions of service, termination and dismissal, did not apply to employees of parastatals.

(f) An appeal by an employee of a parastatal lay to the Parastatals Commission. It had the power to direct the board of the parastatal to institute disciplinary proceedings against an employee or itself institute such proceedings.

(g) The funding of the Corporation is derived from monies appropriated to it by the Legislature as well as from monies accruing from its own operations.

(h) An employee who, before 1 July 1970, was employed by the State in the Ministry of Posts and Telecommunications and whose employment had not been terminated, was transferred to employment with the Corporation.

GUBBAY

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(i) The Minister of the Public Service, on the recommendation of the Public Service Board may, with the consent of the employee concerned, transfer him to employment with the Corporation. Upon such transfer the employee is to enjoy the same security of tenure, salary and salary scale, pension, leave and hours of duty, as immediately prior to the date of transfer.

Against this legislative backdrop it seems to me somewhat idle to contend that Jieman was not an official of the State for the purpose of the crime of common law bribery. He was employed by a parastatal effectively headed by a Minister of the State and under the control of the Parastatals Commission, a Governmental body. His remuneration was derived at least partly from State funding, and his conditions of service were subject to the approval of the Parastatals Commission. He was not engaged to perform a purely private function, but an official one, being responsible for awarding contracts for maintenance work relating to public institutions, such as post offices and other properties which vested in the Corporation. He derived his authority from the public sector.

In sum, the *nexus* between Jieman and the central Government was shown to be very much closer than that in many of the examples cited above.

It was not argued by the appellant's counsel that the period of imprisonment imposed on each count was excessive; only that the cumulative effect, resulting as it did, in actual incarceration for seven years, called for interference.

The Regional Magistrate, in a full and comprehensive Judgment, gave the most careful thought to an appropriate overall punishment. He weighed the inherently serious nature of the offence of bribery, the appellant's somewhat persistent course of conduct, and the very substantial amount of the bribes, against such mitigating personal features as his hitherto unblemished record, the position he held in the community and the effect of his downfall upon his family and company employees. Several apposite Judgments of both the Supreme Court and the High Court were analysed and allowances made for factual differences pertaining to those offenders and the appellant.

Having regard to the need in this country to discourage bribery and to assure society that the courts will not tolerate this type of crime, I am satisfied that the penalty meted out to the appellant was not unduly harsh. It was deserved.

GUBBAY

It should never be overlooked that bribery is an insidious crime which undermines integrity. It is a cancer which strikes at the roots of justice. In this connection I would repeat what was said in *S v Ngara* 1987 (1) ZLR 91 (S) at 101C:

> "If unchecked or inadequately punished, it will disadvantage society by depriving it of a good, fair and orderly administration. Deterrence and public indignation are the factors which must predominate above all others in the assessment of the penalty."

It follows that the appeal is to be dismissed in its entirety.

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McNally JA: I agree

Korsah JA: I agree

Chinamasa, Mudimu & Chingwenyu, appellant's legal practitioners

BANGANI v MUFOWO & ANOR 1992 (2) ZLR 290 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

13 & 26 October 1992

Flynote

Spoliation order - couple living together whether married or not - limited rights to take property of party moving out of home.

Headnote

When a man and woman have been living together, whether married or not, and one moves out, removal by the party moving out of any property which was in their joint possession without the consent of the other party constitutes spoliation. A party moving out can only remove things which she establishes were both her own property and always in her individual possession. If the things do not fall into this category she must claim a division of property; she cannot simply take them away. In this case a man had decided not to continue renting lodgings which he occupied with a woman. The woman therefore decided to move out first and in his absence took away various pieces of property The man was entitled to a spoliation order requiring the return of these items at his new home.

Cases cited:

Manga v Manga 1991 (2) ZLR 251 (S)

Manduna v Mutizwa 1992 (2) ZLR 90 (S)

S Phiri for the appellant

J Kwenda for the respondent

Judgment

McNally JA: The appellant sought a spoliation order in the Magistrates Court, Harare, by way of application for a *rule nisi* and a temporary mandatory interdict ordering the two respondents to restore certain house

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McNALLY

hold goods to him. He was successful in obtaining the interim relief on 31 October 1991, but failed to obtain confirmation of the rule on 2 December 1991. He now appeals.

It must be noted in passing that it was procedurally undesirable to seek a temporary mandatory interdict in this case for the obvious practical reason that it could have resulted in the property shuttling back and forth between the parties. However, we are not told what actually happened or where the property now is.

The basic facts were these. The appellant and the first respondent had been living together in lodgings in Kambuzuma and possessed various pieces of property, furniture etc. They then quarrelled. The first respondent moved out with the property and stored it at the premises of the second respondent. The appellant now accepts that he should not have proceeded against the second respondent, who was not a spoliator. We are left, therefore, with the two parties to whom I will refer for convenience as "He" and "She" or "Him" and "Her" as the case may be.

It seems in fact that both parties moved out of the lodgings. The circumstances of his departure are not clear. He says simply that he was away at work on 2 October 1991 when she removed the goods. She, however, says that on 2 October he moved out with his personal possessions, said he was going to stay in Mabvuku, and further said that the lodgings at Kambuzuma were no longer available since he was not going to pay the rent. She, therefore, was obliged to go and stay with her relative (the second respondent). She took the property because it was either hers (stove, iron, heater, pots and blankets) or jointly owned which she had a right to use, pending a legal distribution between the two of them.

In reply to this he does not adequately deal with the allegation that he removed his personal property and walked out on 2 October refusing to pay the rent. He concentrates instead on attempting to demonstrate that it was he who bought and paid for the property.

Failure to deal with facts may lead the court to conclude that they have been ignored because they are "inconvenient". Thus in the present case we must conclude, from his failure to deal with the allegations, that he did not simply go to work on 2 October 1991, but actually walked out intending to spend the night (or perhaps longer) elsewhere.

McNALLY

However, even if one makes that assumption in her favour it cannot be contended that he was abandoning the property at the Kambuzuma lodgings. Indeed she does not claim that to be the case. She does not say that she removed it for safe-keeping. He was paying the rent for the lodgings and he remained the lawful occupier of them despite his threat to stop paying rent. She too, of course, was a lawful occupier. But the point is that he did not abandon possession of the property by moving out. It was still in the lodgings of which he was the lessee.

We have dealt with the question of the property of a man and a woman living together, whether

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married or not, when the joint home is abandoned by one or other. The two relevant cases (neither of which were referred to in argument) are *Manga v Manga* 1991 (2) ZLR 251 (S) and *Manduna v Mutizwa* 1992 (2) ZLR 90 (S).

Judging the present matter in the light of the principles laid down in these cases, one can come to the following conclusions:

1. Both parties had been in possession of the items in dispute.

2. Her contention that certain of the items were in fact and always had been her own property and in her individual possession, as in *Manduna, supra*, was not established.

3. He did not abandon the property, even assuming that he left the lodgings intending to sleep somewhere else. He remained the occupier of the lodgings and the joint possessor of the property.

4. Her removal of the property from the lodgings was a spoliation in that he was deprived of his joint right of possession - see *Manga supra*.

5. His delay in seeking legal redress, from the spoliation on 2 October 1991 to the application on 31 October 1991 was not an unreasonable one - see *Manga, supra*.

It may seem a little odd that, in the final analysis, both parties have moved out of the joint home and that we are ruling that he may take the property with him whereas she may not. However it must be stressed that we are dealing here not with the ultimate rights of the parties but only with the factual situation pending the final resolution of those rights. She was the one who took the unlawful step of removing the goods when she left the lodgings. She

must return them. However, he is no longer living there. So she must return them to him at his present address. Her right is to claim a division of the property, not to take it.

In the circumstances the magistrate was wrong in denying the appellant the right to possession of the property. He ought to have made an order that the first respondent return the property to the appellant, with costs. I use that phraseology because the rule itself was not worded in such a way that it could simply be confirmed.

As far as the second respondent is concerned, there would have been no harm in citing him simply as the *de facto* custodian of the despoiled property. But it should have been made clear that no relief or costs were being sought against him. In the premises he must be awarded such costs as he incurred in pointing out that no claim should have been made against him. He was not, however, involved in the appeal.

Accordingly the following order is made:

1. The appeal is allowed with costs against the first respondent.

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2. The Judgment of the magistrate in case no. 25125/91, delivered on 3 December 1991, is set aside.

3. In its place the following order is made:

   a. The first respondent is ordered to restore possession to the applicant of the property listed in Annexure A to the application, within seven (7) days of the service of this order upon her, failing which the Messenger of the Court is hereby directed to effect restoration of the property to the applicant.

   b. The first respondent is to pay the applicant's costs of suit.

   c. The applicant is to pay the costs of the second respondent.

Gubbay CJ: I agree

Korsah JA: I agree

Ziumbe & Mtambanengwe, appellant's legal practitioners

Mugabe, Mutezo & Partners, respondents' legal practitioners

PRAKASH v WILSON & ANOR 1992 (2) ZLR 294 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

15 & 26 October 1992

Flynote

Defamation - pleading defence of fair comment instead of justification - but truth of contents of article proved at trial - incorrect statement in newspaper article headline - amount of damages to be awarded therefor

Headnote

The respondents had published an article about the appellant. When the appellant sued for defamation, the respondents pleaded the defence of fair comment, without also pleading justification. The trial judge found that the defence of fair comment was not established because the article contained statements of fact and not comment. However, the truth of the allegations made against the plaintiff in the article had been extensively investigated and proved during the trial of the case. On appeal,

Held, that, although the defence of justification should have been pleaded as well as fair comment, no objection was taken at any stage to the adduction of evidence tending to show

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that the statements were true. In the circumstances, the defence of fair comment based on facts shown to be true should have been upheld, except in relation to the headline to the newspaper article, which was not true.

Held, further, in relation to the headline to the newspaper, that this was inaccurate because it tended to suggest criminal conduct on the part of the appellant, whereas the contents of the article established only that the appellant had been an unreliable business partner. However, as the appellant had made nothing of this point until the matter actually came for trial and could undoubtedly have had a correction published by the respondents had he asked for it, nothing more than nominal damages was justified.

MCNALLY

A J Dyke for the appellant

D P Carter for the respondents

Judgment

McNally JA: The appellant sued the respondents in the High Court, Harare, for damages for defamation. Mr Justice Reynolds found that the newspaper article complained of was indeed defamatory. He then found that the defence of "fair comment on a matter of public interest" was not established because the article contained statements of fact and not comment.

However, he ruled that no damages had been suffered because a "retraction" had been published. Moreover, he held that the appellant's legal adviser had agreed on his behalf that the "retraction" would be the end of the matter. Accordingly, no damages were awarded and no order for costs was made.

The appellant has appealed, contending that:

1. The appellant had suffered damages;

2. What was published was not a retraction;

3. It had not been agreed that the "retraction" would settle the matter; and

4. The appellant should have been awarded costs.

I will deal with points 2 and 3 first.

What was published was certainly not a retraction. A retraction is a withdrawal. (To retract: "withdraw or revoke a statement or undertaking" - Concise Oxford Dictionary).

What happened was this. The Financial Gazette, of which the first respondent was the editor and the second respondent was the publisher, published the following article on 20 February 1987:

"INTERPOL SEEKS LOCAL BUSINESSMAN AFTER FAILED GOATS-TO- DUBAI DEAL

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A deal conducted by a Harare resident to export 1 620 live goats and 5 000 kg of chilled meat from Zimbabwe to a Dubai trading company worth some US$50 000 appears to have gone badly wrong. Interpol is now involved and Zimbabwe's export reputation has been harmed in that Arab state.

In July 1985 the Creek Trading Corporation of Dubai entered into a legal contract with a man known to them as a Mr J Prakash of Living Waters Pvt Ltd in Harare - apparently a farming concern.

McNALLY

Mr Prakash signed the contract agreeing that he would deliver the live goats and chilled meat to the Dubai company, according to documents in the possession of the *Gazette.*

In return the trading corporation in Dubai established an irrevocable confirmed letter of credit payable at sight for US$38 250, and established a bank guarantee for the freight charges of US$51 000 encashable after the live goats and meat had been landed at the Dubai airport.

The Dubai company also paid Mr Prakash an advance of US$19 445 towards the initial expenses and airfreight costs, to be adjusted against the total payment due later.

In return, the Dubai company required Mr Prakash to give them a security cheque to be held by them in case he should breach any of the conditions of the contract. This he did and handed them a cheque in September 1985 drawn on Barclays Bank, Slough, Queensmere Branch, for an amount of £14 831 sterling and on which he put his own signature under the name of R Rajan.

The latest date of shipment of the goats to the Dubai company was to be August 15, 1985. In the contract the seller, Mr J Prakash, and the Creek Trading Corporation director, Mr Mohammed Al Moallem, agreed 'to work together in mutual interests and explore all possibilities of future business between Zimbabwe and the United Arab Emirates'.

An agreement of exclusive arrangement was to be discussed and entered into after the success of this first trial order for the live goats and chilled meat.

But since then the Dubai Corporation has not received one goat or a single kilogram of Zimbabwe meat.

When the deadline for the arrival of the Zimbabwe goats and meat at Dubai had come and gone, the company promptly sent the security cheque for £14 831 to Barclays Bank in Slough for payment in breach of contract, but the cheque bounced. It was returned to them by the English bank with an annotation saying: 'Orders not to pay'.

The Dubai company is still seeking the whereabouts of the man known to them as Mr J Prakash (or R Rajan). Earlier this month, after fruitlessly trying to trace either Mr Prakash or his Living Waters company in Harare with the help of a member of the Zimbabwe National Chamber of Commerce who had visited Dubai last year, the company handed the matter over to Interpol in Dubai.

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The company has also enlisted the help of a visiting British businessman who is at present in Harare on business.

This businessman, Mr Aston Piper of Newbury in Berkshire, runs a British export business to the Middle East and is a friend of executives of the Creek Trading Corporation in Dubai.

Now Mr Piper, too, is trying to trace the Mr J Prakash of Living Waters who failed to fulfil his export order for goats and meat to Dubai some 18 months ago.

> 'The Creek Trading Corporation is now claiming US$33 000 from Mr Prakash for breach of contract and also for the expenses they have incurred in connection with this outstanding matter', said Mr Piper this week.
>
> 'A friend who is connected with the Corporation in Dubai has sent me all the documents and details and has asked me to try to settle this matter if possible while I am in Zimbabwe on other business'.
>
> Mr Piper said: 'It is most unfortunate that Dubai's dealings with Zimbabwe have turned out this way. I do not believe it will completely discourage the Dubai company from being willing to explore avenues for trade with this country. But obviously any possible future dealings for exports to Dubai would be very carefully investigated by all Dubai businessmen.'
>
> According to records at the office of the Registrar of Companies in Harare, the directors of Living Waters Pvt Ltd are a Ms Viswakamari Amma Jayaprakash Rajan who is married out of community of property to a Mr Redemptus Jayaprakash Rajan."

The appellant was advised of this article by his wife while he was away in South Africa. He objected to it and instructed his legal representative in Harare to take action. The instructions were relayed through his wife, but it is clear that he had read the article and had telephoned his lawyer twice. The lawyer's letter was dated 11 March 1987.

The lawyer's letter protested about the article. It ended:

> "Our client demands an immediate retraction and an unreserved apology. This apology will include Mr Prakash as well. The parties' right to institute an action for damages is reserved."

In reply the first respondent wrote a letter on 17 March 1987, suggesting that the protest was unconvincing for a number of stated reasons and ending: "..... we would be prepared to go into the article in more detail should you wish to pursue the matter".

After some further interim correspondence, the lawyer wrote again on 31 March 1987, saying *inter alia*:

> "Our client would be prepared to consider withholding this action providing that you publish a retraction in the issue for Friday 10 April 1987. This retraction should be to the effect that Creek Trading Company specifically instructed Living Waters to cancel the Letter of Credit. . . . Unless we hear from you by no later than Monday 6 April 1987, agreeing to the retraction, action will be instituted against you."

I pause here to observe that this is a curious definition of the word "retraction". It would seem that all that the lawyer wanted was a statement that "Creek Trading Company specifically

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instructed Living Waters to cancel the Letter of Credit".

The publication deadline of 10 April was not adhered to, but in the edition of 30 April 1987 the following statement, agreed between the lawyer and the first respondent, was published in the Financial Gazette:

> "GOAT DELIVERY IMPOSSIBLE
>
> With reference to a story published in *The Financial Gazette* of February 20, under the heading 'Interpol seeks local businessman after failed goats-to-Dubai deal' Messrs Winterton, Holmes and Hill of Harare, legal representatives of Living Waters (Pvt) Ltd, asked us to state the following:
>
> 'A contract was concluded between Creek Trading Company of Dubai and Living Waters (Pvt) Ltd of Harare, of which Mrs V J Prakash is a director. The contract was for the supply for goats and chilled meat to Dubai.
>
> It was not possible for Living Waters to effect delivery by the contract date because of difficulties in arranging transport. As a result, Creek Trading requested Living Waters to return its original letter of credit to the issuing bank, as it was obviously not possible for the contract to be implemented.
>
> Creek Trading indicated that another letter of credit would be raised in the future. No further contract was entered into.'"

McNALLY

It will be seen that the article contained in substance and effect the words requested.

On 16 June 1987 the lawyer wrote a further letter to the first respondent. He indicated that his client was unhappy with the article published. He asked that "a more detailed insertion" be published and that the name of the member of the Zimbabwe National Chamber of Commerce mentioned in the article be provided. This the first respondent declined to do. Summons and declaration were accordingly issued, claiming damages in the sum of $30 000.

At the trial the appellant and his wife gave evidence, as did the first respondent and the reporter concerned. The evidence revealed that all the allegations of fact in the offending article were at least *prima facie* true, except the statement in the headline that "Interpol seeks local businessman". It was apparent that the businessman in Dubai had in fact made a report to Interpol, but there was no evidence that Interpol had instituted a search for the appellant.

The factual allegations which were established were:

1. That it was in fact very difficult to get in touch with the appellant or other representatives of his company;
2. That he had entered into a contract to deliver live goats and meat to Dubai by 15 August 1985;
3. That he had not delivered anything in terms of the contract;
4. That he had received an advance of US$19 445 to cover expenses;

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5. That he had given the purchasers a cheque drawn on a London Bank for

   £14 831 by way of security for due performance by him; and

6. That when the purchasers attempted in terms of the written agreement to cash that cheque, payment was stopped by the appellant.

It must be said that, whereas the allegations against the appellant were supported by documents, the allegations he made were not so supported. He said, for example, that the contract was not cancelled but extended at the request of the purchasers. The telex message he produced did not support this. It indicated merely that they gave him a few days' grace and then cancelled the agreement, while holding out the hope that a further agreement might be negotiated. Similarly, his claim that they agreed that they would not attempt to encash the cheque he gave them as security contradicts the written

terms of the contract. The appellant suggested that the contract was extended because the purchasers could not take delivery. The correspondence indicates that he was unable to arrange a suitable transport contract to move the goats and meat from Harare to Dubai. It was these "difficulties", which were in no way the responsibility of the purchasers, that led to his failure to perform in terms of the contract.

In short, all the allegations made against the appellant were shown on a balance of probabilities to be true, except the headline allegation that Interpol were seeking him. Indeed, he did not deny the other allegations of fact. He merely sought, somewhat unconvincingly, to explain them away. Even the offending allegation was more an overstatement than an outright falsehood. And, strangely, the offending headline was not even mentioned in the original declaration. It referred only to the allegations in the article that: "Interpol is now involved" and "The company handed the matter over to Interpol in Dubai". Both these allegations are apparently true.

We are left therefore with the following situation. The allegations made were on a balance of probabilities true, except for the one allegation that Interpol were looking for the appellant. He made no initial complaint about this particular allegation. All that was said in the original letter of complaint was that: "The fact that Interpol is mentioned compounds the problem". In the second letter the lawyer said: "In the light of the copy telex sent to you with our previous letter we would be interested to know whether you consider Interpol's involvement justifiable".

It is a fair conclusion that had the respondents been asked to publish a retraction of the headline they would have agreed to do so.

Against that background I turn to consider the four grounds of appeal:

1. RETRACTION

It is true that no retraction was published. But it is also true that the respondents published precisely what they were asked to publish, and that publication was described by the appellant's

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lawyer as a retraction.

2. WHETHER IT WAS AGREED THAT THE "RETRACTION" WOULD SETTLE THE MATTER

It is clear that the appellant's lawyer did not agree at any stage that the

McNALLY

"retraction" would settle the matter. He said no more than that he would consider withholding the action provided that the agreed "retraction" was published. It was published.

3. HAD THE APPELLANT SUFFERED DAMAGES?

There is no doubt that it was defamatory of the appellant to allege that Interpol was looking for him. But in assessing the quantum of his damages, the facts mentioned are highly mitigatory. These are:

a. His actions had in fact been reported to Interpol;

b. His lawyer agreed on the terms of the "retraction" which was published, and no mention was made of the headline allegation;

c. Even the declaration as originally drafted made no mention of the defamation in the headline. It was brought in only by way of amendment on the opening day of the trial;

d. The other allegations as to his conduct in relation to the contract were shown, on a balance of probabilities, to be substantially true;

e. Even without the headline, the other allegations in the article, which were shown to be substantially true, were damaging to his reputation; and

f. Had the appellant sought the withdrawal of the allegation that Interpol were actually looking for him, the probabilities are that it would have been withdrawn.

The respondents did not plead that their allegations were true and that it was in the public interest that they should be published. They pleaded instead that the words were "fair and *bona fide* comments on a matter of public interest and were published without malice".

The learned judge held that they were not comment but allegations of fact. He held, however, that the allegations of fact, save for that about Interpol seeking the appellant, were "reasonably believed to be true". I have gone further. In my view, the factual allegations by the respondents, with the one exception mentioned, have on a balance of probabilities been shown to be substantially true. Moreover, the remark that "Zimbabwe's export reputation has been harmed in that Arab state" is surely comment, albeit masquerading as a statement of fact. It seems to me that insofar as it is comment, it is fair

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comment based on facts shown on a balance of probabilities to be substantially true, and is in the public interest.

There should have been a plea of justification as well as a plea of fair comment. But no objection was taken at any stage to the adduction of evidence tending to show that the statements of fact were true. In the circumstances, it seems to me that the defence of fair comment based on facts shown to be true should have been upheld in regard to all the allegations, except the allegation that Interpol was seeking the appellant.

I should add that the plea also failed to raise the question of the alleged "retraction" as well. However, in view of the finding that there was no retraction nothing turns on this.

The *quantum* of damages is therefore to be calculated purely on the basis of the defamatory statement that: "Interpol seeks local businessman". The statement is both defamatory and unjustified. But it must be considered in the light of the points (a) to (f) made earlier in this Judgment. Taken together, these considerations virtually eliminate the sting of the allegation. Insofar as there is a sting, it lies in the fact that whereas the other allegations tend to show the appellant to be an unreliable business partner, this particular allegation tends to suggest criminality.

But that sting in turn is significantly reduced when one considers that the appellant himself made nothing of the point until the last moment, and could undoubtedly have had a correction published had he asked for it.

In all the circumstances, it is my view that nothing more than nominal damages were justified. But the learned judge was, with respect, wrong when he found that there was a binding agreement that the publication of the "retraction" would end the matter - a defence, as I have pointed out, that was not even pleaded.

Accordingly a nominal award of damages must be made. Since the learned Judge in the court *a quo* has resigned, it is accepted that this court should determine the *quantum.*

4. COSTS

The question of costs is not an easy one. In the court *a quo,* in view of the minimal award, costs will be awarded on the magistrates' court scale. In this

court the appellant has succeeded but, again, minimally. In fact he has succeeded only on the technical point that his lawyer's agreement to the retraction was not an absolute defence to any award of damages. See generally Cilliers *Law of Costs* 2 ed at para 14.09. Moreover the amount claimed was grossly excessive and was still claimed on appeal - see Cilliers *op cit* at para 3.02.

In the event the appeal is allowed, but there will be no order as to the costs of appeal. The

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Judgment of the court a quo is set aside. In its place the following order is made:

"There will be Judgment for the plaintiff in the sum of $200, with costs on the magistrates court scale".

Gubbay CJ: I agree.

Korsah JA: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

Atherstone & Cook, respondents' legal practitioners

FERRYMAN v MINISTER OF HOME AFFAIRS 1992 (2) ZLR 304 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Manyarara JA & Ebrahim JA

Civil appeal

8 & 27 October 1992

Flynote

Delict - unlawful arrest - appellant arrested with others - no reasonable suspicion that appellant had committed crime

Headnote

Some money was stolen from the cash office at business premises. Five women employed by the business had access to this office. Feldman worked in the accounts office next to the cash office. The cash office could only be entered by passing through the accounts office. There was a partition between the two offices with glass panels and plywood. Anyone in the accounts office could easily see into the inner office. At the time of the theft Feldman was working in the outer office, together with two other women and there was one woman in the inner office.

The police arrested all five women and took them to the police station. They were strip searched. Nothing was found. They were later taken back to to the workplace so that their handbags could be searched. These had been left at their place of work when they were arrested. They were held overnight at the police station and released on bail the next day. None of these women was subsequently prosecuted for theft. One of the five women, Feldman, subsequently sued for unlawful arrest.

Held, that the onus of establishing that the arrest of Feldman was in compliance with s 29(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*] and was therefore lawful rested upon the respondent.

Held, further, that the vital question was whether, prior to the arrest of Feldman, the arresting

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officer had had reasonable grounds for suspecting that Feldman had committed theft.

Held, further, that the police had reasonable grounds to suspect that **one** of

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the five women must have stolen the money. However, as the police did not suspect that the women had acted in concert to steal the money, the vital question was whether at the time of the arrest, the arresting detail had reasonable grounds for suspecting that Feldman was the culprit.

Held, further, that there were no reasonable grounds for suspecting that Feldman was the culprit. Prior to the arrest of the appellant no meaningful effort was made to establish which of the five women was the thief. Whatever investigation or questioning was carried out by the investigating officer was purely perfunctory. There was no probing of the appellant's movements with either her or the other women. There was no attempt to ascertain her background and status, which would have revealed that she had been in employment with the company for 24 years. If the general manager had been asked about the appellant, he would have expressed the opinion that she, of all the women, was the least likely to have stolen the money. There was no request made of the appellant for permission to search her handbag or the drawers of her desk. Most importantly, no regard was taken of the rank improbability that the appellant, in the accounts office, could have entered the cash office, unnoticed by the two other women in the accounts office and the woman in the cash office, and removed the money without being observed.

Cases cited:

A-G v Blumears & Anor 1991 (1) ZLR 118 (S)

Min of Law & Order & Anor v Dempsey 1988 (3) SA 19 (A)

Min of Law & Order & Ors v Hurley & Anor 1986 (3) SA 568 (A)

Nevhutala & Ors v Min of Police & Anor 1986 (4) SA 822 (V)

R v van Heerden 1958 (3) SA 150 (T)

Duncan v Min of Law & Order 1986 (2) SA 805 (A)

Min of Home Affairs v Allan 1986 (1) ZLR 263 (S)

Holgate-Mohammed v Duke [1984] 1 All ER 1054 (HL)

Mallory v US 354 US 449 (1957)

MJ Gillespie for the appellant

DP Carter for the respondent

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Judgment

Gubbay CJ: On the morning of 6 June 1988, Mrs Lashme Arab and Mrs Sithembiso Msipa, two employees of FW Woolworths (Pvt) Ltd, engaged at the company's department store in Bulawayo, were assigned the duty of checking the amount of cash paid by customers to the till operators working on the ground and first floors.

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According to Mrs Arab, after taking possession of the notes and silver in the drawer of till no. S1, which was operated by Mrs Audrey Moyo, she and Mrs Moyo went to an office on the first floor where together they counted the cash. Satisfied that the resultant sum of $1 097 corresponded exactly with the figure reflected on the till slip, both initialled the slip. Mrs Arab then placed the cash and the signed till slip into a small cloth bag, which she secured and left in the office. After repeating the procedure with several other till operators, she carried the individual bags to the cash office on the third floor. She placed them on her desk and departed for a tea break.

On her return, at about 9.30 am, Mrs Arab commenced to recount the money in each cash bag, preparatory to banking all of it. She soon discovered that compared to the till slip there was now a shortfall of $490 in the amount collected from Mrs Moyo's till. All the $20 notes and some $10 notes were missing. Mrs Arab informed the appellant, Mrs Olivia Feldman, who was the senior cashier. The appellant counted the money and confirmed the loss. The general manager, Mr John Holland, was advised. He reported the theft - for certainly there was no other explanation for the missing money - to the police.

The cash office on the third floor could be entered only by passing through the larger accounts office, being partitioned from it with panels of glass and plywood. Anyone in the accounts office was able to see easily into the inner cash office and was afforded free access thereto.

During the entirety of the short period between the placement of the money in the cash office and the discovery of the theft, the accounts office was occupied by the appellant, Mrs Theresa Bell and Mrs Dawn Roberts, and the cash office by Mrs Msipa.

It was about 12.45 pm when Detective Inspector Mutara, accompanied by one or two members of the Central Investigation Department, went to Woolworths Store. He spoke to Holland, who explained what had happened. Holland offered Mutara the use of an office should he wish to question in private the five women on the third floor, but the offer was declined. Mutara was shown to the third floor. Having observed the layout of the accounts office and the cash office, he concluded that it was possible for any one of the women employed in either office to have stolen the money. After speaking briefly to them, but not individually, Mutara decided that the incident was better dealt with by the store-breaking section of the Central Investigation Department. Accordingly, he telephoned to Section Officer Munyengeterwa to come to the store.

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Munyengeterwa arrived to find Mutara with Holland in a ground floor office. Mutara informed him that there had been a theft of cash and suggested that the female employees on the third floor be taken to the Police Station, as he considered it far preferable that they be questioned there, away from their working environment. Mutara already had a list of their names, which he produced. Munyengeterwa went up to the third floor and collected the five women, including the appellant. There was no questioning of them at that stage by either police officer.

The women were conveyed in a police truck to the Central Police Station, where they were immediately removed to the cells and subjected to a search of their clothing and bodies. That done, they were questioned separately by Munyengeterwa and Detective Patrol Officer Mpofu, but the identity of the thief was not disclosed. All five women denied responsibility for the theft. Each suggested that one of the others could be the guilty party. Later that afternoon they were returned, in custody, to Woolworths Store in order to retrieve and search their handbags. No trace of the stolen money was found.

The appellant and the other women were detained overnight in the police cells. Early the next morning a search of their individual residences was conducted. This too proved unsuccessful. Later that same day they were remanded by a magistrate for trial on a charge of theft, but were released upon the payment of bail.

The charge of theft was eventually withdrawn against each of the women.

Contrary to the evidence of Mutara and Munyengeterwa, the appellant and her witnesses, Mrs Roberts and Mrs Arab, testified to having being informed while at Woolworths Store that they were under arrest and not after they had been conveyed to the Police Station. Their version is to be preferred for the following reasons. First, it was conceded by Mutara that the women were not asked whether they were willing to go to the Police Station for questioning. They were ordered there and so afforded no choice in the matter. Second, they were treated with little respect and were taken away with such indecent haste that they had no time to recover their handbags. Third, they were not allowed to make their own way to the Police Station, which was only a short distance away, but were driven there in a police truck. Fourth, immediately upon arrival they were escorted to a cell, forced to strip down to their pants, and searched. Such a search could only have been lawfully effected if they were already under arrest.

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Notwithstanding some of the differing findings of the learned judge *a quo*, I am satisfied that this is the true scenario which emerges from a close analysis of the evidence of the many witnesses and from a proper consideration of the probabilities.

It is perhaps as well to emphasise that this court is concerned solely with the situation of the appellant and not with that pertaining to any of the other four women, who were arrested at the same time. It was the appellant who brought action in the High Court, claiming damages for unlawful arrest and detention; and it is she who feels aggrieved by its dismissal.

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At this point I might usefully repeat what was said by this court in *Attorney-General v Blumears & Anor* 1991 (1) ZLR 118 (S) at 122A-C:

> "The standard for the deprivation of personal liberty under s 13(2)(e) of the Constitution are facts and circumstances sufficient to warrant a prudent man in suspecting that the accused person had committed, or was about to commit, a criminal offence. This standard represents a necessary accommodation between the individual's fundamental right to the protection of his personal liberty and the State's duty to control crime. It seeks, on the one hand, to safeguard the individual from rash and unreasonable interference with liberty and privacy, and from unfounded charges of crime; yet, on the other, to give fair leeway for enforcing the law in the community's protection. The criterion of reasonable suspicion is a practical, non-technical concept which affords the best compromise for reconciling these often opposing interests. Requiring more would unduly hamper the legitimate enforcement of the law. To allow less would be to leave law-abiding persons at the mercy of the whim or caprice of the authorities."

Now the *onus* of establishing that the arrest of the appellant was in compliance with s 29(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*], and therefore lawful, rested upon the respondent. In this regard, the following remarks of HEFER JA in *Minister of Law & Order & Anor v Dempsey* 1988 (3) SA 19 (A) at 38B-C are relevant:

> "I accept, of course, that the *onus* to justify an arrest is on the party who alleges that it was lawfully made and, since an arrest can only be justified on the basis of statutory authority, that the *onus* can only be discharged by showing that it was made within the ambit of the relevant statute. Any statutory function can, after all, only be validly performed within the

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> limits prescribed by the statute itself and, where a fact or a state of affairs is prescribed as a precondition to the performance of the function (a so-called jurisdictional fact), that fact or state of affairs must obviously exist and be shown to have existed before it can be said that the function was validly performed."

See also *Minister of Law & Order & Ors v Hurley & Anor* 1986 (3) SA 568 (A) at 587H-588C and 589D-G; *Nevhutalu & Ors v Minister of Police & Anor* 1986 (4) SA 822 (V) at 830I-832B.

It had to be shown by the respondent that, in effecting the arrest of the appellant at Woolworths Store, the police officers not only subjectively harboured a suspicion that she, individually, had stolen the money, but that, on an objective appraisal, there existed reasonable grounds for that suspicion, resulting from what they had ascertained prior to arresting her. In other words, the circumstances giving rise to the suspicion were such as would ordinarily lead a reasonable man to form the suspicion that the arrestee had committed an offence mentioned in the First Schedule to the Criminal Procedure and Evidence Act (which includes theft). See *R v van Heerden* 1958 (3) SA 150 (T) at 152E; *Duncan v Minister of Law & Order* 1986 (2) SA 805 (A) at 814C-E; *Minister of Home Affairs v Allan* 1986 (1) ZLR 263 (SC) at 266E-F and 267G.

It is plain, to my mind, that the police officers had reasonable grounds to suspect that the person who had stolen the money was one of the five women working on the third floor. Indeed, this much was fairly conceded by the appellant and Mrs Arab.

Since it was not suggested by the police officers that subjectively they suspected the money to have been stolen by two or more of the women, acting in concert, the substantive point, which was not addressed by the learned judge, was whether reasonable grounds for suspecting that

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one of the five had stolen the money, justified reasonable grounds upon which to suspect the appellant of having committed the offence. This is the issue of fact now to be determined.

It should not be overlooked that prior to the arrest of the appellant no meaningful effort was made to establish which of the five women was the thief. Whatever investigation or questioning was carried out by Mutara, and there was little, was purely perfunctory. There was no probing of the appellant's movements with either her or the other women. There was no

attempt to ascertain her background and status, which would have revealed that she had been in Woolworths' employ for twenty-four years. If Holland had been asked about the appellant, he would have proffered the opinion that she, of all the women, was the least likely to have stolen the money. There was no request made of the appellant for permission to search her handbag or the drawers of her desk. Finally, and most importantly, no regard was taken of the rank improbability that the appellant, in the accounts office, could have entered the cash office, unnoticed by Mrs Roberts and Mrs Bell, and removed the $20 and $10 notes from one of the bags on Mrs Arab's desk without being observed; for at all times the cash office was occupied. In the absence of Mrs Arab, Mrs Msipa remained there. But apparently no enquiry was made of her as to whether the appellant had come into the cash office.

Mr *Gillespie*, who appeared for the appellant, submitted that the decision of the police officers was that as it was impossible to pin-point the thief, five women were to be arrested and conveyed to the Police Station for interrogation, in the hope that by so doing the identity of the culprit would be revealed; albeit that they must have been morally persuaded that four of the women were innocent. The following passages in the evidence of the two police officers support this contention:

Mutara -

> "Q. I put it to you your belief that the plaintiff might have stolen this money - your suspect - was totally unreasonable? A We took several ladies working in these offices. If I had been convinced one lady was responsible, I would have taken her leaving the rest.
>
> Q But are you saying it is right to arrest a group of ladies and hope, somewhere along the line, you could find who the real culprit is? This is the right way? A I was convinced if the police took them away from their working environment maybe we would get the correct stories from them."

And:

> "Q. Mr Mutara, you said in your evidence you hoped that one of the suspects would then reveal the truth. Is that right? A Yes, My Lord.
>
> Q And if none of them decided to reveal the truth you had a problem? A I could foresee problems.

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Q And you did have a problem? A That was the reason why I took them to the police station."

Munyengeterwa -

"Q. Do you have any particular reason why you detained the plaintiff from the bit of facts presented to you? A Yes. The plaintiff was working in an office where money went missing and it was entirely up to her to disprove that she had not taken the money. I had no doubt one of them could have taken the money and the best we could do is to send them to court under those circumstances - that the money went missing from the office where they were employed.

Q. So it would then be up to them to disprove that they had taken the money? A Definitely."

And:

" Q I am putting it to you there was nothing to show that this plaintiff was actually involved in this theft? A As far as we are concerned we had no doubt that one of them had taken the money because the money went missing while they were there."

On behalf of the respondent, Mr *Carter* argued that in the predicament which faced the police officers, and suspecting as they did upon reasonable grounds that one of the five women had stolen the money, it was permissible to arrest the appellant with the object of taking her to the Police Station, where there was a greater likelihood of her responding truthfully to interrogation. In other words, their enquiries were more likely to be fruitful in identifying the thief if the appellant and the others were compelled to go to the Police Station than if the questioning were conducted at their place of employment.

In support of this proposition, counsel cited the decision of the House of Lords in *Holgate-Mohammed v Duke* [1984] 1 All ER 1054 (HL). That case, in my view, affords him no assistance. It was concerned with a situation in which the arresting policeman, Detective Constable Offin, had reasonable cause for suspecting Mrs Holgate-Mohammed to be guilty of burglary (see at 1057c-d) and was thus entitled in law to arrest her, but in exercising his discretion to do so took into account that she would be more likely to confess what he had reasonable cause to believe to be the truth if she were arrested and taken for questioning to the Police Station. The final extract from the

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speech of LORD DIPLOCK at 1059j-1060a makes this clear:

"In my opinion the error of law made by the county court judge in the instant case was that, having found that Det Con Offin had reasonable cause for suspecting the appellant to be guilty of the burglary committed in December 1979 to which he rightly applied an objective test of reasonableness, the judge failed to recognise that the lawfulness of the arrest and detention based on that suspicion did not depend on the judge's own view whether the arrest was reasonable or not, but on whether Det Con Offin's action in arresting her was an exercise of discretion that was *ultra vires* under *Wednesbury* principles because he took into consideration an irrelevant matter. For the reasons that I have given and in agreement with the Court of Appeal, I do not think that in the circumstances Det Con Offin or any other police officers of the Hampshire Constabulary acted unlawfully in the way in which they exercised their discretion."

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The distinguishing feature is that in the present case the condition precedent to the taking of the appellant into custody was not fulfilled. As was pertinently remarked by Justice Frankfurter in *Mallory v United States of America* 354 US 449 (1957) at 456:

> "Presumably, whoever the Police arrest, they must arrest on 'probable cause'. It is not the function of the Police to arrest, as it were, at large, and to use the interrogatory process at Police Headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause'."

It follows necessarily from the unlawful arrest that there was no justification for detaining the appellant from the afternoon of 6 June 1988 until the next morning when she was brought before a magistrate and released on bail.

Counsel were agreed that, in the event of this court coming to the conclusion it has, the appellant should be awarded damages in an amount of $2 500 against the respondent.

In the result, the appeal is allowed with costs. As the Judgment of the trial court in respect of the second and third defendants was not appealed against, the order made is altered to read:

1. Judgment with costs be and is hereby entered for the plaintiff against the first defendant in the sum of $2 500;

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2. The plaintiff's claims against the second and third defendants be and are hereby dismissed with costs.

Manyarara JA: I agree.

Ebrahim JA: I agree.

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

Coghlan & Welsh, respondent's legal practitioners

MUZABAZI v JAMBAWU & ORS 1992 (2) ZLR 314 (HC)

Court **High Court, Harare**

Smith J

Civil action

6, 7 & 9 October & 4 November 1992

Flynote

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Delict - unlawful arrest and detention - whether reasonable suspicion for arrest

Headnote

The plaintiff was arrested and detained for two nights in the cells at a police station. She was arrested on suspicion that she had been involved in a murderous attack by a group of women upon the complainant. She sued the police officers who arrested and detained her and the Ministry of Home Affairs for damages for unlawful arrest and detention. The court dismissed the claim, holding that the police had had good grounds for holding a reasonable suspicion that she had been involved in the attempted murder of the complainant. The court found that the police had had a reasonable suspicion that the plaintiff was involved because

- two informers who were apparently reliable had told the police that she was one of the attackers;
- the police had definite evidence that Mrs Chikowore had been one of the attackers and the plaintiff was a friend of Mrs Chikowore and both worked together in the same office for the CIO;
- on the day the attack had been carried out by Mrs Chikowore and other women, the plaintiff had left the office in the company of Mrs Chikowore and had gone to the latter's home;
- a friend of the plaintiff had telephoned her to ask her about the attack and had expressed the hope that the plaintiff had not been involved.

Cases cited:

Masawi v Chabata & Anor 1991 (1) ZLR 148 (H)

SMITH J

Blackburn & Ors v Union Govt 1926 CPD 305

Thompson & Anor v Min of Police & Anor 1971 (1) SA 371(E)

Girach v A-G & Ors HH-356-86 (unreported)

Shaaban Bin Hussein & Ors v Chong Fook Kam & Anor [1969] 3 All ER 1626

S v Ganyu 1977 (2) RLR 97 (A)

S Phiri for the plaintiff

K Ngozo for the respondent

Judgment

Smith J: The plaintiff, who is, and was at the time, employed in the Central Intelligence Organization (hereinafter referred to as "CIO") is suing the defendants for wrongful arrest and

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detention and claiming damages in the sum of $20 000. She and Mrs Chikowore, who was also employed in CIO at the time, gave evidence concerning events which took place in January and February 1990 and which led to the arrest and detention of the plaintiff. The plaintiff was detained for two nights in the cells at Rhodesville police station under conditions which she alleged were "sub-human". The circumstances surrounding the arrest and detention of the plaintiff are as follows.

St Tropez is the name of a block of flats owned by the Workers' Compensation Insurance Fund. A Mrs Debra Chidakwa (hereinafter referred to as "the complainant") and her son Munyaradzi Chikowore were staying in one of the flats in the block. According to the plaintiff, Mr Chikowore had got the flat for the complainant and paid the rent. On 15 January 1990 five women entered the flat whilst the complainant was out and hid there. When the complainant returned they grabbed her and tied her to the bed. They then set fire to some papers in the flat and left, locking the door behind them. The complainant screamed and she and her son were rescued. The police were called and started investigations.

About 4.15 pm on Friday 26 January 1990 the plaintiff was arrested and taken to the Central Police Station where she was questioned by some of the defendants about what she had done on the afternoon/evening of 15 January. She told them that after work she had gone with her friend, Mrs Chikowore, to the latter's home because she had promised to plait the hair of Mrs Chikowore's daughter who was returning to school. On the way they passed Mrs Chikowore's son who was being taken to St George's School. After plaiting the daughter's hair she had supper with Mrs Chikowore. Just when she was ready to leave, Mr Chikowore, who is, and was at the time, a Government Minister, arrived. His wife asked if he could take the plaintiff

back to town but the Minister said he could not as he had some urgent business and was going in a different direction. So Mrs Chikowore, accompanied by one of her husband's bodyguards, took the plaintiff back to her house. The plaintiff had supper at her house then went to bed. Her two children and her domestic help could confirm that.

After being questioned for about four and a half hours by some of the defendants the plaintiff was taken to Rhodesville Police Station. There she was made to remove her shoes, underwear and jewellery and taken to a cell to spend the night. She was released from the cell at 6 am the next day and given a cup of tea, then returned to the cell until 12 noon when she was let out for lunch. About 7 pm some of the defendants came to question her and asked her to write out her statement. She did so and then was returned to her cell. She was told that she would be required to attend an identification parade the following day, which was Sunday. She was taken to Harare Central Police Station the following day in the afternoon and an identification parade was held. The complainant picked her out and asked her to walk around but said that she could not positively identify the plaintiff as having been one of her attackers. She was released after the parade and taken back to her house.

Mrs Chikowore said that she too had been arrested in January 1990 on an allegation of attempted murder. She had been taken to the Central Police Station and questioned until about

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9 pm when she was taken to a Police rest camp outside Harare to sleep. The following day she was returned to the Central Police Station and kept in an office where she was questioned. That night she was taken back to the rest camp but there was no room there so she was brought back to town and taken to a hotel where she spent the night. She was collected about 7 am and taken back to the Central Police Station where she was kept until about 5 pm when she was released. She had not been allowed to use the telephone but her husband had found out that she had been arrested and he had visited her at the police station. He had brought her some food.

It is settled law that once the plaintiff has established that he or she has been arrested the onus lies on the person or persons responsible to establish that it was legally justified: see *Masawi v Chabata & Anor* 1991 (1) ZLR 148 (H) and the cases referred to therein. The first and fourth defendants gave evidence as to the circumstances of the arrest and detention of the plaintiff and then woman constable Muchamwa who is, and was at the time, based at Rhodesville Police Station gave evidence as to the conditions under which persons are detained in the cells there.

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The fourth defendant said that on the basis of information received from a reliable source, she and some of the other defendants had gone to the CIO offices to arrest the plaintiff. The plaintiff had admitted that she was a friend of the number one suspect, Mrs Chikowore, but denied that she had been involved in the attempted murder of Mrs Chidakwa and her son. The plaintiff had been questioned and then detained because there were four others involved in the attempted murder. After being questioned on the Friday evening the plaintiff had been taken to Rhodesville Police Station and kept in the cells. At the identification parade on the Sunday afternoon the complainant had indicated the plaintiff as possibly being one of her assailants but she could not be sure. Thereafter the plaintiff was released. This witness said that the complainant had described the attack on her and had positively identified Mrs Chikowore as being one of the attackers. The police had picked up three suspects and questioned them. The plaintiff and Mrs Chikowore were two of the three. Under cross-examination the following points were made. The police had not been able to lift any fingerprints from the flat because when the fire brigade put out the flames the contents of the flat had been damaged or destroyed. The police had received tip-offs implicating by name the plaintiff, Mrs Chikowore and a third person as being amongst the group of five that attacked the complainant. There had been one tip-off in person and another anonymously by telephone call.

The evidence given by Chief Superintendent Jambawu did not differ materially from that of Woman Sergeant Mugadza. He said that the complainant had named Mrs Chikowore as being one of her assailants. He had led the team that had arrested the plaintiff. He had decided that the plaintiff should be detained overnight at the Rhodesville Police Station. When he had seen the plaintiff on the Saturday and the Sunday she had not complained about the condition of her cell, the food or her treatment. He had directed that she be released after the identification parade because the complainant had not been able to identify her positively as one of the attackers. Investigations had continued after the release of the plaintiff and a docket had been compiled and sent to the Attorney-General over a year ago. He had been told that the case was

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to be set down for trial but that had not materialized. Three suspects had been named in the docket. Under cross-examination the following emerged. The complainant had said that one of her attackers had carried a rifle. Although Mrs Chikowore was the main suspect, she had not been arrested until 5 February 1990, some ten days after the arrest of the plaintiff and of the other suspect. The attack on the complainant had been mentioned in the press on two occasions.

SMITH J

Mr *Phiri* submitted that the court should not place any great weight on the statement by the defendants that they had received a tip-off implicating the plaintiff because they had refused to identify their source. He argued that the conclusion that the plaintiff's arrest was without reasonable grounds and therefore wrongful and unlawful was inescapable for the following reasons. The defendants had not questioned, let alone arrested, the main suspect Mrs Chikowore before arresting the plaintiff. The plaintiff was not questioned prior to her arrest. She was released because of a "negative identification parade". No meaningful attempt was made to check her story as to her movements on 15 January through Minister Chikowore, Mrs Chikowore, the bodyguard or her maid or children. Mr *Phiri* went on to submit that the plaintiff was questioned in an "insistent, aggressive, harsh and intimidatory manner", that the tone of the woman police officer was one of "scorn, contempt and ridicule" and that whereas the first defendant had treated her kindly the third defendant had said that her story was "bullshit" and called her a liar. He pointed out the different treatments meted out to the plaintiff and Mrs Chikowore. The former had been kept for two nights in police cells whereas the latter, who was the main suspect and had been positively identified by the complainant, had spent one night at a Police rest camp and another at a three-star hotel in town.

Mr *Ngozo* pointed out that the plaintiff in her plea alleged that her arrest was wrongful and unlawful but gave no particulars as to the grounds for this assertion. She should have made some clear statement of the basis for the allegation of the arrest being wrongful and unlawful: *Blackburn & Ors v Union Government* 1926 CPD 305. He submitted that the plaintiff, although alleging wrongful and unlawful arrest, was in fact basing her claim on malicious arrest or imprisonment. He submitted that the defendants had good grounds for their "reasonable suspicion" that the plaintiff had been involved in the attack on the complainant for the following reasons. They knew that the complainant was having an extra-marital affair with Minister Chikowore, having had a child by him almost two years earlier. He had provided her with the flat at St Tropez. They had received an anonymous telephone call to say that the plaintiff was one of the attackers. An informant had also told them that the plaintiff had been involved in the attack. The plaintiff herself said that a friend of hers (Memory Mugwanyo) who also worked in the CIO had phoned her the day following the attack and asked her about the rumour that was circulating about a workmate and close friend of the plaintiff who was involved in the attempted murder of a girl friend of her husband. The friend Memory had commented that she hoped the plaintiff was not involved. Mr *Ngozo* submitted that the evidence of Mrs Chikowore was totally irrelevant.

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SMITH J

The plaintiff must have been piqued by the fact that Mrs Chikowore received preferential treatment because of her status as wife of a Cabinet Minister. I agree with him on this issue. The treatment accorded to Mrs Chikowore could not affect the question of whether or not the arrest of the plaintiff was lawful or whether she was subjected to "sub-human" treatment. Accommodation in the police cells at Rhodesville must obviously be inferior to the accommodation provided at a Police rest camp or a three-star hotel. However, not many suspects under arrest can expect to receive the same treatment as that accorded to Mrs Chikowore.

In *Thompson & Anor v Minister of Police & Anor* 1971(1) SA 371 (E) at 375F-G EKSTEEN J said:

> "In the main claim based on wrongful arrest however the position is different. There the delict is committed by the illegal arrest of the plaintiff without the due process of the law. Improper motive or want of reasonable and probable cause required for malicious arrest have no legal relevance to this cause of action. It is also irrelevant whether any prosecution ensues subsequent to the arrest; and, even if it does, what the outcome of that prosecution is. The injury lies in the arrest without legal justification, and the cause of action arises as soon as that illegal arrest has been made."

I concur with the views so ably expressed by the learned judge. In terms of s 29(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*] a peace officer may arrest without warrant any person whom he has reasonable grounds to suspect of having committed any offence mentioned in the First Schedule. Attempted murder is such an offence. Did the defendants have a reasonable suspicion that the plaintiff was involved in the attempted murder of the complainant on 15 January 1990? In *Girach v Attorney General & Ors* HH-356-86 at pp 4 and 5 of the cyclostyled Judgment REYNOLDS J said:

> "The term 'reasonable suspicion' has been examined in many cases. In my view, the meaning ascribed to this expression by DEVLIN LJ in *Shaaban Bin Hussein v Chong Fook Kam* [1969] 3 All ER 1626 is wholly apposite to the present matter. At p 1630 he said:
>
> > 'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end. When such proof has been obtained, the

> police case is complete; it is ready for trial and passes on to its next stage.'"

Similar views were expressed by MACDONALD CJ in *S v Ganyu* 1977 (2) RLR 97 (A) at 104E-F where he said:

> "In deciding whether a reasonable suspicion has been proved, it must of necessity be recognized that a reasonable suspicion never involves certainty as to the truth. Where it does, it ceases to be suspicion and becomes fact."

In this case the defendants had two informants who said that the plaintiff had been one of the attackers. Even a friend of the plaintiff, within 24 hours of the incident, had heard of the attempt

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to kill the complainant and that the plaintiff's friend and workmate had been involved and telephoned the plaintiff to ask about it and express the hope that the plaintiff had not been involved. That at the very least, to my mind, indicates that the plaintiff's friend thought that the plaintiff might have been involved and hoped that she had not been. As far as the defendants were concerned, not only did they have the tip-off about the plaintiff - they also had definite evidence that Mrs Chikowore had been one of the attackers and that she was a friend of the plaintiff and they both work in the same office for the CIO. In fact on the day in question the plaintiff had left the office in the company of Mrs Chikowore and had gone to the latter's home. It seems to me that the defendants had good grounds for a reasonable suspicion that the plaintiff had been involved in the attempted murder of the complainant.

I do not consider that there is any substance in the plaintiff's complaints as to the manner in which she had been questioned by the defendants or the conditions in which she had been detained in the cells at Rhodesville Police Station. However, as Mr *Ngozo* submitted, the conditions of her detention in the cells are irrelevant in a claim for wrongful arrest.

The application is dismissed with costs.

Ziumbe & Mtambanengwe, plaintiff's legal practitioners

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

MUJAWO v CHOGUGUDZA 1992 (2) ZLR 321 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

Civil appeal

29 September & 10 November 1992

Flynote

Succession - intestate succession - claims to estate by two sons - first son progeny of unregistered customary union - second son progeny of later civil marriage in terms of Marriage Act [Chapter 37] - which son entitled to inherit estate

Interpretation of statutes - s 13 of the African Marriages Act [Chapter 238] - whether overridden by s 3 of the Customary Law and Primary Courts Act 1981.

Headnote

The deceased, who was over 18 years of age, had died intestate. The deceased was the natural father of two male children. The older boy was the progeny of an unregistered customary union with the respondent. The deceased had paid lobola for the respondent. His other son was the progeny of a civil marriage he had entered into with the appellant in terms of the Marriage Act [*Chapter 37*] after the deceased had paid lobola for the appellant. The union

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with the respondent had not been dissolved prior to this subsequent marriage, although when the second marriage was entered into the respondent was living a separate existence from the deceased.

Claims to the estate had been brought on behalf of their respective minor children by the appellant and the respondent. The trial court appointed the respondent's son as rightful heir. It decided that African customary law had to be applied to the devolution of this estate and it was the deceased's eldest son who was entitled to inherit his father's estate under customary law as the eldest son. The appellant appealed against this

MAYARARA JA

decision. The Supreme Court set aside the Judgment of the trial magistrate and appointed the appellant's son as the rightful heir. In making this decision the court reasoned as follows.

Where an African contracts a marriage according to African law or custom s 69(1) of the Administration of Estates Act lays down that customary law will apply to the administration of the estate of the African.

On the other hand, the general law applies to marriages under the Marriage Act. Such a marriage is monogamous and thus incompatible with a potentially polygamous customary marriage. By contracting a later civil marriage under the Marriage Act [*Chapter 37*] the deceased had conclusively opted to have general law govern his legal relationships and the earlier customary law union had been dissolved by operation of law. The passing of the Legal Age of Majority Act 1982 had changed the status of both males and females over the age of 18. Since the passing of that Act the right of an adult male to contract a civil marriage under the Marriage Act is no longer derived from nor subject to the fetters contained in ss 12 and 13 of the African Marriages Act.

Although s 13 of the African Marriages Act [*Chapter 238*] lays down that the contracting by Africans of marriage in terms of the Marriage Act does not affect the property of the spouses and that, if that property is not disposed of by will, it shall devolve according to African law and custom, this section has been overridden by s 3 of the Customary Law and Primary Courts Act 1981. This section lays down the criteria to be used to determine whether customary law or general law is to be applied in civil cases. Applying these criteria, general law governed the present civil case and the case did not fall under s 69(1) of the Administration of Estates Act.

The estate of the deceased therefore should be administered and distributed in terms of s 26 of the Administration of Estates Act as read with the Deceased Estates Succession Act [*Chapter 302*]. The appellant was the "surviving spouse" in terms of both those pieces of legislation.

However, as under s 3(3) of the African Marriages Act [*Chapter 238*], the appellant's son was legitimatised, he was entitled to a child's share of the deceased estate in terms of the provisions of the Deceased Estates Succession Act [*Chapter 302*].

Cases cited:

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R v Moyo 1946 SR 12

Chikosi v Chikosi 1975 (1) RLR 140 (G)

Dayimano v Kgaribaitse 1931 SR 134

Katekwe v Muchabaiwa 1984 (2) ZLR 112 (S)

MANYARARA JA

E Chatikobo for the appellant

AJ Dyke for the respondent

Judgment

Manyarara JA: The parties to this matter made conflicting claims to the estate of Maxwell Mujawo ("the deceased"), who died intestate in 1990. The claims were made on behalf of the minor sons of the parties, the appellant's son being the "first claimant" and the respondent's son the "second claimant".

It was common cause that the deceased was the natural father of both claimants. He had first paid lobola for the respondent and the second claimant was born about one year before he died. He had then paid lobola for the appellant and entered into a civil marriage with her in terms of the Marriage Act [*Chapter 37*] before he died. The first claimant was born posthumously. No marriage had been registered with the respondent.

To complete the picture, the deceased had completed his studies at the University of Zimbabwe and was in gainful employment in Harare at the time of his death. He had set up a matrimonial home with the appellant, whilst the respondent appears to have been leading a separate existence elsewhere in the city. Both she and the appellant had been trained as school teachers at the Belvedere Teachers' Training College, but were teaching at different schools.

The civil marriage was admitted but the respondent contended that she remained the deceased's "first wife" and the appellant his "second wife" in the order that lobola had been paid. According to her, the second claimant was the rightful heir, as he was the deceased's eldest son.

The Community Court referred the dispute to a provincial magistrate in terms s 69 of the Administration of Estates Act [*Chapter 301*]. The respondent's contention prevailed and the second claimant was appointed the heir. See Storry's Customary Law in Practice p 80, and the many other texts available on the subject.

Section 69(1) of the Administration of Estates Act provides as follows:

> "69. (1) If any African who has contracted a marriage according to African law or custom or who, being unmarried, is the offspring of parents married 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."

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MANYARARA JA

Mr *Chatikobo*, for the appellant, argues that it was incompetent to refer the estate in terms of the provision. He summarised his argument as follows: -

> "Even assuming that the late Mujawo contracted a customary union with respondent, at the time of his death he was not a person married according to customary law as he had contracted a civil marriage (with the appellant) in terms of the Marriage Act [*Chapter 37*]. The civil marriage contracted by the late Mujawo superseded the polygamous customary union contracted with Respondent. Since a marriage under the Marriage Act is a monogamous union, it cannot exist side by side with a potentially polygamous union.
>
> . . .
>
> The effect of the subsequent Christian (civil) marriage was to make the late Mujawo a person not married according to customary law or customs, with the consequence that his estate cannot be distributed according to the customs and usages of his (people)".

Mr *Dyke*, for the respondent, has summarised his argument to the contrary as follows:

> "Section 13 of the African Marriages Act provides that the solemnisation of marriages by Africans in terms of the Marriage Act does not affect the property of the spouses 'which shall be held, may be disposed of and, unless disposed of by will, shall devolve according to African law and custom'. On its own, therefore, s 13 of the African Marriages Act would indicate that respondent's son, in terms of African law and custom, is the heir to the deceased's estate.
>
> Section 3 of the Customary Law and Primary Courts Act 1981 does appear to have the intention of overriding s 13 of the African Marriages Act but it is submitted that if it is clear that customary law should apply in terms of s 3 of the former Act, s 13 of the latter Act then comes into play.
>
> The record reveals that whilst the deceased married the appellant in terms of the Marriage Act, the customary formalities were nevertheless complied with in that:
>
> a) a go-between was appointed;
>
> b) *lobola* was paid.
>
> . . .
>
> The above would indicate that insofar as his domestic lifestyle was concerned, the deceased lived and conducted his private affairs in a

MANYARARA JA

> customary manner. Furthermore, his marriage to appellant without taking any steps to bring to an end the first marriage (albeit unregistered) indicates an intention to maintain two marriages rather than just the latter one. As such, therefore, it is submitted that customary law is clearly applicable to his estate in terms not only of s 3 of the Customary Law and Primary Courts Act but also s 13 of the African Marriages Act."

The words "marriage according to African law and custom" are not defined by Chapter 301 or the Marriage Act or even the African Marriages Act, where one would expect to find such a definition. The African Law and Tribal Courts Act [*Chapter 237*], since repealed, contained the

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following definition:

> "'customary law', in relation to a particular African tribe, means the legal principles and judicial practices of such tribe except in so far as such principles or practices are repugnant to -
>
> (a) natural justice or morality; or
>
> (b) the provisions of any enactment:
>
> Provided that nothing in any enactment relating to the age of majority, the status of women, the effect of marriage on the property of the spouses, the guardianship of children or the administration of deceased estates, shall affect the application of customary law, except in so far as such enactment has been specifically applied to Africans by that or any other enactment."

It will be evident that ss 12 and 13 of the African Marriages Act, on which Mr *Dyke* relied, are based on the exceptions set out in the proviso to the definition. The Act which repealed and substituted Chapter 237 is the Customary Law and Primary Courts Act 6 of 1981. This defines customary law merely as "the customary law of the indigenous people of Zimbabwe or any section or community thereof".

It is against that background to the legislation that one must endeavour to ascertain whether the deceased, being an African in the ethnic sense, had contracted a customary marriage. If he had contracted such a marriage, *caedit quaestio*, his estate was correctly referred in terms of s 69 of Chapter 301.

Generally speaking, the expression "marriage according to African law and custom" bears the same meaning as "customary law marriage", which can be misleading.

MANYARARA JA

Traditionally, all that a man was required to do to take any unmarried woman as his wife was to agree the amount of lobola payable for the woman with her father or guardian and she became his spouse even before the lobola was paid. This is what had happened in this case and in terms of s 3(3) of the African Marriages Act both claimants were legitimized for the purpose of inheriting from the deceased.

Therefore, it is more accurate to refer to an **unregistered** customary union simply as a "customary union" and to the parties as "customary spouses" to distinguish such a union from a customary marriage, properly so called, which has been duly registered under the African Marriages Act. The distinction is necessary for the purpose of interpreting the disputed words, even though what the Legislature has done in the African Marriages Act is to adopt the character of a customary union as the basis for the registration or "solemnisation" of a marriage under the Act.

The crucial point is that both types of union, being potentially polygamous, are covered by the words "marriage according to African law and custom" or "customary union"; and a civil marriage, which is monogamous, is simply not such a marriage.

The distinction is drawn clearly by the decisions on the criminal offence of bigamy cited by Mr

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Chatikobo. The brief Judgment in one such case, *R v Moyo* 1946 SR 12, reads as follows:

> "The accused was convicted of the crime of bigamy and sentenced to two months' imprisonment with hard labour.
>
> The charge alleges that the accused, during the subsistence of his marriage to A, married B It does not, however, allege that either of the marriages was according to civilised rites.
>
> Now, our law recognises polygamy among natives and consequently a native can lawfully marry as many wives as he likes provided he marries them by native custom. But once he has entered into a civilised or monogamous marriage he is deemed in law to have waived his customary privileges in respect of polygamy and to have submitted to the ordinary law of the land. Consequently a native married according to civilised rites, whether before a minister of religion or other marriage officer, commits the crime of bigamy if, during the subsistence of such a marriage, he marries another woman. *R v Kaodza* 1912 SR 5, *R v Mgedesa* 1917 SR 37. Conversely if, during the subsistence of a

MANYARARA JA

> marriage by native custom, he goes through the form of a marriage by civilised rites, he is also guilty of bigamy. *R v Nkabi* 1918 SR 160. As our law recognises polygamy among natives the basis of a charge of bigamy against a native is that he has entered into a civilised marriage and thereby forfeited his customary privileges. Therefore, whenever a native is charged with bigamy it is essential that the charge should allege that one or other of the marriages was by civilised rites."

As neither of the deceased's polygamous unions with the parties was **registered as a marriage**, there was no bar to his contracting a civil marriage with one or the other of the parties, or with any other unmarried woman for that matter, in terms of the Marriage Act. Therefore, contrary to Mr *Dyke's* opinion, it was not necessary for the deceased to formally dissolve either of the unions before contracting a civil marriage. Both unions were nullified by operation of law: *Chikosi v Chikosi* 1975 (1) RLR 140 (G).

For different reasons from those set out in *Chikosi's* case, *supra*, I accept the correctness of its general proposition that a customary union is not recognised in Zimbabwe as a valid marriage for all purposes but as valid only according to African law and custom.

However, I suggest that the valid legal distinction between a **customary union or marriage** and a **civil marriage** is that the former is potentially polygamous and the latter strictly monogamous.

It is a fact of the political history of the country that in the past legislative policy aimed at treating the status and proprietary rights of the spouses as fixed by their cultural background. This emerges clearly from Macaulay J's explanation for the enactment of ss 12 and 13 by the African Marriages Act, at 143 of *Chikosi's* case, *supra*, which proceeds as follows:

> "By s 12 of the African Marriages Act, Africans are given the right to contract a civil marriage under the Marriage Act, now Act 18 of 1964; nothing in the former Act denies this option to Africans who, having already contracted a registered customary union, desire to convert the potentially polygamous character of their married status into a monogamous one, governed by the Marriage Act. Nor can I see anything in logic or principle to prevent such a course. Unlike *Thynne v Thynne* [1955] 3 All ER 129 at 140, the second marriage is not devoid of content and ineffective to bring about some change in their status. It converts their earlier potentially polygamous status into a monogamous one with

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MANYARARA JA

> all the personal incidents associated with the latter. See *R v Tarasanwa* 1948 (2) SA 29 (SR). It also establishes their marriage as one recognized henceforward in Rhodesia for all purposes and not merely one 'according to African law and custom'. Section 13 of the African Marriages Act impliedly recognizes this by presrving in such a marriage only the proprietary rights of the parties as they exist according to African law and custom."

Sections 12 and 13 were clearly intended to be read together and they must stand or fall together. The former "gave" Africans the right to contract civil marriages and the latter circumscribed that right. The difficulties attendant thereon probably accounted for the enactment of the African Status Determination Act [*Chapter 239*], repealed by Act 33 of 1981 in a single section of eight words, seven of which are the title of the Act repealed.

In other words, the law-giver as an administrator rather than a jurist committed his intention on the incidents of any marriage between Africans to the African Marriages Act as legislation which "specifically applied to Africans" in keeping with the provisions of the African Law and Tribal Courts Act. As already mentioned, the latter was repealed by the Customary Law and Primary Courts Act, s 3(1) of which provides as follows:

> "3. (1) Subject to the provisions of this section and of any other enactment. unless the justice of the case otherwise requires -
>
> (a) customary law shall be applicable in any civil case where -
>
> (i) the parties have expressly agreed that it should apply; or
>
> (ii) having regard to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or
>
> (iii) having regard to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;
>
> (b) the general law of Zimbabwe shall be applicable in other cases."

As we have seen, the Act defines customary law simply as "the customary law of the indigenous people of Zimbabwe or any section or community thereof". The general law of Zimbabwe is defined as "the common law of Zimbabwe and any enactment, and excludes customary law". In other words, the two systems of law no longer overlap but exist separately, each in its own right as part of the laws of Zimbabwe.

MANYARARA JA

With regard to marriage, I would respectfully suggest that the words of RUSSELL ACJ in *Dayimano v Kgaribaitse* 1931 SR 134 at 138 are an immutable principle of law:

> "The celebration of marriage according to civilised usage creates a definite status whereunder the parties acquire certain rights and are subject to certain obligations. The dissolution of such marriages and the consequences arising therefrom are governed by fixed principles of policy and justice, even though the parties may be natives. I therefore take the view that the attributes and incidents of native law may only exist side by side with the civilised

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status in so far as they do not violate these principles."

"Policy and justice" have, in the present context, been merged by the enactment of the Legal Age of Majority Act 15 of 1982, whose provisions were fully considered and applied in *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (S). Although that case dealt specifically with the changed status of African women, the principles enunciated therein apply *mutatis mutandis* to African men. They too were regarded as subject to the "tutelage" of their fathers or guardians until they married and set up their own matrimonial homes.

It follows, in my respectful view, that the right of any adult person to contract a civil marriage can no longer be either given or fettered in the manner envisaged by ss 12 and 13 of the African Marriages Act, as the Legal Age of Majority Act applies **for the purposes of any law or enactment, including customary law.**

In other words, status can no longer be decided on the basis of ss 12 and 13 of the African Marriages Act without contravening the Legal Age of Majority Act. To the extent that these provisions and their precursors purported to do so, they must be disregarded. The basis for presuming that the Legislature has committed its intention on the Marriage Act to the African Marriages Act has disappeared.

I would therefore respectfully suggest that for the present purpose one may borrow from the principles enunciated in *R v Moyo*, *supra*, without doing violence to their true legal effect, the following propositions -

1. That customary law shall be applicable to the estate of a person who had contracted a customary union or marriage;

2. That the estate of a person who had contracted a civil marriage in terms of the Marriage Act [*Chapter 37*] shall be dealt with under the general law of Zimbabwe because, by waiving the privileges of a customary marriage, he must be deemed in law to have avoided the consequences of such a marriage.

It follows that I have no quarrel with the manner in which Mr *Chatikobo* has chosen to attack s 13 of Chapter 238. He submits that the provision is overridden by s 3 of the Customary Law and Primary Courts Act, in that it does not preclude an enquiry in terms of s 3 thereof to determine which choice of law rule should apply to ascertaining whether the estate should be referred in terms of s 69 of Chapter 301 or the general law of Zimbabwe.

In my view, it was pointless to conduct the enquiry referred to, for the reason already explained, that the deceased's civil marriage is conclusive proof that his status cannot be regarded as that of a person who had contracted a marriage according to African law and custom.

The conclusion I have reached precludes a finding that the second claimant's right to benefit from the estate is saved by s 3(3) of the African Marriages Act. It seems to me that the subsection saves only his legitimacy, thus entitling him to a child's share of the deceased's

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estate in terms of the provisions of the Deceased Estates Succession Act [*Chapter 302*].

In this regard, Mr *Dyke's* submission, though made in support of the wrong argument, is apposite, that "the right to inherit from an estate in circumstances of intestacy is a **birthright** and not one that may be extinguished by the subsequent marriage of the deceased". I agree.

Finally, I also agree with both counsel that the issues raised by this case are of such importance that it is the estate which must bear the costs of the appeal, regardless of the outcome. The appeal will be allowed on that basis. For the avoidance of doubt, the estate shall be administered and distributed in terms of s 26 of the Administration of Estates Act, as read with the Deceased Estates Succession Act [*Chapter 302*], as amended by Act 18 of 1977.

The appellant is the "surviving spouse" referred to in the two enactments.

The Judgment of the Provincial Magistrate is hereby set aside, but his order that each party shall pay its own costs of the enquiry he conducted shall stand. The costs of the appeal shall be borne by the estate.

MANYARARA JA

McNally JA: I agree.

Korsah JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Stumbles & Rowe, respondent's legal practitioners

S v LIVER 1992 (2) ZLR 323 (HC)

Court **High Court, Harare**

Mtambanengwe J

Criminal review

11 November 1992

Flynote

Criminal procedure - record - magistrate tampering with record - impermissible - can be criminal offence

Headnote

A trial magistrate had imposed a fine in excess of the maximum permitted for a statutory offence. After the scrutinising magistrate had queried the matter, the trial magistrate destroyed

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the original charge sheet and endorsed on a new charge sheet a sentence fine below the maximum provided for.

Held, that when in a case the trial magistrate is *functus officio*, any errors needing to be corrected must be referred to the High Court.

Held, further, that tampering with a court record is a criminal offence and might result in the prosecution of the person doing this.

Judgment

Mtambanengwe J: The record of the proceedings in this case was sent to me by the scrutinizing regional magistrate with the following comment:

> "The accused was convicted on his own plea of guilty on two counts of assault common. The proceedings were in terms of s 255(2)(a). The trial magistrate treated both counts as one for sentence and sentenced the accused to a $300 fine. This was clearly incompetent because the maximum sentence under that section is restricted to $200.
>
> After I had raised the query the trial magistrate destroyed the original charge sheet and had a new one made on which she endorsed a sentence of $150 on each count oblivious of the fact that she was now *functus officio*. The substituted sentences are incompetent at law.

MTAMBANENGWE J

> It is a matter of concern that the trial magistrate seems to think that she can destroy a portion of the record of proceedings and make substitutions in her office at will.
>
> It is submitted that the trial court having treated both counts as one for sentence the only competent maximum sentence that it could impose was $200,00. That sentence should be substituted for the $300,00 which is incompetent."

I entirely agree and for everyone's benefit would like to draw attention to the fact that tampering with a record of proceedings is an offence and might result in prosecution.

Once the magistrate has finalized the matter, as was the case here, he or she is *functus officio* and any errors that need to be corrected must be referred to the High Court.

The trial magistrate in trying to maintain the $300 fine wrongly imposed when she took the two counts as one for sentence subsequently sentenced the accused to a fine of $150 on each count. That in itself amounts to sentencing the accused twice. The sentence(s) by the trial magistrate are set aside and in their place is substituted a sentence of $200 for both counts being taken as one for sentence. The accused must be advised of this and the $100 excess he paid must be refunded to him.

Smith J: I agrees.

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GURURE v RUSIKE 1992 (2) ZLR 334 (HC)

Court **High Court, Harare**

Smith J

Civil action

4 & 11 November 1992

Flynote

Contract - Contractual Penalties Act 1992 has replaced Conventional Penalties Act [Chapter 42] - court must reduce agreed penalty if disproportionate to prejudice suffered - date from which interest accrues on money which has to be refunded - period of notice required for cancellation of deed of sale under Part III of Contractual Penalties Act 1992

Headnote

On 5 June 1987 the parties entered into a deed of sale contract, whereunder the defendant sold a plot of land to the plaintiff. After the plaintiff had paid a substantial portion of the total purchase price, he failed to pay a monthly instalment due under the sale agreement. The defendant cancelled the sale. He immediately resold the property for a higher price than that which the plaintiff had agreed to pay. The defendant purported to retain the entire amount already paid by the plaintiff as *rouwkoop*. The plaintiff averred that the amount retained by the defendant was completely out of proportion to the damage he had suffered and should be reduced to an equitable amount.

Held, that the Contractual Penalties Act 1992 which replaced the Conventional Penalties Act [*Chapter 42*] applied to this deed of sale agreement as the legislation applies to all penalty stipulations as defined in s 2 entered into on or after 9 November 1973.

Held, further, that under the Contractual Penalties Act 1992 the court must reduce the penalty imposed if it is disproportionate to the loss suffered.

Held, further, that the defendant had in fact made a profit rather than a loss as a result of the plaintiff's default, as he had re-sold the property at a higher price.

SMITH J

Held, therefore, that the defendant must refund to the plaintiff the total amount paid by him towards the purchase price, but he could retain the amount paid by the plaintiff for rates and for the agent's commission.

Held, further, that the plaintiff was only entitled to interest at the prescribed rate from the day after the defendant received the money for the re-sale and not from the date of cancellation of the deed of sale agreement.

Held, further, that had Part III of the Contractual Penalties Act 1992 been in operation at the time of the cancellation, under s 8 of that Act the plaintiff would have been entitled to receive not

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less than 30 days' notice of cancellation.

Cases cited:

Magadza v Mahlaba HH-59-91 (unreported)

Salisbury Financial Hldgs (Pvt) Ltd v van Niekerk 1974 (1) ZLR 333 (G)

Western Bank Ltd v Meyer & Ors 1973 (4) SA 697 (T)

Mrs S Moyo for the plaintiff

Defendant *in absentia*

Judgment

Smith J: On 5 June 1987 the parties entered into a written agreement of sale wherein the defendant sold to the plaintiff a stand in Marlborough for $10 500. Under the agreement of sale the plaintiff paid the defendant $7 500 towards the purchase price. He also paid $115,56 for rates on the property. The defendant cancelled the sale in July 1988 and thereafter resold the property. The plaintiff has instituted this action claiming that the defendant's cancellation of the sale was unlawful and therefore the $7615,56 paid by the plaintiff in terms of the agreement must be refunded. The defendant opposed the plaintiff's claim on the basis that his cancellation of the sale was lawful and that he was entitled in terms of the agreement to retain the amount paid by the plaintiff as *rouwkoop*. The plaintiff then amended his claim so as to aver in the alternative that the amount retained by the defendant was out of proportion to the damage he suffered and should be reduced to an equitable amount.

The plaintiff gave evidence concerning the agreement of sale. He said that in July 1988 he did not have money to pay the instalment of $250 so he had approached a "business executive" who had promised to see the defendant and either arrange for the suspension of the payment of the instalment or else pay it on behalf of the plaintiff. On 5 August the plaintiff had then visited the defendant to pay the instalments due and had been shown a copy of a letter that had been written to him by the defendant's lawyers. The letter was dated 25 July and was to the effect that unless the instalment due on 1 July was paid before the end of the month the sale would be cancelled. The defendant refused to

accept any money from the plaintiff. He subsequently resold the property for $13 000 a month or so later. The deed of transfer showed that he had received the full purchase price before 30 November 1988. The plaintiff said that the property was undeveloped.

Mrs *Moyo* conceded that the defendant was entitled, in terms of the agreement, to cancel the sale once the plaintiff had failed to pay an instalment due within 21 days of the due date. She therefore based her argument on the provisions of s 4 of the Contractual Penalties Act 3 of 1992 which was promulgated and came into operation on 23 October 1992. That Act repealed and replaced the Conventional Penalties Act [*Chapter 42*]. Section 3 thereof provides that the

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Act shall apply in respect of all penalty stipulations, as defined in s 2, entered into on or after 9 November 1973.

Section 4(2) provides that if it appears to a court that a penalty is out of proportion to any prejudice suffered by the creditor as a result of the act, omission or withdrawal giving rise to liability under a penalty stipulation, the court may reduce the penalty to such extent as the court considers equitable under the circumstances.

In *Magadza v Mahlaba* HH-59-91 Gibson J, who was dealing with the equivalent section in the Conventional Penalties Act [*Chapter 42*], pointed out that the provision in question had been considered in a number of cases both in this country and in South Africa and the general consensus was that the provision cast a duty, not merely a discretion, on the court to reduce the penalty if it appeared disproportionate to the prejudice suffered by the creditor. She referred to *Salisbury Financial Holdings (Pvt) Ltd v van Niekerk* 1974 (1) ZLR 333 (G) which was a case where the defendant was also in default. In that case DAVIES J at p 335 cited *Western Bank Ltd v Meyer & Ors* 1973 (4) SA 697 (T) where at p 699 D it said:

> "The word 'may' in s 3 does not merely confer a discretion, but a power coupled with a duty .... The courts will therefore apply s 3 even where, in an action for enforcement of a penalty, the debtor is in default of appearance."

Although the defendant did not appear, it is patent that he could not have suffered any prejudice as a result of the plaintiff's failure to pay the July instalment timeously. He did not receive an instalment of $250 in July 1988. He was offered the August instalment on 5 August but refused to accept it. Within a month or so he was able to resell the property for $13 000, as opposed to the $10 500 he was due to receive under the original agreement of sale with the

plaintiff. Thus he received an additional $2 500 and it appears from the deed of transfer that he received the purchase price in full and so did not have to wait to get his money. It is obvious that, far from suffering any prejudice, the defendant gained an advantage from the plaintiff's default in paying the instalment. It seems to me that the penalty paid by the plaintiff must be reduced. As the property was undeveloped the defendant could not have incurred any expenditure in relation thereto during the period from 5 June 1987 to 31 July 1988. He admitted that the plaintiff had paid $115,56 for rates in respect of the property. In my view, it would not be equitable to require the defendant to refund that amount. Also, in terms of the agreement of sale the estate agents who handled the sale were entitled to a commission of $515 which was payable by the defendant. That, too, he should not be required to refund. Having regard to all the circumstances of this case, I consider that it would be equitable for the penalty to be reduced by $6 985. The plaintiff has claimed interest at the rate of 13.25% per annum from 1 August 1988 to date of payment. No grounds are given for claiming interest at the rate of 13.5% as opposed to the prescribed rate of 12.5%. I do not think that it would be equitable to order that the defendant pay interest from 1 August 1988, which is the date the agreement was cancelled. However, as the defendant had received $13 000 from the resale of the property by 30 November 1988, it would seem to be equitable that he pays interest at the prescribed rate on the plaintiff's money with effect from 1 December 1988.

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I would point out that had Part III of the Contractual Penalties Act 1992 been in operation in July 1987 the cancellation of the agreement by the defendant would not have been lawful because the notice given to the plaintiff by the defendant's lawyers would not have met the requirements of s 8 of that Act. Clause 9 of the agreement of sale provides that if the purchaser fails to pay any instalment within 21 days of due date the seller is entitled to cancel the agreement summarily. However, s 8 of the Act provides that no seller under an instalment sale of land may terminate a contract on account of any breach of contract by the purchaser unless he has given the purchaser a reasonable period of not less than 30 days to remedy the breach. The period commences on the date the notice is sent or given and not on the due date of any payment or the date of breach of the agreement.

It is ordered that the defendant pay to the plaintiff $6985,00 with interest thereon at the rate of 12.5% per annum from 1 December 1988 to the date of payment, together with costs of suit.

Honey & Blanckenberg, plaintiff's legal practitioners

PA Chinamasa, Manyika & Co, defendant's legal practitioners

S v DUBE 1992 (2) ZLR 338 (SC)

Court **Supreme Court, Harare**

Manyarara JA, Korsah JA & Ebrahim JA

Criminal appeal

1 October & 12 November 1992

Flynote

Criminal law - attempted murder - whether court may convict if only legal (constructive) intention and not actual intention exists

Headnote

Evidence - discrepancies between contents of indictment, summary of State case and preamble to the warned and cautioned statement on the one hand and the evidence of State witnesses on the other hand - whether discrepancies material

In Zimbabwean and South African law it is settled law that the *mens rea* for an attempt to commit a crime can be either actual intention or legal (constructive) intention. Thus a person can be convicted of attempted murder if he had either actual or legal intention to kill. The approach that legal intention suffices for attempt to commit a crime is deeply rooted and is an eminently logical and reasonable approach.

Where there are discrepancies between the contents of the indictment, the summary of the State case and the preamble to the accused's warned and cautioned statement on the one

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hand and the evidence given by State witnesses the court will examine whether the discrepancies are material and essential and whether the accused has been prejudiced in the conduct of his defence by the discrepancies. Although the summary of the State case should be an accurate summary of what is contained in the police docket and not a figment of the imagination of the policeman who prepares the summary, the summary should not be treated on the same basis as an outline of defence which has been prepared on the instructions of the accused. A State witness has no control over what the policeman compiling the

KORSAH JA

summary decides to include in the summary as being relevant. Therefore the credibility of a State witness will not be destroyed simply because there are apparent conflicts between his testimony and the summary on matters which are not essential to establish the offence alleged. If, however, there are discrepancies between the summary and the evidence of a State witness on matters essential to establish the offence charged, then unless a satisfactory explanation is proffered, it cannot be said that the prosecution has proved its case beyond reasonable doubt.

Cases cited:

S v Oliveira & Anor S-183-92 (unreported)

S v Chigova 1992 (2) ZLR 206 (S)

R v Huebsch 1953 (2) SA 561 (A)

R v Poteradzayi 1959 (1) R & N 31 (FS)

R v Matsikira 1968 (2) RLR 227 (A)

S v Henderson S-17-84 (unreported)

S v Bassopo-Moyo S-12-85 (unreported)

S v Bhaiwa 1988 (1) ZLR 412 (S)

S v Ndlovu S-131-90 (unreported)

R v Mahon [1975] 2 All ER 193 (CA)

R v Hancock [1986] 1 All ER 641 (HL)

AP de Bourbon SC for the appellant

JT Manokore for the respondent

Judgment

Korsah JA: On 31 January 1992, at the Regional Magistrate's Court for the Western Division

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sitting at Bulawayo, the appellant was convicted on two counts of attempted murder. Taking both counts as one for the purpose of sentence, he was sentenced to five years' imprisonment with labour, of which two - and - a - half years were suspended for five years on conditions. He now appeals against his convictions on both counts as well as the sentence imposed.

This is another case in which the respondent's heads of arguments were notoriously out of time. See the remarks of Ebrahim JA in *S v Oliveira & Anor* S-183-92. But Mr *de Bourbon* did not oppose condonation in this instance.

The facts giving rise to these offences were as follows. The appellant is the proprietor of Kensington Store and Bottle Store. Attached to the Bottle Store is a hall where patrons purchase and consume opaque beer. The appellant

KORSAH JA

resides with his family in a flat above his business premises. The complainants, Robert Dube and Esther Moyo, reside at Plot 4, which is adjacent to the appellant's business premises.

On the evening of 9 December 1989, the complainants were among the patrons at Kensington Store and Bottle Store. It is common cause that just before closing time there was a brawl between two girls, one of whom was Robert's sister, within the precincts of the hall. The hall was cleared, and the appellant fired five shots from his residence above the business premises into the street below. One of the shots injured Robert on the shin and Esther Moyo and the child strapped on her back also sustained gunshot injuries. These constitute the bare facts upon which the offences charged were founded.

The appellant's defence to the charges was that his workers and property were attacked by some patrons, among whom was Robert, who were throwing stones at his property. Fearing that his workers and members of his family were in danger of being injured in the fracas he went upstairs to fetch his pistol with which he attempted to frighten away the mob by firing twice in the air. As this did not have the desired effect, he decided to shoot into the ground in the hope that the dust kicked up by a bullet would sufficiently frighten the attackers to run away. He said if anyone was hit by a bullet it was purely accidental, and that such harm was not intended by him.

It was submitted on behalf of the appellant, that for a variety of reasons, the evidence in support of the charges was so poor and flawed that it should not have been accepted. Under this head it was contended that, notwithstanding the comments by the learned trial magistrate regarding the credibility of the State witnesses, their evidence could not be accepted because two of them initially refused to take the oath, and no explanation was proffered as to their sudden change of mind subsequent to an adjournment being granted.

It is clear to me from the reason given by the witness for refusing to take the oath, and the reason furnished by State counsel for an adjournment that the sudden change of mind to testify is self-explanatory. The witness Esther Moyo said:

> "Your worship I cannot take the oath because I did not do anything. . . . Your worship I will take the oath if I had

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done something wrong if I have not done wrong your worship I won't take the oath."

This was a simple witness, without knowledge of court procedure, incapable

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of distinguishing the role of a State witness and that of an accused in criminal proceedings and labouring under the misapprehension that it is only those who have done something wrong that are required to take an oath to clear themselves.

The public prosecutor sought an adjournment for the following recorded reason:

". . . it would appear that the witness has absolutely no idea of the purpose behind taking an oath. It apparently appears that she believes the oath means you are being implicated if you take the oath."

It is obvious to me that the reason for the change of mind was that the purpose of taking the oath was explained to the witness during the adjournment and it was only when she understood its intendment that she submitted to testify on oath. To my mind this does not affect the credibility of a witness in any way.

It was alleged that the learned trial magistrate erred in holding that the inaccuracies and discrepancies between the evidence of the first three State witnesses, on the one hand, and the indictment, the summary of State case as well as the preamble to the warned and cautioned statement were not material. What forms then did these inaccuracies and discrepancies take?

The indictment and the preamble to the warned and cautioned statement alleged that Robert Dube was injured on the **right** shin. The summary of State case alleged that Robert was injured on the **left** shin. Robert himself stated that the injury was to his **left** shin. The doctor confirmed that the injury to Robert was on the **left** lower leg. Although there is a conflict between the indictment and the preamble to the warned and cautioned statement, on the one hand, and the summary of State case and the evidence on the other, it seems to me that the conflict is such as could be resolved by a simple amendment to the indictment, as the evidence clearly indicated that the injury to Robert was on the left shin. And in any event the charge that the appellant was facing was one of attempted murder. Whether or not the shots he fired hit Robert on the left or right shin is of little significance to the intent with which he fired the shots.

Again the summary of State case alleged that Esther Moyo and her husband were inside the bottle store when the brawl started, but the testimonies of Esther and all the prosecution witnesses were to the effect that Esther and her

KORSAH JA

husband were drinking outside the hall and that she never entered the bottle store. This discrepancy between the State outline and the evidence of the State witnesses does not go to the root of the matter. It did not prejudice the appellant in formulating his defence against the charge of attempted murder.

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It was also alleged in the summary of State case that the appellant was inside the shop when he discharged his gun towards Robert. Yet the evidence from the appellant, and all of the prosecution witnesses, was that he discharged his gun from a room at his dwelling above the bottle store and hall. This inaccuracy in the State outline, in my view, was cured by the evidence and did not in any way prejudice the appellant in his defence to the charge of attempted murder.

I am in accord with Mr *de Bourbon* for the appellant that the summary of the State case should be an accurate summary of what is contained in the Police docket, and not a figment of the imagination of the person who prepares the summary. But, as was observed by this court in *S v Chigova* 1992 (2) ZLR 206 at p 213D-E:

> "... a précis of a case by the State is not to be given equal weight with the outline of defence on behalf of the accused. The reason for this is simple. The complainant has no control over what a policeman may find relevant enough to include in a precis. The précis is not her word and deed. She is not to be taken as having made categorical statements on matters which, though relevant, are not essential to establish the offence alleged. The complainant's credibility is not to be assessed on apparent conflicts between her viva voce testimony and a summary of the case prepared by someone else."

It must, however, be remarked that if there are discrepancies between the summary of State case and the evidence of the prosecution witness on matters essential to establish the offence charged, then unless a satisfactory explanation is proffered, it cannot be said that the prosecution has proved its case beyond a reasonable doubt. Since none of the discrepancies and inaccuracies alleged is essential, either by itself or cumulatively, to establish the offence charged they, as the learned trial magistrate found, were not material.

It was urged before this court that Robert Dube was, in respect of the fracas that preceded the shooting, himself an accused person in an allegation of malicious injury to property. He had, therefore, a motive not only to turn the tables on the appellant, but also to deny that he had thrown stones at the time of the incident in question.

KORSAH JA

Robert did deny that he threw stones at the appellant's property. Until he is prosecuted to conviction the question of his guilt on such a charge must remain open. I am, therefore, unable to accede to the concession by the State that in firing the five shots the appellant "acted with some measure of private defence", albeit that he "exceeded the legitimate bounds of self-defence."

Esther was shot at and injured. She was not involved in the fracas at the beer-hall. She was not even in the beer-hall. She was, with her husband, running away, in order not to be involved in the commotion that had erupted in the beer-hall, when she was shot at. Was the appellant also defending himself, his family, property and employees from this fleeing woman with a baby strapped on her back? She had damaged no property. From her there was nothing to fear. Yet she might, but for the grace of God, have been killed by the bullet that passed through her arm. There was a high degree of probability that the appellant, shooting as he did, would cause death or serious bodily injury. Even Robert was out of the beer-hall, and no longer a threat to

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the appellant, when he was injured by one of the shots fired by the appellant. The magistrate found the appellant guilty on the basis of a constructive intention to kill.

It was submitted that the learned trial magistrate should not have found the appellant guilty of attempted murder on the basis of a constructive intention to kill. It was conceded that the criminal law of South Africa and Zimbabwe are settled: that if the appellant fired at the complainants in the appreciation that there was some risk to life involved in his action, and he was reckless as to whether or not the risk was fulfilled in death, then there was a sufficient mental element for a verdict of attempted murder: *R v Huebsch* 1953 (2) SA 561 (A)*; R v Poteradzayi* 1959 (1) R & N 31 (FS); *R v Matsikira* 1968 (2) RLR 227; *S v Henderson* S-17-84; *S v Bassopo-Moyo* S-12-85 at p 12-13; *S v Bhaiwa* 1988 (1) ZLR 412 (S) at 414D-F; *S v Ndlovu* S-131-90. But it was contended that the time has come to declare in Zimbabwe that a constructive intention forms no part of the law relating to the crime of attempting to commit an offence.

Mr *de Bourbon* argued that an attempt to commit an offence is in itself a crime, irrespective of what the offence may be: Burchell & Hunt *South African Criminal Law and Procedure* Vol 1 2 ed at p 451; Gardiner & Lansdown South African Criminal Law and Procedure Vol 1 6 ed at p 132. Thus, the offence in the present matter should more correctly be described as an attempt to commit an offence rather than attempted murder.

KORSAH

Mr *de Bourbon* submitted that because of its very nature as an inchoate crime, the crime of an attempt to commit an offence can only be committed where there is proof of both an *actus reus* and a required *mens rea* to attempt to commit an offence, and that constructive intention simply does not enter into the analysis. In other words, only actual intent to attempt the offence will suffice to support a conviction for an attempt to commit an offence. Mr *de Bourbon* leans for support of this submission on the English authority of *R v Mahon* [1975] 2 All ER 193 (CA).

I am mindful of the fact that in English law *mens rea* for a crime requiring an intention consists of "actual" intention whereas *mens rea* in our law embraces both actual intention as well as recklessness, and in our law recklessness suffices as the *mens rea* for an inchoate crime. What, then, is the intention which must be established in crimes requiring *mens rea* in English law?

As stated by James LJ in the Mahon case , *supra*, at p 200(C) of the report:

> "Prior to the enactment of the Criminal Justice Act 1967, s 8, the standard test in English law of a man's state of mind in the commission of an act was the foreseeable or natural consequence of the act. Therefore it could be said that when a person applied his mind to the consequences that did happen and foresaw that they would probably happen, he intended them to happen, whether he wanted them to happen or not. So knowledge of the foreseeable consequences could be said to be a form of intent."

To my mind, under the English law, prior to the enactment of the Criminal Justice Act, intention was to be presumed from the natural consequences that flowed from the act of the accused, and not from a consideration of all the surrounding circumstances.

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The common law concept of intent in English Criminal Law was overtaken by s 8 of the Criminal Justice Act 1967, which reads:

> "A court or jury, in determining whether a person has committed an offence -
>
> (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions, but
>
> (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances" (emphasis added).

KORSAH JA

This piece of legislation brought the meaning of intention closer to the concept of intention in South African and Zimbabwean Criminal Law. Commenting on this section in the Mahon case, *supra*, James LJ at p 200e of the report observed that:

> "... on the question whether or not the accused had the necessary intent in relation to a charge of attempt, evidence tending to establish directly, or by inference, that the accused knew or foresaw that the likely consequence, and, even more so, the highly probable consequence, of his act - unless interrupted - would be the commission of the completed offence, is relevant material for the consideration of the jury. In our Judgment, evidence of knowledge of likely consequences, or from which knowledge of likely consequences can be inferred, is evidence by which intent may be established but it is not, in relation to the offence of attempt, to be equated with intent. **If the jury find such knowledge established they may and, using common sense, they probably will find intent proved, but it is not the case that they must do so**" (emphasis added)

My understanding of the above passage is that the specific intent required in English law may be gathered from all the circumstances surrounding the commission of the offence, not excluding evidence from which knowledge of the likely consequence of the accused's action may be inferred. It is true that the word "recklessness" is not used as an alternative to the specific intent required, but to my mind, if the accused, with knowledge of the likely consequences exhibits an attitude of mind towards a particular evil consequence, then he may be taken to have done so reckless of the fact that it would result in the completed crime. I am fortified in my view of the matter by this statement of the learned Law Lord which appears at p 200h of the report:

> "The bounds are presently set requiring proof of specific intent, a decision to bring about, insofar as it lies within the accused's power, the commission of the offence which it is alleged the accused attempted to commit, **no matter whether the accused desired that consequence of his act or not**" (emphasis added).

The Criminal Justice Act 1967 has been replaced by the Criminal Attempts Act 1981, but this has not affected the meaning of specific intent in English law.

The evidence accepted by the trial court, and for good reason, was that Robert was not throwing stones at the appellant's premises. Esther was fleeing from

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the area. It was dark outside. The appellant shot at, and not above the heads of, the

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complainants, who were on the other side of the street. The learned trial magistrate found that from the evidence knowledge of the likely consequence of death ensuing from firing shots at people in the dark in such circumstances may, using common sense, be inferred. The learned trial magistrate rightly inferred an intention on the part of the appellant, insofar as it was within his power, to commit the offences of which it was alleged he attempted to commit, no matter whether he desired the consequence or not.

In as much as the intention of a person charged with an attempt to commit an offence may in English law be inferred from evidence of the surrounding circumstances, the manner of establishing the specific intent, though markedly different from the approach in our law, yields the same result.

Though English law has always accepted that the mental element in murder is a specific intent, that is the intent to kill or to cause grievous bodily harm, it has not shrunk from the view that intent may be inferred from the evidence, and, not least, from the probability of the result of the physical act. Thus LORD SCARMAN said in R v Hancock [1986] 1 All ER 641 (HL) at 650g:

> "In a murder case, where it is necessary to direct a jury on the issue of intent by reference to foresight of consequences, the probability of death or serious injury resulting from the act done may be critically important. Its importance will depend on the degree of probability: if the likelihood that death or serious injury will result is high, the probability of that result may, as Lord Bridge noted and Lord Lane CJ emphasised, be seen as overwhelming evidence of the existence of the intent to kill or injure."

And at 651 (a):

> "... the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that the consequence was also intended."

The *ratio decidendi*, including, as it does, that a proposition that a person has the *mens rea* of murder if he knows that it is highly probable that his act will cause death or serious bodily harm, I am unable to appreciate how this approach to specific intent in English law can be said to ignore recklessness altogether.

It seems to me that the approach in our law to the establishment of guilt, as regards inchoate crimes, is not only eminently logical and reasonable, but

KORSAH JA

also so deeply rooted that it cannot be swept aside by a stroke of the pen without deep, sober and profound reflection.

The Judgment of the learned trial magistrate contains no misdirection either on the facts or in law. There is no reason, therefore, for interfering with the convictions. The concession by the State to interfere with the convictions is not well founded, and is accordingly rejected.

As regards sentence the appellant was not a first offender. He had exhibited aggressive tendencies on other occasions for which the courts had exacted retribution in the form of fines. I cannot fault the learned trial magistrate's finding that the appellant displayed a high degree of recklessness. It is not the superficial nature of the injuries that concern me, it is foresight of the

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high probability that firing in the dark at people in such circumstances may result in death or bodily harm to someone. It is fortuitous that the complainants were only injured and not killed.

Accordingly the appeals against both conviction and sentence are dismissed.

Manyarara JA: I agree

Ebrahim JA: I agree

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

HORA v TAFAMBA 1992 (2) ZLR 348 (SC)

Court **Supreme Court, Harare**

McNally JA & Ebrahim JA

Civil appeal

26 October & 16 November 1992

Flynote

Family law - maintenance - duties of magistrate in maintenance case - suggested method of calculation of maintenance

Headnote

The aim in a case concerning maintenance for a child is to give the child reasonable financial support without placing an undue burden on either parent. The magistrate dealing with the case must act as the upper guardian of the child.

Magistrates who preside over maintenance courts, where the parties usually appear without legal representation, have a duty to carry out the fullest investigation into the relevant facts. Especially where the parties are unrepresented the magistrate must adopt an investigative role. He is not merely an umpire in a dispute between two sides. He is must protect the interests of the child who is the most important person involved in the dispute. He must seek out the relevant facts and ask necessary questions.

If a party incurs further financial commitments to the detriment of that person's prior responsibilities to a child, the court may decide to disregard those further commitments when assessing the party's disposable income.

An approximate method of calculating the amount of maintenance which is particularly useful where the parties are not wealthy has been suggested in the case of *Gwachiwa v Gwachiwa* S-134-86. This approach can be used as a starting point but is subject to such adjustment as the particular facts suggest.

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This method, however, may not be suitable in all cases and it must not be slavishly adhered to. This method entails the following steps:

McNALLY JA

1. Ascertain and add together the total net income of the father's household and the mother's household. The total gives the total money available per month.
2. Calculate what claims there are on that income by allocating two shares to each adult in the two households and one share to each child in the two households.
3. Divide the total amount of money available each month by the total number of shares. One share will be a child's share and two shares will represent an adult share.
4. Calculate how much money (if any) should be paid by the father to the mother as maintenance in order to ensure that the child who is the subject of the dispute receives a child's share.
5. Adjust the figure arrived at in step 4 up or down to allow for the innumerable variable factors and special features which may arise in the case under consideration.

Cases cited:

Bapata v Bapata S-187-92 (unreported)

David v Tanga S-51-88 (unreported)

Gwachiwa v Gwachiwa S-134-86 (unreported)

Mugabe v Majwere S-110-92 (unreported)

Tshumba v Sibanda S-163-89 (unreported)

Maramba v Chikosha S-35-88 (unreported)

Chirume v Chivizhe S-104-87 (unreported)

Fugede v Motsi S-105-87 (unreported)

Nhira v Nhira S-106-87 (unreported)

Acutt v Acutt 1990 (2) ZLR 220 (S)

Appellant in person

Respondent in person

Judgment

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McNally JA: This is an appeal against an order for the payment of maintenance for a child, made by the Magistrate, Harare.

It is to be regretted that the magistrate concerned made only the most cursory examination of the facts before ordering the appellant to pay $200 per month by way of maintenance of the child born on 8 April 1990.

Magistrates who preside over maintenance courts, where the parties usually appear without legal representation, have a duty to carry out the fullest possible investigation of all the relevant facts. They should ask for the

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McNALLY JA

production of up-to-date pay-slips and, where necessary, birth certificates, marriage certificates and other documents in support of allegations made by the parties, especially where the relevant facts are in dispute.

Where a party claims that he or she is paying off a clothing or furniture account (as is commonly the case) they should ascertain how much remains to be paid.

The instalment on the pay-slip may be the last one to be paid, or at the other extreme, it may be the first instalment on a commitment entered into at a time when the party should have been aware of his (or her) prior responsibility for the child. In such cases the magistrate may decide to ignore that commitment in assessing the party's disposable income.

Similarly, it is surprisingly common for a man with extensive family responsibilities to produce a pay-slip which shows large life insurance or funeral insurance commitments. It may be necessary in such cases for the magistrate to point out that the man is taking care of his future at the expense of his present obligations. The court cannot, of course, order him to cancel those policies. But it can refuse to take them into account in assessing the level of the maintenance order. See *Bapata v Bapata* S-187-92.

Again, it is often important to look carefully at the alleged "net incomes" of the parties, so as to be sure that like is being compared with like. For example, a single man may produce a pay-slip which shows a "net income" of $500. But a close enquiry may reveal that he is a hotel worker who is provided with free board and lodging. His real "net income" is far higher than the $500 shown. In the present case, he has free accommodation, and her housing loan is deducted on her pay-slip, so their net incomes are comparable.

Generally, the duty of a magistrate in a maintenance application, more particularly where the parties are unrepresented, is that of an investigative magistrate. He is not merely an umpire in a dispute between two sides. He is the upper guardian of the most important party, the child. He must therefore seek out the relevant facts. He must ask whatever questions are necessary to enable him to give an adequate judgment. He must aim to give the child reasonable financial support without placing an unfair burden on either parent.

This is what is meant by s 5(1) of the Maintenance Act [*Chapter 35*] when it says: ". . . the

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maintenance court shall inquire (my emphasis) into the matter of the complaint".

McNALLY JA

It happens all too frequently, as in this case, that this court, the Supreme Court, is obliged to make lengthy enquiries of the parties when they appear on appeal. We are in fact doing the magistrate's work for him. This is not acceptable.

In this case the mother of the child made a claim for maintenance in the sum of $350 per month. The father failed to appear at the hearing on 21 February 1991. The request was granted - it would seem without any enquiry into his means or his responsibilities. This was the first error. There should have been an investigation even though the father was in default. (See Order 11, Rule 8(a) of the Rules, SI 290/1980 and s 5(1) of the Maintenance Act).

The father then applied for a variation. This was the second error: He should have been advised to apply for a rescission of the default Judgment and a full hearing. (See Order 30 of the Rules). A variation is normally based on a change of circumstances which has arisen subsequent to the original order. (See s 8 of the Maintenance Act). Thus a variation order normally comes into effect at some date later than the original order. What he was clearly saying was that the original order should never have been made. He was not relying on a change of circumstances at all. He wanted the original order to be altered from the beginning.

The magistrate's Judgment is, I have to say, completely inadequate. It omits most of the important facts and it cites several "facts" which are patently incorrect. It leaps from a bare recital of limited facts to a conclusion totally unsupported by any kind of arithmetical calculation. It is worth setting it out in full as an object lesson in how not to deal with a maintenance case. It reads as follows:

> "Respondent (the woman) concedes that maintenance be reduced, but to a figure of $250. Applicant (the man) offers $55 per month. He earns as he says $593,60. She earns $427 and her expenses amount to $780 she says, and his are $391 and he says he consistently pays $160 to the respondent.
>
> It appears both sides have not been frank with the court regarding the expenses and the court must make an objective assessment.
>
> Regrettably the $350 per month order appears to have been ordered by default.
>
> I am satisfied that it was rather inflated and must be adjusted.

MCNALLY JA

ORDER

Application granted. The order of the court dated 23 February 1991 is hereby varied to read $200 per month."

It will be seen that there is no attempt whatsoever to show how the figure of $200 was reached.

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(See *David v Tanga* S-51-88).

I ventured some years ago in an unreported Judgment - *Gwachiwa v Gwachiwa* S-134-86-to suggest a very approximate method of calculating the quantum of maintenance, particularly useful where the parties are not wealthy. The Gwachiwa approach has been referred to as a broadly useful guide in a number of subsequent unreported decisions of this court: *Mugabe v Majwere* S-110-92; *Tshuma v Sibanda* S-163-89; *David v Tanga* , *supra*; *Maramba v Chikosha* S-35-88; *Chirume v Chivizhe* S-104-87; *Fugede v Motsi* S-105-87; *Nhira v Nhira* S-106-87. It has also been referred to in a reported Judgment by the Chief Justice: *Acutt v Acutt* 1990 (2) ZLR 220 at 226A-B.

I emphasised in Gwachiwa that the approach I suggested "must be understood to be a general rule about a starting point, not an immutable rule for all cases". I cautioned that "a slavish adherence to figures is usually undesirable" and that "an approach which is suitable in most cases may not be suitable in a particular case". I stressed that "the arithmetical approach provides no more than a starting point, to be adjusted up or down as the particular facts suggest".

The approach I suggested was to start with the total net income of the father's household and the mother's household. Added together, that gives the total money available per month.

The second step is to calculate what claims there are on that income by allocating two shares to each adult in the two households and one share to each child in the two households.

The third step is to divide the total amount of money available each month by the total number of shares. That will produce a figure which is a theoretical child's share. Double that figure is an adult's share.

The fourth step is to calculate how much money (if any) by way of maintenance should be paid by the father to the mother to ensure that the child who is the subject of the dispute receives a child's share.

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The final step is to adjust that figure up or down to allow for the innumerable variable factors and special features which arise in the specific case under consideration.

Applying the formula to the facts of the present case produces the following results:

Step I

His net income was at the time allegedly $593,66. Hers was $447,00. But in addition she has another source of income (which the magistrate ignored). The father of the other child, a nine year old in Grade 4, is very generous and pays her at least $500 per month. Obviously some of that is for the child, but on her own calculation she allows $200 per month for that child. So $300 of that money is in fact her personal income. I will reduce it to $250. So her real net

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income is $447 + $250 = $697. The total net income of the two households is $593,66 + $697 = $1 290,66.

Step II

The households are complicated. He has two children in respect of whom he pays maintenance via the Community Court. He also has two other children who are presently being looked after by his father. They are thus at present not a liability on his purse.

Moreover, in the magistrate's court he failed to mention more than two children (other than the child who is the subject of this dispute). Nor did he mention the wife he now says he has to maintain. It can only be assumed that he did not mention the two children because he is in fact not maintaining them. If that situation changes he may be entitled to a variation, but at present he is to be regarded as having to support two children only. As to the wife, he did not mention her because presumably she was not there at the time of the hearing. He told us that they were married only a few days before the appeal hearing, having lived together for a year before that. The fact remains that in his affidavit before the magistrate's court on 13 April 1992 he made no mention of a wife. Nor did he do so in his evidence on that date. He told us that she would probably soon get a job, and for all these reasons I propose to ignore her in making my calculations.

So in the final analysis he has to support himself and two children. She has to support herself and one child (her other child being covered by the $250 from its father).

McNALLY JA

Step III

Two adults and three children amounts to seven shares. The total income is $1 290,66. This means a child's share is $184,38. An adult's share is twice that, i.e. $368,76.

Step IV

He has to support one adult and two children, so on this calculation he should have $368,76 + $184,38 + $184,38 = $729,52. She should have $368,76 + $184,38 = $553,14.

But in fact his income is less than $729,52, and hers is more than $553,14. So the conclusion is that he should not have to pay any maintenance at all.

Step V

That conclusion requires adjustment in the light of the following adverse and favourable factors:

ADVERSE FACTORS

1. The two children he supports do not cost him $184,38 each. He pays maintenance for them

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in a total amount (including arrears) of $135 per month.

2. He has indicated a willingness to pay $55 per month.

3. He receives a daily allowance of $12 when he is away from his station, but it is not clear how often this occurs.

4. His regular net income, ignoring the maintenance deductions, is about $100 per month higher than he claims, i.e. more like $700 than $593,66.

FAVOURABLE FACTORS

He has in fact got a wife to support and he has apparently a moral, though not a legal, responsibility to pay school fees for two young brothers.

CONCLUSION

I have no doubt that the earlier awards of $350 per month and then $200 per month were grossly excessive. The deduction of these amounts, plus $50 per month to cover arrears, has caused him considerable hardship.

1992 (2) ZLR p355

McNALLY JA

The amount must be reduced. I do not propose to reduce it to $55 as he offers. I think he should pay $75 per month, the same as he pays for one of the other two children he maintains through the Clerk of the Community Court.

The effect of this reduction, backdated to the date of the order under appeal, will be considerable. The appellant will have a significant credit balance. I am unable to calculate this exactly because I do not have a copy of the order of 23 February 1991 and thus I do not know when the first payment of $350 was ordered to be made. Nor (and this is another error on the part of the magistrate making the variation order) is it clear from what date the variation to $200 per month came into effect. Was it backdated to the date of the original order or not? And, if not, when did it come into effect?

This appeal is against the order of the magistrate who made the order of $200 per month. The reduction of the figure of $200 per month to $75 per month will be effective from the date that the order to pay $200 per month was effective.

Whether that was the end of February 1991 or some later date I do not know. But the calculation will have to be made because the garnishee order on the appellant's salary will have to be suspended until his credit balance is used up.

The order of this court is as follows:

1. The appeal is allowed.

2. The order of the Magistrate, Harare, in maintenance case M1185/91, handed down down

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on 13 April 1992, is amended by substituting the figure "$75" for the figure "$200".

Ebrahim JA: I agree.

KNOWER v MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS & ANCHOR 1992 (2) ZLR 356 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Manyarara JA

Civil appeal

3 & 16 November 1992

Flynote

Administrative law - Public Service (Officers) (Misconduct and Discharge) Regulations 1986 - impermissible to impose unspecified surcharge on officer - inquiry necessary to establish extent of guilt - whether inquiry therefore necessary to establish guilt itself

Headnote

A considerable amount of stationery ordered by the section under the control of a public official went missing. The public official had failed to keep records of the large amounts of stationery coming in and going out of his section. The Public Service Commission found him guilty of certain charges under the Public Service (Officers) (Misconduct and Discharge) Regulations. These charges related to negligent performance of his duties and to failure to take reasonable care of or to account for stationary ordered by his section. Various penalties were imposed including demotion and the imposition of a surcharge on the officer for the stationery unaccounted for, in a sum to be determined in consultation between the officer's Ministry and the Treasury. This determination was made by the Public Service Commission without holding a Board of Inquiry into the matter.

In a review of this determination in the High Court, the court found that on the evidence before it the Commission was entitled to find him guilty as charged, but that it should have held an inquiry to determine the extent of his guilt and hence what penalty was appropriate. Such an inquiry was necessary in order to allow the officer to offer an explanation for the shortfall in the stationery stocks and how this had come about. The court

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therefore set aside the penalty imposed and remitted the matter to the Commission to make a fresh determination as to penalty after holding an inquiry.

In appeal against the High Court decision it was argued on behalf of the officer that if an inquiry

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was necessary to establish the extent of the officer's guilt, then an inquiry was also necessary to establish the guilt itself and that therefore an inquiry into his guilt should have been held.

Dismissing the appeal, it was decided that no inquiry into guilt was required because the officer was clearly guilty of negligence as he had failed to keep any records and he had maintained no control system. The Supreme Court, however, pointed out that it was impermissible to impose an unspecified surcharge as a penalty and referred to the case of *Metsola v Chrmn*, *PSC & Anor* 1989 (3) ZLR 147 (S) at 160B et seq in this regard.

Cases cited:

Chrmn, PSC & Anor v Marumahoko 1992 (1) ZLR 304 (S)

Metsola v Chrmn, PSC & Anor 1989 (3) ZLR 147 (S)

Chrmn, PSC & Anor v Gwisai S-188-91 (unreported)

J R Devittie for the appellant

J B Colegrave for the respondents

Judgment

McNally JA: The appellant was charged with misconduct in the course of his employment with the first respondent (the Minister) during 1988, 1989 and part of 1990, and was found guilty by the second respondent (the Commission). He was punished in a number of ways as follows:

1. He was down graded to Senior Clerk;
2. He was severely reprimanded;
3. He was disallowed his salary and accrued vacation leave during the period of his suspension (29 May 1990-8 July 1991.)
4. He was surcharged for the stationery unaccounted for, in a sum to be determined in consultation between his Ministry and the Treasury.

He was dissatisfied with this determination by the Commission and took the matter on review before the High Court in Harare. Essentially his contention was that there should have been a Board of Inquiry, and since there was not, the Commission's decision was unreasonable, having regard to the following factors:

1. The seriousness of the charges, involving missing stationery worth $171 000;

2. The charges lacked clarity and supporting documentary evidence;
3. The applicant's unequivocal denial of the charges, which raised a fundamental and

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material dispute of fact.

The learned Judge concluded that the Commission was entitled to find him guilty of the charge, on the evidence before it, but that an inquiry was needed in order to determine the extent of his guilt and therefore his punishment. Accordingly he confirmed the finding of misconduct but set aside the "sentence" and directed the Commission to determine "a fresh sentence after the applicant is given an opportunity to account for the shortfall and to (provide an) explanation of how that shortfall is arrived at". (These are not criminal proceedings so the word "sentence" is inappropriate. The proper word is "penalty").

I should mention in passing that the order produced by the Deputy Registrar was not a proper one. An order should be clear and specific, capable of standing on its own without reference to any other document. The order issued in this case was: -

"That the application partially succeeds.

That the respondents pay half of the applicant's costs."

This is a meaningless order.

It should have read something like the following:

"1. That the second respondent's determination that the applicant is guilty of misconduct in that he failed to keep proper records and follow Treasury Instructions is confirmed.

2. That the penalty imposed by the second respondent is set aside.

3. That the matter is hereby remitted to the second respondent for determination of a fresh penalty after the applicant is given an opportunity to account for the shortfall and provide an explanation as to how that shortfall was arrived at.

4. That the respondents pay half of the applicant's costs jointly and severally, the one paying the other to be absolved."

The respondents did not appeal against this order, and so, perhaps fortunately, we are not called upon to decide whether the wording of what I have set out as para 3 of the order is competent, bearing in mind the provisions of para 19(3) of the Regulations, SI 161 of 1986, as amended by para 5 of SI 111

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of 1988. I have commented previously - *Chairman, Public Service Commission & Another v Marumahoko* 1992 (1) ZLR 304 (S) - on the problem the Commission creates for itself, when, by declining to hold an inquiry, it is able to find an officer guilty of misconduct, but quite unable to make any rational assessment of the penalty which should be imposed. See the paragraph numbered "2" on p 8 of that Judgment.

That is the basis for the High Court's order in this case. The charges levelled against the appellant on 11 December 1990 were two in number:

1. Improper, negligent, inefficient or incompetent performance of duties, in contravention

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of Item 2 of the First Schedule to the 1986 Regulations. (Three paragraphs of particulars supplied)

2. Misconduct in terms of item 8 of the First Schedule to the 1986 Regulations, namely:

Theft of, or failure to take reasonable care of or to account for, or to account for, or making improper or unauthorised use of the stationery your section ordered (details annexed of a shortfall of stationery worth $171 944,10).

It may be noted in passing that Item 8 of the Regulations is concerned with money. Item 9 is concerned with property. The charge should have been framed in terms of Item 9. But nothing turns on this.

By letter dated 4 July 1991 the Commission advised the appellant that it had:

> "... determined that in terms of section 7(a) as read with section 19(1) of the Public Service (Officers) (Misconduct and Discharge) Regulations, 1986, you be and are hereby found guilty of performing your duties improperly, negligently, inefficiently and incompetently leading to you failing to account for stationery worth $171 944,01."

It then proceeded to impose the penalty referred to at the beginning of this judgment.

This determination is a very unsatisfactory one. First of all, is he being found guilty on the first count only, or on both counts? Secondly, on what specific allegations is he being found guilty? It seems that the theft allegation has not been found to be established. Nor, it would seem, has it been found that he "made improper or unauthorised use of the stationery your section ordered".

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But it is not possible to be absolutely sure about these points. One is left with the impression that the Commission has left this issue deliberately vague. However, I note that the Acting Chairperson of the Commission in her affidavit confirms that there was no finding of theft. She also confirms that the amount of the surcharge is to be determined in terms of the Audit and Exchange Act.

I must point out that the imposition of the unspecified surcharge is clearly contrary to the ruling given by the Chief Justice in *Metsola v Chairman,* Public Service Commission & Another 1989 (3) ZLR 147 (S) at 160B et seq. One wonders whether the Commission's legal advisers keep a record of, or even read, the relevant Judgments of this court.

The learned judge in the court a quo took a robust view of the problem before him. He held that it was quite beyond dispute on the papers that the appellant had been guilty of misconduct in that he had performed his duties "improperly, negligently, inefficiently and incompetently." But at the same time he held that the extent of the appellant's culpability for the loss of the stationery had not been adequately established for the purpose of the assessment of the penalty. Accordingly he upheld the finding of misconduct and upset the finding on the penalty, remitting that matter only for further assessment after the appellant has been given an opportunity to explain and account for the shortfall.

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The Commission, as I have said, has not appealed, so we are not concerned whether or not the remittal was properly ordered.

The appellant's grounds of appeal are, in summary:

1. There should have been an inquiry;

2. Without an inquiry the learned Judge should not have upheld the finding of misconduct.

These two grounds of appeal really amount only to the contention that, if an inquiry was necessary to establish the extent of his guilt, an inquiry should have been held to establish the guilt itself.

The two things are not necessarily synonymous (compare *Chairman, Public Service Commission & Another v Gwisai* S-188-91). The appellant was patently negligent in failing to keep any records. He was in charge of very

large amounts of stationery coming in and going out. If there was no system he should have introduced one. It was no use his pointing out to his superiors (if he did so) that there was no system. Even a simple record of transactions in a note book would have been better than nothing. He does not dispute that he maintained no control system.

Accordingly I am satisfied that there is no merit whatsoever in the appeal. In reconsidering the matter the Commission will, I trust, bear in mind what I have said about the surcharge. However no point was made of this in the appeal and so no special order as to costs need be made.

The appeal is dismissed with costs.

Gubbay CJ: I agree

Manyarara JA: I agree

Atherstone & Cook, appellant's legal practitioners

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

S v MUBAIWA & ANOR 1992 (2) ZLR 362 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Criminal appeal

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29 October & 24 November 1992

Flynote

Appeal - attempted murder - no automatic right of appeal - leave to appeal must be applied for

Criminal law - common purpose - whether second appellant had performed any act of association with the murder and whether he had the requisite intention for murder

Criminal procedure (sentence) - murder - extenuating circumstances - what constitutes - whether present where weapon taken from victim of theft used to kill person intervening to assist victim

Criminal procedure (sentence) - murder - extenuating circumstances - State must not refer to accused's previous convictions at stage when extenuating circumstances are being referred to

Criminal procedure - verdict - competent verdict - murder charge - attempted theft or conspiracy to commit theft not competent verdicts

Headnote

The first and second appellants went to a farm to steal property. Knowing that the farmer, Mr van Dyk, possessed firearms they pretended to the farmer that they were CIO officers who were searching for spies and for unlicensed firearms. Using this pretence they induced the farmer to hand over one of his firearms, a pistol. This weapon, which was loaded, was handed to the first appellant. Some of the farmer's workers had suspected that the appellants were criminals and had gone to a neighbouring farm and informed the owner of that farm, Mr Vemba, of the presence of these men on Mr van Dyk's farm. Mr Vemba and a number of relatives came

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to try and rescue Mr van Dyk. Mr Vemba had a non-functioning rifle with him. When the first appellant heard Mr Vemba's car arrive, he went outside carrying Mr van Dyk's pistol. The second appellant followed first appellant outside. The first appellant had the pistol concealed behind a clipboard. Mr Vemba advanced on him carrying the rifle and demanded to know what he wanted. The first appellant warned Mr Vemba not to come near him. However, Mr Vemba advanced on him and when he reached the first appellant he threw down his rifle and grabbed the first appellant by the shoulder. As he did so the first appellant fired one shot from the pistol, hitting Mr Vemba at point blank range in the head and killing him. He also fired several more shots in rapid succession at Mr Vemba's two relatives who had accompanied him. These shots missed the two people.

The two appellants were found guilty of murder and of attempted murder. On the murder charge they were both sentenced to death after the trial court found that there were no extenuating circumstances. In an appeal against conviction and sentence:

Held, that there is no automatic right of appeal against a conviction for attempted murder and that leave to appeal should have been sought.

Held, further, that the conviction of the second appellant of murder and attempted murder must be set aside. He could only properly be convicted of these charges if he had formed common

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purpose with the first appellant to kill Mr Vemba and to attempt to kill his two relatives. For the common purpose doctrine to apply in a case of murder or attempted murder it would have to be proved that the accused did something to associate himself with the actions of the person who actually did the killing or attempted to do so, knowing that the other person intended to kill or foreseeing the possibility that he intended to kill. On the facts, the common purpose doctrine did not apply as:

- there was no prior agreement other than to commit theft by false pretences and possibly common assault.
- there was nothing to show that the second appellant made common cause with the first appellant in respect of the shooting.
- although the second appellant was present and witnessed the killing of Mr Vemba and the shooting at his relatives, he did not commit any act of association, because his act of coming outside did not constitute an act of association.
- the second appellant did not have the requisite *mens rea*. He did not have actual intention that his fellow criminal should kill the deceased and attempt to kill the others. Although he may have foreseen that the first appellant might engage in a murderous enterprise when he

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saw him go outside with the loaded weapon, he did not perform any act of association with him reckless as to whether or not death would ensue.

- the second appellant did not causally contribute to the death of the deceased.

The only possible verdict in respect of the second appellant was one of acquittal as attempted theft or conspiracy to commit theft were not competent verdicts on a charge of murder or attempted murder.

Held, further, that on the facts the first appellant was correctly convicted of murder. His conviction for attempted murder was also confirmed, although in respect of only the second complainant.

Held, further, (**McNally JA:** dissenting) that the finding of the trial court that there were no extenuating circumstances in respect of the murder committed by the first appellant was correct and the appeal against the death penalty was dismissed. The fact that the original criminal plan did not encompass armed robbery or the use of fatal force and the fact that the pistol used in the murder was only acquired at the homestead to which they had gone to steal did not lessen the moral culpability of the first appellant. He made a deliberate decision to take the pistol outside when Mr Vemba arrived in his car and had the pistol concealed behind the clipboard. He must have had in his mind the real possibility of having use the pistol to evade lawful arrest. He had chosen to kill in order to overcome resistance, despite the fact that he had had had ample time to reflect on his actions and to choose some other course of action.

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Held, further, that the State must not refer to evidence of previous convictions at the stage when extenuating circumstances were being considered. If this rule is broken and there is a reasonable danger that this might have influenced the trial court improperly, it may be necessary for the Supreme Court to interfere with the finding on extenuating circumstances.

Cases cited:

S v Venter & Anor S-20-88 (unreported)

S v Shabalala 1966 (2) SA 297 (A)

S v Mpala 1986 (2) ZLR 93 (S)

S v Musimurimwa S-66-87 (unreported)

S v Namatimba S-27-92 (unreported)

S v Kaira S-74-92 (unreported)

S v Ndlovu S-34-85 (unreported)

S v Hlabangani 1977 (2) RLR 301 (GD)

S v Lunga & Anor 1982 (1) ZLR 95 (H)

S v Safatsa 1988 (1) SA 868 (A)

McNALLY JA

S v Mgedezi & Ors 1989 (1) SA 687 (A)

S v Motaung & Ors 1990 (4) SA 485 (A)

S v Khumalo & Ors 1991 (4) SA 310 (A)

S v Peterson 1989 (3) SA 420 (A)

S v Langton 1972 (2) RLR 57 (A)

S v Ncube A-24-77 (unreported)

S v Ndhlovu S-34-85 (unreported)

WRS Russell for the appellants

LR Goredema for the respondent

Judgment

McNally JA: These two brothers were convicted of the murder of one man and the attempted murder of two others. On the murder charge they were both sentenced to death. On the

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attempted murder charge they were each sentenced to fifteen years' imprisonment with labour, the one charge encompassing both attempts.

There is an automatic right of appeal in a matter where the death sentence is imposed. But there is no such right in the attempted murder count. Leave to appeal should have been sought if an appeal was to be prosecuted.

Counsel in the trial should have attended to the drawing of the notice of appeal and to the making of the application for leave to appeal if they considered such an application warranted. They did not do so. This was a failure in their duty to their clients: see S v Venter & Anor S-20-88.

In the result, we were faced with almost meaningless notices of appeal on both counts from both brothers. Through the Registrar we advised counsel for the appellants that leave to appeal against the attempted murder conviction and sentence should be sought. As a result of some confusion leave was sought and granted only in respect of the second appellant.

While on the subject of procedural errors, I should also mention that the State should not have referred to evidence of previous convictions at the stage when extenuating circumstances were being considered. This has been said time and again: *S v Shabalala* 1966 (2) SA 297 (A); *S v Mpala* 1986 (2) ZLR 93 (S) at 100G; *S v Musimurimwa* S-66-87; *S v Namatimba* S-27-92; *S v Kaira* S-74-92.

If there is a reasonable danger that this might have influenced the court improperly, it may be necessary for this court to interfere with the finding on

extenuating circumstances. What was particularly damaging was that the prosecutor advised the court that both appellants had previous convictions for robbery. When he eventually proved the previous convictions it turned out that that was not so. The first appellant had a conviction for housebreaking and theft and the second appellant had a minor previous conviction for assault with intent to do grievous bodily harm for which he was fined $20.

I propose to set out the relevant facts. In so doing I have no hesitation in agreeing with the learned trial judge that the appellants were quite patently untruthful in most of what they said. Where their "facts" conflict with the facts placed before the court by the State witnesses I will accept the version of the State witnesses.

The two appellants and two others who were apparently not apprehended, had no money. They were unable to support their families. They decided to steal. The plan was to go to Edelweiss Farm in Mount Darwin and steal money from the farmer, a Mr van Dyk.

They knew or suspected that Mr van Dyk had guns, so they evolved a scheme to neutralise this factor. They persuaded someone to type a note for them saying they were members of the CIO from Bindura. They were authorised to search for spies and for unlicensed firearms. The appellants, I may say, are apparently illiterate. They also brought some bark twine to tie up Mr

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van Dyk before they left, if the need should arise.

They arrived by foot at Edelweiss Farm on the afternoon of Friday 29 December 1989. They presented their note and were ushered into the presence of Mr van Dyk who was ill and confined to bed. The two appellants went in to the bedroom while the other two waited outside. Mr van Dyk engaged them in fairly amicable conversation, despite the fact that he was somewhat dubious about the authenticity of the note which was apparently not in the best English (we have not seen it). Moreover he was very indignant at the suggestion that his weapons were unlicensed. He does not seem to have paid much attention to the allegation about spies.

He called in his manager's wife who looked after his files and she produced the file with the licences. They then asked where the rifle was and he answered "behind that door there, but be careful, it is loaded." They asked where the shot gun was and he said the cook had it. And finally they asked where the pistol was and he pulled it out from under his pillow and handed it to the first appellant, saying: "Look, be careful, that thing is cocked, let me

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uncock it for you". But the first appellant assured him he knew about firearms and proceeded to unload and then reload the pistol. During all this time the second appellant was doing nothing. In fact he sat on a chair calmly smoking Mr van Dyk's cigarettes.

The first appellant then went with the cook to check the presence of the shot-gun in the cellar, and came back. He was still dangling the pistol from his finger tips. It is worth noting that neither of the appellants sought to take possession of the loaded rifle or of the shot gun. Nor did the first appellant threaten anyone with the pistol. He was still pretending to be a CIO man.

The first appellant opened a few drawers, looking for money, and he asked one of the staff whether the employees had been paid their wages for that month. He was told they had been.

At this point the sound of a car was heard, drawing up outside the window of the bedroom. The first appellant went outside still carrying the pistol. Mr van Dyk said to the second appellant: "Hey, there he goes with my pistol, I want my pistol back." The second appellant said: "He will bring it back just now" and then he stood up and followed the first appellant out of the room.

What had happened was that the farm workers, being less trusting than Mr van Dyk, had hurried to the neighbouring farm to report to the owner, Mr Vemba, that there were "tsotsis" at Mr van Dyk's farm who were up to no good.

Mr Vemba promptly jumped up and set off to the rescue in his car. A number of his relatives accompanied him. At the last moment someone thrust into his hands a non-functioning rifle, suggesting that it might be useful to frighten the "tsotsis". He took it with him.

As he and his companions got out of the car, the first appellant came out of the house. He was carrying the pistol, but concealing it behind a clipboard he was also holding. So it was not apparent that he was armed. Mr Vemba advanced resolutely towards him holding his rifle, and

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demanding to know what he wanted. The first appellant stood there, according to one witness, saying over and over again: "Don't come near me, don't come near me."

As Mr Vemba reached the first appellant he threw down his rifle and grabbed the first appellant by the shoulder. As he did so the first appellant fired one shot from the pistol, hitting Mr Vemba at point blank range in the head and killing him.

McNALLY JA

At that stage the second appellant was somewhere behind the first appellant, having emerged from the house.

Almost immediately after firing the fatal shot, the first appellant fired several more shots in rapid succession. It is on those shots that the attempted murder charge was based. Thereafter he and the second appellant ran away. It is not clear what happened to the other two accomplices but they had apparently already left the scene.

On their way home at one stage the second appellant carried the pistol while his brother went to the toilet. He then gave it back to the first appellant who later hid it.

On the totality of this evidence it seems to me that three major questions arise for consideration, two of law and one of fact. None of them was clearly or specifically dealt with at the trial or adequately argued on appeal.

1. Is it a circumstance of extenuation that the firearm was neither brought to the scene for the purpose of robbery nor acquired at the scene for the purpose of robbery or escape?

2. Was the basis of common purpose established so as to warrant the conviction of the second appellant for the shootings by the first appellant?

3. Was the attempted murder established on the factual evidence before the court?

1. EXTENUATION

It has been said often enough in this court that those who take a dangerous weapon such as a firearm on an expedition to rob can expect little mercy if the firearm is used and someone is killed. See eg *S v Ndlovu* S-34-85.

But that is not what happened here. The offence as planned was primarily a theft by false pretences, although there was an element of force in it, in that they brought the bark twine to tie up Mr van Dyk if it should become necessary to do so. But this use of force was simply a last resort, which might not become necessary, and in any event it would have happened only after the money was taken and then only if Mr van Dyk saw through their false pretences.

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It is an essential element of the crime of robbery - see South African Criminal Law and Procedure Vol 2, 2 ed at p 681 - that "the violence or threats must precede the taking and cause the submission." Therefore what was planned was not robbery, let alone armed robbery. See *S v Hlabangani* 1977 (2) RLR 301 at 302F-H and *S v Lunga & Anor* 1982 (1) ZLR 95 at 97G-H.

It is true that the plan necessarily involved acquiring control over firearms. But the appellants' statements clearly indicate that they saw this acquisition of control in a negative sense (preventing Mr van Dyk from using the firearms) rather than in a positive sense (acquiring weapons with which to carry out the robbery). Certainly they must be given the benefit of the doubt in this respect.

In favour of that interpretation are the following facts:

1. They made no attempt to take possession of the loaded rifle behind the door which was pointed out to them by Mr van Dyk.

2. They made no attempt to take possession of the (apparently unloaded) shotgun in the cellar.

3. The loaded pistol was actually handed to the first appellant by Mr van Dyk. It would not have been safe for the first appellant to hand it back, but it is significant that he did not threaten Mr van Dyk with it. In other words, he did not abandon the "theft by false pretences" approach in favour of a "robbery" approach.

4. It so happened that Mr Vemba's car drove up while the first appellant was still present with the loaded gun in his hand. True, he had already unloaded it and loaded it again, but that was done more to show Mr van Dyk that he knew how to handle firearms than to ensure that he had a loaded weapon with which to fight his way out if necessary.

5. The very fact that they brought the bark twine to tie up Mr van Dyk supports the idea that they were not thinking in terms of using the firearms.

I have already concluded that the trial court misdirected itself in two ways in relation to extenuating circumstances. The first was to allow the State to introduce misleading evidence of previous convictions before the finding on extenuation was reached. The second was to treat the case as if ab *initio* this

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McNALLY JA

was planned as an armed robbery. The learned Judge said "you embarked on a criminal enterprise to rob". That finding was not warranted on the evidence.

This court is therefore at large to come to its own conclusion. I am persuaded that the first appellant's moral blameworthiness is significantly diminished by the fact that:

a. He did not plan the enterprise as an armed robbery;

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b. He did not set out with a pistol;

c. He did not expect to have a loaded pistol in his hand at the critical moment;

d. He could not produce his pistol and say "stand back" because he no doubt feared that this would precipitate a "shoot-out" with Mr Vemba. He was not to know that Mr Vemba's weapon was incapable of shooting.

e. Therefore the killing was unpremeditated, unforeseen, and carried out in a moment of panic.

In my view, that is sufficient to establish the presence of extenuating circumstances such as to permit the imposition of a sentence other than the death sentence. However, I am in the minority in holding that view.

It must follow a fortiori and subject to the conclusion to be reached on common purpose, that the same considerations apply in the case of the second appellant.

2. COMMON PURPOSE

The landmark decisions on common purpose in Southern Africa start with *S v Safatsa* 1988 (1) SA 868 (A), yet neither that case nor any but one of the many that have since followed it were cited either in this court or in the trial court. I refer in particular to *S v Mgedezi & Ors* 1989 (1) SA 687 (A); *S v Motaung & Ors* 1990 (4) SA 485 (A); and *S v Khumalo & Ors* 1991 (4) SA 310 (A).

These cases make it clear that:

1. Each individual in a common purpose case is to be judged on his own *mens rea;*

2. The *actus reus* of the accused, on which his criminal responsibility for the murder is founded, consists, not necessarily in an act which is causally linked with the death of the deceased, but solely in an act by which he associates himself with the common purpose to kill.

McNALLY JA

If one looks at the role of the second appellant, one starts from the premise that his *mens rea* was related entirely to the planned theft by false pretences. That was why he was present. He never picked up a firearm, although there was a loaded rifle available which he could have taken into his possession. Even when he heard the car arriving he did not pick up the weapon. He simply went outside, presumably to see what was happening. And, for what it is worth, he reassured Mr van Dyk that the first appellant would bring his pistol back "just now". He could hardly have meant "as soon as he has killed whoever it is that has just arrived."

I do not think it can safely be said that it must have been within his contemplation, at any stage prior to the event, that the first appellant would (a) take aggressive possession of a firearm; (b)

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find that it was loaded; and (c) use it to kill someone.

The second appellant's position would have been fundamentally different if he had gone on the expedition knowing that the first appellant had with him a loaded gun. As it is his position is more analogous to that of the appellant in *S v Peterson* 1989 (3) SA 420 (A) to which Mr Russell referred us. In that case, the appellant planned to rob the deceased and attacked him in pursuance of that objective. While they were struggling, the appellant called to another man to come and help him. The other came and, quite unexpectedly, pulled out a knife and stabbed the deceased in the heart. It was held on appeal that the appellant was not guilty of murder, but only of robbery.

The second appellant in this case had, in my view, a far less "active association" with the death of the deceased than the appellant in Peterson, *supra*. I can find no basis for the application of the doctrine of common purpose in this case beyond a common purpose to commit theft and if necessary common assault.

The matter can be judged by applying the five tests propounded by Botha JA in *S v Mgedezi & Ors*, *supra*, at 705I-706B as follows:

> "In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in *S v Safatsa & Ors* 1988 (1) SA 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he

> must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea;* so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association wit recklessness as to whether or not death was to ensue."

Applying these tests to the present facts one can say:

1. There was no proof of any prior agreement other than to commit theft by false pretences and possibly common assault.

2. The second appellant did not contribute causally to the death of the deceased.

3. He was present.

4. He was aware of the shooting only in the sense that he witnessed it.

5. There is nothing to show he intended to make common cause with his brother in the firing of the pistol.

6. He did not perform any act of association. (Merely emerging from the room is not an act of association. Nor is their joint escape afterwards.)

7. He did not have the requisite *mens rea* in that he did not intend the deceased to be killed, nor could he have foreseen the possibility that he might be killed until he saw his brother go outside with the gun, and

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then he did not "perform his own act of association with recklessness as to whether or not death was to ensue."

In my view there was no basis in the doctrine of common purpose for the conviction of the second appellant on either count. Nor is attempted theft, or conspiracy to steal, a competent verdict on a charge of murder.

3. THE ATTEMPTED MURDER

There is no doubt that the first appellant fired a number of shots after killing Mr Vemba. The police appear to have found four empty cartridge cases and three live rounds at the scene, all 9 mm ammunition. When the FN pistol was later recovered it was found to have three live rounds in it. We are not told

how many bullets it can hold. So at least three shots were fired after the murder of Mr Vemba. The evidence must show that these shots were fired at the two complainants with the intention of killing them, or at least recklessly as to whether they were killed or not.

The first complainant was one Evaristo. He is the eldest brother of the deceased and had come with him in the car. He got out of the car and remained watching as the deceased went up to the first appellant and was shot dead. His evidence reads:

"After my brother had been shot and fallen to the ground, the accused fired at my brother-in-law, however he missed him. He later fired at me, and missed me as well, and then fired two more shots that is the fourth and fifth shot towards the gate."

However Evaristo moved away from this clear statement. He said later:

"After accused No 1 had shot my young brother, then he fired some other shots at random."

And later, still in examination-in-chief, he said:

"I did not remain looking at the accused after he had shot my young brother and my young brother had fallen to the ground, I was then running away trying to take cover.

Q. So you had your back to him at that time?

A. I had my back towards him at the time I was afraid of the gun."

The cross-examination, ignoring the golden rule not to question a witness who has given answers favourable to your client, almost rescued the State case:

"Q. So you did not actually see him aim at either you or your brother-in-law?

A. I was also looking at him, that is accused 1.

Q. After the first shot?

A. No, my Lady, in fact after the first shot I did not look at the accused person because everyone was running away.

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Q. So for all you know the accused might have been firing maybe into the air?

A. I would not know that."

McNALLY JA

The second complainant was one Marko, the brother-in-law of the deceased. He also came in the car. He also emerged from the car and watched his brother-in-law advance on the first appellant. He gave a voluble description of the shooting but was far clearer than Evaristo. He claims to have seen the first appellant move the gun after shooting the deceased so that it was pointing at him (Marko) and then the gun was fired at him. He then turned and ran, and as he did so he heard another shot.

Although he does not say specifically how close he was to the first appellant, he says he was close to him, just behind the deceased. He was the closest person to the deceased. It seems to me that his evidence is acceptable evidence of an attempt to murder him. I would not therefore interfere with the conviction of the first appellant on the second count. Both the complainants were included in that count, so the absence of proof in relation to the first complainant does not invalidate the conviction for the attempted murder of the second complainant.

Again, however, and for the same reasons as before, I do not consider that the second appellant can be convicted on the second count on the basis of the doctrine of common purpose.

In the final analysis, therefore, I would have substituted a finding of murder with extenuating circumstances on count one, in respect of the first appellant. In respect of the second appellant the only possible verdict is an acquittal.

On count two I would confirm the conviction of the first appellant for attempted murder, although in respect of the second complainant only. I would set aside the conviction of the second appellant on this count.

As far as sentence is concerned the first appellant has a relevant and recent previous conviction for housebreaking with intent to steal and theft for which he was sentenced to five years' imprisonment with labour. The extenuation in his case was minimal and I would have reflected this by reducing the death sentence to one of imprisonment for life. The sentence on the second count would have run concurrently with the sentence on the first count. As to the propriety of conjoining a determinate with an indeterminate sentence, see *S v Langton* 1972 (2) RLR 57. The second appellant must be found not guilty and discharged on both counts.

In the circumstances, however, the order of the court will be as set out by the Chief Justice.

GUBBAY CJ

Gubbay CJ: I have had the advantage of reading in draft the Judgment of my brother McNally.

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He has come to the conclusion that:

(i) as the trial court has misdirected itself in respect of its finding that the first appellant was guilty of murder without extenuating circumstances, this court was at large to come to its own decision;

(ii) the features he listed diminished the moral blameworthiness of the first appellant sufficiently to permit the imposition of a sentence other than death;

(iii) in relation to count two the conviction of attempted murder and the sentence of fifteen years' imprisonment with labour are to stand; and,

(iv) there is no basis in the doctrine of common purpose to sustain the convictions of the second appellant.

I agree with the first, third and fourth conclusions, but not with the second, for the reasons which now follow:

Although the criminal enterprise embarked upon did not encompass an armed robbery and the pistol used in the fatal shooting of the deceased was only acquired at the homestead of Mr van Dyk, I do not view these facts as in any way lessening the degree of the first appellant's moral culpability. All that may be said is that its extent would have been even further aggravated if the first and second appellants had conspired together to perpetrate an armed robbery upon Mr van Dyk. See for instance *S v Ncube* AD 24-77; *S v Ndhlovu* S-34-85 (both unreported).

Nor am I able to accept that the first appellant fortuitously happened to have the loaded pistol in his hand when, alerted by the sound of the deceased's motor vehicle, he left Mr van Dyk's bedroom to investigate. At that critical stage he had been in possession of the pistol for quite some time and had exhibited obvious signs of excitement upon acquiring it. He made a deliberate decision to take the pistol outside with him, concealing it behind the clipboard. The real possibility of having to resort to its use in order to evade lawful arrest must have been ever present to his mind.

As the first appellant had no way of knowing that the deceased's rifle was non-functional he ought, upon sight of it, to have surrendered immediately so as to avoid the risk of a "shoot-out"; or, at the very least, he should have

called out to the deceased and his companions that he too was armed with a lethal weapon. He elected to do neither. He waited until the deceased had dropped his rifle to the ground and was virtually on top of him before intentionally firing at point-blank range, not at the lower part of the deceased's body, but at his head. In this way he achieved his purpose which was to ensure that he was not apprehended by the deceased's group.

I consider that the great and overriding moral guilt of the first appellant lay in his choosing, when he had ample time for reflection, to kill in order to overcome lawful resistance or in order to facilitate unlawful escape. He put himself into that situation. There is, to my mind, no mitigatory factor which serves to diminish the sombre burden of that guilt.

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Accordingly, I would order as follows:

1. The appeal of the first appellant on both counts is dismissed in its entirety.

2. The appeal of the second appellant on both counts is upheld and the convictions and sentences set aside.

Ebrahim JA: I have also had the advantage of reading the Judgment of

McNally JA: and the dissenting Judgment of the Chief Justice.

I am in agreement with the views expressed by the Chief Justice on the issue of extenuating circumstances and I consider it unnecessary to add to them. I, therefore, associate myself with the orders made consequent thereupon.

Pro Deo

BARCLAYS BANK OF ZIMBABWE LTD v AIR ZIMBABWE CORPORATION 1992 (2) ZLR 377 (HC)

Court **High Court, Harare**

Adam J

Civil action

18 May & 25 November 1992

Flynote

Carriage of goods - by air - extent of liability of carrier for missing goods

Headnote

Two gold bars were stolen at Harare airport by security officials employed by the defendant. These security officials were responsible for unloading and safeguarding the consignment of gold at Harare Airport. The two gold bars were part of a consignment of gold carried on a domestic flight from Bulawayo to Harare by the defendant corporation on behalf of the plaintiff. The contractual terms of the carriage were contained in a waybill which was signed by or on behalf of the plaintiff. This waybill made the carriage contract subject to the limitations on liability laid down by the Warsaw Convention. In terms of Article 29 of that Convention, the right of the person whose goods are being carried to claim delictual damages is extinguished if the action is not brought within two years, when the cargo arrived or should have arrived. Article 22 limits the liability for loss of cargo to 250 francs per kilogram.

One of the stolen gold bars was subsequently recovered but the other was not. The plaintiff claimed from the defendant $61970,23. This was the value of one gold bar, less what it had

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been able to recover of the proceeds of the sale of some of the stolen gold.

Held, that the Warsaw Convention governed the contract of carriage.

Held, further, that although the security officials had been acting in the course of their employment when they committed the theft, the plaintiff's delictual claim had been extinguished as a result of its failure to bring the claim within two years as required by Article 29 of the Warsaw Convention.

ADAM J

Held, further, that the defendant had done nothing which would estop it from relying on the defence that the delictual claim had been extinguished under Article 29 of the Warsaw Convention.

Held, further, that the plaintiff was only entitled to recover compensation for the lost gold at the gold value rate specified in Article 22 of the Warsaw Convention, namely 250 francs per kilogram. This gold value was to be ascertained in accordance with the standard or weight and fineness specified in Article 22 of the Warsaw Convention. Every gram or fraction of a gram of such ascertained gold value must be treated as representing the price of gold bullion set by the Reserve Bank of Zimbabwe in dollars on the date of Judgment.

Cases cited:

Westminster Bank v Imperial Airways Ltd [1936] 2 All ER 890 (KB)

Pan American World Airways Inc v SA Fire & Accident Ins Co Ltd 1965 (3) SA 150 (A)

Fawcett Security Ops (Pvt) Ltd v Omar Entprs (Pvt) Ltd 1991 (2) ZLR 291 (S)

Adler v Elliot 1988 (2) ZLR 283 (S)

Bulk Freight Svcs (Pvt) Ltd v Min of Defence S-124-91 (unreported)

DD Tpt (Pvt) Ltd v Abbot 1988 (2) ZLR 92 (S)

Resisto Dairy v Auto Protection Ins Co Ltd 1963 (1) SA 632 (A)

Shinga v General Accident Ins Co (Zim) Ltd 1989 (2) ZLR 268 (H)

Seniors Svcs (Pvt) Ltd v Nyoni 1986 (2) ZLR 293 (S)

Rymanowski v Pan American World Airways Inc 15 Avi 17 698

Baker v Landsell Protective Agency 19 Avi 18 195 (1986)

Trans World Airlines Inc v Franklin Mint Corp 18 Avi 17 778 (1984)

Samuel Montagu & Co Ltd v Swiss Air Tpt Co Ltd [1966] 1 All ER 814 (CA)

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Morris v CW Martin & Sons [1965] 2 All ER 725 (CA)

Rustenburg Platinum Mines Ltd v SA Airways & Pan Am World Airways Inc [1979] 1 Lloyds Rep 19 (CA)

Nott v ZANU(PF) 1984 (2) SA 115 (ZS)

Whittaker v Roos & Anor 1911 TPD 1092

SS Harnland v SS President Angot (1972) 7 Eur Transport Law 933

Olympic Airways v Zacopulos (1972) IATA ACLR No 461

DP Carter for the plaintiff

AP de Bourbon SC and JB Colegrave for the defendant

ADAM J

Judgment

Adam J: The plaintiff consigned three sealed boxes of gold bars on 25 June 1986 (with the completion of "Air Waybill No. 221665 For Carriage Only within Zimbabwe" and being signed by or on behalf of the plaintiff) to the defendant for carriage on its domestic flight from Bulawayo Airport to Harare Airport. It is common cause that in terms of the contract these three boxes of gold bars were handed to the servants of the defendant and they were duly carried on its scheduled airflight UM 134 on 15 June 1986 from Bulawayo to Harare. Upon its arrival at Harare Airport, one of the boxes containing two gold bars was stolen by the defendant's two security officials, Martin Nyahwata and Godwin Dembedzeko. In order to perpetrate this theft, these two employees fabricated a box to look like one of the boxes used by the plaintiff in which was placed a brass bar. These two employees were responsible for the unloading of the three boxes of gold bars and during the course of handling the cargo, they substituted their fabricted box for one of the genuine boxes of gold bars.

On 26 June 1986, on taking delivery of the three boxes from the defendant, the plaintiff realised on examination that one box had been fabricated, so reported the matter to the defendant and to the Police. The two employees of the defendant cut the two gold bars into five pieces, out of which one gold bar, consisting of three pieces, was subsequently recovered but the other gold bar of two pieces has not been recovered. The defendant's two employees were eventually arrested, prosecuted and sentenced to ten years' imprisonment with labour for the theft. Although the other gold bar has not been recovered, however, the plaintiff managed to secure the proceeds of sale of some of the stolen gold bars. This stolen gold bar weighed 15.0055 kg and was valued at $223 241,14 and the amount not recovered of the sale proceeds by the plaintiff was equivalent to $61 970,23, which the parties have agreed was the equivalent of 4.1655 kgof gold. It is accepted that the time of the theft the defendant had entrusted the two employees with safeguarding the cargo and they were acting in the course of and in the scope of their employment with the defendant. The plaintiff instituted proceedings with the summons and declaration being issued on 16 August 1988 and the defendant being served on 23 August

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1988. The plaintiff's declaration alleged in para 5 that the loss of the two gold bars was as a result of the wilful misconduct of the defendant's servants or agents, Martin Nyahwata and Godwin Dembedzeko acting in the course and within the scope of their employment, when they stole the two gold bars. The defendant's plea, filed on 11 November 1988, averred in para 4.1 that in the premises that Nyahwata and Dembedzeko were not acting within the scope of their employment, Article 22(2) of the Warsaw Convention, in the First Schedule to the Carriage by Air Act [*Chapter 256*] (read with Part

ADAM J

2 of the defendant's general conditions of carriage) limits the defendant's liability to a sum of 250 francs per kilogram, so the defendant consented to judgment on that basis. The plaintiff's replication, filed on 18 November 1988, denied each and every averment of fact and conclusion of law in the defendant's plea and, in particular, denied that the Carriage by Air Act applied in this matter. It averred that article 25(2) of SI 410 of 1957 (the reference should have been to SRGN 410 of 1957) rendered the defendant liable for the entire loss sustained by the plaintiff which applied. In its notice of intention to amend its plea at the hearing of the matter filed on 27 April 1989, the defendant sought to amend para 4.1 and to add para 4.2, para 5 and to amend the prayer. In a new para 4.1, it asserts that in the premises that Nyahwata and Dembedzeko were not acting in the course and within the scope of their employment, and so in terms of Article XIV(1) of para 25 of its general conditions of carriage, it is not liable to the plaintiff. Alternatively, in para 4.2, it states that in the aforesaid premises, the contract of carriage is governed not by the defendant's general conditions of carriage but by the Warsaw Convention, as read with Part 2 of the defendant's general conditions of carriage. In terms of Article 22(2) of the Warsaw Convention, it says, its liability is limited to 250 French francs per kg. In accordance with Article 41, it avers that in any event as the theft took place on 25 June 1986 and since the summons was served upon the defendant after 16 August 1988, the plaintiff has no course of action as the action was extinguished either in terms of Article XV(4) of Part 2 of the defendant's general conditions of carriage or in terms of Article 29 of the Warsaw Convention, as read with Part 2 of the defendant's general conditions of carriage. In the prayer, the defendant asks that the plaintiff's claim be dismissed with costs or, alternatively, in the event that the plaintiff has a cause of action which is not extinguished and to which the First Schedule to the Carriage by Air Act [*Chapter 256*] applies, the defendant consents to Judgment for 250 French francs per kg in accordance with Article 22(5) of the Warsaw Convention and asks that in respect of the balance of the plaintiff's claim that it be dismissed with costs.

In its notice of application to amend its replication, filed on 6 February 1992, the plaintiff abandons its previous notice of application to amend its replication (filed on 27 June 1989). In response to para 5 of the defendant's plea, it avers that the defendant is not entitled to rely on any provision that seeks to extinguish the plaintiff's cause of action, in that (1) the defendant has admitted liability in its plea filed on 11 November 1988, that (2) such reliance would be in breach of Rule 135(3) of the Rules of Court, in that this ground of defence did not arise after the defendant had delivered its plea, and that (3) the defendant is estopped from relying on such a provision due to the exchange of correspondence between the parties prior to these

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proceedings,

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whereby the plaintiff believed, and justifiably believed, that the defendant was dealing with the plaintiff's claim without reliance on any provision which might extinguish such plaintiff's claim.

It is accepted that the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Hague Protocol 1955 is the First Schedule to the Carriage by Air Act [*Chapter 256*], hereinafter called the "Warsaw Convention".

At the hearing the parties by consent filed a stated case and the court was given a statement of agreed facts. The following outlines the stated case's legal issues for determination:

(1) Is the defendant entitled in law to rely on the limitation of liability and extinction of action set out in the Warsaw Convention or in defendant's general conditions of carriage?

(2) If the air waybill was a valid document in terms of the Warsaw Convention, is the plaintiff's claim prescribed or extinguished in terms of Article 29 of the Warsaw Convention or in terms of Article XV(4) of Part 2 of the defendant's General Conditions?

(3) Is the defendant estopped from relying on prescription or any extinguishing provision in the Warsaw Convention or in its general conditions of carriage on the grounds averred in para 4 of the plaintiff's amended replication filed of record on 6 February 1992 and in light of correspondence annexed to the statement of agreed facts, being letters dated 14 August 1987, 12 January 1988, and 6 April 1988 (from the plaintiff's legal practitioners) and responses to those dated 4 January 1988, 22 February 1988, 5 April 1988 and 14 June 1988 (from the defendant's legal practitioners)?

(4) Is the defendant prevented from relying on the limitations of liability set out in Article 22(2) of the Warsaw Convention and in Article XIV (3) of Part 2 of the defendant's general conditions of carriage? If not, what are the relevant dates of conversion so far as the price of gold is concerned to determine the present value in Zimbabwe dollars of a convention franc?

(5) Did Proclamation 8 of 1982 (SI 85/1982) and the repeal thereby of the Carriage of Air Act [*Chapter 270*] of 1963 have the effect of repealing

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Southern Rhodesia Proclamation 36 of 1957 (SRGN 410/ 1957). In other words, was Southern Rhodesia Proclamation 36 of 1957 part of the existing law of Zimbabwe on

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25 June 1986?

(6) Is the plaintiff entitled to be paid $61 970,23 for the loss of gold, or some other lesser sum on the concept of the convention franc?

(7) What order as to costs should be made?

In his heads of argument Mr Carter submits that this contract of carriage is governed by the defendant's general conditions of carriage, which incorporates by reference the Warsaw Convention, whereby the air waybill is in terms of Article 11 *prima facie* evidence of the conditions of carriage. Mr Carter maintains that the defendant is not entitled to rely on the limitation of liability, firstly, as the air waybill did not comply with Article 8, in that it did not contain the notice that was required (see *Westminster Bank Ltd v Imperial Airways Ltd* [1936] 2 All ER 890; Pan American Airways Inc v *South African Fire & Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 170), and secondly, since it is common cause that Article 25 is applicable, the limits of liability of Article 22 were not relevant: *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd* 1991 (2) ZLR 291 (S). Mr *Carter* argues that the air waybill applies the Warsaw Convention to the defendant's general conditions of carriage, which in Not 1 and in Article XIV of Part 2 emphasizes that aspect; therefore any limitation of liability must be construed in terms of the Warsaw Convention. Further, Article XV of the defendant's general conditions of carriage must also be construed in accordance with Article 29 of the Warsaw Convention, which lays down that the *lex fori* enables that law to interrupt the running of prescription: Shawcross & Beaumont *Air Law* 4 ed Vol 1 at p 416. Mr *Carter* also submits that the unamended para 4.1 of the defendant's plea was an admission of liability and a confessionary pleading which may not be disproved and it is conclusive upon the party making it: *Adler v Elliot* 1988 (2) ZLR 283 (S). As the *lex fori* applies to the calculation of the limitation period, in addition to the express admission of liability and consent to Judgment in the unamended defendant's plea, the course of prior correspondence between the parties constituted an express acknowledgment of liability for the purposes of s 17(1) of the Prescription Act 1975 Mr *Carter* maintains that any reliance on Article 29 of the Warsaw Convention or Article XIV of the defendant's general conditions of carriage is in breach of Rule 135(3) of the High Court of Zimbabwe Rules 1971 in that this ground of defence did not arise after the defendant delivered his plea. Mr *Carter* submits that the application to amend

ADAM J

the defendant's plea constitutes a withdrawal of an admission which should not be allowed: *Adler v Elliott* , *supra*; *Bulk Freight Services (Pvt) Ltd v Minister of Defence* S-124-91 and *DD Transport (Pvt) Ltd v Abbot* 1988 (2) ZLR 92 (S). He argues that the defendant is estopped, on the basis of waiver and the defendant's conduct, from raising the limitation provision as it was being made in the application to amend the defendant's plea some three years after the event and some six months after filing of the defendant's plea: *Resisto Dairy v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A). Mr *Carter* submits that should it become necessary for this court to convert convention francs into Zimbabwe dollars this must be done, in terms of Article 22(5) of the Warsaw Convention, according to the gold value of the national currency as

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at the date of judgment.

In his heads of argument Mr *de Bourbon*, the defendant's legal practitioner, submits that the air waybill does comply with Article 8 of the Warsaw Convention. He asserts that in the event it is held that the air waybill does not comply with Article 8 the effect of this would not make the air waybill invalid but would simply exclude Article 22 limitation of liability. In that case the limitation of liability of Article XIV of Part 2 of the defendant's general conditions of carriage would apply. He argues that, since the carriage took place on 25 June 1986, by the time the plaintiff's summons was served the plaintiff's claim had been extinguished (*Shinga v General Accident Insurance Co (Zimbabwe)* Ltd 1989 (2) ZLR 268 (H)) since the prescriptive provision of Article 29 of the Warsaw Convention is an extinctive provision which extinguished the claim in its entirety: Joubert *Law of South Africa (LAWSA)* vol 1 at para 680 and Shawcross and Beaumont op cit at para 443. Even if there was fault on the defendant's part and Article 25 of the Warsaw Convention were applicable, this would not affect the issue of prescription - *LAWSA loc cit*. Accordingly, the defendant maintains that any admission made in the defendant's plea is irrelevant as it was made, assuming it was made, after the claim had been extinguished. Mr *de Bourbon* submits that estoppel raised by the plaintiff is without merit, as the prior correspondence in question does not constitute a representation, let alone any statement likely to mislead and that in any event there is simply nothing to show that the plaintiff altered its position to its prejudice as a result of any silence on the part of the defendant: *Seniors Services (Pvt) Ltd v Nyoni* 1986 (2) ZLR 293 (S) at 305 and Lawsa vol 9 para 376-378. Mr *de Bourbon* argues that Article 25 of the Warsaw Convention removes the limitation of liability where the plaintiff proves that the defendant acted or omitted to act with intent to cause damage or recklessly and with knowledge that damage would probably result. Furher, the wilful misconduct or intent of the servant or agent is not

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sufficient: *Rymanowski v Pan American World Airways Inc* 15 Avi 17 698 and *Baker v Landsell Protective Agency* 19 Avi 18 195 (1986).

Mr *de Bourbon* also submits that, assuming limitation of liability is restricted to convention francs, the calculation set out in Article 22 of the Warsaw Convention has to be used and so Zimbabwe should follow the cases elsewhere in the world and fix on the price of gold on 12 October 1929: *Trans World Airlines Inc v Franklin Mint Corp* 18 Avi 17 778 (1984). He argues that since Proclamation 36 of 1957 was made in terms of Carriage by Air Act [*Chapter 256*], it was that Act that was repealed by Proclamation 8 of 1982 so the provisions of s 15(2) of the Interpretation Act are applicable.

The back of the Air Zimbabwe air waybill reads as follows:

> "CONDITIONS OF CONTRACT
>
> (i) Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention ... signed at Warsaw ... as amended by the Hague Protocol, 1955, whichever may be applicable to carriage hereunder, whether such carriage is "international carriage" as defined by the Convention or is "non-international". To the extent not in conflict with the foregoing all carriage hereunder ... by each Carrier are subject to the

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applicable laws (include national laws implementing the Convention or extending the rules of the Convention to carriage which is not international carriage as defined in the Convention) Government regulations, proclamations, orders and requirements, and insofar as they are not inconsistent therewith subject to the terms and conditions contained in the Company's General Conditions of Carriage ...

(ii) Any claim or action arising from carriage by the Carrier shall be determined according to the laws of Zimbabwe and actions shall be brought before the courts of Zimbabwe only."

In *Westminster Bank Ltd v Imperial Airways Ltd* (1936) , *supra*, the reverse of the consignment note read:

"Carriage by air : the general conditions carriage of goods are applicable to both internal and international carriage. The general conditions are based upon the Convention of Warsaw of Oct 12, 1929 in so far as concerns international carriage."

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LEWIS J held that this statement on the consignment note was not a sufficient statement as required by Article 8 of the Warsaw Convention that the carriage was subject to the rules relating to liability established by that Convention.

However, in *Samuel Montagu & Co Ltd v Swiss Air Transport Co Ltd* [1966] 1 All ER 814 (CA) the air consignment note had the following:

"Convention of Warsaw and General Conditions of Carriage ... 2(a) Carriage hereunder is subject to the rules relating to liability established by the Convention ... signed at Warsaw ... unless such carriage is not international carriage as defined by the Convention."

When considering the appellant's contention that the insertion of the additional phrase concerning carriage is not international carriage meant that the air consignment note was not being sufficient to satisfy Article 8, Lord Denning MR observed at 816-817:

"They say that a strict interpretation should be given in this matter. They refer to the decision of Lewis J in Westminster Bank Ltd v Imperial Airways Ltd

I do not think we should give a strict interpretation of art 8(q) in the Convention. We should not give it so rigid an interpretation as to hamper the conduct of business. I do not interpret the article as meaning that the waybill must contain the statement verbatim. It is sufficient if it contains a statement to the like effect...

It is very desirable that the air transport companies should be able to use one waybill to fit both international carriage and also non-international carriage ...

In the courts of the United States this very point has come up for consideration. In April 1963, in the case of Seth v British Overseas Airways Corporation (1964) 1 Lloyds Rep 268, Judge Wyzanski of the Federal District Court in Massachusetts held that a statement in these self-same words in the waybill was sufficient to satisfy the convention. He was affirmed by the Court of Appeals of Massachusetts."

In the light of the foregoing, since the words used on the Air Zimbabwe air waybill are somewhat of similar effect, it cannot be maintained that the Zimbabwe air waybill does not satisfy Article 8 of the Warsaw Convention.

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In *Rymanowski v Pan American World Airways Inc supra*, the New York Supreme Court Appellate Division at 699 stated:

> "An employee acts within the scope of his employment 'when he is doing something in furtherance of the duties he owes to his employer and the employer is, or could be exercising some control, directly or indirectly, over the employee's activities ...' (*Lundberg v State of New York,* 25 NY 2d 467, 420)... plaintiff ... charges theft and collusion, tortious acts foreign to the interests of Pan Am for which it cannot be held liable."

However, in *Morris v CW Martin & Sons Ltd* [1965] 2 All ER 725 (CA) Lord DENNING MR held that, when the defendant had charge of the plaintiff's goods in such circumstances that the defendant was under a duty to take reasonable precautions to protect them from theft, then, if the defendant entrusted that duty to an employee, the defendant was liable for the manner in which the employee carried out his duty for the theft committed by the employee. Also, in *Rustenburg Platinum Mines Ltd v Pan Am World Airways Inc* [1979] 1 Lloyds Rep 19 (CA) Lord DENNING MR observed that if goods entrusted for loading carefully and securely in an aircraft are stolen by an employee alone or with others, such an employee is guilty of wilful misconduct acting within the scope of his employment. EVELEIGH LJ (p 24) in addition to basing liability of the employer upon the principles of bailment, also would have found liability upon vicarious liability, since the employee's

> "...job was to load it in a way which would see to its safe transit, but he in fact loaded it in a way which would put it in peril. He put it in a position from which it could be readily stolen and that was his intention when he put it there ... he was doing wrongly that which he was employed to do."

In *Nott v Zimbabwe African National Union (Patriotic Front)* 1984 (2) SA 115 (ZS) Beck JA held that the doctrine of vicarious liability of a master for such delictual acts of his servant as are committed in the course of his employment is part of our law. In *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd*, *supra*, GUBBAY CJ said that the test, in order to render an employer vicariously liable for theft by his employee, is whether the goods have been entrusted to the employee's care; if they have not been, the theft is outside the scope of his employment. He said at 298A:

> "The culpable employee must be one to whom the custody of the goods was deputed by his employer, not just any employee whose employment simply afforded him the opportunity to steal them."

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It follows that Nyahwata and Dembedzeko are culpable employees such that make the defendant vicariously liable. I am not persuaded by the New York Supreme Court Appellate Division that the defendant can maintain that it is not liable for Nyahwata and Dembedzeko's theft of the gold bars on the grounds that these acts were "foreign to the interests" of the defendant. The proper approach is that approved by GUBBAY CJ in *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd* , *supra*.

In *DD Transport (Pvt) Ltd v Abbot*, *supra*, GUBBAY CJ (as he then was) confirmed that a formal admission - *confessio judicatis* - in a pleading was conclusive, rendering it unnecessary for the other party to adduce evidence to prove the admitted fact. Further, before a court will exercise

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its discretion pertaining to amendments that involve the withdrawal of such an admission, it will require:

(a) a reasonable explanation both of the circumstances under which it was made and the reason why it was being withdrawn;

(b) the amendment sought must be bona fide; and

(c) if the amendment allowed it must not cause prejudice or injustice to the other party which a special order for costs will not compensate.

Can it be said that para 4.1 of the defendant's plea was a "clear and unequivocal" admission? It is certainly not a complete admission to the claim in plaintiff's declaration in paras 5 and 7. But the defendant's plea in that paragraph does state the defendant's liability was limited and therefore it consented Judgment. In para 5 of the application for amendment to the defendant's plea it avers that the plaintiff does not have a cause of action since it is extinguished. This new para 5 along with the new para 4.1 make the averments very wide in scope (even after making allowance for the new para 4.2 in the alternative) when these are taken in conjunction with the defendant's admission that it failed to deliver the gold bar. It cannot be denied that to a limited extent the amendment sought by the defendant constituted a withdrawal of the consent to Judgment. I am mindful of the plaintiff's denial that Article 22 of the Warsaw Convention was applicable, but an admission in the defendant's plea is of the greatest importance and although this court "has the greatest latitude in granting amendments", it nevertheless has "to do justice between the parties" and "will not look to technicalities, but will see what the real position is between the parties": *Whittaker v Roos & Anor* 1911 TPD 1092 at 1102-1103. There is no doubt that what presently the defendant's plea shows is that the defendant failed in its undertaking to deliver the gold bar but it denied it was liable on the basis and in the amount claimed as the defendant's servants were not acting in the course and within the scope of

their employment which consequently limited the defendant's liability in a prescribed manner by the Warsaw Convention which the defendant consented to Judgment. It must follow that this court can only allow an amendment to the defendant's plea to the extent that it does not negate that consent to Judgment unless the defendant has satisfied the requirements enunciated by Gubbay CJ, which it has not done. In light of this, the amendment allowed by this court to the defendant's plea will exclude any withdrawal of that consent to Judgment, which means that the plaintiff will be entitled at the end of the day to Judgment at least to that extent. Since there is no objection by the plaintiff to the amendment sought to the plaintiff's replication, that is allowed.

Mr *de Bourbon*'s argument is that Article 29 of the Warsaw Convention is an extinctive provision which extinguishes the claim in its entirety and any admission of liability is irrelevant as it was made after the claim was extinguished. For this view, he relies on cases from certain courts in Switzerland, Italy, France and the USA cited in *LAWSA* vol 1 at para 680 which held that the two-year period is an extinguishing and not merely a time expiry limit, making this a "condition precedent" to the right to sue and not a statute of limitations which normally would be

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susceptible to interruption or suspension. But there is also another view which asserts that reference to *lex fori* in Article 29 enables the interruption or suspension of the two year period. For this position there are certain cases from France and some courts in the USA cited in Shawcross & Beaumont *op cit* at para 443. It should be mentioned that Shawcross & Beaumont find the first view preferable as being the most natural meaning of the text and also representing the intentions of the authors of the Warsaw Convention. It is not necessary for purposes of this case to decide which of the two views should apply, since it is not my understanding of Mr *de Bourbon*'s contention that the defendant, when placing reliance on Article 29, was not required to plead it. The defendant in its original plea, rather than pleading reliance on Article 29, was prepared to consent to Judgment. It follows that when this court has to consider the exercise of its discretion pertaining to amendments of pleadings that involves the withdrawal of a *confessio judicalis*, it cannot treat such a formal admission as irrelevant.

The plaintiff raises estoppel. In *Senior Services (Pvt) Ltd v Nyoni* , *supra*, at 305 DUMBUTSHENA CJ accepted the broad principles of estoppel as follows:

"(a) a representation by words or conduct which might reasonably be expected to mislead;

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(b) the misleading of the representee;

(c) inducing him to alter his position on the faith of such representation;

(d) the representor must have intended that the representation should be acted upon by the representee, though this is normally presumed."

In *Resisto Dairy (Pvt) Ltd v Auto Protection Insurance Co Ltd* , *supra*, the appellant made a claim against the respondent. It became necessary for the appellant to decide whether the defendant accepted the claim or not as soon as it received the claim. The respondent's subsequent conduct was consistent only with acceptance of the claim: its silence and inaction towards the appellant for so long a period constituted a representation that it accepted the claim and this representation had induced the appellant to refrain from taking any steps and thereby the appellant had been prejudiced. HOEXTER JA at 642-643 observed:

> "Let me say at once that the correspondence between the respondent's agents and the claimant's agent cannot be regarded as a representation by the respondent to the appellant, who was unaware of that correspondence when it took place. The only representation made by the respondent to the appellant was one made by silence and inaction in circumstances in which it was the duty of the respondent, if it wished to repudiate, to inform the appellant of its decision within a reasonable time...
>
> It will be appropriate to quote what Spencer-Bower Estoppel by Representation p 60 has to say about representation by silence or inaction:
>
> > '75. The main condition subject to which alone silence or inaction counts as a representation is that a legal (not a mere moral or social) duty shall have been owed by the representor to the representee to make the disclosure or take the steps, the omission of which is relied upon as creating the estoppel. The theory is this. The parties to a transaction are entitled to assume as against one another, *omnia rite esse acta*; each of them is entitled to suppose that the other has fully discharged all such obligations (if any) of disclosure or action towards himself as may have been created by the circumstances. If, therefore, he received from

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that other no intimation, by language or conduct, of the existence of any fact which, if existing, it would have been the latter's duty, having regard to the relation between them, the nature of the transaction, or the circumstances of the case, to reveal, he has legitimate grounds for believing that no such fact exists, or that there

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is nothing so abnormal or peculiar in the nature of the transaction, or in the circumstances of the case, as to give rise to any duty of disclosure, and to shape his course of action on that assumption; in other words, he is entitled to treat the representor's silence or inaction as an implied representation of the non-existence of anything which would impose or give rise to such a duty, and, if he alters his position to his detriment on the faith of that representation, his representor is estopped from afterwards setting up the existence of such suppressed or undisclosed fact. The terms, "lying by", "standing by", "acquiescence", "waiver", "laches" and "encouragement", are often used, in preference to "estoppel",for the purpose of enunciating and justifying the rule under discussion, but it is really one and the same doctrine which is the subject of these terminological variants.'

The representation in the present case caused prejudice to the appellant by lulling him into a false sense of security. The appellant believed, and justifiably believed, that the respondent was dealing with its claim ... and the appellant itself therefore made no attempt to investigate or to prepare a possible defence or to attempt a reasonable settlement. After the lapse of seven months it was suddenly and unexpectedly faced with the problem of dealing with the summons itself.

...

In the circumstances I am of the opinion that the long silence and inaction of the respondent constituted a representation to the appellant .. that this representation induced the appellant to refrain from taking any steps to deal with the claimant's claim, and the appellant was prejudiced thereby."

Looking to the correspondence relied upon by the plaintiff, that began in August 1987 with the last reply from the defendant's legal practitioners on 14 June 1988, it cannot be disputed that the defendant always denied liability as claimed by the plaintiff and there is nothing, either expressly or impliedly from the correspondence between the parties, that could cause the plaintiff to believe that the defendant was not going to place any reliance on the limitation period or that it was waiving such a limitation period. In fact the 14 June 1988 letter from the defendant's legal practitioner was most explicit on the issue of liability, when they stated that they were not in a position to advise their client to increase the offer of £13.63 sterling per kg for the missing consignment put to the plaintiff based on the applicable limitation. There is nothing in that correspondence or after that date which could constitute a representation which induced the plaintiff from taking any steps. On the contrary, the plaintiff had an offer of settlement. It was either required to accept this offer or to institute proceedings. That these proceedings would

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concern the application of the Warsaw Convention was clearly disclosed by the correspondence, so they had to be instituted within two years from 26 June 1986. Instead the plaintiff commenced proceedings with the service of the process on the defendant on 23 August 1988. There is no evidence before this court that shows that the defendant caused the plaintiff

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to wait until that date before instituting proceedings. Nor can it be maintained that since the defendant had filed its plea that it was under a duty to the plaintiff to indicate that the defendant was not going to raise the limitation period, particularly as the Prescription Act 1975 expressly allows prescription to be raised at any stage of the proceedings.

The written agreement is the Air Zimbabwe air waybill which contains the "Conditions of Contract" that specifies that carriage under this was subject to the Warsaw Convention. The most relevant provisions are Articles 18-22; 24; 25; 26 and 29. Article 18 makes a carrier liable for damage sustained in the event of the loss of any cargo during the carriage. Article 24 states that any action for damages covered under Article 18 however founded can only be brought subject to the conditions and limits set out in the Warsaw Convention. Article 22(2) and (5) indicates that the liability for carriage of cargo is limited to 250 francs per kgunless special declaration is made. The sum in francs is deemed to refer to a currency unit consisting of 65 and a half milligrams of gold of millesimal fineness 900, which sum may be converted into national currencies in round figures. The conversion of the sums into national currencies other than gold must in judicial proceedings be made according to the gold value of such currenies at the date of Judgment. Article 25 provides that the liability limit of Article 22 does not apply where the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result provided that the servant or agent was acting within the scope of his employment. Article 26 requires that a complaint concerning cargo damage must be in writing within, at the latest, 7 days of the receipt of the cargo; failing complaint no action will lie against the carrier except for fraud on his part. Article 29 provides that the right to damages is extinguished if action is not brought within 2 years reckoned from the date of the cargo's arrival or from the date it ought to have arrived and the method of calculating the period must be determined by the court seized with the action.

The statement of agreed facts mentions that 4.1655 kg of gold was not recovered, with the amount of sale proceeds for this being $61 970,23. In their letter of 5 April 1988, included with the statement of agreed facts, the

defendant's legal practitioners were of the view that the limitation in francs in Article 22 should be converted into sterling in accordance with the provisions of the Carriage by Air (Sterling Equivalent) Order 1986, which seems to be a reference to the English SI 1986/1778 and which specified 250 francs as having sterling equivalent of £13.63 sterling a kilogram. On this basis, the defendant's legal practitioners offered settlement to the plaintiff for the missing consignment of gold.

In *SS Harnland v SS President Angot* (1972) 7 Eur Transport Law 933 the Netherlands Supreme Court used the "official" value of gold as a conversion factor. On the other hand, in *Olympic Airways v Zacopulos* (1972) IATA ACLR No 461 the Athens Court of Appeal applied the "market" value of gold. Mr *de Bourbon* referred to a number of cases including *Trans World Airlines Inc v Franklin Mint*, *supra*, where the Par Value Modification Act had set an "official" price of gold in the USA at US $42,22 per ounce; but this Act was repealed in 1978. However,

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the Civil Aeronautics Board (CAB) continued to rely on the last 1978 "official" price of gold at US $42,22 per ounce as a conversion factor. The Federal District applied this and held that the conversion factor was the last "official" price of gold and ruled that Trans World Airlines' liability under the Warsaw Convention was limited accordingly. The Court of Appeals for the Second Circuit concluded that the Warsaw Convention's liability limit was unenforceable (due to the repeal of the Par Value Modification Act) in the USA as it required a factor for converting the liabilities limit into US dollars. But the US Supreme Court (Stevens J dissenting) upheld the Federal District Court by asserting that the Warsaw Convention's liability limit remained enforceable despite the repeal in 1976 of the Par Value Modification Act and the CAB's use of the 1978 last "official" price of gold of US $42,22 per ounce as a conversion factor was valid. O'Connor J, for the majority, maintained that the Warsaw Convention's first "purpose was to set some limit on the carrier's liability", its second objective was to set a stable, predictable and internationally uniform limit" and "not a parochial, standard". She found the CAB's choice as stable and predictable but she recognized that the Warsaw Convention's "objective of international uniformity might require periodic adjustment by the CAB". She continued that the third purpose of the Warsaw Convention's gold-based limits may have been its link to a constant value but recognized that in an inflationary economy this may fail on the long term. She agreed that between 1934 and 1978 the value of the liability limit, as measured by the free market price of both gold and other commodities, had declined substantially, while the official price of gold was formally maintained. However, she could "not ignore the actual, reasonably harmonious practice adopted by the United

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States and the other signatories in the first 40 years" of the Warsaw Convention's existence. Therefore, she concluded that, as of 31 March 1978, the CAB's choice represented a "correct" conversion of the liability limit into dollars. According to her, tying the liability limit to free market price of the gold would no longer serve to maintain constant value of carrier's liability since a free market price of gold "would simply force carriers to become unwilling speculators in the gold market. Whatever other purposes they may have had, the convention's framers and signatories did not intend to adapt or agree to a liability limit that is fluid, uncertain and altogether inconvenient." Stevens J, on the other hand, asserted that the majority held that the CAB's choice was"deemed to correspond more closely to the Convention's 'purposes' than the limitation actually selected by the Convention itself". He observed:

> "In setting on a particular figure for a liability limitation the delegates at Warsaw first had to agree upon a common standard of value. They did so in unambiguous terms: the standard of value was gold of a stated fineness. Art. 22(4). The liability limitation for cargo was set at 250 units of fine gold weighing 65 and half grams per unit. Art. 22(2), 22(4). The delegates chose an international standard of value ...
>
> A gold clause such as that contained in the Convention was common in treaties, see, eg Article 262 of The Treaty of Versailles; Article 214 of The Treaty of St Germain, and Article 197 of The Treaty of Trianon and other international agreements
>
> ... The Permanent Court of International Justice, in Payment of Various Serbian Loans Issued in France (PC1J Series A (1928-30) No 14), Payment in Gold of Brazilian Federal Loans Issued in France (PC1J Series A (1928-30) No 21), held that simple references to the gold franc in certain international obligations were intended

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to represent a gold standard of value ... The Court continued:

> 'As this standard of value was adopted by the Parties, it is not admissible to assert that the standard should not govern the payment because the depreciation in French currency was not foreseen, or, as it is insisted, could not be foreseen at the time the contracts were made. The question is not what the Parties actually foresaw, or could foresee, but what means they selected for their protection. To safeguard the repayment of the loans, they provided for payment in gold value having reference to a recognized standard [of weight and fineness] ... The conclusion at which the Court has thus arrived is not affected by the fact that, for more or less extended periods gold specie in francs or

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> a franc gold parity was not quoted on the money market, as was the case at the time when the loans were issued; for the value can always be fixed either by comparison with the exchange rates of currency of a country in which gold coin is actually in circulation, or, should this not be possible, by comparison with the price of gold bullion ... Once the gold value is fixed, it is its equivalent in money in circulation which constitutes that amount which is payable ... It was depreciation in value that was the object of the safeguard, not this or that particular currency, and it was evidently for this reason that the reference was made to the well-known stability of gold value.'

...

Moreover, the gold clause did not depend on signatory nations adhering to a gold standard. Indeed, such clauses were used in contemplation of a nation going off the gold standard as method of describing and measuring payment with the intention of guarding against fluctuations in the value of a domestic currency. Feist v Société *Intercommunale Belge D'Electricite* [1934] AC 161, 171-173.

...

The Court tells us that the limit agreed to by the Convention is 'fluid, uncertain, and altogether inconvenient' in to-day's world. If the convention as drafted is unworkable in to-day's world, that should not be surprising ...

The majority takes the Convention written for a few years ... and rewrites it in the hope that it will last a few more years ... Just why it does so escapes me. The question whether that needs to be done and the question whether that should be done are simply not decisions for this Court to make."

Various approaches have been adopted by other courts; some are in favour of the "official" price while others adopt the "market" price of gold.

Section 8(4) of the Carriage by Air Act [*Chapter 256*] states that the Minister of Transport and Energy may, by notice in the *Gazette*, specify the respective amounts which for purposes of Article 22 of the Warsaw Convention are to be taken as equivalent to the sums expressed in francs. To date the Minister has not issued any notice in the *Gazette*. This means, as STEVENS J observed, that this court must accept that the reference to the gold franc in the Warsaw Convention was intended to represent a gold standard of value. The signatories of the Warsaw Convention selected this gold standard of value and provided for payment in gold value. It follows that this court therefore has to fix the value with reference to the price of gold bullion set by the Reserve Bank of

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Zimbabwe. Once the gold value is obtained the equivalent in dollars which constitutes that amount will then be payable.

The response to the stated case is as follows:

(1) The defendant is not precluded from relying on the limitation of liability and extinction of action set out in the Warsaw Convention.

(2) The Air Zimbabwe air waybill was a valid document in terms of the Warsaw Convention and the plaintiff's claim (based on the defendant's servant's conduct done with intent to cause damage or recklessly and with knowledge that damage would probably result) had become extinguished in terms of Article 29 of the Warsaw Convention.

(3) Estoppel did not apply in these proceedings.

(4) Since the defendant was not precluded from relying on the limitation of liability as determined in paragraph (1) above, the defendant's liability for the loss of the consignment of gold weighing 4.1655 kilograms in terms of Article 22 of the Warsaw Convention was limited to 250 (gold) francs per kilogram, to be converted (once the gold value has been obtained from the price of gold bullion set by the Reserve Bank of Zimbabwe) to the equivalent in dollars.

(5) Proclamation No 36 of 1957 (SRGN 410/1957) was made in terms of s 5(1) of Chapter 256 of 1939 and it was to be read as one with Proclamation No 17 of 1965 (SRGN 283/1965) made in terms of s 5(1) of Chapter 270 of 1963. Chapter 270 of 1963 in Annexure 1 of Chapter 256 was repealed by Proclamation No. 8 of 1982 (SI/1982). Section 15(2) of the Interpretation Act [*Chapter 1*] states that nothing in subs (1) shall be taken to authorize the continuance in force, after the repeal of an enactment, of any statutory instrument made under that enactment. Accordingly Proclamation No. 36 of 1957 and Proclamation No. 17 of 1965 did not continue in force after the repeal of Chapter 270 of Annexure 1 of Chapter 256 by SI 85/1982.

(6) The plaintiff is not entitled to be paid $61 970,23 for the loss of the consignment of gold but for the loss of 4.1655 kilograms of gold, limited to 250 (gold) francs per kilogram converted as indicated in paragraph (4) above.

In all the circumstances, there will be an order in terms of the alternative prayer to the defendant's amended plea where it consents to Judgment. Accordingly, the plaintiff is only entitled to Judgment of such sum in dollars as represents the gold value of the loss consignment of 4.1655 kg at 250 (gold) francs per kilogram. Such gold value had to be ascertained in accordance with the standard of weight and fineness specified in Article 22

of the Warsaw Convention. Every gram or fraction of a gram of such ascertained gold value must be treated as representing the price of gold bullion set by the Reserve Bank of Zimbabwe

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in dollars on the date of Judgment. Further in respect of the balance of the plaintiff's claim it is dismissed with costs of suit.

Atherstone & Cook plaintiff's legal practitioners

Sawyer & Mkushi respondent's legal practitioners

S v RAMOTALE 1992 (2) ZLR 397 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Criminal appeal

1 December 1992

Flynote

Evidence - culpable homicide arising out of motor accident - need for proper scrutiny of real evidence and to assess credibility of witnesses by comparing their testimony against real evidence - evidence on point of impact - evidence on death and cause of death

Headnote

Two motor vehicles had collided and a number of passengers in one of the vehicles had been killed. The appellant had been tried and convicted of culpable homicide. The State had alleged that he had strayed onto the wrong side of the road and collided with the complainant's vehicle. On appeal the conviction was set aside, the court finding that the evidence was not adequate to support a conviction. In reaching this conclusion the court pointed out shortcomings in the evaluation of the evidence by the trial magistrate. These shortcomings were as follows:

- The magistrate had found that the State witnesses were credible. This finding had been based solely on impressions gained from their demeanour. The Supreme Court said that this was a wrong approach. In motor collision cases credibility cannot be measured by demeanour. The complainant and his witnesses may be mistaken about or not be prepared to admit to the exact location of the complainant's vehicle at the time of the accident. The credibility of such witnesses in these circumstances can only be measured by comparing their testimony against the real evidence.
- The magistrate had failed to scrutinise properly the real evidence. In particular he had failed to examine the implications of glaring discrepancies between the rough drawing of the accident situation

MCNALLY JA

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drawn up soon after the accident and the sketch plan drawn up some days later.

The Supreme Court also commented on how to approach evidence of the point of impact in a motor accident case. It commented upon what evidence must be produced of death and cause of death in culpable homicide cases. It pointed out that prosecutors tend to forget the need to prove that the deceased died as a result of the collision. In this case, the prosecutor produced by consent four post-mortem reports, and the police witnesses spoke of "bodies scattered on the road". No-one said that they were dead bodies. And even if they were dead, no-one said they were the same bodies as those referred to in the post-mortem reports and named in the charge. Either the defence should have been asked to make a formal admission about these matters or the deaths and the cause thereof should have been properly proved.

S Nkiwane for the appellant

L R Goredema for the respondent

Judgment

McNally JA: Every motorist is familiar with the problems of driving at night when either your own lights are inadequate or the oncoming driver's lights are glaring. Usually, after a moment or two of extra and anxious concentration, the danger passes.

In this case the danger did not pass. An Army lorry driving from Bulawayo along the main road to Beitbridge met a Kombi full of passengers from South Africa 26 kilometres out of Bulawayo at about midnight on 1-2 January 1991. They collided. It appears that the front offside corner of the Army vehicle struck the side of the Kombi somewhere near the driver's door.

As a result of the collision four passengers in the Kombi died. The driver (a South African) had his leg amputated. When he recovered he was prosecuted and convicted of culpable homicide. At the hearing of his appeal we set aside the conviction and sentence. We said that our reasons would follow. I propose to set out those reasons in the form of a series of comments on various aspects of the case and of the Judgment by the magistrate.

1. CREDIBILITY

The magistrate set out the evidence of each State witness in brief summary and without comment. He then summarised the accused's evidence, pointing to a minor contradiction. He then concluded:

McNALLY JA

> "I must say that these State witnesses gave evidence well and the court accepts their evidence as the truth of what happened. Their evidence is corroborated by the Police officer who attended the scene and was adamant that the point of impact was on the Army driver's side."

There is absolutely no examination of the testimony of the men in the light of the real evidence on the ground which is so important in collision cases. It is notorious that most drivers in collision cases swear that they were driving cautiously on the extreme left hand side of the road.

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They do so for one of three reasons: either they were in fact doing so; or they honestly but mistakenly thought they were doing so; or they are not prepared to admit that they were not doing so.

Credibility in such cases cannot be measured by demeanour. It can only be measured by comparing the testimony against the real evidence. This the magistrate simply did not do.

2. THE REAL (OR CIRCUMSTANTIAL) EVIDENCE

The real evidence in this case consisted of -

1. Photographs of the damaged vehicles;
2. Facts recorded in the Traffic Accident Book;
3. The sketch plan of the scene.

All of these were introduced and explained by the Police witness.

The photographs were not particularly helpful. But the differences between the rough drawing in the Traffic Accident Book, which was made shortly after the accident, and the sketch plan prepared in Bulawayo some 18 days later are remarkable. So is the magistrate's failure to comment on them.

The major difference is that in the sketch plan the Army vehicle is shown as having come to rest on his correct side of the road, just inside the centre line of the road and some 47,5 metres ahead of the alleged point of impact.

In the Traffic Accident Book the Army vehicle is clearly shown straddling the centre line of the road.

The other differences are -

McNALLY JA

1. The sketch plan shows a brake or tyre mark made by the Army vehicle's near side (left) rear tyre from after the point of impact to where it stopped, and a gouge mark made by that vehicle's differential or front axle (the policeman is not sure which it was) which runs parallel to the brake mark. Both are roughly parallel to the broken centre line. Neither is shown on the Traffic Accident Book drawing.
2. Both documents show an X (the alleged point of impact) on the Army lorry's side of the road. But the Traffic Accident Book shows glass scattered on both sides of the broken centre line. This is omitted from the sketch plan.
3. The Traffic Accident Book shows the Kombi's direction at the time of the accident by means of an arrow pointing along the road to Bulawayo. On the sketch plan the arrow swerves from the extreme left of the road towards the point of impact. There are no marks on the road to support this drawing, which can only be described as unfoundedly

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Judgmental.

The major conflict was put to the policeman in cross-examination. He simply admitted the difference. He gave no explanation. Yet the difference is fundamental. If the drawing in the Traffic Accident Book is correct then the Army vehicle was probably on the wrong side of the road at the point of impact. If the sketch plan is correct the Kombi was probably on the wrong side of the road or very close to it.

If we do not know which is correct, we are deprived of the most important piece of real evidence against which to test the credibility of the witnesses. On either version, it may be noted in passing, the Army driver's statement that "I moved to the far left side of the road" is shown to be false. He was, at best for him, just inside the centre line, and at worst across it.

On this basis alone, it is impossible to say that the defence version of the crash is false. On this basis alone, therefore, the appellant should have been acquitted. But certain other comments need to be made.

3. THE PLAN OF THE SCENE: MEASUREMENTS

It should have been obvious to the police detail that the major issue was going to be where the impact took place in relation to the centre of the road as marked by the broken white line. In consequence there were two vital measurements which needed to be made. One was the distance between the

tyre mark and the centre line. The other was of the width of the Army vehicle. Neither of these measurements was noted or recorded.

If they had been, we would have known with absolute certainty the path of the offside (driver's) edge of the Army vehicle in relation to the centre line immediately after the collision. This in turn would have been a strong indication of the position of the Army vehicle at the moment of impact in relation to the centre line.

A proper recording of these two measurements would first of all have helped to decide which driver should have been prosecuted, and secondly would have been a major factor enabling the court to convict.

Other helpful measurements and observations would have been:

a. How far from the approximate centre of the glass particles did the tyre marks begin?

b. Was the gouge mark central under the Army vehicle and if not how far was it from one side or the other?

c. Where approximately on the side of the Kombi was the point of impact?

4. THE POINT OF IMPACT

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(See generally Cooper Motor Law Vol 2 p 420.)

The police detail was very confused about this. When it is clear, as it was here, that the Army vehicle's offside headlight was roughly the first part of that vehicle to hit the Kombi, then the glass fragments from that headlight will give a rough indication of the point of impact.

Clods of earth or piles of dust, on the other hand, may fall from all parts of both vehicles and more often than not will fall from the rear wheel hubs. A clod of earth therefore, if one does not know from which part of which vehicle it fell, can be of no help except as a general indicator of the area where the accident took place.

The police detail put his X (point of impact) some distance away from the glass particles and further into the side of the road on which the Army vehicle was travelling. When asked by the court he said:

McNALLY JA

> "The glass particles were scattered all over including the centre, but the dust particles were heaped at the point of impact."

That statement shows how unreliable the positioning of the alleged point of impact was. In fact, since the Army vehicle hit the side of the Kombi, it is likely that the glass particles would bounce off the side of the Kombi. So their presence on both sides of the centre line is possibly more consistent with an impact on the Kombi's side of the road.

5. EVIDENCE OF DEATH AND CAUSE OF DEATH

Prosecutors tend to forget the need, in culpable homicide cases, to prove that the deceased died as a result of the collision. In this case the prosecutor produced by consent four post-mortem reports, and the police witness spoke of "bodies scattered on the road". No-one said they were dead bodies. And if they were, no-one said they were the same dead bodies as those referred to in the post-mortem reports and named in the charge.

Either the defence should have been asked to make a formal admission, or the deaths should have been properly proved.

For all these reasons we were satisfied that the evidence was not adequate to support a conviction.

Gubbay CJ: I agree.

Korsah JA: I agree.

Anthony Murphy Attorneys, appellant's legal practitioners

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GUMBO v NORTON-SELOUS RURAL COUNCIL 1992 (2) ZLR 403 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

McNally JA, Manyarara JA & Korsah JA

Civil appeal

29 September & 3 December 1992

Flynote

Employment - Labour Relations Act 16 of 1985 - whether Act applicable to employment conditions of officer of rural council - Labour Relations (General Conditions of Employment) (Termination of Employment Regulations, 1985 (SI 371 of 1985) - whether applies to dismissal of employees of rural council

Statutory interpretation - whether certain labour regulations apply to various parastatals and to rural and urban councils - conclusion depends upon wording of statutes relating to particular institution

Headnote

Section 3 of the Labour Relations Act 1985 provides that the Act applies to all employers and employees "except those whose conditions of employment are otherwise provided for by or under the Constitution".

By virtue of s 3(1) of the Interpretation Act [*Chapter 1*], "Act" includes any statutory instrument in force under it.

The Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 ("the Dismissal Regulations") were promulgated under the Labour Relations Act. Under ss 2 and 3 of the Dismissal Regulations, an employee to whom the Labour Relations Act applied could only be dismissed with Ministerial approval but he could be suspended pending a ruling by a labour relations officer.

The appellant, who was an employee of the Norton-Selous Rural Council, had been dismissed by the Council acting in terms of s 62(3) of the Rural Councils Act [*Chapter 211*]. The Minister of Labour's approval had not been sought for the dismissal and neither had the matter been referred to a labour relations officer. If the Labour Relations Act and the Dismissal

McNALLY JA

Regulations applied in this case, then the dismissal would have been unlawful.

Held, that the conditions of employees of rural councils were not otherwise provided by the Constitution. Therefore the Labour Relations Act and the Dismissal Regulations applied to such employees and as no Ministerial approval for the dismissal had been obtained and the matter

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had not been referred to a labour relations officer, the dismissal had been unlawful.

Held, further, that in deciding whether the Labour Relations Act and the Dismissal Regulations applied to particular institutions set up by statute the specific wording of the relevant statutes setting them up had to be examined.

Held, further, that whereas special legislative provisions had been passed allowing urban councils to obtain permission for dismissal from the Minister in charge of local government instead of from the Labour Minister and to make inapplicable to parastatals the provisions the Labour Relations Act, no such special legislative provision had been passed in relation to rural councils.

Held, further, that the effect of s 3 of the Labour Relations Act was to take away from employers certain powers they originally had over their employees. Whether the employers had these powers by virtue of private contract or by reason of statutory enactment was immaterial. These powers were now to be exercised under the overall control and supervision of the central government. The only employer exempted from this takeover of powers was, logically enough, the central government itself. The conditions of various officers of central government were otherwise provided for by or under the Constitution. These included members of the public service, the police, the defence forces, the judiciary, the Ombudsman and his deputy, the Chiefs, the Comptroller and the Auditor-General and the Attorney-General and his deputy.

Cases cited:

Gumbo v Norton-Selous Rural Council HH-283-91 (unreported)

Musendekwa v PTC HH-33-91(unreported)

Musendekwa v PTC S-165-92 (unreported)

Nyakanyanga v Postmaster-General NO HH-19-89 (unreported)

Mutare City v Ncube & Ors HH-139-87(unreported)

Masasi v PTC 1991 (2) ZLR 73 (H)

Matereke v CT Bowring & Assocs (Pvt) Ltd 1987 (1) ZLR 206 (S)

JB Colegrave for the appellant

A J Dyke for the respondent

McNALLY JA

Judgment

McNally JA: This appeal raises a question of statutory interpretation which (it is said) has been answered differently by different judges. It is whether or not the provisions of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985

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(SI 371 of 1985) apply to parastatals and/or to rural and urban Councils, or to one or other or some of them. In fact, as I will endeavour to show, one cannot generalise. Differently worded statutes lead to different conclusions.

The appellant in the present case, to whom I will refer as "Mr Gumbo", was employed by the Norton-Selous Rural Council ("the Council") as an engineer. He was dismissed by the Council on 11 April 1991. But the Council did not obtain the prior written approval of the Minister of Labour, Manpower Planning and Social Welfare ("the Minister"). Therefore, it was contended, in the light of SI 371 of 1985, the dismissal was unlawful and of no effect.

In the court a quo (*Gumbo v Norton-Selous Rural Council* HH-283-91) CHAMBAKARE J rejected that contention and upheld the dismissal. He had earlier come to a similar conclusion in relation to a Posts and Telecommunications Corporation employee in *Musendekwa v Posts and Telecommunications Corporation* HH-33-91 (upheld on appeal in Judgment number S-165-92). So had Gibson J in *Nyakanyonga v Postmaster-General NO* HH-19-89, citing REYNOLDS J in *City of Mutare v Ncube & Ors* HH-139-87. But in *Masasi v Posts and Telecommunications Corporation* 1991 (2) ZLR 73 SMITH J concluded that the Minister's approval was essential. In its absence he ruled the dismissal unlawful.

The relevant statutory provisions in this case are as follows:

1. The Rural Councils Act [*Chapter 211*], though repealed by the Rural District Councils Act 8 of 1988, continues to exist for the purposes of this case by reason of the provisions of s 166(2)(a) of Act 8 of 1988.

2. Section 62(3) of the Rural Councils Act, as amended by s 25 of Act 31 of 1974, provides:

"Unless otherwise provided in the contract of employment concerned, a council may, by resolution passed by a majority of the councillors entitled to sit on the council, discharge -

(a) an officer, upon notice of not less than three months; or

(b) an employee . . . ;

McNALLY JA

Provided that a council may discharge without notice an officer or employee for any dishonesty, misconduct, negligence or other reason which would justify such discharge at common law."

Mr Gumbo was "an officer" and it is not in dispute that his discharge was proper in accordance with that provision of the Act.

3. The Labour Relations Act 16 of 1985, which came into effect on 15 December 1985 provides in s 3 that:

"This Act shall apply to all employers and all employees except those whose conditions of employment are

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otherwise provided for by or under the Constitution."

4. The Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (which I shall refer to as "SI 371/85") were promulgated under the Labour Relations Act on 13 December 1985, but nothing turns on the fact that they pre-dated the Act itself by two days (see *Matereke v C T Bowring & Associates (Pvt) Ltd* 1987 (1) ZLR 206 (S) at 207).

5. In terms of ss 2 and 3 of SI 371/85:

"No employer shall, summarily or otherwise, terminate a contract of employment with an employee unless -

(a) he has obtained the prior written approval of the Minister to do so; or

(b) . . . ; or

(c) . . . ; or

(d) the contract of employment is terminated in terms of section 3."

Section 3 goes on to provide for suspension pending a ruling by a labour relations officer.

It is common cause that the respondent has not either obtained the Minister's approval or referred the matter to a labour relations officer. If that procedure is necessary, then the dismissal was unlawful. It is essential therefore to determine whether the Labour Relations Act and SI 371/85 apply in the present case or not.

The first, and perhaps the only, question which needs to be answered is

McNALLY JA

whether an officer of the Norton-Selous Rural Council is an employee "whose conditions of employment are otherwise provided for by or under the Constitution" by reference to s 3 of the Labour Relations Act. If he is, the Minister's approval is not necessary. If he is not, the Minister's approval is necessary.

CHAMBAKARE J did not deal directly with this question. He seemed to accept that for some purposes the Labour Relations Act and Regulations might apply to rural council officers. His main conclusion, however, was that a mere regulation made under the Labour Relations Act could not override a specific provision in the Rural Councils Act itself. He pointed to s 17(2) of the Labour Relations Act. This provides that regulations made under the Act "shall prevail over the provisions of any other statutory instrument or of any agreement or arrangement whatsoever .....". It does not say the Regulations shall prevail over the provisions of any other Act.

CHAMBAKARE J also pointed to the absurdity that would result if a statutory body such as the respondent, after full enquiry in the exercise of its statutory powers, decided to dismiss an officer, and then had to submit its decision to a (relatively) lowly official such as a labour relations officer.

On the basis therefore that a regulation could not override a statute he decided that the

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procedure specifically set out in the Rural Councils Act was not overridden by the general provisions of the Labour Relations Act as read with the provisions of SI 371/85.

Smith J in *Masasi*, *supra*,, approached the interpretation question head-on. He said that the provisions of the Labour Relations Act and the Regulations were clearly intended to apply:

> "... to all employers and employees except those whose conditions of employment are provided for by or under the Constitution **which would principally mean members of the Public Service, the Zimbabwe Republic Police, the Defence Forces of Zimbabwe and the Prison Service.**" (My emphasis).

It is necessary to consider what the significance is of the word "principally" in that statement. No doubt His Lordship was contemplating the position, for example, of the Judiciary. But certainly by using that word he was making it clear that his list was not an exclusive one. The exception might apply to others.

McNALLY JA

I think it is necessary to have a closer look at the categories of persons covered by the phrase:

> '. . . except those whose conditions of employment are otherwise provided for by or under the Constitution."

Certainly members of the Public Service, the Zimbabwe Republic Police, the Defence Forces of Zimbabwe and the Prison Service are specifically referred to in the Constitution. So are the Judges, the Ombudsman or his Deputy, Chiefs, the Chairman of the Public Service Commission, the Attorney-General, the Comptroller and Auditor-General, and indeed the President himself, the Speaker of the House, Ministers and many others.

Regulations concerning the Public Service, the Zimbabwe Republic Police, the Defence Forces of Zimbabwe and the Prison Service are made in terms of the relevant sections of the Constitution - ss 75, 96 and 100. Their conditions of service are provided for both "by" and "under" the Constitution.

A judge's conditions of service, at any rate insofar as the termination of his employment is concerned, are provided for "by" the Constitution, in s 87. His salary and allowances, however, are provided for "under" the Constitution, in that s 88 provides that he shall be paid "such salary and allowances as may from time to time be prescribed by or under an Act of Parliament".

Thus, even if a judge's salary were to be provided for in a Statutory Instrument made "under" an Act of Parliament, it would still be provided for "under" the Constitution. "Under" in this context means, in my view, "as expressly provided for in".

Again, if one looks at the provisions in the Constitution for the removal from office of such persons as the Comptroller and Auditor-General (s 105(5)), the Attorney-General and his Deputy (s 110), the Ombudsman and his Deputy (s 110), and the Chiefs (s 111(4)), it is clear that provision is made directly or indirectly for the procedure for their removal from office. Their conditions of service in that regard are therefore provided for "by or under the Constitution".

What then is the position of Mr Gumbo, an officer of a rural council, whose tenure of office is regulated, not by the Constitution, but by the Rural Councils Act? That Act, in a broad sense, is

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an Act "under the Constitution" in the sense that it was incorporated into the law of Zimbabwe in terms of

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s 113 of the Constitution. Can it therefore be said that Mr Gumbo is "an employee whose conditions of service are otherwise provided for by or under the Constitution"?

I cannot accept that interpretation for a number of reasons:

1. It would reduce the phrase "under the Constitution" to virtual meaninglessness. It would mean simply "not unconstitutionally". In that sense a private contract of employment between a man and his gardener would be a contract "under the Constitution" and thus exempt from the provisions of the Labour Relations Act. Clearly that was not intended.

2. Had it been the intention to exclude the employees of Rural Councils from the ambit of the Labour Relations Act, it would have been a simple matter to add to s 3 of that Act the words "or by or under any Act of Parliament". (The phrase appears in s 88 of the Constitution, as already noted).

3. The Parastatals Commission Act 1987 (now repealed) specifically provided in s 18 for the inapplicability of the provisions of the Labour Relations Act and Regulations to parastatals and their employees. But if, as the argument suggests, the provisions were inapplicable anyway, why was it necessary to make the provision? And if it was thought necessary, why was not a similar provision included in the Rural District Councils Act of 1988?

4. Similarly, the Urban Councils Act [*Chapter 214*] was amended in 1986 by an amendment to s 90(9). That amendment, introduced by Act 15 of 86, read as follows:

> "Notwithstanding any other law to the contrary, if the consent of the Minister [ie the Minister of Local Government, Rural and Urban Development] has been obtained for the discharge of any employee of a council, the council need not obtain the consent of any other Minister or authority."

The reference to "any other law to the contrary" is obviously a reference to the Labour Relations Act, enacted the previous year. The Legislature clearly understood that, without that provision, the consent of the Minister of Labour, Manpower Planning and Social Welfare would have been needed for the dismissal of an urban council employee. No such change was made in the Rural Councils Act. Indeed s 68(1) of the Rural District Councils Act 8 of 1988 uses quite different words.

MCNALLY JA

5. The wording of s 3 of the Labour Relations Act 1985 was made necessary by the very fact that the Constitution provided for the conditions of service and tenure of office of

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certain persons. They therefore had to be excluded from the ambit of the Labour Relations Act. Any change in regard to those persons would have had to be brought about by a change in the Constitution. All other persons were intended to be covered by the Labour Relations Act.

I am therefore convinced by the reasoning of Smith J in Masasi , *supra*, that s 3 of the Labour Relations Act does not exclude Rural Council officers or employees from the ambit of the Act. I am aware, of course, that His Lordship was not dealing with a Rural Council, but his reasoning leads inevitably to that conclusion.

It therefore becomes necessary to consider whether any obvious injustices or inconsistencies flow from such an interpretation. In particular I must deal with the reasoning of Chambakare J in coming to the opposite conclusion.

His main point was that a mere regulation made under the Labour Relations Act could not overrule a specific provision of the Rural Councils Act.

I do not accept the force of this argument, for two reasons. In the first place, logically it is not the Labour Relations Regulations which override the provisions of the Rural Councils Act. It is the provisions of s 3 of the Labour Relations Act which override the provisions of s 62 of the Rural Councils Act. Secondly, as pointed out by Mr *Colegrave*, the words "This Act" in s 3 of the Labour Relations Act mean "This Act and the regulations made under it" - see s 3(1) of the Interpretation Act. So it is not a question of a regulation overruling an Act, but of a later Act overruling an earlier Act.

Chambakare J then pointed to the absurdity of an interpretation which meant that a rural council, after going through the statutory procedure for dismissal, then had to submit to Ministerial approval or, worse still, to the approval of some relatively junior labour relations officer.

But the same could be said of a major industrial or commercial concern which wished to dismiss an employee. Many such bodies have elaborate internal procedures before a person can be dismissed. Despite this, they have then to seek Ministerial approval or the sanction of a labour relations officer. Why should a rural council be different simply because it is a creature of statute? After all, s 62(3) of the Rural Councils Act does no more than give rural

councils the powers that ordinary common law employers already have. And it was precisely those powers that the Labour Relations Act sought to modify.

In short, the effect of s 3 of the Labour Relations Act was to take away from employers certain of the powers they originally had over their employees. Whether the employers had these powers by virtue of private contract or by reason of statutory enactment was immaterial. The powers were now to be exercised under the overall control and supervision of the central government. The only employer exempted from this takeover was, logically enough, central

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government itself.

In 1986, by reason of the introduction of the new s 90(9) into the Urban Councils Act by the amending Act 15 of 86, the position of urban councils was modified. The approval of the Minister of Local Government, Rural and Urban Development was made acceptable as an alternative to that of the Minister of Labour, Manpower Planning and Social Welfare.

In 1987 the position of parastatals was modified by the specific term of the Parastatals Commission Act (since repealed). But no change has been brought about in respect of rural councils.

It will be apparent therefore that the position is different depending on whether the employer is a rural council, an urban council, or a parastatal. The conflicting decisions to which I have referred earlier are not necessarily in real conflict because the applicable statutes are differently worded.

In particular, I must point out that the decision in *Musendekwa's* case on appeal, *supra*, is based on totally different legislation. Musendekwa's dismissal from the Posts and Telecommunications Corporation was dealt with when the Employment Act 13 of 1980, the predecessor of the Labour Relations Act of 1985, was in force. The decision is neither relevant to, nor in conflict with, this decision.

This case, however, concerns a rural council and I have concluded that there is no provision in the Rural Councils Act which overrides the provisions of s 3 of the Labour Relations Act.

The prior written approval of the Minister of Labour, Manpower Planning and Social Welfare was therefore necessary before Mr Gumbo could be lawfully dismissed. That approval was not obtained. Therefore the dismissal was unlawful. It must follow that the appeal succeeds, with costs.

McNALLY JA

I am advised by the parties that in fact Mr Gumbo is now employed elsewhere and that all that is required is a declaratory order. Accordingly the following order is made:

1. The appeal is allowed with costs.
2. The order of the High Court in Case No. HC 2379/91 is set aside.
3. In its place the following order is made:

a. That the purported dismissal of the applicant by the respondent was invalid;

b. That the respondent pay the applicant's costs of suit.

Manyarara JA: I agree.

Korsah JA: I agree.

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Scanlen & Holderness, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

RITCHIE v DELTA PENSION FUND 1992 (2) ZLR 413 (SC)

Court **Supreme Court, Harare**

Manyarara JA, Korsah JA & Ebrahim JA

Civil appeal

21 September & 11 December 1992

Flynote

Costs - circumstances in which successful party will be deprived of his costs

Insurance - pension fund - age limit to join scheme - person joining fund misrepresenting that he was below age limit - fund paying out to widow but then finding out about misrepresentation - whether fund entitled to recover money paid out under conditio indebiti

Headnote

No person was eligible to join the pension scheme and related life insurance scheme run by the respondent if he was over 55 years of age. When the husband of the appellant joined that scheme he was over 55 but he misrepresented that he was under 55 and this misled the respondent as to his eligibility. After the death of her husband the respondent paid out to his widow, the appellant, a large sum of money representing the insurance benefits payable under the scheme. The respondent then found out that the appellant's husband had been over 55 at the time he joined the pension scheme. It alleged that the appellant had been unjustly enriched by the payment made to her by the respondent and claimed repayment of the sum paid by means of the *conditio indebiti*.

Held, that an insurance contract is a contract *uberrimae fidei* under which the party seeking insurance cover is obliged by law to disclose all material facts. Instead of disclosing his true age, the appellant's husband had deliberately falsified his date of birth and this misrepresentation had induced the respondent to allow an ineligible person to join the scheme.

Held, further, that the payment to the appellant had been made under a mistaken belief induced by her husband's misrepresentation that the

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husband was entitled to be a member of the scheme and that, on his death, his widow was

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entitled to insurance benefits.

Held, further, that the *conditio indebiti* applies whenever a payment is made by mistake to a person who is not entitled to that payment except where the person making the payment was so grossly negligent or reckless that it had to be inferred that he intended the payee to have the money whether or not it was owed to him.

Held, further, that the respondent had been somewhat careless in proceeding to pay out the money to the widow despite having been supplied with documentation by the widow which would have enabled it to discover the ineligibility of the husband. The respondent had not, however, been grossly negligent or reckless and it could not be inferred that it had intended the payee to keep the money whether or not it was owed. The respondent was thus entitled to recover the amount paid under the *conditio indebiti*.

Held, as to costs, that the trial judge was correct to deprive the respondent of its costs on the basis, firstly, that it had been careless in paying the money after it had been given documents showing the true date of birth of the deceased and, secondly, that it had made the appellant more determined to oppose the action to recover the money by making an insulting allegation that her marriage to the deceased had been bigamous.

Cases cited:

Govender v Standard Bank of SA Ltd 1984 (4) SA 392 (C)

Frame v Palmer 1950 (3) SA 340 (C)

Kelly v Solari (1841) 9 M&W 54

Divisional Council of Aliwal North v De Wet (1890) 7 SC 232

Calder v SA Mutual Life Assurance Soc 1972 (4) SA 285 (R)

EWW Morris for the appellant

AJ Dyke for the respondent

Judgment

Korsah JA: These are an appeal and cross-appeal against the Judgment of Smith J, handed down in the High Court, Harare, on 2 October 1991.

The respondent, Delta Pension Fund, the applicant in the court below, is a body corporate established in terms of the Pension and Provident Funds Act 20 of 1976. The appellant, the respondent in the court below, was the wife of James Robert Ritchie, the deceased. On or about 27 September 1989 the deceased applied for a position as an engineer with National Breweries, (called "Natbrew"), a division of Delta Operations (Private) Limited. In his

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application form he stated that his date of birth was **17 April 1937**. His application was successful and he entered into a contract of employment on 24 October 1989.

It was a term of the contract of employment that the deceased would be required, if eligible for membership, to join Delta's Pension and Group Life Assurance Scheme, the respondent. In terms of the rules of the respondent, no person is eligible to become a member of the respondent after he attains the age of fifty-five years. For the purpose of determining his eligibility for membership of the respondent he was required to provide a copy of his birth and marriage certificates. With this requirement he did not comply.

On 13 November 1989 the deceased completed certain forms for his employer's records and on one of the forms he stated that his date of birth was **17 April 1938**. This information was transmitted by the personnel department of Natbrew to the respondent. Relying on the information supplied by the deceased to Natbrew, which turned out to be false, the respondent believed in error that the deceased was eligible to become a member of the respondent. He was thus accepted, and paid contributions to the respondent, as a member of the respondent.

The deceased was asked several times by his employer to produce his birth certificate but failed to do so. On 18 April 1990 the deceased died. On the same date his employer's Personnel Manager informed the appellant of the employer's group insurance policy and asked her to let him have sight of the deceased's passport and birth certificate. She supplied these within a week of the request and they were passed on to the respondent's agent.

Both documents showed the deceased's date of birth as **17 April 1932**. On 1 June 1990 the documents were returned to the appellant and she was paid an amount of $120 000 in respect of Group Life Assurance benefits in the erroneous belief that the deceased had been eligible for membership of the respondent. When officials of the respondent were working out what "widow's pension" should be paid to the appellant, they realised, for the first time, that, as the deceased's date of birth was 17 April 1932, he had been over fifty-five years of age when he entered employment and was, therefore, not eligible for membership of the respondent pension fund.

The respondent, therefore, alleged that the appellant had been unjustly enriched and claimed repayment of the sum of $120 000 by means of the *conditio indebiti*

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The appellant resisted the claim on the grounds that she did not solicit or demand the payment; she was not a party to the completion of the various forms; the deceased had contributed $300 a month to the pension fund; and she had submitted his birth certificate and passport to the respondent several weeks before she was paid the money.

The respondent admitted having received the birth certificate and passport of the deceased from the appellant before effecting payment of the money, but said that it was the usual policy of the respondent to obtain from its members copies of all relevant documents, such as birth and marriage certificates, for the purpose of maintaining a complete set of records. Its employees did not consider it necessary, when they received the documents from the appellant, to

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scrutinise the dates of birth stipulated therein. Going by the information supplied by the deceased in his lifetime, it was assumed that the deceased had not misstated his date of birth when he completed the forms on 13 November 1989, and that the mistake only came to light when computing the "widow's pension".

One need hardly to be reminded that contracts of insurance provide the outstanding example of contracts *uberrimae fidei*. In such contracts the law requires the party possessing full knowledge of all the material facts (in this case the deceased) to make full disclosure of all those facts known to him, otherwise the policy may be vitiated for non-disclosure.

I think it is a general rule of the common law that where money is paid to another under the supposition that a specific fact is true which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back. As is stated in Wessels *The Law of Contract in South Africa* Vol II section 3635:

> "... if in error payment has been made of a thing which was not due, the thing or its value can by action be recovered back from the recipiens by the person who makes the payment."

ROSE-INNES J gave expression to the rule in the following words in *Govender v Standard Bank of SA Ltd* 1984 (4) SA 392 (C) at 396F:

> "In the case of the *conditio indebiti*, a person who makes a payment of money (or delivers a thing) to another due to a reasonable error of fact in the belief that the payment is owing, whereas it is not, may claim

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> repayment to the extent that the person who received the payment has been enriched at his expense."

The requisites for a claim under the *conditio indebiti*, as set down in *Frame v Palmer* 1950 (3) SA 340 (C) at 346D-F by Van ZYL J, are the following:

> "(a) The plaintiff must prove that the property or amount he is reclaiming was transferred or paid by him or his agent to the defendant.
>
> (b) He must prove that such transfer or payment was made *indebiti* in the widest sense (ie, that there was no legal or natural obligation or any reasonable cause for the payment or transfer).
>
> (c) he must prove that it was transferred by mistake."

It was not in dispute that the amount claimed was paid by the respondent or its agent to the appellant, and that there was no legal or natural obligation or any reasonable cause for effecting such payment.

The contention by the appellant was that the payment to her could only be said to be *indebiti* if the admission of the deceased to the respondent's pension fund was a *justus* error. And that, even assuming that such admission of the deceased to the pension fund was an error, such error could only have been *justus* if the deceased knew or ought reasonably to have known that

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he had to give his correct date of birth to the respondent. Mr *Morris* submitted that, of this, there is no evidence whatsoever. Nowhere, he said, was there an indication that the deceased was ever told that his eligibility for membership to the respondent's pension fund was dependent upon his being under the age of fifty-five years. This is doubtful.

In Natbrew's Conditions of Appointment, which was subscribed to by the deceased, para 7 recites that:

> "... you will be required to join the Company assisted Pension and Group Life Assurance schemes, contributions to which amount to 6'% of your monthly salary. In this connection, please supply our Personnel Department with a copy of your Birth and Marriage Certificates. Please note that the Company contributes 16% of your monthly salary to your pension in addition to your own contribution. Please refer to the Pension Fund Booklet for further details."

KORSAH JA

It is true that the Pension Fund Booklet was never produced, but it is clear from para 7 that the deceased was made aware that he was required to furnish his birth and marriage certificates for the purpose of the information contained therein to be used to effect his Pension and Group Life Assurance policies. The law required him, therefore, to make full disclosure of all those facts known to him, instead of which he not only failed to furnish the required documents, but deliberately falsified his date of birth on two separate occasions. Why, one may ask, does a man get the day and the month of his birth right on each occasion, but persistently get the year of his birth wrong, by opting for years that make him younger?

However that may have happened, in his application form the deceased had given his date of birth as 17 April 1937, and so when his employer completed the "Conditions of Appointment" form in October 1989 the misrepresentation as to the age of the deceased was transferred to that form. This made the deceased fifty-two years of age at the relevant time and, therefore, eligible to membership of the Fund. This was an error which originated from the misrepresentation made by the deceased. And the payment of the amount claimed by the respondent was induced by this misrepresentation as to the fact of the age of the deceased.

It has been said that for a claimant to succeed under the *conditio indebiti* the burden lies with him to establish that his error was either justifiable or excusable. In this regard, at section 3690 of Wessel's Law of Contract in South Africa , *supra*, is to be found the following:

> "The modern tendency, however, seems to be to attach little importance to negligence on the part of the solvens. The essential question for the court to decide is whether the plaintiff thought that he owed the money and whether he paid it in error. The negligence of the payer ought not to be considered as a ground for allowing the received to enrich himself at the payer's expense. The fact that the payer was careless ought not to preclude him from recovering back his money, provided that his carelessness cannot be construed into an intention that the person who receives the money should have it in any event, whether it was really due or not. **If the payer had the means or knowledge and carelessly refused to avail himself of the means he possessed to determine the true facts, his ignorantia supina aut affectata might well be construed either into actual knowledge or into such indifference as to whether the money was due or not**, that he must be held to have intended the payment whether he owed the money or not."

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KORSAH JA

The issues that fall for determination, in my view, are whether the respondent was in any way negligent in paying to the appellant the amount claimed, and, if so, whether such negligence was so gross "that a court can infer from it that the payment was made with an intention to make a gift, or that the money was paid intentionally or with complete indifference whether it was due or not, . . ." - see section 3688 of Wessels, *supra*.

The first point of note is that the mistake of fact relied upon by the respondent was not one of its own making, but was one which was induced by a misrepresentation of fact by the deceased which would have rendered the contract of insurance void *ab initio*.

The second point of relevance is that, although the appellant furnished the respondent with the birth and marriage certificates of the deceased wherein the date of birth of the deceased could have been gleaned before payment was effected, the payment was made without recourse to the documents furnished by the appellant but rather on the basis of the information furnished by the deceased regarding his date of birth, which made the deceased an eligible member of the Fund. Though the respondent had the means of knowledge at hand, such means of knowledge is not to be regarded as synonymous with actual knowledge.

The English case of *Kelly v Solari* (1841) 9 M & W 54 is one of the many cases which Wessels relied on for the views expressed at section 3690 of his work above quoted. In the words of Parke B at p 59 of the report:

> "If, indeed, the money is intentionally paid without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it. But, if it is paid under the impression of the truth of fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it."

And, in *Divisional Council of Aliwal North v De Wet* (1890) 7 SC 232, De Villiers CJ expressed himself thus at pp 234-5 of the report:

> "The plaintiff's ignorance should not be, as stated by *Voet, supina aut affectata* (12.6.7), the meaning of which expression he explains in

KORSAH JA

> another passage (22.6.7) to be that the ignorance should not be of a fact concerning the plaintiff's own affairs or of a fact which, although concerning the affairs of others, is known to everybody except a few individuals. **But even in regard to facts relating to his own affairs his ignorance may sometimes be excusable, and the illustrations given by Voet justify the conclusion that if the plaintiff had been led into the mistake by the defendant himself he is entitled to relief."**

In the present case, the deceased himself misrepresented his age to the respondent. It was this

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misrepresentation that induced the respondent to accept him as a member of the Fund. The respondent paid the amount claimed under the impression of the truth of a fact which was untrue. Since the respondent had been led into the mistake by the deceased himself, the respondent is entitled to relief. See also *Calder v SA Mutual Life Assurance Society* 1972 (4) SA 285 (R).

Had the deceased not misrepresented his age, he would not have been accepted as a member of the pension fund. It follows that the appellant would not have fallen into the purview of those persons entitled to the payment of death benefit from the respondent. She would not even have been requested to submit any documents. The error was that there was a valid policy in force, whereas there was not.

I am in agreement with Smith J that the failure by the respondent to ascertain the correctness of the representation by the deceased of his age constitutes carelessness rather than gross negligence or recklessness.

Regarding costs of the proceedings in the trial court, the learned trial Judge declined to award costs to the successful party, the respondent, because he was of the opinion that:

(a) the failure by the respondent to detect the false information which was submitted by the appellant's husband was such negligence as would disentitle the respondent to an award of costs; and

(b) the reference to bigamy in the respondent's founding affidavit reflected on the appellant's character.

The respondent lodged a cross-appeal against the order refusing it costs, on the basis that the learned trial Judge fell into error in disallowing costs on these grounds.

KORSAH JA

It was submitted by Mr *Dyke* that in effecting payment the respondent was entitled to rely on the date of birth furnished by the deceased and that it was reasonable to assume that the deceased had given the correct date of birth. If that was the case, it would not have been necessary to demand in the "Conditions of Appointment" that the employee should supply the Personnel Department with copies of his birth and marriage certificates. Indeed, the failure of the deceased to furnish these documents after persistent requests should have put his employers upon their enquiry. The omission by the respondent to check the birth and marriage certificates furnished by the appellant at its request before effecting payment amounts to carelessness. But for that omission this matter may not have been the subject of court proceedings.

Mr Dyke further submitted that the reference to bigamy on the part of the deceased reflected on the character of the deceased rather than the appellant and that the respondent ought not to have been deprived of its costs on this ground.

The accusation of bigamy was made generally, without reference to who was at fault. It read:

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"I have received information to the effect that the purported marriage may have been bigamous."

It does not specify whether it was the deceased or the appellant who, being already lawfully married, entered into what purported to be a lawful marriage with the other; or whether both parties, knowing that one or the other was married, entered into what purported to be a lawful marriage. These considerations apart, whenever an imputation of bigamy is made, which is unsupported by evidence, what it amounts to, it seems to me, is a false statement about a woman to her discredit. It is, in my view, an unjustified attack upon a woman's chastity when such an allegation of bigamy is made without supportive evidence.

The reasons advanced by the learned trial Judge for refusing to award costs are, in my view, unexceptionable and are best expressed in his own words:

"The general rule is that costs follows the event - the successful party is entitled to his costs. A successful party may, however, be deprived of his costs where he has been negligent in litigating or if he has led the unsuccessful party into litigating and the latter has acted reasonably in

instituting proceedings - see Cilliers Law of Evidence 2nd ed, paras 3.13 and 3.14. It seems to me that in this case the applicant should be deprived of its costs for two reasons. Firstly, it was the carelessness of the applicant in paying the money to the respondent, after it had in its possession documents showing the true date of birth of the deceased, that necessitated the action. The respondent, in my view, acted reasonably in opposing the action on the basis that she thought the applicant had been grossly negligent and that its negligence was inexcusable. Secondly, the allegation that her marriage was bigamous was an unnecessary insult which could only have made her more determined to oppose the application. It could not have helped the applicant's case in any way. The court must mark its displeasure at such allegation having been made."

Accordingly, the appeal is dismissed with costs. Likewise, the cross-appeal is dismissed with costs. The orders made by Smith J are to stand.

Manyarara JA: I agree.

Ebrahim JA: I agree.

Stumbles & Rowe, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

ZIJENA v MAPHOSA 1992 (2) ZLR 423 (SC)

Court **Supreme Court, Bulawayo**

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Gubbay CJ, Manyarara JA & Ebrahim JA

Civil appeal

8 & 18 December 1992

Flynote

Delict - defamation under customary law - defences - truthfulness - telling of lie - actionable if told with intention of injuring reputation - but may not be actionable if audience would readily dismiss statement as nonsense

Customary law - defamation - imputation of immorality defamatory both under customary law and general law - but differences between the customary law and the general law on defences available to defendant

Headnote

The respondent had been accused at a village meeting of setting fire to the appellant's granary. He was annoyed by this accusation. He believed that the appellant had committed adultery with the wife of one Gambiza and the relatives of Gambiza had burnt the appellant's granary as a reprisal for his adultery. In anger after this meeting he took aside one of the villagers and told him that the appellant had committed adultery with Gambiza's wife.

Held, that this statement imputing to the appellant immoral conduct by committing adultery was defamatory under both customary law and the general law.

Held, further, that there were differences as between the customary law in relation to the defences to an action for defamation.

Held, further, that although truth was a full defence under customary law, the respondent had not pleaded the defence of truth.

Held, further, that under customary law the defence of lying could be raised to an action for defamation. In both Shona and Ndebele custom a

MANYARARA JA

distinction was made between a lie told with intent to injure the plaintiff in his property or reputation, which is actionable, and a lie which the audience to whom it is published can readily dismiss as "nonsense". The defendant in the latter case would invariably be a person whom the community would consider to be a person who was not to be taken seriously because he was a lunatic. In the present case the respondent did not claim or feign insanity when he uttered the defamatory words and thus this defence did not apply.

R Moyo-Mujwabu for the appellant

P Dzima for the respondent

Judgment

Manyarara JA: The appellant sued the respondent in the Community Court at Mberengwa in an

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action for defamation, alleging that the respondent said of him that he had committed adultery with the wife of one Gambiza, for which he claimed damages in the sum of $5 300.

The respondent denied liability but the presiding officer disbelieved him and awarded the appellant $250 damages plus $340,39 as costs of suit.

Both parties appealed to the District Court against the Judgment. However, the appellant's appeal was struck off for late noting and only the respondent's appeal was heard. It was allowed with costs and the presiding officer's decision was set aside.

The appellant in his first ground of appeal to this court alleges that the evidence shows that the respondent did utter the words complained of and they were defamatory. It is alleged in the second ground of appeal that the magistrate, in allowing the respondent's appeal, dealt with the wrong words and misdirected himself. The point is conceded in the magistrate's reply to the notice of appeal.

The question of the quantum of damages has not been raised in the notice of appeal but Mr *Moyo-Mujwabu* has included it in the heads of argument he filed on the appellant's behalf. Consideration of this point must await the determination of the question of liability.

The magistrate dealt with the issue of liability in terms of the general law. The presiding officer in the Community Court appears to have done the same. But the latter expressly assessed damages along the customary law principles set out in Goldin & Gelfand *African Law and Custom in Rhodesia* p 200 *et seq*.

MANYARARA JA

The obscurity of the presiding officer's approach to the question of liability is inconsequential. It is common to both the general law and the customary law that a statement which attributes immorality to the plaintiff is defamatory and adultery is immoral: McKerron Law of Delict pp 171-2 and Goldin & Gelfand, op cit. The difference between the two systems lies in the defences open to a defendant as will be pointed out in my Judgment.

As I have said, the respondent denies uttering the words complained of but was disbelieved by the presiding officer. The magistrate considered the wrong words and he has properly left it to this court to determine whether the presiding officer's decision was correct. The case turns on credibility and one must examine the evidence to determine the question.

The general background to the case is not disputed. It is that both parties resided in the rural area of the Zvishavane district. The appellant described himself as a businessman. We do not know the respondent's occupation and it must be assumed that he was a villager.

On some unspecified date the appellant's granary hut was set on fire and apparently destroyed. The respondent was suspected of being the culprit but he denied any involvement before a tribal meeting ("*dare*") called to investigate the matter and to the police who were called in to do the same.

The version given on the appellant's behalf and denied by the respondent is that at the "*dare*"

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which was attended by the parties the respondent indicated that he knew the identity of the arsonist. As those attending the meeting dispersed, the respondent called the appellant's brother, Shadreck, aside and said something to him out of the appellant's hearing.

The relevant portion of the evidence is as follows:

> "He (the defendant) told me that the plaintiff had an affair with Gambiza's wife and (Gambiza's) cousins had burnt the (plaintiff's) granary."

The clear meaning of the statement is that Gambiza's relatives burnt the appellant's granary hut to avenge his adultery with Gambiza's wife. It is trite that the statement, if published, is defamatory *per se*.

Shadreck adds that at the time that the respondent uttered the words he "was crying and he threw down his (walking) stick". This piece of evidence is admitted but the uttering of the defamatory words is denied.

MANYARARA JA

Fani Murambi says that he was within earshot of Shadreck and the respondent. He was related to both parties and he states that he overheard the respondent say to Shadreck that the appellant "had taken Gambiza's wife." But he makes no mention of the burning of the appellant's granary hut and the respondent did not pursue the omission of that fact in cross-examination of the witness. However, whether the words uttered were those testified to by Shadreck or by Fani the result would be the same as the gravamen is that the respondent accused the appellant of adultery with Gambiza's wife.

The appellant admits that the respondent publicly denied uttering any defamatory words to Shadreck when he called him aside after the meeting to discuss the matter. The rest of the appellant's evidence is inadmissible hearsay, being a repetition of what Shadreck told him.

The respondent maintained his denial of Shadreck's and Fani's evidence as already stated. According to him the appellant and his relatives concocted the evidence in order to extract money from him for refusing to grant the appellant a certain servitude over his land. He attributed Fani's support for the appellant's case to ill-feelings which he believed that the witness harboured against him following a suit which the witness had previously instituted against him claiming damages for his adultery with the witness's wife. The outcome of the suit is not disclosed but it is reasonable in the circumstances to assume that the action failed.

The respondent's evidence proceeded as follows:

> "Junias (the plaintiff) asked to use my drain. I refused. Plaintiff's granary was destroyed by fire. A dare was called. People expressed their opinions. Someone else then mentioned that I had been arrested.
>
> I was called to the Police to be questioned about this granary. I told them that I knew nothing. They asked for suspects. I told them I knew of no one.
>
> The dare was dismissed. I then called defendant's brother and I told him I was not responsible for burning the granary. I started crying. My young brother came and took me home.

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A dare was called. Gambiza asked me. I refused I had mentioned the words. We then left.

. . .

I deny that I burnt plaintiff's granary. I also deny that I mentioned that he committed adultery with Gambiza's wife. All these things were planned. That is all."

MANYARARA JA

The respondent did not call any witnesses, nor did his cross-examination of the plaintiff's witnesses take his case any further.

The magistrate, in the Judgment now appealed against, admits that he understood the words complained of as: "He said (the granary) was burnt by Gambiza's cousins". This was a serious misdirection of fact which the magistrate concedes led him astray.

The Community Court considered the words correctly complained of, that the respondent said that the appellant had committed adultery with Gambiza's wife.

The presiding officer was impressed by the quality of the evidence led on the appellant's behalf and by the demeanour of the witnesses called. He concluded as follows:

"Defendant mentioned at the meeting that he knew the person who had burnt the granary. He obviously did not see the person but was acting out of suspicion. I say this because if he had seen the person, he should have told the police the truth when he was picked up by the police as a suspect. The purpose of calling plaintiff's brother aside after the meeting is very clear. It was the defendant's intention to exonerate himself from the blame, and to tell plaintiff's brother who had done it since he had mentioned at the meeting that he knew the person who had burnt the granary. I am of the opinion that defendant mentioned that Gambiza's cousins had burnt the granary. Defendant then should have provided Gambiza's cousins with a motive. Their motive should have been to avenge the alleged adultery which plaintiff had committed with their uncle's wife.

I cannot see the reason why plaintiff's first and second witnesses connived a story which implicates Gambiza's wife in order to plot (against) defendant. They could have thought of any other story besides this one.

In giving evidence, plaintiff's witnesses were straight forward. They were not at all shaken by defendant's cross-examination. I am of the opinion that they were to be believed. Accordingly I find that defendant did make the defamatory statement."

The conclusion accords with my reading of the brief record of the case and it effectively disposes of Mr *Dzimba's* contrary argument on the respondent's

MANYARARA JA

behalf which need not be set out. Any possibility of error on the presiding officer's behalf is eliminated by the authority on which he relied in his assessment of damages: Goldin and Gelfand op cit p 201, which reads as follows:

"Firstly words spoken in a heated moment approximates the defence of *rixa* under Roman-Dutch law. Tribal courts consider such a factor as affecting the amount of damages to be awarded, but it does not affect liability. Secondly, even if the attitude of others or the status of the plaintiff is not affected by a defamatory statement, a

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> tribal court awards damages for using unjustified words which upset the plaintiff. Irrespective of the attitude of others, if the words used reasonably or expectedly excite or anger the complainant, it can result in a breach of the peace which must always be preserved. Hence an action will lie irrespective of whether the complainant's reputation or status was affected."

On the respondent's own evidence, there was no love lost between him and the appellant for denying the latter the servitude he wanted over his land. To Fani he attributed bitterness over his belief that the respondent had committed adultery with his (Fani's) wife. Everyone at the tribal meeting as well as the police suspected him to be the arsonist which he denied. He had then called Shadreck aside to tell him something he did not want anyone else to hear.

If what the respondent had to say was innocent, he would not have called Shadreck aside. The inescapable inference is that what the respondent had to say was otherwise. He was unable to suggest why both Shadreck and Fani picked on the appellant's likely association with Gambiza's wife as the reason for the attack on the appellant's granary hut. For a person who claimed that the appellant's people and Fani bore grudges against him for the reasons he gave, it is improbable that he would have laid himself open to the accusation levelled against him by calling Shadreck aside in the circumstances he did.

The probability that the respondent was annoyed at being suspected of setting fire to the appellant's granary hut is overwhelming. It follows that he must have himself suspected the culprits to be Gambiza's relatives for the reason to which Shadreck and Fani testified. His behaviour was suspicious, to say the least, and his word as against that of the two witnesses was unconvincing. In my view, the required standard of proof was attained, that on a balance of probabilities the respondent published the defamatory statement. It may well be that he did so in anger *(rixa)* at being unjustifiably suspected of arson when

he knew or had reason to suspect who the culprits were and their reasons for committing the arson but he was not man enough to disclose such information to the public.

According to Goldin and Gelfand *op cit* it is a complete defence to defamation under customary law to prove that the statement published is true. The respondent did not avail himself of this defence. And if he doubted the truth of his belief, he should have held his tongue. He loosened it at his peril.

He chose to deny the allegations baldly and was disbelieved. It is trite that an appellate court will not lightly upset such a finding, based as it is on credibility and demeanour which the trial court is best placed to determine. I can see no reason for departing from the general rule in this case.

I would comment in passing on the validity of the defence of lying ("kunyepa") to which Goldin & Gelfand *op cit* also refer. Both the Shona and Ndebele draw a clear distinction between a lie told with intent to injure the plaintiff in his property or reputation, which is actionable, and a lie which the audience to whom it is published can readily dismiss as "nonsense" which may not be actionable. The defendant in the latter case would invariably be a person to whom the

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community concerned would readily refer as a person not to be taken seriously-normally referred to as "benzi" in Shona and "uhlanya" in Ndebele, which literally translates to "a lunatic".

The respondent did not claim or feign insanity when he uttered the defamatory words and his liability was satisfactorily proved.

Turning to the quantum of damages, all that the Community Court had to go by was the appellant's terse evidence that:

> "Maphosa refused that he had uttered these words. This is why I am claiming $5 300,00. He spoke bad things about me after my granary had been destroyed by fire. That is all."

As already mentioned, quantum was not a ground of appeal though Mr *Moyo-Mujwabu* included it in his heads of argument. Leaving aside the absence of the necessary application to amend the notice of appeal accordingly and for condonation of the lateness thereof, Mr *Moyo-Mujwabu* was unable to cite any authority for an award of damages of the magnitude claimed or to suggest any reason justifying interference with the Community Court's award.

MANYARARA JA

That court made its own assessment of the extent of the injury caused, and the court arrived at a value Judgment I would not disturb in the absence of a predecent for interfering therewith. The appellant's main aim was to clear his name and this has been achieved.

Therefore, I would allow the appeal with costs, set aside the District Court's judgment and confirm the Community Court's decision. It is so ordered.

Gubbay CJ: I agree

Ebrahim JA: I agree

James, Moyo-Mujwabu & Nyoni, appellant's legal practitioners

Hove, Mutasa & Associates, respondent's legal practitioners

MHLANGA v MTENENGARI & ANOR 1992 (2) ZLR 431 (SC)

Court **Supreme Court, Bulawayo**

Gubbay CJ, Manyarara JA & Korsah JA

Civil Appeal

7 & 18 December 1992

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Flynote

Civil procedure - one judge hearing some evidence in case - case then transferred to another judge - whether trial has to start afresh if parties consent to second judge adjudicating on basis of record of evidence heard by first judge and further evidence to be adduced

Headnote

After a judge trying a civil case had heard some evidence, the defendant made an allegation of bias against him. This judge then recused himself from the case. The case then came before a second judge. The second judge had before him the record of the testimony previously adduced before the first judge. The second judge decided that the trial should not start afresh but instead should resume from the point at which it had been adjourned. He did not ask counsel representing the parties whether they agreed to this course of action but neither counsel raised any objection to this being done. The second judge decided the case based on the record of the previous testimony and on further oral testimony.

On appeal it was argued by the appellant that the failure by the second judge to start the proceedings afresh amounted to a fatal irregularity which justified the setting aside of the entire proceedings.

Held, that the general rule was that where a judicial officer is unable to complete a part-heard civil trial, due to supervening death or resignation on account of ill-health or some other form of incapacity, his successor should commence the trial de novo. This general rule applied because the second judicial officer would be deprived of the substantial advantage of seeing and hearing the witnesses himself and of being able to compare their demeanour with that of the witnesses who testified in person before him.

1992 (2) ZLR p432

GUBBAY CJ

Held, however, that this rule was subject to the exception that the trial does not have to start afresh where the parties to the action agree to the the case proceeding before the second judge from the stage it had reached before the first judge. If all the parties to the proceedings consent to the second judge deciding the case on the basis of the record of the evidence adduced before the first judge and any additional evidence presented before the second judge, the second judge must accept their wishes and re-start the trial at that point, even if the original trial had reached an advanced stage. The second judicial officer must not override the wishes of the parties and insist that the trial commences *de novo*.

Held, further, that although it would have been better for the second judge to have asked their legal representatives if they agreed to the case proceeding from the point it had left off when it was before the first judge, the representatives had not objected to the case proceeding in this way and must be taken to have accepted this procedure. Because of this acceptance there was no irregularity in the proceedings.

Cases cited:

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Philipp v Lindau 1948 (1) SA 1033 (SWA)

Protea Assurance Co Ltd v Gamlase & Ors 1971 (1) SA 460 (E)

Samuel & Ors v Seedat 1949 (3) SA 984 (N)

Greenblo v Levett 1914 CPD 244

The Forest Lake [1966] 3 All ER 833 (PDA)

S Nkiwane for the appellant

R Moyo-Majwabu for the respondents

Judgment

Gubbay CJ: On 30 July 1986 the first and second plaintiffs, the respondents in this appeal, instituted an action against the defendant, now the appellant, in the High Court, at Bulawayo. They sought an order directing the defendant to re-register certain immovable property, being Stand H3, Mzilikazi Township, Bulawayo, ("the house") into the name of the second plaintiff.

It was alleged in the declaration that the house had been purchased in 1982 by the first plaintiff for her mother, the second plaintiff, it being agreed that it be registered in the defendant's name, as at the time the second plaintiff was not qualified in terms of Municipal Regulations to have it registered in her own name. It was to be transferred by the defendant to the second plaintiff upon her obtaining the requisite qualification. This she did in 1985. In her plea the defendant denied the existence of any such agreement, averring that she had purchased the house with her own funds and for her own benefit.

GUBBAY CJ

The trial of the action commenced on 19 June 1989, before Sansole J The opposing parties were represented by counsel. Over the course of that day and the next the evidence of the first plaintiff and her witness was led and they were fully cross-examined. On the morning of the third day the learned judge summoned the parties and their legal representatives to his Chambers. He disclosed that he had just received a letter addressed by the defendant, in which she complained that he ought not to be presiding over the trial since, in the past, he had been in love with the first plaintiff. Deeply offended by the implicit accusation of bias and the affront to his integrity, the learned judge invited the defendant to bring her grievance to the attention of the then Chief Justice in order for him to investigate its veracity. He intimated that he felt obliged to recuse himself from continuing with the trial, and awarded the plaintiffs the wasted costs of the two day hearing on the ground that the defendant should have raised her objection at the inception of the trial. Unfortunately the learned judge did not expressly order that the trial was to start *de novo* before another judge, although this was clearly inherent in his award of costs.

Thereafter the defendant made no attempt to substantiate her allegation of judicial impropriety. All that happened was that her legal practitioner withdrew from the matter and another was

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appointed to represent her.

After a delay of many months, caused by the inaction of the defendant, the parties were advised by the Registrar that the case was set down for hearing on 16 May 1990 before MUCHECHETERE J He was provided with a transcription of the evidence adduced before his predecessor, as were the parties.

On the afore-mentioned date MUCHECHETERE J announced that, in the exercise of his discretion, he had decided that the trial should resume from the point at which it had been adjourned before SANSOLE J, rather than commence *de novo*. He should, no doubt, have enquired of counsel who appeared for the parties whether they accepted his view that there was "no good reason for starting the matter afresh". Neither counsel raised any objection to the procedure outlined by the learned judge, although there is no indication that they expressly approved of it. Consequently, the trial continued just as it would have if SANSOLE J had still been presiding. The second plaintiff's evidence was taken and she was cross-examined. The plaintiffs then closed their case, and the defendant and her witness testified. In a reserved Judgment MUCHECHETERE J believed the evidence of the plaintiffs and rejected that of the defendant. He accordingly granted the relief claimed with costs.

GUBBAY CJ

The sole ground upon which the decision of the court a *quo* is now appealed against is that once SANSOLE J had recused himself, MUCHECHETERE J should have commenced the trial *de novo*, and that his failure to do so amounts to a fatal irregularity which justifies the entire proceedings being set aside.

As a general rule, where a judicial officer is unable to complete a part-heard civil trial, be it due to supervening death or resignation on account of ill-health or some other form of incapacity, his successor should commence the trial *de novo*, notwithstanding that to do so involves recalling those witnesses who have already testified and adducing their evidence afresh. See *Philipp v Lindau* 1948 (1) SA 1033 (SWA) at 1036; *Protea Assurance Co Ltd v Gamlase & Ors* 1971 (1) SA 460 (E) at 465A. The desirability of adopting such a course is self-evident. The second judicial officer would otherwise be deprived of the substantial advantage of seeing and hearing the witnesses for himself and of being able to compare their demeanour with that of the witnesses who testified in person before him. He would be steeped only partially in the atmosphere of the trial.

In such a situation the attitude of the litigants as to how best to proceed is, to my mind, of the utmost importance. It is not for the judicial officer to dictate that the trial is to re-commence at the point reached by his predecessor, although depending on the nature and extent of the evidence led it might appear to him desirable, for the avoidance of wasted costs, time and inconvenience, to so order. His duty is to consult the parties. He may bring his persuasive power to bear. But it is only in the event of it being agreed by the parties that he continue the trial, in the sense that the transcript of the proceedings so far be produced as evidence before him, that he is at liberty to do so. In the absence of consent, he must commence the trial afresh.

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In *Samuel & Ors v Seedat* 1949 (3) SA 984 (N) the magistrate trying the case fell ill and it was then placed before another magistrate. The parties agreed that the evidence which had already been given should form part of the record. The second magistrate gave Judgment for the respondent. The preliminary point taken on appeal was that the second magistrate had no jurisdiction to continue the case because he had not heard the evidence of the witness who had testified before the first magistrate. In dismissing the contention, Selke J, in whose Judgment Broome J concurred, said at 988-989:

> "Obviously, the first question must be, did the parties consent to what was done? Here they clearly did, and that puts the matter on quite a different footing from that on which it would be were there no such consent. The

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> next question is, I think, whether there is anything which suggests that the magistrate, by being confined to reading the notes of the evidence taken by his predecessor, was deprived to an appreciable extent of the benefits which he would have had by seeing and hearing the witness give the testimony contained in the notes."

With all deference, I do not consider that the limitation placed by Selke J upon the consent of the litigants is justified. If they are willing and anxious that the evidence previously given be accepted by the second judicial officer, I can perceive of no basis why their wish should not hold sway, even though the trial before the original judicial officer may have reached an advanced stage. I do not think it correct for the second judicial officer to override the decision of the parties and insist that the trial commence *de novo*.

There is support for this view. In *Greenblo v Levett* 1914 CPD 244 (not referred to by SELKE J), the case came before three different magistrates. When it came before the first it was postponed. It then came before another magistrate. Part of the evidence was led and there was then a further postponement as the defendant wished to have interrogatories to confirm his evidence. It was agreed that all the evidence taken so far should be accepted before any other magistrate who might further try the case. This was necessary as the second magistrate was only a relieving magistrate temporarily in Cape Town and would not be available at the resumed hearing. The matter finally came before the third magistrate who, after reading the record of the previous hearing and the interrogatories, decided the dispute on the merits. On appeal, there was no suggestion that he ought to have ordered the *viva voce* evidence to be led afresh before him.

The Forest Lake [1966] 3 All ER 833 (PDA) is perhaps an even more apposite decision. The facts were that, at a hearing before HEWSON J of a collision action involving foreign ships, certain witnesses had their evidence taken fully and were cross-examined. Thereafter the case was adjourned part heard. In the interim HEWSON J fell ill and retired before the adjourned hearing was resumed. Pursuant to the Rules of the Supreme Court, an order was made that the trial be heard *de novo* before another judge. Thereupon leading counsel for the parties moved an application requesting that the trial be restored using the evidence already given before HEWSON J In granting the relief KARMINSKI J said at 834E-G:

> "The real point of this application which needs consideration is whether the circumstances of this case, namely, that the original trial judge retired

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> when it was part heard, compels the court to start again at the beginning and to call de novo all those witnesses who are still available. It is clear, as both leading counsel realise, that to bring them back would be both difficult and expensive. The witnesses are masters, first officers and other members of the ship's companies concerned, including the master of a third vessel. Probably none of these witnesses are within the jurisdiction - indeed, probably few of them are British nationals - and it might be difficult to find a convenient date to bring them all here at any one time. Not less do I have to consider the resulting expense, because it is obviously undesirable from that point of view to bring witnesses back from all over the world for a further hearing if it can be avoided, not only on the ground of expense but also on the ground of inconvenience to hem and the shipping companies who employ them."

After distinguishing one early authority and referring to two later ones which supported his view, the learned judge continued at 835I-836A:

> "Having had the benefit of argument from counsel for the plaintiffs and counsel for the defendants, who has agreed in all respects with counsel for the plaintiffs' submissions on these points, I think that the right course to take here is to do what both counsel have asked me to do and to accept as evidence the evidence given on oath before Hewson J, in this case."

In sum, I am firmly of the opinion that if the parties agree to place before the second judicial officer the record of evidence adduced before the first and are content that he determine the issues between them by having regard to that evidence as well as any additional evidence that may be presented to him, he should give effect to their wishes. On the other hand, it is not for him to direct, contrary to the will of either one or both of the parties, that the record of the evidence given before his predecessor be produced as evidence at the hearing over which he is about to preside.

In the present matter it is plain that neither counsel protested the ruling of Muchechetere J that the trial was not to start afresh. Both of them are fairly long-standing and experienced legal practitioners. There can be no question of either being overawed by the learned judge and hesitant to interpose any disapproval of his decision. Moreover, they had been pre-warned by the Registrar that the trial was to resume before a different judge and had been provided with a copy of the transcription of the aborted proceedings before SANSOLE J Counsel for the plaintiffs would have been made aware that it was

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only necessary for the second plaintiff to testify and not for the first plaintiff and her witness. The defendant's new counsel would have been alerted to the necessity of being prepared to cross-examine the second plaintiff but not the first plaintiff and her witness.

I am satisfied that if either counsel had considered it in any way prejudicial to his case that the trial be continued, and not commenced *de novo*, he would have communicated his objection to the Registrar before the date of resumption; or, at least, even without being invited, would have expressed it to the learned judge. Both of them deliberately refrained from speaking out before the second plaintiff was called to testify. They remained silent. They must be taken to have

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acquiesced in the procedure adopted.

In the circumstances, the defendant, who ultimately lost the trial, cannot now cry foul. There was no irregularity in the proceedings.

It follows from the aforegoing that the appeal fails and is dismissed with costs.

Manyarara JA: I agree.

Korsah JA: I agree.

Anthony Murphy & Associates, appellant's legal practitioners

James, Moyo-Majwabu & Nyoni, respondents' legal practitioners

S v SIBANDA 1992 (2) ZLR 438 (SC)

Court **Supreme Court, Bulawayo**

Gubbay CJ, Manyarara JA & Ebrahim JA

Criminal appeal

8 & 18 December 1992

Flynote

Evidence - criminal case - extra - curial statement only admissible against its maker - two exceptions only to rule

Criminal procedure - misdirection - appeal court must determine whether misdirection resulted in substantial miscarriage of justice

Criminal procedure (sentence) - murders committed in course of robberies

Headnote

During the course of a robbery which he had committed with an accomplice, the appellant had allegedly killed the deceased. In finding the appellant guilty of murder, one point which the trial judge had taken into account was that, though the warned and cautioned statement and indications of the appellant's accomplice were not admissible against the appellant, these nevertheless confirmed the essential truthfulness of the main State witness in regard to the presence of the two men and their involement in the robbery.

Held, that the general rule is that an extra-curial statement of a person is admissible only against its maker. This rule is subject to two exceptions. An extra-curial statement may be admitted as evidence against a co-accused implicated thereby

- where the co-accused by his words or conduct accepts the truth of his statement so as to make all or part of it

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a statement of his own;

- in cases of conspiracy, where statements made by one of two conspirators made in execution or futherance of a common design are admissible in evidence against any other party to the conspiracy.

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Held, further, that in the present case neither of the exceptions to the rule applied and the judge had misdirected himself in considering the extra-curial statement to be confirmatory of the truthfulness of the State witness's testimony in respect of the appellant. The extra-curial statement was pure hearsay as regards the appellant and could not be used to corroborate the testimony of the State witness against the appellant.

Held, however, that the misdirection of the trial court in this regard had not resulted in a miscarriage of justice and the conviction was properly based. There was ample evidence, apart from the point wrongly taken into account as a result of the misdirection, establishing the guilt of the appellant.

Held, as regards extenuation, that no extenuating circumstances could be found on the facts. The appeal court drew attention to the frequent warnings it had given in the past that, in the absence of weighty extenuating circumstances, a murder committed in the course of a robbery would attract the death penalty. The public had to be protected against robberies resulting in death, which were disturbingly prevalent.

Cases cited:

R v Kohlinfila Qwabe 1939 AD 255

S v Strydom & Ors 1980 ZLR 364 (A)

R v Miller & Anor 1939 AD 106

R v Mayet 1957 (1) SA 492 (A)

R v Blake & Anor (1844) 6 QB 126

Mirza Akbar v King-Emperor [1940] 3 All ER 585 (PC)

S v Ngara 1987 (1) ZLR 91 (S)

S v Ndlovu S-34-85 (unreported)

M L Perry for the appellant

I Houston for the respondent

Judgment

Gubbay CJ: At about 10 pm on Saturday, 16 May 1987, the deceased, Tizirayi Gondo, was found lying upon on a dirt footpath in the bush area between Marisha Bar and Magwegwe

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Secondary School, Bulawayo. He had been stabbed in the stomach with a sharp instrument.

Although nobody witnessed the fatal assault perpetrated upon the deceased, the appellant and his colleague, Enock Moyo, were arrested, in connection therewith, on the Monday. At the conclusion of their joint trial on a charge of murder, the appellant was convicted and sentenced to death, while Moyo was found guilty, on a competent verdict, of assault with intent to rob, and ordered to undergo five years' imprisonment with labour.

1992 (2) ZLR p440

GUBBAY CJ

The appellant consistently denied any encounter with the deceased, who was a total stranger to him. In his defence he deposed that from the afternoon of the Saturday until the following morning he had remained continually at his house with his children.

In order to establish the guilt of the appellant, the State relied on the evidence of the deceased's companion, Judith Banda. It was her testimony that on the evening in question she and the deceased left Marisha Bar at about 9 pm. They proceeded to walk along a path close to Magwegwe Secondary School before sitting down together in the bush. It was then that two men approached. Both were brandishing knives. Sensing danger, the deceased took to his heels. One of the men chased after the deceased. He passed within two metres of where she was then standing before disappearing out of sight. She immediately recognised him as the appellant. He had been her boyfriend some years back. The other man came up to her, slapped her across the face and demanded money. He instructed her to look down. She did not have any money to give him. He she recognised as the appellant's friend, Enock Moyo. A few moments later she heard a whistle and the appellant returned. After receiving a negative response from Moyo on whether he ha taken any money from her, both men walked off.

Judith Banda went on to say that she made her way to her parents' house, which was nearby, believing that the deceased had escaped from his pursuer. She did not report the attempted robbery upon herself to the police that night or in the morning.

Early the next afternoon, she saw the appellant and Moyo waiting at the gate to her house. The appellant asked where she had been the previous day, stating that he had been looking for her. He gave her twenty cents for beer. She excused herself and left them. Later, upon learning that the deceased had been stabbed, she made a report to the police through the agency of a third party.

In both indications made to the police on 18 May 1987 and in a confirmed warned and cautioned statement recorded on 19 May 1987, Moyo admitted that he and the appellant had accosted the deceased and Judith Banda, and that the deceased had been stabbed in the stomach and left on the ground where he had fallen. The appellant, on the other hand, in his warned and cautioned statement, denied all knowledge of the incident.

In a well constructed and closely reasoned Judgment, the trial court examined, with care, the evidence of Judith Banda, who was a single witness. Every criticism levelled at her story by the appellant's counsel was dealt with and

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answered. It was emphasised that Judith Banda had no perceivable motive to falsely incriminate the appellant, and that had it been her intention to do so, she would have claimed to have actually witnessed the stabbing.

In the event, the trial court was much impressed by the quality of Judith Banda's evidence, which it found to have been given with "unusual faultlessness and directness". Her identification of the assailants was likewise held to be reliable and not susceptible of genuine error.

The appellant's denial, on the other hand, of being nowhere near the scene of the crime was rejected as totally false.

The remaining issue of whether, upon an acceptance of Judith Banda's evidence, someone other than the appellant could have attacked and stabbed the deceased, was discounted by the trial court as a mere fanciful possibility. It was pointed out that the deceased was last seen alive by Judith Banda being pursued by the appellant, who was armed with a lethal weapon and intent upon robbery. A few minutes later the appellant had returned to his colleague. Within the hour the deceased was found in the close vicinity, fatally stabbed in the stomach.

However, in one respect the trial court fell into error. It considered that the warned and cautioned statement and indications of Moyo, though not admissible as evidence against the appellant, nevertheless confirmed the essential truthfulness of Judith Banda's evidence in regard to the presence and involvement of both men on the fateful evening.

That approach was undoubtedly correct in relation to Moyo, but was a contradiction in terms in so far as the appellant was concerned. For by using the extra-curial statements of Moyo, which were pure hearsay *vis-â-vis* the appellant, to corroborate as against the appellant the evidence of Judith Banda, which likewise implicated him in the crime, the trial court was in essence infringing the general rule that an extra-curial statement is admissible only against its maker. See *R v Kohlinfila Qwabe* 1939 AD 255 at 262; *S v Strydom & Ors* 1980 ZLR 364 (A) at 366A.

It is only in two exceptional situations that an extra-curial statement may be admitted not only as evidence against its maker but also as evidence against a co-accused implicated thereby. The first is where the co-accused, by his words or conduct accepts the truth of the statement so as to make all or part of it a statement of his own.

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The second exception applies in the case of conspiracy or any crime which was committed in pursuance of a conspiracy. Statements of one of two conspirators made in the execution or furtherance of a common design are admissible in evidence against any other party to the conspiracy. See *R v Miller & Anor* 1939 AD 106 at 115; *R v Mayet* 1957 (1) SA 492 (A) at 494F.

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Thus in *R v Blake & Tye* (1844) 6 QB 126 the accused were charged with a conspiracy to pass goods through the customs without paying duty. Tye had made certain entries in two documents incriminating Blake as well as himself. In one instance the entry in a day book was a necessary part of the fraud; in the other, an entry upon the counterfoil of a cheque was solely for the purpose of record and for Tye's convenience. It was held that the first entry was admissible against Blake as something tending to the advancement of the common design, but the second merely constituted evidence against Tye because it was not concerned with the disposal of the goods.

This distinction was explicitly approved in the following passage of the opinion of Lord Wright in *Mirza Akbar v King-Emperor* [1940] 3 All ER 585 (PC) at 591B-C:

> "Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. It would be a very different matter, however, to hold that any narrative, statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference."

Both that case and *S v Strydom & Ors* , *supra*, concerned the admissibility of an extra-curial statement made to the police by one conspirator which was sought to be relied upon in evidence against another. Each was ruled inadmissible as not having been made in the furtherance of the conspiracy relied upon by the prosecution.

In this appeal, albeit there was evidence *aliunde* to lay the foundation of a conspiracy or common design to commit a robbery with the use of knives, the extra-curial utterances by Moyo to the police were admissible solely against him. They could not be used to confirm or bolster the veracity of Judith Banda's evidence as against that of the appellant.

GUBBAY CJ

In the light of the misdirection by the trial court, it is incumbent on this court to determine whether it appears, in the words of s 11(2) of the Supreme Court of Zimbabwe Act, 1981, "that a substantial miscarriage of justice has in fact resulted". As reiterated in *S v Ngara* 1987 (1) ZLR 91 (S) at 97B-C:

> "... the issue is whether the court hearing the appeal considers on the evidence (and credibility findings, if any), unaffected by the misdirection or irregularity, that there is proof of guilt beyond a reasonable doubt. If it does so consider, and the onus is on the State to satisfy it, then there is no resultant miscarriage of justice."

Firm findings of credibility in respect to Judith Banda appear in the Judgment of the trial court. It would seem that the extra-curial statements were used more as a "makeweight" than as a factor which in the mind of the court effectively negated any lingering doubt as to Judith Banda's honesty. Indeed, a careful reading of her evidence reveals a distinct ring of truth and reality about it. The criticisms raised before this court were all cogently rejected below and there is nothing of substance that I am able to add to that reasoning. Thus no good purpose will be served by traversing them.

With regard to the appellant, I am satisfied that the trial court had no option but to reject his

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evidence in toto. The only reasonable inference that can be drawn from the appellant's visit on the Sunday to Judith Banda was an anxiety on his part to make sure that she had not made a report to anyone about the murder of the deceased.

It necessarily follows that, in my opinion, the misdirection of the trial court did not lead to a miscarriage of justice. I would therefore dismiss the appeal against conviction.

Warnings have frequently been given that, in the absence of weighty extenuating circumstances, a murder committed in the course of a robbery will attract the death penalty. This is because, as observed in *S v Ndlovu* S-34-85 (unreported):

> ". . . it is the duty of the courts to protect members of the public against this type of offence which has become disturbingly prevalent. People must feel that it is possible for them to enjoy the sanctity of their homes, to attend at their business premises, or to go abroad, without being subjected to unlawful interference and attack."

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In this case the trial court found that the appellant had murdered the deceased with an actual intent to kill. It was unable to discern any feature which diminished the appellant's moral culpability in the callous and brutal killing of a defenceless and terrified man who had done him no harm. And so it found that the death sentence was imperatively called for. It is quite impossible to hold that it was wrong in taking that view.

There is no merit in the appeal and it falls to be dismissed.

Manyarara JA: I agree.

Ebrahim JA: I agree.

Pro Deo

PEDZISA v CHIKONYORA 1992 (2) ZLR 445 (SC)

Court **Supreme Court, Harare**

Annotations **Link to Case Annotations**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

2 & 23 December 1992

Flynote

Property law - lease - to - buy - whether lessee - to - buy has locus standi to sue for eviction of person in occupation without cession of action from the registered owner - lessor - whether lessee - to - buy acquires a

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personal or a real right

Headnote

The respondent had entered into an agreement to "purchase" on a lease-to-buy basis from the owner-lessor a plot of land with an incomplete dwelling house. Under the agreement, title to this property would only pass to the respondent after certain conditions had been met. These conditions had not yet been fulfilled. One of the terms of the agreement was that the lessee-to-buy was prohibited from sub-leasing or assigning the property to a third party without the written consent of the owner-lessor. After the agreement had been entered into, the respondent did not move into the house, as he had somewhere else to live. Thereafter he either sub-let this property to the appellant or assigned the property to him by selling to him his right of occupation together with the eventual right to take title. The respondent did this without first obtaining the consent of the owner-lessor to this sub-letting or assignment. Some time later, the respondent brought an action for the eviction of the appellant from the premises. Te main issue on appeal was whether the lessee-to-buy had *locus standi* to sue to evict the appellant without having obtained a cession of action from the owner-lessor.

Held, that the terms of the lease-to-buy agreement were such that the lessee initially acquired only a personal right exercisable against the owner-lessor and not against third parties without recourse to the owner-lessor.

1992 (2) ZLR p446

GUBBAY CJ

This personal right entitled him to delivery of vacant possession of the property from the owner-lessor. But once the lessee had been given vacant possession of the property and had assumed physical control over it, he then acquired a real right entitling him to evict anyone who wrongfully occupied the property such as a trespasser. Although the respondent had not actually moved into the house, he had acquired control over the unoccupied property. He had thus acquired a real right over the property.

Held, therefore, that the respondent had *locus standi* to sue for the eviction of the appellant, even though he had not obtained a cession of action from the registered owner-lessor.

Held, further, that the fact that the respondent had entered into the agreement with the appellant in breach of the clause in the lease-to-buy contract requiring the prior consent of the owner-lessor to subletting or assignment did not preclude the respondent for suing for eviction of the appellant. In effect, the respondent was seeking to undo the sub-lease or assignment entered into in breach of the clause the lease-to-buy agreement. The *in pari delicto* rule applied to an illegal sub-lease; it did not apply to a sub- lease invalid on account of lack of compliance with formal requirement. The purported sub-lease or assignment was not illegal; it was invalid because of the failure of the parties to the agreement to obtain the necessary prior consent. This was a matter of contractual formality. A lessee in occupation under a lease that is invalid due to its form may be evicted by the lessor; so, too, a sub-lessee in occupation under a sub-lease which is invalid due to its form may be evicted by the lessee. If the sub-lessee is ignorant of the defect in the lessee's title at the time he contracts, his remedy is to claim

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damages for the disturbance in the use and enjoyment of the property.

Held, therefore, that the court a quo was right in ordering the eviction of the appellant from the property.

Cases cited:

Gomba v Makwarimba 1992 (2) ZLR 26 (S)

Vumane & Anor v Mkize 1990 (1) SA 465 (W)

Motloung v Rokhoeane 1991 (1) SA 708 (W)

Bodasingh's Est v Suleman 1960 (1) SA 288 (N)

Morkels Tpt (Pty) Ltd v Melrose Foods (Pty) Ltd & Anor 1972 (2) SA 464 (W)

Tshandu v Johannesburg City Council 1947 (1) SA 494 (W)

Jadwat & Anor v Seedat 1956 (4) SA 273 (N)

Padayache v Veerapan & Anor 1979 (1) SA 992 (W)

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Chiloane v Maduenyane 1980 (4) SA 19 (W)

Sorec Properties Hillbrow (Pty) Ltd & Anor v Van Rooyen 1981 (3) SA 650 (W)

Nkadia v Mahlazi & Ors 1982 (2) SA 441 (T)

Steenkamp v Mienies & Ors 1987 (4) SA 186 (NC)

Majuru v Maposa S-172-91 (unreported)

Zimbabwe Granite Quarries (Pvt) Ltd v Gillespie's Monumental Works (Pvt) Ltd & Anor S-177-91 (unreported)

Soffantini v Mould 1956 (4) SA 150 (E)

Marcuse v Cash Wholesalers (Pvt) Ltd 1962 (1) SA 705 (FS)

Stalson v Brook 1922 WLD 143

Akoon v Jhavary 1935 NPD 282

Hissaias v Lehman & Anor 1958 (4) SA 715 (T)

Gopal v Cohen 1946 TPD 283

Kelly v Wright/Kok 1948 (3) SA 522 (A)

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Rubin v Botha 1911 WLD 99

Kala Singh v Germiston Municipality 1912 TPD 155

M J Gillepie for the appellant

G S Wernberg for the respondent

Judgment

Gubbay CJ: Recently, in the case of *Gomba v Makwarimba* 1992 (2) ZLR 26 (S), this court left open the question of whether a lessee-to-buy of immovable property has *locus standi* to sue the person in occupation thereof without cession of action from the registered owner-lessor. It is now to be answered, having been fully argued in this appeal.

In the court below the respondent, a lessee-to-buy in respect of Stand No. 14055, Seke Local Government Area ("the property"), being a portion of State land owned by the Government of Zimbabwe, instituted proceedings against the appellant for his eviction from the property. He succeeded in obtaining the relief claimed with costs.

The factual background was this. On 14 April 1981 the respondent entered into a written agreement with the Chitungwiza Urban Council ("the Council") and the Government of Zimbabwe, in terms whereof he "purchased" the property at a price of $874 (inclusive of $40 due to the Government for the land), payable in monthly instalments of $6.85 to the Council, which had erected a dwelling thereon. Title in the property was only to pass upon (i) the completion by the respondent, within a period of ten years, of improvements to a minimum value of $1 000; and (ii), the payment of the purchase price

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outstanding, together with certain other specified charges. During the intervening period the respondent was forbidden, save with the prior written consent of the Council, from letting the property to any other person, parting with possession of it, or entering into any cession or assignment in respect thereto.

At the date of the agreement the property was vacant, the dwelling having just been constructed. The windows had not yet been fitted, nor the floor completely laid. The respondent decided not to take up residence as he was being provided with satisfactory accommodation elsewhere.

Within a week or so the respondent took the appellant to view the empty dwelling. The appellant, who was desperately searching for a place to live, showed great interest. It was agreed that he occupy the property, but the basis upon which he did so later became an issue between the parties. According to the respondent, the property was sub-let, the appellant to pay as rental the monthly instalments due to the Council. The appellant, on the other hand, firmly contended that he had purchased from the respondent his right to occupation with an eventual right to take title, for the sum of $250, of which $75 was refunded as a contribution to the cost of effecting improvements to the property. But it was common cause that, to the knowledge of both

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parties, the appellant's occupation of the property, whether pursuant to a sub-lease or an assignment of rights and obligations, was without the consent of the Council and in breach of the respondent's lease-to-buy agreement. It was also not disputed that in November 1986 the respondent demanded that the appellant vacate the property, which the latter refused to do.

It is convenient at the outset to determine the preliminary point of whether the respondent had *locus standi* to sue for an eviction order, since a conclusion adverse to him would necessitate the appeal being upheld.

Mr *Wernberg*, for the respondent, submitted that the Council's lease-to-buy agreement, unlike the conventional contract of lease, ipso facto vested the respondent with a real right in the property, which avails against all persons; and not merely a personal right which entitled him to claim delivery from the Council. Reliance was placed on the Judgments of the Witwatersrand Local Division in Vumane & Anor v Mkize 1990 (1) SA 465 (W) and Motloung v Rokhoeane 1991 (1) SA 708 (W). Both held that the effect of legislation under which residential permits and certificates of occupation were issued was such as to bestow upon the lessee/holder a real right, enforceable not only against the lessor Council but against the world.

GUBBAY CJ

In the first-mentioned case, the applicants, who were registered leaseholders, had acquired certain property for a period of ninety-nine years. The deed of sale provided, *inter alia*, that they could acquire possession and vacant occupation of the property. In an application for ejectment of the respondent and her family, the respondent submitted that the applicants, as registered leaseholders, lacked *locus standi* to seek ejectment, since the *rei vindicatio* was available only to the registered owner of the property, the Diepmeadow Council (a local authority). Schabort J acknowledged at 467D that the applicants could not in law be regarded as the owners of the property and were not therefore entitled to rely on a *rei vindicatio*. He pointed out, however, that the applicants' leasehold was governed by the provisions of the Black Communities Development Act 1984, which conferred a right to occupy the buildings on the property from the date of registration of the leasehold. He went on to state at 467G-J:

> "Does this mean that the applicants had the right in the circumstances of this matter to bring this application? There is a dictum at p 291 of *Bodasingh's Estate v Suleman* 1960 (1) SA 288 (N) which may seem to contradict that notion because the applicants have never had possession and occupation of the premises, as I have mentioned. This passage has been severely criticised by Cooper The South African Law of Landlord and Tenant (1973) at 248-52 and was questioned in *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) at 482.
>
> Bodasingh's case and other cases in which it has been referred to may readily be distinguished from the instant matter where a statutory leasehold is in issue, which, as I have indicated, embodies a right to occupy. That right, as I construe the said Act, vested in the applicants from the date that the premises were registered in their name. It is a real right in addition to being of statutory origin.
>
> The fact that the registered owner of the property at all material times retained its *jus vindicandi* does not abrogate the right of the applicants to claim the same relief against the respondent."

In the second case Flemming J decided that a certificate of occupation issued to the applicant in terms of Regulations made by virtue of the Black (Urban Area) Consolidation Act 1945, gave a

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right to occupy and use the premises in question. It was not relative in the sense that it operated only against the owner/lessor, the Diepmeadow Council, or the superintendent. It could be

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enforced against one and all and had the effect of imposing a corresponding burden on the Council. A real right had thus come into existence which enabled the applicant, after the certificate had been issued to him, to obtain an ejectment order against the respondent.

Although this court is concerned with the terms of a contractual document and not with the effect of a legislative enactment, I consider that the same enquiry is justified and would express it in this way: viewed as a whole, does the lease-to-buy agreement bestow a real right upon the "purchaser", intended to be enforceable against third parties without recourse to the Council?

The lease-to-buy agreement, as mentioned already, grants the lessee-purchaser the right to obtain transfer of the property upon payment of the purchase price and other charges and permits him, at any time, to accelerate payment of the outstanding balance in order to sooner achieve that position. Yet there are several provisions which indicate that the Council retains a large measure of control both over the property and the purchaser, until title is passed. In clause 8 the Council is to insure the dwelling and any improvements effected; and in the event of the dwelling with improvements being totally destroyed, the Council is entitled to cancel the agreement and after applying the monies paid to it by the insurer in discharge of the amount outstanding on the purchase price and charges, pay the balance to the purchaser. Clause 9 stipulates that the improvements to be effected are subject to the approval and inspection of the Council and that it may demolish any alterations, additions or improvements made without its consent. Clause 12 prohibits, without the Council's consent, the letting of the property or any portion thereof. Under clause 13 the purchaser may be requested to undertake maintenance work upon the property, any non-compliance empowering the Council to perform such work itself and to recover the costs thereof from the purchaser. Clause 18 provides that should the purchaser fail to complete the improvements required within one year of having obtained registration of title, the Council will be entitled to claim re-transfer of the property. Clause 21 restricts the purchaser, save with consent, from parting with possession of the property or any part thereof, and from ceding, assigning, or hypothecating the agreement or any rights thereunder, to any person.

In my opinion, the cumulative impact of these clauses is such as not to have conferred upon the respondent a real right to the property; what he acquired was a personal right, exercisable against the Council. Put differently, the lease-to-buy agreement created obligations binding solely on the parties to it.

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Where a lessee's rights are personal, as *in casu*, he is entitled to claim delivery of the property from the lessor. His rights are effective against the lessor's gratuitous successors and against purchasers who knew of the existence of the lease when they purchased or took transfer; they

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are not effective against creditors of the lessor or against the lessor's singular successors in good faith. In the case of a short lease, the lessee has a real right only when he is given occupation of the property; in the case of a long lease, he has it after registration, or if he is in occupation for the first ten years. Consequently, upon being given occupation, or the lease being registered, the lessee would be entitled to evict anyone who wrongfully assumes occupation of the property, for example a trespasser. See *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd& Anor* 1972 (2) SA 464 (W) at 482E-F. But not before that occurrence. This principle is set out clearly by Fannin J in Bodasingh's *Estate v Suleman* 1960 (1) SA 288 (N) at 289A, as follows:

> "In the case of any ordinary lease, the lessee to whom possession has not yet been given cannot sue a trespasser for ejectment from the leased property, save under a cession of action from the lessor."

And further at 290F-H:

> "Now it is a primary duty of a lessor to deliver to the lessee the use and occupation of the property, and in order to fulfil this duty he must give him 'free and undisturbed possession not in contest when delivered'. He does not fulfil that duty if, when he hands over the property, it is occupied by some other person, whether that person is a trespasser or is there under colour of right. *Tshandu v City Council, Johannesburg,* 1947 (1) SA 494 (W) at pp 496, 497. Where that person is a trespasser, the lessor must surely therefore have the right to evict him, in order to fulfil his contractual obligation. Cf *Jadwat & Moola v Seedat's* case, 1956 (4) SA 273 (N), at p 274A. Furthermore, a contract of lease (without delivery of possession), as clearly appears from this last case, does no more than entitle the lessee to claim possession **from the lessor** (and those of his successors who had prior notice of the lease), and from no-one else (except under a cession of action). It is only after he has been given possession that he can protect that possession against the whole world, and in particular against all the lessor's successors. In that case, the lessee's rights can be described as real rights."

The same principle has been applied, albeit in slightly differing contexts, in *Padayache v Veranda & Anor* 1979 (1) SA 992 (W) at 999B-G; *Chiloane*

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v *Maduenyane* 1980 (4) SA 19 (W) at 21A-B; *Sorec Properties Hillbrow (Pty) Ltd & Anor v Van Rooyen* 1981 (3) SA 650 (W) at 653H; *Nkadia v Mahlazi & Ors* 1982 (2) SA 441 (T) at 447G-H; and *Steenkamp v Mienies & Ors* 1987 (4) SA 186 (NC) at 188G-189A. It has been referred to by this court in *Majuru v Maposa* S-172-91 and *Zimbabwe Granite Quarries (Pvt) Ltd v Gillespie's Monumental Works (Pvt) Ltd & Anor* S-177-91 (both not reported).

Mr *Gillespie*, who appeared for the appellant at the request of this court and for whose assistance we are indebted, felt constrained to concede that although the respondent had given the appellant initial physical occupation of the property, not authorised under the lease-to-buy agreement, he must nonetheless be deemed to have himself occupied, through his agent, the appellant.

I prefer to approach the issue of whether the respondent's personal right against the Council ever became a real right, by taking account of the primary duty of a lessor. It is to deliver not only *vacua possessio* but also *commodus usus* (undisturbed use) of the property let-to transfer to the lessee the *detentio* or physical control enabling him to use and enjoy it. See *Tshandu v City Council, Johannesburg*, 1947 (1) SA 494 (W) at 497; *Soffiantini v Mould* 1956 (4) SA 150

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(E) at 153D. That duty will not, of course, be fulfilled if, when the property is handed over, it is occupied by some other person, whether he be a trespasser or there under colour of right. In such event the court, at the request of the lessee, will grant specific performance, that is, direct the lessor to give occupation of the property to the lessee. The lessor will be compelled to comply if it is in his power to do so; but where not, he will be ordered instead to pay damages.

I am satisfied that the Council met the primary duty it owed the respondent. The property was vacant. It delivered the use and occupation thereof to him. It handed over the keys. See *Marcuse v Cash Wholesalers (Pvt) Ltd* 1962 (1) SA 705 (FSC) at 709A; Pothier's *Letting and Hiring*, paras 145 and 146. The respondent assumed control over the property although not actually in habitation. He accompanied the appellant to it on more than one occasion and showed him the interior of the empty dwelling. He also paid at least the first month's rental to the Council.

This scenario persuades me that the respondent had taken occupation before the appellant moved onto the property. Consequently, he had *locus standi* to obtain an ejectment order even though the Council, as lessor, retained the ability to do so as well. See *Steenkamp v Mienies & Ors*, *supra*, at 189B-C; Cooper's *Law of Landlord and Tenant* at p 251.

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This is not, however, the end of the matter. What must be considered is whether the trial court should have refused to afford the respondent the relief sought on the ground that in permitting the appellant to occupy the property he was knowingly acting in breach of the wide ambit of clauses 12 or 21 of the lease-to-buy agreement.

It is trite law that where a contract of lease contains prohibitions against sub-letting, cession or assignment, either absolutely or without the lessor's consent, a sub-lease, cession or assignment, entered into by the lessee, without title to do so, is valueless and confers no rights on the third party; for he can acquire no greater rights in the property than the lessee has. Thus, if the third party enters into occupation of the leased property, the lessor is entitled to an ejectment order against him. See *Stalson v Brook* 1922 WLD 143; *Akoon v Jhavary* 1934 NPD 282 at 285; *Hissaias v Lehman & Anor* 1958 (4) SA 715 (T) at 719B-C; Wille *Landlord and Tenant in South Africa* at pp 123 and 124. A further obvious consequence of the prohibition is that the court will refuse to enforce the sub-lease, cession or assignment, at the instance of the lessee. To do otherwise would be to confer a right upon the lessee not given him by the lessor.

What the respondent sued for was not the enforcement of his contract with the appellant, be it in the nature of a sub-lease or an assignment. In reality he was seeking to undo what had been done in violation of clause 12 or clause 21 of the lease-to-buy agreement.

The respondent's entitlement to the aid of the court was dependent, to my mind, on whether the purported contract with the appellant was illegal or merely invalid on account of lack of compliance with the prescribed condition of obtaining the Council's written consent. The difference is important. An illegal sub-lease, for example, is invalid by reason of its content, where such is prohibited by legislation, or is contrary to public policy or is contra *bonos mores.* If

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it lacks compliance with formalities it is invalid by virtue of its form and not its legally objectionable content. In both instances the sub-lease will be void, that is, a nullity. See Cooper op cit at p 11. But whereas the in *pari delicto* rule will apply to the illegal sub-lease, but may be relaxed by the court, it will not apply to a sub-lease invalid on account of lack of compliance with formal requirements. See *Gopal v Cohen* 1946 TPD 283 at 287; Cooper op cit at p 17.

Plainly enough in the present case the content of the lease-to-buy agreement was not illegal; a fortiori neither was the purported agreement entered into

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between the respondent and the appellant. It was invalid because of the failure of the parties to it to request and obtain the written consent of the Council - a failure that related to a contractual formality as opposed to a legislative non-compliance that amounted to an offence. Compare, *Kelly v Wright/Kok* 1948 (3) SA 522 (A) at 526.

It has been held, correctly with respect, that a lessee in occupation under a lease which is invalid due to its form may be evicted by the lessor. See *Rubin v Botha* 1911 WLD 99; *Kala Singh v Germiston Municipality* 1912 TPD 155; *Gopal v Cohen* , *supra*; Cooper op cit at p 17. By parity of reasoning, it seems to me that a sub-lessee in occupation under a sub-lease, which is similarly invalid, would be subject to the same relief at the instance of the lessee. If ignorant of the defect in the lessee's title at the time he contracted, he would be entitled to claim damages for the disturbance in the use and enjoyment of the property.

The conclusion I have reached makes it unnecessary to resolve the factual dispute of whether the appellant occupied under a sub-lease or an assignment. It matters not. Upon either contingency the trial court was right in ordering his eviction from the property.

Accordingly the appeal is dismissed with costs.

McNally JA: I agree.

Korsah JA: I agree.

Pro Deo for the appellant

Nicholas Collins & Associates, respondent's legal practitioners

SAVANHU v POSTMASTER-GENERAL 1992 (2) ZLR 455 (HC)

Court **High Court, Harare**

Robinson J

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Civil application

10 & 31 December 1992

Flynote

Civil procedure - parties - citation - application for reinstatement of Posts and Telecommunications Corporation employee allegedly wrongfully dismissed - Postmaster-General wrongly cited as respondent - Corporation was employer and should have been cited

Employment - termination - discharge - PTC employee - governed by Labour Relations Act 1985 - therefore prior written approval from Minister for dismissal in terms of s 2 of Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 is necessary

Headnote

The applicant was dismissed from his employment with the Posts and Telecommunications Corporation after he was found guilty of misconduct. He applied for an order setting aside the decision that he was guilty of misconduct and reinstating him in his previous post with the payment of salary and benefits from the date of his dismissal to the date of his reinstatement. The Postmaster-General was cited as the respondent in this application. Counsel for the respondent took the point in *limine* that the application should be dismissed because the Postmaster-General was wrongly cited as the respondent when the application should have been brought against the PTC.

Held, that the application had to be dismissed as the application had been brought against the wrong party. The action should have been brought against the PTC which was the employer of the applicant and had the power to dismiss the applicant, and not against the Postmaster-General, who was himself an employee of the PTC.

1992 (2) ZLR p456

ROBINSON J

Held, further, that had the action been brought against the correct party, the PTC, the court would have had to have ruled that the discharge of the applicant was unlawful as the necessary authority for dismissal had not been obtained from the Minister of Labour, Manpower Planning and Social Welfare in terms of s 2 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985, the PTC being an employer covered by the Labour Relations Act 1985.

Cases cited:

Sibanda v Postmaster-General HH-263-90 (unreported)

Cinamon v Town Clerk HH-255-90 (unreported)

Gumbo v Norton-Selous Rural Council 1992 (2) ZLR 403 (S)

Masasi v PTC 1991 (2) ZLR 73 (H)

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Bishi v Sec for Education 1989 (2) ZLR 240 (H)

Crundall Bros (Pvt) Ltd v Lazarus NO & Anor 1990 (1) ZLR 290 (H)

Musara v ZINATHA 1992 (1) ZLR 9 (H)

E Chatikobo for the applicant

GS Wernberg for the respondent

Judgment

Robinson J: In this matter the applicant has approached this court for relief by way of review proceedings instituted against the respondent as a result of the applicant's discharge from the service of the Posts and Telecommunications Corporation ("the PTC") with effect from 17 March 1990 on the ground of his alleged misconduct, it being the applicant's contention that he was neither properly nor lawfully discharged.

In the draft order attached to his application, the applicant seeks the following relief -

"1. That the decision of the respondent that applicant is guilty of misconduct be and is hereby set aside.

2. That the decision of the respondent to discharge the applicant from service with the PTC be and is hereby set aside.

3. That the applicant be and is hereby reinstated to his former position as an employee of the PTC with effect from 17 March 1990.

4. That the respondent be and is hereby ordered to pay applicant's salary and benefits with effect from 17 March 1990 to date of reinstatement

5. That the respondent pay the costs of this application."

ROBINSON J

For the reason to which I shall advert later, Mr *Chatikobo*, who appeared for the applicant, abandoned the relief sought in para 4 of the draft order.

The respondent has opposed the application on three grounds, the first ground being that the applicant has incorrectly cited the Postmaster-General as the respondent instead of citing the PTC as the corporate employer of the applicant. I shall deal with this point first since, if it succeeds, then this will dispose of the application without the necessity for the court to consider the other two grounds relied upon by the respondent, the one being also of a technical nature and the other involving the merits of the matter.

In para 5 of his heads of argument, Mr *Chatikobo* dealt with the point taken by the respondent in *limine* thus:

"Respondent takes the technical point that applicant should have cited the PTC and not him as he is merely an employee of the PTC. While there is force in this point, it is nevertheless submitted that it would be unjust for the applicant to be non suited on this grounds (sic). That is more so when it is borne in mind that no relief is sought

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against the Postmaster-General personally. No prejudice would be occasioned to the PTC because the Postmaster-General is its Chief Executive. In any event the merits of respondent's case has (sic) been fully ventilated on the papers."

In paras 1 to 8 inclusive of his heads of argument, Mr Wernberg, counsel for the respondent, countered with the following submissions.

"In *limine*

1. It is respectfully submitted that the applicant has cited the wrong party as respondent in this case.

2. The Posts & Telecommunications Corporation is a statutory body pursuant to s 3 of the Posts & Telecommunications Act [*Chapter 251*].

3. By virtue of s 3 of that Act the Corporation is declared to be a body corporate, capable of suing and being sued in its own name.

4. The Post Master General, cited in these proceedings as respondent, does not employ the Corporation staff and cannot in law be held liable for wrongful dismissal (assuming such to be the case, which is denied): *Sibanda v Postmaster-General* HH-263-90.

5. The present case is on all fours with Sibanda , *supra*, where the applicant was non-suited on this very basis.

6. Whilst the applicant argues that all the issues have been ventilated

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in the papers before the court, it is submitted that this does not assist the applicant herein. The respondent as cited was perfectly entitled to deal with the merits of the case on the assumption that this might be necessary - it was, with respect not his roll (sic) to assume the outcome of his preliminary objection to these proceedings. The point remains that whilst the order sought is against him in his personal capacity (he was not even cited *nomine officio*, cf *Sibanda, , supra*, at p 3) it cannot be granted against him for the reasons enumerated above. A fortiori, the order sought cannot be granted against the Corporation as it is not party to these proceedings.

7. The Postmaster General is an executive officer of the Corporation. He does not control it - control is vested in the Board appointed under s 4 of the Act. Thus any order made would amount to a *brutum fulmen. Sibanda v Postmaster-General* , *supra*, p 2; *Cinamon v Town Clerk* HH-255-90 (*loc cit)*.

9. (sic) It is thus submitted that the application ought to be dismissed on this ground alone with costs."

With his hands tied by the manner in which his instructing legal practitioners, notwithstanding the decision of this court in *Sibanda's* case, *supra*, had chosen to proceed against the Postmaster-General as the respondent, Mr *Chatikobo* made a valiant effort to try to save the day for the applicant. In the course of his argument, Mr Chatikobo was astute in pointing out that in para 3 of the opposing affidavit purportedly filed on behalf of the respondent - I say purportedly because the deponent to that affidavit appears to have made the affidavit on behalf of the PTC - it is admitted that on 17 March 1990 the respondent suspended the applicant from his employment as a telephone operator and that by letter dated 30 July, 1990 the respondent discharged the applicant from the service of the PTC in terms of the copy letter attached to the applicant's founding affidavit as annexure 'A'.

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However, Mr *Chatikobo's* attempt to persuade the court that it was sufficient for the applicant to have cited the Postmaster-General and not the PTC as the respondent or not to have joined the PTC as a respondent with the Postmaster-General was, in my view, bound to fail for the reasons which I give below.

(a) Section 4 of the Posts and Telecommunications Corporation Act [*Chapter 251*] ("the PTC Act") provides that the "operations of the Corporation shall, subject to the provisions of this Act, be controlled by a board, to be known as the Posts and Telecommunications Board, appointed in terms of this Part".

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(b) Section 20 of the PTC Act provides that for "the better exercise of its functions the Corporation shall, subject to the provisions of this Act, have power to do or cause to be done, **either by itself or through its agents,** all or any of the things specified in the Schedule, either absolutely or conditionally and either solely or jointly with others" (my emphasis).

(c) In the Schedule to the PTC Act listing the powers of the PTC, s 12 provides:

> "To appoint, upon such terms and conditions as the Board may deem fit, such persons as may be necessary for conducting the affairs and carrying out the functions of the Corporation *and to suspend or discharge any such persons* (my emphasis) :
>
> Provided that the Corporation shall not suspend or discharge the Postmaster-General without the approval of the Minister."

(d) In the light of the provisions, *supra*, there can be no doubt that the PTC was the employer of the applicant and that although s 22(1)(a) of the PTC Act vests the management of the operations and property of the PTC in the Postmaster-General, such vesting is expressly subject to the control of the PTC Board and it is clear that whenever the Postmaster-General acts, he acts at all times as an employee and representative of or as an agent of the PTC.

(e) While it is true that under the internal Conduct and Discipline (Officer) Rules of the PTC ("the said Rules") the Postmaster-General is obliged to direct whether an inquiry into a charge of misconduct preferred against an officer of the PTC shall be held by a committee nominated by him for the purpose, it is the Board of the PTC, and not the Postmaster-General which, in terms of s 12(2), as read with s 13 of the said Rules, is responsible for discharging the officer.

(f) It will therefore be seen that the deponent to the opposing affidavit was creating unnecessary difficulties for the Postmaster-General as the respondent in admitting, as he did, that the applicant was suspended and discharged by the respondent, which was neither the case in law nor the factual position, as evidenced by annexure 'A' to the applicant's founding affidavit, which was not even written by, at the instance of or on behalf of the respondent. Due to such admissions on behalf of the respondent, the applicant was ostensibly justified in asking for the relief, set out in paras 1 and 2 of his draft order. However, even if one has to accept artificially that the applicant was suspended and discharged by the Postmaster-General, it is

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clear that the respondent could only have done that as a representative on behalf of the PTC.

(g) Furthermore and in any event, in the light of the Judgment handed down by the Supreme Court earlier this month in the case of *Gumbo v Norton - Selous Rural Council infra*, endorsing the reasoning of Smith J in *Masasi v Posts* and Telecommunications Corporation 1991 (2) ZLR 73 (H) that the Labour Relations Act 1985, governs the discharge of an officer of the PTC, such as the applicant, it follows that, insofar as s 2 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations SI 371/85, provides that no employer shall, summarily or otherwise, terminate a contract of employment with an employee unless he has obtained the prior written approval of the Minister of Labour, Manpower Planning and Social Welfare to do so or the contract of employment is terminated in terms of s 3 (which provides for suspension of an employee pending a ruling by a labour relations officer) of those Regulations, it is the PTC, and not the Postmaster - General, which, as his employer, must be cited by an employee of the PTC in respect of a dispute about the employee's discharge from the service of the PTC.

Consequently, if an officer of the PTC wishes to challenge the regularity or lawfulness of his discharge, he must proceed against the PTC and not the Postmaster - General as his employer. It is precisely because he recognised the dilemma facing him in this respect that Mr Chatikobo had to abandon the relief sought by the applicant in para 4 of the draft order asking that the respondent be ordered to pay the applicant's salary and benefits with effect from 17 March 1990 to date of reinstatement. The applicant was in the same difficulty in asking, in para 3 of the draft order, for his reinstatement by the respondent to his former position as an employee of the PTC with effect from 17 March 1990 since it is only the PTC, as his employer, who is in a position to effect this.

In the premises, the point taken by the respondent in *limine* that the applicant has incorrectly proceeded against the Postmaster - General instead of citing the PTC as the respondent is well taken and, therefore, the applicant must fail in his application, which is accordingly dismissed with costs.

Although the decision reached by me on the point in *limine* renders it unnecessary for me to consider the other two grounds on which the respondent relied, I wish to touch on them briefly.

ROBINSON J

As to the ground that the applicant's delay in instituting these review proceedings over one year out of time should not be condoned, I would observe that even if the applicant had correctly cited the PTC as the respondent, the applicant has not given sufficient particulars to enable the court to determine whether his explanation for his inordinate delay was reasonable. That being the case, the applicant has failed to surmount the first hurdle which he had to surmount if he was to persuade the court, in conjunction with the other factors to be considered by it (see, for example, *Bishi v Secretary for Education* 1989 (2) ZLR 240 (H)), that he had shown good cause

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for the condonation of his delay and for his application to be entertained, albeit well out of time. Indeed, notwithstanding the respondent's attack in his opposing affidavit on the lack of particularity in the applicant's founding affidavit, the applicant made no attempt whatsoever to rectify the position in his answering affidavit, thereby laying himself open to the charge by the respondent's counsel that his explanation for the delay was an insult to this court and gave rise to the strongest possible inference that the applicant had not seen fit to take the court into his confidence as regards the circumstances leading up to the launching of his application.

Finally, as to the merits, the applicant, in his affidavits, approached the matter of his discharge from the PTC without regard to the applicability of the provisions of the Labour Relations Act 1985, although his counsel, Mr *Chatikobo*, in his heads of argument, submitted that if one accepted Smith J's Judgment in *Masasi's* case as correctly reflecting the law that before the applicant could be dismissed, there was an obligation on the respondent to seek the prior written authority of the Minister of Labour, Manpower Planning and Social Welfare to discharge the applicant, then insofar as such authority had not been obtained, the applicant's discharge had been unlawful.

On the other side, Mr *Wernberg* countered with the submissions that the respondent bore no such obligation as he was not an employer as defined in the Labour Relations Act and that, in any event, it was not permissible for the applicant to raise an allegation of fact for the first time in argument: see *Crundall Bros (Pvt) Ltd v Lazarus NO & Anor* 1990 (1) ZLR 290 (H) at 300D - G

Nevertheless, if, as is apparent, the PTC did not obtain the prior written approval of the Minister of Labour, Manpower Planning and Social Welfare to terminate the applicant's employment, it is now clear, in the light of the Supreme Court Judgment in Gumbo's case, *supra*, that the applicant was unlawfully discharged by the PTC. However, it is not competent for this court

to deal with this aspect at the instance of the applicant given the cul-de-sac in which the applicant presently finds himself. Nevertheless, the applicant and the PTC should take heed of the Judgment in Gumbo's case and be guided accordingly in regard to any future action which the applicant might be advised to pursue consequent upon and in the light of this Judgment, in which connection it may be helpful if reference is made to the Judgment which I delivered in Musara v Zimbabwe National Traditional Healers Association 1992 (1) ZLR 9 (H).

In the final result, it is confirmed that the application is dismissed with costs.

Sawyer & Mkushi applicant's legal practitioners

Coghlan, Welsh & Guest respondent's legal practitioners

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S v AITKEN 1992 (2) ZLR 463 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Manyarara JA & Ebrahim JA

Criminal appeal

6, 13 & 18 August 1992 *(2)

Flynote

Criminal procedure - bail - further application after some time had elapsed in terms of s 106(1)(a) of the Criminal Procedure and Evidence Act [Chapter 59] - application refused on basis of absence of fresh facts - appeal against refusal - whether passage of time fresh fact that court can take into account when dealing with further bail application

Headnote

Where bail has previously been refused and a further application for bail is made to the High Court in terms of s 106(1)(a), proviso (ii) to that section requires such application can only be entertained if fresh facts are elicited that were not before the court which refused bail. In the present case the passage of time since the previous application, together with the apparent failure of the State to strengthen its case since the earlier application, constituted a fresh fact in the further application. As the lower court had misdirected itself in this regard, the Supreme Court was now at liberty to exercise its own discretion. The strength of the State case was a salient factor in assessing the risk of the appellant absconding. The failure by the State to strengthen its case over time, weighed with other favourable factors, just tipped the scales in favour of granting bail. Bail was therefore granted on stringent conditions.

Cases cited:

Aitken & Anor v A - G 1992 (1) ZLR 249 (S)

S v Murambiwa S - 67 - 92 (unreported)

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A - G v Blumears & Anor 1991 (1) ZLR 118 (S)

S v Hussey 1991 (2) ZLR 187 (S)

R v du Plessis 1937 (4) SA 463 (W)

JC Andersen SC for the appellant

RH Goba for the respondent

Judgment

Gubbay CJ: On 25 March 1992 Sandura JP dismissed an appeal brought before him in terms

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of s 111(1) of the Criminal Procedure and Evidence Act [*Chapter 59*] against the decision of a magistrate refusing to admit the appellant to bail. A further appeal to this court was also dismissed (see Aitken & Anor v A - G 1992 (1) ZLR 249 (S)).

After a lapse of almost ten weeks the appellant again applied for bail, on this occasion directly to a judge pursuant to s 106(1)(a) of the Act. His application was dismissed by Smith J on 5 June 1992, on the ground that the statement filed by him in support thereof failed to disclose the emergence of any facts which were not in existence, or known, at the date of Sandura JP's determination, and so did not meet the requirements of proviso (ii) to s 106(1). With the grant of leave, that Judgment is now the subject of this appeal.

It was submitted on behalf of the appellant, and accepted by the State, that the learned judge a quo had misdirected himself and fettered his discretion in effectively holding that the expiration of ten weeks from 25 March 1992 to the day he was called upon to make his determination, taken together with what had occurred during such period, was not capable of constituting a new fact upon which a fresh application could be based. I agree with counsel. That view is contrary to the recent Judgment of this court in S v Murambiwa S - 62 - 92, in which it was said:

> "... the fact that some seven weeks had elapsed between the decision of Gibson J and the fresh application before Adam J was at least potentially a fact which was not placed before Gibson J and which had arisen after her determination."

Certainly the learned judge ought to have decided the application with regard to the new fact. He was not "precluded", as he believed he was, from doing so. It necessarily follows that this court is now at liberty to put itself in the position the learned judge was in and come to a decision unaffected by the exercise of a prior discretion.

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The statement filed by the appellant in compliance with Rule 5(1) of the High Court of Zimbabwe (Bail) Rules, 1991, comprised twenty - five closely typed foolscap pages. It exhibits a woeful misconception of the purpose behind proviso (ii) to s 106(1). In the main, it not only repeated and amplified much of what was contained in the statement considered previously by Sandura JP and this court, but sought to counter the shortcomings of that statement by the introduction of facts which had neither arisen nor been discovered after 15 March 1992. It also criticised some of the findings made and inferences drawn by this court. In short, the approach adopted signifies a deliberate reluctance to acknowledge the binding effect of the Judgment of this court and, emanating from a legal practitioner, is to be deprecated.

The ground upon which this court dismissed the previous appeal was that it was unable to hold that Sandura JP had misused his discretion in concluding that the appellant had not established on a balance of probabilities the likelihood that he will stand trial and not abscond, if released on bail. It was to that issue, and to that alone, that the appellant was entitled to lay before Smith J facts which had arisen or been discovered subsequent to the determination of 25 March 1992. They had to be new facts which, viewed in conjunction with the other relevant factors, both adverse and favourable, tended to reduce in significant degree the risk of abscondment before

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trial.

The only truly germane passages in the appellant's statement were these:

> "The respondent has had a further nine weeks plus to investigate the allegations levelled against the applicant and yet appears to be no nearer to preferring specific charges against him."

And:

> "The merit or demerit of the respondent's case should also have begun to emerge more clearly with the further passage of time. The Supreme Court indicated in its Judgment (p 9) that:
>
> > '... 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.'

GUBBAY CJ

> Clearly the strength or otherwise of the respondent's case must be a material factor in regard to assessing the risk of absconding and, indeed, the necessity and fairness of continued incarceration."

These averments brought forth the following cryptic response in the statement filed by State counsel:

> "... it is unreasonable to expect an investigation as complex as this one to be complete or be nearly complete in such a short space of time."

(which was not the criticism). And:

> "... whilst admitting that the applicant's arrest was a result of information received current investigations are making tremendous progress confirming the information in the possession of the State before the applicant's arrest."

I must stress at once that in a matter such as this where a magistrate or judge is faced with the unenviable task of endeavouring to strike a balance between the fundamental right of the individual, presumed innocent of any wrongdoing, to the protection of his personal liberty, and the requirement of the State that he stand trial to be judged, any reluctance by the State to be open and forthright must redound to its disadvantage. See *Attorney-General v Blumears & Anor* 1991 (1) ZLR 118 (S) at p 126C - E ; *S v Hussey* 1991 (2) ZLR 187 (S) at p 192E .

It is apparent that the State did not even deem it incumbent to place before the learned judge the supporting affidavit of one of the officers of the Zimbabwe Republic Police Fraud Section actively involved in the investigation. In the absence of such a deposition, there is no satisfactory means of knowing if any additional evidence was in fact obtained over the ensuing ten week period; and, if so, whether it tends to incriminate or exculpate the appellant in the commission of the offences with which he is charged. This omission is surprising in the light of the opinion previously expressed by this court, that on the information then available it was unable to convincingly assess the strength of the State case. Purposefully, no assistance in this regard has been afforded. I do not suggest that it was necessary to make known anything which, objectively considered, may have compromised the State case. But at the very least

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there should have been revealed an outline of the further evidence, if any, that was obtained, be it documentary or available in the proofs of prospective witnesses.

GUBBAY CJ

The State cannot expect the bald assertions made on its behalf to be blindly accepted without the provision of any factual foundation. For were it to do so, this court would be allowing itself to be used as a "rubber stamp" for the opinion held by the Attorney-General or his counsel. No matter the confidence that judicial officers traditionally repose in the *ipse dixit* of these officers of the court, a subjective, over - cautious or over - zealous approach are dangers to be guarded against where the liberty of the subject is at stake.

There is, accordingly, merit in Mr *Andersen's* contention that, as the investigations continued over the ten week period, the inference to be drawn is that the State case was not strengthened but rather weakened by the failure to detect any further incriminatory evidence against the appellant.

The risk of the appellant absconding must now be examined on the basis that, although the investigation endured for twelve weeks from the date of his arrest to 5 June 1992, the allegations of the State were not strengthened during the relevant ten - week period and, if not weakened, remained, at best, "fairly broad and not very detailed". Appreciation of this position would be bound to influence the appellant, for the weaker he adjudges the case against him to be, so much less is the temptation to resort to flight.

The condition of the State case on the merits of the charges is, of course, one of the most important factors in an enquiry into the risk of abscondment. But even if regarded as unimpressive it must be weighed in the context of, and in conjunction with, other relevant factors, both adverse and favourable to the appellant.

The adverse factors mentioned by this court in its previous Judgment, which remain pertinent, are the serious nature of the charges and the probability, if convicted of being sentenced to a long term of imprisonment; the potential ability of the appellant to cross the border into a country where no extradition treaty with Zimbabwe exists; and the substantial wealth possessed by him outside the country.

The favourable factors are the appellant's status as an officer of the court; the success he has made in the practice of law; the unlikelihood that he would be able to repeat that success elsewhere as a fugitive from justice; the considerable wealth he has amassed in Zimbabwe; the somewhat luxurious lifestyle to which he and his family have become accustomed; the affection he has for this country of his adoption; and the roots his family have here.

GUBBAY CJ

I have reached the view, not without some difficulty, that the new fact of the State having failed to strengthen its case, weighed with the other favourable factors referred to, just tilts the scales

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for the appellant. I have also taken into account the ability of this court to further reduce the risk of flight by attaching to the grant of bail such onerous conditions as will make it more advantageous for the appellant to stand trial than to abscond and thereby estreat his bail. See *R v du Plessis* 1937 (4) SA 463 (W).

The appeal is allowed and the order a quo set aside. Bail is granted upon the following conditions:

1. Payment to the Criminal Registrar of the High Court in the sum of $500 000 (five hundred thousand dollars);

2. The provision of one or more sureties who are acceptable to the Criminal Registrar of the High Court, in a total amount of $500 000 (five hundred thousand dollars;

3. The provision of a recognisance to the Criminal Registrar of the High Court in an amount of $1 000 000 (one million dollars) against the security of the immovable residential property known as No. 9 Nigels Lane, Borrowdale, Harare, which is registered in the name of the appellant;

4. The surrender of all travel documents to the Criminal Registrar of the High Court; and

5. The appellant is to remain within the confines of the aforementioned residential property until the conclusion of his trial, save that -

    (i) he is to report to the Highlands Police Station twice daily between the hours of 8.00 am and 9.00 am and 6.00 pm and 7.00 pm, travelling there and returning by the most direct route;

    (ii) he may leave these premises when required to attend the Magistrate's Court, Harare, for the purpose of remand in connexion with the case, travelling there and returning by the most direct route; and

    (iii) he may leave these premises in order to attend his trial.

Manyarara JA: I agree.

Ebrahim JA: I agree.

Atherstone & Cook, appellant's legal practitioners

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Endnotes

1 (Popup - Popup)

On the subject of whether a statutory body is an organ or agent of the State, see also *Min of Labour, Manpower Planning & Social Welfare v Lerros Motors (Pvt) Ltd* 1989 (2) ZLR 208 (H), confirmed on appeal in *Lerros Motors (Pvt) Ltd v Min of Labour, Planning & Social Welfare* 1990 (1) ZLR 349 (S). - *Editor.*

2 (Popup - Popup)

This judgment was received too late to be included in its correct chronological place in this volume.

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