

CHIRWA v REGISTRAR-GENERAL 1993 (1) ZLR 1 (HC)

Editor's Note:(1)

Editor's Note:(2)

Court High Court, Harare

Adam J

2 August 1990

Opposed application

Flynote

Constitutional law - right to passport - State has no right to withdraw passport from citizen

Constitution of Zimbabwe - ss 9 & 22

Immigration Act 1979 - ss 13 (10) & 26

Headnote

The applicant had successfully obtained an order declaring him to be a citizen of Zimbabwe. The respondent refused to release his passport to the applicant. The applicant sought an order requiring his passport to be delivered to him. The respondent opposed the application on the ground that the passport was issued at the will of the State and could be withdrawn or withheld.

Held, that in order to exercise the constitutional right to travel, the applicant needed his passport and the State has no right or power to withhold the passport of a citizen.

Cases cited:

Sachs v Dönges NO 1950 (2) SA 265 (A)

Tutu v Min of Internal Affairs 1982 (4) SA 571 (T)

R v Sec of State for Foreign & Commonwealth Affairs, ex p Everett [1989] 1 All ER 655 (CA)

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Fellner v Min of the Interior 1954 (4) SA 523 (A)

R v Brailsford [1905] 2 KB 730; [1904-07] All ER Rep 240 (KB)
Joyce v DPP [1946] AC 347; [1946] 1 All ER 186 (HL)
Re Application by Mwau [1985] LRC (Const) 444 (Kenya)
Kent v Dulles (1958) 357 US 116; 2 L Ed (2d) 1204 (US Sup Ct)
Aptheker v Sec of State (1964) 378 US 500; 12 L Ed (2d) 992 (US Sup Ct)
Zemel v Rusk (1965) 381 US 1; 14 L Ed (2d) 179 (US Sup Ct)
Satwant Singh v Assistant Passport Officer [1967] 3 SCR 523 (SC India)
Maneka Gandhi v Union Govt [1978] 2 SCR 621 (SC India)
US v Cotroni & Anor (1989) 42 CRR 101 (SC Canada)
PF-ZAPU v Min of Justice 1985 (1) ZLR 305 (S); 1986 (1) SA 532 (ZS)
Rushwaya v Min of Local Govt & Anor 1987 (1) ZLR 15 (S)
R v Oakes (1986) 26 DLR (4d) 200; 19 CRR 308 (SC Canada)
Thomsen v The Queen (1988) 32 CRR 257 (SC Canada)
CoT v CW (Pvt) Ltd 1989 (3) ZLR 361 (S); 1990 (2) SA 245 (ZS)
R v Big M Drug Mart Ltd (1985) 18 DLR (4d) 321; 13 CRR 64 (SC Canada)
Miss R Munemo, for the applicant
B Q P Simelane, for the respondent

Judgment

Adam J: In this matter, at the end of the hearing, this court issued an order in terms of the draft order and these are now my reasons. In his founding affidavit the applicant indicates that he is a citizen of Zimbabwe and was issued a Zimbabwean passport. He states that in March 1986 the Chief Immigration Officer attempted to deport him, so he commenced proceedings in this court and after a trial, in case HC-1106-86, judgment was given that the Chief Immigration Officer be interdicted and restrained from removing or causing the applicant to be removed from Zimbabwe and the judgment also declared that the applicant was a citizen of Zimbabwe. The applicant avers that after judgment he learnt that his passport had been forwarded by the Chief Immigration Officer to the respondent, so he asked the respondent for it, but the respondent refuses to release his passport. The applicant maintains that he needs his passport to travel outside Zimbabwe in order to discharge his obligations in his employment. He mentions that in September 1989 on an urgent family matter the respondent caused to be issued to him an Emergency Travel Document valid for 21 days, a photo-copy of which was attached to his affidavit as Annexure "B" and which gives his date and place of birth as 20 July 20 1949 in Bulawayo. He asserts that he needs his passport for freer movement.

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In his opposing affidavit the respondent disputes that the applicant is a citizen of Zimbabwe and asserts that the applicant obtained Zimbabwean citizenship and the passport fraudulently and/or by false representation and or by concealment of a material fact, and admits that the applicant's passport had been forwarded to him. He also admits that the applicant successfully challenged the Chief Immigration Officer's attempt to deport him. He indicates that as the Registrar - General, with legal responsibility for processing citizenship applications and the granting of citizenship, he was not cited in that case and was not called as a witness. He states that the applicant's passport is being held by him for the reasons that the applicant's status as a citizen is questionable and therefore he is not entitled to a Zimbabwe passport. He indicates that it must be borne in mind that the holding of a Zimbabwean passport is a privilege, but he does admit that the applicant requires the passport for his employment and that it is true that in September 1989 for an urgent family matter the respondent caused an Emergency Travel Document to be issued to the applicant.

In his answering affidavit, filed on 1 June 1990, the applicant asserts that his citizenship was one of the issues that this court had to determine in case HC-1106-86, whereby he was declared a citizen of Zimbabwe and so he denies that he obtained his citizenship by fraud. He maintains that he did not apply for citizenship as he is a citizen by birth and so obtained a birth certificate and the passport. He denies that the holding of a passport is a privilege but that it is a right which can only be taken away by law.

On 26 June 1990, without leave of this court, the respondent filed a supplementary affidavit which was condoned by me on 28 June 1990, with at the same leave being granted to the applicant to file any further affidavits in response.

I point out at the outset that both in his opposing and supplementary affidavits the respondent has merely made bald assertions as to the status of the applicant, that much of his affidavits are hearsay and that he did not adduce any supporting material. In addition the respondent also attached a photocopy of the page after p 40 of the applicant's passport which is as follows:

"CONDITIONS OF ISSUE

This passport remains the property of the Government of Zimbabwe and may be amended, withdrawn and cancelled at any time. The holder or bearer of this passport shall forthwith surrender the passport when so required by an authorized official.

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This passport is liable to be impounded if -

- (a) it is found in the possession of an unauthorized person; or
- (b) it is mutilated in any way; or
- (c) an amendment, endorsement or addition is made by any person other than a duly authorized official.

When departing from or entering into Zimbabwe this passport must be produced on demand to the authorized official at the place of departure or port of entry, as the case may be."

In his further affidavit in answer to the respondent's supplementary affidavit, the applicant states that he was born in Zimbabwe in 1949, as had been testified by his uncle Akinson Chirwa and his aunt Levis Nyalongwe in this court in case HC-1106-86 and he referred to that evidence. He asserts that the Chief Immigration Officer, a "privy of the respondent", levelled the same allegations in that case.

In the applicant's heads of argument, his legal practitioner submits that as this court had declared the applicant a citizen, the question of his citizenship was *res judicata* and so could not be an issue for determination by this court in this application. She maintains that, as a Zimbabwean citizen, the applicant has the constitutional right of freedom of movement within Zimbabwe, and in leaving or entering Zimbabwe, and in order to enable him to enjoy this constitutional right the applicant obtained a Zimbabwean passport and that by the respondent's refusal to release his passport the applicant's constitutional right had been infringed. She argues that the provisions of the Immigration Act 1979 requires that no person leave or enter Zimbabwe unless he is in possession of a travel document. She asserts that the respondent has no lawful justification for withholding the applicant's passport.

In the respondent's heads of argument his legal practitioner submits that the granting of a passport is a privilege of the Executive and that the holding of a passport is at the pleasure of the Executive, which action is not reviewable: *Sachs v Dönges* NO 1950 (2) SA 265(A); *Tutu v Minister of Internal Affairs* 1982 (4) SA 571 (T) and *R v Secretary of State for Foreign and Commonwealth Affairs*, ex parte *Everett* [1989] 1 All ER 655 (CA). He argues that the applicant's passport contains certain conditions on it and the respondent was invoking one of the conditions of issue: *Fellner v Minister of the Interior* 1954 (4) SA 523 (A).

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I should mention that during the hearing the respondent's legal practitioner on the respondent's behalf abandoned the contention that the applicant is not a citizen of Zimbabwe.

In this case the most relevant provisions of the Constitution of Zimbabwe are as follows:

- "3 This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.
4. A person who, immediately before the appointed day, was or was deemed to be a citizen by birth, descent or registration shall, on or after that day, be a citizen of Zimbabwe by birth, descent or registration as the case may be.
9. Notwithstanding the provisions of this Chapter, an Act of Parliament may make provision in respect of citizenship and, without prejudice to the generality of the foregoing, may provide for -
 - (a) the acquisition of citizenship of Zimbabwe by persons who are not eligible or who are no longer eligible to become citizens of Zimbabwe under this Chapter;
 - (b) the circumstances in which a person may cease to be a citizen of Zimbabwe;

- (c) the deprivation of any person of his citizenship of Zimbabwe;
- (d) the renunciation by any person of his citizenship of Zimbabwe:

Provided that no such law shall provide for the cessation by, or deprivation of, any person of citizenship of Zimbabwe where such person is a citizen thereof by birth except on the grounds that he is or has become a citizen of some other country.

22. (1) No person shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Zimbabwe, the right to reside in any part of Zimbabwe, the right to enter and to leave Zimbabwe and immunity for expulsion from Zimbabwe.

(2) Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be in contravention of subsection (1).

(3) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision -

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- (a) for the imposition of restrictions on the freedom of movement of persons generally or any class of persons that are required in the interests of defence, public safety, public order, public morality or public health;
- (b) for the imposition of restrictions on the acquisition or use of land and other property in Zimbabwe;
- (c) for the imposition of restrictions by order of a court on the movement or residence within Zimbabwe of any person or on any person's right to leave Zimbabwe -
 - (i) in consequence of his having been found guilty of a criminal offence under the law of Zimbabwe or for the purpose of ensuring that he appears before a court for trial for such a criminal offence or for proceedings preliminary to trial;
 - (ii) for proceedings relating to his extradition or lawful removal from Zimbabwe; or
 - (iii) for the purpose of ensuring that he appears before a court as a witness for the purposes of any criminal proceedings;
- (d) for the imposition of restrictions on the movement or residence within Zimbabwe of persons who are neither citizens of Zimbabwe nor regarded by virtue of a written law as permanently resident in Zimbabwe or for excluding or expelling from Zimbabwe any person who is not a citizen of Zimbabwe;
- (e) for the imposition of restrictions by order of a court on the right of any person to leave Zimbabwe that are required for the purpose of ensuring that he appears before a court or other adjudicating authority as a party or a witness or to secure the jurisdiction of the court or other adjudicating authority for the purposes of any civil proceedings; or
- (f) for the imposition of restrictions within Communal Lands of persons who are not tribespeople to the extent that such restrictions are reasonably required for the protection of the interests of tribespeople or their well-being;

except, in the case of any provision referred to in paragraphs (a) to (e), so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a

democratic society.

- (4) The provisions of subsection (3)(a) shall not be construed as authorizing a law to make provision for preventing any person from leaving Zimbabwe or excluding or expelling from Zimbabwe any person who is a citizen of Zimbabwe."

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Now the Immigration Act 1979, in s 13(10), stipulates that no person shall enter Zimbabwe (if aged 16 years and over) without a travel document issued to him, and in s 26(1) provides that no person shall depart from Zimbabwe (if aged 16 years and over) without a travel document issued to him. Section 36 imposes a fine of not exceeding one thousand dollars or to imprisonment not exceeding two years or both such fine and such imprisonment for the contravention of those sections.

In *R v Brailsford* [1905] 2 KB 730 (KB) at 745, LORD ALVERSTONE CJ said:

"It will be well to consider what a passport really is. It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for the individual's protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office, in an official document, vouches the respectability of the person named.

Passports have been known and recognized as official documents for more than three centuries, and in the event of war breaking out become documents which may be necessary for the protection of the bearer."

In *Joyce v DPP* [1946] 1 All ER 186 (HL) at 191-192 Lord Jowitt LC stated:

"The terms of a passport are familiar. It is thus described by LORD ALVERSTONE CJ in *Brailsford's* case [1905] 2 KB 730, at p 745: ... By its terms it requests and requires in the name of His Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need. It is, I think, true that the possession of a passport by a British subject does not increase the Sovereign's duty of protection, though it will make his path easier. For him it serves as a voucher and means of identification... To me, my Lords, it appears that the Crown in issuing a passport is assuming an onerous burden, and the holder of a passport is acquiring substantial privileges. A well known writer on international law has said (see *Oppenheim's International Law*, 4th Edn, Vol I, p 556) that by a universally recognised customary rule of the law of nations every State holds the right of protection over its citizen abroad. This rule thus recognised may be asserted by the holder of a passport which is for him the outward title of his rights. It is true that the measure in

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which the State will exercise its right lies in its discretion. But with the issue of the passport the first step is taken."

In *Sachs v Dönges* NO *supra* at 277, 278 and 287, WATERMEYER CJ observed:

"It was suggested in the course of argument, relying upon something which was said in the judgment in the case of *R v Brailsford* [1905] 2 KB 730, that a passport was a document vouching for the respectability of the bearer. As to that suggestion, it must not be overlooked that conditions governing travel in foreign countries have changed

considerably since 1905, when *Brailsford's* case was decided. Passports were not then such indispensable documents for travel in foreign countries as they have become to-day. In fact, very few countries at that time required a traveller to carry a passport. ...

But the position is different with regard to the passport in the present case, which cannot be regarded as a badge of respectability, seeing it is obtainable from a subordinate official upon an application in which only particulars of identity and nationality are furnished, and its main purpose is to serve as an official certificate of identity and nationality.

From a juristic point of view the grant of a passport is a contract. In consideration of a fee of £1 a document of value to the recipient is delivered to him upon certain conditions. The conditions are an intimation to the recipient that the passport is valid for five years and can be renewed on payment of a fee, but that it may be cancelled for stated causes. In the present case not only was the document accepted and paid for on these conditions, but the representations contained in it were acted upon by the recipient who incurred expenses in consequence of them. So that a right to the possession and retention of the passport vested in the recipient by delivery of it subject to those conditions, and the principles of estoppel, prevent the Crown from claiming any right inconsistent with.

...

It seems clear, therefore, that there is no substance in the contention that the revocation of a passport is an Act of State which cannot be questioned in a court of law."

While Schreiner JA at 306-307 stated:

"I ... only wish to add a brief comment on the meaning of the prerogative .

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The word is ordinarily used to describe compendiously the non-statutory powers of the executive. I use the word powers to include what might perhaps more appropriately be called by other names ... An act done by virtue of the prerogative is simply an act done by the executive, without statutory authority, the lawfulness of which depends on the customary law of England as adopted by us. It does not derive its lawfulness from any vague and elastic notion of executive sovereignty.

Although in describing the category of prerogative powers the word 'discretionary' is sometimes used, this only means that the exercise of the powers is not restricted within the limits of any statute. It does not mean that the powers falling within the category form an almost mystical field in which the executive is free not only to do whatever it wills, but also to undo whatever it has done. There is no general rule that whatever has been done by the executive without statutory authority can be revoked by it at will. Each purported exercise of a prerogative power must be considered, when a case arises, on its own merits to see whether the power exists and whether the exercise is within the power; and this applies equally to the revocation of a previous act, done under a prerogative power."

In *Fellner v Minister of the Interior supra* where the appellant had applied, with the requisite fee, after the 5 years for which her passport was valid had expired, to the passport office, in order to travel abroad and the renewal of her passport was refused by the respondent without giving any reasons. MURRAY J (as he then was) at first instance held that he was bound to follow *Sachs v Dönges* NO; that a contractual relationship was created, which gave her a right of renewal, clearly exercisable at her option to extend the validity of her passport by the payment of the requisite fee for a further period of one to five years, but after her passport expired she had no right of renewal; and so MURRAY J refused to order the respondent to issue her a passport. The Appellate Division held that there was no reason why it should apply the *stare decisis* rule with the same rigidity as in England and that it was not absolutely bound by its own previous

decision. It held by a majority that the *ratio decidendi* in *Sachs v Dönges NO supra* was not that the issue of a passport created a contractual relationship (since only two of the appellate judges so held, while majority did not). The fee charged was for services rendered, which was no different from fees customarily charged by the government, like transfer registration fees; therefore the granting of a renewal of a passport was an executive act on part of the government and so the appellant could not by legal process compel the respondent to renew her passport.

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In *Tutu v Minister of Internal Affairs supra* where the applicant was issued a passport on 19 January 1981 valid until 18 January 1986. The payment was revoked by the respondent during April 1986. GORDON J held that the "Conditions of Issue" in the passport provided that it remained the property of the Government and could be amended, withdrawn or cancelled at any time at the pleasure of the respondent and, upon request of the respondent, had to be forthwith surrendered. As this differed from what was provided in the passport in *Sachs v Dönges NO, supra*, in the exercise of the prerogative power to issue and refuse passports the respondent accordingly had an unchallenged right to revoke the passport before expiry date without giving any reasons for his actions. Further, even if the respondent was required to show good cause for revoking the passport, he had done so.

In *Re Application by Mwau* [1985] LRC (Const) 444 the Kenyan applicant's passport was withdrawn in 1983 by the Principal Immigration Officer. The High Court of Kenya held that in the absence of statutory authority the issue and withdrawal of passports was the prerogative of the Kenyan President exercisable by the responsible Minister in his discretion and therefore not subject to judicial review. Further, the right to freedom of movement in the Kenyan Constitution was not absolute and therefore there was no statutory or legal duty on the Principal Immigration Officer to issue or return passports. The Constitution of Kenya in s 81 states:

"81. (1) No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya.

...

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision ... for the imposition of restrictions on the movement ... or any person's right to leave Kenya that are reasonably required in the interests of defence, public safety or public order."

SIMPSON CJ referred to the statement contained in the passport which read that the passport was the property of the Kenya Government and may be withdrawn at any time and relied on the fact that British passports issued under the royal prerogative may be refused, revoked and impounded in the absolute discretion of the executive and that there was no formal machinery

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for appeal or judicial review. Therefore he held that the prerogative was that of the President which was not subject to judicial review.

But in *R v Secretary for Foreign and Commonwealth Affairs, ex p Everett supra* the applicant, on the expiry of his passport, was refused the issue of a new passport by the Foreign and Commonwealth Office. MANN J at first instance quashed the decision in the letter of July 24, 1986 refusing the applicant the passport. The English Court of Appeal held that although the issue of a passport involved the exercise of prerogative power, the court had jurisdiction to review such a decision and to inquire whether the passport had been wrongly refused. O'CONNOR LJ said at 657-659:

"Until the decision of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, [1985] AC 374 it was generally assumed that the law was that decisions of the administration taken under the prerogative were not amenable to judicial review ... It is quite clear since that decision that there are areas of the exercise of the prerogative which the courts can and will review. There are other areas, some of which identified in that case, which they will not.

...

The judge held that the issue of a passport fell into an entirely different category. That seems common sense. It is a familiar document to all citizens who travel in the world and it would seem obvious to me that the exercise of the prerogative, because there is no doubt that passports are issued under the royal prerogative in the discretion of the Secretary of State, is an area where common sense tells one that, if some reason a passport is wrongly refused for a bad reason, the court should be able to inquire into it.

...

It seems to me that the Secretary of State, in the fair exercise of his discretion, was entitled to refuse the passport but to give his reason for so doing ... but he should, when notifying the applicant that that was the reason for refusing the passport, tell him that if there were exceptional circumstances which might call for the issue of a passport he would consider them. "

International legal instruments have also for a considerable period made provision for the right of freedom of movement. As long ago as the Universal Declaration of Human Rights (UN General Assembly Resolution 217A (III) of 10 December 1948) which declared in Article 13:

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- "1. Everyone has the right to freedom of movement ...
2. Everyone has the right to leave any country including his own and to return to his country."

Also, the International Covenant on Civil and Political Rights (UN General Assembly Resolution 2200 A (XXI) of 16 December 1966) stated in Article 21:

- "2. Everyone shall be free to leave any country including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others, and consistent with the other rights recognized in the present covenant.
4. No one shall arbitrarily be deprived of the right to enter his own country."

Further, the American Convention on Human Rights (San Jose, Costa Rica, 22 November 1969) provided in Article 22:

- "2. Every person has the right to leave the country freely, including his own.
3. The exercise of the foregoing rights may be restricted only pursuant to a law, to the extent indispensable in a democratic society in order to prevent crime or to protect the national security, public order, public morals, public health or the rights or freedoms of others."

Also, the African Charter on Human and People's Rights (Nairobi, Kenya, June 1981) indicated in Article 12:

- "2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restriction, provided for by law for the protection of national security, law and order, public health or morality."

Similarly, the United States Supreme Court had held that a citizen has the right to travel. Federal legislation passed authorized the President and the Secretary of State to regulate the issue of passports, and so the Executive imposed restrictions whereby passports were denied to individuals on the grounds of political beliefs and by area restrictions that prevented visits to certain countries. In *Kent v Dulles* 357 US 116 (1958); 2 L Ed (2d) 1204, passports had been denied to individuals because they were communists. The

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Supreme Court said at 125-126:

"The right to travel is part of the 'liberty' which the citizen cannot be deprived without due process of law under the Fifth Amendment... Freedom of movement across frontiers in either direction, and inside frontiers as well, was part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values ... Freedom to travel is, indeed, an important aspect of the citizen's liberty."

It held that such broad delegation had not been given to the Executive and declared that it would "construe narrowly all delegated powers that curtail or dilute" the right to travel abroad. Again in *Aptheker v Secretary of State* 378 US 500 (1964); 12 L Ed (2d) 992, where the issuance of passports was prohibited to individuals who belonged to communist organizations, the Supreme Court found such prohibition to be over-broad, holding that such governmental regulation affecting "basic freedoms" like foreign travel must be narrowly drawn to prevent the supposed evil and therefore unconstitutional. However, in *Zemel v Rusk* 381 US 1 (1965); 14 L Ed (2d) 179 where the Secretary of State was empowered to impose area restrictions, the Supreme Court upheld the prohibition to travel to Cuba distinguishing it from *Kent v Dulles*, *supra*.

Likewise, the Constitution of India in Articles 14 and 21 provides:

- "14. The State shall not deny to any person equality before the law and the equal protection of the laws ...
21. No person shall be deprived of his life or personal liberty except according to procedure established by law."

In *Satwant Singh v Assistant Passport Officer* [1967] 3 SCR 523 the petitioner, an entrepreneur,

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had his passport withdrawn by the respondent. He brought a writ petition to the Indian Supreme Court, alleging that the right to leave and travel outside of India and return is part of the personal liberty guaranteed in Article 21 and so the withdrawal of his passport and the unfettered discretion given to the respondent to issue or not issue a passport offended Article 14. SUBBA RAO CJ said at 534, 537-9 and 542:

"But the Supreme Court of America for the first time defined the scope of a passport in *Kent v Dulles* ... Mr Justice Douglas described the nature

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of the passport thus: 'A passport not only is of great value - indeed necessary - abroad; it is also an aid in establishing citizenship for purposes of re-entry into the United States.' ... So a passport, whether in England or in the United States of America serves diverse purposes: it is a 'request for protection', it is a document of identity, it is *prima facie* evidence of nationality, in modern times it not only controls exit from the State to which one belongs, but without it, with a few exceptions, it is not possible to enter another State. It has become a condition for free travel.

The want of a passport in effect prevents a person leaving India. Whether we look at it as a facility given to a person to travel abroad or as a request to a foreign country to give the holder diplomatic protection, it cannot be denied that the Indian Government, by refusing a permit to a person residing in India, completely prevents him from travelling abroad...

In India, the Supreme Court has made some observations on the scope of personal liberty in Art 21 in some decisions which throw light on the content of personal liberty. In *Gopalan's* case [1950] SCR 88 ... at p 138 , FAZAL ALI J, says:

'There can therefore be no doubt that freedom of movement is in the last analysis the essence of personal liberty.'

Das J, ... at p 301 ... observes:

'Its purpose is not to provide protection for the general right of free movement but to secure a specific and special right of the Indian citizen to move freely throughout the territories of India regarded as an independent additional right apart from the general right to locomotion emanating from the freedom of person. It is a guarantee against unfair discrimination in the matter of free movement of the Indian citizen throughout the Indian union. In short, it is protection against provincialism.'

The Indian Supreme Court, by a majority, issued a mandamus against the respondent. I should indicate that the Indian Passport Act 1967 makes provision that a passport authority shall upon application from any Indian citizen issue him a passport unless (1) the applicant is likely to undertake activities prejudicial to the sovereignty and integrity of India, or the applicant's foreign visit is likely to be harmful to the security of India; (2) the issuance of a passport to him is not in the public interest or his absence or presence in

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a particular foreign country is likely to prejudice India's good relations with that country; (3) the applicant has been convicted of a crime involving moral turpitude, or criminal proceedings are pending in India, or summons for his appearance in court or a warrant of arrest has been issued

or the court has prohibited him from leaving India; (4) the applicant has been repatriated at government's expense and he has not reimbursed the authorities. That Act also calls for the refusal to be in writing, with a brief statement of reasons for such refusal unless the passport authority is of the opinion that it is not in the interest of the general public to give reasons. In *Maneka Gandhi v Union Government* [1978] 2 SCR 621 the Indian Supreme Court considered that Act. The court declared that the statutory power to withhold a passport in the public interest was not unconstitutionally vague and indefinite as the Indian Constitution itself spoke of the public interest in Article 19 and therefore it had to be so construed.

Further, the court decided that no one can be prohibited from obtaining a passport and leaving India without the use by the governmental authorities of a procedure that is reasonable, fair and just; the applicant must be informed of the grounds on which the action has been taken and be given an opportunity to challenge it by making representations.

The Constitution Act 1982 (Canada) in the Canadian Charter of Rights and Freedoms makes provision in ss 1 and 6(1) as follows :

"1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

...

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada."

In interpreting the Constitution, the Supreme Court of Canada held that a Constitution "must be approached from a broad perspective" and "must be interpreted generously so as to fulfil its purpose of securing for the individual the full benefit of the Charter's protection": *United States of America v Cotroni* (1989) 42 CRR 101 at 109. It also declared that if the right to remain in one's country is to be interfered with, such interference must be justified as being required to meet a reasonable state purpose. It concluded that extradition *prima facie* infringed s 6(1), but the objectives sought by the Extradition Act (Canada) related to concerns that were pressing and substantial,

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impaired the s 6(1) right as little as is reasonably possible (even when a Canadian citizen could be charged and tried in Canada for the offence concerned) and which, therefore, warranted interference with the right under s 6(1).

The respondent's contention is founded on the Executive's exercise of the prerogative, by the vehement assertion that a passport is the property of government, held at its pleasure and that it has absolute discretion in revoking or refusing a passport, which discretion is not subject to judicial review. In *PF-Zapu v Minister of Justice, Legal & Parliamentary Affairs* 1985 (1) ZLR 305 (S) at 320 and in *Rushwaya v Minister of Local Government & Town Planning & Anor* 1987 (1) ZLR 15 (S) at 19, the Supreme Court relying on *CCSU v Minister of Civil Service, supra*, held that the Executive's exercise of the prerogative is amenable to judicial review.

Also, it is clear from the foregoing that the right of freedom of movement (or mobility rights)

encompasses, not only, "locomotion", but also, the right to travel including going abroad and returning to one's own country. The right of leaving and entering one's own country concerns itself with what happens at its entry and departure points, as well as what transpires at the entry and departure points of the traveller's destination. As Subba Rao CJ pointedly observed, a refusal of a passport prevents a person's departure and completely denies him foreign travel.

But the right guaranteed under s 22(1) of the Constitution of Zimbabwe is not, however, an absolute right, since it may be curtailed by what is in any law or done under the authority of such a law to the extent that law makes provision for matters mentioned in s 22(1), except in the case of any provision referred to in paras (a) to (e) of s 22(3), so far as that provision or thing done under thereof is shown to be reasonably justifiable in a democratic society. There are two aspects under this that need to be determined: first whether that guaranteed right has been infringed; and second, whether that infringement is permitted pursuant to s 22(3), since a limitation put on that guaranteed right, therefore calls for the following requirements to be considered: (a) contained in any law or thing done under the authority thereof; (b) shown to be reasonably; (c) justifiable; (d) in a democratic society.

The wording of s 22(3) of the Constitution makes it clear that the burden or onus is cast, on a balance of probabilities, upon those that seek to rely on the limitation that has been placed on the guaranteed right: *R v Oakes* (1986) 19 CRR 308 (SCC) at 335. Further, the curtailment must be contained in any law

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or thing done under the authority thereof, which means it has to be decreed by law, that is, it must be expressly provided for by statute or delegated legislation or results by necessary implication from the terms of a statute or regulation or from its operating requirements and it may also result from the application of a common law rule: *Thomsen v Thedveen* (1988) 32 CRR 257 (SCC) at 265 .

In *Commissioner of Taxes v CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) GUBBAY JA (as he then was) said at 371-372:

"It has been said that the word 'reasonable' implies intelligent care and deliberation - the choice of a course which reason dictates, and that legislation which arbitrarily or excessively invades the enjoyment of a substantive right does not possess the quality of reasonableness ... With that concept I respectfully agree. The principle of reasonableness strikes at arbitrariness and inequality in State action and ensures fairness and impartiality of treatment.

...

In endeavouring to derive a meaning, the learned judge had regard to the *dictum in Speiser v Randall* (1958) 357 US 513 at 537, that a democratic country is 'a free society in which government is based upon the consent of an informed citizen and is dedicated to the protection of the rights of all, even the most despised minorities.'

There is no doubt that the aforementioned quality provides a broad guide as to the fundamental concept of a 'democratic society'. It is a factor of weight, yet can hardly be taken as determinative of the inquiry. The ambiguous nature of the phrase causes it to mean different things to different persons. It is, with the passage of time, continually open to a change in perceptions ...

Appreciative of the insuperable difficulty of defining the reach of human rights derogations by making them subject to the criterion of a democratic society, the Canadian courts have adopted the approach of attaching less and less importance to the abstract and illusive standard of a democratic society and placing an increased focus on whether the derogations imposed on the entrenched freedoms are reasonable. See, for example, *Re Federal Republic of Germany and Rauca* (1982) 141 DLR (3d) 412 at 424. That approach commands itself and I propose to follow it."

It is true that, in the Canadian case cited, the learned Chief Justice of the Ontario High Court did not interpret the concept of a democratic society

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when he considered "reasonable limits" in s 1 of the Canadian Charter of Rights and Freedoms. He held that the phrase "reasonable limits" called for an objective test and the judge must determine if the limit was reasonable or unreasonable. The issue was whether the judge considered there was a rational basis for the limitation - "a basis that would be regarded as being within the bounds of reason by fairminded people accustomed to the norms of a free and democratic society. That is the crucible in which the concept of reasonableness must be tested."

The concept of "a democratic society" may be "ambiguous in nature" and it may have an "abstract and illusive standard". However, with respectful deference, I disagree with the learned Judge Of Appeal(as he then was) since there is little doubt that "a democratic society" does have certain central and well-defined features which distinguishes it from a totalitarian or dictatorial one. It is against at least that type of a society that the validity of the claim of limitation sought has to be determined. Subsequently, in *R v Big M Drug Mart Ltd* (1985) 13 CRR 64 (SCC) at 97-98 DICKSON CJC observed:

"A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms ... Freedom must surely be found in respect for the inherent dignity and the inviolable rights of the human person ...

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction; coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedom of other, no one is forced to act in a way contrary to his beliefs or his conscience.

What may appear good and true to a majoritarian ... or to the state acting

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at their behest, may not, ... be imposed upon citizens who take a contrary view. The Charter safeguards ...

minorities from the threat of 'the tyranny of the majority'."

Further, in *R v Oakes, supra*, the Supreme Court of Canada laid down the two central criteria that had to be satisfied. DICKSON CJ said at 336-337

"First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom: *R v Big M Drug Mart Ltd, supra*, at p 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gains 1 protection...

Second, once a sufficiently significant objective is recognized, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test': *R v Big M Drug Mart Ltd* at p 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right of freedom in question: *R v Big M Drug Mart Ltd* at p 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'.

With respect to the third component, it is clear that the general effect of any measures impugned under s 1 will be the infringement of a right of freedom guaranteed by the Charter; this is the reason why resort to s 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which

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impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purpose it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."

I propose to apply the above principles to the respondent's contention. The respondent not only has failed to apply the reasonable, fair and just procedure enunciated by the Indian Supreme Court, but also has not even provided him the opportunity spoken of by O'CONNOR LJ when notifying him of his reasons for refusing the passport. As the onus is on the respondent seeking the limitation to the applicant's right to enter and leave Zimbabwe guaranteed under s 22, he must also show that the objective which the limitation intended to achieve was of sufficient importance to overcome the protected constitutional right. Further, the respondent must demonstrate that the means adopted to achieve this are proportional or appropriate to the ends. It is true that the nature of the proportionality test will vary depending on the circumstances.

An enquiry in terms of the above principles entails an examination of the nature of the Executive's interest or objective which accounts for its claim of absolute discretion in the refusal

and revocation of a passport. In this case, the respondent has not established what the Executive's aim was in invoking absolute discretion in the matter when considered in relation to defence, public safety, public order, public morality or public health. The respondent has also failed to show that the Executive's claim can be characterised as substantial and pressing. Nor can it be said that the means chosen by the Executive has passed the proportionality test. I have been unable to find a satisfactory justification for this most arbitrary claim of the respondent.

In all the circumstances of the case there will be an order in terms of the draft order.

Gambe, Chinyenze & Associates, applicant's legal practitioners

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

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INTERCONTINENTAL TRADING (PVT) LTD v NESTLÉ ZIMBABWE (PVT) LTD 1993 (1) ZLR 21 (HC)

Court High Court, Harare

Robinson J

Civil trial

11-14 & 20 January 1993

Flynote

Contract - specific performance - when granted - factors to be considered

Headnote

The plaintiff claimed that it had concluded a contract for the supply of certain goods to it by the defendant. The defendant disputed the existence of the contract. The plaintiff sought specific performance of the contract, but the defendant argued that specific performance should not be ordered and that the plaintiff was restricted to a claim in damages. On the facts the learned Judge found that there was a binding agreement and dealt with the law as to specific performance.

Held, whilst the court retained a wide discretion to withhold the grant of specific performance, a wronged party to a contract had a right to select his remedy, and the court would enforce that right unless there were compelling circumstances to refuse the remedy and award damages only.

Held, the onus was on the party seeking to avoid specific performance to establish the facts and circumstances which the court should consider in the exercise of its discretion to refuse specific performance.

Held, in the present circumstances it would not be a proper exercise of discretion to refuse specific performance and thus allow the defendant to avoid its contractual obligations.

Cases cited:

Cohen v Shires, McHattie & King (1882) 1 SAR 41

Farmers' Co-op Soc (Reg) v Berry 1912 AD 343

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Woods v Walters 1921 AD 303

Shill v Milner 1937 AD 101

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

Haynes v Kingswilliamstown Municipality 1951 (2) SA 371 (A)

Baragwanath v Olifants Asbestos Co (Pty) Ltd 1951 (3) SA 222 (T)

Thompson v van der Vyver 1954 (2) SA 192 (C)

Diner v Dublin 1962 (4) SA 36 (N)

Industrial & Mercantile Corp v Anastassiou Bros 1973 (2) SA 601 (W)

B K Tooling (Edms) Bpk v Scope Precision Engng (Edms) Bpk 1979 (1) SA 391 (A)

Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA 398 (A)

Dithaba Platinum (Pty) Ltd v Erconovaal Ltd & Anor 1985 (4) SA 615 (T)

Benson v S A Mutual Life Assurance Soc 1986 (1) SA 776 (A)

Crundall Bros (Pvt) Ltd v Lazarus NO & Anor 1991 (2) ZLR 125 (S); 1992 (2) SA 423 (ZS)

Ex p Neethling & Ors 1951 (4) SA 331 (A)

Gillon v Eppel 1991 (4) SA 656 (B)

Makwindi Oil Procurement (Pvt) Ltd v NOCZIM 1988 (2) ZLR 482 (S); 1989 (3) SA 191 (ZS)

AP de Bourbon SC for the plaintiff

EWV Morris for the defendant

Judgment

Robinson J: The plaintiff, a locally registered company which carries on business as an importer and exporter, seeks an order of specific performance to compel the defendant, which is

also a company incorporated with limited liability under the laws of Zimbabwe and which carries on business as a food manufacturer, to deliver to the plaintiff 3500 cartons of Lactogen, each carton to contain 24 tins of 500 grammes of Lactogen, in terms of a contract allegedly entered into between the parties in 1987.

The plaintiff instituted the present proceedings against the defendant on 27 January 1989 and in paras 3 to 9 inclusive of its declaration, the plaintiff pleaded its case thus :

- "3. In terms of a contract concluded between the parties in August and September 1987, and at Harare, the defendant undertook to supply to the Plaintiff 3500 cartons (or to the nearest truckload, at the buyer's option) of Lactogen.
4. It was a term of the said contract that the Lactogen would be packed

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in cartons, each carton containing 24 tins of 500 grammes of Lactogen.

5. It was a term of the contract that the price for each carton would be \$59,40, subject to a discount of 4% upon payment within sixty days of the presentation of invoice.
6. Accordingly, the total amount due within sixty days of the presentation of invoice would have been the sum of \$199 584.
7. Delivery of the said Lactogen was to be made within reasonable period after the 30th September 1987.
8. Despite the passage of a reasonable period since the 30th September 1987, the defendant has refused or neglected to deliver to the plaintiff the 3500 cartons of Lactogen as aforesaid .
9. At all times the plaintiff has been and still is willing and able to pay the sum of \$199 584 within sixty days of the presentation of an invoice in respect of the said Lactogen"

In reply to a request for further particulars filed by the defendant, the plaintiff responded as follows:

"The plaintiff provides the following further particulars in response to the defendant's request filed of record on the 21st February 1989.

1. Ad paragraph 3
 - 1.1 The contract was concluded on the 31st August 1987 by a telex number G596 of that date wherein the plaintiff accepted the defendant's offer to purchase the goods. A copy of the telex is annexed hereto as Annexure 'A'. The contract was thereafter confirmed in writing by letter from the plaintiff to the defendant of the 30th September 1987, a copy thereof being Annexure 'B' hereto .
 - 1.2 The contract was concluded by Mr P Dobson representing the plaintiff and Mr P Musanide, the Export Development Officer, representing the defendant.
2. Ad paragraphs 4 and 5

All express terms of the contract are set out in Annexures 'A' and 'B' .

3. Ad paragraph 6

It was agreed between the parties, represented as stated above, that payment would be made at sixty days from the presentation of the invoice. Confirmation of this is set out in Annexure 'B'.

4. Ad paragraphs 7 and 8

4.1 The plaintiff does not allege that the delivery of the Lactogen

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was subject to any any conditions other than those set out in Annexures 'A' and 'B'.

4.2 The plaintiff requested delivery in terms of the contract by a telex number H319 of the 23rd December 1987. A copy of that telex is attached hereto as Annexure 'C'."

I shall quote the texts of annexures A, B and C during the course of my judgment.

In the plea filed by it, the defendant denied that any contract was concluded between it and the plaintiff and, in particular, denied that the terms set out in paras 4 & 5 were agreed on. The defendant further denied that it was requested to deliver Lactogen after the passage of a reasonable time.

The month before the trial commenced, the defendant filed a notice of amendment to its plea, which amendment was granted, to which the plaintiff handed in a replication at the outset of the trial. The amendment and replication will be dealt with later.

The immediate issue which thus requires to be determined is whether or not a contract was concluded between the plaintiff and the defendant; if not, that is an end to the matter; but if it is found that a contract was concluded between the parties, then it remains for the court to decide whether it should grant the plaintiff's prayer for an order compelling the defendant to perform its side of the contract.

[The learned Judge set out and analysed the evidence, and concluded as follows.]

I am entirely satisfied that on all the evidence, especially that furnished by the documents before the court, there was a binding contract between the parties in terms of which the defendant was obliged to supply the plaintiff with 3500 cartons of Lactogen, with each carton containing 24 tins of 500 grammes of Lactogen.

Let me add that to have found in this matter that there was no contract between the parties would have been artificial in the extreme and, I am sure, would have prompted any reasonable businessman to remark that if, before, he had thought the law was an ass, he now knew for certain that it was, since it had shown itself to be the domain of niggling academics out of touch with reality and to have nothing to do with the cut and thrust of the business world where

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one is concerned, not with the legal niceties pertaining to, but with the perceived existence of a contract. As a former academic, I think I am well qualified to speak thus!

I turn now to the question of legal redress, in particular, the claim by the plaintiff for an order for the specific performance by the defendant of its obligations under the contract.

Before I deal with this matter, I think it prudent for the court to remind itself of the correct manner in which the remedy of specific performance should be approached.

Historically, it was KOTZÉ CJ in *Cohen v Shires, McHattie & King* (1882) 1 SAR 41 at 45 who, after consulting the authorities, held that Roman-Dutch law clearly recognised the right to a specific performance of a contract; and it is interesting to note that the classic exposition of the rule on specific performance was expressed in a case which arose in the High Court of this country and which came before the South African Appellate Division, namely, *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343. In that case INNES JA stated at 350:

"*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZÉ CJ in *Thompson v Pullinger* (1 OR p 301), 'the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt'."

That right has since been re-affirmed in a multitude of cases such as *Woods v Walters* 1921 AD 303 at 309, *Shill v Milner* 1937 AD 101 at 107, *R v Milne & Erleigh* (7) 1951 (1) SA 791 (A) at 873G, *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at 378D-E, *Baragwanath v Olifants Asbestos Co (Pty) Ltd* 1951 (3) SA 222 (T) at 228A-B, *Thompson v van der Vyver* 1954 (2) SA 192 (C) at 194F-G, *Diner v Dublin* 1962 (4) SA 36 (N) at 40A, *Industrial & Mercantile Corporation v Anastassiou Brothers* 1973 (2) SA 601 (W), *B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 433D-G, *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 440G-441C, *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd & Anor* 1985 (4) SA 615(T) at 627I, *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 782H-I and *Crundall Brothers (Pvt) Ltd v Lazarus NO & Anor* 1992 (2) SA 423 (ZS) at 430C-D.

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However, as INNES JA pointed out in *Farmers' Co-operative Society (Reg) v Berry*, *supra*, at 350, a party's right to specific performance is subject to the court's exercising "a discretion in determining whether or not decrees of specific performance should be made". In other words, as also re-affirmed in the cases cited in the immediately preceding paragraph, it is settled law that the grant or refusal of an order for specific performance is entirely a matter for the discretion of the court in which the claim for specific performance is made.

On the nature of the discretion and the way in which it is to be exercised, it is pertinent to quote the following extract from the judgment of HEFER JA in *Benson's* case *supra* at 782D-J and 783A-F .

"This leads to the third observation which relates generally to the nature of the discretion in question and to the way in which it is to be exercised. In *Haynes v King William's Town Municipality* (*supra* at 378) DE VILLIERS AJA

dealt with the matter in the following terms:

'It is correct, as Mr *Miller* states, that in our law a plaintiff has the right of election whether to hold a defendant to his contract and claim performance by him of precisely what he had bound himself to do, or to claim damages for the breach. (*Cohen v Shires, McHattie & King* 1882 Kotze's Reports at 41.) This right of choice a defendant does not enjoy; he cannot claim to be allowed to pay damages instead of having an order for specific performance entered against him. (*Farmers' Co-operative Society v Berry* 1912 AD 343 at 350.)

It is, however, equally settled law with us that, although the Court will as far as possible give effect to a plaintiff's choice to claim specific performance, it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quod interest*. The discretion which a Court enjoys, although it must be exercised judicially, is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.'

The statement that the discretion is not circumscribed by rigid rules requires some elucidation. The use of the word 'rigid' may be taken to imply that there are indeed rules regulating the exercise of the discretion but that they are not inflexible; that is in effect what Story *Equity Jurisprudence* says in the passage which the learned JUDGE OF APPEAL

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cited with approval at 379 of the report. I doubt, however, whether that is what was intended, particularly after it was accepted that a plaintiff has the right to elect whether to demand performance or to sue for damages, and that the Courts will as far as possible give effect to his election. That a right to specific performance exists was decided as long ago as 1882 (in *Cohen v Shires, McHattie & King* (*supra*)) and subsequently reaffirmed in a host of cases (see eg *Thompson v Pullinger* (1894) 1 OR 298 at 301; *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343 at 350; *Woods v Walters* 1921 AD 303 at 309; *Shill v Milner* 1937 AD 101 at 109; *B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979(1) SA 392 (A) at 433, to mention only a few), subject only to the qualification that the Court has a discretion to grant or to refuse an order for performance. This right is the cornerstone of our law relating to specific performance. Once that is realised, it seems clear, both logically and as a matter of principle, that any curtailment of the Court's discretion inevitably entails an erosion of the plaintiff's right to performance and that there can be no rule, whether it be flexible or inflexible, as to the way in which the discretion is to be exercised, which does not affect the plaintiff's right in some way or another. The degree to which it is affected depends, of course, on the nature and extent of the rule; theoretically, I suppose, there may be a rule which regulates the exercise of the discretion without actually curtailing it but, apart from the rule that the discretion is to be exercised judicially upon a consideration of all relevant facts, it is difficult to conceive of one. Practically speaking it follows that, apart from the rule just referred to, no rules can be prescribed to regulate the exercise of the Court's discretion.

This does not mean that the discretion is in all respects completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, nor upon a wrong principle (Ex p *Neethling* (*supra* at 335)). It is aimed at preventing an injustice - for cases do arise where justice demands that a plaintiff be denied his right to performance - and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, eg, if, in the particular circumstances, the order will operate unduly harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy (cf De Wet and Yeats *Kontraktereg en Handelsreg* 4 ed at 189). Furthermore, the Court will not decree specific performance where performance has become impossible. Here a distinction must be drawn

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between the case where impossibility extinguishes the obligation and the case where performance is impossible but the debtor is still contractually bound. It is only the latter type of case that is relevant in the present context, for in the former the creditor clearly has no legal remedy at all. (See *De Wet and Yeats (op cit)* at 189 n 61 and the cases there cited); and see too in this connection *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd (supra)* at 441-3). "

Before proceeding to an examination of the relevant factors in this case bearing upon the exercise of the court's discretion in deciding whether or not to grant the plaintiff's claim for specific performance, I believe it circumspect also for the court to alert itself to the grounds upon which a court of appeal will consider itself empowered to interfere with the exercise of a judicial discretion by a court *a quo*. In *Ex parte Neethling & Ors* 1951 (4) SA 331 (A) at 335E, GREENBERG JA posed the question thus:

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

Next I turn to the question of what the plaintiff or the defendant must do in order to persuade the court, in the exercise of its discretion to grant or refuse, as the case may be, an order for specific performance and on which party the *onus* lies in this regard.

The position in regard to these points was dealt with thus by MILLER JA in *Tamarillo's* case *supra* at 442E-443H:

"The *dictum* of DE VILLIERS JA in *Shill v Milner* is composed of two elements; (i) that it is for the defendant to raise impossibility as a defence and that he must raise it in his plea (or in his answering affidavit) and (ii) that the *onus* then rests on him to prove impossibility. While I appreciate that the Court might in certain respects, when considering how to exercise its discretion in regard to a claim for specific performance, approach differently (i) a case in which effective performance is possible only with the consent of a third party and (ii) the more usual type of case in which the consent of another is not necessary for effective performance, I am unable to discern why there should be a difference in approach in respect of the first element of the *dictum* in *Shill v Milner*. Ordinarily it is the defendant who is called upon to perform who has peculiar

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knowledge concerning his ability or inability to do what is required of him. This is generally as true of a defendant who is required to deliver a particular article as of one who is required to perform an act which requires, for effectiveness, the consent of another. In the latter case the defendant, having undertaken to perform that act, may in the absence of evidence to the contrary not unreasonably be taken to have made the arrangements necessary to enable him to perform it, just as the defendant who has undertaken to deliver an article may reasonably be taken to have arranged for the article to be available for delivery. It is generally not for a plaintiff to anticipate in his declaration the possible defences a defendant might raise. And still less is it incumbent on a plaintiff who claims specific performance, the grant or refusal of which is in the final result in the discretion of the Court, to anticipate in his declaration the possible grounds which a defendant may advance to induce the Court to exercise its discretion against the grant of specific performance. To the extent that the judgment in *Jacobsz v Fall (supra)* necessarily requires a plaintiff who claims specific performance of an undertaking to assign rights and obligations (eg to assign a lease) to allege in his declaration or particulars of claim, and to prove, that what he claims can effectively be performed by the defendant, I disagree with it.

Concerning the *onus* of proof, the second element of the *dictum* of DE VILLIERS JA, it may be that in certain cases evidence falling short of proof of impossibility might nevertheless justify a Court in refusing to decree specific performance. In *Van Rooyen v Baumer Investments (Pty) Ltd (supra)* ETTLINGER AJ at 120-1, after referring to *Shill v Milner*, expressed the view that 'where the ability of the debtor to perform is raised (by the

debtor) and left in doubt', specific performance should be refused. In a case in which the defendant requires the consent of a third party to enable him to perform effectively, and at the end of the case, the defence of impossibility having been raised and canvassed, the probabilities in regard to that issue appear to be evenly balanced, the Court, it appears to me, might justifiably take the view that refusal of specific performance was preferable to the grant of an order which as likely as not would prove to be ineffectual. A rule that a defendant pleading impossibility as answer to a claim for specific performance must necessarily discharge the onus of proving it if he is to avoid such a decree might hamper and inhibit the Court in the exercise of its discretion. As the extract quoted earlier herein from the judgment of this Court in *Haynes v Kingwilliamstown Municipality* shows, the Court's discretion is not 'circumscribed by rigid rules'. The second element of

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the *dictum* in *Shill v Milner* might well have been too generally and positively stated.

It is not necessary for present purposes, however, to pursue that question further. Tamarillo did not raise the defence of impossibility of performance and there was accordingly no canvass of that issue. Whether or not it was necessary for Tamarillo to discharge the *onus* in order to avoid a decree of specific performance, it certainly bore the burden of alleging impossibility and adducing evidence in support thereof - evidence of the facts or circumstances upon which it asked the Court to exercise its discretion against the grant of the order prayed."

It will therefore be seen that, whether or not it was necessary for the defendant to discharge the *onus* in order to avoid a decree of specific performance, it was certainly incumbent upon the defendant to allege in its plea the grounds upon which it relied in seeking to defeat the plaintiff's claim for specific performance and to adduce evidence in support thereof - "evidence of the facts or circumstances upon which it asked the court to exercise its discretion against the grant of the order prayed", to use the words of MILLER JA.

In this action, the defendant, at the outset of the trial, amended its plea in terms of a notice filed on 18 December, 1992 to include the following paragraph as paragraph 6, the court having caused the preceding paragraphs of the defendant's plea to be numbered 1 to 5 inclusively .

"6. Alternatively

In the event that it is found that a contract was entered into between the parties, (which is denied), defendant states that an order of specific performance would cause undue hardship to it without corresponding hardship to plaintiff and it is therefore not just and equitable that specific performance be ordered. The cause of such hardship is that defendant is reliant upon third parties over whom it has no control for the supply of materials and packaging and accordingly cannot guarantee performance; secondly, the costs to defendant of manufacture of Lactogen for re-sale at 1987 prices would result in an inordinate loss. Defendant accordingly tenders such damages as plaintiff can prove it has suffered."

The plaintiff filed the following replication to the notice of amendment to the defendant's plea.

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"The plaintiff replies to the defendant's notice of amendment to its plea as follows:

1. The plaintiff denies the factors set out in the notice of amendment filed of record on 18 December 1992 as being matters of fact, and denies that those facts, if established, would constitute a valid basis for the

refusal of specific performance by the defendant.

2. In the event that this Honourable Court finds that specific performance should not be granted, the plaintiff avers that it has suffered a loss of United States \$9,19 per carton in respect of its loss of profits on the export of the 3500 cartons of Lactogen to Zambia in 1988. The basis of its loss of US\$9,19 is attached hereto.

Wherefore the plaintiff persists in its claim for specific performance, alternatively avers that its loss is United States \$32165, such sum to be converted to Zimbabwe dollars at the prevailing rate of exchange as at the date of payment, with interest at the prescribed rate thereon from the date of judgment to the date of payment."

The annexure to the plaintiff's replication reflects the calculation of the plaintiff's loss of profits thus:

"Calculation of Loss of Profits

Cost per carton FOT Harare	ZW\$	59,40
less 4% discount	ZW\$	2,38
less 9% export incentive	ZW\$	6,14
Nett FOT Harare price converted to United States dollars	ZW\$	50,88 per carton
at rate of 0,595	US\$	30,27
Less: Transport Harare to Ndola	US\$	0,47
Insurance	US\$	0,23
30 day finances at 1% of product	US\$	0,30
Bank charges	US\$	0,15
Total CIF Ndola	US\$	31,42
Contract selling price in Zambia	US\$	40,61
Less CIF Ndola cost	US\$	31,42
Profit per carton 3500 cartons at US\$9,19 = US\$ 32165,00"	US\$	9,19

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In contending that an order for specific performance would cause undue hardship to it without corresponding hardship to the plaintiff and that it is therefore not just and equitable that specific performance be ordered, the defendant has pleaded two grounds, namely -

- (i) that the defendant is reliant upon third parties over whom it has no control for the supply of materials and packaging and accordingly cannot guarantee performance;
- (ii) that the costs to the defendant of the manufacture of Lactogen for re-sale at 1987 prices

would result in an inordinate loss.

The first ground is easily disposed of in the light of the testimony of the defendant's Mr Poole, from whose evidence it emerged -

- (a) that after difficulties encountered by the defendant in the manufacture of Lactogen up to mid 1991, thereafter the position had improved to the extent that the defendant had no problem in acquiring the 3 to 4% raw material content of its product which had to be imported and its requirements for packaging, milk and sugar; and the defendant did not anticipate the drought would affect its supplies of milk and sugar;
- (b) that Lactogen was to be taken off the market in three to four months' time and launched as a different product;
- (c) that it took the defendant about two days to manufacture 42 tonnes of Lactogen, being the net quantity required to supply the plaintiff's order of 3500 cartons of Lactogen with each containing 24 tins of 500 grammes of Lactogen;
- (d) that the defendant was in a position lawfully to purchase from other local companies at a small premium the amount of foreign currency which such companies had been allowed to retain under the Export Retention Scheme but which they had not utilised, to enable the defendant to bring goods into Zimbabwe;
- (e) that if an order of specific performance was granted against it, the defendant could supply the plaintiff's order comprising 42 tonnes of Lactogen within six weeks of the date of the order.

As he had little alternative but to do, Mr *Morris* conceded that, in the light of this evidence, the first ground raised by the defendant to avoid an order for specific performance had fallen away.

It therefore remains for the court to consider the other ground relied upon by

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the defendant, which is allied to the defendant's grievance that if performance is ordered in favour of the plaintiff, this "would mean that a vast sum of money would end up in their pockets and nobody else's", as Mr Poole put it.

Let me say immediately that while the defendant's grievance is undoubtedly a factor to be weighed by the court with all other factors in deciding whether to grant or refuse an order for specific performance it cannot be regarded as a factor decisive on its own. See *Dithaba Platinum's* case, *supra*, at 627B and 628B & I where, in the face of the contention of the respondents' senior counsel that the court's discretion to order specific performance should not be exercised in the applicant's favour "since it would enable the applicant to purchase rights worth several million rand for R118,60", the court nevertheless ordered specific performance, even though, as the court remarked, this "would be to allow the applicant to purchase a valuable mineral right for a ridiculously low price" and even though the judge (PREISS J) appreciated the drastic consequences of his order, for which, however, he found "no good ground in law for

depriving the applicant of its ordinary remedy of specific performance".

See also *Gillon v Eppel* 1991 (4) SA 656(B) at 667C-E in which COMRIE AJ, in concluding, said:

"Relying upon *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371(A) and *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776(A), counsel for the defendant urged upon me that an order for specific performance would be unjust in the sense that it would operate unduly harshly upon his client. In this regard he pointed to the financial loss which the defendant would suffer, and to the fact that the plaintiff (and his wife) will have two houses whereas the defendant will have none. In my opinion these consequences are not harsh or unjust. The defendant will receive the price which he contracted to receive. I can see no good reason for keeping the plaintiff out of the bargain which he struck or for denying him the remedy to which in law he is ordinarily entitled."

I wish to pause here to clarify that insofar as the defendant tenders such damages as the plaintiff can prove it has suffered in lieu of an order for specific performance, the defendant does not enjoy a right of choice in this regard (see *Farmers' Co-operative Society (Reg) v Berry*, *supra*, 350); nor should the defendant think it can clutch onto the statement of INNES J in the *Farmers' Co-operative Society (Reg)* case, *supra*, at 350 that "there are many

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cases in which justice between the parties can be fully and conveniently done by an award of damages" to justify the defendant in asking for an order for specific performance to be displaced by an award of damages. In this latter regard I can do no better than quote, with approval, the following passage from Christie *The Law of Contract in South Africa* 2 ed at 618.

"INNES J's reference to justice being done by an award of damages is not as clear as it might have been, and sometimes gives rise to the argument that, on the facts of a particular case, specific performance should not be granted because damages would be an adequate remedy. This is a false argument, compounded perhaps of the English principle that damages are the primary remedy for breach of contract and the relationship in our law between interdict *pendente lite* and damages, which is not the same as the relationship between specific performance and damages. Whatever its origins, this argument provides no reason for the court to exercise its discretion against granting specific performance."

See also Joubert *General Principles of the Law of Contract* at 226.

Before considering the remaining ground relied upon by the defendant, that the costs to it of the manufacture of Lactogen for re-sale at 1987 prices would result in an inordinate loss, I propose to list the factors which should be taken into account on the plaintiff's side, being -

- (a) that when it contracted with the plaintiff in 1987, the defendant was not in the least concerned with the profit which the plaintiff would make out of the Lactogen which it sold to its buyer - indeed, to enable the plaintiff to trade as profitably as possible, the defendant granted the plaintiff a discount on its order;
- (b) that, in any event, as already noted, the fact that if specific performance is ordered, this will result in the plaintiff's making a windfall profit at the expense of the defendant is not, *per se*, a ground for refusing the order;

- (c) that following upon and, one might say, thanks to the plaintiff's order for Lactogen, the defendant, which prior to February, 1988 had exported only small amounts of Nestum to Malawi and insignificant amounts of Lactogen elsewhere, became aware of the great potential of the export market to Zambia with the result that whereas in 1988 a reasonable estimate of the value of its exports would have been 1,58 million, over the last two years the defendant has exported in excess of 17 million;
- (d) that given that the defendant backed out of its contract with the plaintiff for financial reasons, it hardly lies in the mouth of the defendant now to protest about any financial gains which may accrue to the plaintiff as a

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result of the defendant's own wrongful conduct in failing to honour its bargain with the plaintiff;

- (e) that as the party responsible for rendering it impossible for the plaintiff to fulfil its obligation to supply the 3500 cartons of Lactogen to its buyer, Sulmark, it hardly befits the defendant to try to capitalise on the situation by saying that because it was no longer obliged to supply its buyer, the plaintiff will stand to benefit financially by acquiring the Lactogen from the defendant at 1987 prices; nor does it befit the defendant to be scornful about the plaintiff's intentions, if specific performance is ordered, to re-approach Sulmark with a view to repairing its tarnished reputation by offering the Lactogen to it.

Reverting now to the ground of hardship raised by the defendant, viz, that the costs to the defendant of the manufacture of Lactogen for re-sale at 1987 prices would result in an inordinate loss, it is to be noted, firstly, that beyond saying that its input costs had gone up considerably, with the price of milk having risen 122,3% and the price of tins by 55,9% and with all other costs having also risen, resulting in the export price of Lactogen having risen drastically from \$59,40 per case to \$235,00 per case, the defendant has not shown the court, by way of itemised calculations, what is the actual amount of its "inordinate loss".

In any event, in pleading undue hardship on this score, one must not lose sight of the fact that the defendant has only itself to blame for wrongfully bringing the roof down on its head in the sense that by trying to wriggle out of its contract with the plaintiff for financial reasons, the defendant now finds itself in its present costly dilemma.

It is of passing interest to note that, according to Mr Poole's evidence, the defendant is a wholly owned subsidiary of Nestlé in Switzerland, which means that any financial loss sustained by the defendant will ultimately be borne by its external holding company. Accordingly, if the loss will be so "inordinate", there is nothing to stop the defendant from turning to its external holding company for financial assistance in this regard, which should have the effect of lessening the

loss considerably because of the very favourable rate of exchange existing in favour of the defendant's external holding company. Certainly, the defendant, existing as it does within the secure compass of a financially powerful and world-wide group, is better placed to handle a financial loss than a company which does not exist within such a group.

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In approaching the question of hardship, it has been suggested that one should have regard to whether the situation is one which is called "a hardship breach", being where the seller finds himself unable to perform at the stipulated time, for example, because of a lack of funds, or the situation is one which is called "a cynical breach", where the seller decides not to perform because he is offered the opportunity to benefit from another more profitable deal, the significance of the distinction being that in cases of hardship breach the court should be reluctant to order specific performance, which would deprive a defendant of the benefit of mitigated damages (see Farlam & Hathaway *Contract - Cases, Materials and Commentary* 3 ed at 549).

Certainly, if one were to adopt that approach in this matter, one would classify the defendant's breach of contract as a cynical breach, meriting an order for specific performance in the absence of good grounds for not so ordering.

It is true that in *Haynes v Kingwilliamstown Municipality*, *supra*, at 378H-379, DE VILLIERS JA said that specific performance would not be granted "where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances". And he went on to say at 381 that he could not "see any logical reason why the time when performance is claimed should not be the time when the judge *ex aequo et bono* should consider the result of such an order (for specific performance) and the alternative remedy open to the plaintiff".

However, as I understand it, the grounds referred to by DE VILLIERS JA are not to be considered on a vague, general basis since it is clear that a defendant must allege in his plea the grounds upon which he relies in seeking to avoid a claim for specific performance. See *Tamarillo's case*, *supra*, at 443F-G. Accordingly, in this case, the court, in considering whether an order for specific performance would operate unreasonably hardly on the defendant or would produce injustice or would be inequitable under all the circumstances, must view these grounds *vis-à-vis* the remaining ground pleaded by the defendant, viz, that the costs to the defendant of the manufacture of Lactogen for re-sale at 1987 prices would result in an inordinate loss.

At the end of the day, given all the factors and grounds raised on each side, one might ask whether it would be unduly harsh, unconscionable, unjust or inequitable in all the circumstances to order the defendant to perform in terms of its contract with the plaintiff? In my view, the answer is a very loud no. In

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fact I believe it would be unconscionable, unjust and inequitable in the circumstances of this case not to order specific performance and, in this connection, I identify myself fully with the following remarks made by DAVIDSON J in *Industrial & Mercantile Corporation v Anastassiou Brothers, supra*, at 609A:

"It seems to me that a court should avoid becoming supine and spineless in dealing with the offending contract breaker, by giving him the benefit of paying damages rather than being compelled to perform that which he had undertaken to perform and which, when he was called upon to perform by summons, and (*sic*) he chose to defy..."

It could well have been me speaking at the conclusion of this case when COMRIE AJ concluded thus in *Gillon's case, supra*, at 667E:

"The defendant will receive the price he contracted to receive. I can see no good reason for keeping the plaintiff out of the bargain which he struck or for denying him the remedy to which in law he is ordinarily entitled."

I would wind up by saying that if the right of specific performance is to be shown to have real meaning to businessmen, then the loud and clear message to go out from the courts is: businessmen beware. If you fail to honour your contracts, then don't start crying if, because of your failure, the other party comes to court and obtains an order compelling you to perform what you undertook to do under your contract. In other words, businessmen who wrongfully break their contracts must not think they can count on the courts, when the matter eventually comes before them, simply to make an award of damages in money, the value of which has probably fallen drastically compared to its value at the time of the breach. Businessmen at fault will therefore, in the absence of good grounds showing why specific performance should not be decreed, find themselves ordered to perform their side of the bargain, no matter how costly that may turn out to be for them.

Since the plaintiff has succeeded in its claim for specific performance and does not seek an order for damages in the alternative, there is no need for me to address the question of damages. Nevertheless, let me add, without, however, in any way intending to decide the point, that if I am right in thinking that Mr *Morris* did not contest the manner in which the plaintiff had calculated its loss, then it seems to me, in the light of the judgment of the Supreme Court in *Makwindi Oil Procurement (Pvt) Ltd v National Oil*

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Company of Zimbabwe (Pvt) Ltd 1988 (2) ZLR 482 (S), that Mr *de Bourbon* was justified in expressing the plaintiff's loss in United States dollars and to ask for such amount to be converted to Zimbabwean dollars at the prevailing rate of exchange as at the date of payment.

In the result, the defendant is hereby ordered to supply the plaintiff, within 8 weeks from the date of this order, with 3500 cartons of Lactogen, each such carton to contain 24 tins of 500 grammes of Lactogen each, payment for which in the sum of \$199 584,00 is to be made by the plaintiff to the defendant within 60 days of the date of supply of the said 3500 cartons of Lactogen to the plaintiff.

It will be observed that in my order I have used the word "supply" rather than the word "deliver" - this is because it is my understanding that it is common cause that the quantity of Lactogen in question will be supplied by way of collection thereof by the plaintiff from the defendant.

I have provided for payment of the purchase price to be made within 60 days of the date of supply of the Lactogen to the plaintiff to accord as near as may be with the position under the contract in that respect.

The defendant is further ordered to pay the plaintiff's costs of suit.

Atherstone & Cook, plaintiff's legal practitioners

Surgey, Pittman & Kerswell, defendant's legal practitioners

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NCUBE v NCUBE 1993 (1) ZLR 39 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA, Ebrahim JA

Civil appeal

8 December 1992 & 28 January 1993

Flynote

Husband and wife - matrimonial property - fault - has no place in distribution order

Statutes - Matrimonial Causes Act 1985 - s 7(3)

Headnote

The parties had agreed to a divorce, but went to trial on the distribution of their matrimonial property. On appeal,

Held, since divorce was now based on the "no fault" concept, the conduct of the parties could play no role in the determination of the distribution of the matrimonial property.

Cases cited:

Wachtel v Wachtel [1973] 1 All ER 829 (CA)

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

Archer v Archer 1989 (2) SA 885 (E)

TA Cherry for the appellant

J Moyo - Majwabu for the respondent

Judgment

Korsah JA: On 2 February 1990, subsequent to the unopposed dissolution of the marriage of the parties and an order, by consent, for the delivery of certain items of property by the respondent to the appellant, SANSOLE J made an order in consequence of an application for the division, apportionment or distribution of the assets of the spouses in terms of s 7 of the Matrimonial Causes Act 1985 (the Act): that the appellant's claim to the properties

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enumerated hereunder fail and are rejected:

- "(a) Two fitted carpets at Stand Number 61171 Pelandaba Township.
- (b) A share in the value of Stand Number 61171 Pelandaba Township.
- (c) A share in the immovable property situate at No. 34 Napier Avenue, Hillside, Bulawayo.
- (d) A Massey Ferguson Tractor; and
- (e) That the appellant is to pay the costs of suit."

Against that order an appeal was lodged by the appellant.

The parties were married on 29 August 1980. In or about 1986, the appellant left the matrimonial home to take up residence elsewhere, for reasons that the parties dispute and were never resolved by the trial court, because of their mutual resolve to end an unhappy union. Their marriage had not been blessed with children. At the time of the commencement of the proceedings for the dissolution of their marriage the respondent was employed by the Postal and Telecommunications Corporation as a transport controller, while the appellant was engaged by the Bulawayo Chronicle as a saleslady.

Subsection (3) of s 7 of the Act provides that, in making an order for the division, apportionment or distribution of the assets **of the spouses**, the court shall have regard to all the circumstances of the case, including:

- "(a) the income, earning capacity, assets and other financial resources which each spouse ... has or is likely to have in the foreseeable future;
- (b) ...
- (c) ...
- (d) ...
- (e) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties.
- (f)
- (g) the duration of the marriage;

and in so doing the court shall endeavour as far as is reasonable and practicable and, **having regard to their**

conduct, is just to do so, to place the spouses ... in the position they would have been in had a normal marriage relationship continued between the spouses."(emphasis added)

The above provisions, to my mind, do no more than furnish broad guidelines for deciding what is a fair order in all the circumstances, adjusting property rights if need be, under the wide powers bestowed on the court. The determination of the strict property

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rights if need be, under the wide powers bestowed on the court. The determination of the strict property rights of each spouse in such circumstances, involving, as it may, factors that are not easily quantifiable in terms of money, is invariably a theoretical exercise for which the courts are indubitably imbued with a wide discretion.

It is true that the provisions make reference to a division of assets having regard to the conduct of the parties, but as LORD DENNING MR explained in *Wachtel v Wachtel* [1973] 1 All ER 829 (CA), when the parties come to an agreement that their marriage has irretrievably broken down, what place has conduct in it? The proper approach to adopt is to accept that both parties have contributed to the breakdown and then to get on with the distribution of the assets on that basis. To invite a court to take cognisance of who was responsible for the breakdown after such an agreement, as the appellant requested of the trial court, is to resurrect the old spectre of guilt and innocence and drag the judge "to hear their mutual recriminations and go into their petty squabbles for days on end, as he used to do in the old days." If that was the intention of Parliament then the concept of the irretrievable breakdown of the marriage in s 5 of the Act is shorn of almost all meaning. For as the learned MASTER OF THE ROLLS observed at 835h-836b of the report, *supra*, of a similar provision in the United Kingdom:

"It has been suggested that there should be a 'discount' or 'reduction' in what the wife is to receive because of her supposed misconduct, guilt or blame (whatever word is used). We cannot accept this argument. In the vast majority of cases it is repugnant to the principles underlying the new legislation ... There will be many cases in which a wife (although once considered guilty or blameworthy) will have earned for the home and looked after the family for very many years. Is she also to be deprived of the benefit otherwise to be accorded to her by s 5(1)(f) because she may share responsibility for the breakdown with her husband? There will no doubt be a residue of cases where the conduct of one of the parties is in the judge's words 'both obvious and gross', so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such a case the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered. But, short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame. To do so would be to impose a fine for supposed misbehaviour in the course of an unhappy married life."

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I am of the view that once the parties finally consented to the dissolution of their marriage on the ground of irretrievable breakdown, and their mutual recriminations appeared to counter-balance each other, and the conduct of one was not more gross than the other, there was no duty on the court to dwell on the conduct of the parties in its assessment of what would

otherwise be a fair and just apportionment of the assets of the spouses.

I take the phrase "assets of the spouses" to include all such property as a spouse was possessed of at the time of the distribution, and not only what was acquired by one or the other or both the parties during the subsistence of the marriage, save such assets which are proved to the satisfaction of the court to have been acquired by a spouse, whether before or during marriage-

- (a) by way of inheritance; or
- (b) in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally; or
- (c) in any manner and which have particular sentimental value to the spouse's 7(2).

In order to determine whether or not, in deciding as he did, SANSOLE J made a fair and equitable apportionment of the assets of the parties, regard must be had to all the assets of the parties and the items of property offered by the respondent and accepted by the appellant, by way of settlement of their property rights. The following items of movable property were offered by the respondent and accepted by the appellant:

- (i) A bedroom suite consisting of a "Fantasy" doublebed, mattress, headboard, dressing table and a stool ;
- (ii) Pots, pans, cups, cutlery, kitchenware and utensils, some of which were wedding gifts and others purchased by the parties. Most of these had already been taken away by the appellant, but the remainder was still on offer;
- (iii) The appellant's personal effects and clothes which were offered by the respondent constitute property which is of particular sentimental value to the appellant and is not part of the "assets of the spouses" available to be traded in settlement of their property rights.

The contest between the parties as regards property rights related to kitchen fittings, two fitted carpets, a tractor, and certain immovable property .

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(a) The Treger kitchen fittings

Prior to their marriage, the respondent had acquired by hire purchase in 1979, when the appellant was still a student in Senegal, certain Treger kitchen fittings. The appellant estimated the value of these fittings as \$5000 and claimed to be entitled to a share thereof. The respondent, for the sake of reaching a settlement, offered to pay the appellant the sum of \$1000 in full settlement of her claim in respect of these fittings.

The trial court rejected the appellant's claim to a share of the value of these kitchen fittings because it found that they were bought by the respondent and were paid for in full before the

parties got married, and that the appellant made no contribution direct or indirect towards the acquisition of the fittings.

With all due respect to the trial judge, if the "assets of the spouses" are what I perceive them to be under the Act, then the statement that the appellant had no claim to this property is too sweeping and does not accurately reflect the intent of the law giver. It seems to me that what the legislature intended was that regard must be had to all the assets of the spouses at the time of the dissolution of the marriage, except such as are proved to the satisfaction of the court to fall within the ambit of s 7(2)(a), (b) and (c) of the Act, when effecting a fair and just distribution of these assets.

For the determination of what is a fair and just division, apportionment or distribution, so as to place the spouses in the position they would have been in had a normal marriage relationship continued between them, consideration must be given to all the surrounding circumstances including, but not limited to, the matters specified under s 7(3) of the Act.

Clearly, there is a difference between the phrases "assets of the spouses" and "family assets", which latter phrase the learned MASTER OF THE ROLLS said in *Wachtel v Wachtel supra* "refers to those things which are acquired by one or other or both of the parties, with the intention that they there should be a continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole". The English authorities abundantly establish that in respect of "family assets" a spouse cannot reap where he or she has not sown and that to deserve a share of such assets a spouse must have contributed money or money's worth. See *Wachtel v Wachtel supra* at p 837f.

Notwithstanding this difference between the phrases "assets of the spouses"

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and "family property", the provision by s 7(3)(d) that, in the distribution of the assets of the spouses, regard must be had to the direct and indirect contribution made by each spouse to the family, seems to me to suggest that it is only in very exceptional circumstances that a spouse may benefit from assets to which he or she has not contributed money or money's worth.

I am in agreement with the learned trial judge that the rationale for taking into consideration the matters specified under s 7(3) of the Act is to empower the courts to prevent a spouse from acquiring a morally indefensible financial advantage from the failed marriage. To achieve this, the court must take an overall view of how justice can best be achieved between the parties. See *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 992D-F; *Archer v Archer* 1989 (2) SA 885 (E) at 894A.

Having regard to all the surrounding circumstances and, in particular, to a concession by the respondent to the appellant of the various items of moveables, it cannot be said that the trial court in refusing to grant the appellant a share in the Treger kitchen fittings, either did not act equitably, or failed to exercise its discretion judicially.

(b) The two fitted carpets

These are two carpets, one cream and the other brown, which were fitted in the matrimonial home of the parties at Stand No. 61171 Pelandaba Township. That property was registered in the name of the respondent's uncle, one Jonah Moyo. The learned trial judge held on the evidence that the appellant and respondent occupied this property free of rent, save for meeting dues owing to the City of Bulawayo - under the long lease. During their occupation of these premises as man and wife the respondent purchased these carpets from Cash Wholesalers with the understanding between the parties that, upon vacating the premises, the carpets were to be left for the use of the owner of the premises by way of their appreciation for affording them accommodation at the premises.

On the strength of this evidence, which to me seems eminently probable, I find no ground upon which the exercise of the learned trial judge's discretion in refusing the appellant's claim to these carpets can be assailed.

(c) Stand No. 61171 Pelandaba Township

It was conceded by the appellant that this particular property, rented on a

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lease to purchase basis, was registered in the name of the respondent's uncle, Jona Moyo, in the records of the Municipality in the 1970s. This, of course, made Jonah Moyo the registered owner of the property. The appellant, however, contended that the respondent, and not Jonah Moyo, was the true owner of the property. She said her knowledge of the true ownership of this property was inferred from the respondent's conduct towards the property. She therefore prayed the court in the exercise of its discretion in terms of s 7 of the Act to award her half of the estimated value of \$16 000 for this property which she regarded as a matrimonial asset.

When property is registered in the name of a person there is a presumption that the person in whose name it is registered is the one who has a real right in the property. A real right so registered becomes enforceable against the world at large. Unless the presumption is successfully rebutted, such person must be deemed to be the true owner.

Stand 61171 Pelandaba was registered in the name of Jonah Moyo even before the appellant met the respondent. The respondent deposed to the fact that the property belonged to his uncle. Jonah Moyo was neither joined in the proceedings relating to this property nor called by either party to testify to his interest in the property. The appellant's testimony regarding inferences drawn from the respondent's conduct in respect of this property does not even begin to rebut the presumption in favour of Jonah Moyo that he is the true owner of Stand 61171 Pelandaba Township.

As the appellant failed to prove that this property was an asset of her spouse (the respondent), her claim to half the value thereof was rightly rejected by the trial court. Improvements, if any, effected by the parties to this property can likewise not be categorised as assets of a spouse since they attached to property which does not belong to either spouse and are not claimable by

one spouse from the other.

(d) 34 Napier Avenue, Hillside, Bulawayo

It was common cause that prior to their marriage the respondent was the owner of a leasehold property in Luveve Township (the Luveve House). And that at the behest of the appellant the respondent sold the Luveve House to the appellant's father, one David Mallila, for \$3 200. And that part of this money was used as a deposit towards the purchase of No. 34 Napier Avenue and also to defray the costs of transfer.

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KORSAH JA

It was also common cause that the parties never lived in the Hillside House . The house was immediately let to tenants and the loan repayment was and is serviced out of the rentals accruing from the lease.

It was further common cause that the purchase of 34 Napier Avenue was made feasible because the respondent's employers, the Posts and Telecommunications Corporation, provided him with the required guarantee to enable him to raise a bond to cover the balance of the purchase price.

However, this house was transferred into and registered in the joint names of the parties. The respondent did not object to this arrangement because he intended the property to be enjoyed by his wife and children. It cannot, therefore, be disputed that No. 34 Napier Avenue was jointly owned by the parties in equal shares.

Since the separation of the parties, however, but prior to the proceedings for divorce, the respondent had had a Durawall erected around this property at a cost of \$9 500, and had also sunk a borehole on the property at a cost of \$3 000, at his own expense.

The appellant claimed that as a joint owner of No. 34 Napier Avenue, she was entitled to a half share of the value. It is true that joint owners of property own each and every part of the property equally and, therefore, own equal shares in the value of the property. But when property comes to be apportioned or distributed under s 7 of the Act, even though the spouses may be joint owners of the property, the Act confers on a court of law, in the interest of justice, equity and fair-play, power to take part of a spouse's share in property jointly owned to give to the other spouse if, by so doing, it could place the spouses in the position they would have been in had a normal marriage relationship continued between them .

A prerequisite to understanding the order of the learned trial judge in respect of this house is an appreciation that the assets of both spouses fall to be scrutinised and to take into account, as indeed s 7 of the Act enjoins the court to do, the assets, not only of one spouse, but of both spouses, when it comes to the division, apportionment or distribution of their assets. The section also empowers the court, if it considers it just and equitable so to do, to order that any asset be transferred from one spouse to the other.

The trial court heard evidence, which was not denied by the appellant, that through the

respondent's own efforts he discovered that, since the appellant

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KORSAH JA

left the matrimonial home, she had acquired two immovable properties, the first in 1987 under a Deed of Transfer No. 2706/87 and the second in 1988 under a Deed of Transfer No. 3291/88.

The former was a vacant piece of land upon which she had since erected a dwelling house consisting of eight rooms and the latter is a piece of land upon which is situated a double storey dwelling house which, according to the respondent, is worth about \$90 000. The respondent testified that in view of the fact that he made no contribution towards the acquisition of these properties he was laying no claim to them. These properties, although they were acquired by the appellant after she had left the matrimonial home, were acquired soon after her departure therefrom and during the subsistence of the marriage. They are, in terms of the Act, the assets of a spouse, and regard must be had to them when the division, apportionment and distribution of the assets of the spouses by the court is taking place.

It is incorrect to say that the appellant as a registered joint owner is not entitled to a half share of the value of the Napier Avenue property because she did not contribute money or money's worth towards the acquisition of the property. As a registered joint owner she is in law entitled to a half share of the value of that property.

The proper approach is to accord her her share of that property and then, taking into account all the assets of both spouses, to endeavour, as far as is reasonable and practicable and just to do so, to place the spouses in the position they would have been in had a normal marriage relationship continued between them. In the performance of this duty a court is empowered in the exercise of its discretion to order that any asset be transferred from one spouse to the other.

Here, we have the appellant who, without making any contribution in money or money's worth, has been constituted a joint owner of the Napier Avenue property by the respondent. This is the only immovable asset that the respondent as a spouse has an interest in. On the other hand, the appellant, as a spouse of the marriage, is possessed of two immovable properties acquired during the subsistence of the marriage, albeit after their separation, but towards which the respondent contributed neither money nor money's worth and in which he disclaims any right. Surely, if a happy marriage relationship had continued between them, the appellant would have given up her half share in the Napier Avenue property upon her acquisition of the two immovable properties or, afforded the respondent a half share of the two

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KORSAH JA

immovable properties acquired by her, in reciprocity to the gratuitous enjoyment of her half share in the Napier Avenue property. All this is a matter for conjecture.

A matter of some pertinence, which tends to be overlooked, when a distribution of the assets of

the spouses falls for consideration is the income, earning capacity, assets and other financial resources which each spouse has or is likely to have in the foreseeable future. It was common cause that both parties were in gainful employment. The appellant undoubtedly has acquired more assets than the respondent since their separation. The real consideration is: would it be fair and equitable to allow the appellant, in addition to her ownership of her two immovable properties, one of which is far more valuable than the Napier Avenue property, to retain her half share in the Napier Avenue property, or to order that her half share in that property be transferred to the respondent?

In essence, the latter was the result of the order which SANSOLE J made and against which the appellant appeals. Having regard to all the circumstances the proper order to have made in respect of the Napier Avenue property was that the appellant's interest in that property be transferred to the respondent. It will be necessary to amend HIS LORDSHIP'S order, to give effect to the clear intention of his judgment in this regard.

(e) The Massey Ferguson tractor

There was evidence that the respondent's father was a farmer in the Matopos area; that he gave the respondent a sum of \$1 000 towards the purchase price of \$4 000 for this tractor. The respondent raised the balance of the purchase price of \$3 000 with the Bank of Credit and Commerce and repaid that loan at the rate of \$300 per month. Clearly, this was not an asset intended, on its purchase, to belong to either spouse and to which consideration may be had in a distribution of the assets of the spouses.

Having regard to all the circumstances of this case I am of the view that the orders made by SANSOLE J in respect of the division of the assets of the spouses in this case were fair and equitable.

However, as indicated earlier, the order of the court *a quo* must be corrected to reflect the clear intention to transfer to the respondent the registered undivided half share of the appellant in the immovable property situated at 34 Napier Avenue, Hillside, Bulawayo.

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KORSAH JA

Accordingly the appeal is dismissed with costs. But the order of the court *a quo* is amended as follows:

1. Paragraph 3(c) of the order is deleted;
2. Paragraph 3(d) of the order is re-numbered (3c);
3. Paragraph 4 is re-numbered para 5.
4. There will be a new para 4 in the following terms:

"The defendant is ordered to transfer her undivided half share in the immovable property at 34 Napier Avenue, Hillside, Bulawayo, being Subdivision B of Subdivision D of Farm 7 of Matsheumhlope, and Stands 78-85 and Roads of Matsheumhlope, to the plaintiff, at the Plaintiff's expense, failing which the Deputy Sheriff is authorised

on her behalf to do such things and sign such documents as may be necessary to effect the said transfer."

McNally JA: I agree

Ebrahim JA: I agree

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

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

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F D ARIAN & CO (PVT) LTD v TSODZO & ANOR 1993 (1) ZLR 50 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Gibson AJA

Civil appeal

8 & 15 February 1993

Flynote

Practice and procedure - jurisdiction - High Court - labour dispute - remedies not exhausted under Labour Relations Act 16 of 1985 - whether party to dispute precluded from bringing High Court action

Employment - dispute under Labour Relations Act 16 of 1985 - whether matter may be brought to High Court before remedies under Labour Relations Act exhausted

Headnote

The respondents, who worked for the appellant, had addressed a complaint about unpaid overtime to the Minister of Labour. The dispute was referred for investigation and resolution to the Employment Council for the Motor Industry, which referred the dispute to its agent. The agent, instead of referring the matter to a hearing officer in terms of the Labour Relations Act 16 of 1985, opted to determine the matter himself. He found that the respondents had been underpaid, but they did not accept his determination of the amount. They instituted an action in the High Court for the amounts which they claimed were due to them. The appellant argued that they were not entitled to bring such an action until their remedies under the Labour Relations Act had been exhausted.

Held, dismissing the appeal, that the determination by the agent was not an order of a determining authority under the Act and could not be registered under the Act for the purposes of enforcement. Nor did the parties have a right of appeal against the determination, which bound neither side if they chose not to accept it. Consequently, the respondents were entitled to bring the action they did. Even if the matter had been

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GUBBAY JA

instituted, completed or determined under the Act, the respondents would, by s 140(1) of the Act, have been entitled to bring the matter to the High Court.

Cases cited:

Shames v SAR & H 1922 AD 228

Dickenson v Valuation Ct, Vereeniging & Ors 1944 TPD 83

Liassou v Pretoria City Council 1979 (3) SA 217 (T)

Judgment

Gubbay CJ: The sole issue to be determined in this appeal is whether the two respondents were entitled to institute proceedings in the High Court for the payment of monies alleged to be due and owing, in respect of overtime worked by them in the motor vehicle breakdown business conducted by the appellant. The learned judge presiding held that, although the respondents had not exhausted their domestic remedies under the Labour Relations Act 16 of 1985, they were not barred from bringing their grievances before him. He found it proved on the evidence that the appellant was indebted to the first respondent in the sum of \$12 207.61 and to the second respondent in the sum of \$7 682.30 and so entered judgment in their favour in the said amounts, together with interest thereon and costs of suit.

The facts which gave rise to the jurisdictional objection advanced on behalf of the appellant at the trial were not in contention.

On 16 December 1987 the respondents addressed a complaint concerning unpaid overtime to the Minister of Labour, Manpower Planning and Social Welfare. In reacting thereto, the Secretary, in a letter written the next day, referred the dispute for investigation and resolution to the Employment Council for the Motor Industry, which in turn referred it to its appointed designated agent, Mr JA Hickman. On 1 March 1988 Mr Hickman issued a written reasoned "Determination", in which he found that the appellant had underpaid the first respondent by \$2 992.64 and the second respondent by \$1 996.80. However, due to a miscalculation in the hours worked, he subsequently amended the determination by increasing the first respondent's entitlement to the figure of \$4 084.64 and the second respondent's to \$2 550.24. These findings were unacceptable to the respondents. On 14 April 1988 they issued summons against the appellant.

It was the submission of Mr Dyke, who appeared for the appellant, that the following procedural steps had been taken under the Labour Relations Act (prior to its amendment by Act 12 of 1992, operative from 1 January 1993).

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GUBBAY CJ

First, a labour relations officer, to whom the dispute between the appellant and the respondents had been referred in terms of s 109(1), had decided that it was necessary to refer such dispute

to the Employment Council, pursuant to his right to do so under para (c) of s 109(2). Second, the Employment Council, in the guise of its designated agent, Mr Hickman, having failed to redress the dispute, and acting in terms of para (b) of s 109(2), had made a determination in regard to such dispute. Thereupon, so the submission went, it was open to the respondents to appeal against the determination, pursuant to s 112(1), but this they had not done. Rather than exhaust the procedures laid down in the Act, as they were obliged to do, they had chosen to ignore Mr Hickman's determination and had instituted action in the High Court for the same relief. In other words, they purposefully declined to avail themselves of the pertaining domestic remedies which were capable of giving effective redress. See *Shames v South African Railways & Harbours* 1922 AD 228 at 233-234; *Dickenson v Valuation Court, Vereeniging & Ors* 1944 TPD 83 at 89-90; *Liassou v Pretoria City Council* 1979 (3) SA 217 (T) at 220A-221B.

The success of the objection was dependent upon the appellant being able to establish that the procedures under s 109 had been properly complied with; and, if so, that a right of appeal lay against a determination made by the Employment Council's designated agent.

In my view, the appellant failed at the initial hurdle. The dispute, so it appears, was referred to the Ministry of Labour, Manpower Planning and Social Welfare and not to a labour relations officer. But, more importantly, there was simply no evidence adduced on behalf of the appellant that before referring the dispute to the Employment Council under para (c) of s 109(2), a labour relations officer had "investigated such matter and after due enquiry" had then decided to refer it. To the contrary, the Secretary's letter of 17 December 1987 indicated that, without any investigation being undertaken by a labour relations officer, the dispute was referred by the Ministry to the Employment Council. If this is what occurred, as I perceive it did, then the determination by Mr Hickman was made outside the purview of the Act.

But if I am mistaken, and the principle expressed in the maxim "*omnia rite esse acta praesumuntur nec contraria*" justifies the presumption that a labour relations officer investigated the dispute and only referred it to the Employment Council "after due enquiry", what consequently falls for consideration is whether the Act afforded the respondents any right of appeal against the determination made pursuant to s 109(2)(b).

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GUBBAY CJ

Section 112(1), prior to amendment, read:

"Any person who is aggrieved by an order made by a labour relations officer or a hearing officer may, within the time and the manner prescribed, appeal to the regional hearing officer."

Mr Dyke contended that, as the law-maker could not possibly have intended to make an appropriate workers committee, trade union, employers organisation or employment council (as specified in para (c) of s 109(2)) the final arbiter, the provision must be construed as including a person who is aggrieved by a determination made by any such body. Put differently, that the exclusion by the law-maker of the aforementioned bodies was a "*casus omissus*" which was to be filled by the court.

I am unable to agree. It is clear to my mind that s 112(1) was not intended to embrace a

situation akin to the present.

The right to appeal formerly lay against an order made by a labour relations officer or by a hearing officer, both of whom were classified as a "determining authority". See s 109(3) and the definition in s 2. The determining authority was empowered under ss 110(1) and 111(1) and (2) to make a variety of orders appropriate to, and flowing from, its determination. An employment council and the other bodies mentioned in para (c) of s 109(2) were given no such power. All they could do was advise the parties to the dispute of the finding arrived at which, not being an order by a determining authority, was incapable of being registered under s 111(4) for purposes of enforcement.

It was not urged by Mr *Dyke*, if I understood him correctly, that in the event of it being decided that the respondents had no right of appeal under s 112(1), they were nonetheless barred from pursuing relief in the manner they did.

It would, I think, be absurd to suggest that the determination made of how much the appellant owed each respondent had the effect of negating a right to challenge its validity under the common law. It would mean that by opting to determine the dispute himself instead of referring it to a hearing officer or the Board for determination, from whom or which there was an appeal, Mr Hickman unilaterally clothed his determination with finality. In reality, the determination bound neither party; but if so minded they were free to accept it and settle their dispute in accordance therewith.

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GUBBAY CJ

Section 140(1) of the Act is further supportive of the view I take. It recognises a right to institute proceedings in respect of a matter which is the same or related to one which had been instituted, completed or determined, under the Act, provided that the court or tribunal concerned with the later proceedings is first advised of the earlier proceedings.

For the reasons aforementioned I am satisfied that the appellant's objection to the exercise of jurisdiction of the High Court was totally misconceived. I would accordingly dismiss the appeal with costs.

Korsah JA: I agree.

Gibson AJA: I agree.

Surgey, Pittman & Kerswell, appellant's legal practitioners

Sawyer & Mkushi, respondents' legal practitioners

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PTC PENSION FUND v STANDARD CHARTERED MERCHANT BANK ZIMBABWE LTD

ANOR 1993 (1) ZLR 55 (HC)

Court High Court, Harare

Annotations [Link to Case Annotations](#)

Robinson J

Opposed application

11 & 16 February 1993

Flynote

Bank - duty of care - merchant bank acting as agent and underwriter for purchase of shares - whether duty of care owed to purchaser of shares

Company - transactions by - officer claiming authority to enter into transaction on company's behalf - officer purchasing shares in another company-nature of authority required

Contract - breach - remedies - restitution - cannot be claimed on basis of delict

Costs - legal practitioner and client scale - failure to state precise grounds on which claim pursued - allegations of impropriety against other party - in both respects party acting on practitioner's advice - proceeding by way of summons warn conflicts affect would arise - other party able to answer allegations without reference to facts - not appropriate to award costs on higher scale

Practice and procedure - interdict - criteria on which may be granted - mandatory interdict - can be granted for a continuing wrong but not to remedy a "one-off" situation

Practice and procedure - pleading - precision in - claim formulated as though based on delict - relief arising from contract asked for - effect

Headnote

The principal officer of the applicant pension fund submitted an application form, signed by himself on behalf of the fund, for an allotment of shares. The allotment was being implemented through the respondent merchant

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bank on behalf of another company. A cheque for \$18 000 000 was made out to the merchant bank. An allotment of shares was subsequently made.

The pension fund later sought an order against the merchant bank and the company whose shares were being issued, claiming a refund of the money paid for the shares. The fund alleged that the principal officer had not been authorised through its board of trustees to apply for the shares. It claimed restitution of the payment against tender of the scrip for the shares, but alleged that the officers of the merchant bank who had made the arrangements were negligent in not confirming that the fund's principal officer had proper authority. It later, in argument, sought to justify the relief on the basis of a mandatory interdict to remedy the wrong caused to it.

Held, dismissing the claim against the merchant bank, that the relief sought by the applicant

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was a contractual claim for restitution, not a delictual claim for damages. There was no contractual relationship between the fund and the merchant banks and accordingly the applicant had no cause of action.

Held, further, that a mandatory interdict is designed to remedy the situation of an ongoing wrong, not to remedy a "one-off" situation, and the claim for such an interdict was wholly inconsistent with the basis on which the applicant's claim had been advanced.

Held, further, on the request that costs be awarded against the fund on a legal practitioner and client scale, that it would be unjust to penalise the fund for -

- (a) its failure to state clearly the basis on which its claim was made and for its persistence in pursuing a claim without merit, as in this regard it was entirely reliant upon its legal representatives, who included senior counsel;
- (b) the allegations that the bank's officers had acted improperly, as these were also attributable to the fund's legal advisers; or
- (c) proceeding by way of summons when it must have known that conflicts of fact would arise, as the merchant bank was in a position to dispose of the application summarily without reference to the facts.

Semble, that it would be prudent and simple for a merchant bank to require, in the case of a corporate application, that the applicant attach to the application a copy of a resolution of the corporation's board, recording that the person signing the application was authorised by the board to do so.

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Cases cited:

Roodepoort - Maraisburg Town Council v Posse Property (Pty) Ltd 1932 WLD 78

Rosebank Television & Appliance Co (Pty) Ltd v Orbit Sales Corp (Pty) Ltd 1969 (1) SA 300 (I)

Crundall Bras (Pvt) Ltd v Lazarus NO Anor 1991 (2) ZLR 125 (S); 1992 (2) SA 423 (ZS)

A P de Bourbon SC for the applicant

J C Andersen SC for the first respondent

M J Gillespie for the second respondent

Judgment

Robinson J: The litigation between the parties in this matter arises from the allotment and issue of shares by the second respondent, FP Holdings Ltd ("FP Holdings"), implemented through its underwriter and agent, being the first respondent, Standard Chartered Merchant Bank Zimbabwe ("the Merchant Bank", to the applicant, the PTC Pension Fund ("the Pension

Fund") in February 1992, under a prospectus signed by the Directors on 20 January 1992 and registered in terms of the Companies Act [Chapter 190], whereby FP Holdings offered for public subscription 20 000 000 ordinary shares of a nominal value of \$1,00 each, at an issue price of \$1,80 per share.

It is common cause that on 5 February 1992 the Principal Officer of the Pension Fund, Mr Labani Hove, submitted a completed application form signed by himself on behalf of the Pension Fund, in which he declared that he had full legal capacity to contract, applying for the allotment to the Pension Fund of 10 000 000 shares in FP Holdings at a price of \$1,80 per share. The application form was accompanied by a cheque drawn and signed by the Principal Officer and one Robert Ganye, then a Deputy Principal Officer of the Pension Fund, on behalf of the Pension Fund, in favour of the Merchant Bank for \$18 000 000, posts to 14 February 1992.

It is further common cause that initially 8 555 555 shares in FP Holdings were allotted to the Pension Fund at a cost of \$15 399 999 and that, thereafter, at the request of the Pension Fund's Principal Officer, the Merchant Banks arranged to exchange 1 111 000 of the shares in FP Holdings for 2 084 000 shares in David Whitehead Textiles ("David Whitehead") at a cost of 96 cents per David Whitehead share, thereby resulting in a final allotment of 7 444 555 shares in FP Holdings to the Pension Fund.

What is in dispute, however, is whether the Pension Fund's Principal Officer

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was authorised by the Pension Fund, through its Board of Trustees, to apply for the allotment to the Pension Fund of 10 000 000 shares in FP Holdings and to arrange for the exchange of shares in FP Holdings for shares in David Whitehead.

The Pension Fund contends that its Principal of Boer was not so authorised and, accordingly, claims, as against the Merchant Bank, an order that the Merchant Bank pay to the Pension Fund the amount which the Pension Fund paid for the shares in FP Holdings and David Whitehead which were issued to the Pension Fund in February 1992, against tender of the said shares to the Merchant Bank and the sum of \$52 376,36 received by the Pension Fund by way of a dividend on the David Whitehead shares, together with interest and costs.

As against FP Holdings, the Pension Fund seeks an order setting aside the allotment of 7 444 555 shares in FP Holdings to the Pension Fund and directing FP Holdings to cancel the issue of such shares and to pay the Pension Fund the sum of \$13 400 199, together with interest and costs, against the return to FP Holdings of the share certificate in respect of the said shares.

I deal first with the Pension Fund's claim against the Merchant Bank.

Before the present proceedings were commenced by the Pension Fund, its legal practitioners, Coghlan, Welsh & Guest, wrote to the Merchant Bank on 26 March 1992, demanding payment of the account which the Pension Fund had paid for the shares in FP Holdings issued to the Pension Fund, against the return of the scrip for the shares, on the ground that its Principal

Officer had not had special authority to pay for the shares. In the penultimate paragraph, the Pension Fund's legal practitioners concluded their letter thus:

"Accordingly, the Fund is entitled to claim restitution of its payment against tender of the aforesaid shares back to your company. Such tender is hereby formally made."

In reply to this letter, the Merchant Bank's legal practitioners, Atherstone & Cook, wrote to the Pension Fund's legal practitioners of 31 March 1992 and raised the following queries

"It is not clear to us on what basis you claim that our client is obliged to refund the amount mentioned in your letter. It is, surely, quite clear to

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your client and yourselves that our client merely acted as a Merchant Banker and, in receiving the money, acted as an agent for FP, which issued the shares.

It must also be clear to your client and yourselves that our client simply, acted as a Merchant Banker and agent in arranging for the exchange of shares. Again, we do not understand the basis for your claim that our client has any Liability to your client."

The Merchant Bank's legal practitioners addressed two further letters to the Pension Fund's legal practitioners on 14 April 1992 and 30 April 1992 seeking the latter's clarification on the queries raised by them, in response to which the Pension Fund's legal practitioners advised as follows in a letter dated 6 May 1992:

"The basis of our client's claim is fully set forth in our letter to your clients dated the 26th March, 1992.

Your clients acted as underwriters to the issue of the shares. The shares in question were not acquired with due end proper authority. Our clients never wished or intended to purchase them.

The Principal Officer acted *ultra vires* the provisions of the Fund's Constitution.

Furthermore, your client's (*sic*) were guilty of negligence in not confirming that our client's Principal Officer had due and proper authority to make the acquisition in question. The allotment of the shares is unlawful as was the alteration of the allotment, in that the allotment and the alteration thereof were made before the closing date for the subscription of the said shares.

The Applicant's Founding Affidavit has been prepared in draft and will be settled by counsel before the proceedings are commenced. We expect counsel to be able to settle the draft Affidavit before the end of next week."

As perplexed as before, the Merchant Bank's legal practitioners responded thus in a letter to the Pension Fund's legal practitioners dated 15 May 1992:

"We write to acknowledge receipt of your letter dated the 6th May 1992.

You state that the basis of your client's claim was fully set out in your letter of the 26th March. However, we pointed out in reply to that letter

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that our client not act as a principal but simply acted as an agent and you appear to have ignored that in your letter of the 6th May.

The fact that our client acted as underwriters does not appear to us to give your client a cause of action and it is for this reason also that we asked you to explain the basis of your client's claim. The underwriting contract is simply a contract between our client and FB. (*sic*)

We are also instructed that the allegations that the Principal Officer acted *ultra virus*, that our client was guilty of negligence, and that the allotment of shares was unlawful or indeed that the Principal Officer did not have the necessary authority to complete the transaction are denied.

We note that an application will be made and presumably when that is received, your client's claim will be clarified so as to deal with the points made above."

However, the Merchant Bank's legal practitioners were to be disappointed and to remain perplexed because, notwithstanding the advice of the Pension Fund's legal practitioners that their client's founding affidavit would be settled by counsel, the Pension Fund's founding affidavit was, to use the words of *Mr Andersen*, who appeared for the Merchant Bank, "muddled and confused", in that after seemingly pitching the Pension Fund's claim in delict, the Pension Fund concluded by asking for relief which arises from contract.

In this connection, I refer to paras 20 and 21 of the pension Fund's founding affidavit, which read as follows:

- " 20. THAT in our submission the First Respondent, as underwriters for the share issue, through its officers, should have taken steps to check that the Applicant had given the necessary and required authority to the Principal Officer to make an application for half the shares to be issued in the Second Respondent.
- 21. THAT I contend that the Officers of the First Respondent were at fault in that their handling of this matter has caused the Applicant substantial prejudice, particularly since the shares in question have lost over one-half of their market value since the subscription was made and there is little or no trade in such shares or demand therefor."

However, the relief sought by the Pension Fund is in no way a delictual claim

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for damages but constitutes a contractual claim for restitution to recover the amount paid by the Pension Fund for the shares in FP Holdings issued to it, against the return of the shares to the Merchant Bank.

The Merchant Bank's response to the Pension Fund's founding affidavit, in taking for the Pension Fund's application against it to be dismissed, is summarised in para 41 of its opposing affidavit as follows:

"41. In summary, it is my contention that -

- 41.1 even if the alleged absence of authority of its Principal Officer does entitle the Applicant to the return of monies paid for the FP shares (which is denied), its remedy would be against FP alone and not

against the Bank which acted merely as the agent of FP in respect of the issue of the shares;

41.2 in processing the application for FP shares, the Bank followed the long established, uniform and accepted practice of all merchant banks in Zimbabwe;

41.3 the Applicant has not established that its Principal Officer lacked the necessary authority to apply and pay for shares on behalf of the Applicant and in any event

41.4 the Principal Officer had ostensible authority to apply and pay for shares on behalf of the Applicant."

What was the Pension Fund's response in its answering affidavit? Completely undeterred and, apparently, in blissful ignorance, it not only maintains its confused stance but muddles matters further when it replies thus in para 1:

"1. Ad Paragraph 2 and 3

The Order sought by the Applicant against the Bank in respect of the FP Share Issue is based upon the contract concluded by the Bank with the Applicant for the Share Issue in question to be allocated to the Applicant by the Bank acting in its capacity as the underwriter for FP to conclude such contracts for the issue of FP's shares in terms of its said Prospectus. It appears to me that the Bank has failed to appreciate that in such a situation FP cannot be compelled to take transfer of its own shares and it is for that very reason that the Bank accepted for the fees charged the role of underwriting agent for the share issue. **The Applicant seeks restitution of the moneys paid on the grounds that the contract is voidable as a consequence of Mr Hove's failure to obtain proper authority from the Applicant to acquire the said shares which may and has caused loss and prejudice to the members of the Pension**

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Fund. The transaction itself must be nullified and the parties, restored to their former position of every benefit given and received between them which can only be achieved by tender of the shares to the Bank against repayment of all amounts paid illegally and without authority paid by the Applicant. The Bank acted at all material times as the underwriter of FP and the funds received from the Applicant have been duly paid to FP by the Bank

The object of this application is to recover moneys paid to the Bank against tender and return of all shares issued to the Applicant (including those swapped) pursuant to a juristic act which was voidable ab initio and unenforceable." (My emphasis)

Again, in para 21 of its answering affidavit, when addressing para 38 of the Merchant Bank's opposing affidavit, the Pension Fund says that it "is entitled to restitution because subscription for FP shares was not authorised by the Trustees".

In his heads of argument, the Pension Fund's counsel, Mr *de Bourbon*, in shifting territory on the Pension Fund's behalf by contending that its claim against the Merchant Bank is an Aquilian claim against the Merchant Bank in its capacity as the underwriter of the share issue, purports to justify the relief sought by the Pension Fund on the basis of a mandatory interdict to remedy the wrong caused to the Pension Fund, citing, in support, McKerron *The Law of Delict* 7 ed at p 140.

As was Only to be expected, in his heads of argument Mr *Andersen* goes straight for the Pension Fund's jugular vein and, in one stroke, demolishes the Pension Fund's application

against the Merchant Bank by correctly contending as follows:

- "(a) Applicant has no cause of action for the relief claimed.
- (b) The relief claimed is not for a mandatory interdict but for restitution.
- (c) A claim for restitution arises *ex contractu* and as no contract subsisted between the parties, as is now acknowledged by Applicant by its abandonment of the basis upon which the claim was initially made, its claim must fail."

The contention that the Pension Fund is entitled to claim the relief which it seeks by way of a mandatory interdict grounded in delict is devoid of all merit and, as Mr *Andersen* again correctly submits, is wholly inconsistent with the

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basis on which the Pension Fund's claim has been advanced. Accordingly, I do not intend to waste time on this contention beyond pointing out that it is significant that in Beck's *Theory and Principles of Pleading in Civil Actions* 5 ed at 228 and 229, the subject of a mandatory interdict is classified under the heading of "Continuing wrongs"; and that at p 229 it is stated that a "*mandamus* may sometimes be a remedy for a continuing wrong" and "is an order requiring the performance of an act", for example, "if plaintiff alleges that a building is encroaching on his property he may sue for an order that the owner of the building remove the encroachment", as happened in *Town Council of Roodepoort - Maraisburg v Posse Property (Pty) Ltd* 1932 WLD 78. In other words, a mandatory interdict is designed to remedy the situation of a continuing wrong and not to remedy a "one-off" situation; or, as Mr *Andersen* put it when dealing with the present matter, the relief claimed by the Pension Fund "is not for an order for First Respondent to remedy a wrongful state of things which it has created in the sense referred to in McKerron *The Law of Delict* 7 ed at p 140 or the authorities referred to therein and is without precedent. The relief sought is for a contract to be set aside and for *restitutio in integrum*".

It will therefore be seen that the Pension Fund's attempt to change horses in midstream by substituting an Aquilian cause of action to justify what is and will always remain a remedy peculiar to contract was bound to fail. It follows that the Pension Fund's claim against the Merchant Bank cannot succeed and, accordingly, its application against the Merchant Bank is hereby dismissed.

According to Mr *Andersen*, the Merchant Bank does not wish to succeed on a technical point and, therefore, counsel has requested the court to address the merits of the matter, secure in the knowledge, I might add, that whatever the outcome of the case on the merits, counsel is in the happy "braces and belt" position of being able to fall back on the technical point, if need be.

Mr *de Bourbon*, presumably aware that the Pension Fund would go down on the technical point in question, likewise had nothing to lose by inviting the court to break new ground by finding that the Merchant Bank owed a duty of care to the Pension Fund in the circumstances existing where the Merchant Bank acts in its capacity as an issuing and receiving house (and not, I would stress, where it acts in its capacity as an underwriter under its underwriting agreement with FP Holdings); and that the Merchant Bank was negligent in failing to verify the authority of

the Pension Fund's Principal Officer to make the application on behalf of the Pension Fund for the 10 000 000 shares in FP

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Holdings by virtue of the duty of care which the Merchant Basils owed the Pension Fund in that regard.

However, while, on the one hand, I admit that, as a former academic, I would have been most interested to address this issue' on which no doubt the merchant banks in Zimbabwe would welcome a decision on the other hand, I do not consider that any useful practical purpose will be served in my so doing, since at the end of the day, my views will be merely *obiter* views on a far-reaching issue which obviously calls for wide and thorough research and careful consideration; besides which, there is no valid delictual claim before the court in respect of which it is even possible for the court, if it were in a position to do so, to grant judgment for the applicant. I therefore must regretfully decline the invitation of both counsel also to deal with the merits of the matter.

Before turning to the question of costs I would like to say something about the subject of authority in the case of corporate entities. Section 6(a) of the Pension and Provident Funds Act 20 of 1976 provides that upon registration, a pension fund "shall, under the name by which it is so registered, become a body corporate capable of suing and being sued in its corporate name and of " doing all such things as may be necessary or incidental to the exercise of its powers or the performance of its functions in terms of its rules." However, in making my remarks, I do so on the clear and strict basis that they are not to be taken in any way indicating any ruling by me on the legal questions of whether as an issuing and receiving house, a merchant bank owes any duty of care to an investor which is a corporate entity and which applies for shares to be allotted to it in a new issue of shares to the public by the merchant bank's principal ("the corporate applicant"), to verify that the person signing the application on behalf of the corporate applicant is properly authorised to do so; and whether, if such a duty of care does exist, a merchant bank acts reasonably in relying upon the mere self-declaration of the signatory that he is authorised to apply for the shares on behalf of the corporate applicant.

In my view, it is surely both prudent and a simple expedient for a merchant bank to require, in the case of a corporate applicant, that such an applicant attach to its application form a duly certified copy of a resolution passed by the applicant's Board of Directors or Trustees, as the case may be, recording that the person signing the application on behalf of the corporate applicant is duly authorised to do so. Certainly, bearing in mind that

(a) a signatory's self-declaration that he has "full legal capacity to contract"

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or is authorised to make the application on behalf of the corporate applicant will not necessarily and always suffice to protect a merchant bank from the signatory's lack of

authority (see, for example, *Rosebank Television and Appliance Co (Pty) v Orbit Sales Corp (Pty)* 1969 (1) SA 300 (T), at 303D-E) and

- (b) as conceded in para 37.2 of the Merchant Bank's opposing affidavit, a merchant bank, as an agent, owes a duty to its principal to satisfy itself that a person signing an application on behalf of a corporate applicant applying for the allotment of shares in the principal to the corporate applicant, is authorised to do so,

I would have thought that, as opposed to merely relying upon a signatory's own say-so that he has "full legal capacity to contract" and upon the normal and customary practice and procedure adopted by merchant banks in that regard, the more so in the absence of any clause in the agreement between the merchant banks and its principal exempting the merchant bank from all liability to its principal for any negligent acts or omissions on its part and indemnifying it against, and holding it harmless from any proceedings brought against it by a corporate applicant, the wisest and safest course for a merchant bank to adopt would be to require a corporate applicant to provide a duly certified copy of a resolution, with its application, recording that the person signing the application on its behalf was properly authorised by the corporate applicant's board of directors or trustees to do so. Had this been done in the present case, the Pension Fund and the Merchant Bank would not have found themselves engaged in legal battle with each other.

Lest it be thought that my comments above on the duty owed by a merchant bank to its principal to satisfy itself that a person signing an application on behalf of a corporate applicant is authorised to do so is an invitation to FP Holdings to bring an action against the Merchant Bank, let me hasten to add that my comments are made in the knowledge and light of FP Holdings' statements (a) in para 8 of its opposing affidavit that it is not aware of any way in which the Merchant Bank has failed in its obligations to FP Holdings; (b) in para 29, that even assuming the Pension Fund's Principal Officer had no authority to subscribe for the shares in question, it is entirely plain from the papers that the Merchant Bank was entitled to assume that the Principal Officer was duly authorised to represent the Pension Fund; and (c) in para 33, that it is denied by FP Holdings that the Merchant Bank's officers were at fault in their handling of the matter.

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On the issue of costs, Mr *Andersen* has asked the court to award costs against the Pension Fund on the higher scale on three cumulative grounds, as set forth in the final paragraph of his heads of argument, which I quote:

"It is submitted that the order for costs should be on the higher scale having regard of the failure of Applicant to state clearly the basis on which its claim was made; its persistence in pursuing a claim with no merit at all on the papers; and continued stubborn persistence in pursuing that claim on an ostensibly different basis for which there is no precedent for which the proper foundations of fact were not laid, and for which there is little or no merit. In addition it is submitted that the court should mark its disapproval of Applicant's allegation of improper motives on First Respondent's part with no factual basis on which it was justified in doing so. Finally it is submitted that Applicant should in any event have proceeded by way of summons knowing of the conflicts of fact which would arise."

I deal with the three grounds *seriatim*.

Firstly, having regard to the fact that the Pension Fund was entirely reliant upon its legal practitioners for the presentation of its application against the Merchant Bank and that in the proceedings it has been represented by senior counsel who, seemingly, approved its founding affidavit, I consider it would be unnecessarily harsh and unjust to mulct the Pension Fund in costs on the higher scale for the confused and muddled manner in which its claim against the Merchant Bank has been presented and prosecuted by its legal practitioners.

Secondly, while I appreciate the upset and grievance which must have been felt by the Merchant Bank's officers involved in the issue of shares to the public by FP Holdings, namely, Mr dos Remedios and Mr Donovan, for the alleged improper motives attributed to them, again one must remember that the Pension Fund had clearly been led by its legal is to believe that the Merchant Bank had been at fault in failing to satisfy itself as to the authority of the Pension Fund's Principal Officer to submit the application all question. Accordingly, it is not difficult to understand how and why it was that the Pension Fund, because of its belief that the Merchant Bank's officers were to blame for the position in which it now found itself, should have, in "the heat of battle", to use the expression of GUBBAY CJ in *Crundall Bros (Pvt) Ltd v Lazarus NO Anor* 1991 (2) ZLR 125 (S) at 136; 1992 (2) SA 423 (ZS) at 432B when, on appeal, he disallowed an award of costs mark on the higher scale by the court *a quo* against the applicant in that case, struck out at the Merchant Bank's officers, albeit unjustifiably, in its papers.

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Be that as it may, I am confident that any one knowing Mr dos Remedios and Mr Donovan for the ethical and highly conscientious and professional persons that they are, could not have begun to accept that either of them would have acted improperly or unprofessionally in any way.

Finally, as regards the submission that the Pension Fund should have proceeded by way of summons knowing of the conflicts of fact which would arise, the short answer to this is that the Merchant Barfly was clearly in a position to dispose of the Pension Fund's application summarily without reference to the facts and that, in any event, it is not usual to award costs on the higher scale on that score only.

In the circumstances I am not prepared to award costs against the Pension Fund other than on the ordinary scale, as I hereby do.

I now advert to the Pension Fund's claim against FP Holdings.

In his heads of argument, Mr *Gillespie*, who appeared for FP Holdings, submitted at the outset that the relief sought by the Pension Fund against FP Holdings was forbidden by law because it involved a reduction in the share capital of FP Holdings through the effective purchase by FP Holdings of its own shares.

However, while I cannot accept that there is substance in this submission, in view of the decision which I have reached on the procedural aspect of the Pension Fund's claim against FP Holdings, I shall postpone debate and a definitive ruling on this point should counsel see fit to

pursue it.

Since all three counsel, for one reason or another, seemed to accept that it would be necessary for the court to hear evidence to resolve an aspects bearing on the issue of whether the Pension Fund's Principal Officer had authority to apply for the allotment of the shares in FP Holdings to the Pension Fund, far be it from me to try to resolve the issue on the papers.

Accordingly, I hereby direct that this issue, including, if need be, the question of the knowledge which the Chairman of FP Holdings and its Group Chief Executive, namely, Fanuel Chakanetsa Muhwati, had, at the material time, in his capacity as the Chairman of the Board of the PTC concerning investment in equities by the Pension Fund and whether such knowledge is to be imputed to FP Holdings, is to be determined by way of trial, with the papers presently filed standing as the parties pleadings. As regards the

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pleadings, I consider that, at the pre-trial conference to be held after both parties have given discovery of documents on oath to each other, it should be a simple and straightforward matter to define the precise issues for trial.

Because, in my view, the Pension Fund should have realised that the conflicts of fact in regard to the issue of its Principal Officer's authority to make the application for shares on its behalf could not be determined by way of application procedure and could only be resolved by hearing evidence to establish the true position, I order the Pension Fund to pay FP Holdings' costs relating to the hearing on 11 February 1993 and to the hearing today; otherwise costs shall be costs in the cause.

It is, of course, unnecessary for the court to concern itself with the question of the Merchant Bank, in its capacity as the underwriter to the share issue by FP Holdings, being joined as a party to the trial proceedings, either at its own instance or at the instance of FP Holdings.

Coghlan, Welsh & Guest, applicant's legal practitioners

Atherstone & Cook, first respondent's legal practitioners

Gill, Godlonton & Gerrans, second respondent's legal practitioners

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PRINCIPAL IMMIGRATION OFFICER & ANOR v O'HARA & ANOR 1993 (1) ZLR 69 (SC)

Editor's Note:(3)

Court **Supreme Court, Harare**

Manyarara JA, Korsah JA & Ebrahim JA

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Civil appeal

19 October 1992 & 18 February 1993

Flynote

Immigration - domicile - factors which determine

Statute - interpretation - historical approach - meaning of the word "may" - whether permissive or mandatory

Statute - Immigration Act 1979 - ss 3(1), 3(4) & 14

Statute - Immigration Regulations 1979 (SI 373/79) - ss 17 & 38

Statute - Citizenship of Zimbabwe Act 1984 - s 9(9)

Headnote

The first respondent and his wife had obtained an order from the High Court in Bulawayo that they were entitled to be in and remain in Zimbabwe without any residence or work permit, and that the Immigration Department was required to endorse an alien's permit in their passports. The Immigration Department appealed against that order. Held, that since the promulgation of the Citizenship of Zimbabwe Act 1984, the domicile of all non-citizens of Zimbabwe has been limited to those who formerly held dual citizenship of this and another country.

Held, further, that merely because the Department of Immigration may not prohibit a person from entering Zimbabwe does not confer on such person any special rights when they are allowed to enter Zimbabwe.

Held, further, that an Immigration Officer had the discretion under s 38 of the Immigration Regulations 1979 as to whether to allow or refuse a non-domiciled Zimbabwean native an alien's permit, and in this regard, the word "may" in s 38 of the Regulations is permissive and not mandatory.

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Cases cited:

Holme v Guy (1887) 5 Ch 901

Cohen v Daniels 25 Ia 88

Udny v Udny (1869) LR 1 HL Sc & Div 441

Huth v Clarke (1) 25 QBD 391

In re Baker: Nichols v Baker (1890) 44 Ch D 262 (CA)

Sheffield Corp v Luxford; Sheffield Corp v Morrell [1929] 2 KB 180 (DC)

A-G for the Dominion of Canada v Cain & Anor [1906] AC 541 (PC)

US ex rel Polymeris v Trudell (1932) 76 L Ed 291; 284 US 279 (US Sup Ct)

Schmidt v Sec of State [1969] 1 All ER 904 (CA)

Maluleke v Min of Internal Affairs 1981 (1) SA 707 (BSC)

AVM Chikumira for the appellants

HI Bisset for the respondents

Judgment

Manyarara, Korsah & Ebrahim JJA: The question for determination in this appeal is whether the word "may", appearing in s 38(1) of the Immigration Regulations 1979 (SI 373/79) ("the Regulations"), is to be interpreted as permissive or mandatory.

Consequent upon an application made by the respondents the High Court, Bulawayo, held that the word "may" in the said section was to be accorded a mandatory meaning and granted consequential orders in favour of the respondents, declaring that both of them were entitled to be and remain in Zimbabwe without residence permits or work permits, and requiring the first appellant to endorse on the passport of each respondent an alien's permit in terms of s 38 of the Regulations, subject to the production by the second respondent of a radiologist's certificate. The court also ordered the second appellant to bear the respondent's costs of the application.

The events giving rise to the application in the court below may broadly be stated as follows.

At the time of the first respondent's birth in 1958, in the then Southern Rhodesia, his father was a citizen of the United Kingdom domiciled or ordinarily resident in this country. Since his parents were domiciled or

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ordinarily resident in this country, the first respondent acquired a domicile of origin in this country and was entitled to citizenship of Zimbabwe. By virtue of his father's birth in England, the first respondent was also entitled to citizenship of the United Kingdom by descent. In July 1991, he married the second respondent, who is a citizen of the United States by birth. In August 1991, he was advised by an official of the Immigration Department that it was necessary for him and his wife to hold a residence permit and a temporary work permit in order to live and work in Zimbabwe. The respondents disputed this assertion and sought the order referred to.

In terms of s 9(8) of the Citizenship of Zimbabwe Act 1984, the first respondent, by failing to renounce his United Kingdom citizenship, ceased to be a citizen of Zimbabwe. However, s 9(9) of the Citizenship of Zimbabwe Act gave recognition to the right of persons, who were ordinarily resident in Zimbabwe immediately prior to its promulgation, and who ceased to be citizens of Zimbabwe, to be domiciled or resident in Zimbabwe. It in effect accorded them a domicile and/or

permanent residence status in Zimbabwe.

The first respondent emigrated to South Africa in 1987 and obtained a permanent residence permit from the South African authorities, thereby acquiring a domicile of choice since the acquisition of domicile takes place when a person resides in a country with an intention of remaining there permanently.

It seems to us that in this matter, as the domicile or residence of persons was originally governed by international law, which was part of the common law of this country, the proper point at which to commence our enquiry is a consideration of those rules of international law governing domicile. As SIR GEORGE JESSEL MR said in *Holme v Guy* (1877) 5 Ch 901 at 905:

"The Court is not to be oblivious ... of the history of law and legislation"

when statutes fall to be construed.

In the interpretation of statutes a court may have regard to those external or historical facts, such as the prior existence of some law, custom or practice, which are necessary for a comprehension of the legislation, and to consider whether the statute which is the subject matter of interpretation was intended to alter the existing law or merely to codify it.

We have used the terms "domicile" and "residence" interchangeably. We must stress, however, that for legal purposes they do not connote the same

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idea. The broad distinction was well drawn by BECK J in *Cohen v Daniels* 25 Ia 88, when he said:

"The distinction between the terms residence and domicile is obvious. The first is used to indicate the place of dwelling, whether permanent or temporary; the second to denote a fixed permanent residence to which, when absent, one has the intention of returning. "

Under the common law, one feature of a domicile of origin was that it could not be extinguished by any act of its owner. This principle was succinctly expressed by LORD WESTBURY in *Udny v Udny* (1869) LR 1 HL Sc & Div 441 at 457-8 as follows:

"When another domicile is put on, the domicile of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicile of choice; but as the domicile of origin is a creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished."

With the mobility of persons being facilitated by more expeditious forms of transport, as well as the desire of persons for political or economic reasons to change their residences, it became necessary for sovereign States to regulate by immigration laws those aliens whom the State would allow to be resident therein and the conditions of their stay. It may safely be said that there is no sovereign State that has no immigration laws.

The issue of permits to justify the presence of an alien in a country is a creation of statute law.

The interpretation clause of the Immigration Act 1979 merely states that "permit means a permit issued in terms of this Act". And in s 2 of the Regulations a residence permit is defined as meaning a resident permit issued or continued in force in terms of s 17.

Now, under the common law two things had to concur to constitute domicile: first, residence; and, secondly, the intention of remaining permanently at that place. Section 3(1) of the Immigration Act, which provides that:

"Subject to the provisions of this section, a person shall be regarded for the purposes of this Act as being domiciled in a country if -

- (a) he resides permanently in that country; or

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- (b) that country is the country to which he returns as a permanent resident;"

appears to us to introduce nothing new to the concept of domicile of choice and may therefore be regarded as a codification of the common law.

As already mentioned, the status of non-citizens ordinarily resident in Zimbabwe prior to the promulgation of the Citizenship of Zimbabwe Act 1984 was given both recognition and definition by s 9(9) of that Act. That section provides that:

"Notwithstanding anything to the contrary contained in any other enactment, but subject to subsection (10), any person who was ordinarily resident in Zimbabwe immediately before the fixed date and who ceases to be a citizen of Zimbabwe in terms of subsections (4), (5), (6), (7) or (8) shall be entitled, on and after that date on which he ceased to be a citizen of Zimbabwe -

- (a) to reside in Zimbabwe; and
- (b) to acquire, hold and dispose of moveable and immovable property in Zimbabwe; and
- (c) to be indentured as an apprentice or trainee and to enter, practice or engage in any profession, trade, calling or employment in Zimbabwe; and
- (d) to obtain education for himself and his children in Zimbabwe; and
- (e) generally, to do all such things as may be done by persons who are ordinarily resident in Zimbabwe."

The domicile of all non-citizens in Zimbabwe, irrespective of whether they are born of parents ordinarily resident in Zimbabwe at the time of their birth, was thereafter founded on this piece of legislation.

Whereas under the common law the domicile of origin remains in abeyance, and is not lost, upon the acquisition of a domicile of choice, the provisions of s 9(9) of the Citizenship Act, read together with s 3(4) of the Immigration Act are indicative of an intention by the Legislature to depart from the common law concept of domicile of origin. Section 3(4) recites that:

"Subject to the provisions of subsection (5):

- (a) a person shall, for the purpose of this Act, lose his domicile in Zimbabwe if he:

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- (i) has voluntarily departed from and resides outside Zimbabwe with the intention of making his home outside Zimbabwe; or
- (ii) is absent from Zimbabwe for a continuous period of seven years or such longer period as the Minister may at his request fix before the expiration of that period. "

The proviso to the section is not relevant to this judgment.

Section 9(9) of the Citizenship of Zimbabwe Act 1984, being later in time than s 3(4) of the Immigration Act 1979, must be taken to have been enacted with full knowledge of the conditions upon which a person domiciled in Zimbabwe may lose his domicile if there should be a change of residence of a permanent character voluntarily assumed.

The first respondent, having lost his domicile in Zimbabwe was clearly not a "returning resident"; for a "returning resident" is defined in s 2(1) of the Regulations as "a former resident returning to Zimbabwe who has not lost his domicile in Zimbabwe".

Now, s 14 of the Immigration Act declares certain classes of persons to be "prohibited persons". "Prohibited persons" are by s 17 not allowed to enter or remain in Zimbabwe. Section 15 of the Act does no more than specify, for the avoidance of doubt, persons who are not prohibited from entering Zimbabwe. It does not confer on such persons any special rights when they are allowed to enter Zimbabwe.

What then is the status of the first respondent in this country? He is not a citizen of Zimbabwe; he is not a person prohibited from entering Zimbabwe and he has been allowed to enter the country. The definition ascribed to the word "alien", that it "means a person who is not a Zimbabwean citizen", appears to us to be determinative of the status of the respondents.

Storey in his commentaries on *The Conflict of Laws* 7 ed at 19-20 stated that:

"The first and most general maxim or proposition is that ... every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every State affect and bind directly all property, whether real or personal, within its territory, and all persons who are resident within it, whether natural born or aliens, and also all contracts made and acts done within

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it. A State may, therefore, regulate the manner and circumstances, under which property, whether real, or personal, or in action within it shall be held, transmitted, bequeathed, transferred, or enforced; the condition, capacity and state of all persons within it ..."

So also Graveson says in his work on the *Conflict of Laws* 2 ed at 92:

"Status in English law is a person's legal condition in society, either absolute or in relation to another person, which is conferred by and at the will of the state of the person's domicile, in the case of domestic status, or on the

same or some other basis such as residence or mere presence ..." (emphasis added).

It is clear from the observations of these eminent authorities on the subject that status and the rights that flow from it are conferred at the discretion of the State of the person's domicile.

Section 5 of the Immigration Act reposed in the Minister of Home Affairs the function of exercising the powers created by the Act and the right to appoint immigration officers and to delegate to them certain of his functions in terms of s 6. Section 41 mandated the Minister to make regulations "for the better carrying out of the objects and purpose of this Act." Subs (2)(o) of s 41, in particular, imbued the Minister with a wide discretion to make provisions for "the conditions on which former residents of Zimbabwe may resume residence in Zimbabwe otherwise than as new immigrants or be deemed to have regained their domicile for the purposes of this Act". The Regulations, the subject matter of construction, were made in terms of s 41 of the Act.

The Minister was vested with a wide discretion in the exercise of his functions under the parent Act. He was authorised to appoint officers and delegate certain of those functions to them. If the functions so authorised to be delegated involved the exercise of discretion, then unless the provision delegating the authority indicates to the contrary, the necessary inference should be that the discretion that goes with the exercise of those functions falls to be exercised by the persons to whom those functions have been delegated, otherwise the delegation of the function would be shorn of critical meaning.

"Delegation", said WILLS J in *Huth v Clarke* (1) 25 QBD 391 at 395, "as the word is generally used, does not imply parting with powers by the person who granted the delegation, but points rather to the conferring of an authority to

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do things which otherwise that person would have to do himself." If, therefore, the Minister was invested with the power to set "the conditions on which former residents of Zimbabwe may resume residence in Zimbabwe otherwise than as new immigrants or be deemed to have regained their domicile for the purpose of this Act", then so also, by delegation, was the immigration officer upon whom that function was conferred invested with the discretion of setting the appropriate conditions in each case.

Now s 38 of the Regulations recites that:

"38 (1) An Immigration Officer may endorse the passport relating to any alien referred to in paragraph (b), (c) or (d) of subsection (1) of section 15 of the Act who enters or has entered Zimbabwe and who is not domiciled in Zimbabwe with an alien's permit in the Form No IF 15". (emphasis added)

In the interpretation of statutes words must bear their primary meaning unless the contrary is indicated. So notorious is this principle that authority is not required for its support. In ordinary English usage the word "may" is understood to be an enabling word giving an absolute discretion to the repository of a power whether he would or would not exercise that power. In the words of COTTON LJ in *In re Baker: Nichols v Baker* (1890) 44 ChD 262 (CA) at 270:

"I think that great misconception is caused by saying that in some cases 'may' means 'must'. It never can mean

'must', so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a judge has a power given him by the word 'may', it becomes his duty to exercise it."

So also in *Sheffield Corporation v Luxford*; *Sheffield Corporation v Morrell* [1929] 2 KB 180 (DC) at 183-4, did TALBOT J observe that:

"'May' always means may. 'May' is a permissive or enabling expression; but there are cases in which, for various reasons, as soon as the person who is within the statute is entrusted with the power it becomes his duty to exercise it. One of these cases is where he is applied to to use the power which the Act gives him in order to enforce the legal right of the applicant."

Central to the immigration laws of any State are its nationality laws. The

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intendment of the immigration laws of the State is to regulate the entry and residence of aliens. The predominant purpose behind such laws is to protect, the State from its enemies and the interests of its citizens. It is, therefore, in the interest of the community to control and supervise aliens who seek to enter and remain within the State. The laws of the State may be exclusively adapted to promote its own peculiar policy or the personal or proprietary interests of its citizens. In order to achieve these aims the officials appointed to administer the immigration laws are necessarily given wide discretionary powers to impose appropriate conditions upon the entry and residence of aliens.

To construe the word "may", in s 38(1), as meaning "shall", would be to impose an unnecessary shackle which would unduly blunt the wide discretion reposed in the officers appointed to administer the Act. We do not perceive that it was the intention of the legislature to fetter the wide discretion vested in the Minister, as the voice of the supreme power in the State, to determine the conditions upon which former residents of Zimbabwe, who have lost their domicile in Zimbabwe, may resume residence in Zimbabwe.

Finally, as has already been observed, both respondents are aliens. Both at common law and international law an alien has no right of entry into a State except by such permission as he is accorded by the receiving State. This is a proposition of universal acclaim and there are respectable dicta from various jurisdictions in support of it.

In *Attorney-General for the Dominion of Canada v Cain & Anor* [1906] AC 542 (PC) at 546 LORD ATKINSON expressed himself thus:

"One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social and material interests: Vattel, *Law of Nations*, book 1, s 231, book 2 s 125. The Imperial Government might delegate those powers to the governor or the Government of one of the Colonies, either by royal proclamation which has the force of a statute ... or by a statute of the Imperial Parliament, or by the statute of a local Parliament to which the Crown has assented."

The Parliament of Zimbabwe delegated those powers to the Minister of

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Home Affairs, who in turn conferred the exercise of his powers on designated officers.

In *US ex rel Polymeris v Trudell* (1932) 76 L Ed 291; 284 US 279, it was held that a returning alien cannot enter unless he has either an immigration visa or a return permit. The relators must show not only that they ought to be admitted but that the United States by the only voice authorised to express its will has said so. Obviously it has not done so and therefore the judgment must be affirmed.

In the instant case, the respondents have failed to establish that Zimbabwe, by the only voice authorised to express its will, has said that they are entitled to what they demand.

Clearly, when the various sections of the legislation are read together, it would be seen that s 38(1) gives an immigration officer ample power to refuse admission to an alien, or to grant him leave to enter for a limited period, or to refuse to extend his stay, or impose such other conditions as, by statute, he may. And, as LORD DENNING MR observed in *Schmidt v Secretary of State* [1969] 1 All ER 904 (CA) at 908 D :

"I think the Minister can exercise his power for any purpose which he considers to be for the public good or to be in the interest of the people of this country"

And at 908 *in fine* - 909A:

"I quite agree, of course, that where a public officer has power to deprive a person of his liberty or his property, the general principle is that it is not to be done without his being given an opportunity of being heard and of making representations on his own behalf. But in the case of aliens, it is rather different; for they have no right to be here except by licence of the Crown. And it has been held that the Home Secretary is not bound to hear representations on their behalf, even in the case of a deportation order, though, in practice he usually does so. "

No examination of such a universal principle can be complete without a consideration of cases in Southern Africa. Reference to only one such case is sufficient to illustrate the universality of the acceptance of the principle. Attention is drawn to the statement by HIEMSTRA CJ in *Maluleke v Ministry of Internal Affairs* 1981 (1) SA 707 (BSC) at 710A-B that:

MANYARARA JA *et al*

"It is trite law that a Sovereign State can exclude aliens for good reasons, for bad reasons and for no reasons at all. Such an alien cannot approach the courts of the country, to which he seeks admission, to have the decision reversed. The most he can do is to persuade the authorities in his own country to remonstrate along diplomatic channels with the authorities in the country from which he has been excluded. It is one of the marks of sovereignty that aliens can be excluded at will. The authorities for this preposition are numerous."

The respondents herein, being aliens, are in this country at sufferance and cannot claim entitlement to any status other than that which the only voice of the supreme power of the State accords them.

It follows from the foregoing that the word "may" in s 38(1) of the Regulations bears a

"permissive" and not a "mandatory" meaning.

The appeal succeeds with costs. The order of the High Court, Bulawayo, is replaced by an order dismissing the application with costs.

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

Webb, Low & Barry, respondents' legal practitioners

1993 (1) ZLR p80

MUPINI v MAKONI 1993 (1) ZLR 80 (SC)

Court Supreme Court, Harare

Gubbay CJ, Korsah JA & Gibson AJA

Civil appeal

11 & 18 February 1993

Flynote

Practice and procedure - judgment - execution - stay of - grounds for - fraud - what must be proved

Headnote

Execution of a judgment is a process of the court and the court has an inherent power to control its own processes and procedures, subject to such rules as are in force. In the exercise of a wide discretion, the court may set aside or suspend a writ of execution or cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The *onus* rests on the party seeking a stay of execution to satisfy the court that special circumstances exist. Such special circumstances can be more readily found where the judgment is for ejectment or the transfer of property, because the carrying into operation of the judgment could make restitution of the original position difficult.

Where a party seeks to have a judgment set aside on the grounds of fraud, he must allege and prove that -

- (a) the successful litigant was a party to the fraud;
- (b) the evidence was in fact incorrect;
- (c) it was given fraudulently and with intent to mislead;
- (d) the false evidence was the *causa causans* of the unfavourable judgment.

To obtain a stay of execution it is not necessary to go as far as actually proving that a fraud had been perpetrated upon the court, but it has to be shown that the applicant has a reasonable prospect of success.

GUBBAY CJ

Cases cited:

Cohen v Cohen (1) 1979 ZLR 184

Santam Ins Co Ltd v Paget (2) 1981 ZLR 132 (G)

Chibanda v King 1983 (1) ZLR 116 (H)

Strime v Strime 1983 (4) SA 850 (C)

Childerley Est Stores v Standard Bank of SA Ltd 1924 OPD 163

Makings v Makings 1958 (1) SA 338 (A)

Pswarayi v Pswarayi 1960 R & N 587 (SR)

Swart v Wessels 1924 OPD 187

Smit v van Tonder 1957 (1) SA 421 (T)

Arab v Arab 1976 (2) RLR 166 (A)

E Chatikobo for the appellant

A J Dyke for the respondent

Judgment

Gubbay CJ: This is an appeal against the order of the High Court discharging, with costs, a rule nisi that called upon the respondent and the Deputy Sheriff of Zimbabwe, to show cause why the latter should not be restrained from evicting the appellant from the residential property known as 72 St Patrick's Road, Hatfield, Harare ("the property"), pending a decision, in an action to be brought by the appellant, as to whether the judgment obtained for his eviction was to be rescinded on the ground of fraud.

In order to determine if a stay of execution ought to have been granted the appellant, it is necessary at the outset to trace, in sequence, the relevant historical events. They were these:

1. On 11 October 1989 the respondent instituted proceedings by way of notice of motion in which he sought orders directing the appellant to give him vacant possession of the property and the Registrar of Deeds to effect transfer thereof into his name. The relief claimed was based upon an allegation that on 13 March 1981 he had entered into a written agreement of sale of the property with the owners, Sybrand Johannes Grobler and Richard Andrew Els, and had paid the purchase price of \$12 000 in full.

The application was opposed by the appellant. He averred that on 20 November 1978 he had purchased the property, from Els, in terms of a deed of sale, for \$13 000, payable as to a deposit of \$2 000 and instalments of \$80 per month. Since then he had remained in

occupation of the property.

1993 (1) ZLR p82

GUBBAY CJ

2. In a reserved judgment handed down on 21 August 1991, CHEDA J granted the respondent the relief he claimed, with costs.
3. Thereafter a writ of execution was issued by the High Court directing the Deputy Sheriff to enforce the order for ejectment.
4. The prescribed time within which to note an appeal against the decision of CHEDA J having expired, the appellant, on 18 September 1991, petitioned the High Court for a stay of execution pending the determination of an application to be made to the Supreme Court for condonation of the late noting of an appeal.
5. Simultaneously therewith, the appellant filed his application before this court. The supporting affidavit merely set out the reasons for the failure to note an appeal timeously. It made no reference to the existence of reasonable prospects of success.
6. The next day the High Court granted the appellant a stay of execution upon the terms sought.
7. On 15 November 1991 EBRAHIM JA refused the appellant leave to appeal out of time. Consequently, the stay of execution terminated and the order of CHEDA J once again became executable.
8. The writ of execution was served upon the appellant on 7 December 1991, but he was allowed until 8 am on 16 December 1991 to vacate the property.
9. On 18 December 1991 the appellant petitioned the High Court, upon a certificate of urgency, for a further stay of execution. He alleged for the first time that the respondent had perpetrated a fraud upon CHEDA J, notwithstanding that the information upon which he grounded such accusation had become available to him during October 1991, if not before.
10. A rule *nisi* issued on 19 December 1991.
11. In his replying affidavit, filed on 13 December 1991, the respondent vehemently denied that the judgment in his favour had been procured by means of deception. His opposition was upheld by CHINENGUNDU J on 15 January 1992.

1993 (1) ZLR p83

GUBBAY CJ

Against the uncontentious background outlined, and the allegation of fraud made and denied, I turn to consider whether there is any room for this court to interfere with the discretion exercised by CHINENGUNDU J to end the interim stay of execution.

Execution is a process of the court, and the court has an inherent power to control its own process and procedures, subject to such rules as are in force. In the exercise of a wide discretion the court may, therefore, set aside or suspend a writ of execution or, for that matter, cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The *onus* rests on the party seeking a stay to satisfy the court that special circumstances exist. The general rule is that a party who has obtained an order against another is entitled to execute upon it. Such special reasons against execution issuing can be more readily found where, as *in casu*, the judgment is for ejectment or the transfer of property, for in such instances the carrying of it into operation could render the restitution of the original position difficult. See *Cohen v Cohen* (1) 1979 ZLR 184 at 187C; *Santam Ins Co Ltd v Paget* (2) 1981 ZLR 132 (G) at 134G-135B; *Chibanda v King* 1983 (1) ZLR 116 (H) at 119C-H; *Strime v Strime* 1983 (4) SA 850 (C) at 852A.

Counsel for the appellant refrained from submitting, and wisely so, that the discretion exercised by CHINENGUNDU J was vitiated by misdirection. The proposition he advanced was that the conclusion arrived at was unreasonable, in the sense that no right-thinking person could support it, thereby permitting this court to exercise its own discretion in substitution.

In denying the appellant relief, the learned judge had regard to two significant factors. The first was that the appellant had failed to act expeditiously in seeking to rescind the judgment complained of. He had come by the information that Grobler could not have been a party to the agreement of sale entered into with the respondent at the very latest in October 1991, yet was content to do nothing about it; to simply await the outcome of his application for leave to appeal. If condonation had been granted, the appellant would then have been obliged to challenge the propriety of the judgment of CHEDA J on its merits. In short, he was prepared, in that event, to abide by the decision of the Supreme Court. Only when that avenue closed, and the writ of execution was again served, did he resolve to protest the judgment on the ground of fraud; and even so he delayed with the filing of a petition until after the days of grace allowed him by the Deputy Sheriff had expired.

It seems to me that the dilatory manner in which the appellant brought this

1993 (1) ZLR p84

GUBBAY CJ

serious allegation of fraud before the High Court is suggestive of a last desperate resort to resist enforcement of its judgment and thereby continue in occupation of the property.

But quite apart from the censurable conduct of the appellant, the learned judge was also of the opinion that, on the papers placed before him, the averment that the respondent had been a party to a fraud, was based on conjecture, unsupported to any adequate degree by the facts relied upon.

It is well settled that at common law a judgment obtained by fraud (including forgery and perjury) may be set aside at the suit of an interested party. See, for instance, *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163 at 169; *Makings v Makings* 1958 (1) SA 338 (A) at 342G-343E; *Pswarayi v Pswarayi* 1960 R&N 587 (SR) at 592A-E. The fraud must be of such a

nature as to entitle the other party to *restitutio in integrum*. It is necessary for him to allege and prove: (i) that the successful litigant was a party to the fraud; (ii) that the evidence was in fact incorrect; (iii) that it was made fraudulently and with intent to mislead; and (iv) that it diverged to such an extent from the true facts that the court would, if the true facts had been placed before it, have given a judgment other than that which it was induced by the incorrect evidence to give - ie the false evidence was the *causa causans* of the unfavourable judgment. See *Swart v Wessels* 1924 OPD 187 at 189-190; *Smit v van Tonder* 1957 (1) SA 421 (T) at 426H.

To obtain a stay of execution the appellant was not required to go to the length of *proving*, to the satisfaction of CHINENGUNDU J, that a fraud had been perpetrated by the respondent upon the court presided over by CHEDA J. Such a task in motion proceedings is well nigh impossible. What had to emerge from the affidavits viewed as a whole was that the action the appellant intended to institute for rescission of the judgment enjoyed a reasonable prospect of success, with due regard to the fundamental principle that as far as possible there should be finality in litigation. See *Arab v Arab* 1976 (2) RLR 166 (A) at 172E.

As the dispute of fraud on the respondent's part is presently the subject of a pending trial in the High Court, it is undesirable to comment in much detail upon the facts raised by the appellant in his affidavit. Suffice it to state that, although Grobler could not have signed the agreement of sale that the respondent had entered into on 13 March 1981 (he died on 22 December 1978), it was by no means a consequence thereof, as concluded by the appellant, that the respondent had forged Grobler's signature to the agreement.

1993 (1) ZLR p85

GUBBAY CJ

(or was a party to such forgery) "with the fraudulent intention to mislead the court, thereby maximising his chances of success in the application". To the contrary, I consider that the information made available to the court *a quo* pointed to the likelihood of it being Els who had forged Grobler's signature. It was Els who, as an estate agent, had prepared the agreement of sale. It was Els who had purchased the property from Grobler on 17 August 1978 upon undertaking liability to pay the outstanding balance owed to a building society at the rate of \$50 per month. It was Els who shortly afterwards, and without transfer having been passed to him, sold the property to the appellant under a deed of sale. It was Els to whom the respondent paid the purchase price of \$12 000. And it was Els who soon left the country without trace, having failed to pay what was due to the building society. All this made cogent the respondent's assertion that he was told by Els that the appellant was in occupation of the property as a tenant and that he thought he was signing an agreement with a man introduced to him as Grobler (who in fact must have been an impostor).

It necessarily follows that I am in respectful agreement with the learned judge. I am satisfied that the appellant failed to show a reasonable prospect of being able to prove in a trial action that the respondent had perpetrated a fraud on the court.

I hasten to add, however, that this view is based entirely on the facts revealed in the affidavits and must not be regarded as of any weight in the forthcoming trial. It may be that at that stage the appellant's case against the respondent will be stronger. If successful, his right of

occupation to the property will be reinstated.

Before concluding, there is one further matter that warrants mention. It is this: on the return of the rule *nisi*, on 7 January 1992, which had been anticipated by the respondent, the appellant's counsel sought a postponement in order to prepare and lodge answering affidavits. The request was refused and, after argument was addressed on the merits, the learned judge reserved judgment. A few days later, before judgment was delivered, the appellant's legal practitioners, without obtaining leave to do so, filed further affidavits from the appellant and another person, together with many documents, totalling some forty-six pages. That was entirely improper. It bordered on contempt of the learned judge's ruling. These additional papers were, however, ignored by him, and although wrongly included in the record before this court, have been likewise disregarded.

1993 (1) ZLR p86

GUBBAY CJ

In the result I would order that the appeal be dismissed with costs.

Korsah JA: I agree.

Gibson AJA: I agree.

Kantor & Immerman, appellant's legal practitioners

Gollop & Blank, respondent's legal practitioners

1993 (1) ZLR p87

S v NDLOVU 1993 (1) ZLR 87 (HC)

Court **High Court, Bulawayo**

Muchechetera J

Criminal review

19 February 1993

Flynote

Criminal procedure - review of sentence - nature of review powers of High Court - whether custodial sentence as alternative to fine is to be added together with additional suspended custodial sentence to determine whether total sentence imposed in excess of 6 months and thus subject to review

Headnote

If it is questionable as to whether a criminal case decided in the magistrates' court should be sent for review by the High Court or should simply be scrutinised by a regional magistrate, the question should be resolved by sending the matter for review as the High Court's powers of

review are wider in scope than the magistrate's scrutiny powers.

In addition to its statutory review powers, the High Court also has inherent common law review powers. A magistrate has the right to send any case on review even though the case does not fall within the ambit of s 55(1)(b) of the Magistrates Court Act [*Chapter 15*].

Under s 63 of the Magistrates Court Act, when a sentence is above 6 months, it is reviewable by the High Court. A wholly suspended sentence which is above 6 months must be sent for review and so, too, must a custodial sentence as an alternative to a fine which is in excess of 6 months. Where a fine with an alternative custodial sentence and also a suspended custodial sentence have been imposed, the alternative custodial sentence to the fine must be added together with the suspended custodial sentence and if the total is in excess of 6 months, the matter must be sent on review.

Cases cited:

1993 (1) ZLR p88

MUCHECHETERE J

R v Ismail 1983 (4) SA 240 (T)

R v Robey 1973 (1) RLR 1 (G)

S v Chidodo & Anor 1988 (1) ZLR 299 (H)

Levy v Benatar 1987 (1) ZLR 120 (S)

S v Phiri HB-14-82

S v Ngulube HB-7-82

S v Tazwirei HB-67-82

R v De Wit 1932 OPD 79

Judgment

Muchechetero J: The accused in this matter pleaded guilty to assault with intent to do grievous bodily harm. He was duly convicted of the offence and thereafter sentenced to a fine of \$500 or in default of payment 4 months' imprisonment with labour. In addition he was sentenced to 4 months' imprisonment with labour, wholly suspended for a period of 5 years, on the usual condition of good behaviour.

The matter came before me for review with the following comments from the scrutinizing regional magistrate:

- "2. The fine of \$500 (and in alternative custodial sentence) imposed here is subject to scrutiny by a regional magistrate. However because there is an additional suspended custodial sentence of 4 months there appears to be a measure of uncertainty as to whether such matter should be subject of scrutiny by a regional magistrate or review by a judge. One interpretation of s 63 of the Magistrates Court Act [*Chapter 18*] is that all we have to do is to add up the alternative custodial sentence (ie 4 months' imprisonment with

labour in this case) to the additional suspended sentence (ie 4 months' imprisonment with labour). The total of the two is 8 months' imprisonment with labour, so the matter is subject to review by a judge. On the other hand, another interpretation is that once the accused pays the fine of \$500 the alternative prison sentence is out of question and cannot be considered for determination whether the matter is for review, scrutiny or not. The latter interpretation appears to have been followed in South Africa in *S v Ismail* 1983(4) SA 240 (T). So if we follow the reasoning in the *Ismail* case (*supra*) the payment of the \$500 fine is the determining factor ie if Mr Ndlovu did not raise the \$500 fine the matter should go to the judge for review but if he paid the fine the matter goes before a scrutinising regional magistrate.

3. We kindly request your guidance. "

1993 (1) ZLR p89

MUCHECHETERE J

I am grateful for the view of the Attorney-General's Office on the matter which views I agree with.

In the first instance, I consider that where there is any conflict as to whether a matter should be subjected to a review or scrutiny this conflict should always be resolved by forwarding the matter for review. The reason for this is that review powers are by their nature and ambit wider in scope and are also embrasive of scrutinable and otherwise non-scrutinable matters. See ss 63, 63(2a) and 63A(3) of the Magistrates Court Act [*Chapter 18*]. The powers of scrutiny are limited in so far as they are exercised only to the extent of certifying proceedings as being in accordance with real and substantial justice but if it appears to the scrutinizing court that doubts exist as to the propriety of the proceedings the matter is sent for review to the High Court where wide and almost limitless powers of review are exercised - see s 63A(3)(g) of the Magistrates Court Act [*Chapter 18*] and s 29 of the High Court of Zimbabwe Act 29 of 1981. The High Court also has additional powers of review in terms of s 26 of the High Court Act which reads:

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

The above statutory review powers are complemented by the High Court's inherent common law review powers. In *R v Robey* 1973 (1) RLR 1 (G) BEADLE CJ said at p 3:

"...The High Court has an inherent right to review any proceedings before any inferior court and a Magistrate has an inherent right to send any case to a judge of the High Court for review even though it does not fall within the ambit of s 55(1)(b) of the Act (the Magistrates Courts Act [*Chapter 15*]) (now s 63 of the Magistrates Courts Act [*Chapter 18*])."

See also *S v Chidodo & Anor* 1988 (1) ZLR 299 (H) at 302 where GREENLAND J said:

"It should be also noted that the High Court has common law powers of review which are supplemented by the power specifically conferred by the High Court Act."

See also *Levy v Benatar* 1987 (1) ZLR 120 (S) and *S v Maponga* HH-276-84.

1993 (1) ZLR p90

MUCHECHETERE J

On the interpretation of s 63 of the Magistrates Court Act [*Chapter 18*] my view is that the first proposition put forward by the learned Regional Magistrate, that is adding up the alternative custodial sentence, in this case 4 months' imprisonment with labour, with the wholly suspended 4 months' imprisonment with labour, is the correct and proper one. This is because the said Act does not distinguish sentences referred to in s 63 according to whether it is a sentence of a fine or an alternative custodial sentence or a partly suspended sentence or a wholly suspended sentence or an effective custodial sentence. In the circumstances even a wholly suspended sentence or one alternative to a fine as long as it is above the stipulated reviewable sentence should be sent for review. In the present case both the alternative term of imprisonment and the wholly suspended sentence should be taken into account for the purposes of determining whether the matter is for review or scrutiny. This appears to be in accord with the practice of the courts. A number of cases have been reviewed by the High Court which would not have qualified to be sent for review if the above proposition had not been adopted. See *S v Phiri* HB-14-82; *S v Ngulube* HB-7-82 and *S v Tazwirei* HB-67-82. It is also worthy of note to quote what BOTHA J said at p 79 in *R v De Wit* 1932 OPD 79:

"Review is necessary even in cases where the operation of a sentence is suspended."

The second proposition put forward by the learned regional magistrate and which appeared to have been followed in *R v Ismail supra* appears to have been the practice which was followed in South Africa prior to 1984 and 1987. This was because, in addition to provisions similar to our s 63 of the Magistrates Court Act, the South Africans also had s 302(2) and (3) of the Criminal Procedure Act 51 of 1977 which provided as follows:

"(2) For the purposes of subsection (1)

(a) ...

(b) that part of a sentence which is suspended or a sentence of which the whole is suspended shall not be taken into account:

Provided that where such a sentence is put into operation, the provisions of subsection (1) shall come into operation in respect of the sentence in question.

(3) The provisions of subsection (1) shall only apply -

(a) ...

(b) where a fine is imposed, if a sentence of imprisonment is imposed in terms of section 287 as a punishment alternative to

1993 (1) ZLR p91

MUCHECHETERE J

to such fine, and such fine is not paid or if time is not given for payment thereof before the person convicted is received into prison:

Provided that if the person convicted is at any time received into prison by reason of his failure to pay the fine or any part thereof, the provisions of subsection (1) shall come into operation in respect of the sentence in question."

The *Ismail* case was therefore based on the above South African provisions for which we have no equivalent. The above South African provisions were, however, later repealed by s 22 of the Criminal Procedure Act 59 of 1983 and s 13(b) of the Criminal Procedure Act 26 of 1987 respectively. The end result in the position now obtaining in South Africa is that all fines above the stipulated limit are reviewable notwithstanding the payment or non-payment of the fine by the accused person.

Blackie J agrees.

1993 (1) ZLR p92

MUZONDA v MINISTER OF HOME AFFAIRS & ANOR 1993 (1) ZLR 92 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

5 & 23 February 1993

Flynote

Delict - wrongful arrest and detention - arrest without warrant - discretion vested in police officer - when discretion wrongly exercised

Damages - wrongful arrest and imprisonment - elderly woman arrested and detained overnight on petty charge

Criminal procedure - arrest without warrant - extent to which discretion vested in arresting officer - when arrest should be made - factors to consider

Headnote

The appellant, an elderly woman, lived with her son and her daughter-in-law. She was involved in a dispute with her daughter-in-law, during the course of which she struck her daughter-in-law, whose wrist watch fell off. The daughter-in-law left the watch in the house and went to report the incident to her husband. On returning to the house she found the wrist watch was gone, so reported the assault and the apparent theft of the watch to the second respondent, a police officer. The next day he fetched the appellant and another woman who lived at the same house to the police station and questioned them, following which he formally arrested the appellant on charges of theft and assault. She was detained in the cells until the next day, when she was released, following the intervention of her son. She claimed damages from the respondent Minister and the police officer for wrongful arrest and detention.

Held, that the police officer had, as required by s 29(1)(b) of the Criminal Procedure and Evidence Act, reasonable grounds for suspecting that the appellant had committed the crimes of assault and theft, which are both First Schedule offences.

GUBBAY CJ

Held, further, that although the police officer was authorised to arrest the appellant, he had a discretion as to whether to do so or not; the power of arrest is not intended always, or even ordinarily, to be exercised.

Held, further, on the question of whether the police officer exercised his discretion reasonably, that the principles applicable to administrative law applied: that the court would have to find that the exercise of the discretion was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it.

Held, further, that among the considerations to be taken into account in determining whether an arrest is open to challenge are the possibility of escape, the prevention of further crime and the obstruction of police enquiries. On none of these grounds could the exercise of the discretion be justified.

Held, further, that the deprivation of personal liberty is an odious interference and has always been regarded as a serious injury. For this type of civil wrong there must be an exemplary element in the assessment of reparation and damages of \$3 000 would be justified.

Cases cited:

A-G v Blumears & Anor 1991 (1) ZLR 118 (S)

S v Ganyu 1977 (2) RLR 97 (A)

Dumbell v Roberts & Ors [1944] 1 All ER 326 (CA)

Feldman v Min of Home Affairs 1992 (2) ZLR 304 (S)

Holgate - Mohammed v Duke [1984] 1 All ER 1054 (HL)

Shaaban Bin Hussein v Chong Fook Kam [1969] 3 All ER 1626 (PC)

CCSU & Ors v Min for the Public Svc [1984] 3 All ER 935 (HL)

Nottinghamshire County Council v Sec of State for the Environment [1986] 1 All ER 199 (HL)

Allan v Min of Home Affairs 1985 (1) ZLR 339 (H)

Chifforobe v Nyamusara S-7-91

Chintzy v Min of Home Affairs HH-261-89

Masawi v Chabata & Anor 1991 (1) ZLR 148 (H)

Mweti v Min of Home Affairs & Ors HB-5-93

B Mtetwa for the appellant

H Simpson for the respondents

Judgment

Gubbay CJ: This appeal from the High Court arises out of an arrest and detention of the plaintiff on 24 December 1988. The arrest was effected, in the course and scope of his duties, by Constable Makuvatsine, the second,

1993 (1) ZLR p94

GUBBAY CJ

respondent, for reasons relating to an occurrence three days earlier involving the plaintiff and her daughter-in-law Maria.

The plaintiff resided with her son Michael, his wife Maria and their infant child, at a house in Unit K, Seke Township. Beauty, the plaintiff's sixteen-year-old daughter lived there as well. The marriage between Michael and Maria was an unhappy one and a strained and antagonistic atmosphere pervaded the household. The plaintiff's sympathies rested with Michael.

During the late afternoon of Wednesday, 21 December 1988, an argument developed in the kitchen between the plaintiff and Maria over the latter's use, for her child, of a bottle of orange cordial. The plaintiff lost her temper and struck Maria three fist blows to the side of the chest. No injury was caused but the wrist-watch Maria was wearing dropped to the floor. She picked it up and placed it on top of one of the cupboards. In a state of distress, rather than physical pain, she left the house and proceeded to the bus stop with the intention of reporting the assault at the Chitungwiza Police Station. When the bus arrived, Michael alighted. After Maria had related the incident to him, he persuaded her not to report it but to return with him to the house. Upon their arrival Maria went immediately to retrieve her wrist-watch. It was missing. A search for it proved unsuccessful. Not unnaturally Maria suspected that either the plaintiff or Beauty had taken the wrist-watch for they alone had remained in the house during the fifteen minutes or so while she was away.

The next morning Maria went to the Chitungwiza Police Station where she reported the assault upon her, and the theft of the wrist-watch, to Constable Makuvatsine. In the hope of being able to amicably resolve what seemed to him to be something of a domestic dispute, Constable Makuvatsine provided Maria with a note to deliver to the plaintiff. It contained a request that the plaintiff and Beauty come to the police station at 8 am the following day so that Maria's complaints could be investigated. Maria was told to be there at the same time.

At the appointed hour, on 23 December 1988, the plaintiff and Beauty presented themselves at the Chitungwiza Police Station. Constable Makuvatsine explained briefly that Maria wished to lay charges of assault and theft and that they were to await her arrival. When, after an hour, Maria had not appeared, Constable Makuvatsine suggested that they return home. He warned them, however, to remain accessible for questioning. Maria arrived at the police station later that morning at a stage when Constable Makuvatsine had already left for the city. She had been

ordered from the

1993 (1) ZLR p95

GUBBAY CJ

house by Michael and so had first taken her child and belongings to her grandmother's residence in Mbare.

The following morning Maria, with her mother, returned to the police station. As she remained insistent upon laying the charges, Constable Makuvatsine decided to fetch the plaintiff and Beauty and bring them back to the police station for the purpose of questioning them there. He drove to the residence, together with Maria, her mother and a reserve constable. The plaintiff was present. She informed him that Beauty had left for the communal lands. This annoyed him. He enquired about the wrist-watch but the plaintiff denied responsibility for its loss. Considering it futile to conduct a search of the house for so small an item of property, Constable Makuvatsine instructed the plaintiff to accompany him, and the rest of the party, to the police station. He did not arrest her.

Back at the police station Constable Makuvatsine sat down with the three women in the reception area. He again questioned the plaintiff about the wrist-watch. She repeated her denial of having stolen it. He asked her whether it was true that she had assaulted Maria. This she admitted in terms which gave him the impression that she believed such action was justified. It was intimated by Maria that if the plaintiff was prepared to return the wrist-watch, she would withdraw both complaints. The plaintiff was unmoved. It was then that Constable Makuvatsine formally arrested her on charges of theft and assault and arranged that she be detained in the cells.

Early on Christmas morning Michael went to the police station in order to try to secure the release of his mother. Maria arrived there a short time later. At the instigation of Constable Makuvatsine the two of them discussed the issue of the wrist-watch. What concerned Maria was that she had not yet paid for it. She agreed to withdraw both charges provided she received \$35, being the stipulated purchase price. This was acceptable to Constable Makuvatsine. He regarded the assault as a trivial offence, and so did Maria. Michael handed \$35 to Maria and the plaintiff was released from the cells and allowed to go home. She had been detained for twenty-one hours.

It was on a conspectus of these facts that the learned judge *a quo* held that Constable Makuvatsine was justified in arresting the plaintiff without a warrant, and in detaining her.

Section 29(1)(b) of the Criminal Procedure and Evidence Act [Chapter 59] makes it clear that a peace officer must have reasonable grounds to suspect

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a person of having committed any of the offences mentioned in the First Schedule- which includes an offence at common law - before he is empowered to arrest him without a warrant.

Without such an important protection, even the most democratic and enlightened society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens in the case of an arrest made without a warrant, it is essential for a peace officer to demonstrate the reasonable grounds upon which the arrest was based. The importance of this to citizens of a democracy is self-evident. Yet society must also be protected against crime. Thus what has to be struck is a necessary accommodation between the individual's right to liberty and that of society to be protected from crime. It is done by requiring of a peace officer that before arresting without a warrant he must satisfy himself that reasonable grounds for suspicion of guilt do exist. That requirement is very limited. He is not called upon before acting to have anything like a *prima facie* case for conviction. Certainty as to the truth is not involved, for otherwise it ceases to become suspicion and becomes fact. Suspicion, by definition, is a state of conjecture or surmise whereof proof is lacking. See *Attorney-General v Blumears & Anor* 1991 (1) ZLR 118 (S) at 122B-C; *S v Ganyu* 1977 (2) RLR 97 (A) at 104F; *Dumbell v Roberts & Ors* [1944] 1 All ER 326 (CA) at 329A-B.

There is another safeguard. It is not sufficient for a peace officer to personally believe that he has reasonable grounds on which to base the arrest. These grounds must, in addition, be justifiable from an objective point of view, that is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable grounds. See *Feldman v Minister of Home Affairs* 1992 (2) ZLR 304 (S) and the cases there cited.

Unquestionably, as the learned judge held, Constable Makuvatsine suspected, and had reasonable grounds for so doing, that the plaintiff had committed the offence of common assault, for without any duress on his part she had somewhat proudly admitted as much to him. But was there also "reasonable grounds to suspect" her of having stolen the wrist-watch?

It is not, I think, open to doubt that Constable Makuvatsine subjectively harboured a suspicion that the plaintiff had stolen the wrist-watch. The argument centred upon whether the cumulative effect of the items of information ascertained by him, prior to making the arrest, met an objective appraisal that there existed reasonable grounds for that suspicion. They were these: (a) the subsisting ill-feeling between the plaintiff and Maria; (b) the plaintiff's awareness that Maria had placed the wrist-watch on top of a

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cupboard in the kitchen; (c) the presence of the plaintiff in the house during the fifteen minutes of Maria's absence and the disappearance of the wrist-watch over that period; (d) the reasonable inference that, having first assaulted Maria for a supposed wrongdoing, the plaintiff was desirous of adding to that punishment by depriving her of possession of the wrist-watch; and (e) Maria's belief that the plaintiff was the culprit rather than Beauty.

I am persuaded that these features, taken together, were sufficient to constitute reasonable grounds to suspect the plaintiff of having committed the theft. In coming to this conclusion, I have not lost sight of the submission advanced on behalf of the plaintiff that, as Beauty had an equal opportunity to steal the wrist-watch, without questioning her, there was no reasonable

basis to suspect the plaintiff of the theft rather than Beauty.

The situation in *Feldman v Minister of Home Affairs supra* upon which reliance was placed, was very different. There any one of five women employees at Woolworth's Store could have stolen the money. The police arrested all five and removed them to the police station without making any meaningful effort to establish the culprit. It was hoped that her identity would be revealed in the course of interrogation.

In the instant case, the thief was one of two related persons - the plaintiff or Beauty. But it was the plaintiff who had the motive to steal. Furthermore, it was the plaintiff, being a figure of authority, who possessed the ability to maintain a stance of innocence faced with inevitable questioning from Maria. Beauty, on the other hand, who was still a child, would have been alive to real risk of breaking down.

The next crucial point to consider - one not raised by counsel or addressed by the trial court - is whether, notwithstanding that there were reasonable grounds to suspect the plaintiff of having committed the First Schedule offences of common assault and theft, Constable Makuvatsine was required by law to arrest and detain her.

Prior to its amendment, s 31(1) of the Criminal Procedure and Evidence Act [*Chapter 28 of 1939*], the precursor of the present Chapter 59, provided that every peace officer "is authorised and required to arrest without warrant every person who commits an offence in his presence". This wording called forth the pertinent observation of YOUNG J in *R v Vengayi* 1956 R & N 355 (SR) at 356G that:

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"Having regard to the multiplicity of offences, both serious and otherwise, created by statute, it is surprising that a peace officer is not given a discretion as to whether to arrest the offender or not. Such a discretion was conferred under the corresponding (South African) legislation as far back as 1935."

The law-maker soon took heed of this undesirable anomaly, and deleted the words "and required" from the old s 31(1).

Section 29(1) of the present Act employs the phrase "is hereby authorised ... to arrest". I am satisfied that, read with para (b), it is to be construed as imparting a discretion upon the peace officer in the exercise of his power of arrest. This conforms with common sense, for it would be absurd if, for instance, a peace officer were compelled to arrest a person whom he had reasonable grounds to suspect of having assaulting another by gesturing with his fist. It is also consistent with comparative provisions in both the South African Criminal Procedure Act 1977, and the Police and Criminal Evidence Act 1984, of England and Wales. See s 40(1)(b) and s 24(6) respectively. In short, in enacting s 29(1)(b), the law-maker did not intend that the power given a peace officer to arrest is always, or even ordinarily, to be exercised.

In the celebrated case of *Holgate - Mohammed v Duke* [1984] 1 All ER 1054 (HL) the issue arose as to whether the exercise of the discretion to arrest was to be treated in the same manner as the assessment of the existence of reasonable grounds for suspicion. Stated

otherwise: was the arrest rendered unlawful if the decision was one which the court believed to be unreasonable, applying the same general objective test as it would to the existence of grounds? The House of Lords held that the police constable's discretion to arrest was not reviewable in the same way as the grounds for arrest, but only on the principles applicable in administrative law, where an executive discretion is conferred on a public officer. This was explained by LORD DIPLOCK in the course of his speech at 1057e-g:

"So the condition precedent to Det. Con. Offin's power to take the appellant into custody and the power of the other constables at Southsea police station to detain her in custody was fulfilled; and, since the wording of the subsection under which he acted is 'may arrest without warrant', this left him with an executive discretion whether to arrest her or not. Since this is an executive discretion expressly conferred by statute on a public officer, the constable making the arrest, the lawfulness of the way in which he has exercised it in a particular case cannot be questioned

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in any court of law except on those principles laid down by LORD GREENE MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680; [1948] 1 KB 223, that have become too familiar to call for repetitious citation. The *Wednesbury* principles, as they are usually referred to, are applicable to determining the lawfulness of the exercise of the statutory discretion of a constable under s 2 (4) of the 1967 Act, not only in proceedings for judicial review but also for the purpose of founding a cause of action at common law for damages for that species of trespass to the person known as false imprisonment, for which the action in the instant case is brought."

See also *Shaaban Bin Hussein v Chong Fook Kam* [1969] 3 All ER 1626 (PC) at 1630E; Wade *Administrative Law* 6 ed at p 405.

Accordingly, a far stricter test than reasonableness in the normal meaning of the word is to be applied. The decision will be held to be *ex facie* unreasonable and subject to interference only where it is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it": *per* LORD DIPLOCK in *Council of Civil Service Unions v Minister for the Public Service* [1984] 3 All ER 935 (HL) at 951 a-b. Later, in *Nottinghamshire County Council v Secretary of State for the Environment* [1986] 1 All ER 199 (HL) at 202f, LORD SCARMAN spoke of a decision having to be so absurd that the decision-maker "must have taken leave of his senses" for a challenge to succeed.

In making the determination of whether the decision to arrest the plaintiff is open to challenge, several important factors require to be considered. They are: (i) the possibility of escape; (ii) the prevention of further crime; and (iii) the obstruction of police enquiries.

It ought to have been apparent to Constable Makuvatsine that the plaintiff was a respectable and elderly lady of fixed abode. There was little, if any, risk of her absconding in order to evade being tried on such charges. Quite apart from the inherent pettiness of the offences and the consequent certainty that if convicted she would be granted the option to pay a fine, the plaintiff had a sixteen-year-old daughter to care for. In the knowledge that she was to be questioned about the assault and theft of the wrist-watch, she had complied with the request to be at the police station on the morning of 23 December 1988.

Moreover, there was absolutely no warrant to believe that if the plaintiff were

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permitted to remain at liberty she would commit further offences, especially since Maria had removed herself and her belongings from the house.

It is true that being free the plaintiff may have obstructed police enquiries into the theft by exerting influence over Beauty; but if that were her intention it was very likely that she had already done so prior to being arrested. Generally I think it also of some significance that Constable Makuvatsine regarded the complaints as bordering upon a domestic dispute. He had no difficulty in allowing the charges to be withdrawn by Maria after Michael had paid her \$35, being the value of the wrist-watch. There the matter ended.

Accepting as I do that it is a hard task to persuade a court that a decision taken is unreasonable in the *Wednesbury* sense, I am nonetheless convinced that it was so in this case. It was as if Constable Makuvatsine believed that because there were reasonable grounds to suspect, he was obliged to make the arrest. That action was so outrageous in its defiance of logic that no sensible police officer, applying his mind to all relevant factors, would have done likewise.

In deciding what measure of damages the plaintiff is due for her twenty-one hour sojourn in the police cells, this court is not fettered by the exercise of a prior discretion.

The deprivation of personal liberty is an odious interference and has always been regarded as a serious injury. The importance which attaches to such a fundamental right was eloquently spoken of by REYNOLDS J in *Allan v Minister of Home Affairs* 1985 (1) ZLR 339 (H) at 346B-D. I can do no better than repeat his words:

"Since time immemorial the liberty of the individual has been regarded as one of the fundamental rights of man in a free society. Long before the Magna Carta codified the principle almost eight hundred years ago, man has pursued and jealously guarded his right to freedom of person. In the words of Thomas Jefferson - 'The God who gave us life gave us liberty at the same time.' Revolutions have been staged and wars have been fought in the name of freedom. This includes Zimbabwe's own long and bitter struggle. The protection of this right is enshrined in the Constitution of Zimbabwe, and the courts will certainly play their part in preserving this right against all infringements, and all attempts to erode or violate the principle involved. In a speech delivered in the House of Commons in 1783, William Pitt said, 'Necessity is the plea for every infringement of human freedom. It is the argument of tyrants.' The warning implicit

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GUBBAY CJ

in these words must be heeded. Instances of unwarranted or oppressive assumptions of power may always be challenged in the courts."

For this type of civil wrong there must thus be an exemplary element in the assessment of reparation. I respectfully agree with the comment of McNALLY JA in *Chikowore v Nyamusara* S-7-91 (not reported) that:

"The hope must be that the police will take steps to avoid repetitions of such cases if the price of non-compliance

is higher rather than lower."

The plaintiff is an elderly grandmother in her early sixties. She graphically illustrated the degree of concern, anxiety, humiliation and distress she felt at being incarcerated when she said in evidence: "I thought it was better to die rather than being detained". She was made to remove her underwear, head scarf and shoes. She had to be lifted by the other female occupants in the cell to the top bunk bed. She had no privacy in the use of the toilet which was inside the cell. When Michael visited her late that night she was in a very distraught state. He described her as being "emotionally broken down". Nor should it be overlooked that the period of the plaintiff's unlawful detention deprived her of the society of her loved ones and friends both on the eve and morning of Christmas. Any celebration that she may have planned would have been totally disrupted and she would hardly have been in the spirit to enjoy the festivities after her release.

Awards of damages made in such recent decisions as *Chitunga v Minister of Home Affairs* HH-261-89; *Chikowore v Nyamusara supra*; *Masawi v Chabata and Anor* 1991 (1) ZLR 148 (H); *Chigede & Anor v Kamudyariwa & Anor* S-79-92; *Feldman v Minister of Home Affairs supra*; and *Mweti v Minister of Home Affairs and Ors* HB-5-93, provide only general guidance. Each case is in a sense without parallel, having individual subjective aspects to it.

Taking account as best I can of the extent of the plaintiff's suffering, I am of the opinion that an award of \$3 000 would be fair in all the circumstances.

Accordingly I would allow the appeal with costs and alter the order of the court *a quo* to read:

"There will be judgment for the plaintiff against both the defendants, jointly and severally, the one paying the other to be absolved, in the sum of \$3 000 together with costs of suit."

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GUBBAY CJ

McNally A: I agree.

Korsah JA: I agree.

Kantor & Immerman, appellant's legal practitioners

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

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GCM (PVT) LTD v RM INSURANCE COMPANY (PVT) LTD 1993 (1) ZLR 103 (HC)

Court High Court, Harare

Smith J

Civil action

12 November 1992 & 24 February 1993

Flynote

Insurance - repudiation of liability - whether an insurance company seeking to repudiate on basis of an exception has to plead and establish a causal link between the alleged breaches and the accident

Headnote

When, in an insurance policy giving coverage for bodily injury resulting from accidents, liability is excluded if the insured commits a specified breach, the insurance company normally has to establish that the breach was the proximate cause of the accident which led to the injury. However, the insurance company can word the policy so as to dispense with the need to prove proximate causation.

In an aviation insurance policy, liability was excluded if the injury to the insured resulted from an accident sustained "directly or indirectly" from a breach of the Aviation Regulations.

The inclusion of the words "directly or indirectly" was held to have the effect of displacing or excluding the need to prove that the breaches were the proximate cause of the accident. They did not, however, exclude entirely the need to prove some form of causal link between the breaches and the accident.

Cases cited:

Coxe v Employers' Liability Assurance Corp Ltd [1916] 2 KB 629

Agiakatsikas NO v Rotterdam Ins Co Ltd 1959 (4) SA 726 (C)

Taylor NO v National Life Assoc of Australasia Ltd 1988 (4) SA 341(E)

Rabinowitz & Anor NO v Ned Equity Ins Co Ltd & Anor 1980 (1) SA 403 (W)

Kohler v CIR 1949 (4) SA 1022 (T)

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SMITH J

Gillespie for plaintiff

DP Carter for the defendant

Judgment

Smith J: The plaintiff issued a summons claiming \$50 000 as being due and owing to the plaintiff by the defendant under an insurance policy arising out of the death of a Mr Smith (hereinafter referred to as "the deceased"). The deceased was an insured person in terms of the insurance policy. On 4 May 1989 he was the pilot of an aircraft which crashed at Buffalo Range airport, causing the death of the pilot and 7 passengers. The defendant repudiated liability in

terms of an exception contained in the policy. The relevant portion of the exception (hereinafter referred to as "Exception C 3") reads as follows:

"3. The insurers shall not be liable to pay any compensation under this policy in respect of bodily injury -

- (a) ...
- (b) ...
- (c) resulting from an accident sustained directly or indirectly by an insured person by any breach on the part of the insured person of any Air Navigation Act, Order or Regulation or Airworthiness or other Regulation imposed by a competent authority or by the insured person's failure to comply with any instruction of the pilot or other member of the air crew of an aircraft of which the insured person is not the pilot. "

The defendant averred that at the material time the deceased was in breach of the Aviation (Air Navigation) Regulations 1988 in that:

- (i) he was flying the aircraft without a valid licence;
- (ii) he had not conducted more than five take-offs and landings in an aircraft of the same class within ninety days immediately preceding the accident;
- (iii) the aircraft was being flown without a valid radio licence.

Accordingly the defendant pleaded that it was not liable to pay compensation in terms of the policy.

The plaintiff denied that at the time of the accident the deceased was flying the aircraft without a valid licence. It, however, admitted the other breaches but denied that they entitled the defendant to the exclusion from liability.

The plaintiff excepted to the defendant's plea. The grounds for the exception were that Exception C 3 provides for exclusion of liability for an injury resulting from an accident sustained directly or indirectly by an insured person by any breach on the part of the insured

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SMITH J

person and that there was no averment of any causal link between the breaches alleged by the defendant and the accident which caused the death of the insured person.

It is agreed that there is only one issue to be resolved. Does Exception C 3 provide an exclusion only where there is a causal link between the loss and the breach of the policy by an insured person? If so, the defendant's plea discloses no defence because there is no averment of the nexus. If not, then the exception must be dismissed.

Mr *Gillespie* argued that the words "directly or indirectly" in Exception C 3 imported the notion of causation and the words "by any breach" could only be understood as requiring proof that the accident be sustained as a result of a breach. Any interpretation denying the need for a causal link must disregard the said words completely. Mr *Carter*, on the other hand, submitted that the

defendant was not required to show that there was a causal connection between the breach and the accident in order to avoid liability in terms of Exception C 3. His submission was based on the premise that where the words "directly or indirectly" are used in a personal accident policy the doctrine of causation is excluded.

In order for an insured person to be able to claim under a policy of insurance, the loss must have been caused by the peril insured against. The maxim *causa proxima non remota spectatur* applies, regard being had only to the proximate cause of the loss - see Gordon & Getz *The South African Law of Insurance* 3 ed p 172. The doctrine of proximate cause may, however, be displaced. In *Coxe v Employers' Liability Assurance Corporation Ltd* [1916] 2 KB 629, an accident policy excepted death "directly or indirectly caused by, arising from or traceable to war". SCRUTTON J said that the words "directly or indirectly" could not be reconciled with the maxim of proximate cause which would have been applicable had the words not been in the condition. At p 634 he said:

"But the words which I find it impossible to escape from are 'directly or indirectly'. There does not appear to be any authority in which those words have been considered, and I find it impossible to reconcile them with the maxim *causa proxima non remota spectatur*. If it were contended that the result of the words is that the proximate cause, whether direct or indirect, is to be looked at, I should reply that that result does not appear to me to be consistent or intelligible. I am unable to understand what is an indirect proximate cause, and in my judgment the only possible effect

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SMITH J

which can be given to those words is that the maxim *causa proxima non remota spectatur* is excluded and that a more remote link in the chain of causation is contemplated than the proximate and immediate cause.

But a line must be drawn somewhere. For instance, the birth of Captain Ewing, even though it may be said to have led in the chain of causation to his being in the position in which he was killed, could not be considered as causing his death; and if on the facts it was possible to hold, in accordance with the principles I have enunciated, that the clause was not applicable, I should have been able to find that his representatives had a claim. But I am unable to hold that any principle excludes, upon these facts, a possible finding by the arbitrator that war was the indirect cause of this accident. "

In *Agiakatsikas NO v Rotterdam Ins Co Ltd* 1959 (4) SA 726 (C) the court had to consider a condition of an insurance policy which excluded liability where death or disablement was "directly or indirectly" caused by intoxication. VAN WINSEN J at p 730 B held:

"The word 'indirectly' would seem to absolve the Company from having to prove that the intoxication of the deceased was the approximate cause of the injuries sustained by him. (See *Coxe v Employers' Liability Assurance Co Ltd* 114 LT 1180.) If it could be shown that the state of intoxication of the deceased materially contributed to the bringing about of the collision then I think defendant could be said to have discharged the *onus* resting upon it."

Another case in which the phrase "directly or indirectly" was considered is *Taylor NO v National Life Association of Australasia Ltd* 1988 (4) SA 341 (E) at p 347, where EKSTEEN J said:

"Seen in this light it seems to me that it would be sufficient for the defendant company to prove that the deceased was intoxicated in the sense that the alcoholic liquor he had consumed had impaired his mental or physical faculties to such an extent that they contributed directly or indirectly to his death. The use of the word 'indirectly' means that the defendant need not show that the consumption of intoxicating liquor was the proximate cause of

his death but merely that it probably contributed in some material respect of his death".

It is clear from the cases I have referred to that the inclusion of the phrase

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SMITH J

"directly or indirectly" in Exception C 3 has the effect of displacing or excluding the principle of proximate causation but not the doctrine of causation itself.

In *Rabinowitz & Anor NOv Ned - Equity Insurance Co Ltd & Anor* 1980 (1) SA 403 (W) at 428 NICHOLAS J said:

"The words '... by reason of' should be construed as connoting a causal relationship (cf *Kohler v Commissioner for Inland Revenue* 1949(4) SA 1022 (T) at 1026-1027). If those words stood alone, they would be construed as relating to the proximate cause (cf *Coxe v Employers Liability Assurance Corporation Ltd* [1916] 2 KB 629 at 634, where SCRUTTON J said that the words 'caused by' or 'arising from' have always been construed as relating to the proximate cause). The use of the words 'directly or indirectly', however, means that the maxim *causa proxima non remota spectatur* must be excluded, and a more remote chain of causation is contemplated than the proximate and immediate cause."

I am satisfied that in this case Exception C 3 has not excluded the principle of causation. Accordingly it would be necessary for the defendant, in order to avoid liability, to plead and establish some causal link between the breaches it has alleged and the accident which caused the death of the deceased.

The exception is upheld with costs. Judgment is granted in favour of the plaintiff in the sum of \$50 000, plus interest at the rate of 12,5% per annum from the date of judgment to the date of payment, and costs.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Atherstone & Cook, defendant's legal practitioners

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MOYO v MATSIKA 1993 (1) ZLR 108 (SC)

Court Supreme Court, Harare

McNally JA, Ebrahim JA & Gibson AJA

Civil appeal

16 & 25 February 1993

Flynote

Customary law - custody of children - maintenance - status of in customary law - rearing fee - whether a form of arrear maintenance

Headnote

Maintenance is a concept which is alien to and indeed in conflict with the basic tenets of customary law. In customary law a child is an asset, while in statutory law it is a liability. A rearing fee (*chiredzwa* or *isondhlo*) is a fee paid by the father of a child to the family of the child for the period during which the mother's family paid for the child. Although there is an element of arrear maintenance in this payment, it is symbolic rather than actual arrear maintenance. It is not intended to recompense the family for their expenses, so the amount that a court orders a man to pay as a rearing fee should be realistic when viewed against his means.

Cases cited:

Mvenge v Tafura 1974 AAC 9

Stamper v Ngolobe 1978 - 80 AC 147 (S)

Kapisi v Magwayi 1937 SRN 90

Musakwa v Musakwa S-11-84

Msonko v Mutuswu 1963 AAC 7

Vela v Jack 1953 SRN 361

MP Mahlangu for the appellant

J James for the respondent

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Judgment

McNally JA: The appellant had a relationship with the respondent's daughter, in the form of an unregistered customary union. The respondent said, without contradiction, that he had been paid \$60 in 1975 by the appellant by way of what he described as *bvura muromo*. He spoke of the appellant as his son-in-law.

Two children were born to the appellant and the respondent's daughter, Anna. They were Smolly (on 26 June 1976) and Shorai (on 17 February 1978). Then, in 1979 or 1980, the relationship broke down. Anna returned, with the children, to her father's home. She earned money by making and selling jerseys. Between them, she and her father supported the children. Some small contributions, by way of clothing, came initially from the appellant but after a time relationships deteriorated and he ceased to make any contributions.

The argument before us has proceeded on the basis that these children were illegitimate, but I must say I have reservations about this. The payment of *bvura muromo* (literally "to open the mouth", ie the initial payment to open negotiations for a marriage), plus the acceptance of the young man as son-in-law was, I would suspect, sufficient in customary law to make the children legitimate. I am strengthened in this belief by the following passage from Harold Child's book *The History and Extent of Recognition of Tribal Law in Rhodesia* at p 63 where, under the

heading "Legitimate Children", he wrote:

"There is a presumption of legitimacy where the main elements of an African customary union are present. The payment of '*Kangaziwe*' [which I take to be the same as *bvura muromo*] although not essential to a marriage, is nevertheless some evidence of such union. The handing over of this '*Kangaziwe*' (meaning 'let me be known') and its acknowledgement is corroborative of the acceptance of the man as son-in-law.

Where a child is born in such circumstances, to hold that no traditional union subsisted at the time of the birth would have the effect of bastardising the child.

Kulumo v Diyana and Ors 1944 SRN 35."

Be that as it may, the parties came before the courts in 1984 when the daughter Anna approached a village court and sought maintenance for the children.

We have seen no record of the proceedings in that court, although the Village

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McNALLY JA

Court Rules, SI 755 of 1982, make provision for the keeping of a record. Section 10(1) provides:

"The presiding officer shall ensure that a record is kept of the proceedings and judgment in every case by completing Form V C.1 or causing it to be completed."

(These Rules have since been replaced by the Local Court Rules 1991, SI 115 of 1991).

All that we know about the proceedings is that the respondent was invited to attend at some stage and that the court awarded custody of the two girls to their father, the appellant, and ordered him to pay a "rearing fee" of \$500 to the respondent. The children were subsequently taken away by their father in 1986 but for some reason which is not clear the rearing fee was not paid. All this comes from the respondent's own evidence.

The next development was that the respondent wanted his rearing fee. He went to see his lawyer. He issued summons in the Community Court on 19 September 1986.

Although the claim was stated to be a claim for *isondhlo* or "rearing fee", the particulars of claim make it clear that the sum claimed was calculated as an arrear maintenance claim. The allegation was that the respondent had been supporting the children from their birth up to the time the appellant took them away in or about June 1986. The claim was for \$10 000.

At the hearing in the community court, the Presiding Officer stated that the village court decision was a nullity. He made that ruling on the ground that the village court had no jurisdiction to entertain Anna's claim for maintenance. It does not seem to me that that was a proper basis for such a ruling, because the village court did not make any order for maintenance. It made an order in respect of custody, which has been obeyed, and it made an order as to the payment of a rearing fee, which was certainly within its competence.

Having thus, and I think wrongly, disposed of the village court ruling, the community court went on to make an order, with costs, that the appellant should pay a rearing fee or *isondhlo* or

chiredzwa in the sum of \$10 220 to the respondent.

This order was taken on appeal to the district court which, without any

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McNALLY JA

discernible process of reasoning or mathematical calculation, reduced the award to \$7000 and made no order as to costs.

The appellant now appeals. On his behalf Mr *Mahlangu* argued that:

1. *Isondhlo* is not arrear maintenance;
2. The order of the village court in regard to *isondhlo* was not appealed against and remains binding;
3. The *quantum* was not properly proved;
4. A claim for arrear maintenance at a time when there is no existing maintenance order is incompetent.

1. *Isondhlo*

The payment of a rearing fee - *isondhlo* in Ndebele, *chiredzwa* in Shona - was and is a commonly accepted practice when a father, living apart from the mother who has gone back to her family, wishes to take custody of the children when they have reached an appropriate age to leave their mother. The authorities suggest that there are three elements to this payment, and that the terms *isondhlo* and *chiredzwa*, used in this present case as synonymous terms, in fact represent different elements in the payment.

Thus Harold Child *The History and Extent of Recognition of Tribal Law in Rhodesia* 1 ed p 68 says, under the heading "Illegitimate Children":

"The rule is that a seducer has no right to his child born as a result of illicit intercourse with an unmarried girl, unless the father of the girl at his option accepts (a) damages for the seduction plus (b) a payment of compensation acknowledging paternity (Ndebele 'lobola umtwana', Shona, 'maputiro', 'chiredzwa'). On payment of (b) the child is accepted as that of the seducer. In addition 'maintenance' (Ndebele 'isondhlo', Shona 'ngombe yokurera') must be given for the period during which the girl's people paid for the child."

See also Goldin & Gelfand *African Law and Custom in Rhodesia* p 184.

Since these children were probably not regarded, in customary law, as illegitimate, I can understand why the questions of seduction damages and acknowledgement of paternity did not arise. But it seems to me that the village

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McNALLY JA

court relied on the final sentence in the quoted extract in its award of \$500 to the respondent

father-in-law. It was an award of *isondhlo*.

I must say, with great respect, that I think there is a danger in trying to graft on to customary law a civil law concept such as maintenance. I say this for two reasons.

The first, and more obvious, is that in our modern law of maintenance anyone who has custody of children, whether under customary or common or statute law, can claim maintenance from the father. It is therefore unnecessary to try to graft the concept on to the customary law tree. It can stand by itself.

The second, and more profound, reason is that maintenance is a concept which is alien to and indeed in conflict with the basic tenets of customary law. In customary law a child is an asset. In statutory law a child is a liability. That is why one sometimes hears the bewildered comment from an unsuccessful litigant father: "Do you mean she gets the child and the money as well?"

That is also the explanation for the otherwise apparently heartless provision in customary law that it is for the mother's guardian to maintain illegitimate children. See, for example, TW Bennett *Application of Customary Law in Southern Africa* where he says at p 178:

"Customary law imposes no duty on the natural father to maintain any illegitimate children he procreates; here the duty rests on the mother's guardian."

And see *Mvenge v Tafura* 1974 AAC 9; *Stamper v Ngolobe* 1978-80 AC 147 (S) referred to in the supplement to the Digest of South African Black Civil Case Law 1969-1979 at No. 373.

I accept, of course, that there is an *element* of maintenance in any claim for *isondhlo* or *chiredzwa*. But since the children were normally left with the mother until they were seven years old, one would have expected some indication that there was a mathematical calculation of the cost of keeping the child for seven years, when *isondhlo* was claimed. I do not believe there was, until it began to creep in in the later pre - Independence years. In other words, *isondhlo* is symbolic maintenance rather than actual arrear maintenance. See *Kapisi v Magwayi* 1937 SRN 90. After all, if the father never claims his child he never has to pay *isondhlo*. Why should that be so if *isondhlo* is maintenance?

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McNALLY JA

Common sense also would suggest that the maintenance aspect is largely nominal. Our civil law considers that both parents are equally responsible, according to their ability, to look after their child. If she looks after the child for seven years, and he looks after it thereafter and during the expensive school years, is that not a roughly reasonable division of responsibility?

Common sense, too, would suggest that to order a man, who has just taken on responsibility for two extra children on a salary of \$753 net per month, to pay a lump sum of \$10 220, or even \$7 000, is utterly unrealistic. And when a line of legal reasoning leads to an absurd conclusion, one should look again at the reasoning.

To equate *isondhlo* exactly with arrear maintenance is, I believe, erroneous. If this had been a claim for arrear maintenance in so many words, a number of difficulties would have arisen. Was

not some of the claim prescribed? Who was the claimant - the mother of the children or her father, the respondent? On what basis can arrear maintenance be claimed when no claim for current maintenance was put forward? See *Musakwa v Musakwa* S-11-84 at p 3, para 3. Was the appellant able to contribute such a large sum? See s 6(2)(b) of the Maintenance Act [Chapter 35].

Mr *James*, for the respondent, relied on the case of *Msonko v Mutuswu* 1963 AAC 7 (Court of Appeal for African Civil Cases). It is correct that KNIGHT J said in that matter:

"There is ample authority that owing to changing conditions the archaic token payment of a beast as rearing fee may well be disproportionate to the actual expenses of the party who has fed and clothed the children for a number of years"

But I do not think that the reasoning in that judgment is, with respect, to be followed to its apparently logical conclusion, that *chiredzwa* or *isondhlo* is to be equated with arrear maintenance. That is not to say that the sum awarded as *chiredzwa* or *isondhlo* should not in a proper case be increased beyond the traditional value of a beast, or that allowance for inflation should not be made.

I note further that *Storry Customary Law in Practice* p 70 refers to *Mvenge v Tafura* 1974 AAC 9 for the proposition that -

"The mother's father or guardian may relinquish custody on payment by

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the child's father of 'muripo' or 'chiredzwa', but until this payment has been made it is the mother's father or guardian who is responsible for the maintenance of the child, not the child's father."

Unfortunately I have been unable to find this report, but the decision is in line with the extract from Bennett quoted earlier in this judgment.

2. The order of the Village Court

Whatever the correct position may be, the fact remains that Mr *Mahlangu's* second submission on appeal seems to me to be unanswerable. The village court made an order on two points in regard to which it had jurisdiction. The community court had no right to declare its order a nullity. Therefore the community court had no right to make an order on a matter where the village court's order still stood.

It is particularly to be noted that the respondent has at no stage disputed the village court's order as to the custody of the children. He (and his daughter) have never appealed against that order, or demanded that the children be returned. They have accepted that arrangement.

All that bothered the respondent was that he had not been paid the \$500 awarded to him. He was perfectly entitled to be concerned about that. He may have believed it was too little, but he did not appeal. He may have believed that it should be increased since the children were left with him for something like two years after the order was made (see *Vela v Jack* 1953 SRN 361

and *Msonko v Mutuswu supra* at p 8). But again he did not make application on that basis.

In my view, therefore, it is not necessary, and in the absence of fuller argument perhaps undesirable, to lay down any hard and fast rule about the extent to which customary law permits a claim for arrear maintenance under the title of *isondhlo*. I am content to express my doubts and leave the matter for later discussion and consideration.

I am satisfied there was no proper basis for the community court to reopen the issue of *isondhlo* when an award had already been made under that head in the village court. The order of the community court and its variation by the district court must therefore be set aside.

However, although this means that the appeal succeeds, it remains an

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McNALLY JA

important and relevant fact that the appellant has still not paid, or tendered, the \$500 awarded to the respondent in the village court. In the circumstances, I propose to make no order as to the costs of this appeal or the costs in the community court.

Accordingly the following order is made:

"1. The order of the community court in case no. CC 925/86, as varied by the district court in case no. DAC 4/89, is set aside and in its place the following order is made -

'The plaintiff's claim is dismissed with no order as to costs.'

2. There will be no order as to the costs of appeal."

Ebrahim JA: I agree.

Gibson AJA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

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

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MASAMA v BOREHOLE DRILLING (PVT) LTD 1993 (1) ZLR 116 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

25 February 1993

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Flynote

Civil procedure - default judgment - serious negligence of legal practitioner - court refusing to grant rescission

Costs - *de bonis propriis* - against legal practitioner who was negligent to a serious degree

Headnote

The respondent sued the appellant and the appellant made a counter claim. On two occasions default judgment had been obtained by the respondent in respect of his claim, but on these two occasions rescission of judgment had been obtained. Default judgment was then obtained for a third time and the appellant applied to a magistrate for rescission of the judgment. All of these default judgments had been obtained because of the gross negligence of the appellant's legal practitioner. The magistrate refused to grant the third application for rescission despite the fact that no blame attached to the appellant for the defaults and that the appellant appeared to have a good defence to the claim and thus a reasonable prospect of success on the counter-claim. The appellant appealed against the decision of the magistrate refusing to grant rescission.

The appeal was dismissed. It was held that the application for rescission had properly been refused because the repeated and inexcusable disrespect by the legal practitioner for the process of the court could not be condoned, otherwise it would encourage further blatant negligence by legal practitioners.

The appellant's legal practitioner was ordered to pay the costs of the appeal *de bonis propriis* in order to "crack the whip" against him. He was also

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GUBBAY CJ

directed not to recover any costs or disbursements in respect of the earlier magistrates court proceedings in the matter. Finally the judgment in the matter was referred to the Law Society.

Cases cited:

Saljee & Anor NOv Min of Community Development 1965 (2) SA 135 (A)

Immelman v Loubser en 'n Ander 1974 (3) SA 816 (A)

Bosman Tpt Works Cttee v Piet Bosman Tpt (Pvt) Ltd 1980 (4) SA 794 (A)

Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein & Ors 1985 (4) SA 773 (A)

S v McNab 1986 (2) ZLR 280 (S)

Moraliswani v Mamili 1989 (4) SA 1 (A)

Ndebele v Ncube S-58-92

Machumela v Santam Ins Co Ltd 1977 (1) SA 660 (A)

Waar v Louw 1977 (3) SA 297 (O)

Webb & Ors v Botha 1980 (3) SA 666 (N)

Coley Hall (Pvt) Ltd v Sinclair Builders 1972 (2) RLR 101 (G)

Ruzvidzo v Kanhanga S-70-91

AP de Bourbon SC for the appellant

JR Devittie for the respondent

Judgment

Gubbay CJ: In dismissing the appellant's application for rescission of judgment the magistrate, in the court below, implemented the oft-repeated warning that notwithstanding an understandable reluctance to penalise a litigant on account of the lack of diligence of his legal practitioner, there is a limit beyond which the results of such conduct cannot be escaped. For, as remarked by STEYN CJ in *Saloojee & Anor NO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C-D:

"(to) hold otherwise might have a disastrous effect upon the observance of the Rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity."

See also *Immelman v Loubser en 'n Ander* 1974 (3) SA 816 (A) at 823G-824B; *PE Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799E-H; *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein & Ors* 1985 (4) SA 773 (A) at 787 F-H; *S v McNab* 1986 (2) ZLR 280 (S) at 284 A-E; *Moraliswani v Mamili* 1989 (4) SA 1 (A) at 10B.

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GUBBAY CJ

In *Ndebele v Ncube* S-58-92 (not reported) McNALLY JA aptly expressed the ever increasing concern of our courts at the decline in the standard of legal proficiency. He said at pp3-4:

"But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in number. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry ...

The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt* - roughly translated, the law will help the vigilant but not the sluggard."

It is difficult to imagine a case in which a litigant was so ill served by a legal practitioner than the appellant was by Mr Wilbert Mutezo, a partner of the firm Mugabe Mutezo and Partners. The facts recited below reveal the stark reality of this.

On 23 January 1991 the respondent, through its legal practitioners issued summons, under Case No. 1104/91, against the appellant claiming payment of the sum of \$2 230,50, alleged to be due for repairs carried out to a borehole on the appellant's property. Apparently, prior to

service upon him of the respondent's summons, the appellant, on 6 February 1991, issued summons under Case No. 2330/91 against the respondent, seeking damages in an amount of \$2 625,49, suffered in consequence of the respondent's poor workmanship in repairing the borehole. In respect of each summons an appearance to defend was entered.

On 22 February 1991 the appellant's legal practitioners were served with a request for further particulars to his summons, attached to which was a notice to plead to the respondent's summons. Mr Mutezo, who was dealing with both actions on behalf of the appellant, quite obviously did not bother to scrutinize these documents. The notice to plead completely escaped his attention. Of course, if he had attended to answering the request for particulars timeously, as he ought to have done, he would have had sight of the notice to plead.

Thereafter, on 4 March 1991, the respondent's legal practitioners served an application for default judgment. Even this evoked no reaction from Mr

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Mutezo. So, on the next day, judgment by default on the respondent's claim was duly entered. It was only when the appellant came and exhibited the writ of execution to him that Mr Mutezo discovered the notice to plead in his file of documents.

An application for rescission of judgment was lodged on 27 March 1991 and though justifiably opposed by the respondent, was allowed by the court.

The two actions were then consolidated and a pre-trial conference was arranged by consent for 26 November 1991, at 12.15 pm. As neither the appellant nor Mr Mutezo appeared before the magistrate at the appointed hour, without any indication of inability to do so, the respondent was granted judgment by default on its claim and the appellant's counter-claim was dismissed.

For the second time rescission of judgment was sought. The explanation proffered by Mr Mutezo for overlooking the date of the pre-trial conference and for omitting to advise the appellant thereof, was his state of distress at the death of a cousin. Somewhat generously the respondent did not oppose this application and, on 4 February 1992, it was allowed by consent.

On 12 March 1992 Mr Mutezo wrote to the clerk of the court requesting that a fresh pre-trial conference date be arranged and on 27 March 1992 a notice was issued from that office advising that it was to be held at 2.30 pm on 21 April 1992.

As Mr Mutezo had failed to attend the first pre-trial conference, the respondent's legal practitioner took the precaution of informing him in writing, on 9 April 1992, of the date and time, and of annexing to that letter a copy of the official notice. Notwithstanding such solicitous treatment, on 21 April 1992, Mr Mutezo and the appellant, were for the third occasion, in default. Yet again the respondent was granted judgment on his claim and the appellant's counter-claim was dismissed.

On 28 April 1992 the respondent's legal practitioner wrote to Mr Mutezo. He advised of the fate of the litigation and requested payment of the respondent's claim, together with party and party

costs amounting to \$740.

This provoked a third application for rescission, set down for 2 June 1992. Whilst acknowledging that the letter of 9 April 1992 had been received on that day, Mr Mutezo deposed in a supporting affidavit that he only came across it on 27 April 1992. This was because, on 15 April 1992, another

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cousin had been killed in a road accident. And the death necessitated his absence from Harare until 23 April 1992. On that day he was fully occupied with administrative matters and the next day was engaged in a trial at Chinhoyi. No proper explanation was advanced as to why he had failed to peruse the letter over the period 9 to 15 April 1992. His contention that it ought to have been marked "urgent" is absurd. There was no obligation to write at all and, in any event, the letter had been despatched almost two weeks before the date of the pre-trial conference. Even if Mr Mutezo's claim that notification from the clerk of court was not sent to him, (an assertion open to suspicion), such non-receipt was an entirely irrelevant factor, since the respondent's legal practitioner had taken the trouble of advising him of the pre-trial conference.

Faced with this continuing catalogue of irresponsibility and negligence, the magistrate, who presided at the pre-trial conference on 21 April 1992, had no hesitation in making the order he did.

It is correct, as was stressed by the appellant's counsel, that in terms of Order 19 Rule 1 (12) of the Magistrates Court (Civil) Rules 1980, it was not obligatory for the magistrate to grant judgment on the claim and dismiss the counter-claim. However, he did so in spite of being satisfied that no blame whatever for the defaults attached to the appellant himself, who appeared to have a good defence to the claim and, thus a reasonable prospect of success on the counter-claim.

I entertain not the slightest doubt that the magistrate's decision reflects a proper exercise of a judicial discretion and one quite beyond the reach of interference. To have acted otherwise would have been to condone a repeated and inexcusable disrespect for the process of the court, and to encourage similar dilatoriness in other legal practitioners.

With regard to costs I take the view that although the appeal was brought in the name of his client it is Mr Mutezo who, in reality, is seeking relief from this court - in all probability to avoid the ire of the appellant and a prospective claim for damages for professional negligence. As he is shown to have been negligent in a serious degree in the handling of the appellant's litigation there seems to me to be every justification to "crack the whip" and order him to pay the costs of the appeal *de bonis propriis*. See *Immelman v Loubser & Anor*, *supra*, at 825B-D; *Machumela v Santam Insurance Co Ltd* 1977 (1) SA 660 (A) at 664B; *Waar v Louw* 1977 (3) SA 297 (O) at 304C-E; *Webb & Ors v Botha* 1980 (3) SA 666 (N) at 673B-F.

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There are, in addition, many precedents where a court has directed that a legal practitioner should not be permitted to recover costs from his client. See, *Machumela v Santam Insurance Co Ltd supra* at 664B-D; *Coley Hall (Pvt) Ltd v Sinclair Builders* 1972 (2) RLR 101 (G) at 104E; *Ruzvidzo v Kanhanga* S-70-91 (unreported); and the further instances cited in Jacobs and Ehlers *Law of Attorneys Costs and Taxation Thereof* at pp 48-49.

Unquestionably the circumstances of this case warrant that Mr Mutezo be subjected to such a direction.

It was for these reasons that at the conclusion of Mr *de Bourbon's* restrained and pragmatic submissions, this court issued the following order:

1. The appeal is dismissed.
2. The costs of the appeal are to be borne by Mr Mutezo of Messrs Mugabe Mutezo and Partners *de bonis propriis*.
3. It is directed that Messrs Mugabe Mutezo and Partners shall not recover from Mr Amos Masama any costs or disbursements in respect of the proceedings in the Magistrates Court under Case Nos 1104/91 and 2330/91 (consolidated); any costs or disbursements already paid are to be immediately refunded.
4. The Registrar is directed to serve a copy of this judgment upon the Secretary of the Law Society.

McNally JA: I agree

Korsah JA: I agree

Mugabe, Mutezo & Partners, appellant's legal practitioners

Atherstone & Cook, respondent's legal practitioners

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EX PARTE CHIEF IMMIGRATION OFFICER 1993 (1) ZLR 122 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Application to set aside judgment

8 & 22 March 1993

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - right to a fair hearing - whether right breached when court not properly constituted

Court - Supreme Court - judgment - validity of - whether court properly constituted - judge resigning after argument but before judgment delivered

Legal practitioner - conduct - criticism of conduct of proceedings - nature of criticism permissible

Practice and procedure - party - withdrawal of - effect on proceedings - declaratory order - whether court may nevertheless make such order at instance of other party

Headnote

In February 1993 the Supreme Court handed down its judgment in the matter of *Principal Immigration Officer v O'Hara & Anor**(4) The judgment purported to be that of MANYARARA, KORSAH and EBRAHIM JJA. The appeal had been argued in October 1992. On 1 January 1993, before the judgment was handed down, MANYARARA JA resigned. He had not reached the age of 65, at which, in terms of s 86(1) of the Constitution, retirement is mandatory unless the judge concerned has earlier elected to retire at the age of 70.

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The respondent in the earlier case lodged an application with the Supreme Court, claiming that he had been deprived of his right, under s 18(9) of the Constitution, to be afforded a fair hearing because the court, when delivering its judgment, was not properly constituted in terms of the Supreme Court of Zimbabwe Act 28 of 1981. His founding affidavit had been drafted by his legal practitioner and attacked the merits of the judgment in intemperate and disrespectful language. The application claimed that the judgment was a nullity, necessitating the rehearing of the case.

The Chief Immigration filed a counter-application, seeking an order that the judgment be declared to be valid. On the same day, a notice of withdrawal was filed on behalf of the respondent in the original case; no reason was given for the withdrawal. The Chief Immigration Officer nevertheless persisted in his application and the question had to be decided whether, in the light of the withdrawal, a declaratory order could be made.

Held, that if, when litigation commenced, there was a live dispute, the court will proceed to decide it even though at the time of hearing no actual dispute remained. The Chief Immigration Officer therefore had *locus standi* to seek a declaratory order. In addition, however, suitable circumstances must exist for the exercise of the court's discretion. Such circumstances did exist in the present case, because the question raised by the Chief Immigration officer was of real and practical consequence and other parties would be affected.

Held, further, that although decisions of the courts are properly subject to scrutiny and criticism, legal practitioners have a special responsibility to avoid openly criticising proceedings in which they have been involved, because there is a risk that their criticism may be partisan rather than objective.

Held, further, that as, in fact, MANYARARA JA had, before his resignation, discussed the case with the other judges and they had jointly reached the conclusion that was later handed down,

any irregularity that occurred was somewhat technical and did not amount to a breach of s 86(4) of the Constitution, which allows a retiring, but not a resigning, judge to continue to sit to complete matters commenced by him.

Held, further, that there had been no breach of the right of a fair hearing. The court had been properly constituted at the date of the hearing and was procedurally fair. No actual or potential prejudice was caused by MANYARARA JA's subsequent resignation.

Held, further, that where, as here, a judge became unable to sit after the appeal had been fully argued, the presiding judge did not have the discretion under s 4(3) of the Supreme Court of Zimbabwe Act to direct that a

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GUBBAY CJ

further judge be obtained to sit. However, following the practice of the Court of Appeal in England, the disability of a member of the court did not necessitate a fresh hearing of the appeal unless deadlock occurred. Where the remaining members of the court constitute the majority of the court, their decision is the decision of the court.

Cases cited:

Merricks & Anor v Nott - Bower & Anor [1964] 1 All ER 717 (CA)

Grant v Knaresborough Urban District Council [1928] ChD 310

Ex p Nell 1963 91) SA 754 (A)

Nkadia v Mahlazi & Ors 1982 (2) SA 441 (T)

Clarke v Hurst NO & Ors 1992 (4) SA 630 (D)

Ex p Ginsberg 1936 TPD 153

Ex p Prokureur-Generaal, Tvl 1978 (4) SA 15 (T)

Polurrian Steamship Co Ltd v Young [1915] 1 KB 922 (CA); [1914-15] All ER Rep 116

Kennedy v Spratt [1971] 1 All ER 805 (HL)

Green v Lord Penzance & Ors (1881) 6 AC 657 (HL)

Automated Business Systems (Pty) Ltd v CIR 1986 (2) SA 645 (T)

Lord Advocate v Wemyss & Anor [1900] AC 48 (HL)

IRC v Wilsons (Dunblane) Ltd [1954] 1 All ER 301 (HL)

Ross Smith v Ross Smith [1963] AC 280; [1962] 1 All ER 344 (HL)

Somersetshire Drainage Commrs v Corp of Bridgewater (1899) 81 LTR 729 (HL)

Adcock-Ingram Laboratories Ltd v SA Druggists Ltd & Anor 1983 (2) SA 350 (T)

A V M Chikumira, for the applicant

Judgment

Gubbay CJ: On 18 February 1993 this court handed down its judgment in the matter of *Principal Immigration Officer & Anor v O'Hara & Anor* S-272-92*(5). It purported to be the joint judgment of MANYARARA, KORSAH and EBRAHIM JJA. It allowed an appeal against a decision of the High Court and held, in effect, that the respondents, who are husband and wife, and "aliens" as defined in the Immigration Act 1979, did not enjoy the right to reside and work in Zimbabwe without the grant of residence permits or work permits. I shall hereafter refer to them as "the O'Haras".

Four days later the O'Haras lodged an application with this court, upon a

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GUBBAY CJ

certificate of urgency, in which they claimed, in the main, an order declaring that the aforementioned judgment:

"... amounts to an infringement of the Declaration of Rights in the Constitution of Zimbabwe, in that the applicants were thereby deprived of the right conferred upon them by s 18(9) of the Constitution 'to be afforded a fair hearing by an independent and impartial court ... in the determination of their civil rights and obligations' and is null and void because the court, when it delivered its judgment, was not properly constituted in terms of proviso (i) to s 3 of the Supreme Court of Zimbabwe Act, 1981."

The founding affidavit deposed to by Mr O'Hara had obviously been drafted by his legal practitioner and voiced the latter's views. It attacked, at length, the merits of the judgment, which was not only irrelevant to the nature of the relief sought, but was intemperate and disrespectful in its language.

Although decisions of courts are properly subject to scrutiny and criticism by members of the public, including legal practitioners, judicial officers are prohibited by custom from defending themselves. Their inability to do so imposes special responsibilities upon the legal practitioner. He should avoid openly criticising proceedings in which he himself has been involved, for otherwise there is a risk that his criticism may be, and may appear to be, partisan rather than objective. One cannot escape the impression on reading this affidavit that the legal practitioner seized upon the opportunity to reveal to this court his extreme dissatisfaction and displeasure at the judgment.

The basis of the application, stated to be brought pursuant to s 24(1) of the Constitution of Zimbabwe, was that although this court was duly constituted, in terms of the Supreme Court of Zimbabwe Act, on 19 October 1992, when the appeal was argued, it had ceased to be, by the date judgment was handed down. This was because, in the intervening period, MR JUSTICE MANYARARA had prematurely "retired" at the age of sixty-two years. He was thus not qualified to sit or give judgment in terms of s 86(4) of the Constitution, in that he had neither reached an age at which it was mandatory for him to retire nor remained in office at all. The judgment was,

therefore, a nullity, necessitating that the appeal against the decision of the High Court be set down afresh for oral argument before this court.

The opposing affidavit of the Deputy Chief Immigration Officer was filed on 1 March 1993.

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GUBBAY CJ

On 3 March 1993 a counter-application was lodged with this court, supported by the affidavit of the Chief Immigration Officer ("the applicant"). It seeks an order declaring judgment S-272-92 to be valid, notwithstanding that one of the judges who heard the appeal had retired or resigned after judgment had been reserved by this court and before it had been delivered. The grounds relied upon are set out in the following paragraphs of the affidavit:

"I have found it necessary to seek a reverse declaratory order because there are challenges being made to the validity of the judgment no. 272/92. Besides the challenge in this particular case, there is the case of *Ford v The Chief Immigration Officer & Anor* BHC Case No. 3415/92.

It is essential in the running of the affairs of my Department that I know for certain that the absence of one of the judges who heard argument in the matter above, does not affect the validity of the judgment that the remaining judges subsequently delivered after the judge had retired just before delivery of judgment. ... I face challenges of the validity of this court's judgment as in the Bulawayo case no. 3415/92, which is due to be heard on Friday the 5th of March 1993. I believe that such challenges have been advanced by some of the most senior members of the Zimbabwe Bar and for that reason I should take them seriously. I stand to face considerable expense in defending future challenges and in any event I believe that I am entitled to know what the law affecting my Department is.

Because of the challenges to the validity of judgment S-272-92 I am left in doubt as to what to do. I have tried to implement the law as interpreted by that judgment and then I was served with a Bulawayo High Court order preventing me from acting according to this Honourable Court's judgment on the ground that the judgment's validity was being challenged."

Also on 3 March 1993 a notice of withdrawal was filed on behalf of the O'Haras. It failed to tender the wasted costs. Although no explanation was proffered, this court was informed by Mr *Chikumira*, who appeared for the applicant, that the reason for the withdrawal was not due to an acceptance that the contention previously advanced was wrong in law.

This then was the state of the matter on the day argument for the applicant was heard.

If the O'Haras had not withdrawn their application, then it seems to me that

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GUBBAY CJ

this court, if it were satisfied that the submissions they raised were to be rejected, would have been at liberty to consider whether it was preferable to make what is known as a reverse declaratory order in the terms sought, rather than simply dismissing the initial application. See *Young Declaratory Orders* para 909 at p 83 and the cases there cited. But does the withdrawal have the effect of putting an end to these proceedings? Does it disable the applicant from obtaining relief in the form of a declaratory order because there is no longer a live dispute

between him and the O'Haras? Is it permissible to grant a party a declaratory order whose opponent has left the arena of conflict?

There is respectable authority in English law for the proposition that if, when litigation commenced, there was a live dispute, the court will proceed to decide it even though at the time of hearing no actual dispute remained between the parties. Three decisions illustrative of this only need to be referred to.

In *Marion White Ltd v Francis* [1972] 3 All ER 857 (CA) a restrictive covenant between employer and employee had expired as between the plaintiff and the defendant, but the question of validity of the covenant was still of importance between the employer and other employees. The court heard the matter and granted the employer an order declaring that the covenant was valid both in regard to area and period.

Then, in *Merricks & Anor v Nott - Bower & Anor* [1964] 1 All ER 717 (CA) the plaintiffs were police officers who in 1957 had been transferred because of a report by an Inspector Fleming. Two years later Fleming was discredited and in 1963 the plaintiffs sought declarations that the transfer was contrary to natural justice as they were not heard, nor were the Police (Discipline) Regulations 1952 followed. The defendants, the present Commissioner of Police and his predecessor, moved to strike out the statement of claim. This was refused by LORD DENNING MR, who said at 721A-D:

"All that is claimed is a series of declarations, all of them to the effect that the transfer was made without regard to the regulations and without regard to the principles of natural justice. It is asked: What use can such declarations be at this stage, when the transfer took place six-and-a-half years ago? What good does it do now? There can be no question of re-opening the transfers. The plaintiffs have been serving in these other divisions all this time. They cannot be transferred back to Peckham. On this point we have been referred to a number of cases which show how

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greatly the power to grant a declaration has been widened in recent years. If a real question is involved, which is not merely theoretical, and on which the court's decision gives practical guidance, then the court in its discretion can grant a declaration. A good instance is the recent case on the football transfer system, decided by WILBERFORCE J, *Eastham v Newcastle United Football Club Ltd* [1963] 3 All ER 139. Counsel for the plaintiffs aid that, in this particular case, the declaration might be of some use in removing a slur which was cast against the plaintiffs by the transfer. He also put it on the wider ground of the public interest that the power to transfer can only be used in the interests of administrative efficiency and not as a form of punishment. He said that it would be valuable for the court so to declare. Again on this point, but without determining the matter, it seems to me that there is an arguable case that a declaration might serve some useful purpose."

The facts in *Grant v Knaresborough Urban District Council* [1928] ChD 310 were these. On 25 March 1927 the defendant council, for the purpose of making a new valuation list under the Rating and Valuation Act, served a notice on the plaintiff requiring him to make a return of certain particulars relating to his licensed premises. On 27 April 1927 the plaintiff commenced an action for a declaration that the return requested was *ultra vires*. The defendant thereupon withdrew the notice, yet later put up a defence denying its invalidity. Shortly after the action was set down for trial, the defendant withdrew its defence, stating that it did not propose to contest the action any further. The plaintiff nonetheless persisted in seeking a declaration that the form

of return was invalid and did not move for judgment in default of defence. The invalidity of the notice having been proved, ASTBURY J held that the plaintiff was entitled to the declaration as at the date of the writ.

With this present litigation there was, of course, a live dispute until 3 March 1993. But the issue of whether this court was duly constituted on 18 February 1993 goes beyond the mere parties to the judgment. Its procedural validity is a matter of public importance. Already it is the intention in *Ford v Chief Immigration Officer* case no. BHC 3415/92 to argue that the judgment is not binding on the High Court. I appreciate the applicant's concern that it is essential to obtain clarity on the issue as soon as possible. He is, as he contends, entitled to know whether this court has committed a procedural irregularity which renders inoperative the judgment given in his favour. In relation to persons in the same position as the O'Haras, he wants to be certain of the precise extent of the powers and obligations of his officers.

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On this approach, I consider that the court was justified in permitting counsel for the applicant to argue for a declaration. The question it raises is not purely academic but of real and practical consequence. There are interested parties upon whom the declaratory order would be binding.

Moreover, the competency for this court to grant a declaratory order in the situation that pertains, may be determined in a different manner.

Section 14 of the High Court of Zimbabwe Act 1981, provides that:

"The High Court may, in its discretion, at the instance of any interested party, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such declaration."

No similar provision is to be found in the Supreme Court of Zimbabwe Act, doubtless for the reason that the Supreme Court does not generally exercise original jurisdiction. Nonetheless, on an exceptional occasion, such as this, where an application for a declaratory order is moved before it, it seems to me that s 14 of the High Court of Zimbabwe Act ought not to be overlooked.

Section 14 is in virtually identical terms to the provisions of s 19(1)(c) of the South African Supreme Court Act 59 of 1959 and its precursor, s 102 of Act 46 of 1955. It had been laid down in a long series of decisions that, in the exercise of the jurisdiction conferred, there must be an existing and concrete dispute between parties, albeit as to future or contingent rights, before the court will act under s 102. In *Ex p Nell* 1963 (1) SA 754 (A), however, the Appellate Division, in a marked departure from this view, expressly held that an existing dispute was not a prerequisite for the exercise by the court of its discretion to make a declaratory order. STEYN CJ pointed out that the existence of a dispute was not one of the conditions specified in s 19(1). He said at 759G-H:

"The need for such an order can pre-eminently arise where the person concerned wished to arrange his affairs in a manner which could affect other interested parties and where an uncertain legal position could be contested by one or all of them. It is more practical, and the interests of all are better served, if the legal question can be laid

before a court even without there being an already existing dispute" (in translation).

Nor is it a requirement that there be an opponent. There must be interested parties upon whom a declaratory order is binding. It may determine

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the applicant's rights but it is not necessary that it pronounce upon the respondent's obligations. See *Nkadia v Mahlazi & Ors* 1982 (2) SA 441 (T) at 449C-E; *Clarke v Hurst NO & Ors* 1992 (4) SA 630 (D) at 635B-D. Thus in *Ex p Ginsberg* 1936 TPD 155 it was held that a declaration of rights could be granted on an *ex parte* application. The case concerned the interpretation of a statute regulating the admission of attorneys. And in *Ex p Prokureur - Generaal, Transvaal* 1978 (4) SA 15 (T) no relief was claimed specifically against anyone, the application being brought to obtain clarification of s 75 of the Criminal Procedure Act 1977. BOSHOF AJP (with whom NICHOLAS and MELAMET JJ concurred) said at 20B-D:

"The applicant consequently has a real interest in his rights and obligations in respect of s 75. Mr *van Dijkhorst*, however, argued that there were no persons on whom the order would be binding and that for that reason this court was therefore not authorized to make a declaratory order. In this regard he referred to cases in which declaratory orders had been applied for in private law matters. In the present application we are dealing with a public law matter in which the order will be binding on the applicant as well as magistrates and regional magistrates in respect of powers and obligations which are of material importance because they are or could be relevant in many courts practically every day."

These remarks are especially apposite, for this application involves a matter of public and not private law. In whatever form it may take, the order will be binding on the applicant and his officers, as well as on the courts.

It necessarily follows that upon an adoption of either approach the conclusion reached is that the applicant has *locus standi* to seek a *declaratur*. But that is not sufficient. In addition, suitable circumstances must exist for the exercise of the discretion of this court.

A powerfully persuasive factor for the exercise of the discretion in favour of the applicant is that the issue concerning the judgment of this court is anything but abstract or purely intellectual. It is very much alive and if not resolved in these proceedings will inevitably come before this court in the near future. It affects the applicant Ford and doubtless many other aliens similarly positioned to the O'Haras. The raising of it in legal circles has caused uncertainty and anxiety in the minds of immigration officers.

It is only right and proper, therefore, that this court should declare, as it is requested to do, upon the validity or otherwise of its judgment.

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I start then with a consideration of s 86(4) of the Constitution. It states:

"A judge of the Supreme Court or the High Court may, notwithstanding that he has obtained the age at which he is required by subsection (1) to retire, sit as a judge for the purpose of giving judgment or otherwise in relation to any

proceedings commenced before or heard by him while he was in office."

What this means is that once a judge attains the mandatory age of retirement he has the right, should he so wish, to continue in office in order to complete any matters which were commenced or heard by him before the date at which he reached the age of retirement. He is granted a *moratorium* to fulfil that function. The same facility is not, however, extended to a judge who has resigned office or has been removed from office. He is denied the option to "sit as a judge" after resignation or removal.

With regard to the situation of MR JUSTICE MANYARARA, I deem it necessary to make certain disclosures. This it is permissible to do. See, for instance, *Polurrian Steamship Co Ltd v Young* [1915] 1 KB 922 (CA) at 927; *Kennedy v Spratt* [1971] 1 All ER 805 (HL) at 809b.

Although MR JUSTICE MANYARARA wrote to His Excellency, the President of Zimbabwe, that it was his wish to **retire** with effect from 1 January 1993, what was recommended to the President, and approved by him, were the terminal benefits payable to MR JUSTICE MANYARARA upon **resignation**. That was an accurate categorisation. For the age at which a judge of the Supreme Court or the High Court **shall retire**, as laid down in s 86(1) of the Constitution, is sixty-five years unless, before he attains that age, he has elected to retire on attaining the age of seventy years. If a judge therefore is desirous of leaving the bench before attaining the age of sixty-five years, as MR JUSTICE MANYARARA was, he must tender his resignation by notice in writing to the President (see s 86(2)).

Second, MR JUSTICE MANYARARA considered the merits of the argument in the *O'Hara* matter, held discussions with his brethren concerning it and came to the conclusion, well in advance of 1 January 1993, that the appeal was to be allowed. That opinion was shared by his brethren, as reflected in the judgment. What he left for them to do was to prepare a written judgment in conformity with the view he had expressed. This they did subsequent to his resignation. He then approved the final draft of the judgment and signed the original copy.

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It must be accepted that the judgment should have issued under the names of KORSAH and EBRAHIM JJA, perhaps with an explanation that, prior to his resignation, MR JUSTICE MANYARARA, who had been the remaining presiding member of the court, had expressed agreement that the appeal was to be allowed with costs. However, the irregularity that occurred was somewhat technical. The court was duly constituted in terms of the Supreme Court of Zimbabwe Act when it heard the appeal and reserved judgment thereon. MR JUSTICE MANYARARA continued to sit as a judge until the date of his resignation. He did not come to a decision as to the fate of the appeal after he ceased to sit; nor, thereafter, did he engage in any further discussions with his brethren about the matter. There was nothing more for him to do.

In such circumstances, I think it would be patently absurd to hold that the delivery of the judgment, on 18 February 1993, amounted to a breach of s 86(4) of the Constitution. What the position would have been if MR JUSTICE MANYARARA had reached his decision, or written a judgment, only after he had ceased to sit as a judge does not, of course, fall for determination.

It had been the contention of the O'Haras that the protection guaranteed by s 18(9) of the Constitution had been infringed, in that the determination of the appeal was by a court which was not duly constituted. This subsection reads:

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

The argument, if I understand it correctly, is that the word "hearing" means "to hear and determine", and that as MR JUSTICE MANYARARA had resigned, the court that determined the appeal on 18 February 1993, was not duly constituted as it consisted of less than three judges.

The phrase "to be afforded a ... hearing" (with the omission for the moment of the adjective) is somewhat vague and is susceptible of different meanings in varying contexts. It may well be that where the law-maker has directed that a particular cause be heard in a particular court, the verb "to hear" covers the final disposition of such case. See *Green v Lord Penzance & Ors* (18881) 6 AC 657 (HL) at 669; *Automated Business Systems (Pty) Ltd v Commissioner for Inland Revenue* 1986 (2) SA 645 (T) at 655H-J. But depending on the intendment, "to hear" may not be the same as "to hear and determine". See *Stroud's Judicial Dictionary* 5 ed vol 2 at p 1148.

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Section 18 of the Constitution specifies the procedures to be applied by a court or adjudicating authority for the purpose of securing the protection of the individual. It is in such a context that subs (9) is to be construed. The word "fair" which precedes "hearing" signifies, in my view, that what is aimed at is the protection of the individual at the actual hearing of the cause in which he is involved. He must, for instance, be accorded the right to be represented by counsel of his choice; the right to adduce evidence; the right to cross-examine his opponent's witnesses; the right to object to inadmissible evidence; the right to address argument; and all such other procedural rights that conventionally obtain before a court or adjudicating authority. In short, the proceedings must conform with the precepts of natural justice. That is the entitlement of the individual. Once the hearing has been procedurally fair, the constitutional protection is complied with.

In any event, no actual or potential prejudice was caused to the O'Haras by the subsequent resignation of MR JUSTICE MANYARARA. The appeal had been argued before three Supreme Court judges on their behalf by experienced counsel. Judgment thereon was reserved. All three judges agreed as to the outcome. Even if MR JUSTICE MANYARARA'S assent were to be discounted, two Supreme Court judges ruled against the O'Haras. They were the majority of the court (see s 4(1) of the Supreme Court of Zimbabwe Act).

In my opinion, s 18(9) does not bear upon the enquiry.

I turn now to consider whether there is any provision in the Supreme Court of Zimbabwe Act that makes the judgment, delivered after the resignation of MR JUSTICE MANYARARA, a

nullity.

Section 3 provides that, for the purposes of exercising its jurisdiction in any matter, the Supreme Court shall be duly constituted if it consists of not less than three judges, of whom one shall be the Chief Justice or a judge of the Supreme Court, provided that, except in the case of appeals from decisions of the High Court, the Chief Justice may give directions for the jurisdiction of the Supreme Court to be exercised by two judges of the Supreme Court, of whom one shall be a substantive appointee. As a matter of law, therefore, the Supreme Court is duly constituted in respect of an appeal brought before it from a decision of the High Court where one judge of the three who are required to exercise jurisdiction is the Chief Justice or a judge of the Supreme Court.

Under s 4(3):

"If at any stage during the hearing of an appeal or application by three

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or more judges of the Supreme Court any such judge dies **or retires** or is otherwise unable to **sit** as a member of the Supreme Court or is **absent**, the presiding judge may in his discretion direct that the appeal or application shall **proceed** before the remaining judges or that a further judge of the Supreme Court be obtained to **sit**" (emphasis added).

This provision plainly visualises a situation where the hearing of the appeal or application has commenced. If prior to commencement, one of the judges assigned to the matter died, or was unable to sit because of illness, immediate resignation or removal from office, then the Supreme Court could only exercise jurisdiction by obtaining another judge to sit. Thus what is to be determined is whether the phrase "during the hearing" is to be construed as extending beyond the completion of argument and the intimation that judgment is to be reserved, to the stage when the judgment is actually delivered, that is, officially pronounced.

The use of the words "sit", "absent" and "proceed" are significant. They indicate, to my mind, an intention on the part of the law-maker to provide for the possibility that either while the appeal or application was being argued before the Supreme Court, or where the matter was part-heard and had been adjourned to a date in the future for completion, one of the judges concerned with it became no longer able to **sit in court**. The inability could be due to a variety of causes - death; the onset of a serious debilitating or terminal illness; the attainment during a long intervening adjournment of the mandatory age of retirement and a resolute refusal to continue in office to complete the matter; resignation or removal from office; or physical absence. Faced with any such happening the presiding judge (who could be the most senior judge left) would then be free to direct that the appeal be heard *de novo* before the remaining judges and a further judge, or that the argument "proceed", in the sense of being resumed before the remaining judges, at the stage at which it was stopped.

Perhaps the strongest pointer that the law-maker did not intend to vest the discretion in the presiding judge where the disability occurred after the appeal or application had been fully argued, is the inclusion, as a disabling factor, of the absence of one of the judges who sat.

Certainly a judge's physical absence from the court would create no difficulty in his approving a draft of the judgment to be delivered. It could be sent, or otherwise communicated, to him. He could write a judgment, to be approved by his brethren, or a separate judgment. Indeed, the delivery of the judgment could pend the judge's return, since the disability is absence and not disappearance; his whereabouts remain known.

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Consistent with this interpretation of s 4(3) is s 4(4)(b). It envisages that the presiding judge, who has obtained a further judge to sit, may deem it necessary for additional argument to be presented before the judges who originally constituted the court and the further judge, and so empowers him to so order.

In the premise, I am satisfied that the resignation of MR JUSTICE MANYARARA fell outside the ambit of s 4(3) of the Supreme Court of Zimbabwe Act.

It is s 6 of the Supreme Court Act that must be looked to. It reads:

"In any matter relating to records, practice and procedure for which no special provision is contained in this Act or in rules of court, the matter shall be dealt with by the Supreme Court or a judge thereof as nearly as may be in conformity with the law and practice for the time being observed in England by the Court of Appeal."

As the issue is *res nova* in this jurisdiction, it becomes necessary to ascertain what is the practice and procedure of the Court of Appeal in England.

In *Halsbury's Laws of England* 4 ed para 726 at p 331 it is said:

"Where one of the members of an appellate court dies after the hearing but before judgment has been delivered, it would seem that a judgment written by the deceased member before his death may be adopted by one of the other members as his own, if it is to stand as part of the decision of the court."

The proposition is borne out by several decisions of the House of Lords, the highest court of appeal in England. See *Lord Advocate v Wemyss & Anor* [1900] AC 48 (HL) at 59; *Polurrian Steamship Co Ltd v Young supra* at 927; *Inland Revenue Commissioners v Wilsons (Dunhbane) Ltd* [1954] 1 All ER 301 (HL) at 305H; *Ross Smith v Ross Smith* [1963] AC 280 at 332; *Kennedy v Pratt supra* at 809b.

It is not a material factor that the deceased member of the court who writes a judgment happens to die before the court re-convenes to announce its decision. Even if death precedes the writing of a judgment or the expression by him of a view of the matter, a single judgment or separate judgments may be delivered by the remaining members of the appellate court. Put otherwise, the subsequent disability of one of the judges who heard the appeal, whether it be due to death, mental incapacity or whatever, does not necessitate a fresh

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hearing of the appeal, unless, of course, a deadlock ensues. Where the remaining members of

the court constitute the majority, their decision is the decision of the court. That this is so is apparent from the situation that arose in the case of *Somersetshire Drainage Commissioners v Corporation of Bridgewater* (1899) 81 LTR 729 (HL). The members of the House who heard the arguments, during May and June 1899, were the EARL OF HALSBURY LC, LORDS WATSON, MACNAUGHTEN, MORRIS, SHAND and AVEY. On 14 September 1899 LORD WATSON died. On 15 October 1899 Lord Macnaughten delivered a speech concurred in by LORD MORRIS, dismissing the appeal. LORD DAVEY gave a separate speech, also dismissing the appeal. The LORD CHANCELLOR and LORD SHAND took no further part.

The practice in South Africa would appear to be the same. Where, after the hearing, one of the judges dies or becomes incapacitated through illness and incapable of acting, the remaining judges constitute the majority, and their judgment is the majority of the court. See *Adcock-Ingram Laboratories Ltd v SA Druggists Ltd & Anor* 1983 (2) SA 350 (T) at 351F-G; *Automated Business Systems (Pty) Ltd v Commissioner for Inland Revenue supra* at 656A.

By the adoption of this practice, the judgment of KORSAH and EBRAHIM JJA must be taken as the majority judgment of the Supreme Court, which was accordingly duly constituted on 18 February 1993 when that judgment was delivered.

In the result the following order will issue:

"It is declared that the judgment of this court in *Principal Immigration Officer & Anor v Terence Ashley James O'Hara & Anor* S-272-92, is a valid judgment, notwithstanding that MR JUSTICE MANYARARA had resigned after judgment had been reserved and before it was delivered on 18 February 1993."

The O'Haras are ordered to pay the applicant's costs up to and including 3 March 1993.

McNally JA: I agree.

Korsah: I agree.

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

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HARTNACK v MASTER OF THE HIGH COURT & ANOR 1993 (1) ZLR 137 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

25 March 1993

Flynote

Administration of estates - inspection of liquidation and distribution accounts - who may make such inspection
- whether necessary to show a financial interest in the estate

Headnote

There is no requirement for a person who wishes to inspect the distribution accounts relating to a deceased estate to establish a financial interest in the estate. The interest in an estate relates to the lodging of an objection to the accounts and arises as a result of the inspection of the accounts. Without an inspection any potential objector would be unaware of the contents of an account and so would be unable to decide whether to lodge an objection or not. Once an objection is made, the Master may rule on its legitimacy, but until then he is not empowered to prohibit an inspection of the accounts or the lodging of an objection thereto.

Where a journalist wished to inspect the accounts in the estate of the late wife of the President of Zimbabwe and proceeded by way of a chamber application, the application was refused in the High Court on the ground that, as he had failed to establish the prerequisite of urgency, he ought to have proceeded by way of a normal application. On appeal,

Held, that, because the time during which the accounts lay open for inspection was very limited, a refusal to grant the applicant's urgent application denied him the right to decide, on inspection, whether to lodge an

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objection to the account. Accordingly, the application should have been granted.

Case cited:

Lentell v Registrar - General & Anor (1) 1979 RLR 62 (G)

A J Dyke for the applicant

L R Goredema for the first respondent

D Drury for the second respondent

Judgment

Gubbay CJ: This is an application for the urgent hearing of an appeal against a decision of the High Court (SMITH J) dismissing, with costs, a chamber application brought pursuant to Rule 226(2)(a) of the High Court Rules, 1971. The relief sought was for a provisional order calling upon the first respondent and the second respondent, in his capacity as the executor dative in the estate of the late Sally Sarah Francesca Mugabe, to show cause why: (i) the first respondent should not be directed to allow the applicant to inspect, with immediate effect, the first and final liquidation and distribution account of the afore-mentioned estate; and (ii) a copy thereof should not be provided to him. Its refusal was upon the ground that, as the applicant had failed to establish the prerequisite of urgency, he ought to have proceeded by way of a normal court application, and not a chamber application. The *ratio decidendi* of the learned judge was

that because the applicant had not indicated that he was, or possibly might be, desirous of lodging an objection to the second respondent's account during the three week period it had been advertised as lying for inspection, it was not essential that he be afforded an inspection before the expiry of the date, being 26 March 1993. He could inspect the account at any subsequent time, as he was entitled to do in terms of s 121(1) of the Administration of Estates Act [Chapter 301] ("the Act").

It was common cause between counsel that the fate of both this present application and the appeal itself turned on whether the learned judge was correct in the view he expressed. If he was wrong then, since there was only one day remaining to the applicant within which to lodge an objection in writing with the first respondent - if upon inspecting the account he were to decide to do so - it would be incumbent not merely to grant the application, but to uphold the appeal as well, and issue a final order.

The applicant, a citizen of Zimbabwe, has been practising as a journalist in this country since 1966. He represents a number of newspapers, which are published both in the Republic of South Africa and overseas, and was

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instructed by them to follow the administration of the estate of the deceased. On 5 March 1993 he read in a notice, published in the Harare Herald and inserted by the second respondent in compliance with s 53(5) of the Act, that the first and final liquidation account in the said estate would lie for inspection at the office of the first respondent for the ensuing twenty-one days. Consequently, he approached the first respondent and requested that he be permitted an inspection of the account. The first respondent made it clear that he was not prepared to permit an inspection to anyone who was unable to prove a financial interest in the estate of the deceased. On a later occasion he refused to allow the applicant's legal practitioners to obtain a copy thereof on his behalf.

In maintaining that he had a real and proper interest, albeit not a financial one, in inspecting the first and final distribution account, the applicant made the following averments in paras 10 and 11 of his affidavit:

"That international interest in the administration of the said estate is considerable as a result of the deceased being the former First Lady of Zimbabwe and the Secretary for Women's Affairs in the Politburo and her estate being exempt from estate duty in terms of the Finance Act, 1988, due to her official designation as a national heroine.

That failure to allow me access to the account will result in unnecessary speculation taking place as to the content of the account which will be to the unnecessary detriment of the reputation of both the deceased and the Republic of Zimbabwe."

It is ss 121(1) and 53(8) of the Act that have to be examined in order to determine whether the stance adopted by the first respondent was justifiable.

Section 121(1) provides:

"The Master or Assistant Master, as the case may be, shall preserve all original wills, codicils, testamentary

instruments, death notices, inventories and liquidation, administration and distribution accounts lodged with him under the provisions of this Act, and any person may at any time during office hours inspect any such document, and, subject to the provisions of subsection (2), obtain a copy thereof or an extract therefrom, on payment of the prescribed fees ...".

The prescribed fees for inspection and making a copy of a document are laid

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down in the Administration of Estates (Master's Office) (Fees) (Amendment) Regulations, 1980 (No. 1), SI 57 of 1980. And s 53(8) reads:

"Any person interested in the estate may at any time before the expiration of the period allowed for inspection lodge with the Master in writing any objection, with the reasons thereof, to that account."

Under s 121(1) an inspection is allowed to any person at any time during office hours of a variety of documents, included in which are administration and distribution accounts whether in preliminary or final form. The phrase "at any time" cannot sensibly be taken to exclude an inspection during the three week period in which the executor's account is to be open for inspection. Upon tendering the prescribed fees any person is afforded an absolute right to inspect and obtain copies of documents. See *Lentell v Registrar - General & Anor (1)* 1979 RLR 62 (G) at 64A-D.

Section 53(8), on the other hand, is aimed at the lodging with the Master, before the expiration of the three week period, of objections in writing. There is a right to object to the account if the person interested in the estate considers it to be incorrect.

Counsel for the respondents supported the Master's contention that s 53(8) is to be construed as entitling only those persons with a financial interest in the estate, such as, for example, creditors, debtors, heirs and legatees, to inspect the account. I am unable to agree.

In my view, the interest in the estate relates to the lodging of an objection. The interest arises as a result of the inspection. For without an inspection of the account any potential objector would be completely unaware of its contents, and so unable to decide whether to lodge an objection or not. If the inspection is not made within the three-week period the right to lodge an objection is lost. If it is so made, then it is for the Master to rule upon its legitimacy (see ss 53(9) and (10)). It is at that stage that the Master may exercise authority. Prior thereto he is not empowered to prohibit an inspection of the account or the lodging of an objection thereto.

It necessarily follows that, in finding that the urgency of the matter had not been established, the learned judge, due to the limited time within which the account was still open for inspection, effectively denied the applicant his right to decide, upon such inspection, whether to lodge an objection to the account. In this he erred.

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It was for the reasons foregoing that, at the conclusion of argument, an order was issued in

the following terms:

"That the application for an urgent hearing of an appeal against the decision of the High Court dismissing the application be and is hereby granted.

That the appeal against the decision of the High Court is allowed and its decision is set aside.

That the Master of the High Court is directed to permit Mr Michael Hartnack to inspect the first and final liquidation and distribution account in the estate of the late Sally Sarah Francesca Mugabe on 26 March 1993, during office hours.

That the costs of both the application and the consequent appeal are to be borne by the first and second respondents jointly and severally, the one paying the other to be absolved.

That the costs of the application in the High Court proceedings are to be borne by the first respondent."

McNally JA: I agree.

Korsah JA: I agree.

Coghlan, Welsh & Guest, applicant's legal practitioners

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

Gollop & Blank, second respondent's legal practitioners

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K v COMMISSIONER OF TAXES 1993 (1) ZLR 142 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Income tax appeal

16 & 26 March 1993

Flynote

Appeal - income tax - appeal involving questions of fact - approach by court in such cases

Revenue and public finance - income tax - gross income - source of income - employee of Zimbabwe firm being seconded to organization outside Zimbabwe but being paid an allowance by Zimbabwean firm - such allowance deemed to have been accrued from source in Zimbabwe and as such taxable

Headnote

Where an appeal from the Special Court for Income Tax Appeals or from the High Court on an income tax matter involves questions of fact, the Supreme Court will approach such matters in the normal way. While paying due regard to the findings of the Special Court on the facts and the credibility of witnesses, it is not necessarily bound by them.

The appellant, a chartered accountant, was employed by a firm in Zimbabwe. He and his wife were allowed by their firm to take part in a programme under which they would work for firms outside Zimbabwe for a period in order to gain experience which would, on his return, benefit both him and his Zimbabwean employer. While abroad he was paid by the firms he worked for but he was also paid his normal salary by his Zimbabwean employer. In addition, the Zimbabwean firm continued to pay his medical aid and pension contributions. His leave continued to accumulate while he was away.

Held, that the facts showed that he remained an employee of the firm in Zimbabwe. The money he was paid by the Zimbabwean firm was

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therefore deemed to have accrued to him from a source within Zimbabwe and had to be included in his gross income.

Judgment of SMITH J in *K v Commissioner of Taxes* 1990 (1) ZLR 191 (H) upheld.

Cases cited:

CIR v Black 1957 (3) SA 536 (A); 21 SATC 226

CIR v Nell 1961 (3) SA 774 (A); 24 SATC 261

CoT v R 1966 (2) SA 342 (RA); 28 SATC 115

Hicklin v Sec for Inland Revenue 1980 (1) SA 481 (A)

CIR v da Costa 1985 (3) SA 768 (A)

Colonial Mutual Life Assurance Soc Ltd v Macdonald 1931 AD 412

Ready Mixed Concrete (South East) Ltd v Min of Pensions & National Ins [1968] 1 All ER 433 (QBD)

S v Lyons Brooke Bond (Pvt) Ltd 1981 ZLR 384 (A); 1981 (4) SA 445 (RA)

Southampton Assurance Co of Zimbabwe Ltd v Mutuma & Anor 1990 (1) ZLR 12 (H)

ITC No. 749 (1952) 18 SATC 319

ITC No. 1088 (1966) 28 SATC 202

ITC No. 1497 (1990) 53 SATC 254

ITC No. 837 (1957) 21 SATC 413

ITC No. 878 (1958) 23 SATC 230

A P de Bourbon SC for the appellant

M J Gillespie for the respondent

Judgment

Gubbay CJ: This is an appeal, consequent upon the grant of leave in terms of s 55(1)(b) of the Income Tax Act [*Chapter 181*], against a decision of the High Court dismissing an objection to the inclusion of an amount of \$18 425 in the appellant's gross income for the year ended 31 March 1986. An additional amount of \$17 450 received by his wife was, however, ordered to be deducted therefrom.

The judgment, that of SMITH J, has been reported, under the same name, in 1990 (1) ZLR 191 (H) and in 52 SATC 177. It sets out comprehensively and accurately the history of the matter at 192F-193B and 193F-195H; also at 180 and 181-183. I can do no better than to quote the relevant narration:

"The appellant and his wife were both employed as chartered accountants by a firm which carries on business as such in Zimbabwe (hereinafter

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referred to as 'the employer'). The employer is a partnership with international associations. It is a member of a scheme known as the Managers International Development Programme (hereinafter referred to as 'the Programme'). The appellant and his wife resided outside Zimbabwe for a continuous period of 206 days from 19 July 1985 to 10 February 1986 during which time they rendered services to firms in England. They were provided by the firms concerned, which are associated with the employer, with accommodation and an allowance to cover their living costs. During that period (hereinafter referred to as 'the overseas period') they were also paid their normal salaries by their employer. By Assessment No. 1/83654/86 the respondent assessed the gross income earned by the appellant and his wife for the year ended 31 March 1986 and included in such income an amount of \$35 875 (hereinafter referred to as 'the disputed amount') which was the total of the salaries paid by the employer to the appellant and his wife during the overseas period. The appellant duly objected but his objection was disallowed. He thereafter noted an appeal to the High Court. The basis of the appeal was that the disputed amount was earned from a source outside Zimbabwe and should not have been included in his gross income."

And:

"Two witnesses gave evidence in support of the appellant's case. The first was a senior partner of the employer. He said that the employer was one of a number of accounting firms using the same name which carry on business in different countries. Each such firm was a member of an international co-ordinating body which was incorporated in the Bahamas and had offices in London and New York. There were no direct financial interests involved. The co-ordinating body co-ordinated manpower development programmes, helped in the recruitment of manpower and developed accounting standards. It monitored audit technique(s) and developed new ones and produced information booklets which were distributed to member firms. It was responsible for operating the Programme. The co-ordinating body had issued a booklet setting out the purpose and objectives of the Programme. According to the booklet, it was intended to benefit both firms and staff. It had a number of objectives, including the following: to encourage the personal development of the participant through exposure to people and practices in another country; to make participants aware of the group of accounting firms as an international organization and to foster enthusiasm for it in preparation for their assuming more senior positions in their own firms;

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to further the professional development of participants and thereby promote the highest calibre of work throughout firms in the group; to encourage participants in their careers with their own firms and to indicate to them, by selection to participate in the scheme, that they were under consideration for further progress. The booklet also set out administrative arrangements. It stated that participants should only be selected from staff who were considered to have clear partnership potential and also that normally managers would participate in the Programme at an early stage in their careers as managers. It also set out guide-lines to be used as a basis for setting financial arrangements for participants. One of the guide-line was that a participant would continue to receive his salary from his own firm during the period of the Programme.

The employer had a number of managers who were senior chartered accountants who had not been admitted as partners. When a manager was identified as a potential partner, he was requested to participate in the Programme. Whilst such a person would not be obliged to participate, it was virtually a prerequisite before a manager was offered a partnership. A person selected to participate in the Programme would go to another country to work for an associate firm and the employer was obliged, in terms of the Programme, to accept and provide work for participants from other countries. In terms of the Programme, a receiving firm was required to pay all living expenses of a person participating in the Programme and to provide transport and accommodation or funds to pay therefor. As participants received in the country in which they were working, less than they would have received had they not participated, they continued to receive from the sending firm their full salaries during their absence. When a participant was engaged on the Programme, whilst technically he remained an employee of the firm which sent him on the Programme, that firm had no control over the work he did or the manner in which he did it. Once a sending firm had selected a particular employee to participate in the Programme, it contacted the co-ordinating body and indicated the level of experience of the participant and the field in which it wished him to gain experience. When a participant returned from the Programme, he submitted a report to his employer as to the type of work he had done and the experience he gained. The firm for which he actually worked would also send a report to his employer on his technical ability. There was no obligation on the part of the participant to remain with his employer after his return from the Programme. However he would be expected to remain and to become a partner.

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The appellant was the second witness. He started work with the employer at the end of 1978 after leaving university. He and his wife both qualified and were registered as chartered accountants. Early in 1985 he was asked to participate in the Programme. The employer agreed that his wife should participate in the Programme during the same period as the appellant. However, she later advised the employer that she would be starting a family and therefore could not consider becoming a partner. Consequently she was ineligible to participate in the Programme. The appellant and his wife left Zimbabwe on 19 July 1985 and returned on 10 February 1986. They spent ten days holidaying in Spain before arriving in London to take up employment and a further ten days in Kenya after the Programme before returning to Zimbabwe. During the Programme the appellant worked as a manager for an accounting firm associated with the employer. He took over responsibility for the clients of a manager who had been sent to Australia as a participant in the Programme. He had the same responsibilities as he had had when working for the employer, namely planning and controlling audits and reporting thereon to the partner concerned. During the Programme he had had no contact with any clients of the employer and his only contact with the employer was that once or twice he spoke on the telephone to one of the senior partners on a social level but not about his professional work. The appellant's wife was not able to participate in the Programme because she did not intend to become a partner of the employer. However the co-ordinating body referred to earlier employed her at its office in London to assist in writing information booklets and pamphlets on a world-wide approach to auditing for distribution to all the associated members of that body. She did not do any auditing. Both of them were paid a daily allowance whilst in England to cover transport and living costs and they were provided with accommodation. The employer continued to pay their salaries in Zimbabwe whilst they were in England and also the employer paid contributions to a medical aid society. The amount involved was \$18 425 for the appellant's salary and \$17 450 for his wife's. The appellant was admitted as a partner of the employer some 16 months after his return from England. His wife resigned from her employment some three months after their

return. Whilst they were participating in the Programme they continued to accrue leave and they were not required to take vacation leave to cover their absence whilst on the Programme. The appellant said that his participation in the Programme contributed significantly to his professional development. Whilst on the Programme he earned fees for the associate firm which employed him and the employer continued to pay his and his wife's salaries although

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they did not earn any fees for the employer. They also continued to earn vacation leave which accrued to them whilst they were working in England."

It is, perhaps, necessary at the outset to indicate the approach of this court to an appeal from either the Special Court for Income Tax Appeals or the High Court involving, as this one does, questions of fact.

Prior to the repeal of s 55 of the Income Tax Act by the Finance Act 27 of 1977, a determination by the Special Court or the General Division of the High Court was final, unless it was erroneous in law. Accordingly, no right of appeal lay against the factual findings of those courts except where such findings were so perverse that no reasonable person could reach the same conclusion. See *Commissioner for Inland Revenue v Black* 1957 (3) SA 536 (A) at 543E: 21 SATC 226 at 234; *Commissioner for Inland Revenue v Nell* 1961 (3) SA 774 (A) at 781H: 24 SATC 261 at 270; *Commissioner of Taxes v R* 1966 (2) SA 342 (RA) at 345A: 28 SATC 115 at 118 *in fine* - 119. The re-enacted s 55(1)(b) now provides for a full right of appeal, with leave, on a question of fact alone or a question of mixed law and fact. Such an appeal, in the words of TROLLIP JA in *Hicklin v Secretary for Inland Revenue* 1980 (1) SA 481 (A) at 485F; 41 SATC 179 at 185:

"... is therefore a re-hearing of the case in the ordinary, well-known way in which this court, while paying due regard to the findings of the Special Court on the facts and credibility of witnesses, is not necessarily bound by them."

See also *Commissioner for Inland Revenue v da Costa* 1985 (3) SA 768 (A) at 775B-G: 47 SATC 87 at 95.

The learned judge *a quo* made three findings of fact. First, that during the overseas period the appellant had remained an employee of the sending firm, even though he was not doing any work specifically for or on behalf of it. Second, that the source of the salary paid to the appellant by the sending firm during the overseas period was from outside Zimbabwe. Third, that by virtue of s 12(1)(b) of the Income Tax Act, the salary paid to the appellant during the overseas period was deemed to have accrued to him from a source within Zimbabwe.

Mr *de Bourbon's* initial argument on behalf of the appellant, and one previously advanced before the learned judge, was that the appellant was not

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employed by the sending firm whilst working in England. Under the Programme he had, in

effect, been seconded by the sending firm to the receiving firm. Thereafter the sending firm had no control as to when, how or where, he worked. He was subject to the direct and sole control of the receiving firm. In consequence the sending firm had voluntarily forsaken all incidents of the relationship of employer/employee in respect of the appellant. In support of this proposition counsel cited *Colonial Mutual Life Assurance Society Ltd v Macdonald* 1931 AD 412 at 434-435; *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433 (QB) at 440C-D; *S v Lyons Brooke Bond (Pvt) Ltd* 1981 (4) SA 445 (RA) at 449H; 1981 ZLR 384 (A) at 390A; *Southampton Assurance Co of Zimbabwe Ltd v Mutuma & Anor* 1990 (1) ZLR 12 (H) at 15C. He went on to urge that the *causa* for the payment of the monthly amounts to the appellant was the *quid pro quo* for his temporary transfer; a recognition that it was unrealistic to expect the appellant to uproot himself and give up his commitments in his country of origin. Stated otherwise, the monthly amounts were paid, not for any services rendered by the appellant, but gratuitously, in order to ensure that he was in a position to meet all his financial obligations while away, and so be able to preserve his lifestyle in Zimbabwe; and also as an inducement for him to return to the sending firm with the added skills and knowledge acquired overseas.

The learned judge acknowledged, as I unhesitatingly do, that during the overseas period the work done by the appellant was under the sole supervision and control of the receiving firm. He held, however, that having regard to the particular facts of the case, the absence of control in the sending firm as to where, how or when, the appellant worked in England did not warrant the conclusion that he had ceased to continue as an employee of the sending firm, even though during that period he was not engaged in doing any specific work for it. At 196E (183 of the SATC report) he said:

"The employer continued to pay contributions to the pension fund and medical aid society on (his) behalf. As far as the employer was concerned (he was) on leave, from which (he) could presumably be recalled at any time should the exigencies so require. It is not unknown in law for an employee to have two employers at the same time. The employer continued to pay (his) salary whilst (he was) in England but this was not related to the particular services (he) performed whilst in England."

This reasoning is compelling and, with respect, I adopt it fully. In further amplification, I would stress the importance of two clauses in the information

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booklet pertaining to the Programme. Both appear under the heading "Financial Arrangements". Clause 2 reads in part:

"Participants will continue to receive their salary from their own firm during the period of the program.

The receiving firm will also pay a living allowance which will be fixed according to the level of local costs and the size of the visitor's family. It should cover accommodation costs (other than rent which is covered below), light, heat and other services, household expenses and periodic living costs; it is not intended to cover personal entertaining, luxuries, purchase of possessions or souvenirs and social and leisure outgoings. The allowance should be reasonably generous, as it is the intention that participants should be able to live in the host country on a basis reasonably comparable with the local managers and should not find it necessary to dig into their own pockets for what would be considered normal living costs."

This unequivocally identifies the payment the appellant received from the sending firm as salary, and that from the receiving firm as an allowance.

Clause 5 deals with "benefits". It stipulates:

"The sending firm remains responsible for providing insurance cover for death, disability and medical expenses, as well as for pension entitlement; all pension and other rights will continue to accrue in that firm."

Included in the "other rights" referred to, on the appellant's own admission, was the accrual of leave from the sending firm. In other words, his entitlement to leave remained unaffected by his absence from Zimbabwe. How, it may be asked, could the appellant have been allowed to accrue vacation leave if he were not still an employee?

I am satisfied that the appellant retained the status of an employee of the sending firm. The *causa* for the payment of the monthly salary to him during the 206 days he was away in England was the continued subsistence of his employment in this country.

Mr *Gillespie*, for the Commissioner, argued that the learned judge ought to have held that the source of the salary paid to the appellant by the sending firm was within Zimbabwe. I find it unnecessary to deal with that argument

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because, even assuming that the salary did not accrue to the appellant from a source within Zimbabwe, I remain unpersuaded that it did not accrue to him from a source which is deemed to be within Zimbabwe. On that basis alone it was rightly included in the assessment of his gross income.

Section 12(1)(b) of the Income Tax Act, in relevant part, provides:

"(1) An amount shall be deemed to have accrued to any person from a source within Zimbabwe whenever it has been received by or has accrued to or in favour of such person -

- (a) ...
- (b) for any services rendered or work or labour done by such person in the carrying on in Zimbabwe of any trade ...".

It was not in contention that the definition of "trade" in s 2(1) of the Act is wide enough to cover the appellant.

The test applied by the learned judge, being one approved in several decisions of the Special Court in this country, was that enunciated by DOWLING J in ITC No. 749; (1952) 18 SATC 319 at 322:

"There must I think be some close link between the work done outside the Union (ie South Africa) and the carrying on of a trade within the Union, a link closer than the mere fact that the tax-payer is carrying on a trade in the Union and that the work done outside the Union is in the way of such trade or of the same nature as the work done by the tax-payer in the Union. It may be that the link must be a causal link, eg that the person came by the work because his Union business goodwill or reputation had attracted the work in question."

See also *Commissioner for Inland Revenue v Nell supra* at 781B-C and 269. The activity must be performed as part of the tax-payer's trade in Zimbabwe.

It is, of course, impossible to define within exact limits what services rendered or work or labour done outside Zimbabwe would be rendered or done in the carrying on in Zimbabwe of the tax-payer's trade, s 12(1)(b) having left the decision to the discretion of the judicial authority.

In finding the existence of a close link between the work the appellant did outside Zimbabwe and the carrying on of his trade within Zimbabwe, the learned judge expressed himself thus:

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"The only reason why the appellant left Zimbabwe to work overseas was because he wanted to participate in the Programme. He did so in order to broaden his experience, both personal and professional, in order to make himself better fitted to become a partner with the employer. He was well aware that participation in the Programme was virtually a *sine qua non* to becoming a partner. ... It was because of the appellant's position with, and the regard in which he was held by, the employer that he was invited to participate in the Programme. He participated in the Programme in order to further himself in his career and in his profession."

See at 198G-199B (p 185 of the SATC report).

Mr *de Bourbon* argued that the features alluded to by the learned judge establish no more than a tenuous link between the work externally undertaken by the appellant and the carrying on of his trade in Zimbabwe. He referred to a *dictum* of GREENFIELD P in ITC No. 1088; (1966) 28 SATC 202 at 207, to the effect that, in the case of an ordinary employee remunerated by salary or wages paid by his employer in the country where the main part of his work is done, it was more difficult to apply the "close link" test than to a self-employed person. I do not quarrel with that view. But difficulty is just that and no more. The particular circumstances of each case play the all important rôle in this connection.

Mr *Gillespie*, on the other hand, strongly supported the finding of the learned judge. He submitted that, but for the appellant's status as an employee of the sending firm and his aspirations to be appointed a partner, he would not have performed any services for the receiving firm; that the whole purpose of enabling the appellant, who was a prospective partner, to participate in the Programme, as reflected both in evidence and in the written objectives of the Programme, was to advance his professional development; to widen his exposure to international trends for the benefit of multinational clients and, generally, to heighten his usefulness to the sending firm. Furthermore, it was significant that, save for the appellant's continued employment with the sending firm, he would not have been paid merely an allowance by the receiving firm; he would not have been placed on a remunerative scale different from that of his peers who were also in the employ of the receiving firm.

These submissions, and the reasoning of the learned judge, convince me that the link so constituted between the work performed by the appellant in England and the carrying on of his trade in Zimbabwe is, indeed, close

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enough to justify this court in upholding the decision reached below, that the salary paid by the sending firm during the overseas period must be deemed to have accrued to the appellant from a source within Zimbabwe.

Finally, Mr *de Bourbon*, contended, albeit somewhat faintly, that if the appellant were found to be an employee of the sending firm, he would then fall outside the ambit of s 12(1)(b). Reliance for this proposition was placed on the following passage in the judgment of KROON J in ITC No. 1497; (1990) 53 SATC 254 at 258:

"In the light of our finding that the appellant is not an independent contractor, it is not necessary to consider the provisions of s 9(1)(d) (the equivalent of s 12(1)(b) of Chapter 181) because it was common cause that if the appellant were an employee of A that section would not be applicable."

I have two observations to make. In the first place, the court accepted a joint concession by counsel as to the law and did not purport to rule on its validity. Secondly, and more importantly, the concession was contrary to authority. See ITC No. 837 (1957) 21 SATC 413; ITC No. 878 (1958) 23 SATC 230; ITC No. 1088 *supra*. If these cases had been referred to the learned judge, I feel sure that the applicability of the deeming provision would not have been overlooked.

In the result I would dismiss the appeal with costs.

Korsah JA: I agree.

Ebrahim JA: I agree.

Atherstone & Cook, appellant's legal practitioners

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

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MARTIN v ATTORNEY-GENERAL & ANOR 1993 (1) ZLR 153 (SC)

Court **Supreme Court, Harare**

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

15 & 31 March, 14 April 1993

Application in terms of s 24 of the Constitution of Zimbabwe

Flynote

Constitutional law - right to approach Supreme Court for relief - refusal of lower court to refer alleged breach to Supreme Court - itself a breach of s 18(1)

Criminal law - statutory offences - Prevention of Corruption Act 1985 - s 3(1)(f) - actus reus is failure to

disclose - obtaining of gift is element of mens rea

Constitution of Zimbabwe - ss 13(2)(e), 18(1), 22 & 24

Prevention of Corruption Act 1985 - ss 3(1)(f) & 15(2)(d)

Headnote

The applicant was placed on remand, on bail, on an allegation of contravening s 3(1)(f) of the Prevention of Corruption Act 1985. The magistrate had been requested to refer the matter to the Supreme Court in terms of s 24(2) of the Constitution. The magistrate decided to place the applicant on remand, and held therefore that the request to refer the matter was frivolous and vexatious. The applicant applied directly to the Supreme Court in terms of s 24(1) for relief. The respondents opposed the application, contending, *inter alia*, that s 24(3) precluded the Supreme Court from hearing the application.

On the facts the State alleged that the mere failure to disclose to a principal the receipt of a gift constituted the offence in question, whereas the applicant argued that the *actus reus* was the failure to disclose the full nature of the transaction associated with the principal's business.

Held, that the test of whether a request for referral under s 24(2) of the Constitution is frivolous or vexatious is whether or not it would constitute

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an abuse of the process of the Supreme Court, and had to be determined by applying conscientious and objective thought to the question.

Held, further, that since the magistrate had not applied the proper approach, the application was properly before the Supreme Court as the remand was a breach of s 18(1) of the Constitution, and the deprivation of the applicant of his passport was a breach of s 22 of the Constitution.

Held, further, that the test for deciding whether there is a reasonable suspicion that an offence has been committed by an accused is the same as for an arrest without a warrant.

Held, further, that the offence created by s 3(1)(f) of the Prevention of Corruption Act 1985 has as its *actus reus* the failure to disclose to a principal the full nature of any transaction carried out in connection with the principal's affairs. The *mens rea* element involves a consideration of why a gift was obtained. Section 15(2)(d) raises a presumption in relation to the mens rea element of the offence, not the *actus reus*. The mere failure to disclose the receipt of a gift does not constitute the offence in question.

Cases cited:

Young v Holloway & Anor [1895] P 87

Dyson v A-G [1911] 1 KB 410 (CA)

Norman v Mathews (1916) 85 LJ KB 857

S v Cooper & Ors 1977 (3) SA 475 (T)

Fisheries Development Corp of SA Ltd v Jorgensen & Anor 1979 (3) SA 1331 (W)

In re Mlambo 1991 (2) ZLR 339 (S); 1992 (4) SA 144 (ZS)

A-G v Blumears & Anor 1991 (1) ZLR 118 (S)

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

Bull v A-G & Anor 1987 (1) ZLR 36 (S)

A P de Bourbon SC for the applicant

Mrs J A Zindi for the respondents

Judgment

Gubbay CJ: This application is brought pursuant to s 24(1) of the Constitution of Zimbabwe. It is founded upon an allegation that the Declaration of Rights has been breached in relation to the applicant by the magistrate who placed him on remand on a charge of contravening s 3(1)(f) of the Prevention of Corruption Act 1985, but out of custody, subject to the fulfilment of certain monetary and other conditions.

On 5 January 1993 the applicant, a long-standing and senior employee in the

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Department of National Parks and Wild Life Management, was informed that it was the decision of the Attorney-General to have him put on remand on the charge aforementioned. It was agreed, however, not to effect the arrest of the applicant provided he reported to the investigating officer at a fixed hour the following morning. This the applicant did. Shortly thereafter he appeared, represented by counsel, before the magistrate for initial remand.

The prosecutor placed before the magistrate a "Request for Remand" form signed and dated by the investigating officer. It set forth the following allegations:

"The accused is employed by the Department of National Parks and Wild Life Management as an Assistant Director and as such is a Public Officer. The accused received a vehicle valued at \$202 000,00 from Ingrid Schroeder, the President of Save African Endangered Wildlife Foundation, a charitable organisation based in New York. Schroeder was the representative of the International Black Rhino Foundation in an agreement signed between Zimbabwe and the Foundation, in which 40 black rhinos were to be translocated to the United States of America and Australia. Whilst the negotiations were underway the accused, who was responsible for the re-drafting of the memorandum of agreement which was finally signed in September 1991, received the gift of a vehicle from Schroeder ordered from Toyota Motor Company, Japan, through Mobile Motors, Harare. The vehicle was delivered to the accused in March 1992. The accused did not disclose the gift to his principal. The State alleges that the accused was given the gift as a reward for the influential rôle he played in the successful conclusion of the agreement between the Zimbabwe Government and the Foundation."

And below the heading "Evidence ... facts linking accused to the commission of crime ..."

appeared these three paragraphs:

- "1. Accused is in possession of the vehicle.
2. A receipt for \$80 970,50 as payment of duty and other charges for the same vehicle was recovered from the accused's house.
3. A letter from the donor, a letter from the donor's banker, an application for a 'no currency involved' import licence and the registration book for the vehicle, were recovered from the accused's house."

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As soon as the "Request for Remand" form had been read out by the prosecutor, defence counsel requested, in terms of s 24(2) of the Constitution, that the question of whether the facts outlined established a reasonable suspicion of the applicant having committed the offence charged, thereby justifying the deprivation of his personal liberty under s 13(2)(e) of the Constitution, be referred to the Supreme Court. In support of the request two persons were called to testify. They were Mrs Julia Wood, a former member in the Attorney-General's Office and the law officer to whom the draft agreement between the Government and the International Black Rhino Foundation had been submitted, and Professor Marshall Murphree, the Chairman of the Parks and Wild Life Board. The State's witness was Detective Inspector Mukonho. His evidence added nothing of any relevance to the information already before the magistrate.

In his address, and without in any way withdrawing the request for referral, defence counsel urged that the allegations contained in the "Request for Remand" form, taken in conjunction with the unchallenged *viva voce* evidence, not merely failed to establish a reasonable suspicion of the applicant having committed the offence charged, but did not disclose the offence itself. The prosecutor, on the other hand, argued that the facts alleged were such as to give grounds for a suspicion, that was reasonable, that the applicant had committed the offence on which it was sought to place him on remand, assuming those facts to be capable of proof.

The nature of the addresses may well have misled the magistrate, for he proceeded to rule on whether the applicant was to be placed on remand. Defence counsel then interposed and pointed out that the magistrate was obliged to comply with the request made and refer the question to the Supreme Court. The prosecutor was non-committal. Thereupon the magistrate adjourned the proceedings for closer examination of the matter.

Two days later, on the morning of 8 January 1993, the magistrate delivered a prepared judgment in which he held that as, on the facts alleged, the State had established a reasonable suspicion of the applicant having committed the offence charged, the request for referral was "merely frivolous and vexatious". Consequently it was to be denied and the applicant remanded pending trial.

Faced with the request to refer the question raised on the applicant's behalf to the Supreme Court, the magistrate had no option but to act in accordance therewith, unless of the opinion

that the question was, as characterised in s 24(2) of the Constitution, "merely frivolous or vexatious". In order to be

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satisfied that it was not, he obviously had to consider, to some extent, the merits of the argument. But it did not necessarily follow, as he assumed to be the case, that since in his judgment the facts alleged gave grounds for a reasonable suspicion that the applicant had committed the offence charged, the contrary submissions advanced by defence counsel in support of the request for referral were frivolous or vexatious. In reality, as I later endeavour to show, the request made was far from frivolous or vexatious. It was simply not sufficient for the magistrate to deny it because of the view he took as to the existence of a reasonable suspicion.

In the context of s 24(2), the word "frivolous" connotes, in its ordinary and natural meaning, the raising of a question marked by a lack of seriousness; one inconsistent with logic and good sense, and clearly so groundless and devoid of merit that a prudent person could not possibly expect to obtain relief from it. The word "vexatious", in contra-distinction, is used in the sense of the question being put forward for the purpose of causing annoyance to the opposing party, in the full appreciation that it cannot succeed; it is not raised *bona fide*, and a referral would be to permit the opponent to be vexed under a form of legal process that was baseless. See *Young v Holloway & Anor* [1895] P 87 at 90-91; *Dyson v Attorney-General* [1911] 1 KB 410 (CA) at 418; *Norman v Mathews* (1916) 85 LJKB 857 at 859; *S v Cooper & Ors* 1977 (3) SA 475 (T) at 476D-G; *Fisheries Development Corporation of SA Ltd v Jorgensen & Anor* 1979 (3) SA 1331 (W) at 1339E-F.

To my mind, the purpose of the descriptive phrase is to reserve to subordinate courts the power to prevent a referral of a question which would amount to an abuse of the process of the Supreme Court.

It was this unfortunate misconception by the magistrate that was relied upon by Mr *de Bourbon* as justification for bringing the application under s 24(1) of the Constitution. That enactment allows a person who alleges a contravention of the Declaration of Rights to approach the Supreme Court for redress. The right is subject to the provisions of s 24(3).

I am in agreement with counsel that the magistrate's wrongful refusal to refer the question raised violated the applicant's entitlement, granted under s 18(1) of the Constitution, "to the protection of the law" - "law" being defined in s 113 as including "any provision of this Constitution". In other words, the magistrate breached the protective right afforded the applicant by s 24(2) to have access to the Supreme Court. Furthermore, the magistrate's consequential order that the applicant surrender his passport as one of the conditions of

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being remanded out of custody, amounted to a deprivation of the applicant's rights under s

22(1) of the Constitution, to leave and re-enter Zimbabwe.

Mrs Zindi, for the Attorney-General, contended that, as the applicant had been advised on 5 January 1993 that it was the intention of the State to place him on remand, and since it was his belief that such action would contravene s 13(2)(e) of the Constitution, he ought to have applied directly to the Supreme Court for redress. True, that option was open to the applicant, although the time available would have made its pursuit somewhat impracticable. I cannot, however, accept the suggested corollary that, having decided to request a referral in terms of s 24(2) - a proper course to take as indicated in *In re Mlambo* 1991 (2) ZLR 339 (S) at 343D-E - once the magistrate held that the question raised in the proceedings before him was "merely frivolous or vexatious", the applicant lost his right to seek redress from the Supreme Court (albeit that the ruling was based upon a misunderstanding of the meaning of the phrase); and that the only remedy available to him lay under s 24(3), namely, to raise the question on appeal from the determination of the magistrate in those proceedings.

The fallacy of the contention is self-evident. Suppose that a judicial officer, solely due to animosity towards an accused, in bad faith and without any warrant, were to rule that the question raised by him was frivolous or vexatious and so order his remand in custody pending trial. Could it then be said that the accused was only entitled to approach the Supreme Court for relief under s 24(3)? I think not. Such action by the judicial officer concerned would, as mentioned before, itself constitute an infringement of the accused's entitlement to the protection of the law. Moreover, and most importantly, since at the conclusion of any remand proceedings there is no right of appeal, no remedy under s 24(3) would be available to that accused.

On the other hand, if a judicial officer, after applying conscientious and objective thought to the question raised in the proceedings before him, were to express the opinion that it was frivolous or vexatious, the requesting party would, in consequence, have no *locus standi* to apply to the Supreme Court for redress under s 24(1). He would only be entitled, if an appeal lay from the determination of the proceedings, to raise the question in reliance upon the provisions of s 24(3).

For these reasons I am satisfied that the present application was correctly brought under s 24(1) of the Constitution. The order made by the magistrate was, in the particular circumstances, beyond his jurisdiction. This court must

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now place itself in the position it would have been in had the magistrate, as he ought to have done, referred to it the question raised before him.

It is the entitlement of every individual to challenge the power and right of the State to place him on remand. This he does upon a submission that insufficient facts have been alleged to enable the court to objectively find the existence of a reasonable suspicion of his having committed, or being about to commit, a criminal offence, thereby justifying the deprivation of his personal liberty under s 13(2)(e) of the Constitution. He may adduce evidence, as the applicant did, designed to demolish, clarify or weaken, the facts alleged by the State. The test to be applied is

the same as that for arrest without warrant. It does not require the firm resolution of conflicting evidence that guilt beyond a reasonable doubt demands, nor even a preponderance of probability. Certainty as to the truth is not involved, for otherwise it ceases to become suspicion and becomes fact. Suspicion, by definition, is a state of conjecture or surmise whereof proof is lacking. See *Attorney-General v Blumears & Anor* 1991 (1) ZLR 118 (S) at 122B-C; *S v Ganyu* 1977 (2) RLR 97 (AD) at 104F.

In order to determine whether the facts alleged by the State, and amplified by the evidence, ground a reasonable suspicion that the applicant contravened s 3(1)(f) of the Prevention of Corruption Act, it is necessary at the outset to have regard to, and appreciate, the elements of this particular offence. They are -

- (a) that an agent
- (b) with intent to deceive his principal, or
- (c) with intent to obtain a gift or consideration for himself or any other person
- (d) fails to disclose to his principal the full nature of any transaction carried out in connection with his principal's affairs or business.

The State undoubtedly alleged that the applicant was an agent and also that, prior to the conclusion of the agreement between the Government and the International Black Rhino Foundation, he had obtained, or was in the process of obtaining, a gift of a motor vehicle from Ingrid Schroeder, a representative of the Foundation. But were any facts alleged that pertained to a failure by the applicant to disclose to his principal, the Director of the Department of

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National Parks and Wild Life Management, the full nature of the transaction carried out in connection with his principal's affairs or business? For it was that that constituted the *actus reus* of the offence.

The approach of the magistrate, and the prosecutor, was that the essence of the offence was the applicant's failure to disclose his receipt of the gift. In this they misinterpreted the purport of s 3(1)(f). The obtaining of a gift relates to the element of *mens rea* and forms no part of the *actus reus*. This is made abundantly clear by s 15(2)(d) of the Act, which provides that, upon proof that the agent failed to disclose to his principal the full nature of the transaction carried out in the course of his agency, it shall be presumed that he did so "with intent to deceive his principal and to obtain a gift or consideration for himself or for any other person". If, therefore, the *actus reus* is not proved, the presumption does not arise and the obtaining of the gift becomes an irrelevant factor; the necessary link is missing.

What aspect of the transaction carried out in connection with his principal's affairs was it alleged that the applicant failed to disclose? The "Request for Remand" form merely stated that the applicant "was responsible for re-drafting the memorandum of agreement which was finally signed ...". There was no allegation that in doing so he failed to disclose something to his

principal. Furthermore, the undisputed evidence adduced on behalf of the applicant revealed that during October 1990 a draft of the agreement was sent to the office of the Attorney-General, and was referred to Mrs Wood. After seeking the approval of the Director of Legal Advice, she consulted the applicant with regard to a clause relating to the return of progeny of the translocated rhino. In the event, she re-drafted that clause. The revised agreement was then examined by the Public Agreements Advisory Committee, which is chaired by the Chief Law Officer attached to the International Law Section. On 2 September 1991, and after the agreement had been scrutinised by many persons, the members of the Parks and Wild Life Board under their Chairman, Professor Murphree, approved it and recommended its immediate conclusion by the Minister of Environment and Tourism. He signed it on 6 September 1991. Subsequently, on 20 November 1991 the Board re-endorsed its support for the agreement.

I entertain no doubt that the facts presented to the magistrate, and on record before this court, do not amount to a contravention of s 3(1)(f) of the Prevention of Corruption Act. Thus, the issue of the existence of a reasonable suspicion of the applicant having committed that offence does not arise. What is alleged against him falls short of constituting it.

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The application succeeds and, in conformity with the decision in *Bull v Attorney-General & Anor* 1987 (1) ZLR 36 (S), carries with it an order for costs against the respondents.

For the sake of clarity, it is declared that the remand on bail of the applicant on 8 January 1993 was in contravention of s 13(1) of the Constitution of Zimbabwe.

McNally JA: I agree.

Korsah JA: I agree.

Ebrahim JA: I agree.

Sandura AJA: I agree.

Atherstone & Cook, applicant's legal practitioners

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VICE-CHANCELLOR, UNIVERSITY OF ZIMBABWE & ANOR v MUTASAH & ANOR 1993 (1) ZLR 162 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

26 March & 27 April 1993

Flynote

Administrative law - disciplinary proceedings against University student reviewable - irregularities in proceedings - failure to follow provisions of Ordinance governing proceedings by denying student legal representation

Constitutional law - whether the denial of legal representation in disciplinary proceedings would violate s 18 of the Constitution

Headnote

Three students at the University of Zimbabwe were expelled by the Vice - Chancellor on the recommendation of the Student Disciplinary Committee. These expulsions were then ratified by the University Council.

The students applied to the High Court for the setting aside of the disciplinary proceedings on the grounds of gross procedural irregularities. The High Court granted this application.

The University authorities then appealed against the High Court decision. It was argued on behalf of the appellants that the entire disciplinary process against students at a university was a purely domestic matter which was not amenable to review by the courts. It was also argued that the Student Disciplinary Committee acted simply as an investigatory body which made recommendations and that therefore its proceedings were not reviewable. Finally, it was argued that if these proceedings were subject to review, there had been no irregularities in the proceedings.

Held, that university disciplinary proceedings were reviewable by the courts,

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both in terms of s 27 of the High Court of Zimbabwe Act 1981 and under common law.

Held, further, that it had yet to be decided by the Supreme Court whether the proceedings of an investigatory body is subject to review, but that, in any case, the Student Disciplinary Committee is not merely an investigatory body but is obliged to make positive findings as to the guilt or innocence of students.

Held, further, that although the University of Zimbabwe Act, as amended, no longer expressly grants the right to be legally represented as it did before the amendments, Ordinance 30 passed by the University Council still governed the way in which student conduct and discipline is to be regulated and the provisions of this Ordinance give a student charged with a disciplinary offence before the Student Disciplinary Committee the right to be legally represented.

Held, further, that the removal of an existing right has to be done expressly and not indirectly and the amendments to the University of Zimbabwe Act did not expressly remove this right.

Held, further that by leaving intact the provisions in Ordinance 30 providing for such a right, it had to be assumed that the University intended that there would continue to be a right to legal

representation.

Held, therefore, that by refusing to allow the students to be legally represented before the Student Disciplinary Committee, there had been a gross irregularity such as to necessitate the setting aside of these proceedings.

Held, obiter, that while it remained to be decided whether a provision purporting to remove the right to legal representation before a disciplinary tribunal violates s 18(9) of the Constitution, there was much to be said for the view that where an individual's career is at stake before a tribunal he may be entitled as of right, by reason of natural justice, to legal representation if he so wishes.

Cases cited:

In re Mlambo 1991 (2) ZLR 339 (S)

Fikilini v A-G 1990 (1) ZLR 105 (S)

Thorne v Univ of London [1966] 2 All ER 338 (CA)

Herring v Templeman [1973] 2 All ER 581 (Ch)

Patel v Univ of Bradford Senate & Ors [1978] 3 All ER 841 (Ch)

Thomas v Univ of Bradford [1987] 1 All ER 834 (HL)

Page v Hull Univ Visitor [1993] 1 All ER 97 (HL)

Philips v Bury [1694] Holt KB 715; 90 ER 1294

PF-Zapu v Min of Justice (2) 1985 (1) ZLR 305 (S)

S v Delta Consol (Pvt) Ltd & Ors 1991 (2) ZLR 234 (S)

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Assd Provincial Picture House Ltd v Wednesbury Corp [1947] 2 All ER 680

Anisminic Ltd v Foreign Compensation Comm [1969] 1 All ER 208

O'Reilly v Mackman [1982] 3 All ER 1124

CCSU v Min for the Civil Service [1984] 3 All ER 935

Ngurube v Sec of the Commission of Enquiry HH-158-86

Ngurube v Sec of the Commission of Enquiry 1988 (1) ZLR 244 (S)

Bell v van Rensburg NO 1971 (3) SA 693 (C)

Blackmore v Moodies GM & Exploration Co Ltd 1917 AD 402

Chairman, PSC v Hall S-49-89

Metsola v Chrmn, PSC & Anor 1989 (3) ZLR 147 (S)

Mutare, City of v Mlambo 1992 (1) ZLR 17 (S)

Chrmn, PSC & Anor v Marumahoko 1992 (1) ZLR 304

AP de Bourbon SC for the appellants

SV Hwacha for the respondents

Judgment

McNally JA: The three respondents ("the students") were at the University of Zimbabwe and office-holders in the Students Representative Council in 1992. They were expelled on 30 September 1992 by the Vice - Chancellor on the recommendation of the Student Disciplinary Committee ("the SDC"). The expulsions were ratified by the Council.

The students applied to the High Court for relief in November 1992. They asked that the disciplinary proceedings of the SDC be declared invalid or set aside; that their expulsion be declared invalid or set aside; that the ratification of their expulsions by the Council be set aside; and that their costs be paid by the respondents jointly and severally.

The matter was heard on 13 January 1993 and on 22 January 1993 GIBSON J gave judgment in favour of the students. Her Ladyship declined to make a declaratory order but she set aside the proceedings, the expulsions and the ratification thereof with costs as prayed.

The University authorities (to use a convenient collective term) appealed. A number of points were taken on appeal, but not all were argued before us by Mr *de Bourbon* when the matter was heard on 26 March 1993. Specifically, he abandoned the submissions based on *lis alibi pendens* and *res judicata*.

The submissions before us related to the following contentions:

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1. The respondents had no right in law to bring the proceedings of the first, second or third appellants on review: such proceedings are not subject to common law review by the courts;
2. The learned judge erred in holding that the composition and the proceedings of the SDC were *ultra vires* the provisions of the University of Zimbabwe Act 1982 ("the Act");
3. The learned judge erred in finding that the proceedings of the SDC had to be in terms of

Ordinance 30. She ought to have held that Ordinance 30 must be read as amended by the University of Zimbabwe Amendment Act 1990 ("the Amendment Act");

4. The learned judge erred in finding that the students were entitled to legal representation during the proceedings of the SDC;
5. The learned judge erred in holding that the students had a legitimate expectation of being granted legal representation at the hearing of the SDC;
6. The learned judge erred in failing to find that the students had been accorded the audience envisaged by s 23(5) of the Act, as amended, and had no further rights than those granted to them in terms of the statute; and
7. The learned judge erred in any event in making an award of costs against the third appellant (the Council).

Are the University's Disciplinary Proceedings not reviewable by the courts?

Zimbabwe's Constitution contains a Declaration of Rights. In terms of s 18(1) of the Constitution every person is entitled to the protection of the law. In terms of s 24 the Supreme Court is vested with the authority to enforce the protective provisions of the Declaration of Rights. See *In re Mlambo* 1991 (2) ZLR 339 (S) at 355B-C.

In terms of s 26 of the High Court of Zimbabwe Act 29 of 1981, the High Court:

"... shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe."

Section 27 allows intervention on various grounds including "gross irregularity

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in the proceedings or the decision". Section 28 allows the court to set aside or correct the proceedings or decision. See *Fikilini v Attorney-General* 1990 (1) ZLR 105 (S) at 109.

The same powers of review are vested in the Supreme Court and every judge of the Supreme Court by s 23 of the Supreme Court of Zimbabwe Act 28 of 1981.

In drawing attention to these constitutional and statutory provisions, I do not mean to concede that the Supreme Court and the High Court do not have inherent jurisdiction in these matters. It is unnecessary to go into that question because the constitutional and statutory provisions are so plain.

Against this background Mr *de Bourbon's* submission comes as something of a shock. One can understand that the courts might well be loath to intervene where, for instance, a student obtained a third class pass in philosophy when in his own opinion he should have passed in the second class. But to say that he may be expelled in consequence of proceedings which were grossly irregular, or by an authority which had no jurisdiction to expel him, or by an authority which was biased or corrupt, and that he has no recourse to the courts, is surprising. I should

add that these are hypothetical situations. I am simply using the language of s 27 of the High Court of Zimbabwe Act.

The authorities on which Mr *de Bourbon* relies for his submission are English authorities. He cites the following: *Thorne v University of London* [1966] 2 All ER 338 (CA); *Herring v Templeman & Ors* [1973] 2 All ER 581 (Ch); *Patel v University of Bradford Senate & Ors* [1978] 3 All ER 841 (Ch); *Thomas v University of Bradford* [1987] 1 All ER 834 (HL); *Page v Hull University Visitor* [1993] 1 All ER 97 (HL).

The exclusivity of the jurisdiction of a University Visitor dates from the decision of HOLT CJ in *Philips v Bury* (1694) Holt KB 715; 90 ER 1294. But the institution of Visitor is a peculiarly English one. Not all English Universities have Visitors. Where they do, the Visitor is a representative of the original founder. LORD BROWNE-WILKINSON in *Page's case supra* said, at p 106c, that:

"... the visitor of an eleemosynary charity (i.e. one dependent on alms) has an exclusive jurisdiction to determine what are the internal laws of the charity and the proper application of those laws to those within his jurisdiction. The court's inability to determine those matters is not

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limited to the period pending the visitor's determination but extends so as to prohibit any subsequent review by the court of the correctness of a decision made by a visitor **acting within his jurisdiction and in accordance with the rules of natural justice** (my emphasis).

This inability of the court to intervene is founded on the fact that the applicable law is not the common law of England but a peculiar or domestic law of which the visitor is the sole judge. This special status of a visitor springs from the common law recognising the right of the founder to lay down such a special law subject to adjudication only by a special judge, the visitor."

His Lordship then went on to hold, at p 109 *in fine*, that:

"I have therefore reached the conclusion that judicial review does not lie to impeach the decisions of a visitor taken within his jurisdiction (in the narrow sense) on questions of either fact or law. Judicial review does lie to the visitor in cases where he has acted outside his jurisdiction (in the narrow sense) or abused his powers or acted in breach of the rules of natural justice."

A minority of those involved in the decision in that case (LORD MUSTILL and LORD SLYNN OF HADLEY) did not agree with the conclusion that a Visitor's decision could not be reviewed for error of law. There is much to be said for the minority view, which is to be found in the speech of LORD SLYNN. But it is unnecessary for our purposes to enter into that controversy.

I am content to rely on the second part of LORD BROWNE-WILKINSON *dictum* quoted above. He virtually paraphrases the words of s 27 of our High Court of Zimbabwe Act.

Thus, even if it were to be accepted that the Vice - Chancellor and the Council of the University of Zimbabwe are analogous to the English University Visitor, their decisions would be reviewable by the courts on the grounds stated.

But plainly they are not analogous. It is evident that a Visitor is a person or personage external

to the University, someone with a quasi-judicial status who is in a position to adjudicate upon disputes between the University authorities on the one hand and the students and/or staff on the other. How can the Council or the Vice - Chancellor be judges in their own cause, if it be

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alleged that they have conducted themselves with gross irregularity, or acted beyond their jurisdiction, or come to a conclusion by bias and corruption? There must be some authority above them, and, if there is no Visitor, it must be the courts.

I am satisfied, therefore, that there is no question of any ouster of the jurisdiction of the High Court where a review is sought of the actions of the University authorities on any of the grounds of review set out in s 27 of the High Court of Zimbabwe Act.

I am further of the view that the limitations imposed by the English law on the full application of review powers to the decision of a University Visitor are not relevant in the case of the University of Zimbabwe because there is no-one in the position of a Visitor to that University.

The powers of review of the courts of Zimbabwe in this case are those powers elaborated in a line of decisions from *PF-ZAPU v Minister of Justice* (2) 1985 (1) ZLR 305 (S) to *S v Delta Consolidated (Pvt) Ltd & Ors* 1991 (2) ZLR 234 (S). They are based on the English decisions in that well-known series of cases - *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680; *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208; *O'Reilly v Mackman* [1982] 3 All ER 1124; *CCSU v Minister for the Civil Service* [1984] 3 All ER 935 at 950.

Mr *de Bourbon* then took the point that the proceedings of the SDC were not reviewable because they involved merely investigation and recommendation. For this proposition he relied upon *Nguruve v Secretary of the Commission of Enquiry* HH-158-86. It may be noted that that particular finding was specifically left open when the matter came on appeal - see *Nguruve v Secretary of the Commission of Enquiry* 1988 (1) ZLR 244 (S) at 250 *in fine*.

The fact is, however, that the SDC was not "merely charged with investigation and recommendation". In terms of s 23(4) of the Act, as amended by Act 21 of 1990:

"The functions of the Student Disciplinary Committee shall be to investigate any breach of a Statute, Regulation or Ordinance or other misconduct on the part of any student and, subject to subsection (6), to recommend to the Vice - Chancellor the punishment to be imposed on the student if it finds him guilty of such misconduct" (my emphasis).

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And subs (6) goes on to say:

"Where the Student Disciplinary Committee has found a student guilty of misconduct ...".

These sections must be read together with s 8(4) of the amended Act, which provides:

"The Vice-Chancellor shall not expel a student for misconduct unless the student has been found guilty of that misconduct by the Student Disciplinary Committee in terms of section twenty-three."

So in fact the SDC is required to make a finding as to guilt, and a positive finding is a prerequisite to expulsion. This is far more than mere investigation and recommendation. Compare *Bell v van Rensburg* NO 1971 (3) SA 693 (C). A positive and important finding as to guilt or innocence has to be made. Unless there is a finding of guilt the Vice - Chancellor may not expel on the ground of misconduct. Such a finding is undoubtedly subject to review. The principles of natural justice must apply - see *Bell's case supra* at 729 (in translation at 531-2).

Were the proceedings of the Student Disciplinary Committee grossly irregular so as to warrant interference on review?

There seems to have been a fundamental misunderstanding of the effect of the amending statute (Act 21 of 1990) on the University Ordinance governing disciplinary proceedings. In order to make this clear, it is necessary to go into a little detail.

1. In terms of the Act (No. 27 of 1982) the University, through its Council, was empowered in s 27 to:

"... make Ordinances providing for ...

- (c) the proceedings of any committee or board created in terms of this Act or the Statutes or the Regulations ... and
- (i) the control of the conduct of students and their discipline;"

2. In terms of s 23(3) of the same Act:

"The student charged shall have a right of audience and a right to be represented by a registered legal practitioner before the Student Disciplinary Committee."

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3. The Council did enact an Ordinance (Ordinance 30) in 1984 which was entitled "The Rules of Student Conduct and Discipline Ordinance 1984". This document contained within it a s 8 entitled "Rules of Procedure in Disciplinary Proceedings before the Student Disciplinary Committee". This s 8 set out the student's rights. In particular s 8.4.6. provided that the notice to the student summoning him/her to appear before the Committee shall advise him/her of:

"6. His/her right to be accompanied and represented before the Committee by a legal practitioner."

4. The Amendment Act repealed s 23 of the Act and the former s 23(3) set out above was replaced by a new s 23(5) which read:

"A student charged with misconduct referred to in subsection (4) shall have a right of audience before the Student Disciplinary Committee."

5. No alteration was made at any relevant stage to the provisions of Ordinance 30. Whether this was deliberate, because of the intense debate sparked off by the Amendment Act, or whether it was simply inadvertent, is not known. The Amendment Act came into effect on 21 December 1990 and the proceedings against the students started in June 1992, so there was plenty of time for the Ordinance to be amended or repealed. The fact that it was not amended or repealed therefore assumes greater significance.

What, then, was the effect of the Amendment Act upon Ordinance 30?

Mr *de Bourbon*'s submission was that s 8 of Ordinance 30 was drafted to meet the requirements of the old s 23 of the Act. The clear intention of Parliament in 1990 was to take away from the Council the need to prescribe the procedure in the SDC. Thus s 8 of Ordinance 30 must be deemed to have been repealed on the promulgation of the Amendment Act in 1990.

Alternatively, Mr *de Bourbon* submitted that s 8 of Ordinance 30 must be read as having been modified by the Amendment Act, and in particular the right to legal representation has been specifically removed.

Mr *Hwacha* contends that neither the old nor the new sections 23 prescribe the procedures to be followed. The only legal instrument which does do so is Ordinance 30. Ordinance 30 has not been expressly repealed or altered. It

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remains in force. The provisions of s 27 of the Act under which it was made have not been altered. The Amendment Act does not forbid legal representation as does, for example, the recently enacted Small Claims Court Act 20 of 1992 in s 6. There was therefore no reason why the University should not adhere to its previous practice despite the fact that it was no longer statutorily required to do so.

It seems to me that two questions arise. Did Ordinance 30 govern the procedures of the SDC and the rights of the students? And did the students have a right to legal representation under Ordinance 30? I will deal with them in turn.

Did Ordinance 30 govern the procedures of the SDC and the rights of the students?

There can be no doubt that s 27 of the Act, which remains unamended, provides for the making of Ordinances by the Council to regulate the proceedings of committees and the control of the conduct of students and their discipline.

Ordinance 30 was made in terms of that provision. It has not been amended or repealed. The procedure for the making, amending and repealing of Ordinances is set out in s 27(2), as read with s 26(2) of the Act.

Therefore Ordinance 30 remains as the document governing the way in which student conduct and discipline at the University is regulated. I do not accept Mr *de Bourbon*'s submission that the Amendment Act makes it unnecessary for the Council to lay down the procedures by Ordinance, but even if he is correct the fact remains that the Council has laid down the

procedures and has not amended or repealed them.

The Amendment Act of 1990 did not amend the Ordinance. It amended the Act. However, it is true that the Ordinance contains numerous references to the Act. Clearly, therefore, where the Amendment Act is inconsistent with the Ordinance there may be an argument that the provisions of the Ordinance must give way to the provisions of the legislation.

But one must be careful about what one means by "inconsistent". The Ordinance is not inconsistent with the Act simply because the Ordinance allows legal representation, whereas the Act provides only that the student is entitled to a right of audience.

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The Amendment Act does not forbid legal representation. All that one can say is that the Act, as amended, does not expressly grant to a student appearing before the SDC the right of legal representation. There is no reason at all why the University should not, in its wisdom, allow that right. If the student has a right under the Ordinance to legal representation, and it is the Ordinance which governs his rights, what does it matter that the Act is silent on the matter?

It is quite evident from a study of the record of the proceedings that the SDC as originally constituted recognised, albeit somewhat hesitantly, that Ordinance 30 governed its proceedings. It was the re-constituted SDC, meeting from 20 July 1992 onwards, which fell into the error of believing that because it was "established under the University Amendment Act of 1990" it could ignore the provisions of Ordinance 30.

Did the students have a right to legal representation under Ordinance 30?

The relevant sections of the Ordinance are 8.1 and 8.4.

Section 8.1 does not speak directly of the right of legal representation. It sets out a number of specific rights, but says that this is done:

"... with no derogation of his/her rights in terms of s 23(3) of the University Act ..."

This is the section of the Act which, at the time, provided specifically that the student had both a right of audience and a right to legal representation. Now the equivalent section (s 23(5)) of the Act, as amended, specifies only the right of audience. Therefore, submits Mr *de Bourbon*, the right to legal representation is no longer protected by s 8.1 of the Ordinance.

I do not accept that submission in that stark form.

It must be noted that s 8.1 begins with a general statement that:

"The Chairman of the Committee shall regulate proceedings in a manner as simple and informal as possible which is, notwithstanding, best fitted to do substantial justice and at all times in accord with the principles of natural justice."

It then continues with the phrase "More particularly ... and with no derogation of his/her rights in terms of s 23(3) of the University Act" to list certain specific rights.

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The point about this formulation is that even if the Legislature decided to omit any reference to the right of legal representation, the University is still bound to proceed "in accord with the principles of natural justice". It would be reasonable for the University to consider that it would be in accord with the principles of natural justice to allow legal representation, particularly to students facing expulsion and the premature termination of their University careers. In fact that is precisely what the original SDC meeting on 26 June 1992 agreed to recommend.

I prefer to say, therefore, that the right to legal representation is no longer **expressly** protected by the provisions of s 8.1 of Ordinance 30.

However, the reference to legal representation in s 8.4 remains unaltered. In terms of that section the notice to a student summoning him/her to appear before the SDC for investigation **shall** be contained in a letter addressed to him/her and advising him/her of, inter alia:

"... his/her right to be accompanied and represented before the Committee by a legal practitioner".

But, says Mr *de Bourbon*, that refers to the right contained in the unamended Act. Now that the right is no longer in the Act, the provisions of s 8.4.6 are meaningless. There is no longer a right. Therefore there is no need to advise the student of the right. Therefore s 8.4.6. must be taken *pro non scripto*.

Not so, says Mr *Hwacha*. The situation is, at worst for his clients, ambiguous. The interpretation which favours the preservation of existing rights is therefore to be preferred. He cites *Blackmore v Moodies GM & Exploration Co Ltd* 1917 AD 402 at 416-417. A most telling citation from that case is to be found at p 404 where WESSELS J, in the court below, spoke of:

"... an essential principle of our law, viz that no man's rights shall be indirectly taken away from him without even mention being made that he is deprived of those rights."

At p 408 GREGOROWSKI J is recorded as saying:

"The principle is quite clear that one must not read a law in such a way as to confiscate rights when it can be quite well read so as to preserve those rights."

It must be steadily borne in mind that we are interpreting the Ordinance not the Act. The Act in any event is colourless. It neither grants nor denies

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the right to legal representation. We look at the Ordinance and we see that when it was drafted it recognised both the requirements of natural justice and the entitlement to legal representation as specified in the Act. It provided specifically that the student be advised of his/her right to legal representation. Whether that right arose from the statute or from the dictates of natural justice, or from both, is not specified.

When the Act was amended so as to omit reference to the right to legal representation, one finds that for eighteen months - and indeed as far as we know the position is still unchanged - the Ordinance remained unamended. It still referred to the student's right to legal representation. Why should we assume, in those circumstances, that the University intended to deprive the students of that right? The intention of the University in this respect is the intention of the Council as expressed through its Ordinances. The Ordinance never changed. Why then assume that the intention changed?

Whether one interprets *in favorem libertatis*, or *contra proferentem*, the result must be the same. One must assume that the Council, recognising the demands of natural justice, decided against any amendment to the Ordinance, because it did not wish to deprive the students of the right to legal representation, despite the opportunity to do so which was provided by the amendment to the legislation. It was not for the Chairman of the SDC to amend the Ordinance. Nor indeed was it for the Legislature to do so. It was the function of the Council to do so. And it did not do so.

If the Council had wished to amend its Ordinance it could have done so quite simply by deleting s 8.4.6. Whether this court would have upheld that deletion in the light of s 18(9) of the Constitution is another matter. It is not necessary now to decide it because, in my view, the Ordinance still recognises the right to legal representation.

I would simply say that in a series of cases - *Chairman, Public Service Commission v Hall* S-49-89; *Metsola v Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S) at 158A; *City of Mutare v Mlambo* S- 229-91 at pp 5-6; and *Chairman, Public Service Commission & Anor v Marumahoko* 1992 (1) ZLR 304 at p 314 - this court has suggested, without deciding the point, that there is much to be said for the view that where an individual's career is at stake before a tribunal he may be entitled as of right, by reason of natural justice, to legal representation if he so wishes.

I conclude therefore that there was gross irregularity in the proceedings

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before the Student Disciplinary Committee in the denial of legal representation to students facing possible expulsion. The irregularity arose from the failure of the Committee, the second appellant, to appreciate -

- a. That Ordinance 30 governed the procedure of the Committee insofar as it was not inconsistent with the Act;
- b. That Ordinance 30 recognised the right of the students to legal representation;
- c. That to deny the students that right in the face of their specific request was seriously prejudicial to their rights and a gross procedural defect; and
- d. That to allow their legal representative to be present without any right of participation was not compliance with the Ordinance.

On that ground alone I would dismiss the appeal. That is not to say there is no merit in the other

points raised by the students. Nor is this a judgment on the merits or demerits of what the students are alleged to have done. That question was not before us.

As far as costs are concerned, the only point taken by Mr de *Bourbon* was that no finding was made against the third appellant and therefore there should not have been an order of costs against him.

But in fact the third appellant was a relevant party, since his Council ratified the decision to expel. Moreover, his ratification was set aside by the court *a quo* so to that extent an order was made against him. And, of course, his Council enacted Ordinance 30. In any event, all three parties were cited *nomine officii* and so presumably the costs of the respondents will be paid by the University.

In the circumstances the appeal is dismissed with costs against the three appellants jointly and severally, the one paying the others to be absolved.

Gubbay CJ: I agree.

Korsah JA: I agree.

Scanlen & Holderness, appellants' legal practitioners

Kantor & Immerman, respondents' legal practitioners

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MUTETWA v MUTETWA 1993 (1) ZLR 176 (SC)

Court High Court, Harare

Adam J

Opposed application

29 October 1992 & 28 April 1993

Flynote

Family law - child - custody - separation of parents - sole custody vested in mother unless father proves that it would be in child's best interests that custody be awarded to him - Guardianship of Minors Act [Chapter 34], ss 3 and 4

Headnote

Under the common law, a father had guardianship of his minor children and was *prima facie* entitled to their custody. The guilt or innocence of the parties to a divorce was also a relevant factor, where it was not clear what was best for the children. Over the years, though, this situation was eroded, and the interests of the child were seen as the paramount consideration. The legislature intervened, in the form of the Guardianship of Minors Act [Chapter 34]. The effect of that Act is that, on separation, the father's superior rights have been completely altered:

the wife exercises, subject to the provisions of the Act, sole custody of the minor children of the marriage. This custody may only be temporary, as the father can apply for and obtain an order under the Act regulating the custody of the children. Until he brings such an application and can show (the *onus* being on him) that it would be in the best interests of the children that he should have custody, the mother is entitled to custody. That entitlement is not defeated, delayed or postponed by any *de facto* custody the father may have exercised before he brings his application.

Cases cited:

Lynch v Lynch & Anor 1964 (1) RLR 554 (G)

van Deijl v van Deijl 1966 RLR 424 (G)

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Ex p Walton 1969 (2) RLR 133 (G)

W v W 1981 ZLR 243 (A)

B v K 1983 (1) ZLR 212 (H)

van Rooyen v Werner (1892) 9 SC 425

Cronje v Cronje 1907 TS 871

Tabb v Tabb 1909 TS 1033

Kramarski v Kramarski & Ors 1906 TS 937

Cook v Cook 1937 AD 154

Calitz v Calitz 1939 AD 56

Milstein v Milstein 1943 TPD 227

Wille v Wille 1944 WLD 96

Dunsterville v Dunsterville 1946 NPD 594

Fletcher v Fletcher 1948 (1) SA 130 (A)

Kallie v Kallie 1947 SR 53

Fortune v Fortune 1955 (3) SA 348 (A)

Hassan v Hassan 1955 (4) SA 388 (N)

van Aswegen v van Aswegen 1954 (1) SA 496 (O)

Mashaoane v Mashaoane 1962 (1) SA 628 (D)

Mohaud v Mohaud 1964 (4) SA 348 (T)

The Firs Invtn Ltd v Levy Bros Ests (Pty) Ltd 1984 (2) SA 881 (A)

Sapukwanyanya v Sapukwanyanya S-180-88

MJ Gillespie for the applicant

JC Andersen SC for the respondent

Judgment

Adam J: The applicant was granted on 19 June 1992 a provisional order in case no. HC 3918/92, whereby the respondent husband was to show cause why a final order should not be made compelling him to allow the applicant to return to the matrimonial home and that he be bound over to keep the peace. That order also provided for a temporary interdict in similar terms. In case no. HC 6018/92, filed on 28 August 1992, the applicant seeks the custody of their two minor children. At the hearing of both matters the respondent was content for the applicant to remain in the matrimonial home pending the determination of the divorce proceedings in case no. HC 5443/92 filed on 7 August 1992 by him, while the applicant no longer seeks the binding over order. By consent this court ordered on 29 October 1992 that the applicant be allowed to remain in the matrimonial home pending the determination of the divorce proceedings in case no. HC 5443/92 and that the respondent pay the costs of the application in case no. HC 3918/92. Therefore, the only issue in this matter now pertains to the question of the custody of their two minor children.

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It was agreed between the parties that, after hearing full argument, this court reserve judgment for the filing of a report from CONNECT concerning the minor children and that, upon that being done, each party be entitled to file in writing supplementary submissions. That report by Mrs Norma Hall, Deputy Director/Therapist of CONNECT, was filed on 4 December 1992.

The parties were married on 4 September 1986 by Christian rites according to the laws of Zimbabwe and there are three minor children. The respondent denied paternity of the third child and the applicant agreed to have a blood test concerning this.

In the applicant's heads of argument, Mr *Gillespie* relies on s 4(1) of the Guardianship of Minors Act [*Chapter 34*] which provides that on separation the wife has statutory custody of the minor children. The statute also provides that this court may award custody to either parent; but until such time as the respondent, approaching with clean hands, successfully moves the court for such a custody award, however, the Act places the minor children in the applicant's custody. He submits that the respondent has made no such application but rather has flouted the law. He also argues that in the meantime the children suffer as they are separated from each other and from their mother and there is every reason to suppose they are being used against, and perhaps even indoctrinated against, their mother, and the two minor children must rely upon a maid for maternal attention which their mother is yearning to give and which they need. He

further submits that even in resisting this application the respondent has done nothing to prove, as the burden is upon him, that the applicant is unsuitable to have custody of their two minor children. He asserts that the respondent's case is that he is a medical doctor (which is scarcely germane) and that their minor children like their maid. He submits that even if it were true that Batsirai were showing some reluctance to be with the applicant, this would be a sign not of the fitness of the respondent to have custody but of the harm being done to the children by the present disruptive arrangements. Mr *Gillespie* maintains that no argument designed to preserve the status quo can prevail where such status quo is a continuing infringement of the Guardianship of Minors Act by the respondent and his failure to show the applicant as unfit to exercise custody of their minor children.

In the respondent's heads of argument Mr *Andersen* submits that the applicant is not entitled to the custody of the minor children as of right, despite the provisions of the Guardianship of Minors Act, which are subject to the overriding power of this court to order what is in the best interest of the

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children. He argues that the respondent has had the two minor children for a substantial period of time and that there is nothing to show that it would be contrary to the best interests of the minor children for the status quo to be preserved. He submits that the conflicts of facts between the parties are such that the matter should be referred to trial. He argues that there is ample authority that this court, as upper guardian of minor children, may make whatever order that may be proper as to custody despite the provisions of the Guardianship of Minors Act: *Lynch v Lynch & Anor* 1964 (1) RLR 554 (G); *van Deijl v van Deijl* 1966 RLR 424 (G); *Ex p Walton* 1969 (2) RLR 133 (G); *W v W* 1981 ZLR 243 (A) and *B v K* 1983 (1) ZLR 212 (H). He submits that, in the circumstances, the status quo, whereby the minor children are properly being looked after and to which they have been accustomed, should not be disrupted unless the court is satisfied that it would be in their best interests to do so, and that it will not be possible for the court to make a finding in this regard until oral evidence has been heard. Accordingly he requests that the dispute be reserved for determination in the divorce proceedings.

The position under Roman-Dutch Law originally was as set out in *van Rooyen v Werner* (1892) 9 SC 425. DE VILLIERS CJ said at p 428:

"In considering what the powers of parents are in this country at the present day, it should be remembered that they exercise those powers subject to the supervision of this court as the upper guardians of all minors. So long as the authority of parents is not abused ... their powers ... may be briefly summed up as follows : Firstly, as to the father, he is the natural guardian of his legitimate children until they attain majority. During his lifetime he alone may appoint tutors ... He alone is entitled to their custody, has control over their education and can consent to their marriage. On the other hand, he is bound to maintain them until they can maintain themselves. ... He has a right to administer their property, but he may lose this right by allowing them to live apart from him, and openly to exercise some trade or calling. Until they have thus been virtually emancipated, or until they became majors ... he has the management of their property, except such property as has been left to them by others and placed under different administration ...

Coming next to the mother, her rights of control over the person and property of her legitimate children do not

arise until after the death of the father."

But in *Cronje v Cronje* 1907 TS 871 at 872 SOLOMON J stated:

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"The father, as the natural guardian of the children, is by law entitled to their custody: but that of course, is subject to any order the court may make. I think it is clear that, by our law, where a decree of divorce is granted, the court has the widest discretion on making an order with regard to the custody of the children. The court may give the custody of the children to either the father or to the mother, even though he or she is the guilty party ... In all cases the main consideration for the court in making an order with regard to the custody of the children is, what is in the best interests of the children themselves."

Further, in *Tabb v Tabb* 1909 TS 1033 at 1034 INNES CJ said:

"By our law a father is the natural guardian of his children and therefore *prima facie* entitled to their custody, But that principle does not carry one very far in the circumstances of cases like the present because of the wide discretion allowed by law to courts in deciding questions of custody. And the guiding principle to be borne in mind is not what are the feelings of the parents, but what is best for the children. No doubt it is as a general rule best that children of tender years should be left under the care of their mother; because her love induces her to give that personal attention and supervision to their physical and moral welfare which a mother can most effectively supply. And therefore courts often give custody of children to mothers who have been found guilty of matrimonial offences, provided their character is not such as to make it prejudicial to the moral welfare of the children that they should remain with them."

Similarly in *Kramarski v Kramarski & Ors* 1906 TS 937 CURLEWIS J (as he then was) at 941-942 observed:

"*Prima facie* a husband is always entitled to the care and custody of his children, even though the marriage was celebrated out of this country. Though this court may not have jurisdiction in an action for divorce ..., I think the husband has a right at all times to come to the court, where his children are within the jurisdiction of the court and are withheld from him. But before the court will give an order to restore the children to the custody of the father, the court must be satisfied that they are being wrongfully withheld from the father, and that the circumstances are such that it is in best interests of the children that they should be with the husband and not the mother. In the present case the children are of tender years - there is no question of that; *prima facie*, therefore, as the court has more than once laid down, it is better for the children of tender years

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to be under the care of the mother, especially where the mother has a home."

However, in *Cook v Cook* 1937 AD 154 FEETHAM AJA referred to *Cronje v Cronje supra*, and *Tabb v Tabb supra*, and at p 162 approved the following passage of VAN DEN HEEVER J (as he then was), concerning custody of children of divorced parents in the lower court:

"It seems to me that the true Roman-Dutch rule is this: the innocent spouse will in general be entitled to custody of the children unless the court in its discretion and for good cause directs otherwise in the interests of the children. In exercising this discretion the court will not consider the interests of the children exclusively... I think that discretion should be exercised with due regard to the interests of the children as well as to the rights of the innocent spouse; all the circumstances of the case should be taken into consideration."

Also, in *Calitz v Calitz* 1939 AD 56 at 61 and 63 TINDALL JA said:

"No authorities were quoted which deal directly with a case like the present where the court deprived the innocent father of the custody although no divorce or separation had been granted. Save in cases where an order is made pending action, I know of no case where the court has given the custody of a child to a woman who has deserted her husband without justification. In *Kramarski v Kramarski* 1906 TS 937 the facts were peculiar...

Although the *patris potestas* of the Roman Law was not recognized in the Roman-Dutch Law and the parental power belongs to the mother as well as the father (Voet 1.6.3), there is no doubt that under our law, at any rate as it exists today in the Union, the rights of the father are superior to those of the mother...

The exact effect of granting 'the custody' of a minor to the mother has never been decided ... it certainly gives the mother sole control over the person and education of the minor ... In my judgment the court has no jurisdiction, where no divorce or separation authorising the separate home has been granted, to deprive the father of his custody except under the court's powers as upper guardian of all minors to interfere with the father's custody on special grounds, such for example as danger to the child's life, health or morals."

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But subsequently in *Milstein v Milstein* 1943 TPD 227, after considering *Cook v Cook supra*, *Cronje v Cronje supra* and *Tabb v Tabb supra*, GREENBERG JP said at pp 229-230:

"I venture to suggest that questions of fatherhood or innocence come into account only when it is not clear what is best for the children ... It may be when there is little to choose between the two parents from the point of view of the interests of the children, that these other considerations will have some weight ...

It is also equally clear that the guilt of one of the spouses may be relevant to the question of his or her fitness to have the custody but this is part of the question of the best interests of the children...

The point that I have to consider, therefore, in the first instance and perhaps the sole point is : in whose custody would the interests of the child, Marvin, be best served."

In *Wille v Wille* 1944 WLD 96 at 100 BARRY JP summarised the situation as follows:

"First of all, there is the case where there are no proceedings pending or contemplated; in which case the decision in *Calitz v Calitz* applies, and the husband has the prior rights to custody; then there is the case where matrimonial proceedings have been concluded, and the principles laid down in *Cook v Cook* must be applied, namely, that the father must not be deprived of the custody of the children, subject, of course, always to the interests of the children themselves; and lastly, there is the case where matrimonial proceedings are pending ... in such a case the principles to be applied were not the same as in either of the two cases, but required some modification ... in any application of this kind the court must look mainly to the interests of the children, at the same time not forgetting that, all things being equal, the husband is the one entitled in law to the custody of the child, and that frequent changes of custody are to be avoided.

Now, applying those principles to the admitted facts in the present case ... because I cannot decide on affidavit which version is the one which should be accepted; but there is the fact of the removal; there is the fact, the important fact, that these children are both of very tender years, and it has been frequently laid down in these courts that in such circumstances the children are to remain with their mother."

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In *Dunsterville v Dunsterville* 1946 NPD 594 at 596-597, a case of divorce because of the wife's

adultery, BROOME J (as he then was) stated:

"I do not regard Cook's case as questioning in any way what I have always understood to be the guiding principle or main consideration in these cases, viz, the welfare of the children themselves ... If the children's welfare - using that word in its widest sense and not confining it to mere physical well-being - will be equally safe-guarded with either parent, then considerations of guilt or innocence and of natural guardianship will tip the scale, but otherwise I do not think they carry any weight, though the question of guilt or innocence may have a bearing upon the question of welfare ...

There are, however, two considerations ... The first is the tender age of the children ... it is often said that the best person to look after young children is their mother. So far as mere physical well-being is concerned, I do not think this is a matter of any importance. Few mothers are capable of attending to the bodily needs of their offspring as efficiently as an institution-trained nurse. But that is not the end of the matter. Experience goes to show that a child needs both a father and a mother, and that, if he grows up without either, he will, to some extent, be psychologically handicapped. But the maternal link is forged earlier in the child's life than the paternal, and if not forged early may never be forged at all. The psychological need of a father, on the other hand, only arises later ...

As to the second consideration ... a child needs, from the earliest dawn of intelligence, a stable background, if it is to have the best prospect of developing a stable character. Changes of environment, unless they are unavoidable, are therefore to be deprecated, especially where they involve an interruption of intimate personal relationship."

Subsequently, in *Fletcher v Fletcher* 1948 (1) SA 130 (A) at 132 and 134, CENTLIVRES JA (as he then was) approved what GREENBERG JP held in *Milstein v Milstein supra* when he stated at 132 and 134:

"The ... quotation from the judgment of van den Heever J was discussed by GREENBERG JP ... and I am in agreement with his view that the case of *Cook v Cook* is not, when the facts of that case are carefully examined, authority for the proposition that when the evidence proves that the interests of the child will clearly be better served by its being in the custody of the one spouse, the court may give the custody to the other spouse because the latter is the innocent party ...

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The question, however, still remains as to the weight that should be attached to the fact that one spouse is innocent and the other guilty. I agree with the suggestion made by GREENBERG JP in *Milstein v Milstein (supra)* that the question of innocence comes into account when it is not clear what is best for the children."

SCHREINER JA said at pp 144-145:

"... law on the subject has grown away from the rules directed towards penalising the guilty spouse and towards a recognition of predominance of the interest of the children ...

The way to approach these problems was considered in the case of *Milstein v Milstein* 1943 TPD 227 by GREENBERG JP (as he then was). The language used in some of the cases referred to in Cook's case had suggested that in each case the factors of fatherhood, innocence and welfare of the children ought to be weighed, the one against the other, although they are so essentially different and unrelated as to make this process of balancing really impracticable. This difficulty could be avoided and the paramountcy of the welfare of the children be given effect most satisfactorily by holding that 'questions of fatherhood or innocence come into account only when it is not clear what is best for the children'."

In *Kallie v Kallie* 1947 SR 53 LEWIS J (as he then was), when dealing with malicious desertion of the defendant wife as it concerned custody, said at pp 57-58:

"Now the defendant is admittedly guilty of malicious desertion from the legal point of view. I do not consider,

however, in the circumstances of this case that defendant's desertion of him is so blameworthy that this factor should weigh heavily against her when I come to consider the difficult problem of deciding how best to deal with the dispute as to the custody of the child. Although the father, both as natural guardian and, in this case, as what is called in 'the innocent spouse' has prime claim to the custody of the child, the paramount consideration is what is best in the interests of the child. That question is usually determined by considering which of the spouses would best care, not only for the bodily well-being of the child, but which is best fitted to guide and control her moral, cultural and religious developments."

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The former situation, which held that the rights of the father to be superior to those of the mother and that on dissolution of the marriage the innocent spouse was entitled to custody of the minor children, had clearly been eroded over a number of years, in keeping with the changing moral attitudes and with the growth in the understanding of child development. *Milstein v Milstein supra*, approved in *Fletcher v Fletcher supra*, recognized that the best interests of the child are at all times the paramount consideration. In South Africa, s 5 of the Matrimonial Affairs Act 1953 provided that the court may, if it is proved that it would be in the best interests of the minor, grant either parent sole guardianship or sole custody. In *Fortune v Fortune* 1955 (3) SA 348 (A) at 353 SCHREINER JA explained the effect of that Act as follows:

"The courts have always had the power to give custody to one or other parent; the principles on which such orders should be made have come to us from the Roman-Dutch authorities and have been developed in modern decisions. The section was apparently designed to free the courts from limitations, which might at the present time be thought to exist at common law, on their freedom to treat the interests of the minor as the sole factor."

In this country the Guardianship of Minors Act 1961 had a similar provision in s 3(1) but it also provided in s 3(3) that where either of the parents leaves the other and commences to live apart, the mother shall have the sole custody of the minor.

In *Lynch v Lynch supra*, the husband had four days prior to the separation, without the consent of the wife, placed their minor child with the husband's parents with instructions that they should not hand the minor child to the wife. On an application by the wife, YOUNG J, in determining the function and limit of s 3(3) of that Act said at pp 557-559:

"Experience has revealed that the operation of the common law and the Children's Protection and Adoption Act was not always satisfactory. One difficulty was that on the break-up of the marriage, fathers would not always exercise their paramount rights of custody in the interests of the minor children but for other motives, and, before the court could intervene, a child's interests might suffer. It was because of this, presumably, that the legislature took the step of enacting s 3(3) of the Guardianship of Minors Act, which gives the mother the sole custody of the minor child until there is an order of the court to the contrary or until action is taken under the Children's Protection and Adoption Act. It was

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considered, no doubt, this provided the best solution of the problem, as generally speaking, the mother would be more closely associated with the child's day-to-day life than the father. The paramount right of the father to custody was, in the circumstances envisaged, replaced by the sole right of the mother to custody.

The question is then whether s 3(3) is to remove all discretion from the court, as upper guardian of the minor, to

modify the mother's right of custody pending an order under s 3(1) or action under the Children's Protection and Adoption Act...

Guardianship of minors is in the nature of a trust, and the court has for long now claimed the power to control the exercise of the incidents of guardianship by the guardian. The dominant matter for consideration has always been the welfare of the child and the pre-eminent position of this consideration has obviously been recognized in the Guardianship of Minors Act itself ... It is the duty of the court to control the exercise of the incidents of guardianship, and especially the custody element, in the best interests of the child. If there is ample scope for the words of s 3(3) to operate without any such inroad on fundamental principle, it may well be that the draftsman did not have in mind that the words used are wide enough to subvert the principle. Moreover, without a specific indication in the Act of an intention to cut down the powers of the court, and thus to interfere with fundamental principle, the mere generality of the words will not necessarily suffice ...

If, then, the effect of s 3(3) is construed as merely transferring the predominant right of custody from the father to the mother in the circumstances envisaged, that seems to me to provide ample scope for the words of the statute to operate without cutting down the jurisdiction of the court.

In my judgment, that is the way s 3(3) must be construed. The use of the expression 'sole custody' ... does undoubtedly present a difficulty as *prima facie* this goes beyond predominant right of custody. But ... I see no alternative but substantially to equate 'sole' to 'predominant'. In a sense it could be said that under the common law the father had, vis-à-vis the mother, the sole right of custody; but this was always subject to the overriding powers of the court.

On this view, the court can give the *de facto* custodian an audience. This would not be a matter of right but of discretion; and the court could, I think, in a proper case make an order for the delivery up of the child to

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the mother without giving the *de facto* custodian the opportunity to be heard. It is only where the interests of the child are in question that the court will hear the *de facto* custodian before implementing the mother's right to custody."

But in *van Deijl v van Deijl*, *supra*, upon separation the husband removed their minor daughter from the wife. Upon her application for a declaration in terms of s 3(3) of the Guardianship of Minors Act (the husband having made a counter-application in terms of s 3(1) of that Act) YOUNG J held that where a wife is entitled to sole custody under s 3(3) of that Act her rights cannot be postponed or delayed due to an application by the husband under s 3(1) and an order under s 3(1) cannot be made unless it is in the best interests of the child to do so. YOUNG J observed at p 426:

"In *Lynch v Lynch* (*supra*), it was held that, in a case falling under s 3(3), the upper guardianship of the court is not entirely ousted and that the court may refuse to make an order of delivery up of the minor to the mother where the interests of the child clearly dictate that course. But it seems to me that it would make s 3(3) nugatory if an application by the mother, under s 3(3), for delivery up of the child could be met by a claim by the father under s 3(1) for the sole guardianship. To avoid such a result, I am of the opinion that the court must hold that the right of the mother cannot be delayed or postponed by an application under s 3(1). Any inquiries on the return day of a rule under s 3(3) must not be extended to the inquiry under s 3(1). It was for this reason that I ordered the husband to deliver up Amanda to the wife, pending the determination of his application under s 3(1).

... an order cannot be made in terms of s 3(1) unless it is proved that it would be in the interests of the minor to do so. The interests of the minor means the welfare of the minor, and the term welfare must be taken in its widest sense, to include economic, social, moral and religious considerations. Emotional needs and the ties of affection must also be regarded and, in the case of the older children, their wishes in the matter cannot be ignored."

In *Hassan v Hassan* 1955 (4) SA 388 (N), in dealing with s 5 of the South African Matrimonial Affairs Act, CANEY J said at p 393:

"I consider that the Legislature intended to give to the court the jurisdiction which *Calitz v Calitz supra* held it had not got, namely jurisdiction to deprive the father of the custody of his minor child if it be in the interests

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of the minor to do so, notwithstanding the absence of any legal warrant (in the form of a decree of divorce or separation) for making a separate home. I think also that the intention of the Legislature was to make the interests of the child paramount and that is so whether application be made by the father or by the mother ...

Further, I think this must be so whether the application be termed one for custody or for sole custody, or, as in the present case, for an order 'to deliver possession' of a child."

In *van Aswegen v van Aswegen* 1954 (1) SA 496 (O) at 497 DE VILLIERS J was of the view that although "sole custody" was not defined in that Act the Legislature intended the spouse to whom sole custody was granted to have all powers and be subject to all the duties imposed by the the common law with the additional powers under s 5.

Thereafter, in *Fortune v Fortune supra* at p 353, when considering s 5, SCHREINER JA said:

"The power to grant the sole guardianship 'or' the sole custody to either parent must include the right to grant both to one parent ... The use of the word 'sole' before custody is less easy to explain. Possibly it was introduced simply to contrast the effect of the order with the position while the parents were living together."

Subsequently, in *Mashaoane v Mashaoane* 1962 (1) SA 628 (D) at 632 CANEY J stated:

"In addition ... the sub-section appears to have created a new form of guardianship and of custody, that is to say, 'sole' guardianship and 'sole' custody. One might have thought that the Legislature's intention in using the word 'sole' related to awards of ... custody solely to one parent, to that parent alone, and that when an award of ... custody was made solely to one parent, the added powers and responsibilities referred to in s 5 would attach to the parent to whom such award was made."

But in *Mohaud v Mohaud* 1964 (4) SA 348 (T) at 351 VIEYRA J observed:

"Section 5(1) ... provides that a Supreme Court may grant sole custody of a minor to either 'if it be proved that it would be in the interests of the minor to do so'. 'Sole' seems to be redundant : see *per* SCHREINER JA in *Fortune v Fortune* 1955 (3) SA 348 (A) at 353B. This provision does not envisage any change from the Common Law ... according to which

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'the court entrusts to her all that is meant by the nurture and upbringing of the minor children. In this is included all that makes up the ordinary, daily life of the child - shelter, nourishment and the training of the mind. What ought to have been the preoccupation of both parents, subject to the father's overriding rights where mutual agreement is not attained, is *ex necessitate* entrusted to the mother. But not absolutely, for in the new conditions the court will interfere at the instance of the father for good cause shown."

It is obvious that with the intervention of the Legislature, initially in South Africa in 1953 and later in this country in 1961, the father's superior rights to that of the mother had, when it concerned

their minor children, been completely altered in favour of making the interests of the minor children the paramount consideration for purposes of sole guardianship and sole custody, which was to be given to a particular spouse whenever the parties lived apart for whatever reason. In this country, the 1961 legislation went even further than the 1953 South African legislation by in fact giving the wife the sole custody of the minor child. By the deliberate choice of the word "sole" the Legislature intended, as it pertained to the award of guardianship and of custody to give guardianship or custody to one parent and to that parent alone. In my view, with due deference, YOUNG J was not correct in *Lynch v Lynch supra* when he equated "sole" with "predominant", since the ordinary meaning of the word "sole" has been defined in the *Shorter Oxford English Dictionary* as

"alone, one and only and of things, rights, duties, that is pertaining or due to, possessed or exercised by, vested in one person to the exclusion of all others, exclusive."

In *The Firs Invstm Ltd v Levy Bros Ests (Pty) Ltd* 1984 (2) SA 881 (A), the words "sole irrevocable authority to effect sale" were interpreted by TRENGROVE JA as not only meaning an undertaking not to appoint anyone else to effect the sale but also as depriving the giver itself of the right to sell and that the plain meaning of "sole ... authority" is "exclusive right or power". Briefly, the position under the Guardianship of Minors Act may be said to be that, upon separation of parents, the wife exercises, subject to provisions of that Act, sole custody of their minor children. Both *Ex p Walton supra* and *Sakupwanya v Sakupwanya* S-180-88 do not dispute this.

In *Ex p Walton supra*, the parties separated in October 1967. In November 1967 the wife signed a consent paper giving custody of their minor son to the

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husband. On the wife's *ex parte* application for a rule nisi the proceedings were postponed to allow for the papers to be served on the husband. He was also given an opportunity of putting his case before the court. BEADLE CJ, indicating that the matter appeared to be governed by s 3(1) and (3) of the Guardianship of Minors Act, said at 135:

"There are two decisions by YOUNG J dealing with applications based on s 3(3) ... *Lynch v Lynch* ... and *van Deijl v van Deijl* ... While there are dicta in *van Deijl's* case which might, at first, appear to indicate a contrary conclusion, if both these decisions are read against the background of their own particular facts, it seems to me to emerge that YOUNG J was of the opinion that in all these applications the overriding factor must be the interests of the child concerned, and where there is an application by the wife under s 3(3) of the Act and a counter-application by the husband under s 3(1) of the Act, the case will be decided on where the interests of the child will lie. With this view, I agree. It is true that *van Deijl's* case (*supra*) lays down that if there is nothing to show that the interests of the child would suffer, the wife is entitled to the interim custody of the child until the issue as to whom should have the final custody is eventually determined. However, there is nothing in *van Deijl's* case, as I read it, which lays down that, notwithstanding the fact that, on the papers before the court, it would appear, *prima facie*, that in the interests of the child the proper person to have custody of the child is the father, and to remove the child temporarily from the father's to the mother's custody until the issue of custody is finally determined would be detrimental to the child, the court is, nonetheless, compelled, because of the provisions of s 3(3) to give the mother this temporary custody. I would further point out that in both *Lynch's* case and *van Deijl's* case the father was before the court, so that his side of the case could be considered along with that of the mother's. In the instant case, however, the respondent, the father, has not been notified of these proceedings. He has had no

opportunity of putting before the court any facts which show that it is not in the interests of the child to be in the custody of its mother, nor has he been given the opportunity of making a counter-application in terms of s 3(1) for the child's custody."

It is clear to me that, when the Legislature enacted s 4(1), it was aware of the erosion which case law had achieved concerning the father's superior rights over that of the mother. By deliberately giving sole custody of their minor child, when either parent lived apart, to the mother, the Legislature intended and has in fact decreed that it would be in the best interests of their minor child

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that the mother has sole custody until the father obtained an order under the provisions of that Act regulating the custody of their minor child. The use of "shall have sole custody" in s 4(1) is most significant and clearly discloses the Legislature's preference when it came to the minor child's interests. It follows that when a mother brings an application under s 4(1) against the *de facto* custodian parent she is merely asking this court for a declaratory order or for an order of delivery up of their minor child. Unless there is something before the court upon such an application to show that the interests of their minor child would suffer, the mother is entitled to and s 4(1) mandates that she shall have sole custody of their minor child.

The Guardianship of Minors Act [*Chapter 34*] provides in ss 3(1) and 4(1) as follows:

"3. (1) The High Court or a judge thereof may-

- (a) on the application of either parent of a minor in proceedings for divorce or judicial separation in which an order for divorce or judicial separation is granted;
- (b) on the application of either parent of a minor whose parents are divorced or are living apart;

if it is proved that it would be in the interests of the minor to do so, grant to either parent the sole guardianship, which shall include the power to consent to marriage, or sole custody of the minor ...

4. (1) Where either of the parents of a minor leaves the other and such parent commences to live apart, the mother of that minor shall have the sole custody of that minor until an order regulating the custody of that minor is made under section 3 or this section or by a superior court such as is referred to in subparagraph (ii) of paragraph (a) of subsection (7)."

Section 4(2), (3) and (4) concern applications to the juvenile court and s 4(7) refers to an order of a juvenile court ceasing to have effect upon an order under s 3 or that given by a superior court of competent jurisdiction outside Zimbabwe in proceedings for divorce or judicial separation. The *de facto* custodian father has, in terms of s 3(1), to make an application in order to obtain sole custody of their minor child and the onus of proof is cast upon him to establish that it would be in the best interests of their minor child that he be awarded sole custody.

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Mr Andersen has correctly referred to the conflicts of fact in this matter and submits that the

dispute should be reserved for determination in the divorce proceedings in case no. HC 5443/92. I am aware of the contents of the report from CONNECT which speaks of interim custody and "of sudden emotional upheavals for the two girls only in so far as effective access is immediately forthcoming". The applicant has averred that the respondent has denied her proper access to their two minor children, which the respondent has disputed. The report was prepared after November 1992, in which month two interviews with the respondent, two interviews with the two minor girls and with the maid and one long interview with the applicant were held. The report indicates that "there would appear to have been minimal access to the two girls" by the mother "who last had *one* of the children stay overnight in August". The report states the long term interests of the children may well be in custody being vested in the mother. But it is apparent from the papers filed that on 19 June 1992 an order of this court, in case no. HC 3918/82, put the applicant back into the matrimonial home. This order was personally served upon the respondent on 22 June 1992. He filed his opposing affidavit on 26 June 1992 but only moved out on 29 June 1992 when on 30 June 1992 the applicant returned to the matrimonial home. Prior to that, from 5 May 1992, the respondent had moved the applicant out of the matrimonial home and had kept their two minor daughters. There is no reasonable explanation given in his various opposing affidavits for him only allowing the applicant access into the matrimonial home on 29 June 1992, after this court's order had been served on 22 June 1992.

In *Sakupwanya v Sakupwanya supra*, there were divorce proceedings pending when the wife applied for custody of their minor children *pendente lite* in July 1988, having separated on 30 May 1988, when she was unable to take their minor children. MANYARARA JA, after stating that the common law principles were the same as for an application under s 4(1) of the Guardianship of Minors Act [Chapter 34], then considered the averments in the affidavits of the parties. He said that the clear impression conveyed to him was that the wife was able to take care of their four minor children and that the husband had failed to disprove her case. He stated that the proper approach was that laid down in *Ex p Walton supra*, and he held the wife's entitlement to interim custody could not be defeated, delayed or postponed until the issue was determined in the divorce proceedings except by the husband, upon whom the *onus* of proof lay, showing that the children's interests would suffer if they were the wife.

In the present matter, unlike *Ex p Walton supra*, the *de facto* custodian father

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has been given an audience by this court and he has also had an opportunity of making a counter-application under s 3(1) of the Act.

I am bound by the decision of the Supreme Court in *Sakupwanya v Sakupwanya supra*, which held that the wife's sole custody under s 4(1) of the Act cannot be "defeated, delayed or postponed" pending the determination in the divorce proceedings unless the respondent, who has the onus of proof, establishes that their two minor daughters would suffer if they were left with her. Mr *Andersen* argues that since the father has had *de facto* custody for some period of time there is nothing to show that it would be contrary to the best interests of their two minor daughters for this *de facto* status quo to be preserved. What Mr *Andersen* in fact suggests is

that this court place the onus on the mother to show that it would not be in the best interests of their two daughters to be left with her. This is contrary to the specific provisions of s 4(1) of the Act: see also *Sakupwanya v Sakupwanya supra*.

In *Sakupwanya v Sakupwanya*, the husband (as in this case) had made allegations of infidelity and he had had *de facto* custody of their minor children. The judge before whom the matter came at first instance dismissed the wife's application. He found that there were disputes of fact on whether it would be in the best interests of their minor children for the wife to be given interim custody, that she had left their minor children with the husband, so she must have been satisfied that they would be properly looked after by the husband and the maid, that the three minor children were attending school and one minor child at crèche and that transfer would disturb the children. He ruled that as the custody was *pendente lite* and purely temporary, the issue of custody would finally be dealt with at the divorce proceedings. MANYARARA JA, in allowing the wife's appeal, said that it was trite that as a rule the custody of young children is given to the mother and that it is only when the mother's character is such as to render it undesirable to leave the children in her care or where the father's home and circumstances are more satisfactory than the mother's would custody be given to the father. In this respect reference should also be made to *Mohaud v Mohaud supra*, where, in considering this issue, VIEYRA J observed at pp 352-353:

"... where children are very young as a general principle it is in their best interests that they should be entrusted to the care of their mother. There are certain basic needs which in the case of young children of both sexes can best be provided for by the mother...

But that general principle is not to be considered immutable, for despite

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the children's need of their mother there may be other considerations which are such of a nature as to lead the court to a different view ...

I have come to the conclusion that it has been established in this case that ... the plaintiff is a person so immature in character, so emotionally unstable, so lacking in discretion, so confused in her moral ideas that despite the youthfulness of the children it would not be in their best interest to entrust their custody to her if there exists a better choice."

The respondent has not established, as the onus is upon him, that the applicant's character is such as to render it undesirable to leave the children in her care. Nor is there anything before this court that could lead me to the type of conclusion arrived at by VIEYRA J

In the result, it is ordered -

- (1)(a) that the respondent be and is hereby required to place the minor children Batsirai Tafadzwa (born on 17 June 1986) and Kudzarai (born on 5 February 1989) with the applicant, who has sole custody of them in terms of s 4(1) of the Guardianship of Minors Act, failing which the Deputy Sheriff (if necessary with the assistance of members of the Zimbabwe Republic Police) is hereby authorised to remove the said minor children from the respondent or anyone keeping the said minor children and to

deliver them up to the applicant;

- (b) that the respondent will have, at all reasonable times with prior arrangement with the applicant, access to their minor children, with the respondent having them during the weekend from Friday 5 pm to Sunday 6 pm, and that the respondent be entitled to them staying one half of every school holiday and to have them for every alternate Christmas during the one half stay with him;

(2) that in the event of an appeal being noted against this order, notwithstanding such noting of appeal, this order be and is hereby declared operative and in effect and shall not be suspended;

(3) that the respondent pay the costs of this application with costs of CONNECT report to be costs in the cause in case no. HC 5443/92.

Gill Godlonton & Gerrans, applicant's legal practitioners

Coghlan Welsh & Guest, respondent's legal practitioners.

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LINDSAY v LINDSAY 1993 (1) ZLR 195 (SC)

Court Supreme Court, Harare

Gubbay CJ, McNally JA & Korsah JA

23 February & 29 April 1993

Flynote

Family law - husband & wife - maintenance *pendente lite* - test to be applied as to quantum - self-imposed penury to be disregarded

Headnote

The appellant had divested himself of his substantial assets in order to avoid estate duties. He denied that he could afford to pay maintenance *pendente lite* to his wife, who was admittedly in indigent circumstances. The respondent claimed that the appellant could still afford the payment of maintenance.

Held, that on the facts the respondent had shown her requirements for maintenance and the appellant had not shown that he could not afford such maintenance.

Held, further, *per* GUBBAY CJ, that self-imposed penury cannot be a factor to defeat a legitimate claim by a wife for her own maintenance.

Cases cited:

Glazer v Glazer 1959 (3) SA 928 (W)
Gouws v Gouws 1958 (4) SA 394 (T)
Barass v Barass 1978 RLR 384 (G); 1979 (1) SA 245 (R)
Hawthorne v Hawthorne 1950 (3) SA 299 (C)
Treger v Treger GS-1-77 (not reported)
Stone v Stone 1966 (4) SA 98 (C)
Acutt v Acutt 1990 (2) ZLR 220 (S)
Hodgson v Hodgson S-190-92 (not reported)
Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343 (CA)
O'Donnell v O'Donnell [1976] Fam 83; [1975] 2 All ER 993 (CA)
Moyo v Min of Lands & Anor S-112-91 (not reported)

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Cargo Carriers (Pvt) Ltd & Anor v Nettlefold & Anor 1991 (2) ZLR 139 (S)
Dawe v Dawe 1979 RLR 395 (G); 1980 (1) SA 141 (ZR)
Smith v Smith 1969 (2) RLR 242 (R)
Wilson v Wilson 1981 ZLR 21 (G); 1981 (2) SA 536 (Z)
Davis v Davis 1993 (1) SA 293 (SE)
A P de Bourbon SC for the appellant
J C Andersen SC for the respondent

Judgment

Korsah JA: We have before us cross-appeals from the decision of the High Court, Harare, handed down in this matter on 3 June 1992.

For ease of reference the appellant/respondent will hereinafter be referred to as "the appellant" and the term "the respondent" will be confined to the respondent/appellant.

The decision appealed against by both parties ordered that -

- (1) the appellant pay to the respondent maintenance *pendente lite* in the sum of \$2 000 per month with effect from 1 April 1992, that is to say: \$6 000 before June 1992 and thereafter

\$2 000 before the first day of each succeeding month *pendente lite*;

- (2) the appellant pay to the respondent \$4 000 in respect of the costs of the action for divorce; and
- (3) the respondent pay the appellant's costs.

The appellant complains that the trial court erred in holding that he was endowed with funds and assets sufficient to enable him to pay either maintenance in the sum awarded to the respondent, or to make a contribution to her costs as stipulated.

The respondent, on the other hand, expresses her dissatisfaction with the *quantum* of maintenance awarded her by the trial court, on the ground that it is not an adequate substitute for the provision which she enjoyed during the subsistence of their sharing a matrimonial home, or which a husband, with the affluence of the appellant, is expected in law to make to a wife who is without independent means. She was also discontented with the order that she should bear the costs of the application.

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The appellant, Norman Lindsay, and the respondent, Grace Lindsay, were married on 3 July 1981. The parties lived together until September 1991, when they separated; and the respondent went to live with her daughter. In October 1991 the respondent commenced proceedings for divorce on the ground of irretrievable break-down of the marriage. She claimed maintenance at the rate of \$7 500 per month or, alternatively, a lump sum settlement in lieu thereof of \$1 000 000.

Failing agreement on providing the respondent with any maintenance pending the determination of the action for divorce, the respondent mounted an application in which she sought an order of maintenance *pendente lite* in the sum of \$9 500 per month back-dated to 30 September 1991, as well as a contribution towards costs of \$10 000. This resulted in the order which is appealed.

Mr *de Bourbon* observed that in the notice of cross-appeal the respondent claimed \$7 000 per month as maintenance *pendente lite*, but in her "Schedule of Living Expenses" attached to her heads of argument that amount is scaled down to \$6 058,40.

These fluctuations in the figures which the respondent claimed at varying periods for maintenance led Mr *de Bourbon* to submit that the respondent failed to discharge the *onus* of putting before the court the facts on which the court could make a value judgment as to her real needs.

I entertain no doubt that the *quantum* of maintenance, *pendente lite* or otherwise, which a court may order a husband to pay to a wife without means is at the discretion of the court. In order to ensure the proper exercise of that discretion, the court requires that every party to an application for maintenance shall deal with the court with candour and utmost good faith. Each party must disclose to the court every material fact, whether for or against him or her, which will enable the court to make a fair and just assessment.

The appellant did not dispute the allegation that the respondent is living in indigent circumstances and on the charity of her daughter and friends. There was also no challenge to the assertion that during the time the parties lived together, whilst not living extravagantly, they enjoyed a very comfortable existence in a large house on a fruit farm in Nyanga with all the trappings of wealth. Indeed, the appellant himself deposed to the fact that the respondent wanted for nothing during the period that they lived together. All her expenses were met, and she contributed no money or assets to the marriage

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because she had none. It cannot be said that the respondent had not been frank and candid with the court regarding her financial well-being during the period the parties lived together and her lack of means after they had parted.

The next step required of the respondent was for her to give an estimate of her monthly financial requirements during the period that they are living apart pending the final dissolution of the marriage. To this end, the respondent set out details of the maintenance that she would require. The learned trial judge was of opinion that there was "a certain unrestrained exuberance" about her claim and awarded her maintenance in the sum of \$2 000 per month.

Without doubt, a person who lived on a farm for ten years or more in opulent circumstances would, without experience as to current costs and without actually incurring them, be hard pressed to estimate what it would cost her to live in Harare. While she is expected to be frank and honest with the court, she may only be able, in the circumstances she finds herself, to make rough estimates as to the expenditure that she will have to meet on her own.

It is for the court to determine, having regard to all the circumstances in the particular case, what a spouse without means will require as maintenance, to support herself in the manner to which she had been accustomed during the subsistence of the marriage. As rightly submitted by Mr *Andersen*, on behalf of the respondent, provided the appellant is wealthy enough to pay that amount, he is not entitled to resist doing so on the ground that the respondent should seek employment, or continue to rely on assistance from friends and relations, or on the ground that she was not incurring expenditure for some of the items claimed when the reason for her not doing so was that she had been deprived of the funds necessary to enable her to afford to. See *Glazer v Glazer* 1959 (3) SA 928 (W) at 930C-G; *Gouws v Gouws* 1958 (4) SA 394 (T) (headnote); *Barass v Barass* 1978 RLR 384 (G) at 386B; *Hawthorne v Hawthorne* 1950 (3) SA 299 (C) at 304-5; *Treger v Treger* GS-1-77 (unreported) at 3-5.

At the time the trial court entertained the application for maintenance *pendente lite*, the respondent was not paying rent because she did not have the means. It would appear that in awarding the amount of \$2 000 per month the learned judge overlooked the need for the respondent to have accommodation of her own for which she would inevitably have to pay rental. Had he not fallen prey to such an oversight, having regard to the high levels of rentals for modest accommodation in Harare, it is difficult to understand how the amount awarded could have been restricted to \$2 000 per month

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month - an amount that would just about cover the rental for an unfurnished two-bedroomed flat in the northern parts of Harare.

A court is, of course, entitled to make an assessment of the maintenance required, based on its own experience as well as on such information as is furnished by the parties: *Glazer v Glazer supra* at 931A-E; *Barass v Barass supra* at 386A-B; *Stone v Stone* 1966 (4) SA 98 (C) at 105G-106B; *Acutt v Acutt* 1990 (2) ZLR 220 (S) at 225C-D; *Hodgson v Hodgson* S-190-92 (unreported). Such an assessment would not be interfered with on appeal unless the court had misdirected itself, or the assessment is grossly excessive or substantially inadequate: *Acutt v Acutt supra* at 225 E-F; *Hodgson v Hodgson supra* at 3.

Having regard to the totally recalcitrant attitude adopted by the appellant, that he is not prepared to pay one cent to the respondent by way of maintenance, no attempt, submitted Mr *Andersen*, was made to establish that the amount awarded was excessive, let alone grossly excessive; and that the fact that the respondent's claim may have been excessive does not mean that the award was excessive. Before this court is all the evidence available to the trial court in assisting it to arrive at a value judgment. This court is, therefore, in as good a position as the trial court, where the lower court has fallen into error, to rely on its own experience to determine the amount which in its discretion it should conclude is just.

The principle is well settled that, in the determination of the amount fixed as alimony payable *pendente lite*, regard must be had to what would be adequate as maintenance for a wife of a man in the husband's position, considering his ability to pay and all other circumstances. What, then, is the financial position of the appellant?

The appellant was a man of considerable means. It is common cause that over the last seven years or so the appellant had been engaged in an exercise to divest himself of his assets in order to avoid the payment of estate duty in the event of his death. Apart from a statement that he has transferred all of his assets to companies in which he had very nominal shares, there is no clear crisp statement in the appellant's affidavit, or that of his accountant for that matter, as to the manner in which he divested himself of his assets. Nowhere is there an express denial that he retains a measure of control over such assets. He does not aver that he has divested himself of the income from such assets.

The appellant lives in his own house and not that of his sons. He claims that

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the property in which he resides is owned by the company and that he has a right to use the same free of charge, and his expenses are met by the company. This indicates that there is a right, an entitlement, due to him from the company. If the company is responsible for his expenses then what about the expenses due from him to his wife, the respondent? Should that not be included in his general expenses for which the company, to which he divested his assets,

should assume responsibility?

The whole plan of divesting himself of his assets was for the purpose of avoiding payment of death duty on those assets. It is self-evident that only wealthy persons can divest themselves of property in the manner that the appellant did. The appellant has not taken the court into his confidence and has failed to be open and candid with the court. As Mr *Andersen* was quick to point out, neither the appellant nor his accountant set out the precise nature of the transactions whereby the appellant divested himself of his assets and, more particularly, what agreement was reached in respect of control over them, or income from them. He has not made accessible to the court the agreement by which the companies furnish him with funds for his expenses. It can only be surmised that an astute businessman, such as he has shown himself to be, will not enter into any arrangement which will make his financial position worse than it was when the parties were living together.

The appellant himself averred in his opposing affidavit that, in terms of his Last Will and Testament, he has "provided the respondent with a home, a car, property and a retirement annuity policy". These are not items of property that a poor man can bequeath in his will. In any case, if he can make bequests of this nature, then he can afford to support, if the respondent requires such support, now, and it is his duty to furnish it. He averred that after his demise the respondent would want for nothing. Between now and then how is she to survive?

From the averments contained in the appellant's affidavit, it would be erroneous to conclude that a man who has divested himself of his assets in order to avoid death duty, in the manner that the appellant did, is a man without means and unable to afford to maintain his wife in the style to which she was accustomed.

The divestment of assets commenced in 1985, while the parties were still living together. There was no suggestion from the papers that the plan affected the respondent's life-style. The appellant himself attested to the comfortable life the respondent enjoyed. She kept five pets and indulged in

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gardening. She had domestic help in the home and a worker for the garden. She belonged to the Montclair Golf Club and played golf at least once or twice a week. During the ten years of their marriage she went on three separate holidays to England, Australia and to Cape Town, and these were readily affordable. Why is it being suggested, now that they are separated, that the same divestment exercise should deprive her of what, in all the circumstances, is the sum which should be paid to the wife of a man with the means of the appellant? How much of the husband's means can be ordered to be paid towards the maintenance of his wife depends not only on his income, but on the estate he has at the time of the application.

The respondent has no capital out of which to provide herself with a house, appropriate furniture, or a suitable vehicle - having regard to her advanced years. She is expected to live in the style which reasonably befits the wife of a man of the appellant's means and status in society.

In making an award of \$2 000 per month in favour of the respondent, the learned judge was exercising a judicial discretion. As stated by ASQUITH LJ in *Bellenden (formerly Satterthwaite) v Satterthwaite* (2) [1948] 1 All ER 343 at 345:

"We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

Counsel for the respondent argued that the learned judge so misconceived the financial positions of the parties that this court should interfere with the order of the learned judge and enhance the award.

It seems to me evident that, taking into consideration the factor of adequate accommodation alone, for a wife of a man of the appellant's means the amount awarded by the trial judge as maintenance *pendente lite* was grossly unrealistic. It did not appear to relate to anything which the respondent claimed that she was entitled to in her list of requirements.

Where the husband possesses an ample fortune, the amount of maintenance pending suit should be the sum required to supply his wife with the necessities, comforts and advantages incidental to her station in life. To that

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end, the items set out in the respondent's list of expenditure should receive close scrutiny, including allowances for entertainment and holidays: *Barass v Barass supra* at 385H.

The court must take a pragmatic view of the means of the husband, and not be misled by appearances, especially when the husband is being exceptionally frugal with the truth. The court must ascertain not only what monies the husband admits to having, but also what monies could reasonably be made available to him if he so wished: *O'Donnell v O'Donnell* [1975] 2 All ER 993 (CA) at 996G-H.

Having critically examined the list of the respondent's requirements, I am of the opinion that they are fairly reasonable. Mindful of the considerable assets that the appellant alleges to have divested himself of without disclosing, the manner of the divestment, any control by him over such assets divested, and any income derived from those assets, one can only infer that he is still a very wealthy man capable, from his elusive resources, of furnishing his wife with maintenance of \$6 000 per month, which is the sum I deem adequate to place the spouses in the position they would have been in had a normal marriage relationship continued between them.

I now turn to the issue of arrear maintenance. It seems to me that there is no reason in principle why an order for maintenance pending the determination of the main divorce suit should not be made effective from the date of presentation of the application for such an order and ending with the date of determination of the suit, as the court thinks reasonable. After all, were the applicant not in need of such maintenance at the time of the application, the application would

not have been mounted.

The fact is that the legal procedures of swearing affidavits, opposing affidavits and answering affidavits all take up so much time, not to mention the date of set down and the time for the final determination of the application. If it were not possible to back-date an order to the time of presentation of the application, an applicant for maintenance *pendente lite* would suffer considerable prejudice, not because of any fault on her part, but because of the recalcitrance of an obdurate husband, who ought not to be permitted in law to benefit from protracting the proceedings so as to reduce the burden of maintaining his wife. It is just and equitable, therefore, that such a man should be saddled with the burden of arrear maintenance whenever it is claimed and it is apposite to grant it. I am of the view that it was for these reasons that arrear maintenance prior to the date of judgment was granted in

1993 (1) ZLR p203

KORSAH JA

Barass v Barass supra at 388E-G. The learned trial judge was justified, in this instance, in ordering that the payment of maintenance should commence from 1 April 1992.

The order of costs made in favour of the appellant by the trial court mystifies me. It is unusual to deprive a successful party of her costs, let alone to order her to pay the costs of the unsuccessful party. *Moyo v Minister of Lands, Agriculture & Rural Resettlement & Anor* S-112-91; *Cargo Carriers (Pvt) Ltd & Anor v Nettlefold & Anor* 1991 (2) ZLR 139 (S) at 147E-G.

As submitted by Mr *Andersen*, in applications for maintenance *pendente lite* and a contribution towards costs, it is not unusual for costs to be reserved or made costs in the cause. Here, however, the appellant's failure to disclose the basis on which he had divested himself of his assets and his refusal to take the court into his confidence, so as to make a resolution of the issue of maintenance easy, calls for censure.

In the result, I make the following order:

- (1) The appellant's appeal is dismissed with costs;
- (2) The respondent's cross-appeal is allowed with costs;
- (3) The orders of the High Court in relation to maintenance and costs are set aside and substituted with the following -
 - (a) That the respondent pay to the applicant maintenance *pendente lite* in the sum of \$6 000 per month, with effect from 1 April 1992;
 - (b) That the respondent pay the applicant's costs;
- (4) The order that the respondent pay to the applicant \$4 000 in respect of the costs of the action for divorce is to stand.

Gubbay CJ: I have had the benefit of reading in draft the judgment of KORSAH JA and I am in complete agreement, for the reasons stated by him, with the order it is proposed to make.

I would only wish to add an observation of my own on the submission advanced by counsel that, since the appellant, in good faith, had divested himself of his substantial wealth, he no longer has the funds or assets available to meet any demand for maintenance or for a contribution towards the costs of the action for divorce.

1993 (1) ZLR p204

GUBBAY CJ

Even if I were constrained to accept the appellant's self-imposed penury as factually established, which I am not, I would be loath to permit of the prejudice caused to the destitute respondent, whom the appellant would otherwise be obliged to maintain, by such an induced inability. For, certainly, the change in the appellant's circumstances did not arise from something beyond his control. It was deliberately engineered with the predominate objective of avoiding the payment upon death of estate duty.

In *Dawe v Dawe* 1979 RLR 395 (G) at 398A-B GOLDIN J (as he then was) recognised and reiterated the salutary principle that:

"Generally speaking, a person cannot embark upon a course of conduct or voluntarily assume financial responsibilities which will inevitably render it difficult or even impossible for him to meet the existing obligations to a former wife and children of that marriage, and then invoke such consequences as justification for a variation of an existing maintenance order."

See also *Smith v Smith* 1969 (2) RLR 242 (G) at 246B-C; *Wilson v Wilson* 1981 ZLR 21 (G) at 23F-G; *Davis v Davis* 1993 (1) SA 293 (SE) at 296F.

This principle, then, pertains where difficulties or supposed impossibilities in honouring the obligation to maintain dependants stem from a purposeful undertaking of additional financial commitments, such as a second marriage, or from a decision to reduce income by the taking of early retirement or less onerous and remunerative employment. But it may also encompass a somewhat converse situation - that of a breadwinner who, although not entertaining a positive intention to defeat a potential claim for financial support by a dependant spouse or child, nonetheless irresponsibly closes his eyes to that contingency and voluntarily disposes of all his assets.

A court must always have regard to the particular circumstances of the case. It would have to be an exceptional one, in my view, for a court to refuse financial relief to a dependant applicant where the respondent, no matter the motive, has rid himself of his entire estate.

McNally JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

NH Franco & Company, respondent's legal practitioners

1993 (1) ZLR p205

NCR ZIMBABWE (PVT) LTD v GULLIVER CONSOLIDATED LTD & ANOR 1993 (1) ZLR 205 (HC)

Court High Court, Harare

Mtambanengwe J

Civil application

18 February & 5 May 1993

Flynote

Town and Country Planning - whether s 40 of the Regional Town and Country Planning Act 1976 applies to conditional sales

Headnote

Section 40 of the Regional Town and Country Planning Act 1976 ("the Act") provides that no person shall subdivide any property or enter into any agreement for the change of ownership of any portion of property except in accordance with a permit granted in terms of s 41 of that Act.

Without obtaining such a permit, an agreement was entered into whereunder the applicant agreed to buy some portions of land from the first respondent. This agreement was subject to a condition suspending the agreement until the granting of a permit under s 41 of the Act. Subsequently the requisite permit was obtained for some of the portions of land being bought.

When the applicant sought an order preventing the disposal of these portions of land to anyone other than the applicant, counsel for the respondents excepted to the application on the basis that even a contract of sale subject to such a suspensive condition is prohibited under s 40 of the Act and the agreement was therefore unenforceable. He maintained that this applied even if subsequently the requisite permit is obtained.

Held, that it was not the intention of the legislature to prohibit conditional sales under s 40 of the Act. If it had intended to do so, it would have expressly prohibited such sales. The agreement of sale was therefore enforceable and the court granted the order sought by the applicant.

1993 (1) ZLR p206

MTAMBANENGWE J

Cases cited:

York Ests Ltd v Wareham 1949 SR 197

Corondimas & Anor v Badat 1946 AD 548

Soja v Tuckers Land & Development Corp 1981 (3) SA 314 (A)

Tuckers Land & Development Corp (Pty) Ltd v Strydom 1984 (1) SA 1 (E)
Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd 1978 (2) SA 872 (A)
Mathews v Rabinowitz 1948 (2) SA 876 (W)
Re Mahomed & Ispanhani [1921] 2 KB 716
E (Pvt) Ltd v CoT 1961 R&N 314 (Special Income Tax Court)
BP Southern Africa Pty Ltd v Desden Properties (Pvt) Ltd & Anor 1964 RLR 7 (H)
R v Akoob 1957 (4) SA 683 (T)
Rensford v Rainsford 1968 (2) RLR 285 (G)
Brymoira (Pvt) Ltd v Lalla 1968 (2) RLR 77 (G); 1968 (3) SA 150 (R)
AP de Bourbon SC for applicant
MJ Gillespie for respondent

Judgment

Mtambanengwe J: The following order is sought by applicant in this matter; namely that:

- "1. The first respondent and the second respondent be and are hereby interdicted from disposing or permitting the disposal, save to the applicant, of stands in the development site of the Old Mazowe Road, Marlborough, Harare such as would prevent the transfer in due course to the applicant of 30 stands of 1000 square metres each and 10 stands of 2000 square metres each, pending the outcome of an action to be instituted by the applicant within thirty days of the date hereof (by the applicant) for an order declaring that there be (*sic*) a contract between the applicant and the respondents for the sale of those stands to the applicant and for ancillary relief.
2. The two respondents shall, jointly and severally, the one paying the other to be absolved, pay the costs of this application."

The facts relied upon by the applicant are that after seeing an article that appeared in the *Financial Gazette* of 9 May 1991 that Gulliver Development Property (Pvt) Ltd, a subsidiary of first respondent intended to develop residential stands on the Old Mazowe Road, Marlborough, Harare (the site), applicant's personnel resources manager, Mr Chidamahiya, approached a Mr Clarke who said that he was general manager of Gulliver and the stands

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MTAMBANENGWE J

at the site could be sold at \$20 000 each for the 1000 square metre stands and at \$37 500 each for the 2000 square metre stands. Mr Clarke said that it would be necessary to obtain subdivision of the stands before obtaining title in each of the stands and that he needed a clear commitment by applicant. After Mr Chidamahiya had confirmed with applicant's general manager that the prices of the stands were acceptable a formal offer was made by letter (Annexure "D"). This was hand-delivered by Mr Chidamahiya to Mr Clarke who advised that the

price of the stands would remain fixed provided payment was made when called for. Subsequently a written reply to Annexure D was received by applicant. This reply, on first respondent's letterhead (Annexure "E") reads as follows:

"We thank you for your letter of the 14 May 1991 to purchase 30 stands of 1000 square metres plus 10 stands of 2000 square metres.

It is confirmed that the price of the 1000 sq metre plots are (*sic*) \$20 000 each and that the price of the 2000 sq metre plots are (*sic*) \$37500 each. This will remain unchanged provided payment is made as soon as it is requested. This is because inflation is affecting the construction market dramatically.

These stands will be reserved for you and will be allocated, as soon as they are available.

Thank you once again for your sizeable order.

Yours sincerely

for : GULLIVER CONSOLIDATED LIMITED"

After this application was launched against first respondent it transpired that first respondent's position was that it was only a shareholder in second respondent and that it was only second respondent that could sell the stands. That necessitated a chamber application seeking a provisional order interdicting second respondent, pending the return day of that application, from disposing or permitting disposal save to applicant of the stands, and joining it as second respondent in this application. The basis of that chamber application was that in the light of its opposing affidavit in this application first respondent acted as agent of second respondent - an undisclosed principal - when Mr Clarke ostensibly acted for first respondent, and that the agreement alleged in respect of the sale of the said stands was therefore with second respondent.

The applicant asserts in its founding affidavit that "It was clear at all times that the sale of the stands by respondent was subject to the condition that

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MTAMBANENGWE J

subdivision and title could be obtained by respondent". This, as Mr *de Bourbon* for the applicant states in his heads of argument, is not disputed by first respondent. (Second respondent filed no affidavit(s) in this matter).

Mr *Gillespie* for the respondents has taken the position that, except on one point of law only, in every other respect a *prima facie* case has been made out. It follows that it is not necessary for the sake of determining this matter to refer to other points of dispute that appear on the papers.

Mr *Gillespie* has further stated that his submissions in this matter are based on the assumption that the contract alleged by applicant was subject to a suspensive condition ie the suspensive condition as stated by applicant.

The question for decision then is the one point of law referred to by Mr *Gillespie*, namely, that the contract, even if held to be subject to a suspensive condition, is hit by the provisions of s 40 of the Regional, Town and Country Planning Act 22 of 1976 (the Act). Section 40 of the Act

provides:

"(1) Subject to the provisions of subsection (2), no person shall -

- (a) subdivide any property; or
- (b) enter into any agreement -
 - (i) for the change of ownership of any portion of a property; or
 - (ii) for the lease of any portion of a property for a period of ten years or more or for the lifetime of the lessee; or
 - (iii) conferring on any person a right to occupy any portion of a property where the aggregate period of such lease or right to occupy, including the period of the renewal, is ten years or more; or
- (c) consolidate two or more properties into one property;

except in accordance with a permit granted in terms of section 41".

Section 41 deals with the procedure for applying for such a permit.

The submission by Mr *Gillespie* goes further to say that the fact of a subsequent issue of a permit is immaterial, and he bases this on *York Estate Ltd v Wareham* 1949 SR 197 at 198. He says that the reasoning in cases like *Corondimas & Anor v Badat* 1946 AD 548 has been shown to have been incorrect. The decision in *Corondimas's* case *supra* was concerned with the effect of s 5(1) of the South African Act 35 of 1943 (referred to as the Pegging Act) on an agreement subject to a suspensive condition as is the position in the present case. The provisions of s 5(1) of Act 35 of 1943 were as follows:

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MTAMBANENGWE J

"No European shall except under the authority of a permit issued under section seven, enter into any agreement with an Asiatic in terms of which any party to the agreement acquires or purports to acquire -

- (a) any land or premises in any area in respect of which the provisions of this section apply in terms of section eight; or
- (b) any right to occupy or to allow any other person to occupy any such land or premises for an indefinite period or for a period of ten years or longer or for a period which together with any period or periods for which the holder of such right is entitled to renew the agreement, equals or exceeds a period of ten years; or
- (c) any share in or debenture of any company which is the owner of any such land or premises or the holder of any such right, and no Asiatic shall, except under the said authority, enter into any such agreement with a European".

Subsection 2 of the Act there declared such agreements entered into after the commencement of the Act between a European and an Asiatic, 'otherwise than under the authority of such a permit, shall be null and void'. The Act in the present case has no declaration of nullity. The agreement in *Corondimas's* case *supra*, was, as the agreement in this case, subject to a suspensive condition. The former was entered into without the authority of a permit, but subject

to that authority being obtained, and the latter, (the agreement in the present case) was entered into without a subdivision permit in terms of s41 of the Act, but subject to that being obtained.

The reasoning in *Corondimas'* case is "that an agreement embodying (Cisale) subject to a suspensive condition is not a contract of sale until the condition is fulfilled" - see *Soja v Tuckers Land & Development Corporation* 1981 (3) SA 314 (A) at 321F - or that a contract (of sale) subject to a suspensive condition is not regarded as a contract of sale pending the fulfilment of the condition - see *Tuckers Land & Development Corporation (Pty) Ltd v Strydom* 1984 (1) SA 1 at 3 (E) (English head-note). On that reasoning the court in *Corondimas'* case held that the agreement there involved was not "rendered null and void by the terms of the Act either at the stage when it was first entered into between the parties or at the later stage, now reached, when it has become a binding contract of purchase and sale as the result of the condition as to the obtaining of a permit having been duly fulfilled" - (see the full passage at 559 (last para) to 560, *per* FEETHAM AJA, and therefore upheld the dismissal by the Court *a quo* of the exception to the declaration that it was bad in law, and disclosed no cause of action "in that

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plaintiff, an Asiatic, bases his claim upon an agreement entered into by him with defendants, Europeans, in terms of which plaintiff acquired or purported to acquire landed property in the municipal area of Durban, such an agreement having been entered into without the authority of a permit issued in terms of Act 35 1943, and therefore being null and void".

The reasoning in *Corondimas'* case was followed in a number of South African cases such as, for an example, *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A) at p 887C-E. It has also been followed in a number of cases in our jurisdiction.

But a number of the more recent South African cases criticised "the principle laid in several cases and affirmed in *Corondimas'* case" - as "wrong according to our common law, for the latter regards such a contract as being one of sale *ab initio* although it is subject to the suspensive condition" - see *Soja v Tuckers Land & Development Corporation supra* at 321F-H; and *Tuckers Land & Development Corporation v Strydom supra*.

If the contract entered into by the parties is (as respondents assumed without admitting the same) thus regarded as a contract of sale *ab initio* it is Mr Gillespie's contention that the contract is struck by the statutory prohibition contained in s40 of the Act. He says that the subsequent issue of a permit is immaterial. He relies on *York Estates Ltd v Wareham supra*. The facts of that case are briefly summed up in the headnote as follows:

"W agreed to sell to Y a small portion of W's farm. At the time of the agreement, this portion had not been surveyed nor had it been subdivided from the remainder of the farm and the Minister's approval for such sub-division (in terms of section 65 of the Town and Country Planning Act, No. 19 of 1945) had not been obtained. The portion was subsequently surveyed and the Minister's approval obtained, and Y tendered the purchase price and demanded transfer. W refused to give transfer and Y instituted an action claiming specific performance of the agreement.

Held, on exception taken to the plaintiff's declaration, that, since section 65 makes it illegal to '... offer for sale ...

any portion of a property or enter into any contract or arrangement or do any act which may lead to the subsequent sub-division of a property unless the permission of Minister has been obtained ...' the agreement was illegal at the time that it was entered into, so that it was unenforceable and the exception must be upheld"

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At p 198 LEWIS ACJ, as he then was, stated that:

"As a general rule a contract or agreement which is expressly prohibited by statute is illegal and null and void even when, as here, no declaration of nullity has been added by the statute".

And after discussing the arguments advanced for the respondent why after the Minister's approval had been obtained the contract should become enforceable, (pp 198-9) he drew a distinction between cases in which there were implied prohibitions and those with express prohibitions and then went on to state (199-200) that:

"The Court has no equitable jurisdiction to grant relief to a plaintiff seeking to enforce a contract prohibited by law: see *Mathews v Rabinowitz* (1948 (2) SA 876 W). In fact, the Court is bound to refuse to enforce a contract which is illegal even though no objection to the illegality of the contract is raised by the parties : see *Cape Dairy & General Livestock Auctioneers v Sim* (*supra*).

Furthermore, the Court will not enforce such a contract even though the plaintiff is innocent and the defendant is setting up his own illegality: see *Re Mahomed & Ispanhani* [1921] 2 KB 716."

I should point out that the contract that LEWIS ACJ was considering had no suspensive condition and the remarks which I have quoted above from that judgment would, therefore, only apply to the present case if the agreement were held as operative ab initio as a contract of purchase and sale, as in that case it would be an attempt to contravene s 40 1(b)(i) of the Act. That as I understand the arguments is the position contended for for the respondents.

Mr *de Bourbon's* argument relies squarely on *Corondimas'* case, that the sale was suspended pending the obtaining of the approval ie the permit granted in terms of s 41 and that so far as the 2000 square metre stands are concerned the approval has now been given and therefore the sale in that regard has become perfected. I have already referred to the South African authority applying the principles in *Corondimas'* case. The two cases in our jurisdiction that refer to *Corondimas* are *E (Pvt) Ltd v Commissioner of Taxes* 1961 R&N 314 (Special Income Tax Court) at 318 C, and *BP Ltd v Desden Properties Ltd & Anor* 1964 RLR 7 (H) at 10.

In the *Commissioner of Taxes* case part of the facts are stated thus in the headnote:

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MTAMBANENGWE J

"Appellant company agreed to purchase certain property consisting of a stand and buildings for use as a clothing factory. Payment of the purchase price and transfer was to be delayed for certain reasons but meanwhile Appellant was to be entitled to occupation and possession, the risk in the property passing on the date of occupation agreed. Appellant took occupation and leased the premises to an associate company who carried on a clothing factory on the premises. It was common cause that the use of the building fell within the definition of 'industrial buildings' contained in s 13(5) of the Income Tax Act 1954, that the buildings were used by the appellant

for the purposes of its trade, and that their value was diminished each year by reason of wear and tear."

The agreement entered into by appellant company was subject to the Municipality granting the requisite authority for the use and the transfer to the appellant, which authority was granted on 23 November 1957. It was contended by the Commissioner of Taxes that the ownership of the property not having passed, the appellant had not acquired the building, and so was not entitled to the allowance as a deduction. FIELDSEND P, as he then was, analysed and defined the word "acquire" and stated at p 318:

"It follows, and in fact it was common cause, that by the agreement the appellant acquired a right to the ownership of the property once municipal approval had been given as it was on 23 November 1957: *Corondimas v Badat* 1946 AD 548 and *R v Akoob* 1957 (4) SA 683 (T). The fact that until transfer was effected the appellant agreed to pay a monthly sum for the use of the premises does not affect the legal nature or effect of the agreement of sale ..."

The case of *BP Ltd v Desden Properties & Anor supra* concerned three sale agreements entered into by first respondent, two with second respondent and one with applicant. The ones with second respondent were entered into in January 1963 and the one with applicant was entered into in April 1983. Under the agreements substantially the same property was sold. The passage relevant to this case appears at pp 9I-10C of MACDONALD J's judgment:

"On the question of priority, Mr *Welsh* submitted that the two agreements between the respondents, although not 'current', during the applicants sales agreement, gave rise to a contractual relationship, and that their priority depended on the date on which they were made. In support of this submission he referred to *Corondimas & Anor v Badat*, Mr *Christie* submitted that second respondent's contracts were not operative when

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MTAMBANENGWE J

applicant entered into its contract in April 1963 and that accordingly second respondent enjoys no priority.

It is quite clear that the second respondent's contracts are subject to a suspensive condition, but I am satisfied that applicant's contract is subject to a similar condition; an implied condition that with the landlord's consent applicant would become lawful tenant of the premises in which the business was conducted. It seems to me that if for any reason the substitution of the applicant as a tenant could not be arranged, the applicant would not be bound by the contract.

In my view this case must be dealt with on the basis that second respondent's contractual rights came into being prior to applicant's and on the further basis that the contractual rights conferred by second respondent's contracts do not differ in their nature and quality from the contractual rights conferred on the applicant."

Mr *Gillespie* submits that whether a conditional sale is in contravention of the legislation is an exercise in statutory interpretation. He says it is of great significance in this jurisdiction that by former legislation in *pari materia* s 52A of the Rural Land Act 1963 conditional sales were expressly made exempt. The fact that this exemption has been removed from the law as it presently stands indicates a statutory intent to strike down all contracts, conditional or otherwise, entered into prior to the giving of approval.

In *Rensford v Rainsford* 1968 (2) RLR 285 (G) GREENFIELD J considered the effect of s 75 of the Town and Country Planning Act [Chapter 133] and the provisions of ss 52 and 52A of the Rural Land Act 1963 on an agreement relating to an appropriation of land which was prohibited by statute unless entered into after permission for subdivision of the land was granted by the

Minister. Section 52 of the Rural Land Act incorporated Part IV of the Town and Country Planning Act in relation to rural land. Subsection 1 of s 75 of Chapter 133 reads:

"Subject to the provisions of this section, no person shall subdivide or enter into any agreement for the subdivision of any property unless the permission of the Minister has been obtained."

Subsection 2 reads:

"Any agreement for the sale or alienation of any portion of a property and any agreement whereunder any person is given -

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MTAMBANENGWE J

- (a) a right, whether vested or contingent, to acquire any portion of a property, whether immediately or on the fulfilment of any condition or on the happening of any event or after the lapse of any period of time or the exercise of any option or on the payment of any sum, whether by instalment or otherwise; or
- (b) a right to erect a building on any portion of a property belonging to some other person;

shall for the purposes of this section be regarded as an agreement for the subdivision of the property."

Section 52A of the Rural Land Act (an amendment introduced by Rural Land Amendment Act 1965) provided that:

"Notwithstanding the provisions of section 52 and section 75 of the Town and Country Planning Act [*Chapter 133*], it shall be lawful, in the case of land to which this Act applies, to enter into an agreement whereunder any person is given a right to acquire any portion of a property exceeding fifty acres in extent subject to the condition that an application for a subdivision is granted by the Minister".

Section 75(2) of Chapter 133 covered a wide spectrum of situations which were to be regarded, for the purposes of the section, "as an agreement for the subdivision of the property" including conditional sales. It was the rigours of that provision that the exemption provided in s 52A of the Rural Land Act was meant to alleviate. It is an interesting thought that the provisions of s 75(2) of the Town and Country Planning Act [*Chapter 133*] were enacted after the decision in *Corondimas'* case, and I venture to think that the Legislature then was mindful of that decision and sought to put the matter beyond doubt by enacting the provisions of that section. I say so because it is quite clear to me that had the present case been brought during the currency of Chapter 133 the agreement here in question would have fallen foul of the provisions of s 75 of that Act as :

"any agreement whereunder any person is given -

- (a) a right, ... to acquire any portion of a property ... on the fulfilment of any condition or on the happening of any event"

The decision in *Corondimas'* was in 1946. Section 75 was introduced in that form by s 30 of Act 54 of 1954 which repealed and replaced s 65 of the old Town and Country Planning Act 19 of 1945: *Brymoira (Pvt) Ltd v Lalla* 1968 (3) SA 150 (R) at 151 H

1993 (1) ZLR p215

MTAMBANENGWE J

While it is significant that the exempting given by former legislation *in pari materia* to these provisions of s 75 of Chapter 133 and s 52 (which incorporated Part 10 of Chapter 133) of the Rural Land Act 1963, has been removed from the law as it presently stands, it is also significant, I would say even more significant, that the specific provisions touching on conditional sales have been removed from the law as it stands. By removing both the prohibition regarding conditional sales and the exemption it seems the legislature's intention was to allow conditional sales. I would conclude therefore that the reasoning in *Corondimas* applies to this case in the absence of any statutory provision specifically hitting such sales as was the case in terms of the Town and Country Planning Act [*Chapter 133*].

For these reasons the application succeeds and I grant an order in terms of applicant's amended draft order.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Stumbles & Rowe, respondent's legal practitioners

1993 (1) ZLR p216

JENSEN v ACAVALOS 1993 (1) ZLR 216 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

Gubbay CJ, Ebrahim JA & Korsah JA

Application for condonation of late noting of an appeal

18 January & 20 May 1993

Flynote

Appeal - notice - notice not complying with rules - fatally defective and incurable - correct procedure for rectifying situation - late noting of appeal - application for condonation - principles

Delict - defamation - defamatory statement - what is - allegation that professional man of several years' experience is inexperienced and acting unethically - defences - where more than one pleaded, they should be pleaded in the alternative - justification - what must be shown - qualified privilege - plaintiff a municipal employee - defamatory statements made to his superiors

Headnote

A notice of appeal must comply with the mandatory provisions of the Supreme Court Rules. If it does not, it is a nullity and cannot be condoned or amended. What should be done is that an extension of time within which to comply with the relevant rule must be applied for. Whether such an application will succeed will depend on well-established principles: the extent of the delay; the reasonableness of the explanation proffered for the delay; and the prospects of

success on appeal. The longer the delay, the more certain the court must be that there is a real chance of the appeal succeeding.

The applicant was a professional engineer of some 18 years' experience. He was employed by the Harare City Council and was the engineer in charge of projects to construct reservoirs for the City. The respondent was the managing director of a company which had won contracts to carry out some of the work.

1993 (1) ZLR p217

The applicant, without notifying the respondent of his intention to do so, re-valued the work done by the respondent's company and informed the respondent that his company had been overpaid. The respondent disputed this assertion; an acrimonious correspondence ensued, at the end of which the respondent wrote a number of letters to the applicant's superiors, in which he referred to the applicant as "a junior engineer" who had "no practical experience" and described the applicant as being intransigent, unrealistic, biased and unprofessional. He also ascribed to the applicant "an unethical approach to contract procedure" and said that the applicant wished to penalise him financially for reasons best known to himself. The applicant brought an action for defamation against the respondent.

The respondent admitted publishing the words complained of, but denied that they were defamatory. He also pleaded that there was no intention to defame or injure the applicant, that he bona fide believed that the words were true and that he had a duty or right to publish them to the persons named, who had a duty to receive them.

In dismissing the applicant's claim, the trial judge held that certain of the statements were, in any case, not defamatory.

Held, that while it is permissible to raise more than one defence to an action for defamation, it is desirable, if more than one defence is pleaded, that such defences be pleaded in the alternative. A "rolled-up plea" is objectionable because the plaintiff will be unsure of what defence is being set up. In this case, it appeared that the defences raised were justification and qualified privilege.

Held, further, that the statements were all defamatory. To describe a professional engineer of 18 years' experience as "a junior engineer" is to hold him up to ridicule by suggesting that he is inexperienced. To describe him as "intransigent and unrealistic" infers that he is incapable and inexperienced in his profession and office. To impute a breach of ethics or to allege that the applicant wished to penalise the respondent for unknown reasons imputes dishonest conduct, and such an imputation is defamatory.

Held, further, that in order for the defence of justification to succeed, it is not necessary to prove the truth of every word; only the substance of the defamatory statement need be justified. It must also be established that the publication was to the public benefit.

Held, further, on the facts, that the applicant had acted unfairly, unethically and punitively towards the respondent. His re-assessments of the work done were biased and unprofessional. Even after a mediator and the Council's legal adviser had supported the respondent, the

KORSAH J

refusal to authorise the correct payment to the respondent showed his intransigence. The defamatory words were thus substantially true in every part.

Held, further, that in any event the defence of qualified privilege would apply. Complaints about the conduct of those in authority or with responsibilities to the public may be seen as made from a duty to bring the facts to the attention of those who control or are concerned with the conduct in question or in the furtherance of the interests of those affected in securing redress. The respondent had an interest to protect by making the statements to officers of the City Council who had a corresponding interest to receive them and to inquire into them and take such steps as would prevent a recurrence of the misconduct.

Cases cited:

de Jager v Diner & Anor 1957 (3) SA 567 (A)

Hattingh v Pienaar 1977 (2) SA 182 (O)

McFoy v United Africa Co Ltd [1961] 3 All ER 1169 (PC)

de Kuszaba - Dabrowski et Uxor v Steel NO 1966 RLR 60 (A)

H B Farming Est (Pty) Ltd & Anor v Legal & General Assurance Soc Ltd 1981 (3) SA 129 (T)

Kombayi v Berkhout 1988 (1) ZLR 53 (S)

R v Humanikwa 1968 (2) RLR 42 (A)

Strydom v Fenner - Solomon 1953 (1) SA 519 (E)

Davies & Ors v Lombard 1966 (1) SA 585 (W)

Capital & Counties Bank v Henty (1880) 5 CP 514; 7 App Cas 741

Cassidy v Daily Mirror Newspapers Ltd [1929] 2 KB 331 (CA)

Angel v H H Bushell & Co Ltd [1967] 1 All ER 1018 (QB)

Johnson v Rand Daily Mails 1928 AD 190

Yusaf v Bailey & Ors 1964 (4) SA 117 (W)

Cooper v Lawson (1838) 8 A & E 746; 112 ER 1020

Mahomed v Kassim 1972 (2) RLR 517 (A); 1973 (2) SA 1 (RA)

Borgin v de Villiers & Anor 1980 (3) SA 556 (A)

Harrison v Bush (1855) 5 E & B 344

R v Rule [1937] 2 KB 375 (CCA): [1937] All ER 772

E Chatikobo for the applicant

J B Colegrave for the respondent

Judgment

Korsah JA: This is an application for condonation of the late noting of appeal and for an order that the original defective notice of appeal be amended by the substitution therefor of a new notice of appeal.

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These proceedings arise from an action by the applicant in which he unsuccessfully claimed damages from the respondent for libel, alleged to be contained in a series of correspondence addressed by the respondent to the applicant's superiors.

The judgment sought to be appealed was handed down on Wednesday, 6 December 1989, in stencil form. On 20 December 1989, the following notice of appeal was lodged:

"TAKE NOTICE that Appellant hereby notes an appeal against the judgment of the High Court sitting at Harare on 6 December 1989 dismissing Appellant's claim with costs.

FURTHER TAKE NOTICE that grounds of appeal will be filed upon the reasons for judgment becoming available."

This notice of appeal was defective for non-compliance with the mandatory provisions of Rule 29, subrules (c) (d) and (e) which require the applicant or his legal representative to state: (i) whether the whole or only part of the judgment is appealed against; (ii) the grounds of appeal to be set forth concisely and in separate numbered paragraphs; and (iii) the exact nature of the relief which is sought.

I am unable to accept as a valid reason for the non-adherence to the Rules that the judgment was in stencil form and a copy thereof could not be obtained until 21 December 1989. Firstly, whether or not in stencil form, there was a judgment extant which was capable of being read and from which, one or more grounds of appeal could have been formulated, together with a prayer for relief. Secondly, a cyclostyled copy of the judgment was available to the applicant's legal practitioners well within the time limit of twenty-one days from the date of the handing down of the judgment, within which an appeal was to be noted.

On 3 January 1990, the applicant's legal practitioners filed the grounds of appeal, which were promised in the defective notice of appeal noted on 20 December 1989. They were, just as the legal practitioners had described them, "grounds of appeal", without a prayer for relief.

The notice of appeal, being bad for non-compliance with the rules, was not cured by the filing on 3 January 1990, of grounds of appeal without a prayer. Indeed, even if the grounds of appeal

filed on 3 January 1990 had contained

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a prayer for relief, it would not have been effectual in validating the defective notice of appeal.

The reason is that a notice of appeal which does not comply with the rules is fatally defective and invalid. That is to say, it is a nullity. It is not only bad but incurably bad, and, unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice of appeal to be filed, the appeal must be struck off the roll with costs: *De Jager v Diner & Anor* 1957 (3) SA 567 (A) at 574C-D.

In *Hattingh v Pienaar* 1977 (2) SA 182 (O) 182 at 183, KLOPPER JP held that a fatally defective compliance with the rules regarding the filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule. With this view I most respectfully agree; for if the notice of appeal is incurably bad, then, to borrow the words of LORD DENNING in *McFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172 I, "every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

It was not until 3 September 1992, almost thirty-four months after the judgment sought to be appealed was handed down, that the applicant, realising that his notice of appeal was incurably defective, mounted this application.

The broad principles an appellate court would have regard to in determining whether to condone the late noting of an appeal are: the extent of the delay; the reasonableness of the explanation proffered for the delay; and the prospects of success of the appeal. See *de Kuszaba - Dabrowski et Uxor v Steel* NO 1966 RLR 60 (A) at 62 and 64; 1966 (2) SA 277 (RA); *HB Farming Estate (Pty) Ltd & Anor v Legal and General Assurance Society Ltd* 1981 (3) SA 129 (T) at 134A-B; *Kombayi v Berkhout* 1988 (1) ZLR 53 (S) 57G-58A. And as BEADLE CJ observed in *R v Humanikwa* 1968 (2) RLR 42 (A) at 44B:

"The longer the delay in applying for condonation in the late noting of an appeal the more certain the court must be that there is a real chance of the appeal succeeding."

Although it is apparent that the applicant intended all along to appeal against the judgment of the High Court, no mention is made in the affidavit in support of the application for condonation as to what efforts were made to obtain a

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KORSAH JA

copy of the reasons for judgment. No explanation has been put forward for the non-compliance with the rules by the applicant's legal practitioner. And as for the delay in making this application, it can only be categorised as considerable.

What, then, are the prospects of the applicant in succeeding to have the judgment of the High

Court reversed?

The applicant, Jacob Jensen, claimed damages of \$15 000 from the respondent, Aleck Acavalos, for defamatory statements, affecting his reputation in his business, trade or profession, alleged to be contained in letters written to three people: the Town Clerk, the Director of Works, both of whom are the applicant's superiors, and Senator Chinamasa, the legal adviser to the City of Harare at the relevant time.

At all times material to this matter, the applicant was an engineer employed by the City of Harare. The respondent was the Managing Director of Conforce (Pvt) Ltd (Conforce). In 1984 and 1985 Conforce won four contracts to construct a number of reservoirs for and on behalf of the City of Harare. These contracts were designated DW 1/84, DW 3/84, DW 1/85 and DW 2/85. All these contracts were based upon the general conditions of contract (Exhibit 17); and upon the bill of quantities produced as Exhibit 80.

At the inception the engineer of the City in charge of these projects was one Mr Gow. In the course of the construction of these reservoirs Mr Gow was dismissed by the City of Harare and the applicant given charge of those projects. Not long after his accession to the office formerly held by Mr Gow, the applicant directed the following correspondence, dated 14 March 1986 to the respondent (Exhibit 20):

"Dear Sir,

DW 1/1984, DW 3/1984, DW 1/1985 AND DW 2/1985

Please find attached a re-evaluation of your submitted certificates for the contracts above. They include certificate Number 2 on Contract DW 2/1985, which you submitted on 12th February 1985. On all certificates the quantities have been remeasured. Where other changes have been done explanatory notes have been attached.

At the end of the notes I have made a summary of the four contracts. The balance is \$633 365,72 in our favour. Would you please go through the revaluation and let us have your reply within ten days."

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Attached to this letter was a schedule (Exhibit 20A) detailing how the applicant had arrived at his conclusion.

The respondent, the addressee and recipient of that letter was, understandably, perturbed about this sudden turn of events. In response to Exhibit 20, he addressed a communication dated 17 March 1986 to the applicant, indicating that in the opinion of the respondent the valuation by the applicant of the work done to date by Conforce had been grossly under-estimated, and the reasons given for the greatest part of the deductions were contrary to contract procedure in general and, in particular, to the documents signed.

The respondent further explained that although certain deductions may have been justified, they were more than adequately compensated for by the fact that the company had not claimed for the whole of the completed works, nor for the cost of delays and alterations occasioned at the instance of the City of Harare. The respondent finally suggested that his company would carry out its obligations under the contract and that all the other points raised by the applicant

could be discussed and resolved on the preparation of the final certificate. Meanwhile, as regards contract DW 2/1985, the respondent intimated that while he regarded the estimate by the applicant of the work done amounting to \$80 847,67 as an undervaluation, in order to avoid lengthy discussion at this stage and to enable him to carry on with the work, the company was prepared to accept that valuation for an interim payment, subject to adjustment later.

In consequence of the stance taken by the applicant that the company had been overpaid and was not deserving of payment of one cent more, an acrimonious relationship developed between the respondent and the applicant. The respondent finally gave vent to his opinion of the applicant in various letters to the said superiors of the applicant. It is of certain statements in these correspondence that the applicant claimed had been intended by the respondent to incite feelings of contempt towards him and to diminish the regard in which he was held by his employer and superiors and to cast aspersions on his fitness as an engineer.

The actual words in the letters of which complaint is made are that the respondent referred to the applicant as (a) "a junior engineer"; (b) "totally intransigent and unrealistic"; (c) that he used "a very unethical approach to contract procedure"; (d) that he wished to "penalise (respondent) financially for reasons best known to himself"; (e) that the applicant's superior had allowed himself "to be adversely influenced by junior engineers who appear

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to have no practical experience"; (f) that a document prepared by the applicant was "a biased and unprofessional document;" and (g) that the applicant had proceeded by "various unjustified and unethical means to prove an overpayment was made."

The respondent admitted publishing the words complained of to the named officers of the City of Harare, but denied that the words were defamatory of the applicant. He further alleged that "in any event the words were published by him without any intention to defaming or injuring the applicant, and that he acted without malice and in the *bona fide* belief that the words were true and that he had a duty or right to publish the words to the persons named who had a corresponding duty to receive them."

It is not clear from the above what defence the respondent was putting up. Indeed, Mr *Colegrave* conceded that the pleadings leave a lot to ponder over. Whether the respondent is relying on the defences of justification ie truth and public interest, or fair comment, or qualified privilege, or a combination of any two of these defences, or all three, is unclear.

It is, of course, permissible to raise more than one defence to an action for defamation, but it is desirable that if more than one defence is pleaded that such defence be pleaded in the alternative. See *Strydom v Fenner - Solomon* 1953 (1) SA 519 (E) at 527A-C. A "rolled-up plea" is objectionable because the plaintiff is disadvantaged from knowing whether a defendant is setting up a defence of justification or fair comment. In *Davies & Ors v Lombard* 1966 (1) SA 585 (W) at 588G-H it was stated that:

"A plaintiff is entitled to know which defence a defendant is setting up, whether it is justification or fair comment or

alternatively both."

The mention, however, of the belief that he had a duty or right to publish the words to the persons named and that they had a corresponding duty to receive them indicated that the defendant was raising a defence of qualified privilege.

In any case, the issues to be resolved at the trial were crystallised at the pre-trial conference, thus:

"1. Whether the words complained of were defamatory in the respects alleged in para 9 of the plaintiff's declaration or at all.

2. Whether defendant:

(a) had a duty to publish the words complained of;

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(b) *bona fide* believed the words were true; and

(c) published the words maliciously."

It would appear, therefore, that the defences relied on by the respondent were accepted by the parties to be those of justification and qualified privilege.

The learned trial judge proceeded to look at each of the above expressions by the respondent individually and concluded that the statements in paras (a) (b) (d) and (e) were not defamatory *per se*, in the context in which they were used, but the other statements in paras (c) (f) and (g) were clearly defamatory of the applicant.

All these statements were contained in the following extracts from letters written by the respondent on 16 June 1986, firstly to Mr Chinamasa, the legal adviser to the City of Harare:

"These certificates were compiled jointly between the engineer in charge (for City of Harare) and the contractor [the respondent] and were deemed reasonable interim payments for the purpose of allowing continuity of the works.

It now transpires that a **junior engineer** [the appellant] has analysed these certificates in detail and has arrived at some misconstrued figure of overpayment. The important fact to note is that he ignored work completed but not claimed, increase in cost of materials and he has only considered alterations and variations where these constituted a saving. Furthermore he took it upon himself to vary quantities and rates in the original documents without reference to the contractor or to any agreements reached during the course of the contract. **All in all a very unethical approach to contract procedure**, arriving at misleading conclusions."

Secondly, on 1 December 1986 to the Town Clerk:

"Please therefore forward to us three names of experienced professional and independent engineers from which we can select one to act as mediator on this dispute.

We regret that the situation has been permitted to reach this stage but unfortunately we note that your Mr Jensen's attitude **is totally intransigent and unrealistic**. On the other hand your Mr Jewell whom we regard as a perfectly capable and experienced professional man

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appears to lack the authority to exercise his knowledge and experience to best advantage."

And thirdly, on 1 December 1986 to the Director of Works:

"Your evaluation of the final account to the above contract is unacceptable to us on the following basis:

1. Not only have the points in disagreement not been given careful consideration but also new points and deductions have been included which were not discussed or even mentioned at previous meetings and communications.
2. We trust that you do not include your Mr Jewell as a member of your staff who has participated in this valuation, as we regard him as an honest and experienced professional who would never be party to the preparation of such **a biased and unprofessional document**.
3. It is our considered opinion that your **Mr Jensen has proceeded by any means to show us in bad light**, all the time attempting to prove that we have been overpaid on this contract. Every time introducing new points, albeit **contrary to good engineering practice and contract procedure**, in order **to penalise us financially for reasons best known to himself**.

...

Finally we must express our disappointment in the manner that you have permitted your esteemed office to be adversely influenced by a junior engineer who appears to have no practical experience in the administration and interpretation of contracts of this nature and magnitude."

The statements emphasised in all three extracts are those complained of by the applicant.

The first issue that falls for consideration is whether the words complained of are defamatory. Where words are by their ordinary sense defamatory, the plaintiff has to prove no more than that they were published of him. The words, as in the interpretation of any document, are to be accorded their natural and ordinary meaning. But in arriving at the ordinary and natural meaning of the words complained of, regard has to be given to, "not only what the words are, but what conclusion could reasonably be drawn from them; as a man who issues such a document is answerable, not only for the terms of it but also for the conclusion and meaning which persons would reasonably infer from and place upon the document": *per* COTTON LJ in *Capital &*

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Counties Bank v Henty (1880) 5 CP 514 at 536; approved in *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331 (CA) at 339.

I have no doubt that, if the learned trial judge had not overlooked this aspect of construing statements alleged to be defamatory, he would have concluded that each and every one of the statements complained of could reasonably be understood to intend to injure the reputation of the applicant by way of his profession and office.

The applicant held a master's degree in engineering from the Technical University of Denmark,

and had been practising as an engineer for about eighteen years. To allege that a professional of such vintage is "a junior engineer" is to hold him up to ridicule by suggesting that he is inexperienced. This opinion of the applicant by the respondent is borne out by the following description of him by the respondent:

"your Mr Jensen's attitude is totally intransigent and unrealistic. On the other hand your Mr Jewell whom we regard as a perfectly capable and professional man ...,"

from which any person would reasonably infer that the applicant was incapable and inexperienced in his profession and office.

As regards ascribing to the applicant "an unethical approach to contract procedure", I can only subscribe to the views expressed by MILMO J in *Angel v HH Bushell & Co Ltd* [1967] 1 All ER 1018 (QB) at 1023B-C that:

"... it is a serious imputation to say of a businessman that he is not conversant with business ethics. There is a very real difference between an allegation of failure to comply with etiquette and a failure to conform with ethical standards, and it is the latter imputation which, in my view, is made by this letter. Ethics involve a moral standard, and, in my judgment, a breach of ethics connotes at a minimum dishonourable behaviour. The words complained of, in the context in which they appear, meant that the plaintiff had failed to act honourably in accordance with the standards which respectable businessmen observe in their dealings with one another."

Substitute "professional man" for "businessman" in the above quoted passage and the citation is apposite to the present case.

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To say of the applicant that "he wished to penalise (defendant) financially for reasons best known to himself", to my mind, also imputes to the applicant dishonest conduct.

From the foregoing, it follows that I am of opinion that the allegations (i) "that the applicant's superior had allowed himself to be influenced by junior engineers who appear to have no practical experience" and (ii) "that a document prepared by the applicant was a biased and unprofessional document" are both defamatory of the applicant; as is also the statement that "the applicant had proceeded by various unjustified and unethical means to prove an overpayment was made." I therefore agree with Mr *Chatikobo* that all the statements complained of, construed in their proper context, were defamatory of the applicant.

I now pass to the defence of justification. Where a defendant puts up a plea of justification the *onus* lies on him to prove the truth of the words in their natural and ordinary meaning. He establishes his plea if he proves that the gist or sting of the statement complained of is true. It is unnecessary that the truth of every word need be proved. It is sufficient if the substance of the libellous statement be justified. As WESSELS JA observed in *Johnson v Rand Daily Mails* 1928 AD 190 at 205:

"Now the general rule has been thus stated: 'The plea of justification must be not only as broad as the literal language of the libel but as broad as the inferences of fact necessarily flowing from the literal language', (*Gatley* p 495). As a broad rule this is no doubt true, but like all general statements extracted from the consideration of particular cases it is somewhat vague. In cases where a man is charged with fraud or dishonesty or where criminal acts are attributed to him, the court no doubt will exact from the defendant strict proof of every charge, but where

incompetency is alleged of a caterer or where matters are described which will not necessarily appear the same to two different persons, the defendant is not required to justify every detail when in fact the gravamen of the charge has been amply justified. Why do we allow a defendant to justify at all? 'Because', in the words of LITLEDALE J, in *McPherson v Daniels* (10 B & C p 272), 'it shows that the plaintiff is not entitled to recover damages in respect of any injury to a character which he either does not or ought not to possess.' Hence the courts have modified the general rule by saying that the defendant need only justify the main charge or gist of the libel, - 'he need not justify immaterial details or mere expressions of abuse which do not add to its sting and would produce no different

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effect on the mind of the reader than that produced by the substantial part justified' (*Gatley* p 496)".

See also *Yusaf v Bailey & Ors* 1964 (4) SA 117 (W) at 126E-F.

As was also remarked by COLERIDGE J in *Cooper v Lawson* (1838) 8 A & E 746 at 753; 112 ER 1020:

"It would be much too strong to say that all comments are to be submitted to the jury; for there are cases ... where the inference is so fair, that, if you prove the fact, you prove the correctness of the comment."

For the defence of justification to be sustained the second requirement is that it must be established that the publication was to the benefit of the public. Such public benefit "lies in telling the public something of which they are ignorant, but something which is in their interest to know. If they already knew it, it hardly seems that mere repetition can be of value": *per* BEADLE CJ in *Mahomed v Kassim* 1972 (2) RLR 517 (A) at 529-530; 1973 (2) SA 1 [RA] at 10B.

To revert to the facts appearing on record, the failure to resolve the differences between the parties led to the appointment of Professor MacKechnie as mediator in the dispute over Contract DW 1/1984. His report, Exhibit 14, was very substantially in favour of the respondent's company. The applicant, however, expressed dissatisfaction with the mediator's report and refused to accede to or implement the recommendations therein contained.

Now, Professor MacKechnie is a highly respected member of the engineering fraternity. After graduating from the University of Cape Town with a BSc in engineering in 1953, he followed that with a Post Graduate Diploma in Mechanics in 1955, and subsequently obtained his master's degree in engineering from the University of London in 1957. He has a rich practical experience in the field of engineering. Having previously been a Fellow of the Zimbabwe Institute of Engineers, he is a Fellow of the Institute of Civil Engineers in London, a Fellow of the South African Institute of Civil Engineers, and a Member of the American Society of Civil Engineers.

Professor MacKechnie's report should have ended the matter, not only in respect of Contract DW 1/1984, but also in respect of the other three contracts. But it did not. The applicant objected to the conclusions arrived at by Professor MacKechnie and the matter was referred to Senator Chinamasa, whose findings were very much in line with those of Professor MacKechnie.

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KORSAH JA

Notwithstanding the advice tendered by Senator Chinamasa and a consensus of all the engineers in the relevant department of the City Council, except Messrs Jewell and Nleya, who assisted the applicant in the re-measurement of the work done by Conforce without notification, that a considerable amount was due and owing to Conforce, the applicant refused to sign the relevant papers to permit of the release of the necessary funds in settlement of what was found to be due and owing to Conforce.

The crux of the matter was that after the applicant had taken over from Mr Gow, he, without notice to Conforce, attended the contract sites of Conforce and had the various measurements contained in Exhibit 20A taken, and on the basis of the arbitrary figures so obtained, re-evaluated the certificates which Conforce had submitted for payment, concluding from such data that Conforce had been overpaid. It was this behaviour by the applicant which generated the remarks by the respondent, contained in the four letters to the applicant's superiors, of which the applicant takes exception on the ground that they are disparaging of him by way of his profession and office.

Professor MacKechnie (the mediator) met both parties and in the presence of each other agreed that the mediation be conducted by each party submitting points of argument in writing as well as having the right to make oral submissions in expatiation or explanation of questions raised.

The mediator testified that, from the applicant's written submissions, he formed the impression that the applicant was being unfair and punitive in so far as Conforce was concerned. He said the applicant acted without fairness or justice in a number of ways. He instanced the inadequacy of the applicant's records and said the only submission on reinforcing work carried out, as opposed to the specifications in the drawing, were from the delivery notes produced by Conforce; the applicant's records were of no assistance in that regard. He said it was common practice to check reinforcing before the concrete is poured, and that in cases such as this, where there was difficulty in obtaining the correct size of steel, it was imperative to examine the reinforcing before the concrete is poured in order to have an accurate record.

The mediator stressed that the bills submitted by Conforce, in consonance with the drawings, expressed measurements in linear metres and that it was wrong of the applicant to arbitrarily alter the system of measurement specified to one of square metres without the prior consent of Conforce.

The mediator also referred to the manner in which the applicant arbitrarily

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KORSAH JA

made a reduction in respect of rock excavation when no rate at all had been claimed and generally adopting rates which were unrealistically low for the extirpation of rock. The use by the applicant of a higher rate for deductions and a lower rate for additions in respect of the bills submitted by Conforce also invited adverse comment from the mediator.

The applicant himself accepted that as a professional man he has a duty to be fair. The failure of the applicant to liaise with the respondent prior to the revaluation exercise was, in the opinion

of the mediator, unfair and unethical.

It seems to me that where any doubt is entertained about certificates previously agreed upon, and any person, be he an engineer or not, wishes to ascertain the true position with a purpose of revising the certificated valuation, common sense, decency and justice dictate that the person whose work is going to be revalued be notified and accorded an invitation to be present to explain and defend his evaluation of his work. An arbitrary re-evaluation in such circumstances would, in my view, be grossly unfair. It amounts to a denial of the right of the respondent to justify his claim, and can only be categorised as unethical behaviour, if this is done by a professional man.

The mediator demonstrated in his report and testimony how unrealistic some aspects of the applicant's assessment of the work done by Conforce were. Those assessments by the applicant unfairly penalised Conforce. In so far as such unrealistic assessments unfairly penalised Conforce they were biased and unprofessional. There is no gainsaying that, as regards Conforce and in respect of the re-evaluation exercise carried out by the applicant, he adopted a very unethical approach to contract procedure. One does not expect such an approach to contract procedures from an experienced and seasoned professional.

The applicant's refusal to sign the necessary documents, despite the mediator's recommendation, backed by the opinion of Senator Chinamasa, amply demonstrate the intransigence of the applicant.

In my opinion, the respondent established that the defamatory words published of the applicant, in so far as they relate to facts, were substantially true in every material part, and in so far as they constitute comment upon them were correct.

The words complained of were published to the Director of Works and the Town Clerk, both of whom were the applicant's superiors and had an interest

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KORSAH JA

in receiving such a report, as such conduct of the applicant would most certainly reflect badly on the City Council. As regards Senator Chinamasa, the respondent was instructed by the Town Clerk to direct his complaints to Senator Chinamasa, as the legal adviser of the City Council. And as such legal adviser, he also had an interest in receiving such report to enable him to tender the best possible advice, which he did, but was spurned by the applicant.

I can only conclude that, taking into consideration all the surrounding circumstances the applicant's conduct wholly justified the words complained of. And that should be the end of the matter.

But turning briefly to the defence of qualified privilege, this defence is available if the defamatory statement was published by the person in the discharge of a duty or the protection of a legitimate interest to another person who had a similar duty or interest to receive it: *Borgin v de Villiers & Anor* 1980 (3) SA 556 (A) at 577D-E.

As was stated by LORD CAMPBELL CJ in *Harrison v Bush* (1855) 5 E & B 344 at 348, cited with approval in *R v Rule* [1937] 2 KB 375 (CCA) at 379:

"A communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty although it contains criminary matter which, without this privilege, would be slanderous and actionable."

In this regard, complaints about the conduct of those in authority or with responsibilities to the public may be seen as made from a duty to bring the facts to the attention of those who control or are concerned with the conduct in question, or in the furtherance of the interests of those affected in securing redress. LORD CAMPBELL CJ in *Harrison v Bush supra* at p 349 continued:

"the alleged misconduct of any who are clothed with public authority may be brought to the notice of those who have the power and duty to inquire into it and to take steps which may prevent the repetition of it."

The defence of qualified privilege may be rebutted by proof, either that the statement was not germane to the matter under consideration, or that it was actuated by malice, that is, an improper motive.

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KORSAH JA

It is clear to me that the respondent had an interest to protect by making the defamatory statements to the officers of the City Council who had a corresponding interest to receive his complaints and to inquire into it, as they did, and to take such steps as would prevent the recurrence of such misconduct.

I am disposed to the view that the respondent was more concerned with the collection of the fees due to Conforce than with the reputation of the City Council, but finding as I do that the respondent was not actuated by malice, even if that were the only real motive in writing as he did, I should hold, as I do in this case, that the occasion on which the letters were written to the applicant's superiors was privileged.

In the circumstances, I see no prospects of this appeal succeeding.

The application for condonation is accordingly dismissed with costs.

Gubbay CJ: I agree

Ebrahim JA: I agree

Muvingi & Machaya, applicant's legal practitioners

Byron Venturas & Travlos, respondent's legal practitioners

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EX P MISS X 1993 (1) ZLR 233 (HC)

Court High Court, Harare

Chidyausiku J

Application for review

2 June 1993

Flynote

Health - Termination of Pregnancy Act 1977 - test for authorising abortion - review of refusal to authorise - limited grounds of review

Family Law - abortion - Termination of Pregnancy Act 1977 - test for authorising abortion - review of refusal to authorise - powers of court on review

Headnote

A pregnant woman claimed that her pregnancy was a result of rape. She applied to a magistrate in terms of s 5(4) of the Termination of Pregnancy Act 1977 to obtain a certificate which would have allowed her to have a lawful termination of her pregnancy. The magistrate declined to issue this certificate because he was not satisfied that there was a reasonable possibility that the pregnancy was the result of rape. The woman then re-submitted the application to the magistrate. The magistrate then referred the matter on review to the High Court.

Although the case had not been brought properly before the High Court as Rule 256 Order 33 had not been complied with, the court was prepared to depart from the requirements of the Rules and review the matter as the matter was unusual and the magistrate was seeking guidance. (The decision of the magistrate in this matter was not subject to appeal.)

Held, that the Termination of Pregnancy Act conferred a discretion on the magistrate to decide whether the application should be granted and therefore the High Court could only set aside this matter on review if the magistrate's decision was so grossly unreasonable that no reasonable person applying his mind to the facts before him would have come to that conclusion.

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CHIDYAUUSIKU J

Held, further, that although the court was not entirely satisfied that the magistrate was correct in refusing the permission to terminate the pregnancy, it could not be found that the magistrate's decision was so grossly unreasonable that no reasonable person would have reached that conclusion. The court therefore was obliged to confirm the magistrate's decision.

Cases cited:

S v Ndlovu 1993 (1) ZLR 87 (H)

R v Robey 1973 (1) RLR 1 (G)

S v Chidodo & Anor 1988 (1) ZLR 299 (H)

Levy v Benatar 1987 (1) ZLR 120 (S)

Judgment

Chidyausiku J: A Miss X applied to the Provincial Magistrate for Harare for permission to terminate her pregnancy. (I have used the name Miss X to conceal her identity as I feel it is in the interests of justice to do so. Her name should not be published.) Miss X's story is that she is a cadet draftsman. In November 1992 she was posted to a dam construction site in the Mutare area. She was housed at the officers' camp. The resident engineer, a Mr Musana, advised her that she had the option to use the caravan parked near his house or make use of the spare bedroom in his house. She opted for the caravan but he prevailed on her to use the spare bedroom in his house. She stayed in the house for a whole week without incident. The night of 20 November 1992 was to be her last night at the site. Miss X prepared a meal for both Mr Musana and herself as usual. He went to have a bath and she retired to bed.

At about 2.00 am, Miss X woke up when she felt the presence of someone in her bed. She had not locked the door because there was no key. She realized it was Mr Musana and she screamed and a struggle ensued. He eventually overpowered her, removed her pants and had sexual intercourse with her without her consent. In her statement through her lawyers she alleges that she was raped more than once. In an earlier statement to the magistrate she had said she was raped once. Miss X also told the provincial magistrate in an interview that she had a steady boyfriend whereas in her affidavit she says this man is her customary law husband.

Be that as it may, Miss X alleges that her screams were not heard because Mr Musana's house was far from other houses. She eventually stopped screaming and let him have his way.

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Mr Musana eventually left her room at 5.00 in the morning. She got up, bathed and went to work. She returned to Mutare the same day. She was taken there by a driver. She says she was in a state of shock as she did not believe this could have happened to her. She avers that she was traumatised by the incident. It would appear this occurred on a Friday and on Monday she went to work and requested for leave for 45 days. Her superior, who is a man, asked her why she wanted the leave but she found herself unable to tell him of the incident. She was apprehensive that her story would not be believed.

Her leave was granted and she left Mutare for Harare on 27 November 1992. She missed her menstrual period in December and thought this was due to the stress she was under. The stress she avers also began to affect her relationship with her husband. It is not clear on the papers in what way the relationship was affected, but because of this she decided to tell her husband of the incident. She told him of this on 3 January 1993. After telling her husband, she reported the matter to her employers. Mr Musana was summoned and interviewed. He initially denied having had sexual intercourse with Miss X but he eventually admitted but insisted it was

with her consent.

Her superiors directed her to go and see a doctor which she did on 6 January 1993. The doctor told her that she was pregnant and gave the dates of conception as between 18 and 21 November 1992. The report to the police was made on 21 January 1993 almost two months after the incident. She gives as her reasons for the delay in reporting the matter to the police a number of reasons. She had been raped by a colleague and that she was staying in his house at the time of the rape. The rape had traumatised her and she was apprehensive that people would not believe her. She was also apprehensive of the possible stigma that might come with the revelation.

On or about 12 February, Miss X made an application for a certificate of termination of pregnancy to the provincial magistrate, Harare. The application was made in terms of s 5(4) of the Termination of Pregnancy Act 29 of 1977. The application was refused. The provincial magistrate's reasons for refusing the application were set out in a minute that reads as follows:-

"In the above connection, I wish to advise that on the 12th February 1993, I had occasion to listen to Miss X's version of the alleged rape. I also had occasion to read all the documents which she had brought with her. I have satisfied myself:-

- (1) That a complaint relating to the alleged rape in question has been lodged with the police.

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- (2) That the complaint was only made on the 21st January 1993 when the alleged rape is said to have occurred on the 21st November 1992.
- (3) That it is probable that complainant Miss X decided to report this matter of alleged rape after realising that she had fallen pregnant.
- (4) That because of the lapse of time before the case was reported, it is not easy to say that there is a reasonable possibility that the pregnancy is the result of the alleged rape.

In view of the observations listed above, I hereby decline to issue the certificate authorising the termination of the pregnancy of Ms X "

Upon this refusal Miss X approached her present legal practitioners who re-submitted the application for a certificate of termination of pregnancy. Upon receipt of the second application the provincial magistrate referred this matter for review with the following comments:

"On 12 February 1993 I was approached by a 25 year old woman who was applying in terms of s 5(4) of the Termination of Pregnancy Act 1977.

I recorded the full sworn statement of what she alleged was rape on her. I then wrote a judgment addressed to Sergeant A Mugore stating why I declined to issue a certificate authorising the termination of pregnancy of the said Miss X

Towards the end of April 1993 a legal practitioner from Gambe, Chinyenze and Makarau approached me saying

they represented the applicant. Seeing that I had already made up my mind on the matter I decided that the best thing would be to have my decision reviewed by a judge of the High Court.

I wish to point out that in addition to my decision dated 12th February 1993 I have noticed that Miss X made yet another sworn statement to her legal practitioner. In this statement she said among other things:

- (a) that she is **married according to custom** but she told me and the police that Mr Y was only a boy friend.
- (b) that the resident engineer (Mr Musana) **raped her more than once though she told me she was raped once."**

This discrepancy in her versions, if anything, strengthens my doubt that the pregnancy she wants terminated was the result of the alleged rape."

As I stated earlier, the application was made in terms of s 5 (4) of the above Act. Sections 4(c) and 5(4) of the Act read as follows:

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"4. Subject to the provisions of this Act, a pregnancy may be terminated:-

- (a) ...
- (b) ...
- (c) where there is a reasonable possibility that the foetus is conceived as a result of unlawful intercourse.

5. (1)...

(2)...

(3)...

- (4) A pregnancy may only be terminated on the grounds referred to in paragraph (c) of section *four* by a medical practitioner after a certificate has been issued by a magistrate of a court in the jurisdiction of which the pregnancy is terminated to the effect that:-

(a) he has satisfied himself:-

- (i) that a complaint relating to the alleged unlawful intercourse in question has been lodged with the authorities; and
- (ii) after an examination of any relevant documents submitted to him by the authorities and after such interrogation of the woman concerned or any other person as he may consider necessary, that, on a balance of probabilities, unlawful intercourse with the woman concerned has taken place and there is a reasonable possibility that the pregnancy is the result of such intercourse; and
- (iii) in the case of the alleged incest, that the woman concerned is related within the prohibited degree to the person with whom she is alleged to have had incest; and

(b) in the case of alleged rape or incest, the woman concerned has alleged in an affidavit submitted to

the magistrate or in a statement made under oath to the magistrate that the pregnancy could be the result of that rape or incest, as the case may be."

The Act does not provide for a right of appeal against the decision of a magistrate. The Act does not specifically provide for review of such a decision either, but I am satisfied this court has jurisdiction to review the decision both at common law and in terms of s 26 of the High Court of Zimbabwe Act 1981, which reads:

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

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The above statutory powers are complemented by inherent common law review powers. See *S v Ndlovu* 1993 (1) ZLR 87 (H), *R v Robey* 1973 (1) RLR 1 (G), *S v Chidodo & Anor* 1988 (1) ZLR 299 (H) and *Levy v Benatar* 1987 (1) ZLR 120 (S). This jurisdiction is available in both criminal and civil matters. Section 28 of the High Court Act provides that on review of any proceedings or decisions other than criminal proceedings, the High Court may, subject to the provisions of any other law, set aside or correct the proceedings or decisions of the inferior courts or authorities.

Section 27 of the same Act sets out the grounds for review. It reads as follows:

"(1) Subject to the provisions of this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be -

- (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
- (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
- (c) gross irregularity in the proceedings or the decision.

(2) Nothing in this section shall affect the provisions of any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities."

The above grounds are not exhaustive but I need not concern myself with that issue.

The grounds upon which this matter is to be reviewed are not very clear. This is not surprising because the matter really is not properly before me. Civil matters come before this court on review by way of a court application in terms of Rule 256 Order 33. The Rules provide for departure from the Rules in an appropriate case. This jurisdiction is also inherent. In the light of the above this court has two options in this matter. I should either refuse to review this matter because it is not properly before me or depart from the requirement of the Rules and review the matter. I have decided the latter course because this matter is unusual and the learned provincial magistrate is basically seeking the guidance of this court in this matter. This guidance should not unreasonably be denied.

I will now proceed to review the matter. Section 27 of the High Court Act set out the grounds for

review. That section sets out three grounds for review

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namely lack of jurisdiction, partiality and irregularity. This is not an exhaustive list of grounds for review. There are a number of other grounds for review under the common law.

It would appear from the provincial magistrate's minute that he is not seeking a review on any of the grounds set out in s 27 of the High Court Act. The minute suggests that having considered the matter in the first instance he was *functus officio* and could not consider the matter again, and, in any event, there was nothing in the new and second application to cause him to change his original view.

The Termination of Pregnancy Act confers on a magistrate the discretion to authorise the termination of pregnancy. The magistrate exercised that discretion and refused to authorise such termination. This court sitting as a review court can only set aside that decision if it were satisfied that it was so grossly unreasonable that no reasonable person applying his mind to the facts before him would have come to that conclusion. That cannot be said of the magistrate's decision in this case.

While I accept that the learned provincial magistrate's decision was within his discretion, I am not entirely satisfied that he was correct in refusing the permission to terminate the pregnancy.

It would appear that the provincial magistrate refused to issue the certificate authorising termination of pregnancy in the first instance because of the delay in reporting the alleged rape. This, in my view, would be a proper approach if the magistrate were trying an accused person on a charge of rape. The fact that the victim of the rape delays in making a report is a factor that should cause a magistrate in a criminal trial to doubt the truthfulness of the complainant. That doubt would benefit the accused and lead to his acquittal.

In an application for termination of pregnancy, the stringent requirements of proof before a complainant's evidence can be accepted for the purpose of conviction do not apply. All that was required of the magistrate in this case was to be satisfied that the complainant **probably** did not consent to the alleged intercourse and that there was a **reasonable possibility** that the pregnancy arose from that intercourse. Applying that approach to the facts of the present case, permission to terminate the pregnancy should have been granted. It is common cause that Miss X had sexual intercourse with Mr Musana on 20 November 1992. The doctor confirms that conception took place between 18 and 21 November 1992. The reasonable possibility that

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Miss X conceived as a result of the sexual intercourse with Mr Musana is clearly established. In this regard even if, for argument's sake, Miss X had had lawful sexual relations with another man such as her husband during the same period ie between 18 and 21 November that would not affect the issue, as a reasonable possibility would still exist that it was the unlawful and not

the lawful intercourse that caused the pregnancy.

That being the case the only issue before the provincial magistrate was whether or not sexual intercourse Miss X had with Mr Musana was with her consent. The probabilities are that it was without her consent for the following reasons.

Miss X did report the rape before she discovered that she was pregnant. Her reasons for her reluctance to report are quite probable. It is not a pleasure to report a rape. Indeed a lot of rapes go unreported, not because the victims were not raped, but because they cannot bring themselves to report the rape. In the present case, Miss X feared that nobody would believe her, given the fact that she had agreed to share the same house with Mr Musana against her better judgment.

The fact that Miss X took leave suddenly after the incident tends to support her story that she did not consent to the admitted sexual intercourse.

In the result, if I were sitting as an appeal court, I would have reversed the decision of the provincial magistrate but, because I am sitting as a review court, I cannot interfere with the exercise of the magistrate's discretion. Even if one were to reverse the magistrate's decision, there are certain practical problems that would arise. The matter came before me for review seven months into the pregnancy. An abortion at that stage may not be a practical option. The delay is not of the magistrate's making. If anything he went out of his way to bring this matter for review and he should be commended for it. If anything the blame lies at Miss X's door for her failure to pursue this matter more vigorously and timeously.

The decision of the provincial magistrate is confirmed.

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PRACTICE DIRECTION No. 1 OF 1993 1993 (1) ZLR 241 (SC)

Court **Supreme Court, Harare**

Gubbay CJ

16 June 1993

Flynote

Appeal - record of proceedings in lower court - inordinate delay in obtaining - action to be taken

Judgment

Gubbay CJ: If in any particular case, whether of a criminal or civil nature, a delay in obtaining judgment should occur which is considered to be inordinate, the aggrieved party or his legal practitioner is invited to bring such delay to the attention of the Chief Justice or the Judge President, if it be in respect of a High Court matter, and to the Chief Magistrate, if it be a Magistrates Court matter.

Upon receipt of such notification the Chief Justice, the Judge President or the Chief Magistrate, whoever has been addressed, will proceed to investigate the complaint, and provided he is satisfied that in all the circumstances, the delay is unreasonable, will apply his best endeavours to obviate it.

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CATHOLIC COMMISSION FOR JUSTICE AND PEACE IN ZIMBABWE v ATTORNEY-GENERAL & ORS 1993 (1) ZLR 242 (SC)

Court **Supreme Court, Harare**

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

20 May, 20, 21 & 24 June 1993

Flynote

Constitution - death penalty - delay in carrying out sentence - whether delay itself is inhuman and degrading punishment or treatment - delay conjoined with conditions of detention pending execution - date from which any such delay calculated

Constitution - power of Supreme Court to set aside a sentence already confirmed on appeal

Court - locus standi - human rights organisation to act for condemned prisoners

Constitution of Zimbabwe - ss 15(1), 24(1) & 24(4)

Headnote

The applicant brought the present application in terms of s 24 of the Constitution to prevent the execution of four convicted murderers, and to have the sentences of death set aside on the ground that the delay in carrying out the sentences, taken together with the conditions under which the four prisoners were being held in custody, was itself a breach of the Declaration of Rights. The delays from the imposition of the sentences of death by the trial court to the dates of the proposed execution were 6 years and 21 days, 4 years 4 months and 2 days and 4 years 3 months and 24 days, respectively, for the four men.

Held, that the applicant had *locus standi* to bring the proceedings, and in any event the four condemned men had applied to be joined as additional applicants.

Held, further, that the delay by the Executive in carrying out the sentences of

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death imposed by the courts, together with the conditions under which the condemned prisoners were incarcerated and the anguish that they are thereby subjected to, rendered the proposed executions contrary to s 15(1) of the Constitution as being inhuman and degrading punishment and treatment.

Held, further, that in calculating the period of delay, regard is to be had to the whole period of incarceration as the conditions in prison apply throughout that period. A court must make a value judgment having regard to all the factual issues placed before it in the application.

Held, further, that the Supreme Court had the power and the duty to vacate and set aside the sentences of death in terms of s 24(4) of the Constitution.

Cases cited:

Deary NO v Acting President of Rhodesia & Ors 1979 RLR 200 (G)

Martin v A-G & Anor 1993 (1) ZLR 153 (S)

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

Conjwayo v Min of Justice & Others 1991 (1) ZLR 105 (S); 1992 (2) SA 56 (ZS)

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

Deena @ Deen Dayal & Ors v Union of India & Ors [1984] 1 SCR 1 (SC of India)

Riley & Ors v A-G of Jamaica & Anor [1983] AC 719; [1982] 3 All ER 469 (PC)

Bachan Singh v State of Punjab [1983] 1 SCR 145 (SC of India)

Ex p Medley (1890) 134 US 160; 33 L Ed 835 (US Sup Ct)

Furman v Georgia (1972) 408 US 238; 33 L Ed 2d 346 (US Sup Ct)

District Attorney for the Suffolk District v Watson & Ors (1980) NE 2d 1274 (Mass)

In re Kemmler (1890) 136 US 436; 34 L Ed 519 (US Sup Ct)

Ediga Anamma v State of Andhra Pradesh [1974] 3 SCR 329 (SC of India)

Rajendra Prasad v State of Uttar Pradesh [1979] 3 SCR 78 (SC of India)

Sher Singh & Ors v State of Punjab [1983] 2 SCR 582 (SC of India)

Dhlamini & Ors v Carter NO & Anor (1) 1968 (1) RLR 136 (A)

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

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

US v Cotroni (1989) 42 CRR 101 (SC of Canada)

Mullin v Admin, Union Territory of Delhi AIR 1983 SC 746 (SC of India)

Vatheeswaran v State of Tamil Nadu AIR 1983 SC 361; [1983] 2 SCR 348 (SC of India)

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Javed Ahmed v State of Maharashtra AIR 1985 SC 231; [1985] 2 SCR 8 (SC of India)

Triveniben & Ors v State of Gujarat & Ors [1989] 1 SCC 678; [1989] 1 SCR 509; [1989] 1 SCJ 383 (SC of India)

Madhu Mehta v Union of India [1989] 3 SCR 774 (SC of India)

People v Chessman (1959) 52 Cal 2d 469 (California SC)

Chessman v Dickson (1960) 275 F 2d 604 (US CA 9th Circuit)

US ex rel Townsend v Twomey (1971) 322 F Supp 158 (US Dist Ct)

Trop v Dulles (1958) 356 US 86; 2 L Ed 2d 630 (US Sup Ct)

Potts v State of Georgia (1989) 376 SE 2d 851; 259 Ga 96 (Georgia)

Richmond v Lewis (1991) 948 F 2d 1473

Andrews v Shulsen (1984) 600 F 408

Richmond v Lewis (1992) 113 Sup Ct 528; 121 L Ed 2d 411 (US Sup Ct)

People v Anderson (1972) 493 P 2d 880 (Cal Sup Ct)

Commonwealth v O'Neal (1975) 339 NE 2d 676 (Mass Sup Ct)

Abbott v A-G of Trinidad & Tobago & Ors [1979] 1 WLR 1342 (PC)

de Freitas & Malik v Benny [1976] AC 239; [1975] 3 WLR 388 (PC)

Re Applications by Thomas & Paul [1986] LRC (Const) 285

Soering v UK (1989) 11 EHRR 439 (ECHR)

In re Kindler v Canada (Min of Justice) (1991) 67 CCC (3d) 1 (SC of Canada)

Machhi Singh & Ors v State of Punjab [1983] 3 SCC 470 (SC of India)

S v Chaluwa 1985 (2) ZLR 121 (S)

State v Frampton (1981) 627 P 2d 922 (Wash)

In re Mlambo 1991 (2) ZLR 339 (S); 1992 (4) SA 144; 1992 (2) SACR 245 (ZS)

US v Benz (1931) 282 US 304; 75 L Ed 354 (US Sup Ct)

A P de Bourbon SC for the applicant

A V M Chikumira for the respondent

Judgment

Gubbay CJ:

INTRODUCTION

On 13 March 1993 it was reported in *The Herald* newspaper, which circulates throughout Zimbabwe, that the Minister of Justice, Legal and Parliamentary Affairs had announced that four men, Martin Bechani Bakaka, Luke Kingsize Chiliko, Timothy Mhlanga and John Chakara Zacharia Marichi, convicted of the crime of murder and under sentence of death, were to be hanged within the next few days. Reacting to this information, the Catholic Commission for

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Justice and Peace in Zimbabwe lost no time in lodging with this court an urgent chamber application in respect of the four condemned prisoners. It sought, and obtained, a provisional order interdicting the three respondents, who are the Attorney-General, the Sheriff of Zimbabwe and the Director of Prisons, from carrying out the sentences, pending the decision of this court whether to:

- (i) declare that the delay in carrying out the sentences of death constitutes a contravention of s 15(1) of the Constitution of Zimbabwe; and
- (ii) order that such sentences be permanently stayed.

Notice of opposition was duly filed by the respondents and after the reception of several sets of affidavits, the matter was set down, with the consent of the parties, and heard on 20 and 21 May 1993. This court has had the benefit of the industrious research undertaken by both counsel into the authorities, for which it expresses its appreciation.

As foreshadowed in the provisional order, the important question that falls to be determined is whether this court is obliged to intervene and prevent the respondents from carrying out the sentences of death passed upon the four condemned prisoners. It is claimed that by March 1993 the executions had been rendered unconstitutional due to the dehumanizing factor of prolonged delay, viewed in conjunction with the harsh and degrading conditions under which prisoners are confined in the condemned section at Harare Central Prison.

It was not sought, nor could it reasonably be, to overturn the death sentences on the ground that they were unlawfully imposed. The judgments of this court dismissing the appeals of the condemned prisoners cannot be disturbed. They are final. And the constitutionality of the death penalty *per se* as well as the mode of its execution by hanging, are also not susceptible of attack. The sole contention is whether, even though the death sentences were the only fitting and proper punishments to have imposed, supervening events establish that their execution on the appointed dates would have constituted inhuman or degrading treatment in violation of s 15(1) of the Constitution of Zimbabwe. The challenge is not, therefore, to the judicial sentences, but to their execution, after what are asserted to be inordinate delays. I would emphasise that it must not be thought that the fact that it is permissible to impose the death

penalty in appropriate cases implies that it must be carried out in every instance where it has been upheld on appeal, regardless of the events which have occurred since the imposition or confirmation of that sentence.

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THE OFFENCES

On 28 November 1988 Bakaka and Chiliko were jointly convicted of murder with actual intent to kill and of rape. They were sentenced to death on the first count and to nine years' imprisonment with labour on the second. It was proved that on the night of 14 March 1987 they had broken into the house of a seventy-year-old woman, who lived alone. They assaulted her severely, raped her, tied her up and left her to die while they proceeded to steal her property. The victim sustained a subdural haemorrhage resulting from a blow to the head. Her body was discovered, stripped of clothing, covered in blood and extremely bruised. Their appeals were dismissed on 15 July 1991.

On 17 November 1988 Mhlanga, a member of the Zimbabwe National Army, was sentenced to death for the murder of a seventy-two-year-old male villager. He was also sentenced to ten years' imprisonment with labour for the rape of a thirteen-year-old girl. The evidence disclosed that while proceeding at night along a foot path through the bush the deceased heard a cry for help. It came from the child who was being raped by Mhlanga. The deceased stopped to enquire who was crying. Without receiving a response he was shot twice in the abdomen by Mhlanga. He died instantly. Mhlanga's appeal was dismissed on 22 January 1990.

Marichi broke into the residence of the deceased under cover of darkness. His entry did not go unnoticed by the deceased, who armed himself with a pistol. He confronted Marichi in the passage of the house and fired at least once at him, but missed. Marichi then tackled the deceased whom he succeeded in disarming. He fired at the deceased striking the left collar bone. He then shot the deceased in the head. He was held by the trial court to have fired deliberately with intent to kill and was sentenced to death on 26 February 1987. His appeal was dismissed on 13 November 1988.

THE EVENTS SUBSEQUENT TO THE PASSING OF THE DEATH SENTENCES

(a) The physical conditions endured daily by the four condemned prisoners

Since the passing of sentence of death upon them, the four prisoners have been incarcerated in the condemned section of Harare Central Prison. Pursuant to s 110 of the Prisons Act [Chapter 21] a condemned prisoner is confined in a cell, separately, under constant supervision both by day and night. The cell is approximately three-and-a-half metres long by two metres

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wide. By holding his arms outstretched a person is able to touch the opposite walls. There is a

single window very high up from which only the sky is visible. The door of the cell has a small aperture through which prison officers are able to view the inmate. An electric light burns in each cell and is never extinguished. It supplies the sole source of illumination. There is no inbuilt toilet, the prisoner being obliged to utilise a chamber pot. A thin mattress is provided as well as two sets of clothing - the one to be worn inside the cell, the other when outside - in order to facilitate routine security checks and searches.

The cell is opened every morning at 0600 hours. The condemned prisoner is allowed out in a group for washing of the chamber pot and bathing. He is returned for breakfast. Lunch is served in the cell at 1100 hours and supper at 1400 hours. The food is of poor quality. Ten cigarettes a day are provided.

The condemned prisoner is allowed two periods of exercise time of thirty minutes each in one of two exercise yards, between 0900 and 1100 hours and 1300 and 1500 hours, in a group of about ten other condemned prisoners. No apparatus to exercise is supplied and the playing of games is forbidden. Communication with other condemned prisoners is permitted but not with any other grade of prisoner. In all, he is confined in a cell for a minimum period of twenty-one hours and forty minutes per day, during which he has no contact at all with any other prisoner. He is given a bible and other religious books but no other reading material.

At 1500 hours the condemned prisoner is required to leave all clothing outside his cell. Thereupon he is incarcerated, naked, until the following morning. The cell is very cold in the winter months.

Visitations from family members of about ten minutes' duration, in the presence of prison officers, are permitted periodically.

(b) The mental anguish of the four condemned prisoners

It was proposed to execute Marichi on 16 March 1993 and the others on 19 March 1993. Save for this court's intervention on 15 March 1993, Marichi would have been incarcerated in the condemned section for six years and twenty one days; Mhlanga for four years, four months and two days; and Bakaka and Chiliko, for four years, three months and twenty-four days. Each alleged in his affidavit that throughout the period he has lived in daily fear of being put to death. Execution by hanging is constantly in mind. Chiliko

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deposed that when informed that his appeal had been dismissed he seriously contemplated committing suicide. He thought that it would be less painful to smash his head against the wall of his cell than to be hanged. Eventually he decided against it. Marichi, also, at some stage of his incarceration, considered suicide to be a preferable option.

The affidavits also reveal not infrequent taunting by prison officers of the impending hanging, the mental deterioration suffered by other condemned prisoners, the acute fear experienced when it becomes known that one of their number is about to be hanged and the terrible ordeal

of hearing the sounds of the executions being carried out.

All this is graphically described in the affidavit of Admire Mthombeni. He was sentenced to death on 14 August 1987 for dissident related murders but was released on 4 September 1990 by virtue of a free pardon granted him under Clemency Order No. 1 of 1990, made to mark Zimbabwe's Tenth Anniversary of Independence. His averments, which were not disputed by the respondents, read in part as follows:

"Because you spend so much time in your cell alone you endlessly brood over your fate and it becomes very difficult, and for some people impossible, to cope with it all.

The treatment meted out to you by the warders is very harsh. They are continuously hassling you and chasing you up.

If you make any complaint about anything to do with the conditions you run the risk of receiving a beating. One of the warders blows a whistle. Other warders come running and without further ado they start beating you with their baton sticks.

The warders are also continuously reminding you of the hanging which awaits you. They continually taunt and torment you about it. For instance, they would ask you why you are bothering to read when you are going to hang. They would also say that you are now fat enough to hang.

The gallows themselves are situated within the condemned section itself. Whilst I was there, people were hanged in 1987 and 1988. Although apparently five people can be hanged at the same time the hangings used to take place in stages. This meant that for the rest of us the agony was prolonged.

In 1987 a total of eleven people were hanged. However, the process went

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on for about two weeks. Two people were hanged one day. The next day nobody was hanged. The following day another two people were hanged and so it went on.

During this period, the warders rattled our doors at 4.00 am which is the time they remove people from their cells for hanging. The effect was of course that I woke up suddenly terrified that I was about to be hanged. This was just another way in which they tormented us.

When a person was to be taken out for hanging the warders came into his cell in a group. They leg ironed him and handcuffed him.

Often, the person to be hanged resisted and the warders then used electric prodders to subdue him. I saw this through the peep hole in my cell. The warders also told us that they did this.

We heard the sounds of wailing and screaming of those about to be hanged from the time they are removed from their cells at 4.00 am up to the time they were hanged at about 9.00 am.

We also heard the sounds of the gallows themselves ...

The warders often told us detailed and lurid stories about the hangings themselves which they had witnessed. The aim of this was to torture us.

For instance, after one lot of hangings, they told us that the machine did not work properly. As a result, one of those to be hanged called Chitongo did not die. Instead, he somehow managed to get hold of the hangman and would not let go. We were told that the warders eventually had to get a hammer and then they hammered him to

death.

On another occasion one of the warders showed one condemned man called Vundla a newspaper showing that he was about to be executed. We were not allowed access to any newspapers. The warder therefore deliberately showed this condemned person the newspaper to torture him.

As a result, Vundla managed to climb up to the window at the top of his small cell and from there he dived on to the floor and killed himself.

Many people could not cope with all this and become mentally disturbed. The warders treated these kind of people even worse than us. For instance, if a mentally disturbed prisoner soiled his cell the warders refused for days to have it cleaned up."

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THE LOCUS STANDI OF THE APPLICANT

Although the *locus standi* of the applicant to bring this application was initially objected to in an affidavit filed on behalf of the respondents, the contention was not pressed at the hearing, and correctly so.

The applicant is a human rights organisation whose avowed objects are to uphold basic human rights including the most fundamental right of all, the right to life. It is intimately concerned with the protection and preservation of the rights and freedoms granted to persons in Zimbabwe by the Constitution. Its non-frivolous submission is that, in the circumstances which presently obtain, the carrying out of the death sentences would amount to an abuse of the protection guaranteed the condemned prisoners under s 15(1).

It would be wrong, therefore, for this court to fetter itself by pedantically circumscribing the class of persons who may approach it for relief to the condemned prisoners themselves; especially as they are not only indigent but, by reason of their confinement, would have experienced practical difficulty in timeously obtaining interim relief from this court. See *Deary NO v Acting President & Ors* 1979 RLR 200 (G) at 203A-D.

In any event, since the grant of the provisional order the four condemned prisoners have effectively joined in the application. They have, of course, a direct and immediate interest in its determination.* (6)

THE RELEVANT CONSTITUTIONAL PROVISIONS

Section 24(1) of the Constitution, which is the provision pursuant to which the application was brought, vests in the Supreme Court the power to deal with constitutional issues as a court of first instance. It enjoins the Supreme Court to examine challenged legislation, or a particular practice or action authorised by a State organ, in order to determine whether or not it infringes one of the entrenched fundamental rights and freedoms of the individual. The Supreme Court is empowered to measure the effect of the enactment or action against the particular guarantee it is claimed it offends. Clearly it has jurisdiction in every type of situation which involves an alleged breach or threatened breach of one of the provisions of the Declaration of Rights and,

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particularly, where there is no other judicial procedure available by which the breach can be prevented. Compare, *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S).

The protection embodied in s 15(1) of the Constitution reads:

"No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

Save for the derogations recently introduced by the Constitution of Zimbabwe Amendment (No 11) Act 1990, which are not presently relevant, no further derogation from the rights entrenched is permitted. The prohibitions are absolute. Justification cannot arise. See *S v A Juvenile* 1989 (2) ZLR 61 (S) at 91G; 1990 (4) SA 151 (ZS) at 169F.

THE AVAILABILITY OF THE CONSTITUTIONAL PROTECTION TO THE CONDEMNED PRISONERS

It cannot be doubted that prison walls do not keep out fundamental rights and protections. Prisoners are not, by mere reason of a conviction, denuded of all the rights they otherwise possess. No matter the magnitude of the crime, they are not reduced to non-persons. They retain all basic rights, save those inevitably removed from them by law, expressly or by implication. Thus, a prisoner who has been sentenced to death does not forfeit the protection afforded by s 15(1) of the Constitution in respect of his treatment while under confinement. See *Conjwayo v Minister of Justice, Legal & Parliamentary Affairs & Anor* 1991 (1) ZLR 105 (S) at 109G-111G; 1992 (2) SA 56 (ZS) at 61B-62E and the cases there cited.

THE CONSTRUCTION OF SECTION 15(1) OF THE CONSTITUTION

In *S v Ncube & Ors* 1987 (2) ZLR 246 (S) at 267B-C; 1988 (2) SA 702 (ZS) at 717B-D I expressed the view that s 15(1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of dignity, humanity and decency. It guarantees that punishment or treatment of the individual be exercised within the ambit of civilised standards. Any punishment or treatment incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involve the infliction of unnecessary suffering, is repulsive. What might not have been regarded as inhuman decades ago may be revolting to the new sensitivities which emerge as civilisation advances. I went on to say that an application of this approach

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to whether a form of torture, punishment or treatment, is inhuman or degrading is dependant upon the exercise of a value judgment (see at 268C and 717I). One that must not only take account of the emerging consensus of values in the civilised international community of which this country is a part), as evidenced in the decisions of other courts and the writings of leading academics, but of contemporary norms operative in Zimbabwe and the sensitivities of its

people.

THE ONUS

It was contended on behalf of the applicant that the burden of proof rested upon the respondents to satisfy this court that to carry out the sentences at this time would not constitute inhuman treatment of the condemned prisoners. Reliance was placed on the judgment of the Supreme Court of India in *Deena @ Deen Dayal & Ors v Union of India & Ors* [1984] 1 SCR 1, where CHANDRACHUD CJ at 32E-F stated that notwithstanding that in normal constitutional applications the *onus* lies on the applicant, where it appears that a person is being deprived of his life, or has been deprived of his personal liberty, the burden rests on the State to establish the constitutional validity of the impugned law.

This view is contrary to that expressed by LORD SCARMAN and LORD BRIGHTMAN in their joint minority opinion in *Riley & Ors v Attorney-General of Jamaica & Anor* [1982] 3 All ER 469 (PC) at 480C, wherein it was said that it was for the applicant for constitutional protection to show that:

"... the delay was inordinate, arose from no act of his, and was likely to cause such acute suffering that the infliction of the death penalty would be in the circumstances which had arisen inhuman or degrading."

With respect to CHANDRACHUD CJ I prefer the opposing view. I consider that the burden of proof that a fundamental right, of whatever nature, has been breached is on him who asserts it. In relation to s 15(1) of the Constitution the issue of whether an individual has been subjected to torture or to inhuman or degrading punishment or treatment is essentially a matter of fact and, ordinarily, some evidence would have to be adduced to support the contention. The respondent is not obliged to do anything until a case is made out which requires to be met.

It is also to be noted that the view of CHANDRACHUD CJ is persuasively criticised in Seervai's *Constitutional Law of India*. 3 ed. Supp at 413-415. It

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is there pointed out that as s 354(5) of the Code of Criminal Procedure, which provided that sentence of death was to be carried out by hanging, bore no stamp of cruelty on the face of it, and as sentence of death had been held a constitutionally valid punishment (see *Bachan Singh v State of Punjab* [1983] 1 SCR 145), it was necessary for the petitioner who alleged that death by hanging was a cruel and barbarous punishment, to lead evidence in support thereof; and that is what he did. Furthermore, a presumption of constitutionality in respect of s 354(5) operated in favour of the Union of India.

JUDICIAL AND ACADEMIC ACCEPTANCE OF THE DEATH ROW PHENOMENON

Much has been said and written by jurists, penologists and psychiatrists, about the mental suffering endured by prisoners who have been sentenced to death.

Over one hundred years ago JUSTICE MILLER in *Ex p Medley* 134 US 160 (1890) at 172

opined that:

"... when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it.... as to the precise time when his execution shall take place."

In *Furman v Georgia* 408 US 238 (1972) at 288 JUSTICE BRENNAN gave as one reason for his conclusion that capital punishment is *per se* unconstitutional the fact that:

"... mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."

More recently, in *District Attorney for the Suffolk District v Watson & Ors* (1980) 411 NE 2d 1274 (Mass) at 1283 HENNESSEY CJ said of the death penalty:

"The mental agony is, simply and beyond question, a horror".

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And in *Re Kemmler* 136 US 436 (1890) at 447 the United States Supreme Court accepted that:

"Punishments are cruel when they involve ... a lingering death ... something more than the mere extinguishment of life."

It may validly be argued, so it seems to me, that death is as lingering if a person spends several years in a death cell awaiting execution, as if the mode of execution takes an unacceptably long time to kill him. The pain of mental lingering can be as intense as the agony of physical lingering.

Indian judges have also made the same observations. In *Ediga Anamma v State of Andhra Pradesh* [1974] 3 SCR 329 at 335, KRISHNA IYER J spoke of:

"... the brooding horror of 'hanging' which has been haunting the prisoner in her condemned cell for over two years."

Later, in *Rajendra Prasad v State of Uttar Pradesh* [1979] 3 SCR 78 at 130 the same learned Supreme Court Judge remarked that:

"... the excruciation of long pendency of the death sentence, with the prisoner languishing in near solitary confinement suffering all the time, may make the death sentence unconstitutionally cruel and agonising."

And in *Sher Singh & Ors v State of Punjab* [1983] 2 SCR 583 at 591D-E CHANDRACHUD CJ, in language borrowed closely from the minority opinion in *Riley & Ors v Attorney-General of Jamaica & Anor supra* said:

"The prolonged anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional and physical integrity and health of the individual can render the decision to execute the sentence of death an inhuman and degrading punishment in circumstances of a given case."

In a sociological study entitled *Condemned to Die: Life under Sentence of Death*, the renowned

criminologist, Professor Robert Johnson, wrote:

"Death row is barren and uninviting. The death row inmate must contend with a segregated environment marked by immobility, reduced stimulation, and the prospect of harassment by staff. There is also the risk that visits from loved ones will become increasingly rare, for the man

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who is 'civilly dead' is often abandoned by the living. The condemned prisoner's ordeal is usually a lonely one and must be met largely through his own resources. The uncertainties of his case - pending appeals, unanswered bids for commutation, possible changes in the law - may aggravate adjustment problems. A continuing and pressing concern is whether one will join the substantial minority who obtain a reprieve or will be counted among the to-be-dead. Uncertainty may make the dilemma of the death row inmate more complicated than simply choosing between maintaining hope or surrendering to despair. The condemned can afford neither alternative, but must nurture both a desire to live and an acceptance of imminent death. As revealed in the suffering of terminally ill patients, this is an extremely difficult task, one in which resources afforded by family or those within the institutional context may prove critical to the person's adjustment. The death row inmate must achieve equilibrium with few coping supports. In the process, he must somehow maintain his dignity and integrity." (at 4)

And:

"Death row is a prison within a prison, physically and socially isolated from the prison community and the outside world. Condemned prisoners live twenty-three and one half hours alone in their cells ..." (at 47)

The author proceeded at 110:

"Some death row inmates, attuned to the bitter irony of their predicament, characterize their existence as a living death and themselves as the living dead. They are speaking symbolically, of course, but their imagery is an appropriate description of the human experience in a world where life is so obviously ruled by death. It takes into account the condemned prisoners' massive deprivation of personal autonomy and command over resources critical to psychological survival; tomblike setting, marked by indifference to basic human needs and desires; and their enforced isolation from the living, with the resulting emotional emptiness and death."

See also Johnson "Under Sentence of Death: The Psychology of Death Row Confinement" 1979 *Law and Psychology Review* Vol 5 at 141, and *Death Work* Chapter 4 - Living and Working on Death Row at 48; the unauthored note, "Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment" 1972 *Iowa Law Review* Vol 57 814 at 829-830; Kaplan

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"Administering Capital Punishment" 1984 *University of Florida Law Review* Vol 36 at 181-185; *Bluestone and McGahee "Reaction to Extreme Stress: Impending Death by Execution"* 1962 *The American Journal of Psychiatry* at 393. All these studies describe confinement under sentence of death as exquisite psychological torture, wherein many inmates suffer obvious deterioration and severe personality distortions, including denial of reality.

The respondents recognise and acknowledge the actuality of the death row phenomenon. They do not criticise as partial or in any way exaggerated the psychological traumas and behavioural changes detailed in the literature above cited. Their answer is simply that such "unabating

stress" is inherent in the penalty of death. It is an unavoidable consequence. Where the anguish attains an unacceptable level due to delay in carrying out the sentence, it is always open to the condemned prisoner to move the court for relief. The court will ensure that the suffering ceases, but only insofar as the original punishment, which cannot itself become tainted with the inhumanity or degradation of the treatment, remains unaffected.

THE ATTITUDE OF THE COURTS TO DELAY IN EXECUTING SENTENCE OF DEATH

(a) The position in Zimbabwe up to the present time

There is a very relevant judgment of the Appellate Division of the High Court of Rhodesia. It is in *Dhlamini & Ors v Carter NO & Anor* (1) 1968 (1) RLR 136 (A). The facts were that the three appellants had been sentenced to death prior to the Unilateral Declaration of Independence on 11 November 1965. Their appeals were duly dismissed. The Government, under the 1965 Constitution, considered the question of the exercise of the prerogative of mercy and advised the Officer Adminstrating the Government to decline clemency. In accordance with that advice he confirmed the sentences on 27 August 1967. In seeking to interdict the first respondent, the Sheriff, from carrying out the sentences the appellants relied, *inter alia*, upon the submission that the delay between their imposition and the decision to confirm them, was so inordinate as to constitute inhuman or degrading punishment in violation of s 60(1) of the lawful 1961 Constitution. Two of the appellants had been held on death row for two years and nine months and the third for one month short of two years. In rejecting the argument, BEADLE CJ at 154 *in fine* - 155A said:

"If during the course of his punishment, a prisoner is subjected to inhuman

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'treatment', he can move the court for relief and the court will see that the 'treatment' is stopped, but that does not affect the original 'punishment' which cannot, itself, become tainted with the inhumanity of the 'treatment'.

He continued at 155F-H:

"The inhuman treatment complained of in the instant case is the delay in carrying out the sentence. If, as I have already found, 'treatment' is distinct from 'punishment,' and if the inhumanity of the treatment cannot taint the lawfulness of an otherwise lawful punishment, then the only remedy an accused, who has been sentenced to death, has under s 60(1) is to ask for an order that the delay should stop, something which no person sentenced to death is ever likely to do. Even if, therefore, in certain circumstances, delay may be considered as inhuman treatment, the remedy given an accused who is under sentence of death under s 60 (1) is not one which is likely to be of much value to him, as it gives him no more than the right to ask for the delay to cease."

In conclusion, the learned Chief Justice remarked at 157A-C:

"This court, under its ordinary jurisdiction, is given no power to hear an appeal from the decision of the Executive Council refusing to exercise clemency. On the contrary, as I have pointed out, it has no power to question the manner in which the Executive Council exercises its powers. If the court had any power to interfere with the discretion of the Executive Council, it could, therefore, only have it under s 60 (1), but, as I have pointed out, it is given no power under this section to interfere with a lawful punishment. Its powers are limited to stopping inhuman

treatment or punishment, but it cannot, in dealing with inhuman treatment, interfere with a lawful punishment."

With all deference to one of this country's most illustrious Chief Justices, I consider the approach he adopted to be flawed. Section 60(1) alone (which was cast in similar terms to the present s 15(1)) was examined on the critical issue of whether the court had jurisdiction to deal with the complaint. What appears to have been completely overlooked was that, under s 71(4) of the 1961 Constitution, (the equivalent to the present s 24(4)), the court was vested with special power to make whatever order was necessary to prevent a contravention of any of the fundamental rights and freedoms, including that specified in s 60(1). It was sitting as a constitutional court, not as the Appellate Division, and so was not restricted, as it believed itself to be, to those powers properly exercisable by an appellate body. In the event, whereas a right was acknowledged, a remedy was denied.

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Moreover, and contrary to what was suggested by BEADLE CJ, it is irrelevant to the condemned prisoner's assertion that the alternative to delay may be expeditious execution. It is not his wish for a speedy death that causes due process of law, insofar as it prohibits inhuman or degrading punishment or treatment, to proscribe delay. Rather, as pointed out by Pannick in his book *Judicial Review of the Death Penalty* at 85:

"... the proscription results from the fact that it is unacceptable for the State to inflict mental torture on a defendant, irrespective of that defendant's preference for torture rather than execution. Furthermore, the claim of the appellant is not that further delay would be unconstitutionally cruel and that, therefore, the execution should be carried out immediately. The claim is, rather, that by reason of the delay already suffered, the execution if carried out would constitute cruel, inhuman or degrading punishment. The delay experienced should be added to the pain and suffering normally pursuant to execution in order to determine whether the carrying out of the death sentence would breach the appellant's fundamental rights under the relevant constitutional provision. Whether or not the death penalty is constitutional per se, the pain and suffering it causes may exceed constitutional limits when the agony caused by delay is added to the balance."

Lastly, the judgment having been given twenty-five years ago, is out of step with more enlightened thinking, as exemplified in the decisions of the Supreme Court of India, the minority opinion in *Riley's case supra* and others. It preceded the adumbration by LORD WILBERFORCE in *Minister of Home Affairs & Anor v Fisher & Anor* [1979] 3 All ER 21 (PC) at 26a-e of the liberal interpretative technique applicable to constitutional provisions relating to the protection of the individual - an approach that has more than once received the commendation of this court. See for instance, *Bull v Minister of Home Affairs* 1986 (1) ZLR 202 (S) at 210H-211A; 1986 (3) SA 870 (ZS) at 881C. Also, *United States of America v Cotroni* (1989) 42 CRR 101 at 109 (Supreme Court of Canada).

I have no difficulty, therefore, in holding that *Dhlamini's case supra* was wrongly decided. This court is free to depart from it. See Supreme Court Practice Direction No. 2 of 1981, 1981 ZLR 417 (S).

(b) The position in India

Although there is no provision in the Indian Constitution, framed in 1948-1950, which expressly

proscribes torture or inhuman or degrading punishment

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or treatment, the Supreme Court of India has filled the void and brought the Bill of Rights in the Constitution into conformity with international norms, as set out in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 7 of the International Covenant on Civil and Political Rights. It held in *Francis Coralie Mullin v Administrator, Union Territory of Delhi* AIR 1983 SC 746 that the right to live with basic human dignity implicit in the right guaranteed under Article 21, included the right not to be subjected to torture or to cruel, inhuman or degrading punishment or treatment. This all-important right was, therefore, read by the Supreme Court into the right to life and made part of domestic jurisprudence.

Taking the right of protection as the base, the Supreme Court has proceeded to consider the question of delay in the carrying out of sentence of death, such delay being a notorious feature of the India legal system.

In *Vatheeswaran v State of Tamil Nadu* AIR 1983 SC 361 the Supreme Court, sitting on appeal, considered the claim of the appellants, who had been justly sentenced to death, that to take away their lives after they had been left for eight years in illegal solitary confinement was a gross violation of the fundamental right guaranteed by Article 21 of the Constitution. CHIMNAPPA REDDY J (in whose judgment MISRA J concurred) at 362 posed the question whether:

"... in a case where after the sentence of death is given, the accused person is made to undergo inhuman and degrading punishment or where the execution of the sentence is endlessly delayed and the accused is made to suffer the most excruciating agony and anguish, it is not open to a court of appeal or a court exercising writ jurisdiction, in an appropriate proceeding, to take note of the circumstance when it is brought to its notice and give relief where necessary."

And, quoting from the minority opinion in *Riley & Ors v Attorney-General of Jamaica & Anor supra* at 479e-f, gave the answer at 363:

"It is, of course, true that a period of anguish and suffering is an inevitable consequence of sentence of death. But a prolongation of it beyond the time necessary for appeal and consideration of reprieve is not. And it is no answer to say that the man will struggle to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhuman and degrading. The anguish of alternating hope and despair, the agony of

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uncertainty, the consequences of such suffering on the mental, emotional and physical integrity and health of the individual are vividly described in the evidence of the effect of the delay in the circumstances of these five cases."

The learned judge suggested, unnecessarily, however, that a delay of more than two years should be sufficient to invoke the application of Article 21 (see at 367). The appeal was allowed. The sentences of death were set aside and substituted by life imprisonment.

It was the *obiter dictum*, and not the remainder of the judgment, that was promptly repudiated by the three Supreme Court Judges, including the Chief Justice, in *Sher Singh & Ors v State of Punjab supra*. The court was faced with a writ petition for two condemned prisoners who had unsuccessfully exhausted their rights of appeal against the death sentence. CHANDRACHUD CJ at 590B-D pointed out that the narrow view that jurisdiction to interfere with a death sentence could be exercised only in an appeal against the judgment of conviction and sentence was unacceptable. The inquiry was whether it was harsh and unjust to execute it by reason of supervening events. The learned CHIEF JUSTICE continued at 593B-F:

"A prisoner who has experienced living death for years on end is therefore entitled to invoke the jurisdiction of this court for examining the question whether, after all the agony and torment he has been subjected to, it is just and fair to allow the sentence of death to be executed. That is the true implication of Article 21 of the Constitution. ... It is a logical extension of the self-same principle that the death sentence, even if justifiably imposed, cannot be executed if supervening events make its execution harsh, unjust or unfair."

Finally, it was stated that it was normal for appeals to take over two years and that it would be ridiculous if a convicted person could, by bringing frivolous proceedings, ultimately delay execution so long that it had to be commuted under such a rule (see at 596A-B). In the result, the petition was adjourned in order for the Governor of Punjab to explain why the petitioners had not been executed for more than eighteen months since the ultimate dismissal of their appeals.

In *Javed Ahmed v State of Maharashtra* AIR 1985 SC 231 the petitioner, aged twenty-two years, had been convicted of murder and sentenced to death. His appeal against the sentence had been dismissed and a petition for clemency

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later rejected by the President of India. He had behaved satisfactorily in prison, appeared genuinely repentant and anxious to atone for the grave wrongs he had done. Sentence of death had been awaited for two years and nine months. CHINNAPPA REDDY and VENKATARAMIAH JJ entertained the petition and substituted imprisonment for life for the death penalty.

On 7 February 1989 the aspect of delay came before five Judges of the Supreme Court in *Triveniben & Ors v State of Gujarat & Ors* (1989) 1 SCJ 383. OZA J, giving the lead judgment, laid down at 393 that the only delay which could be considered in a writ petition was from the date the judgment of the apex court was pronounced, ie when the judicial process had come to an end. He made it clear that no fixed period could be held to make sentence of death inexecutable and to that extent overruled the decision in *Vatheeswaran's case supra*. SHETTY J, in a separate concurring judgment, said at 410 paras 74 and 75:

"It has been universally recognised that a condemned person has to suffer a degree of mental torture even though there is no physical mistreatment and no primitive torture. ...

As between funeral fire and mental worry, it is the latter which is more devastating, for funeral fire burns only the dead body while the mental worry burns the living one. This mental torment may become acute when the judicial verdict is finally set against the accused. Earlier to it, there was every reason for him to hope for acquittal. That hope is extinguished after the final verdict. If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether it is just and fair to allow the sentence of

death to be executed."

In *Madhu Mehta v Union of India* [1989] 3 SCR 775, which followed six weeks later, a writ petition brought on behalf of one Gyasi Ram was allowed and the death sentence altered to imprisonment for life. The condemned prisoner had been waiting a decision on his mercy petition by the President of India for over eight years. It was held that he had suffered mental agony of living under the shadow of death for far too long.

(c) The position in the United States of America

The Supreme Court of the United States has never directly addressed the issue of delay in carrying out sentence of death. But it is of some significance,

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if only historical, that in the course of its decision in *Ex p Medley supra* the Supreme Court referred to a few weeks in solitary confinement awaiting execution, with limitations on visitation and uncertainty as to the exact date the execution would take place, as "an additional punishment of the most important and painful character." (at 171)

The modern starting point is the *cause célèbre* involving Caryl Chessman. There are two decisions which dealt with his protest that the mental suffering caused by the years spent on death row was "cruel and unusual punishment". In the first, *People v Chessman* 52 Cal 2d 469 (1959), although the court recognised that mental suffering had occurred, it focused only on the submission that the unusual length of the confinement on death row, eleven years, was due to unconstitutional delays on the part of the California judiciary. It held that the California courts had proceeded without unreasonable delay and that the State of California had not, therefore, been guilty of cruel and unusual punishment. This rationale implies that no matter the extent of Chessman's mental agony because of his confinement, and irrespective of the length thereof, his suffering would not have been a factor in determining whether cruel and unusual punishment had occurred, as long as there was a legitimate reason for him to be confined.

In the subsequent case of *Chessman v Dickson* 275 F 2d 604 (1960), the Court of Appeals for the North Circuit denied a stay of execution. The complaint that the delay, now close on twelve years, constituted cruel and unusual punishment and would render the execution a denial of Chessman's fundamental rights, received short shrift from CHAMBERS CJ. He said at 607-608:

"It may show a basic weakness in our government system that a case like this takes so long, but I do not see how we can offer life (under a death sentence) as a prize for one who can stall the processes for a given number of years, especially when in the end it appears the prisoner never really had any good points. If we did offer such a prize, what year would we use as a cutoff date? I would think that the number of years would have to be objective and arbitrary.

But counsel for petitioner suggest that we take a subjective approach on this man's case. We are told of his agonies on death row. True, it would be hell for most people. But here is no ordinary man. In his appearances in court one sees an arrogant, truculent man, ... spewing vitriol on one person after other. We see an exhibitionist who never before had such opportunities for exhibition. (All this I get from the record). And, I think he has heckled his keepers long enough."

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Conspicuously absent from this so-called reasoning was why Chessman's personality, as assessed by the court, would reduce the level of his mental suffering below that required for the application of the constitutional standard. See the criticism by an anonymous writer in *Minnesota Law Review* Vol 44 at 994.

In *United States ex rel Townsend v Twomey* 322F Supp 158 (1971) the United States District Court accepted that the petitioner had been confined on death row for fifteen years and nine months, the delay in carrying out the sentence being due principally to the skilful and persistent efforts of counsel to secure his release. It acknowledged that the length of his confinement under sentence of death seemingly was unconstitutionally cruel, but deemed itself barred from so ruling by the Supreme Court's decision in *In re Kemmler supra* that electrocution was not a cruel and unusual punishment, and by that court's decision in *Trop v Dulles* 356 US 86 (1958) that the death sentence *per se* was constitutional. However, it granted the petitioner a new trial on the ground of the admission of an illegally obtained confession. The Federal Appellate Court reversed this decision. It held the conviction to be valid but that the death sentence could not be carried out because of serious flaws in the selection of members of the jury. It remanded the case for sentencing or, in the alternative, a new trial. See 452 F 2d 350 (7th Cir 1972).

More recently, in *Potts v State of Georgia* 376 SE 2d 851 (Ga 1989) the Supreme Court of Georgia rejected the plea that a period over thirteen years on death row justified the setting aside of the death penalty. SMITH J quoted extensively from an article by Professor Little in 1984 *Florida University Law Review*, Vol 36 at 201-202, to the effect that the suffering on death row was no worse than that endured by an innocent patient who was to serve out a "death sentence" imposed by disease - a condition, which, though cruel, was far from unusual and out of the run of human experience. No further attempt was made by the learned Judge to analyse the growing body of judicial and academic discussion on the issue of delay as a basis for setting aside a death sentence.

Much the same narrow reasoning was expressed in *Richmond v Lewis* 948 F 2d 1473 (1991). One of the grounds advanced on behalf of the appellant was that the carrying out of the death sentence after sixteen years on death row would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. In rejecting it O' SCANNLAIN, Circuit Judge, stated at 1491:

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"We know of no decision by either the United States Supreme Court or this circuit that has held that the accumulation of time a defendant spends on death row during the prosecution of his appeals can accrue into an independent constitutional violation, and *Richmond* has cited no such decision."

He went on to cite with approval a dictum in the case of *Andrews v Shulsen* 600 F 408 (1984) at 431 (where the petitioner had been on death row for ten years) that to accept the argument would be "a mockery of justice", given that the delay was attributable more to the petitioner's

actions than to the State's. (The decision was, however, reversed on other grounds, *sub nom Lewis v Richmond* 113 S Ct 528 (1992)).

A far more progressive and compassionate approach is evident in *People v Anderson* 493 P 2d 880 (1972). The Supreme Court of California was there concerned with whether the death sentence violated Article 6 of the State's constitutional prohibition against cruel or unusual punishment. In holding that it did, WRIGHT CJ stressed the torturousness of delay involved in the carrying out of the death penalty. He said at 892:

"It merits emphasis that in assessing the cruelty of capital punishment under article 1, s 6, we are not concerned only with the 'mere extinguishment of life', ... but with the total impact of capital punishment, from the pronouncement of the judgment of death through the execution itself, both on the individual and on the society which sanctions its use. Our concern is that the execution which ultimately follows pronouncement of the death sentence has in fact become the 'lingering death' which the Kemmler court conceded would be cruel in the constitutional sense."

And continued at 894-895:

"The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture. Respondent concedes the fact of lengthy delays between the pronouncement of the judgment of death and the actual execution, but suggests that these delays are acceptable because they often occur at the instance of the condemned prisoner. We reject this suggestion. An appellant's insistence on receiving the benefits

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of appellate review of the judgment condemning him to death does not render the lengthy period of impending execution any less torturous or exempt such cruelty from constitutional proscription."

The California State Constitution was later amended in a manner which overruled the decision, by exempting the death penalty from the prohibition against cruel or unusual punishment. Nonetheless, the observations of WRIGHT CJ remain entirely apposite.

The decision of the Supreme Judicial Court of Massachusetts, in *District Attorney for Suffolk District v Watson supra* portrays the same advanced perception. It held the death penalty to be violative of the State's Constitution which prohibited cruel punishment. The delay and pain of waiting for execution was an important part of the rationale, as especially expressed in the opinions of HENNESSEY CJ and LIACOS J. The former said at 1283:

"The mental agony is, simply and beyond question, a horror. ... [W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and actual infliction of death.' *Furman v Georgia supra* at 287-288 (BRENNAN J concurring). '[T]he process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture,' *People v Anderson* 6 Cal 3d 628, 649 and 'the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.' *Solesbee v Balkcom* 339 US 9, 14 (1950) (FRANKFURTER J dissenting.)

The fact that the delay may be due to the defendant's insistence on exercising his appellate rights does not mitigate the severity of the impact on the condemned individual, and the right to pursue due process of law must

not be set off against the right to be free from inhuman treatment. Moreover, it is often the very reluctance of society to impose the irrevocable sanction of death which mandates, 'even against the wishes of the criminal, that all legal avenues be explored before the execution is finally carried out.' *Furman v Georgia supra* 408 US at 289 n.37 (BRENNAN J concurring).

In equally strong vein LIACOS J remarked at 1290-1291:

"The ordeals of the condemned are inherent and inevitable in any system that informs the condemned person of his sentence and provides for a gap between sentence and execution. Whatever one believes about the

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cruelty of the death penalty itself, this violence done the prisoner's mind must afflict the conscience of enlightened government and give the civilized heart no rest."

He continued in graphic terms at 1292:

"The condemned must confront this primal terror directly, and in the most demeaning circumstances. A condemned man knows, subject to the possibility of successful appeal or commutation, the time and manner of his death. His thoughts about death must necessarily be focused more precisely than other people's. He must wait for a specific death, not merely expect death in the abstract. Apart from cases of suicide or terminal illness, this certainty is unique to those who are sentenced to death. The State puts the question of death to the condemned person, and he must grapple with it without the consolation that he will die naturally or with his humanity intact. A condemned person experiences an extreme form of debasement."

See also the similar observations in the lead opinion of TAURO CJ in *Commonwealth v O'Neal* (1975) 339 NE 2d 676 (Mass) at 680-681.

It is, I think, apparent from this survey that both the Supreme Judicial Court of Massachusetts and the Supreme Court of California have indicated an appreciation of the relevance of delay *per se* as a ground of constitutional attack upon the death penalty. The other decisions either failed to view the delay in a constitutional setting, or held that it was not an accountable factor since caused by the condemned prisoner's pursuit, to the full, of his judicial remedies - an approach which "both ignores the drive for self-preservation and penalises the exercise of a legal right": *per* the anonymous writer in 1972 Iowa Law Review at 831.

(d) The position in the West Indies

There are two decisions of the Judicial Committee of the Privy Council that bear on the matter. In *Abbott v Attorney-General of Trinidad and Tobago & Ors* [1979] 1 WLR 1342 (PC) the appellant had been convicted of murder and sentenced to death at Port-of - Spain Criminal Assizes, on 16 July 1973. His appeal was dismissed on 9 July 1974, and a further appeal to the Privy Council was, in turn, dismissed on 20 July 1976. Six days later he petitioned the Governor General for the exercise of the prerogative of mercy. This was declined on 23 February 1977, it being directed that the appellant was to be executed on 22 March 1977. On 15 March 1977 the appellant filed a motion

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claiming that his pending execution would contravene his fundamental human rights under s 14 of the Constitution because of the delay, from 26 July 1976 to 12 March 1977, in dealing with his petition for reprieve. The motion was rejected and the order was later affirmed by the Court of Appeal. The appellant then exercised his right, in a constitutional matter, to appeal to the Privy Council.

It was held, as in *de Freitas & Malik v Benny* [1976] AC 239 (PC), that the appellant could complain neither about the delay totalling three years preceding his petition for clemency, caused by his own action in appealing against his conviction, nor of that of two years subsequent to the denial of his petition. Nonetheless it was remarked that the first period of delay was "greatly to be deplored" (at 1345E). The appellant's case depended solely on the period of somewhat less than eight months which was allowed by the State to elapse between the lodging of the petition for pardon and its rejection. The contention that such a delay was so inordinate as to invoke a contravention of his constitutional right was castigated as "quite untenable". The opinion delivered on behalf of the Judicial Committee by LORD DIPLOCK concluded at 1348B-D:

"Their Lordships accept that it is possible to imagine cases in which the time allowed by the authorities to elapse between the pronouncement of a death sentence and notification to the condemned man that it was to be carried out was so prolonged as to arouse in him a reasonable belief that his death sentence must have been commuted to a sentence of life imprisonment. In such a case, which is without precedent and, in their Lordship's view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not 'by due process of law'; but since nothing like this arises in this instant case, this question is one which their Lordships prefer to leave open."

The learned author, Pannick *op cit* disapproves strongly of the pronouncement that the first period of delay of three years was to be disregarded as due to a utilisation of the appellate procedure. He comments at 85:

"... it ignores the degree of mental torture suffered; it deters the defendant from claiming his rights to review by appellate courts of the penalty of death; and it penalises the claiming of the right to appeal by providing that the exercise of that right prevents the defendant from claiming that his treatment has breached his right not to suffer cruel or inhuman punishment. The defendant's reluctance to suffer a long delay before execution, his knowledge that if he appeals against sentence or conviction

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any delay resulting therefrom will not render his execution unconstitutionally cruel, and his failure accurately to assess his chances of winning an appeal against conviction or sentence, may deter the defendant from appealing, and thereby overturning, a sentence of death unlawfully imposed."

This criticism is impressive in its logic and I adopt it. It is supported by the quoted passage in the opinion of HENNESSY CJ in *Watson's case supra*. There are *dicta* to the same effect in *Vatheeswaran v State of Tamil Nadu supra* at 364 and *Sher Singh & Ors v State of Punjab supra* at 595F-H.

In *Riley & Ors v Attorney-General of Jamaica & Anor supra* the five appellants had been convicted of murder between March 1975 and October 1976 and sentenced to death. In each case an appeal had been dismissed. From April 1976 political factors in Jamaica led to a

suspension of all sentences of death, but on 30 January 1979 the House of Representatives resolved to retain capital punishment. Thereupon, the executions were set on dates between 29 May and 12 June 1979. The appellants then applied to court for a declaration that the executions would be contrary to s 17(1) of the Constitution of Jamaica, contending that the prolonged delay, due substantially to circumstances outside their control, had caused them sustained mental anguish, thereby rendering the punishment inhuman and degrading. Their application failed both at first instance and on appeal. A further appeal to the Privy Council followed.

The majority opinion of LORD BRIDGE (concurred in by LORD HAILSHAM and LORD DIPLOCK) was based specifically on s 17(2) of the Constitution. His Lordship reasoned that since at the time immediately before the Constitution came into effect, execution of a death sentence would have been a punishment of a description which was lawful, notwithstanding any delay between its passing and the issue of the death warrant, execution of the death penalty would be "to the extent" that the law authorised within the meaning of s 17(2) and, therefore, would not contravene s 17(1). (See at 473 b-d). In the course of the opinion it was again reiterated that any delay necessarily occasioned by the appellate procedures pursued was to be excluded (see at 471e and j).

In a joint dissenting opinion, Lord Scarman and Lord Brightman held the appellants to have established a breach of s 17(1) of the Constitution. They said at 476b-c that:

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"The 'treatment' which is *prima facie* 'inhuman' under subs (1) is the execution of the sentence of death as the culmination of a prolonged period of respite. That species of 'treatment' falls outside the legalising effect of subs (2). Subsection (2) is concerned only to legalise certain descriptions of punishment, not to legalise a 'treatment', otherwise inhuman, of which the lawful punishment forms only one ingredient. Subsection (1) deals with 'punishment' and 'other treatment'. In the instant case the punishment is the execution of the death sentence. Subsection (2) is directed both to 'punishment' and to 'other treatment'. The 'other treatment', if inhuman, is not validated by subs (2), in our opinion, merely because lawful punishment is an ingredient of the inhuman treatment."

And continued at 479d:

"It is no exaggeration, therefore, to say that the jurisprudence of the civilised world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognised and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading. As the Supreme Court of California commented in *People v Anderson* it is cruel and has dehumanising effects. Sentence of death is one thing: sentence of death followed by lengthy imprisonment prior to execution is another."

In conclusion, it was stated at 480a-c:

"The cruel and dehumanizing experience suffered by these appellants does meet the test. But we doubt whether actual effect should be the test. It would be quite unacceptable to differentiate in the application of s 17 between victims of strong character and those of weaker character. The test must be, in our view, that of the likely effect of the experience to which they have been subjected. Evidence, of course, of actual effect will be very relevant and, indeed, necessary in order to reach a conclusion as to likely effect."

We answer, therefore, the question as to the meaning and effect of s 17(1) as follows. Prolonged delay when it arises from factors outside the control of the condemned man can render a decision to carry out the sentence of death an inhuman and degrading punishment ... Such a case has been established, in our view, by these appellants."

In my respectful view the minority opinion is to be preferred to that of the majority. It applied the liberal interpretation of fundamental rights

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recommended in *Minister of Home Affairs v Fisher supra* and accords with the evolving standards in any civilised country. It was referred to with approval by the Supreme Court of India in *Vatheeswaran v State of Tamil Nadu supra* and in *Sher Singh & Ors v State of Punjab supra*. In an editorial comment in 1983 *West India Law Journal*, Aubrey Fraser, a former Trinidadian Judge of Appeal, wrote at 12:

"If it were possible to look into the future it might be within the justifiable expectation of the present generation of lawyers in Jamaica, and other countries of the Commonwealth Caribbean, that the enlightenment offered in this dissenting judgment, which should soon join that rare collection of law making dissents, might within this decade, reach beyond the realm of hope, to rescue some of the condemned who, since the middle of the 1970s and onwards, have been awaiting with anguish the execution of their lawful sentences."

In *Re Applications by Thomas & Paul* [1986] LRC (Const) 285, the High Court of Trinidad and Tobago held that the delays that had occurred since the pronouncement of sentence of death were a result of the invocation by the appellants of all the appeal procedures followed by the bringing of the present motion. And no delay could be attributed to the State which was so protracted as to amount to unreasonable incarceration.

Although the court took the passing of the sentences as the starting point of the delay, its reasoning was based on what was, with respect, an unacceptable premise - that the applicants were responsible for the delays and therefore it did not lie in their mouths to complain about them.

(e) The extradition judgments

In *Soering v United Kingdom* (1989) 11 EHRR 439 the European Court of Human Rights decided for the first time that extradition could amount to a breach of Article 3 (the prohibition against torture or inhuman or degrading treatment or punishment) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Soering, a German national, was wanted for murder in Bedford County, Virginia, United States of America. He fled to Europe but was arrested in England on a charge of cheque fraud. Six weeks later he was indicted for two brutal murders in Bedford County and, in consequence, the United States requested his extradition under its 1972 Extradition Treaty with Great

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Britain. The then Federal Republic of Germany, which had abolished the death penalty, also requested his extradition. Being his country of origin, it too had jurisdiction to try him for the alleged murders. The United Kingdom Government asked the US Department of State for an assurance that if Soering were surrendered he would not be executed, but was only provided with an affidavit from the District Attorney for Bedford County stating that he would inform the sentencing judge that "it is the wish of the United Kingdom that the death penalty should not be imposed or carried out." Shortly thereafter a hearing was held in England, upon the request of the United States, for Soering's extradition and the court found him extraditable. Appeals against the decision failed and ultimately Soering was ordered to be surrendered to the United States. In the meantime, however, he filed a complaint with the European Commission of Human Rights, which body advised the United Kingdom not to extradite until it had the opportunity to investigate the claim. The United Kingdom complied.

Before the Commission Soering alleged, *inter alia*, that his extradition to the United States would involve the United Kingdom in a violation of Article 3, in that the condition of incarceration of prisoners under death sentence at Virginia's Mecklenburg Correctional Centre was inhuman and degrading. By a majority of six to five the issue was decided against him, but the Commission referred the case to the court, accepting that it required its attention.

The European Court unanimously found that there was a real risk that a Virginia court would sentence Soering to death and that if he was surrendered for trial, Article 3 would be violated. This determination was based on its assessment of death row conditions at Mecklenburg Correctional Centre. The following passages in the judgment reflect the position of the court.

"56. The average time between trial and execution in Virginia, calculated on the basis of the seven executions which have taken place since 1977, is six to eight years. The delays are primarily due to a strategy by convicted prisoners to prolong the appeal proceedings as much as possible. The United States Supreme Court has not as yet considered or ruled on the 'death row phenomenon' and in particular whether it falls foul of the prohibition of 'cruel and unusual punishment' under the Eighth Amendment to the Constitution of the United States.

106. The period that a condemned prisoner can expect to spend on death row in Virginia before being executed is on average six to eight years

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(see paragraph 56 above). This length of time awaiting death is, as the Commission and the United Kingdom Government noted, in a sense largely of the prisoner's own making in that he takes advantage of all avenues of appeal which are offered to him by Virginia law. The automatic appeal to the Supreme Court of Virginia normally takes no more than six months (see paragraph 52 above). The remaining time is accounted for by collateral attacks mounted by the prisoner himself in habeas corpus proceedings before both the State and Federal courts and in applications to the Supreme Court of the United States for certiorari review, the prisoner at each stage being able to seek a stay of execution (see paragraphs 53-54 above). The remedies available under Virginia law serve the purpose of ensuring that the ultimate sanction of death is not unlawfully or arbitrarily imposed.

Nevertheless, just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full. However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the

ever-present shadow of death.

111. For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. The democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The court agrees with the Commission that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedure safeguards to the defendant in a capital trial. Facilities are available on death row for the assistance of inmates, notably through provision of psychological and psychiatric services (see paragraph 65 above).

However, in the court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the

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United States would expose him to a real risk of treatment going beyond the threshold set by Article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration (ie, by extradition to the Federal Republic of Germany).

Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3."

One important feature that distinguishes this from most human rights cases is that the violation alleged was potential or theoretical, rather than actual. Another is that, although the court acknowledged that most of the period of six to eight years on death row at Mecklenburg is attributable to collateral attacks on the conviction through habeas corpus proceedings in the Federal courts and are, therefore, largely of the condemned prisoner's own making, it noted that it is "part of human nature that the person will cling to life by exploiting those safeguards to the full."

In his note on the case in 1991 *American Journal of International Law* Vol 85 at 145, Professor Richard Lillich suggested that but for the unusual factors of Soering's age, alleged mental disorder and the request by the Federal Republic of Germany for his extradition, the European Court would not have invalidated the extradition and, therefore, the court meant to limit its ruling on the death row phenomenon to the most egregious of cases. But as convincingly answered by Michael Shea in 1992 *Yale Journal of International Law* Vol 17 at 110, such a narrow interpretation ignores the court's rejection of the argument that the appeal process was designed to protect the death row inmate who could always choose to accelerate the process by waiving his appeal rights (see para 106 of the judgment). In short, neither Soering's youth nor his country of origin were either crucial to or determinative of the result.

In *Re Kindler & Minister of Justice* (1991) 67 CCC 3d 1 the Supreme Court of Canada, by a majority of four to three, on facts very close to those in the *Soering* case, refused to block the extradition of the fugitive appellant to the United States. It is unnecessary to deal in any detail with the lengthy separate judgments save to indicate, that for the majority, LA FORREST J, at

15 took the view that:

"While the psychological stress inherent in the death-row phenomenon cannot be dismissed lightly, it ultimately pales in comparison to the

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death penalty. Besides, the fact remains that a defendant is never forced to undergo the full appeal procedure, but the vast majority choose to do so. It would be ironic if delay caused by the appellant's taking advantage of the full and generous avenue of the appeals available to him should be viewed as a violation of fundamental justice."

On the other hand CORY J, for the minority, summarised his conclusions at 44-45, thus:

"Capital punishment for murder is prohibited in Canada. Section 12 of the Charter provides that no one is to be subjected to cruel and unusual punishment. The death penalty is *per se* a cruel and unusual punishment. It is the ultimate denial of human dignity. No individual can be subjected to it in Canada. The decision of the Minister to surrender a fugitive who may be subject to execution without obtaining an assurance pursuant to art 6 is one which can be reviewed under s 12 of the Charter. It follows that the Minister must not surrender Kindler without obtaining the undertaking described in art 6 of the Treaty. To do so would render s 25 of the Extradition Act inconsistent with the Charter in its application to fugitives who would be subject to the death penalty."

(f) Decisions of the United Nations Human Rights Committee

In recent years the Human Rights Committee, under Article 5 para 4 of the Optional Protocol to the International Covenant on Civil and Political Rights, has handed down decisions on whether the length of detention on death row amounted to a violation of the prohibition against "torture or cruel inhuman or degrading treatment or punishment" under Article 7 of the Covenant. In each, the alleged victim, the "author", was a Jamaican national. They are Earl Pratt and Ivan Morgan, Communication No.s 210/1985 and 225/1987, (24 March 1988), Carlton Reid, Communication No. 250/1987, (20 July 1990) and Randolph Barrett and Clyde Sutcliffe, Communication No.s 270/271/1988, (30 March 1992). Although the periods were taken from the imposition of the sentences, and ranged from two years to ten years, the Committee found that the claims had not been substantiated. In the last mentioned it was stated at 8 para 8.4:

"In States whose judicial system provides for a review of criminal convictions and sentences, an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies is inherent in the review of the sentence; thus, even prolonged

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periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies. A delay of ten years between the judgment of the Court of Appeal and that of the Judicial Committee of the Privy Council is disturbingly long. However, the evidence before the Committee indicates that the Court of Appeal rapidly produced its written judgment and that the ensuing delay in petitioning the Judicial Committee is largely attributable to the authors."

This observation called forth a dissent from one of the members, who said at 10:

"The conduct of the person concerned with regard to the exercise of remedies ought to be measured against the

states involved. Without being at all cynical, I consider that the author cannot be expected to hurry up in making appeals so that he can be executed more rapidly. ... in this type of case, the elements involved in determining the time factor cannot be assessed in the same way if they are attributable to the State party as if they can be ascribed to the condemned person. A very long period on death row, even if partially due to the failure of the condemned prisoner to exercise a remedy, cannot exonerate the State party from its obligations under article 7 of the Covenant.."

It is this latter approach that I find the more compelling.

THE CONDEMNED PRISONER'S ENTITLEMENT TO RELY ON THE FACTOR OF DELAY

Such cases as *Chessman v Dickson supra*, *Richmond v Lewis supra*, *Re Kindler & Minister of Justice supra* propound the narrow and somewhat intolerant view that as the condemned prisoner is never compelled to undergo the full appellate and habeas corpus procedures, the period of his confinement on death row resulting therefrom cannot be considered a violation of his fundamental rights, no matter the agony that he is suffering. It is true that the prosecution has no incentive or benefit in consciously delaying the execution of a person who has been sentenced to death. Nevertheless in some countries, such as the United States, delay is a necessary incident to the operation of the due process protections in the criminal justice system.

The contrary approach, and one more in accord with an humane understanding of the desire to "cling to life" as long as possible, is persuasively expressed

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in such cases as *Vatheeswaran v State of Tamil Nadu supra* where it was said at 364:

"We think that the cause of the delay is immaterial when the sentence is death. Be the cause for the delay, the time necessary for appeal and consideration of reprieve or some other cause for which the accused himself may be responsible, it would not alter the dehumanising character of the delay."

See also *People v Anderson supra* at 895 and the *Soering case supra* para 106.

It seems to me highly artificial and unrealistic to discount the mental agony and torment experienced on death row on the basis that by not making the maximum use of the judicial process available the condemned prisoner would have shortened and not lengthened his suffering. The situation could be otherwise if he had resorted to a series of untenable and vexatious proceedings which, in consequence, had the effect of delaying the ends of justice.

I hasten to add that, in any event, the position in Zimbabwe, where there is only one appeal stage, is much different from that prevailing in the United States. A person sentenced to death in this country has an automatic right of appeal to the Supreme Court in terms of s 44(2) of the High Court of Zimbabwe Act 1981. If he is indigent and so unable to afford legal representation (as is the case with over ninety per cent of condemned prisoners) legal aid counsel is appointed at the expense of the State.

Section 114 of the Prison Regulations 1956, as amended, requires the officer-in-charge of the prison to which the condemned prisoner is first admitted, to forthwith advise him of his right to

appeal. More often than not he is assisted with the drafting of a notice of appeal by a prison officer. But even where no notice of appeal is lodged, the trial proceedings are still transcribed, *pro Deo* counsel appointed to argue the matter and the propriety of the conviction and sentence reviewed by the Supreme Court. I know of no instance where the Cabinet has proceeded to debate the prerogative of mercy without being aware that the death sentence has been upheld on appeal. There is a commendable insistence that the appeal process be exhausted. The condemned prisoner has in reality no option - an appeal must go forward.

Obviously, the system is such as to completely disable the condemned prisoner from postponing his execution by embarking upon a series of appeal procedures. And unless he is one of the fortunate few who continues to be

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legally represented subsequent to sentence, he has no control over the expedition with which his appeal will be heard. The time scale lies solely in the hands of the State. It is only after the appeal record has been prepared that legal aid counsel is again briefed to represent the condemned prisoner.

It necessarily follows, to my mind, that any inordinate delay between the imposition of the death penalty and the date of its confirmation by the Supreme Court falls outside the responsibility of the condemned prisoner.

THE COMMENCEMENT OF THE PERIOD OF DELAY

This issue is closely related to the one preceding.

In *Triveniben v State of Gujarat supra* a full bench of the Supreme Court of India ruled at 393 para 16, that the delay:

"... which could be considered while considering the question of commutation of sentence of death into one of life imprisonment could only be from the date the judgment by the apex court is pronounced ie, when the judicial process has come to an end."

As explained in the judgments of OZA J at 391 para 13 and SHETTY J at 409 para 71, an appeal court when dealing with a death sentence may take account of the delay and the cause thereof, along with other circumstances. It must weigh up every factor for and against the appellant. But were it to find the disposal of the case not to be sufficiently mitigatory as to warrant the quashing of the sentence and the substitution of a lesser punishment, it would be inappropriate in a subsequent writ application to fall back on the same delay to impeach the execution. In other words, the stage at which significant delay between the imposition of the sentence and the hearing of the appeal is to be considered, is by the apex court. It is by that forum that the mental agony of the condemned prisoner brought about by protracted delay must be taken into account as a mitigatory circumstance. This is because the passing of sentence of death upon a conviction of murder is not mandatory. It is only to be imposed in the rarest of cases. As explained in *Machhi Singh & Ors v State of Punjab* (1983) 3 SCC 470:

"A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigatory

circumstances have to be accorded full advantage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

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In this country the criminal procedure in respect of the crime of murder is different. Where an accused has been convicted, sentence of death is mandatory, except where he is able to establish, on a balance of probability, the existence of extenuating circumstances (see the proviso to s 314A(a) of the Criminal Procedure and Evidence Act [*Chapter 59*]). Extenuating circumstances are all the factors which, in the minds of reasonable men, may serve to reduce the moral, albeit not the legal, blameworthiness of the accused in the commission of the murder. See for instance, *S v Chaluwa* 1985 (2) ZLR 121 (S) at 130B. Any delay from the imposition of the sentence to the hearing of the appeal cannot be taken into account by the Supreme Court in its determination of whether the opinion of the trial court as to the absence of extenuating circumstances was one which no reasonable court would have reached; for the incidence of delay does not qualify as a circumstance capable of reducing an appellant's moral guilt in perpetrating the murder. It is entirely irrelevant to the commission of that offence.

This procedural distinction clearly renders the ruling in *Triveniben's case supra* which was applied in *Madhu Mehta v Union of India supra* at 782G-H, factually inappropriate to the local jurisprudential context.

In *Abbott v Attorney-General of Trinidad and Tobago & Ors supra* it was conceded on behalf of the appellant, and so held by the Judicial Committee, that the delay of three years between sentence and the rejection of the appeal was to be disregarded as due to an unsuccessful attempt by the appellant to have his conviction set aside. I have already indicated my respectful disagreement with this view. I would only add that in the *Soering case supra* the European Court of Human Rights took as the delay Soering would have to endure if extradited to Virginia, found guilty of murder and sentenced to death, the six to eight years it would take him, from that date, to pursue all the judicial processes available.

Most importantly, in Zimbabwe, as I have mentioned, an appeal against sentence of death is automatic. It is based as much upon the desire of the State to ensure as best it can that the conviction and sentence are justified, as that of the condemned prisoner to have the conviction set aside or the sentence reduced. Moreover, as the responsibility to prepare the record of the trial proceedings for the appeal court rests with the State, and since the vast majority of condemned prisoners are without legal representation immediately subsequent to the conclusion of the trial and until, at earliest, the completion of the record, this interim period of delay is one over which they have no control whatsoever.

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Accordingly, I am entirely satisfied that in the determination of whether there has been a breach of s 15(1) of the Constitution, the period the prisoner has spent in the condemned cell must be taken to start with the imposition of sentence of death. After all, it is from that date that he

begins to suffer what is termed the "death row phenomenon."

THE VALUE JUDGMENT

The Minister of Justice, Legal and Parliamentary Affairs explained in his affidavit that the appeals of the condemned prisoners were dismissed by the Supreme Court during a time when abolition of the death penalty was under discussion by Government. The Cabinet, accordingly, deferred consideration of the prerogative of mercy in respect of all death sentence prisoners; execution would have denied them the benefit of a commutation should the debate have culminated in a decision to abolish.

The Criminal Laws Amendment Act 1992, which retains sentence of death only for murder, treason and certain military offences, was promulgated on 8 May 1992. At that date forty-five prisoners were awaiting confirmation or commutation of sentence of death. After the Bill had been passed by Parliament, which preceded the Act by two months, the compilation of the requisite papers for submission to Cabinet began. Confidential reports had to be prepared by the Social Welfare Department. This involved interviews with both the condemned prisoners and their relatives. Reports also had to be obtained from the trial judges and a memorandum from the Minister. Many copies of various documents, including the judgments of the High Court and the Supreme Court, had to be made.

It was as late as 21 January 1993 that the papers pertaining to the four condemned prisoners were considered by Cabinet and the necessary decisions taken. And it was on 9 March 1993 that the President confirmed the decisions not to commute the sentences.

Although it must be accepted that it was both reasonable and fair, while the debate ranged, for Cabinet to have opted for a moratorium on executions, it is doubtful, to my mind, that the subsequent delay of one year between the passing of the Bill and 9 March 1993, can be justified. However that may be, the criterion is the effect of the entire extent of the delay on the four condemned prisoners and not the cause thereof. The cause is irrelevant for it fails to lessen the degree of suffering of the condemned prisoners. See *Vatheeswaran v State of Tamil Nadu supra* at 364.

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GUBBAY CJ

It has been stressed with frequency that sentence of death should be carried out as expeditiously as possible. See the remarks of LORD DIPLOCK in *Abbott v Attorney-General of Trinidad and Tobago & Ors supra* at 1345E and of BEADLE CJ in *Dhlamini & Ors v Carter NO & Anor supra* at 156E-F. The reason is self evident. It is to minimise the period of terrible anguish. Certainly, s 116(1) of the Prison Regulations recognises the undoubted psychological stress that a condemned prisoner has to endure, for it is there provided that a prison officer who notices anything in the demeanour or behaviour of such a prisoner indicating that he has become mentally disordered must immediately report in writing to the officer-in-charge. And the repealed s 118 required regular searches of condemned prisoners because of the risk of suicide.

From the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanizing

environment of near hopelessness. He is in a place where the sole object is to preserve his life so that he may be executed. The condemned prisoner is "the living dead". See Vogelmann "The Living Dead" (1989) *SAJHR* Vol 5 183 at 195; Mihalik "The Death Penalty in Bophuthatswana" (1990) 107 *SALJ* 465 at 471-472; Johnson and Carroll "Litigating Death Row Conditions: The Case for Reform" (1985) at 8-5 and 6. He is kept only with other death sentence prisoners - with those whose appeals have been dismissed and who await death or reprieve; or those whose appeals are still to be heard or are pending judgment. While the right to an appeal may raise the prospect of being allowed to live, the intensity of the trauma is much increased by knowledge of its dismissal. The hope of a reprieve is all that is left. Throughout all this time the condemned prisoner constantly broods over his fate. The horrifying spectre of being hanged by the neck and the apprehension of being made to suffer a painful and lingering death, is, if at all, never far from mind. Grim accounts exist of hangings not properly performed. See *State v Frampton* Wash 627 P 2d 922 (1981) at 935-936. Gardiner "Executions and Indignities" 1978 *Ohio State Law Journal* Vol 39 at 191-192.

The four condemned prisoners have spoken of the agony and torment they suffer. They maintain that the harsh prison conditions to which they are subjected daily add substantially to the measure of their misery. They are left virtually in solitary confinement in cramped and unhygienic conditions; there is an absence of any meaningful contact with the outside world; they are permitted no reading material save that of a religious nature; there is a total lack of facilities with which to pass the day; they are deprived of all clothing from mid-afternoon to early morning; they are taunted by prison officers with

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impending death by hanging; they are affected by the mental deterioration of some fellow inmates and by suicides and attempt thereat; they are able to hear the sounds of executions being carried out.

Of course, in an enquiry into a breach of s 15(1) of the Constitution, it would be wrong to differentiate between strong and weak personalities. That is why what is to be assessed, is the likely and not the actual effect of the length of the delay upon the ordinary individual. See *Riley & Ors v Attorney-General of Jamaica & Anor supra* at 479g-h and 480b.

Accepting that fear, despair and mental torment, are the inevitable concomitant of sentence of death, the question is whether the delays of 52 months and 72 months, with which this court is concerned, go beyond what is constitutionally permissible.

In the making of a value judgment regard is to be had, *inter alia*, to how the periods of delay from sentence to the proposed dates of execution compare with the average delays over those years from 1978 when executions were carried out in this country. The information with which this court has been provided reflects the following:

Year of Execution	Number of Executions	Average delay in months from date of sentence
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1978	19	4,3
1979	22	4,7
1980	Nil	-
1981	Nil	-
1982	2	13,5
1983	13	18,5
1984	2	22
1985	10	33,2
1986	5	22,8
1987	10	39,6
1988	5	35,6
Overall	88	17,2

The differences between the average period of delay for each individual year as well as that over the nine years, when compared with the present figures of 52 months and 72 months, regrettably indicate a significant upward trend. Viewed against the average of 17,2 months in respect of 88 executions, there is an additional delay of 34,10 months in respect of Bakaka, Chiliko and

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Mhlanga, and 54,10 months in respect of Marichi. Even relative to the year 1987, when the delay peaked to an undesirable average of 39,6 months, the additional delays to which the four condemned prisoners have been subjected, are 12,6 months and 32,6 months respectively.

Making all reasonable allowance for the time necessary for appeal and the consideration of reprieve, these delays are inordinate. As such they create a serious obstacle in the dispensation and administration of justice. They shake the confidence of the people in the very system. It is my earnest belief that the sensitivities of fair-minded Zimbabweans would be much disturbed, if not shocked, by the unduly long lapse of time during which these four condemned prisoners have suffered the agony and torment of the inexorably approaching foreordained death while in demeaning conditions of confinement.

Having regard to the impressive judicial and academic consensus concerning the death row phenomenon, the prolonged delays and the harsh conditions of incarceration, I am convinced that a sufficient degree of seriousness has been attained as to entitle the applicant to invoke on behalf of the condemned prisoners the protection against inhuman treatment afforded them by s

15(1) of the Constitution.

In making this value judgment it has been necessary to remain uninfluenced by the fact that the demand for humane and civilised treatment is made on behalf of those who showed no mercy to their victims but subjected them to extreme cruelty and brutality.

Because retribution has no place in the scheme of civilised jurisprudence, one cannot turn a deaf ear to the plea made for the enforcement of constitutional rights. Humaneness and dignity of the individual are the hallmarks of civilised laws. Justice must be done dispassionately and in accordance with constitutional mandates. The question is not whether this court condones the evils committed by the four condemned prisoners, for certainly it does not. It is whether the acute mental suffering and brooding horror of being hanged which has haunted them in their condemned cells over the long lapse of time since the passing of sentence of death, is consistent with the guarantee against inhuman or degrading punishment or treatment. For like Article 21 of the Constitution of India, s 15(1) stands as sentinel over human misery, degradation and oppression. Its voice is that of justice and fairness. It can never be silenced on the ground that the time to heed to its dictates ended with the passing of the death penalty. It echoes through all stages - the trial, the

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sentence, the incarceration on death row and finally, the execution. *See Sher Singh & Ors v State of Punjab supra at 593F.*

THE APPROPRIATE REMEDY

Section 24(4) of the Constitution empowers the Supreme Court to:

"... make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or seeking the enforcement of the Declaration of Rights."

I shall repeat what was said in *In re Mlambo* 1991 (2) ZLR 339 (S) at 355C; 1992 (4) SA 144 (ZS) at 155J, that:

"It is difficult to imagine language which would give this court a wider and less fettered discretion."

And I would add that even the proviso to the subsection, which enacts that the Supreme Court may decline to exercise its powers where other and adequate means of redress are available to the complainant, is not mandatory. The discretion remains.

The argument on this issue turned upon whether this court, if satisfied that the executions of the four condemned prisoners would be unconstitutional as being contrary to s 15(1), should merely issue a declaratur to that effect, as contended for by the respondents; or quash the sentences of death and substitute in their place sentences of life imprisonment, as prayed at the hearing by the applicant.

The power to "commute" sentence of death is an executive power. Though it exists essentially for the protection of the condemned prisoner he has no right to be heard in the deliberations of

the Cabinet. He may only submit a mercy petition. He has a "*de facto*" right to expect the lawful exercise of the power but no legal remedy is available to him (see s 31K(2) of the Constitution), save where an infringement of one or more of the protective provisions of the Declaration of Rights can be shown. See *Riley & Ors v Attorney-General of Jamaica & Anor supra* at 476h. In which event, the Supreme Court is mandated by the Constitution to fulfil its protective role and enforce the particular fundamental right. In so doing the Supreme Court is not to be taken as interfering with the "pardoning power" of Cabinet or the President. The judicial power and the executive power over sentences are readily distinguishable. See *United States v Benz* 282 US 304 (1931) at 311.

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GUBBAY CJ

It is to be noted that in *Javed Ahmed v State of Maharashtra supra* the Supreme Court of India quashed the sentence of death replacing it with imprisonment for life, notwithstanding that the President of India had refused clemency. And in *Madhu Mehta v Union of India supra* the same distinguished court issued a similar order even though the mercy petition had not yet been considered by the Executive.

It is essential, that this court, in the exercise of its wide discretion, should award a meaningful and effective remedy for the breach of s 15(1). That in my view, may best be achieved by ordering that the sentences of death be vacated.

THE ORDER

In the result I would order as follows:

1. The application is allowed with costs.
2. The sentences of death passed upon Martin Bechani Bakaka, Luke Kingsize Chiliko, Timothy Mhlanga and John Chakara Zacharia Marichi are, in each case, set aside and substituted with a sentence of imprisonment for life.

RECOMMENDATIONS:

The Minister of Justice, Legal and Parliamentary Affairs has fairly recognised that, to some extent at least, shortcomings in the system have been revealed. For he stated in his affidavit:

"My Ministry will henceforth examine ways of ensuring speedy processing of petitions for clemency, in cases of prisoners facing the death penalty."

Such action is, to my mind, imperative. There can be no doubt that to have allowed about ten months to elapse from the date Government resolved to retain the death penalty for murder, to 21 January 1993 when Cabinet finally considered these four matters, was far too long. It is a delay that simply fails to reflect any sense of urgency. And the period of six weeks to 9 March 1993, when the warrants of execution were issued, was also excessive.

It seems to me that the whole procedure relating to death sentence cases requires to be revised

and accelerated.

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GUBBAY CJ

In the first place, I would suggest that once an accused person has been sentenced to death, the trial Judge should direct that the proceedings be transcribed forthwith; that immediately the appeal record has been prepared and lodged with the Registrar of the Supreme Court, the appeal should be set down for hearing as an urgent matter. Once dismissed, no time should be lost in attending to all the procedures necessary for the submission of the matter to Cabinet.

Secondly, consideration should be given to extending the services of the *pro Deo* counsel who appeared at the trial, to the drafting of the notice of appeal; and, in the event of the appeal being dismissed, to the preparation of a petition for mercy. In this way the condemned prisoner would be represented by a legal practitioner from the date of sentence to a stage when assistance was no longer required. The latter would be in a position to ensure total expedition with regard to the preparation of the record and the hearing of the appeal.

Thirdly, a self-imposed rule should be applied by Cabinet that the decision of whether or not to exercise the prerogative of mercy be made within a period, of say, three months from the date the appeal against the death sentence was dismissed.

McNally JA: I agree

Korsah JA: I agree

Ebrahim JA: I agree

Muchechetera JA: I agree

Scanlen & Holderness, applicant's legal practitioners

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

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S v NCUBE & ORS 1993 (1) ZLR 286 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Criminal appeal

7 & 24 June 1993

Flynote

Criminal law - extortion - dumping body of deceased person at home of killer's family to pressure them into

paying compensation - whether existence of custom excuses such conduct - appropriate sentence

Headnote

The appellants were members of a family; a family member was killed in a fracas with a member of another family. They took the body of the deceased to the home of the other family, threatening that if an agreement for compensation was not reached the body would be left there. The other family thereupon agreed to pay compensation for the death of the deceased. The appellants were on these facts convicted of extortion.

Held, that the appeal should be dismissed. What the appellants did was unlawfully to subject the complainants to pressure which induced them to submit to the taking from them of an advantage in the form of the compensation. This constituted extortion, even if compensation was due. If this sort of action had its basis in custom, it was conduct which was no longer acceptable in a civilised Zimbabwean society.

Held, further, that in future cases a sentence of imprisonment might be appropriate. The bodies of the dead should be treated with respect, not used as weapons in games of psychological and emotional blackmail.

Cases cited:

S v Leadley 1979 RLR 231 (A)

Ex p Min van Justisie in re S v J en S v van Molendorff & Anor 1989 (4) SA 1028 (A)

Gonsalves & Anor v Gonsalves & Anor 1985 (3) SA 507 (T)

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McNALLY JA

K M Banda for the appellants

Mrs J Zindi for the respondent

Judgment

McNally JA: The four appellants were convicted on 7 September 1992 of the offence of extortion, and sentenced to 12 months' imprisonment with labour. Of that period, 4 months were suspended on condition that the 6 cattle involved, or their equivalent in money, were returned by 30 October 1992. In respect of the first appellant, because of his advanced age, the whole of the rest of his sentence was suspended on the usual conditions of good behaviour. In respect of the others, 5 months of the remaining 8 were suspended on similar conditions.

The second, third and fourth appellants have served the 3 months' sentence and have been released without either returning the cattle or serving the 4 months. We were advised that they were awaiting the decision of this court before deciding whether to return the cattle or serve this sentence. Presumably the first appellant has not served any period in prison.

I must say that this seems to me to have been a wrong decision by the Prison authorities. They

have in effect granted bail to the 4 appellants pending appeal, when bail was refused by the magistrate and there was no appeal or application to the High Court. That is a decision which the prison authorities are not empowered to make.

The case is an unusual one. What the appellants did was in accordance, so we were told, with the customs of at least some of the people in this country. Assuming that to be so - and no expert evidence was led on the subject - the question is whether the existence of the custom excuses the conduct, or whether the custom is so repugnant to the norms of civilised society that it cannot be accepted as justification for the conduct.

What happened was this. A member of the Siwela family was involved in a fight with a member of the Ncube family called Solo. Mr Freddy Siwela said rather quaintly in evidence:

"I thought I was just making a gesture and unfortunately struck him with a machete."

Solo died as a result and his assailant was taken into police custody. The rights and wrongs of this event are not before us. It is what happened next that is relevant.

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McNALLY JA

The Ncube family, represented by the first three appellants, together with a local headman, the fourth appellant, brought the body of the deceased to the Siwela homestead and dumped it there.

They say that their intention was not to extort compensation for the death but simply to say to the Siwelas - "you killed our man, now you must bury him." The response of the Siwelas was "We would prefer it if you buried him. Let us give you 6 head of cattle as compensation and to pay for the costs of the funeral." So they agreed. It was just an agreement.

We have no difficulty in rejecting this simplistic submission. In any society there is respect for the dead. In any society, a family would be uneasy to have the body of someone they (in a collective sense) had killed, buried at their home. They would fear that the spirit of the dead man would trouble them. Moreover, the deceased's family would want him buried at their homestead, not somewhere else, and especially not at his killer's house.

We have no doubt, as indeed the Siwelas testified, that the body was brought as a threat: "If you do not pay, we will leave the body here." Indeed, at one stage, when insufficient payment was offered, the body was taken from outside the homestead to inside the house. The move succeeded. The offer was increased. If this is a custom, it is not an acceptable one.

In other words, we are entirely satisfied that the appellants and the complainants both knew that it was unthinkable that the body of the deceased should be buried at the complainants' homestead. It was brought as a threat. It was never intended that the complainants should agree to bury the body. It was at all stages intended that they should pay compensation. The body was used to force the complainants to pay adequate and immediate compensation.

Extortion consists in taking from another some advantage by intentionally and unlawfully subjecting him to pressure which induces him to submit to the taking. This definition in Hunt SA

Criminal Law and Procedure vol II 2 ed at p 693 has been approved by this court's predecessor in *S v Leadley* 1979 RLR 231 at 234 and in *S v J* 1980 (4) SA 113 (E). As MACDONALD CJ said in *Leadley supra*:

"The all important point to be made is that while the advantage claimed may be due, the victim of the unlawful pressure may genuinely believe it is not, and may wish to have liability [or, one might add, quantum] tested in a court of law."

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McNALLY JA

(We are not concerned here with the view of the South African Appellate Division in *Ex p Minister van Justisie : in re S v J* en *S v van Molendorff & Anor* 1989 (4) SA 1028 (A) that the benefit must be a patrimonial one.)

The appellants had no right to dump the body of the deceased at the homestead of the complainants. It is the right and duty of the heirs to bury the body of a deceased person, unless he has specially nominated someone else. See *Gonsalves & Anor v Gonsalves & Anor* 1985 (3) SA 507 (T) and the cases there referred to. But in any event we have concluded that the appellants had no intention of allowing the complainants to bury the body. They were simply dumping it as a form of pressure to extort the compensation. They had no right to exert that pressure. They had no right either to dump the body or by doing so to force the complainants to pay them compensation. See generally *Hunt op cit* at 698 (d).

I am satisfied that the conviction was correct.

Since this was the first case of its kind to come before this court, so far as I am aware, and since it may have had its roots in some customary practice which was acceptable in the days before an adequate court structure was available, although no longer acceptable in a civilised Zimbabwean society, I would have preferred to have treated it as a test case, and as a warning to others for the future. In other words, it might have been appropriate not to impose an effective sentence of imprisonment but to indicate that in future effective sentences of imprisonment might be imposed. However, in this case, the effective parts of the sentence have already been served and nothing can be done about that.

What remains is the 4 months' sentence suspended on condition that the cattle, or their equivalent in money, be returned. The date for compliance with this condition has passed.

I see no reason why this part of the sentence should be interfered with. It would simply remove the pressure on the appellants to return the cattle extorted. They should return the cattle or their agreed value if they are no longer available, ie \$400 per head. The period for compliance will be extended to 30 October 1993.

It should be made generally known that this court takes a serious view of the use of dead bodies as a means of gaining some advantage. Sometimes this offence takes the form, as here, of the dumping of a body with someone

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McNALLY JA

accused of responsibility for the death, as a means of compelling the payment of compensation. Sometimes it may take the form of a refusal to attend a funeral, which custom requires you to attend, unless some payment in cash or kind is made. The plea that such action is customary will not be heard. Such customs are no longer acceptable. The bodies of the dead are to be treated with proper respect, and not used as weapons in a game of psychological and emotional blackmail.

Accordingly, the appeals of all four appellants are dismissed, save that the date for compliance with the condition of suspension related to the return of the cattle is extended to 30 October 1993.

Gubbay CJ: I agree

Korsah JA: I agree

Wilmot & Bennet, appellants' legal practitioners

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REGISTRAR-GENERAL v CHIRWA 1993 (1) ZLR 291 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

10 & 24 June 1993

Flynote

Court - judgment - binding nature of on persons not party to dispute - judgments in rem and in personam - distinction - judgment relating to status of person - judgment holding person to be a citizen

Headnote

The Chief Immigration Officer, believing that the respondent had obtained his Zimbabwean passport by falsely declaring that he was born in this country, seized the passport and took steps to have the respondent deported. The respondent commenced an action in the High Court, as a result of which SANSOLE J held that the respondent had not obtained his passport by false pretences and declared him to be a citizen of Zimbabwe. In the meantime, the passport had been sent to the appellant Registrar, who refused to return it to the respondent on the ground that SANSOLE J's judgment was not binding on him.

Held, that judgments *in rem* are binding on all persons, whether or not they were parties to the original proceedings. Judgments which relate to the status of the person are examples of such judgments, and a judgment which determines a person's nationality is an example of a

judgment determining his status. Consequently, SANSOLE J's judgment was binding on the appellant.

Cases cited:

Koster Koöp Landbou Maatskappy Bpk v Wadee 1960 (3) SA 197 (T)

Tshabalala v Johannesburg City Council 1962 (4) SA 367 (T)

Ex p Welsh in re Est Keegan 1943 WLD 147

Amal Engng Union v Min of Labour 1949 (3) SA 637 (A)

Bater v Bater [1906] P 209 (CA)

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GUBBAY CJ

Ex p Oxton 1948 (1) SA 1011 (C)

Salveson (or von Lorang) v Austrian Property Admin [1927] AC 78 (HL); [1927] All ER Rep 78 (HL)

Beardsley v Beardsley & Ors [1899] 1 QB 746

Radoyevitch v Radoyevitch 1930 SC 619

B Q P Simelane for the appellant

R Makarau for the respondent

Judgment

Gubbay CJ: The issue in this appeal turns on whether a judgment of the High Court, declaring the respondent to be a citizen of Zimbabwe, is a judgment *in personam* and, therefore, only binding as between the immediate parties and those who were privy to it; or a judgment *in rem*, conclusive and binding in this country against all the world.

The events giving rise to the appeal were not in contention. They may be set out as follows.

In March 1986 the Chief Immigration Officer, acting upon a belief that the respondent had obtained the grant of a Zimbabwean passport as a result of a false representation of birth in the country, seized the passport and took steps to have the respondent deported. Maintaining his entitlement to the passport, the respondent commenced an action in the High Court (Case No. HH-1106-86), in which he sought (i) an interdict restraining the Chief Immigration Officer from removing or causing him to be removed from the country; and (ii) a declaration that he is a citizen of Zimbabwe. At the trial which followed, witnesses were called by both parties to testify to the dispute. Sansole J, who presided, held that the respondent had not obtained citizenship and the grant of a passport by deceptive means. Accordingly, he awarded him the relief claimed. No appeal was noted against the judgment which, of course, emanated from a court of

competent jurisdiction.

When the respondent, armed with the judgment, requested the return of the passport, the Chief Immigration Officer advised that it had already been forwarded to the appellant and was in his custody. A subsequent approach made to the appellant to retrieve it met with no success.

Aggrieved by the appellant's adamant refusal to relinquish possession, the respondent once more put his faith in the High Court. He instituted proceedings by notice of motion for an order directing the appellant to release the passport forthwith.

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GUBBAY CJ

In an opposing affidavit, the appellant contended that the passport was being retained because the respondent had obtained citizenship fraudulently. Consequently, he was not eligible to be accorded the privilege of holding a Zimbabwean passport. The appellant also complained that as Registrar General, whose legal responsibility it was to process applications for citizenship and to grant the same, he ought to have been cited as a party in the action brought against the Chief Immigration Officer or, at least, been afforded the opportunity to testify thereat.

Clearly, the appellant's defence rested solely on the ground that he was not bound by the declaration made by MR JUSTICE SANSOLE that the respondent was a citizen of Zimbabwe; and, being satisfied that the factual finding upon which such declaration was based was either erroneous or questionable, he was within his rights in deciding to retain the passport.

That stance would have been completely justified if the judgment of SANSOLE J fell into the class of a judgment *in personam* or a judgment *inter partes*, which may be a preferable description. If, on the other hand, the judgment was one which determined the status of the respondent - in the sense of his legal position in or with regard to the rest of the community - then it fell into the class of being a judgment in rem. See *Koster Koöperatiewe Landbou Maatskappy Bpk v Wadee* 1960 (3) SA 197 (T) at 199D-F; *Tshabalala v Johannesburg City Council* 1962 (4) SA 367 (T) at 368H-369A; *Jouberts Law of South Africa* vol 9 at para 366; *Halsbury's Laws of England* 4 ed vol 16 at para 1537. The effect of such a judgment is that, within the limits of the country, all persons, whether party to the proceedings or not, are estopped from asserting that the status of the person is other than that which the court has, in terms of the judgment, declared it to be.

This court was not referred in argument to a case - nor have my researches revealed any - which specifically holds that the declaration of a person's citizenship by a court of competent jurisdiction is a judgment in rem. Nonetheless, in deciding the point, guidance may be found from decided cases and commentaries in which examples of judgments *in rem* relating to status of the person are referred to. Such are:

- (1) A judgment declaring whether persons are married or divorced. See *Ex p Welsh: In re Estate Keegan* 1943 TPD 147 at 149; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 651; *Bater v Bater* [1906] P 209 at 217.

GUBBAY CJ

- (2) A judgment declaring the nullity of a marriage or its existence. See *Ex p Oxtou* 1948 (1) SA 1011 (C) at 1015; *Salvesen (or von Lorang) v Austrian Property Administrator* [1927] All ER (Rep) 78 (HL) at 87B; [1927] AC 78.
- (3) A judgment determining a person's domicile. See *Halsbury op cit* at para 1537.
- (4) A judicial decree presuming a person's death. See *Ex p Welsh supra* at 149.
- (5) A judgment establishing a will or creating the status of administrator. See *Beardsley v Beardsley & Ors* [1899] 1 QB 746 at 750.
- (6) A judicial order relating to the custody of an infant. See *Spiro Conflict of Laws* at 218, citing the Scottish case of *Radoyevitch v Radoyevitch* 1930 SC 619 at 624.
- (7) A judgment declaring a person to be mentally disordered. See *Tshabalala v Johannesburg City Council supra* at 369A.
- (8) A judgment declaring a debtor insolvent or one rehabilitating him. See *Tshabalala v Johannesburg City Council supra* at 369A; *Halsbury op cit* at para 1523.

Having regard to the above, I consider that a fortiori a judgment determining a person's nationality relates to a matter of status, and so is a judgment *in rem*.

I am supported in this view by the meaning attributed to "nationality" (in the sense of citizenship of a State) in *Words and Phrases* 2 ed vol 3 at 306, being:

"... the status of membership of the collectivity of individuals whose acts, decisions and policy, are vouchsafed through the legal concept of the State representing those individuals ... It forms a continuing state of things and not a physical fact which occurs at a particular moment; a continuing legal relationship between the sovereign State on the one hand and the citizen on the other."

It necessarily follows that the judgment of SANSOLE J, delivered on 27 October 1986, was binding on the appellant, even though he was not an actual party to those proceedings.

GUBBAY CJ

I would add, in any event, that the appellant did not state that he was unaware of the institution of the action against the Chief Immigration Officer or the existence of the trial. It is more than likely that the Chief Immigration Officer impounded the respondent's passport in reliance upon information obtained through the offices of the appellant; and that the passport came into the appellant's possession at a fairly early stage of the litigation. In the light of such a situation it seems to me that it was open to the appellant to apply to have been joined as a party in the action or offer to testify on behalf of the Chief Immigration Officer. He did neither.

The appellant also pointed to the conditions upon which a Zimbabwean passport is issued; more especially, that it remains the property of the Government and may be "amended, withdrawn or cancelled at any time". He did not, however, depose that the respondent's passport had, in fact, been withdrawn or cancelled. Certainly notification, official or otherwise, to that effect was not claimed to have been given. The decision of the appellant to retain the passport in his custody was simply because in his opinion, the respondent was not a citizen - a conclusion which refused to take account of, or misunderstood, the binding nature of the judgment of SANSOLE J

For these reasons I would dismiss the appeal with costs.

McNally JA: I agree

Korsah JA: I agree

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

Gambe, Chinyenze & Associates, respondent's legal practitioners

Endnotes

1 (Popup - Popup)

An appeal was noted against this judgement.

2 (Popup - Popup)

This decision has only recently become available

3 (Popup - Popup)

The Immigration (Amendment) Regulations 1993 (No. 12), promulgated on 23 February 1993, confirmed the effect of this judgment.

4 (Popup - Popup)

See p 69 in this volume - *Editor*.

5 (Popup - Popup)

See p 69 in this volume - *Editor*.

6 (Popup - Popup)

In this connection, see s24(1) of the Constitution, which allows any other person to allege that the Declaration of Rights is being contravened in relation to a person who is detained. - ED