HOLME EDEN (PVT) LTD v WYCHWOOD (PVT) LTD 1993 (2) ZLR 1 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Civil appeal

15 June & 5 July 1993

Flynote

Sale - land - sale secured by mortgage bond - provision in bond inconsistent with provision in agreement of sale - breach of duties under mortgage bond - effect

Headnote

An agreement of sale of certain farms was entered into between the appellant and respondent companies. Portion of the purchase price was secured by means of a mortgage bond. It was provided in the agreement of sale that in the event of the purchaser (the respondent) causing a breach and failing, **after** notice, to remedy the breach, the seller could either claim specific performance or cancel the agreement. One of the provisions of the mortgage bond, on the other hand, was that, if any amount due by the mortgagor was not paid on due date, the full amount of the capital sum, together with interest and any sums due under the bond, would become immediately payable, **without** notice. The respondent failed to pay the first instalment on due date and was sued for the capital sum plus the other sums mentioned.

The defendant claimed that this provision in the mortgage bond was inserted in error and that being an ancillary contract the bond did not alter and was not intended to alter any terms of the agreement of sale. This defence was upheld by SMITH J *(1). On appeal:

Held, allowing the appeal, that the provision in the sale agreement relating to breaches referred only to breaches occurring before transfer. The insertion of the disputed clause in the mortgage bond was permissible in

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terms of the agreement of sale and its terms were not in conflict with the agreement.

Held, further, that the evidence established that the insertion of the disputed clause in the

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mortgage bond was not made in error.

Decision of SMITH J reversed.

Cases cited:

Grobler v Scholtz 1953 (3) SA 175 (T)

Taylor v Cape Importers 1938 CPD 362

E W W Morris for the appellant

M J Gillespie for the respondent

Judgment

Muchechetere JA: This is an appeal against the decision of the High Court, Harare, wherein it dismissed the appellant's claim with costs.

The claim arose from an agreement of sale (hereinafter referred to as "the sale agreement") entered into between the appellant and the respondent on 19 October 1988. In terms of the sale agreement, the respondent agreed to purchase three properties owned by the appellant in Mashonaland (hereinafter referred to as "the farm") together with some movable assets on the farm for $700 000. Of the purchase price, $200 000 was payable on the signing of the sale agreement, $300 000 was payable on registration of the transfer of the farm and the balance of $200 000 was, in terms of clause 1.1.3 of the sale agreement, to be secured by means of a mortgage bond over the farm. That clause reads as follows:

> "1.1.3 The balance of $200 000 shall be secured by means of a third Mortgage Bond to be passed by the Purchaser over the Farm in favour of the Seller. **Such bond shall incorporate, *inter alia*, the following provisions**:
>
> 1.1.3.1 The capital shall bear interest at the rate of TEN PER CENTUM (10%) per annum for the period from the 17 October 1988 until the 30 September 1993 and thereafter at the prime commercial bank overdraft rate prevailing on the 1 October 1993 from the 1 October 1993 until date of payment.
>
> 1.1.3.2 Interest shall be paid biannually in arrear on the 31 March and the 30 September in each year, commencing on the 31 March 1989.

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> 1.1.3.3 The capital shall be repaid by means of four equal annual instalments of $50 000 each payable on the 1 October in each year, commencing on the 1 October 1994."(Emphasis added)

Clause 7 of the sale agreement reads as follows:

> "**BREACH**
>
> In the event of the Purchaser causing **a breach of any of the terms and conditions** hereof and failing to remedy the breach within fourteen (14) days after receipt of written notice from the Seller or its agent, **the Seller shall have the right in its discretion either to claim specific performance or to summarily cancel this**

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agreement without prejudice to any claim it may have for damages for breach of contract or otherwise."

(The emphasis is mine)

The sale agreement also provided that transfer of the farm and registration of the bond would be effected by the appellant's legal practitioners. The transfer was duly effected and a bond was drawn by the appellant's legal practitioners and was, after being approved by the respondent, subsequently registered. The bond was in a standard printed form with blank spaces where details of the particular transaction would be typed or written. In this case, the names of the parties and the amount secured were inserted in the relevant clauses of the form. The provisions of clauses 1.1.3.1, 1.1.3.2 and 1.1.3.3 of the sale agreement were inserted in clause C of the form in compliance with the provisions of clause 1.1.3 of the sale agreement. In clause D of the form particulars of the farm were inserted and in clause E a new para (E.18), providing that the respondent was obliged to conduct all farming operations on the farm in accordance with approved methods of husbandry, was also inserted. Clause E of the form contains as part of the printed conditions para 2 which provides the following:

> "That should the Mortgagor(s) (respondent) fail to pay the interest, the instalments of capital (if any), premiums of insurance, or other sums due in accordance with the terms and conditions of this bond on due date, or fail to carry out any of the terms and conditions hereof the Capital, interest and all other sums due hereunder shall immediately be considered as legally claimed and due, without notice notwithstanding the exercise by the Mortgagee(s) (appellant) of any other right granted hereunder."

The respondent failed to pay the first instalment under the bond (which fell due on 31 March 1989) on due date and on 10 May 1989 the appellant issued

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summons claiming $200 000 plus $800,96 interest on that amount and costs of suit on a legal practitioner and client scale, including commission in terms of clause E 1 (ii) of the bond. The respondent opposed the claim but admitted that it had agreed to pay interest as claimed, $800,96. It stated that its liability in that respect arose by virtue of the sale agreement and not the bond. It also submitted that it was not bound by clause E 2 of the bond because that paragraph was wrongly incorporated in the bond due to error on the part of the appellant's legal practitioner. It stated that it was instead bound to the appellant in terms of the sale agreement, in particular, clause 7 thereof.

Mr Cumming, a director of the respondent, was the only person who gave evidence on behalf of the respondent. He was the person involved in the negotiations leading up to the conclusion of the sale agreement and had authority to sign the sale agreement on behalf of the respondent. He signed the sale agreement on 19 October 1988. Early in November 1988, after he had already taken occupation of the farm, he received a letter from the appellant's legal practitioners enclosing a copy of the bond that was required in terms of the sale agreement. He merely checked that the names of the parties were correctly inserted and the details about the repayment of capital and interest and thereafter sent the bond to his legal practitioner in Bulawayo for perusal - to see "whether there wasn't anything funny about it". The legal practitioner returned it to him, saying that it was a standard bond form and recommending its signature. He thereafter signed the power of attorney attached to the bond and returned the

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documents to the appellant's legal practitioners for registration. On 10 April 1989 he received a letter from the appellant's legal practitioners, stating that because the respondent had breached clause E 2 of the bond the outstanding capital and interest were due and payable. After that he sought advice from a legal practitioner and only then became aware of clause E 2 of the bond and its implications. Neither his legal practitioner, in Bulawayo, who had studied the bond, nor Mr Bennett, who had represented the appellant in the negotiations, had advised him that the bond contained such a provision which he claims differed materially from the corresponding provision in the sale agreement. He stated that he objected to the clause because in his view it changed a provision which had been specifically agreed on by the parties and inserted in the sale agreement. He went on to emphasise that when he agreed to the bond and signed it he was not aware of the change introduced by clause E 2. He signed because his legal practitioner in Bulawayo had said that it was all right for him to do so.

The appellant called the legal practitioner who had drawn up the bond to give evidence on its behalf. According to him, clause E 2 of the bond had not been

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inserted in error. Clause 7 of the sale agreement was intended to cover any breach prior to the transfer of the farm and clause E 2 of the bond was to cover any breach after transfer. After he had drawn the bond he sent it to Mr Cumming for perusal and signature. His evidence thereafter reads as follows:

> "Q. Did you thereafter have any discussion with Mr Cumming or any of his representatives?
>
> A. I received a telephone call from Mr Wallett [Wolhuter] who has been mentioned. I understood is [he was] acting on behalf of the defendant [respondent] company who intended to receive the bond and transfer documents from Mr Cumming for him to have a look at. Mr Wolhuter had raised two particular matter(s) with me on the telephone in regard to those documents. Firstly insofar as the mortgage bond was concerned he referred me to clause 18 of that mortgage bond and expressed the **opinion that that particular clause was not a term of the agreement and therefore why I had included it**. And the second query Mr Wolhuter had raised with me related to the split of the purchase price in the transfer documents. ...
>
> I said I would get back to him because I did not have the file in my office. When I got back to him I pointed out to him that the particular clause 18 of the mortgage bond was, I considered, the standard farming type clause for farm hands which he accepted and had no objections to the bond. ...
>
> Q. With that, did Mr Wolhuter express himself satisfied or ... Let me put it in another way, Mr Crosland. Did he indicate in any other way that he was dissatisfied with the papers which you had prepared?
>
> A. I understand he had no further dissatisfaction after that.
>
> Q. And thereafter when the papers were in fact signed what did you think would be ... the signing of the papers by the defendant led you to believe if anything?
>
> A. That the defendant had accepted the terms and conditions in the mortgage bond."(Emphasis added)

Mr *Morris,* for the appellant, submitted that there was no conflict between clause 7 of the sale agreement and clause E 2 of the bond. He also submitted

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that clause E 2 of the bond was not inserted as a result of a mutual mistake or any other sort of mistake and that, alternatively, if there was an error, it was not *justus.* His third submission was that if in any event there is a conflict between the two clauses then the terms of the bond constitute a novation of the sale agreement.

Mr *Gillespie,* for the respondent, submitted that being an ancillary contract the bond did not alter and was not intended to alter any terms of the sale agreement. He went on to submit that clause E 2 of the bond was therefore invalid to the extent that it conflicts with clause 7 of the sale agreement. He also submitted that there was a mutual mistake in respect of the insertion of clause E 2 in the bond and that there is no requirement that the respondent's mistake be *justus* because the initial error in respect of the insertion of the clause was that of the appellant's legal practitioner. In connection with novation, Mr *Gillespie's* submission was that it was impossible because there was no consensus.

I will deal first with the detailed submissions of Mr *Gillespie.* He stated that the facts in this case are on all fours with and practically identical to those of *Grobler v Scholtz* 1953 (3) SA 175 (T) and that at p 179C of the judgment it was held that a mortgage bond is only an ancillary contract to give effect to the provisions of the sale agreement. In this connection MURRAY J (as he then was) stated the following at p 179C-D:

> **"Plaintiff's counsel, however, contended that the Court was bound by the terms of the bond irrespective of those of the earlier deed of sale**. But the position is clear. The bond is only an ancillary to the provisions of the deed of sale. On the papers before me it is extremely improbable that the parties intended by the bond to alter any of the terms of the deed of sale: it would require specific evidence to justify this view and to treat the bond as anything but the expression of the parties' intention to carry out the terms of the deed of sale (emphasis added)."

See also *Taylor v Cape Importers* 1938 CPD 362.

In the first instance, I do not agree that the facts in this case are on all fours with those of *Grobler v Scholtz supra.* The major difference, in my view, is that the relevant clause in the agreement of sale the court had to deal with in that case is different from the clause in this case. At p 177A-C of *Grobler v Scholtz supra* MURRAY J described the clause he was dealing with as follows:

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> "Clause 9 of the deed provided that if the purchaser **failed to make any payment of capital or interest on due date or within thirty days thereafter** or breached any other terms of the contract, the seller would be entitled to cancel the deed and/or bring action against the purchaser, and in such case all amounts already paid by the purchaser would be regarded as *rouwkoop* and/or liquidated damages and forfeited in the seller's favour, the seller nevertheless having the right to claim all arrear amounts as well as compensation for breach of contract, or to claim specific performance (emphasis added)."

Clause 7 of the sale agreement in this case does not contain the words I have emphasised

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above - it only contains the words"a breach of any of the terms and conditions hereof" - which words could be held to also refer to and include payments of capital and interest under the bond. It is the presence of those words which made the court assume and conclude that the provisions of clause 9 of the deed of sale were to be reflected in the bond. In the circumstances, I am of the view that, in the absence of the words emphasised above, the words" a breach of any of the conditions hereof"in clause 7 of the sale agreement in this case only refer to breaches before transfer. Further, it is also clear that clauses 1.1.3.1 to 1.1.3.3 of the sale agreement were only meant to be incorporated in the bond and were therefore not really part of the sale agreement. Consequently they are not governed by clause 7 of the sale agreement.

Secondly, it was, in my view, never specifically argued in the *Scholtz* case *supra,* that clause 9 of the sale agreement only referred to breaches before transfer. From a reading of the case, especially the words I have emphasised in the above passage, it was merely assumed that the terms of clause 9 should have been reflected in the bond and that clause E 2 was an additional sanction. This was, in my view, because it had been assumed that the wording of the clause as concluded above included repayments of capital and interest under the bond.

I therefore agree with the submission by Mr *Morris* that clause 7 only affects matters before transfer, such as the payment of deposit on signature and payment of a further sum on transfer. I also agree that the insertion of clause E 2 was permitted in terms of clause 1.1.3 of the sale agreement which stated that the bond shall contain terms other than those relating to payment and interest. This can be gathered from the words *"inter alia"* in that clause. Further, because of what I have already found above, I am of the view that clause E 2 is not in conflict with any of the terms of the sale agreement. My

view in this respect is fortified by what the appellant's legal practitioner stated was the reaction of the respondent's legal practitioner on being presented with the bond for his perusal. From the evidence quoted above, the latter, who must be taken to either have had the sale agreement in his possession or to have been very much aware of its contents, is said to have raised only the question of clause E 1.8 of the bond as not being in accord with the terms of the sale agreement. He must, therefore, also have been of the view that clause E 2 was not in conflict with any of the terms of the sale agreement.

Lastly, I also agree with Mr *Morris'* submission that clause E 2 of the bond was not inserted in error. The appellant's legal practitioner, who drew both the agreement of sale and the bond, denied that he inserted the clause in error. He was of the clear view that clause 7 of the sale agreement was to govern payments and matters before transfer and that clause E 2 was to govern those long term payments in the bond. This must also have been the understanding of the respondent's legal practitioner because, as shown above, he never raised the question of the clause either being inserted in error or being in conflict with the terms of the sale agreement when he spoke to the appellant's legal practitioner.

I do not intend to go into the question of novation because of what I have already found above.

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In the circumstances the appeal is allowed with costs. The trial court's order in favour of the respondent is set aside and the following is substituted instead:

> "There shall be judgment for the plaintiff in terms of the prayer to the Particulars of Claim, being Annexure A to the summons."

Gubbay CJ: I agree

Korsah JA: I agree

Atherstone & Cook, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

TANEKA v TANEKA 1993 (2) ZLR 9 (HC)

Court **High Court, Harare**

Robinson J

Opposed application

19 May, 5 & 9 July 1993

Flynote

> Husband and wife - divorce - maintence pendente lite - duty of parties to reveal all material facts to the court - payment of arrear maintenance

Headnote

In a case involving a dispute about the level of maintenance payable, the applicant and the respondent must deal with the court with candour and utmost good faith and must disclose all material facts, whether for or against him or her, which will enable the court to make a fair and just assessment.

Where the respondent fails to disclose all material facts and attempts "to pull the wool over the court's eyes", the court is entitled to use its own experience in addition to the information furnished by the parties when exercising its judicial discretion to decide the appropriate level of maintenance payable by the respondent.

In a case where the application for maintenance has been opposed, the court may backdate the maintenance payable from the date of the presentation of the application up to the date of the final determination of the matter. It can do this in order to avoid prejudice being caused to the applicant by the delays attributable to the respondent in opposing the application.

Cases cited:

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Lindsay v Lindsay 1993 (1) ZLR 195 (S)

Glazer v Glazer 1959 (3) SA 928 (W)

Barass v Barass 1978 RLR 384; 1979 (1) SA 245 (R)

Stone v Stone 1966 (4) 98 (C)

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

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Hodgson v Hodgson S-190-92

Bellenden v Satterthwaite [1948] 1 All ER 343

du Preez v du Preez 1961 (3) SA 639 (O)

A J Dyke for the applicant

B Wabatagore for the respondent

Judgment

Robinson J: In December 1991 the applicant instituted proceedings against the respondent in this court claiming a decree of divorce and ancillary relief, including custody of the minor child of the parties' marriage, namely, Kudakwashe Gavin Taneka (born on 5 June 1984) ("the minor child"), maintenance for the minor child (the amount of which it is intended to amend to that claimed in the present application), an order that the respondent maintain the minor child, at the respondent's expense, as a beneficiary on his medical and dental aid scheme and an order that the respondent pay all school fees, the cost of uniforms, remedial tuition and other essentials for the minor child's attendance at school.

In the same proceedings the applicant has claimed damages from Victoria Madzima ("the said Victoria") on the ground of the latter's alleged adultery with the respondent. The said proceedings are opposed by the respondent and the said Victoria and the pleadings are now closed. However, for purposes of this application it is material to note that the respondent is not contesting the applicant's claim for a decree of divorce or for custody of the minor child.

In October 1992 the applicant filed an application claiming from the respondent *pendente lite* -

(a) maintenance for the minor child in the sum of $500 per month;

(b) payment of $500 per month for special medicines required for the minor child for so long as such medicines are required;

(c) payment of the contribution necessary to maintain the minor child on the respondent's medical aid scheme;

(d) payment of all school fees and levies and of school uniforms and clothing for the minor

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child;

(e) the costs of the application.

The respondent opposes the application on the following grounds -

(a) that maintenance of $500 per month is beyond his means in circumstances where he is responsible for medical costs for the minor child, being a child who is disabled, and for the payment of the child's school fees;

(b) that the respondent's CIMAS Medexec Package scheme, under which

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the minor child is covered, ensures that there are virtually no shortfalls in respect of expenses, including special medicines, incurred in respect of the minor child and that, therefore, there is no need for the respondent to pay the sum of $500 per month required for special medicines which, in any event, the respondent says he cannot afford to pay;

(c) that the minor child is already and presently covered under the respondent's CIMAS Medexec Package scheme;

(d) that the respondent is presently paying the minor child's school fees and is indirectly contributing towards the child's clothing.

The respondent therefore asks that the application be dismissed with costs.

In his opposing affidavit, the respondent, in responding to the applicant's schedule of monthly expenses attributable to the minor child, merely comments that the schedule is "frighteningly unrealistic" without attempting to explain why that is so and he fails to advance any reasons for his grave allegation that the applicant" was to a very great measure lying under oaths (*sic*) on averments made in her affidavit". Further, the respondent omits to furnish full details and proof of his income.

On her side, the applicant, surprisingly, failed to file any affidavit answering or, perhaps it would be more appropriate to say, attacking the unsatisfactory affidavit filed by the respondent.

In the circumstances, when this matter came up for hearing before me initially, besides ordering the respondent's legal practitioners to pay the applicant's wasted costs of the hearing due to the former's late filing of the respondent's heads of argument, I ordered the respondent to file and serve an affidavit supplementing his opposing affidavit and the applicant to file and serve an affidavit in answer thereto.

Such further affidavits having been filed and after hearing the parties' legal practitioners in argument today, the court is now in a position to give judgment on the application before it.

At the outset, let me say that I approach this matter in the light of the instructive judgment

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delivered by KORSAH JA in the recent case of *Lindsay* v *Lindsay* 1993 (1) ZLR 195 (S), in the course of which the learned Judge of Appeal highlighted the following points when dealing with a spouse's claim for maintenance from the other spouse *pendente lite.*

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1. To ensure the proper exercise of the discretion to be exercised by a court in determining the *quantum* of maintenance to be paid by a husband *pendente lite* or otherwise, the court requires that the parties 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."

2. A court is "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", in support of which statement KORSAH JA referred to the following authorities: *Glazer v Glazer* 1959 (3) SA 928 (W) at 931A-E, *Barrass v Barrass* 1979 (1) SA 245 (SR) at 246G-H (which, until *Lindsay's* case *supra* was the leading case in Zimbabwe governing the approach to maintenance for a spouse *pendente lite* and a contribution to the costs of the trial action), *Stone v Stone* 1966 (4) SA 98 (C) at 105G-106B, *Acutt v Acutt* 1990 (2) ZLR 220 (S) at 225C-D and *Hodgson v Hodgson* S-190-92 (unreported).

3. An assessment on the *quantum* of maintenance made by a court *a quo* will "not be interfered with on appeal unless the court had misdirected itself, or the assessment is grossly excessive or substantially inadequate". In support, the court cited the cases of *Acutt v Acutt* supra, at 225E-F and *Hodgson v Hodgson supra* at 3, both of which cases relate to the question of misdirection. In the case of *Stone v Stone* supra at 106A-B, WATERMEYER J stated"... a court of appeal will only interfere if there is a substantial difference between its assessment and that of the court *a quo* (see *Bellenden v Satterthwaite* [1948] 1 All ER 343 and *du Preez v du Preez* 1961 (3) SA 639 (O)". In this connection, KORSAH JA referred later to the following statement made by ASQUITH LJ in the case of *Bellenden (formerly Satterthwaite) v Satterthwaite supra* at 345 B:

> "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."

4. On the issue of arrear maintenance, KORSAH JA had this to say:

> "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

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> 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

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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 *Barrass v Barrass supra* at 248H".

On the papers in this case it is clear that the only real issue is whether the applicant is justified in asking for increased maintenance in the sum of $500 per month for the minor child as opposed to accepting the sum of $250 per month which the respondent contends is all he can afford to pay in conjunction with the other payments which he is required to make for the minor child's medical aid coverage and school fees.

Turning first to the applicant's allocation of monthly expenses for the minor child totalling $1597, with which the respondent makes no attempt to deal specifically, in view of the comprehensive medical aid coverage arranged by the respondent for the minor child, there obviously must be an adjustment in respect of the allowance of $250 for medical shortfalls and of $8 for dentist. I consider a reduction of, say, $208 to be fair in this regard.

While the allowances totalling $355 for car maintenance, insurance, licence and transport (by bus with escort) and the allowance of $50 for entertainment and pocket money may be on the high side, in my view the amount of $125 for groceries is on the low side, apart from which there is no allowance for meat, milk and bread. All in all, I do not consider it unreasonable to peg the minor child's expenses at a figure of at least $1 200 per month.

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Consequently, having regard to the applicant's monthly net salary of $1152,14 and to her monthly living expenses, there can be no doubt that the applicant's claim for an additional $250 per month towards the minor child's maintenance is fully merited.

It therefore remains to be seen whether it is true that the respondent cannot afford to pay the extra maintenance of $250 per month required by the applicant in addition to the financial commitments accepted by the respondent for the minor child's medical aid coverage and school fees which, according to the papers before the court, cost the respondent $70 per month and $25 per month respectively.

In examining the information furnished by the respondent regarding his monthly income and expenses, the following points emerge:

(a) The respondent failed to reveal in his initial affidavit that in November, 1992 he received an annual bonus of $7211,12.

(b) The respondent has made no attempt to explain for what purpose he obtained the

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monthly staff loans varying from $991,66 to $2541,86 reflected in his pay slips for November and December 1992 and for March to May 1993 inclusive.

(c) While the said Victoria, with whom the respondent purported to solemnize a marriage while still married to the applicant and who is a co-owner with the respondent, in equal undivided shares, of Lot 80, Meyrick Park of Mabelreign, which was purchased for $245000, is not the lawful wife of the respondent, the respondent is paying $150 per month for the said Victoria, ostensibly as his wife, to be covered as a beneficiary under the respondent's CIMAS Medexec Package scheme.

(d) As regards the respondent's monthly expenses, one would query the reason for his telephone account being as high as $300 and why payments of $300 per month for the luxury of an inanimate object such as a television set should take precedence over the payment of maintenance for his minor child.

(e) The respondent does not disclose for how long he is obliged to continue paying the instalments totalling $1 200 per month for the deep freeze, furniture, television and kitchen table nor why the said Victoria, with whom it appears the respondent is living as man and wife on the said Lot

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80, Meyrick Park of Mabelreign and who conducts her own fashion and hair salon businesses in separate shops at Mabelreign, is not contributing towards the said instalments.

At the end of the day, the court has little difficulty in finding that, in opposing the application in the vague and imprecise manner in which he has, the respondent has not dealt "with the court with candour and utmost good faith" with regard to his financial position - indeed, far from disclosing to the court "every material fact ... which will enable the court to make a fair and just assessment" on the issue of maintenance for the minor child, the respondent has, in my view, attempted to "pull the wool over the court's eyes" by seeking to disguise his true financial circumstances.

That being so, the respondent cannot be heard to complain about the court's decision, "based on its own experience as well as on such information as is furnished by the parties", that, in the exercise of its judicial discretion in assessing the *quantum* of maintenance which should be paid for the minor child, it is satisfied that the respondent is well able to pay maintenance in the amount of $500 per month which sum the court therefore awards to the applicant *pendente lite.*

Because I find the remarks of KORSAH JA in *Lindsay's* case on the issue of arrear maintenance apposite to the circumstances of this case, particularly in view of the respondent's lack of good faith towards the court, I order that the respondent shall pay the applicant maintenance at the increased rate of $500 per month with effect from the date of presentation of this application, that is to say, with effect from and including October 1992.

Since under the CIMAS Medexec Package scheme the minor child is covered for prescribed

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medicines up to $5 000 per membership year and since the applicant will be able to use the arrears of maintenance totalling $2 250 which the respondent has been ordered to pay her to cater for the sum of $250 per fortnight which the applicant has to pay for the two special medicines prescribed for the minor child's asthmatic condition until this amount is refunded to the applicant under the CIMAS Medexec Package scheme, there is no need to entertain the applicant's claim for "payment of $500 per month for specialised medicines required for the minor child for so long as such medicines are required".

As regards the applicant's remaining claims, it is common cause that the respondent has accepted liability for paying the subscription" necessary to

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maintain the minor child on the respondent's medical aid scheme" and for paying the minor child's school fees.

The question of payment for the cost of the minor child's clothing, including school uniforms, I intend to leave over for resolution at the trial of the main action. However, in this respect I would point out that if, at the trial of the main action, the applicant can prove that the respondent does have other sources of income such as from his interest in a gold mine in the Shamva area and from, to quote from para 7 of the applicant's answering affidavit, "businesses at border church in Chihota Communal Lands comprising of a service station, a grinding mill and a hardware shop", the applicant should encounter no difficulty in persuading the trial court to order the respondent also to pay for the child's clothing, including school uniforms.

On the issue of costs, since the applicant has been partly successful in her application, I think the fairest order to make is to direct the respondent to pay one-half of the applicant's costs.

Accordingly, in the final result I order as follows:

(a) that, *pendente lite,* the respondent shall pay the applicant maintenance for the minor child in the sum of $500 per month, such payments to be made on or before the last day of each month;

(b) that the respondent shall pay the applicant arrear maintenance for the minor child in the said sum of $500 per month for the period October 1992 to June, 1993 inclusive, that is to say, the total sum of $2 250 representing the additional amount of $250 per month for the aforesaid period, such total sum to be paid to the applicant by not later than 31 July 1993;

(c) that the respondent shall continue punctually to pay the monthly subscription necessary to keep the minor child covered under the respondent's Medexec Package scheme with CIMAS;

(d) that the respondent shall continue punctually to pay the minor child's Government school fees, including any levies;

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(e) that the respondent shall pay one-half of the costs of this application.

DW Aitken & Co, applicant's legal practitioners

Guni, Wabatagore & Co, respondent's legal practitioners

BAILEY v HEALTH PROFESSIONS COUNCIL OF ZIMBABWE 1993 (2) ZLR 17 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

24 June & 12 July 1993

Flynote

Professions - optician - professional conduct - requirement for mens rea in charges of misconduct

Professions - penalty for misconduct

Administrative law - bias - test to be applied

Headnote

The appellant had been charged with and found guilty of misconduct by the disciplinary committee of the respondent. He was suspended from practice and fined. An appeal to the High Court failed. On appeal to the Supreme Court the appellant argued that he took no part in the conduct in question and thus could not be held liable for misconduct.

The appellant also brought review proceedings in the High Court alleging that two members of the disciplinary committee had been biased against him. The High Court dismissed the application for review.

Held, there was no reason why the allegation of misconduct should not require proof of intent or involvement. On the facts the appellant had not been shown to have committed the misconduct in question.

Held, in any event, the penalty imposed by the disciplinary committee was so severe that it would in any event have been set aside.

Held, the test for bias is whether there is a real danger of bias. On the facts such bias in one member of the disciplinary committee had been established.

Cases cited:

S v Maceys of Salisbury Ltd 1982 (2) ZLR 239 (S)

R v Percy Hall & Co (Pvt) Ltd 1966 RLR 374 (A); 1966 (3) SA 669 (RA)

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R v Gough [1993] 2 All ER 724 (HL)

McNALLY JA

Foya & Matimba v R & Jackson NO 1963 R & N 318; 1963 (3) SA 459 (FS)

Snyman & Ors v Liquor Licensing Court, Windhoek & Anor (2) 1963 (1) SA 460 (SWA)

Omega Freight Svcs (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en Andere 1984 (3) SA 402 (C)

A P de Bourbon SC for the appellant

M J Gillespie for the respondent

Judgment

Mcnally JA: There are two appeals here, involving the same two parties. Both arise out of a decision of the Disciplinary Committee of the Health Professions Council of Zimbabwe (the Council) to discipline the appellant (Bailey). There is an appeal against a finding that he was guilty on three charges and against the penalty imposed. There is also an appeal against a refusal on review to make a finding of bias against two of the members of the Disciplinary Committee.

Bailey has been a registered Ophthalmic Optician in Zimbabwe since January 1953. As such, he is subject to the Regulations governing his profession, specifically the Opticians and Dispensing Opticians (Professional Conduct) Regulations 1973 (RGN 1103/73).

In June 1991, and on several occasions, an advertisement appeared in various newspapers in Zimbabwe, announcing the fact that his new practice was opening in Borrowdale. It was alleged that this advertisement was a contravention of three separate sections of the Regulations, namely ss 4(2), 8(3) and 8(4).

In brief, under s 4(2) it was alleged that the advertisement was not of a dignified and restrained character. Under s 8(3) it was alleged that it exceeded the permitted size. Under s 8(4) it was alleged that it was published without the required approval. The latter two allegations were self evidently correct. The first was disputed.

Unfortunately, Bailey does not seem to have taken the charges very seriously. He submitted written representations but did not appear in person or by counsel.

The essential points made in his letter dated 17 June 1991 were as follows:

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(1) He had to travel to Johannesburg "unscheduled" at the time of the opening of his new

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practice, for medical treatment.

(2) Hence all matters related to the opening were delegated to a colleague.

(3) He was thus unaware of the"detail content"of the advertisements prior to publication.

(4) The colleague mentioned was at the time of writing the letter himself in Johannesburg receiving medical attention.

(5) He apologised for transgressing the regulations."This was unplanned, not supervised by me".

Although this letter is not entirely clear, it appears to contend that he, Bailey, was not personally responsible for the transgressions.

The Disciplinary Committee then formally charged him on 25 October 1991. He was told

> "If you do not wish to appear in person or by a legal practitioner you may make submissions in writing which will be placed before the Disciplinary Committee".

He replied that his written submission needed no further elaboration.

The Committee met on 26 November 1991. In regard to his explanation it recorded the following:

> "The Committee then found the explanation - that Mr Bailey did not know that it was done in his name as he was out of the country at the time - unacceptable."

It proceeded to find him guilty of the three charges and noted in mitigation:

(1) The apology for the transgression of the Regulations noted.

(2) Not supervised by Mr Bailey as he was out of the country.

It then imposed the following penalties:

(1) Suspension from practice for six months

(2) To pay a penalty of $1 000

(3) To pay costs.

It is difficult to understand the finding that his explanation was "unacceptable". The Committee did not disbelieve him, because they accepted his explanation

as mitigatory. So it must mean that they did not accept that what he said was a defence. He was guilty because it was done in his name. In other words, they found, as lawyers would put it, that these were offences of strict liability.

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No authority was cited in the court *a quo* for the conclusion that the offence was one in which it was irrelevant whether there was *mens rea* in the form either of *dolus* or *culpa,* ie that it was an offence of strict liability.

The question of strict liability was considered most recently in this court in *S v Maceys of Salisbury Ltd* 1982 (2) ZLR 239 (S). Although the court differed on the point on the particular facts, there was a general view in favour of requiring at least negligence to be proved by the prosecutor.

The traditional tests were set out by FIELDSEND AJA (as he then was) in *R v Percy Hall & Co (Pvt) Ltd* 1966 RLR 374 (A) at 376B-D. The factors to be considered are:

(1) the object and scope of the legislation;

(2) the nature and extent of the penalty;

(3) the ease with which the penalty could be evaded if the defence of absence of *mens rea* were permitted.

In this case I see no difficulty in requiring *mens rea*. The extent of the penalty is very great. The guilty person may have his name removed from the register, which, in effect, means he may never practise again. Or he may be suspended "for a specified period", fined $5 000 and required to pay the costs. These penalties are so severe that on that ground alone I would be satisfied that it was never intended that these offences should fall into the "strict liability" category.

Nor does the object and scope of the legislation demand that there be strict liability. We are concerned here with the personal behaviour of professional people. The guilt attaches to the person, not to his company. The object of the legislation is not directly to protect the public but to assure proper standards of skill and conduct among registered persons. The object can readily be achieved without any need for strict liability.

In a case like the present there would have been an initial presumption that he had done the acts alleged, simply because the acts were done in his name. But that presumption was rebutted by his explanation - "I was in Johannesburg receiving medical treatment at the time and had no hand in the acts alleged".

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The Committee should then either have accepted the defence and dropped the charges, or required him to give evidence to substantiate his defence. At the end of the enquiry the Committee would have been in a position to decide whether -

a. he was not guilty because he had no hand in the publication;

b. he was guilty of misconduct by reason of negligence;

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c. he was guilty as charged because his defence was untruthful.

But the Committee did not follow this procedure. It clearly treated his letter as a plea of guilty with mitigating circumstances. Indeed, it may have been intended that way. Any criminal lawyer is familiar with the client who pleads guilty in error. But the fact is that the plea (the letter) was a denial of personal responsibility , and was thus a plea of not guilty.

The Committee was not entitled, without oral evidence, to say, as it did in effect say: "Well, even if you are telling the truth, you are still guilty". By doing that, they were interpreting the offence as one of strict liability. As I have said, it is not.

It may be argued that the letter of 17 June 1991 was at least an admission of negligence. But, even assuming that negligence is a proper basis for a conviction under these regulations, I am not satisfied that it was an admission of negligence. Too many questions need to be asked and answered before one can decide that issue. For example:

(1) Who was the colleague to whom the task was entrusted? Was he an experienced registered person who might have been expected to know the rules?

(2) What were the instructions given to that colleague?

(3) Was the visit to Johannesburg a medical emergency? When exactly did it take place in relation to the publications? How"unscheduled"was it?

(4) Was Bailey aware of the Regulations at the time?

Unless questions of that sort were put to and answered by Bailey, it is impossible to say whether his conduct was negligent or not. Accordingly he should not have been found guilty, even on that basis.

In the light of that conclusion it is unnecessary to say anything about the severity of the sentence. I cannot, however, forbear from remarking that the penalty, even assuming a wilful breach, was severe. Given that the Committee found it was not a wilful breach, but no more than an unfortunate error for which the appellant had to be held personally responsible, it was manifestly excessive. Indeed from the wording of the reasons for the sentence it is apparent that the Committee was punishing him on the basis that it was a

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wilful and personal breach. They were disbelieving his explanation, despite what they had said earlier. They had no right to do so without warning him in advance that he should appear to substantiate his allegations or risk being disbelieved.

Having decided the appeal in favour of the appellant, my first thought was that it would be unnecessary to come to any decision on the second appeal about the finding on bias. The main appeal succeeds whether or not one or more of the members of the Disciplinary Committee were biased or gave the appearance of bias.

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The problem with that line of thinking is that if this court makes no finding, then the judgment of the court *a quo* on the point remains valid. That judgment was against the appellant, and carried costs. For the sake of the costs, the appellant is entitled to a judgment on that issue as well.

We have been referred by Mr *de Bourbon* to the very recent reported decision in *R* v *Gough* [1993] 2 All ER 724 (HL). In that matter the test for bias was set out with persuasive clarity in the speech of LORD GOFF at pp 737-738. I do not propose to set out the whole of the relevant passage beginning at the letter "g" on p 737. It is enough to set out his concluding words at the foot of that page:

> "Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the Tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him."

He stressed that by "real danger" he meant a real possibility rather than a real probability of bias.

As far as the one member is concerned, it seems to me that the suspicion of bias is fanciful. But in relation to the other member the possibility of bias is much stronger. The allegations of Bailey are supported by another witness who is admittedly a co-director of his business. They would tend to support one another, but the fact is that both claim that Bailey and the member dislike each other intensely. The member himself, speaking of meetings of the Ophthalmic Association of which he and Bailey are both members, says:

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> "There are two main factions at these meetings, the Rivron group and the Butson group and there is often acrimony between them."

He does not say that he and Bailey are in these opposing groups, but unless that is so it is hard to understand why he makes the statement.

The reasonable danger of bias, it seems to me, was present. Compare *Foya & Matimba v R & Jackson NO* 1963 R&N 318 (FS) at 322H. The extreme severity of the sentence does nothing to lessen that danger.

Mr *Gillespie* suggested, on the authority of *Snyman & Ors v Liquor Licensing Court, Windhoek & Anor* (2) 1963 (1) SA 460 (SWA) at 465 that Bailey had acquiesced in the composition of the Disciplinary Committee, and could not now complain. But there is nothing to suggest that he knew, or was advised of, the composition of the Committee, until he was told by letter of 28 November 1991 of its decisions. It was that letter which told him the names of the members of the Committee. The situation therefore is closer to that summarised in the headnote of *Omega Freight Services (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en Andere* 1984 (3) SA 402 (C).

I would, accordingly, have set aside the proceedings on that ground, had I not already decided

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that the findings of guilt were unwarranted.

In the result the appeals are allowed with costs. The order of the High Court is altered to read:

(1) That in case no. HC 5802/91 the appeal be and is hereby allowed with costs and the findings reached and penalties imposed by the Disciplinary Committee of the Health Professions Council contained in the Registrar's letter DGB/lk/500/91 dated 28 November 1991 are set aside.

(2) That in case no. HC 958/92 no order is made on the merits but the respondent is to pay the applicant's costs.

Ebrahim JA: I agree

Muchechetere JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

MUBVIMBI v MARINGA & ANOR 1993 (2) ZLR 24 (HC)

Court **High Court, Harare**

Robinson J

Opposed application

13 July 1993

Flynote

Practice and procedure - barring - notice of intention to bar - certificate of service - by whom should be completed - default judgment - rescission - late application - condonation - requirements

Headnote

The practice of having service of a notice of intention to bar certified by a person other than a legal practitioner is not a compliance with the provisions of rule 41 of the Rules of the High Court.

An application for rescission of a default judgment must be made not later than a month after the affected person became aware of the judgment. If there is any delay beyond that time, an application for condonation must be made and an explanation for the delay must be given. An explanation which attributes the blame for the delay to the party's legal practitioner will usually be unavailing; non-compliance with or a wilful disdain of the Rules by a party's legal practitioner will be treated as non-compliance or a wilful disdain by the party himself. This will be the case

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even where the affected party has an arguable case on the merits.

Cases cited:

Chetty v Law Soc, Tvl 1985 (2) SA 756 (A)

Cobra & The Wild Cat (Pvt) Ltd v Tundu Distributors (Pvt) Ltd 1990 (1) ZLR 133 (H)

Min of Labour v United Foods & Allied Workers' Union of Zimbabwe H-70-92

Chimbadzo & Anor v Nkosana & Anor H-153-92

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

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Bishi v Sec for Education 1989 (2) ZLR 240 (H)

Mwaera v Matinyarare & Anor H-182-91

Ndebele v Ncube 1992 (1) ZLR 288 (S)

Musakasa v Mimba S-46-92

Mahoqa v Liebenberg S-206-91

P Kawonde for the applicant

A A Musunga for the first respondent

Judgment

Robinson J: After hearing argument from the applicant's counsel, Mr Kawonde, and without calling upon the first respondent's counsel, Mr Musunga, to reply, I dismissed this application with costs.

Before recording my full reasons for dismissing the application, I set out the background facts as extracted from the record in case no. HC 1930/91.

(a) On 16 May 1991 the first respondent (to whom it will be more convenient to refer as"the plaintiff") instituted an action in this court against the applicant ("the defendant") through his legal practitioners, Chirunda, Chihambakwe & Partners, claiming the sum of $25 000 together with interest a tempore morae from the date of judgment and costs of suit.

(b) The plaintiff's claim was for damages representing the value of a Toyota Scout motor vehicle owned by the plaintiff which, in July 1989, the defendant, a self-employed mechanic, had agreed in writing to repair for the plaintiff by 15 January 1990, in pursuance of which agreement the plaintiff had provided the defendant with the spare parts required to repair the said motor vehicle. However, the defendant failed to repair

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the vehicle and, according to the plaintiff, removed various parts from the vehicle, leaving it"irreparable and a bare shell".

(c) Summons and declaration were served on the defendant personally at his place of residence, being Stand No. 12185, Zengeza 4, on 28 May 1991, in response to which the defendant instructed Hove, Mutasa & Associates to enter an appearance to defend on his behalf, which they did on 3 June 1991.

(d) On 13 June 1991 the plaintiff's legal practitioners filed and served a notice of intention to bar and on 19 June 1991 the plaintiff's legal practitioners filed a notice of bar (which was in fact one day premature after excluding Saturday and Sunday, 15 and 16 June, 1991).

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(e) On the same day the defendant's legal practitioners filed a request for further particulars.

(f) On 17 October 1991 the plaintiff's legal practitioners filed a notice setting down the matter for judgment on 23 October, 1991 and filed an affidavit signed by the plaintiff in support of his claim for damages in the sum of $25 000.

(g) On 23 October 1991 the matter was postponed sine die and by a notice signed on 3 March 1992 and copied to the defendant at Stand No. 12185, Zengeza 4, Chitungwiza but bearing the High Court date stamp 4 March 1993, the plaintiff's legal practitioners withdrew the plaintiff's application for judgment.

(h) Apparently the plaintiff's legal practitioners agreed to the upliftment of the bar filed by them on 19 June 1991 because on what, according to the High Court date stamp, seems to be 4 March 1992, the plaintiff's legal practitioners, in a reply signed by them on 27 February 1992 which was directed to the defendant at Stand No. 12185, Zengeza 4, Chitungwiza, furnished the further particulars which the defendant's legal practitioners had requested in their request filed on 19 June 1991.

(i) On 9 April 1992 the plaintiff's legal practitioners filed a notice of intention to bar which, according to an imprint on the notice, was served on and received by the defendant's legal practitioners at 8.10 am on 13 April 1992. The certificate of service incorporated in the notice has not been duly completed by the clerk concerned in the employ of the plaintiff's legal practitioners but it appears clear that, in the certificate, the clerk was purporting to certify service of the notice of intention to bar on one Alice Juru at the offices of the defendant's legal practitioners at 8.10 am on 13 April 1992. (The said Alice Juru seems to have been the person who inserted her name, the time and the day in the certificate of service.)

I pause here to highlight an unsatisfactory practice which has come to be followed in regard to the service of a notice of intention to bar. Because the form prescribed by the Rules of Court, being Form No. 9, embodies a certificate of service, legal practitioners argue that it is sufficient

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for them simply to have the said certificate completed by the person who serves the notice, which usually means that the certificate is not even signed by the person concerned and that, if that person is only a clerk or messenger in the employ of the firm of legal practitioners causing the notice to be served, due

and proper service by the clerk or messenger concerned is not vouched for by a legal practitioner in the firm.

In my view, the provisions of rule 41 govern the service also of a notice of intention to bar which, needless to say, is a most important document. It is for this reason that, notwithstanding the resultant annoyance and inconvenience caused to legal practitioners, I have insisted upon practitioners furnishing me with a certificate which complies with Form 6 or 7 of the Rules of the High Court before I will enter a default judgment in a case where a party has barred the other party in terms of a notice of intention to bar. The present case is a classic example of what can happen where the matter of completion of a certificate of service incorporated in a notice of intention to bar is left to the clerk or messenger concerned. To avoid this unsatisfactory state of affairs, I understand that it is intended to do away with the form of certificate of service presently embodied in the form prescribed for a notice of intention to bar but, until this is done, I shall continue to insist upon a certificate of service inthe case of a notice of intention to bar being completed in accordance with the requirements of rule 41.

(j) On 16 April 1992, the defendant's legal practitioners filed a request for further particulars identical to that filed by them on 19 June 1991, with which the plaintiff's legal practitioners had already complied in their reply filed on 4 March 1992. In view of the previous request filed by them on 19 June 1991, one wonders why the defendant's legal practitioners did not follow up the matter by letter instead of filing an identical request on 16 April 1992, unless this was a stratagem to play for time after they had been served with the plaintiff's notice of intention to bar on 13 April 1992.

(k) On 11 May 1992, according to annexure C to the plaintiff's opposing affidavit filed in the present case, the defendant's legal practitioners filed a notice of renunciation of their agency on the defendant's behalf which was dated 4 May 1992.

(1) On 19 May 1992 the plaintiff's legal practitioners filed a notice of bar (which mistakenly purported to bar the plaintiff!)

(m) On 27 May 1992 the plaintiff's legal practitioners set down the matter for judgment on 10 June 1992 and filed an affidavit by the plaintiff in support of his claim for damages in the sum of $25 000.

(n) On 10 June 1992 MTAMBANENGWE J entered judgment, with costs, for

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the plaintiff in the sum of $25 000 together with interest theren a *tempore morae* from 10 June 1992 to date of payment.

(o) On 16 October 1992 the plaintiff's legal practitioners caused a writ of execution against movable and immovable property to be issued against the defendant for the judgment debt, interest and costs.

(p) On 30 November 1992 a copy of the writ was served by the deputy sheriff on the Registrar of Deeds who advised that Stand 12185, Zengeza 4, Chitungwiza was not registered in his Registry, as a result of which the deputy sheriff retained the writ for service"on Stand 12185 Zengeza and Local Authority".

(q) On 5 December 1992 TK Hove & Partners (the defendant's second legal practitioners) filed a notice of assumption of agency on behalf of the defendant dated 2 December 1992, presumably as a result of the defendant's having become aware that a writ of execution had been issued against him by the plaintiff.

(r) On 9 December 1992 the writ was served by the assistant deputy sheriff on Mr Kwenda, a housing officer with the Chitungwiza Town Council, and a notice of seizure and attachment was handed to Mr Kwenda at the same time. On the same date, according to annexure D to the plaintiff's opposing affidavit filed in the present case, the writ of execution, together with the notice of seizure and attachment, was handed to the defendant at his place of residence.

I turn now to the present application.

[The learned Judge then dealt with the defendant's explanation.]

If, as the defendant seeks to contend, he was not in wilful default and it was his first legal practitioners who were to blame for the default judgment entered against him, then he should have obtained and annexed to his founding affidavit an affidavit from his first legal practitioners setting out the history of events to support his contention since the onus, of course, lies on the defendant to show "good and sufficient cause" for rescission in terms of rule 63(2) of the High Court Rules. In this connection, see *Cobra & the Wild Cat (Pvt) Ltd* v *Tundu Distributors (Pvt) Ltd* 1990 (1) ZLR 133 (H) at 135G-H and 136A-B.

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In this case, however, there is a prior and vital hurdle for the defendant to surmount before it becomes necessary to consider whether he has successfully surmounted the next hurdle by having shown"good and sufficient cause "for rescission of the default judgment obtained against him. Rule 63(1) provides that a party may apply for rescission of a default judgment"not later than one month after he has had knowledge of the judgment". As mentioned earlier, the defendant's application for rescission was filed only on 4 June 1993, on the face of it, almost one year after judgment had been entered against him.

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While the defendant is mistaken when he admits in para 5 of his answering affidavit that he became aware of the judgment in September 1992 when a writ of execution was served upon him, it is certainly clear that the defendant became aware of the judgment, at the very latest (if not before when he was negotiating directly with the plaintiff's legal practitioners), on 9 December 1992, when the writ of execution was served on him personally at his residence. Consequently, it will be observed that the defendant's application for rescission was filed close on five months out of time. And yet, when one looks at the applicant's founding affidavit, what does one find?

The defendant does not even bother to seek the court's condonation in his founding affidavit for the very late filing of his application for rescission; nor is he persuaded to ask for condonation in his answering affidavit after the plaintiff has said in his opposing affidavit, in the third paragraph on p 2, that he is "surprised that the applicant should see it fit to make an urgent Chamber Application six (6) months after he had knowledge of a judgment against him "and that it" is quite clear that applicant is hopelessly out of time and his application is improperly before the court ". Worse still, the defendant makes no attempt to offer any explanation for the inordinate delay in the filing of his application or to show in what ways the fault for the late filing was not his but was entirely that of his legal practitioners. While it is true that in para 5 of his answering affidavit the defendant alleges vaguely that after a writ of execution was served on him in September 1992, he communicated with his legal practitioners but nothing came out of it and that he had faith in his legal practitioners and believed that they could handle his affairs, it appears, ironically, that while the defendant's second legal practitioners thought the defendant was referring to his first legal practitioners, he must have been referring to them because the writ of execution was, in fact, served on the defendant in December 1992, the month in which the defendant's second legal practitioners assumed agency on his behalf. I shall deal later with the consequences of the defendant's belief that he could trust his legal practitioners to handle matters on his behalf.

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I now revert to the matter of condonation. In the defendant's heads of argument, his second legal practitioners made merely this submission:

> "An application for rescission of judgment, if made after one month of the judgment, must be accompanied by an application for condonation of late noting of the application. However, an application for condonation need not always take the form of a written notice of motion. *Min of Labour, Manpower Planning & Social Welfare v United Food & Allied Workers Union of Zimbabwe* H-70-92."

Even if one accepts that the defendant could apply orally for condonation, I would record that when I asked the defendant's counsel for an explanation for the inordinate delay in the filing of the defendant's application for rescission, I was met with a stony silence. Accordingly, if there is absolutely nothing before it to account for the delay in filing an application for rescission out of time, how can a court be expected to exercise its discretion responsibly, let alone judicially, under rule 4C of the Rules of Court, by condoning the late filing of the defendant's application?

At this point I feel it apposite to quote the following remarks of SMITH J, to which I fully subscribe and which apply with equal force to this case, in *Chimbadzo & Anor v Nkosana &*

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Anor H-153-92 (not reported) at pp 5 & 6 of the cyclostyled judgment:

> "Moreover it is not possible from the papers to ascertain whether the fault was that of the applicants or their lawyers which is also a matter of some importance - see *Ruyvidzo v Kanhanga* S-70-91. Not only is there no information as to where the fault lay, there is no explanation for the delay in filing this application. The first applicant's affidavit, which is lengthy, concerns itself solely with the reasons for his default in opposing the claim of the first respondent in case no. HC 4096/91 and his defence to that claim. The affidavit does not deal separately, as it should, with the reason for the delay in making the application for rescission. Where an application for rescission is out of time, the applicant must apply for condonation. The basis on which he seeks condonation must be clearly set out.
>
> He must therefore deal with the matter in two stages. After all, if the application is out of time it is, in reality, two separate applications, one for condonation and, then, the second on the merits. In this case, since the applicants have applied for condonation of the late application I must

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> assume that it was made out of time. As I have pointed out, there is no information as to how much out of time it was and there is no explanation for the delay. Accordingly the court cannot exercise its discretion in favour of the applicants and condone the late application because there is no information on which the court can act. Therefore condonation must be refused.

Since condonation is refused, the application must fail."

Let me add that, even if the defendant had placed information before the court showing, as I suspect to be the case, that the delay in preparing and filing his application for rescission was largely, if not wholly, the fault of his second legal practitioners, this would not have availed him. I would have adopted the stance which is increasingly being adopted by our courts in cases such as this one, that non-compliance with or a wilful disdain of the rules of court by a party's legal practitioner must be treated as non-compliance or a wilful disdain by the party himself. See *S v McNab* 1986 (2) ZLR 280 (S) at 283H-284E, *Bishi v Sec* for Education 1989 (2) ZLR 240 (H) at 243G-H and 244A-G, *Mwaera v Matinyarare & Anor* H-H-182-91 (not reported) at pp 6 & 7 of the cyclostyled judgment and *Min of Labour, Manpower Planning & Social Development v United Food & Allied Workers Union of Zimbabwe supra* at pp 4 & 5 of the cyclostyled judgment.

In this connection, it is perhaps salutary to remind legal practitioners of the following warnings issued by the Supreme Court in *S* v *McNab supra* and *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S).

In the former case DUMBUTSHENA CJ had this to say at pp 283H and 284A-H:

> "It is in the discretion of the court to refuse condonation even in cases in which the respondents do not object to relief being granted to the applicants. In cases in which defective notices of appeal are filed it is in most cases the applicants' legal practitioners who are to blame. In such cases the court has to consider whether to punish the applicants for the negligence of their legal practitioners. In my view clients should in such cases suffer for the negligence of their legal practitioners. I share the view expressed by STEYN CJ in *Saloojee & Anor NNO* v *Min of Community Development supra* at 141C-E when he said :
>
> > 'There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation

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ROBINSON J

> tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are (cf *Hepworths Ltd* v *Thonloe & Clarkson Ltd* 1922 TPD 336; *Kingsborough Town Council* v *Thirlwell & Anor* 1957 (4) SA 533(N)).'

I have dwelt at length on this point because it is my opinion that laxity on the part of the court in dealing with non-observance of the Rules will encourage some legal practitioners to disregard the Rules of Court to the detriment of the good administration of justice."

In *Ndebele v Ncube supra* McNALLY JA, when dealing with an appeal against the refusal by this court at Bulawayo to grant rescission of a default judgment, warned as follows:

> "It is the policy of the law that there should be finality in litigation. On the other hand one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute.
>
> The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt* - roughly translated, the law will help the vigilant but not the sluggard."

In that case, although there was an arguable case for the defence, as indeed there is in this case, the appeal against the decision refusing rescission failed because the court found the delay unreasonable in that it was not "due to some reasonable incapacity to act in time, or to some understandable oversight such as the misfiling, or misplacing of a document".

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Accordingly, it will not save the day for the defendant to say, as he does in para 5 of his answering affidavit, that he had faith in his legal practitioners and believed that they could handle his affairs. Knowing that his immovable property had been attached in execution of the judgment obtained against him and in the light of his conviction that he had been let down by his first legal practitioners, it was clearly incumbent on the defendant to check and monitor that his second legal practitioners processed his application for rescission of judgment as a matter of urgency. It necessarily follows that if he chose simply to sit back for seven months in the belief and hope that his second legal practitioners would do whatever was required to safeguard his position, then he did so at his peril and must pay the penalty for his practitioners' negligence and complete disregard of the Rules of Court.

I must confess that I was concerned about a default judgment having been entered against the defendant for $25 000 as representing the value of the plaintiff's said motor vehicle, on the mere estimation of the plaintiff himself, without evidence being adduced by an independent expert as

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to the likely value of the car. Consequently, I hesitated over the question whether, as a matter of justice, I should set aside the judgment insofar as it related only to *quantum,* as the Supreme Court did in *Musakasa v Mimba* S-46-92 (not reported). However, I decided that it would not be just to adopt this course because the circumstances of this case are very different from those in *Musakasa* v *Mimba supra,* in that-

(a) not only had the defendant failed to make a proper application for the condonation of the late filing of his application but he had failed to lay anything before the court which could be regarded as a reasonable excuse, in the sense explained in *Musakasa's* case *supra* for his inordinate delay in filing his application for rescission, thereby leading the court to the inescapable conclusion that the defendant had been guilty, albeit through the fault of his legal practitioners, of a complete disdain of the Rules of this Court;

(b) this is not a case where the one side is not taking issue with the other over the matter of condonation; on the contrary, the first ground on which the plaintiff relies in his opposition to the defendant's application for rescission is that the defendant's application is"hopelessly"out of time and that there is no application for condonation of the late filing of the application;

(c) on the question of justice, sight must not be lost of the factors to be weighed in the plaintiff's favour, namely:

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(i) that the plaintiff purchased and provided the defendant with the spare parts required for the repair of the plaintiff's car;

(ii) that the defendant appears to have disposed of the spare parts since, most noticeably, he gives no explanation for their disappearance;

(iii) that the plaintiff gave the defendant every opportunity to try to replace the spare parts (see annexures to the defendant's founding affidavit at pp 9 & 10 of the record;

(iv) that the defendant not only failed to use the spare parts supplied by the plaintiff but he appears to have stripped the plaintiff's car of other parts, thereby rendering it"irreparable"and reducing it to"a bare shell"(see para 11 of the plaintiff's declaration);

(v) that due to the defendant's failure to repair the plaintiff's car by 15 January 1990, as undertaken by the defendant, the plaintiff has been without the use of his car since that date, but has made no claim against the defendant in that respect;

(vi) that the value of the spare parts supplied by the plaintiff for the repair of his car do not necessarily have a bearing on the value of the plaintiff's car; and

(vii) that, while the defendant challenges the value placed on the plaintiff's said motor vehicle, he fails to support the value which he places on the vehicle by obtaining and attaching to his founding affidavit an affidavit from, say, Kentucky Service Station where he alleges the plaintiff's vehicle was serviced and, therefore, the court has

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merely the defendant's *ipse dixit* as to the estimated value of the car.

In all the circumstances and having regard to the principle that there should be a finality to litigation and to the case authorities in point (including the case of *Mahoqa v Liebenberg* S-206-91 (not reported) in which KORSAH JA said, at p 5 of the cyclostyled judgment, that without an application by the appellant for condonation of his failure to apply for rescission within the stipulated period, the judicial officer's hands were tied and he had no option but to dismiss the application), I considered myself bound to dismiss the application with costs and to leave it to the defendant to seek redress from his first or second legal practitioners, if so advised. To have acted otherwise would have been to make a mockery of the rules of court and the administration of justice.

In view of the ground on which I rejected the application, there was no need for me to consider the issue whether the defendant had given a reasonable and

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acceptable explanation for his default. In any event, I preferred to leave this question open in case the defendant decided to re-approach this court, this time with a suitably drawn application for condonation for the late filing of a re-drawn application for rescission of judgment, setting out fully all the information required to satisfy the court that there is good and sufficient cause to set aside the judgment concerned and to give the defendant leave to defend.

TK Hove & Partners, applicant's legal practitioners

Chirunda, Chihambakwe & Partners, first respondent's legal practitioners

MASUBEY v MASUBEY 1993 (2) ZLR 36 (HC)

Court **High Court, Harare**

Smith J

Application for eviction order

6 & 14 July 1993

Flynote

Real rights - ownership - co-ownership - right of co-owner to alienate property unilaterally

Headnote

Alienation of jointly-owned property can only be effected by the joint action of all the co-owners. No co-owner has a *ius abutendi* in respect of the property, nor may he prevent any other co-owner from using the property reasonably and in proportion to his undivided share. He

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cannot introduce an innovation or change in the nature of the occupation of jointly-owned land without the consent of his co-owners. Similarly, he cannot permit strangers to share in the use of the property without the consent of all the other co-owners. A single co-owner may, however, alienate his undivided share in the property. In the case of land, if a co-owner occupies a defined share of the property and alienates his undivided share, he would be entitled, as between himself and the purchaser of the share, to reserve his rights of occupation by way of personal servitude.

In the present case, the applicant and her late husband jointly owned their matrimonial home. The applicant and her husband separated and were divorced. Following the divorce, the applicant's mother-in-law, the respondent, moved into the matrimonial home to look after the children of the marriage. The applicant's husband was subsequently killed in a motor accident. The respondent continued to occupy the home and refused to vacate it, claiming that the deceased had granted her a usufruct over or the use of the rooms she occupied.

Held, that the deceased was not occupying a defined portion of the property before his death and so was not entitled to dispose of a part of that defined

SMITH J

share; and without the consent of the applicant, which had not been given, he could not grant a usufruct to the respondent. Accordingly, the applicant was entitled to an eviction order.

Cases cited:

Pretorius v Nefdt & Glas 1908 TS 854

Erasmus v Afrikander Pty Mines Ltd 1976 (1) SA 950 (W)

Oosthuyzen v Muller 1877 Buch 129

Pretorius v Botha 1961 (4) SA 722 (T)

Schultz v Schuurman & Ors 1913 TPD 424

Oosthuyzen v Plessis & Anor (1887) 5 SC 73

R I Costa for the applicant

C F Dube for the respondent

Judgment

Smith J: The applicant was married to the late Rodrigues Masubey (hereinafter referred to as "the deceased"), who was the son of the respondent. In 1990 she instituted divorce proceedings against the deceased (case no. HC 3268/90). There were two minor children of the marriage. On 18 May 1992 the deceased and the elder child were killed in a car accident.

The applicant left the matrimonial home, 15 Gelcon Avenue, Greendale (hereinafter referred to

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as "the property"), which was owned by her and the deceased jointly, before she instituted the divorce proceedings. The deceased continued to live on the property with the two minor children until his death. He invited his mother, the respondent, to live with him on the property so that she could look after the children. The respondent continued living on the property and retained the custody of the surviving child after the death of the deceased. Custody of the child was awarded to the applicant on 1 April 1993 but the respondent remained in occupation of the property and refused to vacate it.

The applicant has instituted these proceedings seeking an order of eviction. The respondent opposes the application. She alleges that the deceased specially built a cottage on the property for use by her until her death. Accordingly she is prepared to vacate the main house and to move into the cottage in respect of which she claims a usufruct for her lifetime.

In her answering affidavit, the applicant denies that any cottage was built on the property for the respondent. She says that the so-called "cottage" is not a separate building. It is a garage/storeroom which is part of the main building

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and has been converted into a dwelling. The property was owned jointly by her and the deceased and is registered in both their names. There is no usufruct registered on the title deeds. She submits that the deceased could not, without her consent, have permitted the respondent to continue to live in the "cottage" until her death.

Mr *Costa* argued that since the property was jointly owned by the deceased and the applicant, the deceased could not unilaterally grant a usufruct over the property. The consent of the applicant was necessary. With regard to the alleged usufruct, he pointed out that in case no. HC 3928/92 opposing affidavits had been filed by the respondent and others, in which reference was made to the deceased having said that, in the event of his death, he wanted all his assets to go to his children and to his mother, the respondent. No mention was made in those affidavits of any usufruct. Therefore it is probable that the existence of the usufruct is a recent fabrication on the part of the respondent.

Mr *Dube* argued that the deceased had granted the respondent a usufruct over and/or *usus* and/or *habitatio* of the cottage and the applicant could not dispute that, as she was not present when the agreement was made. As co-owner of the property the deceased had the right to alienate, lease or mortgage his undivided share in the property or to grant a usufruct, usus or *habitatio* in respect of the property without the applicant's consent.

In Silberberg & Schoeman *The Law of Property* 2 ed, the learned authors deal with the position of joint owners in Chapter XIII (pp 332-7). With regard to the rights and duties of co-owners they make the following statements. All co-owners are entitled to a share in the whole of the property. No co-owner has a *jus abutendi* in respect of it. A co-owner may not prevent any other co-owner from using the joint property reasonably and in proportion to his undivided share. A co-owner cannot introduce "an innovation or change in the nature of the occupation of the land" without the consent of his co-owners. Similarly, he cannot permit strangers to share in the use

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of the property without the consent of all the other co-owners. The learned authors refer to a number of cases to support the propositions set out above. In *Pretorius v Nefdt & Glas* 1908 TS 854, Pretorius and Glas were co-owners of a farm. There was a private road over the farm. Glas gave Nefdt, his son-in-law, permission to use the private road in order to ave access to his lime works on a neighbouring farm. The court held that whilst Glas had the right to use the road as he wished, he could not confer the right of user of the road upon another whilst he was at the same time exercising the right for himself. That

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would be a clear infringement of the rights of Pretorius as co-owner. At p 8 MASON J said:

> "The case in which the rights of co-owners inter se has been most fully discussed seems to be that of *De Beers Consolidated Mines Ltd v McKay* 16 CLJ 121, where the court of the late Republic laid down the general law with reference to this subject. There was no difference as to principles, though one of the judges dissented as to their application. Each co-owner, it was said, could use the common property in accordance with the use to which it was intended to be put, but must refrain from any acts by which the like right of user of the others might be infringed."

This passage was cited with approval by TRENGROVE J (as he then was) in *Erasmus v Afrikander Proprietary Mines Ltd* 1976 (1) SA 950 (W) at 958. At p 960 the learned judge referred to Oosthuysen v Muller 1877 Buch 129 and noted that, in confirming a rule restraining a co-owner from doing various things, DE VILLIERS CJ had observed:

> "There is no doubt that where a co-owner appropriates part of the soil to his own use for the purpose of making bricks, whether to be used on the place or not, the consent of his co-proprietors must be obtained. In the absence of such consent, the person breaking the soil may be interdicted (Voet, 10.3.7.) The person complaining is quite justified in immediately taking steps to prevent misappropriation of the soil."

Voet 10.3.7 (Gane's translation) reads as follows:

> "Moreover no new step can be taken in regard to common property by one partner against the wish of another. The position of him who forbids it is the stronger, so much so that if some new step has been taken by one partner or a mandate given for it against the wish of the other, the one can be forced to put the matter back into its original position."

From the above, it seems clear to me that whilst the deceased was entitled, prior to his death, to dispose of his half share of the property to the respondent, either by donation *inter vivos* or by testamentary disposition, he was not entitled to grant a usufruct over or *usus* or *habitatio* of part of the property without the consent of the applicant. The rights of the applicant would clearly be infringed by any such right being granted to a third person.

In the *Pretorius* case *supra,* at p 859 MASON J said:

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> "With respect to the second branch of the case, the whole point is whether a co-owner can give strangers leave to use a road across a joint farm. In the case of *Oosthuyzen v Plessis and Anor* one co-owner sold her share on condition that she should retain for life the possession of certain premises occupied by her with the full consent of

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> the other co-owners, the right of the pasturing a certain number of cattle, and using wood and water on the farm for domestic purposes, and this was an alienation of a portion of her rights with the reservation of another portion which was held to be valid. It was contended that the respondent Glas had done no more in giving license to Nefdt to cross the farm. The whole point is whether he has alienated only a portion of his rights or whether he has substantially, so far as his right of passage is concerned, with reference to the road in question, imposed another co-owner on the other joint owners. If the sole test be whether a license of this kind injures the other proprietor or impedes in any way their use of the property, then it would follow that one co-owner could allow the whole world to use any of his rights and the other co-owners would have no redress unless they could show some actual prejudice. This would, I think, impose an intolerable burden upon persons who wish to have the farm reserved for really joint use. It seems to me that the position which actually results from a license to use the road is analogous to that arising when another co-owner is imposed on the joint owners. The respondent is claiming for himself, and the court is giving to him the full right of user of this road as a co-owner. I do not think he can also confer these rights upon another, whilst he is at the same time exercising them for himself."

If the deceased were to be able to grant the usufruct, *usus* or *habitatio* claimed by the respondent he would be imposing an"intolerable burden"upon the applicant who might wish to have the property reserved for really joint use.

In *Wille's Principles of South African Law* 8 ed p 311 the learned authors state that an alienation of joint property can be effected only by the joint action of all the co-owners. They refer to *Pretorius v Botha* 1961 (4) SA 722 (T) where Boshoff J rejected out of hand an argument that a resolution by a majority of the co-owners of a piece of land that the land concerned be leased to a third party was binding on the other co-owners. They also refer to *Schultz v Schuurman & Ors* 1913 TPD 424 where GREGOROWSKI J said at p 428:

> "It is true that the owner of undivided rights in land cannot constitute servitudes on the land."

SMITH J

In *Oosthuyzen v Plessis & Anor* (1887) 5 SC 69 , which has been referred to earlier, the plaintiff, who owned an undivided sixteenth share in a farm, sold and transferred that share subject to certain conditions, one of which was that she could continue to occupy certain rooms on the farm for the rest of her life. Although the farm was undivided, she had for many years occupied a defined sixteenth share, which included occupation of the rooms concerned, with the consent of the co-owners. DE VILLIERS CJ held that since the plaintiff, as co-owner of the farm before selling her share, was entitled to occupy the rooms concerned she could, as between herself and the purchaser of her share, reserve the rights to herself by way of personal servitude. The transfer of her share to the purchaser was made subject to her reservation and the purchaser could not, by agreement with the co-owner, deprive her of her rights as *usuarius.*

In this case, the deceased was not occupying a defined share of the property prior to his death. Had he been doing so, with the consent of the applicant as co-owner, then he might have been entitled to dispose of a part of that defined share. I express no opinion on that, however, because he was not in fact occupying a defined share.

I am satisfied, therefore, that even if the respondent could establish that the deceased had granted her the usufruct, usus and/or *habitatio* claimed, the applicant would be entitled to an interdict restraining her from occupying the cottage on the property, because the deceased was

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not entitled to grant any such right without the consent of the applicant.

The respondent has shown great determination, since the death of the deceased, to retain the custody of the surviving child of the applicant and the deceased and also occupation of the property. The applicant has had to resort to litigation on a number of occasions to assert her rights (cases HC 1704/92, 3928/92 and 5486/92). It would not be unexpected for the respondent to lodge an appeal against my decision in this case in order to continue her occupation of the property or part of it pending her appeal. I am of the view that the prospects of success on any such appeal would be minimal.

Firstly, on the authorities set out above, it seems to me that the law is clear that a co-owner cannot grant rights to a third party which would infringe the right of any co-owner. Secondly, the respondent has not established that in fact she was granted the usufruct, *usus* and/or *habitatio* she is claiming. The deceased died on 18 May 1992. In case no. HC 3928/92 the respondent did not mention or claim any such right. One would have expected her to have

done so had the deceased granted her any such right. The first time she mentioned the existence of such right was when this application for her eviction was lodged. In her opposing affidavit she does not mention any third party whom she has told that she has a right to occupy the cottage on the property. Why has she remained living in the main house all this time if she knew that her claim was restricted to the "cottage"?

As the successful party, the applicant is entitled to her costs.

It is ordered that-

1. The respondent and all other persons claiming through her shall vacate the property known as 19 Gelcon Avenue, Greendale, within 72 hours of the date of this order and shall leave *in situ* all the property which belonged to the deceased or to Clive Masubey or which belongs to the applicant or her child Rodrigue.

2. The operation of this order shall not be suspended by the noting of any appeal against this judgment.

3. The respondent pays the costs of this application.

Stumbles & Rowe, legal practitioners for applicant

Kantor & Immerman, legal practitioners for respondent

S v MUDZAMIRI & ANOR 1993 (2) ZLR 43 (SC)

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Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Criminal appeal

8 & 15 July 1993

Flynote

Criminal law - statutory oddness - Witchcraft Suppression Act [Chapter 73] - s 3 - naming a person as a witch - accused describing complainant as a witch but alleging that complainant caused death by poisoning-not covered by section

Criminal procedure (sentence) - arson - principles

Headnote

The gravamen of the offence created by s 3 of the Witchcraft Suppression Act [*Chapter 73*] is that the accused must impute that the person indicated by him used non-natural means which caused a particular disease or injury to the person or property alluded to. The imputation need not be direct; it could arise as a matter of necessary implication from the utterance made, as where the accused indicates a person as a witch or wizard and imputes to him the death of another person. Where, however, the accused describes a person as a witch or wizard, but alleges that the person caused another person to die by poisoning, there is no imputation of the use of non-natural means and the accused's conduct does not fall within the ambit of s 3.

The factors to be considered in assessing moral blameworthiness for arson have been set wit in many cases. Among them are the danger to human life, the degree of the accused's appreciation of that danger, the existence or otherwise of a political motive, the extent of the damage caused and whether the offence was premeditated.

1993 (2) ZLR p44

GUBBAY CJ

Cases cited

R v Ntozonke 1947 SR59; reported *sub nom R* v Nyomocetc 1947 (3) SA 9 (SR)

R v Maposa 1943 SR 194

S v Ndhlovu & Anor 1970 (2) RLR 68 (A)

S v *Mandizvidza* 1970 (1) RLR 171 (G)

S v Lekani A-145-78

S v Hove A-14-81

S v Zurura & Anor S-188-90

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R v Fanuel 1966 RLR 427 (A)

S v Size A-169-70

S v Rangarirayi A-164-72

S v Matowo A-52-81

S v Mumangatira H-H-371-85

S v Machingura S-223-88

S v Mudzimu & Anor S-90

S v *Chirongoma* S-142-92

S v Zinn 1969 (2) SA 537 (A)

M Madzivanzira for the appellants

Mrs J Zindi for the respondent

Judgment

Gubbay CJ: The two appellants were jointly charged in a magistrates court with three offences, alleged to have been committed on 19 December 1992, and involving one Mudonhi Munyalca. The first was common assault, the second, arson, and the third, a contravention of s 3 of the Witchcraft Suppression Act [*Chapter 73*].

Notwithstanding pleas of not guilty, both the appellants were convicted of all charges and sentenced on count one, to two months' imprisonment with labour, on count two, to thirty-six months' imprisonment with labour (of which period six months were suspended for five years on appropriate conditions); and on count three, to twelve months' imprisonment with labour, with three months being conditionally suspended for five years. The elective term of imprisonment was, therefore, forty-one months.

No good purpose will be served by traversing the conflict in the evidence of the complainant and his wife on the one hand with that of the two appellants on the other. In dealing therewith the trial magistrate accepted the account of the former as the truth and rejected that of the latter. He had good reason to do so. Indeed, Mr *Madzivanzira,* who appeared for the appellants, made but

a faint attempt to argue the contrary. Those findings maybe stated as follows.

The appellants and tle complainant are cousins. They and their families resided at a village in Buhera under headman Mudzamiri and Chief Makambe.

On the afternoon of the day in question the two appellants were part of a group of about fifty local males who proceeded to to the huts of the complainant. Their object was to ensure that

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the complainant was expelled from the village, for he was believed to be responsible for the death of one Kudzayi, a close relative of the appellants. Upon receiving a report fran his wife of their approach, the complainant emerged from his huts to meet therm.. He was ordered to sit upon the ground in the centre of the gathering. The headman, who was also present, asked the complainant why he had failed to obey the directive to leave the village. Before the complainant could reply, the first appellant struck him one blow to the upper back with a stick, sufficiently hard to cause it to break. The second appellant joined in the assault, and kicked the complainant's body as he was still seated, and hit him upon the right forearm with the stick he was holding. During the course of their attack, the appellants proclaimed to the hostile crowd that it was their duty to rid the village of the complainant; that he was a wizard who had caused the death of Kudzayi by poisoning his beer.

Having so spoken, the appellants instructed the complainant to remove all his property from his huts The complainant had no option but to comply. Thereafter he was ordered by the appellants to set fire to his three huts and granary. This he did in fear of the consequences were he to refuse.

The complainant assessed the value of the destroyed property at Sl 950.

It was only the propriety of the conviction on count three that was firmly challenged by the appellants' counsel. The argument advanced, which was not fortified by reference to the case law, was that the words spoken did not amount to a contravention of s 3 of the Witchcraft Suppression Act, more especially, in that the use of non-natural means in causing the death of Kudzayi had not been imputed to the complainant. *Per contra* Mrs *Zindi,* for the State, contended that as the appellants named the complainant a wizard and then added that it was he who had caused Kudzayi to die, it was to be implied that they made it known that non-natural means in the form of some sort of wizardry had been employed to achieve the death.

The manning of s 3 of the Act was considered by TREDGOLD J (as he then

GUBBAY CJ

was) in R v *Ntozonke* 1947 SR 59 (reported *sub nom R v Nyomoceke* 1947 (3) SA 9 (SR)). In that case, the evidence established that the accused had indicated someone as being a witch, but not that she had imputed the use of non-natural means in causing disease or injury. The learned judge said that the wording, "that is to say, whoever indicates any other person as being a wizard or a witch" was not intended by the lawmaker to be disjunctive but merely descriptive - restating in another manner the offences created by the earlier phrases. Echoing his own words in *R v Maposa* 1943 SR 194, he continued at 59:

> "This interpretation of the section is confirmed when the Act is considered as a whole. It is not every aspect of the practice of witchcraft that is made criminal, but only those which are believed to have direct ill-effects upon other persons. Whilst the mere designation of a person as a wizard or witch might certainly have such effects, they would not be so immediate as when an actual calamity was laid at the door of such person."

And at 59 *in fine to* 60:

> "In holding that it is only an offence under s 3 to indicate a person as a wizard or witch if disease or injury is

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attributed to him or her, I should perhaps males it clear that it is not necessary that this should be done in express terms.

If it is quite clear on the evidence that the indication of the wizard or witch is associated with disease or injury which has actually occurred the offence would be established."

This decision was cited in *S v Ndhlovu & Anor* 1970 (2) RLR 68 (A) at 74C. F to illustrate the equivocal approach of the law to the practice of witchcraft A similar condemnation is present in the judgment of BEADLE CJ in *S* v *Mandizvidza* 1970 (1) RLR 171 (G) at 174B-C.

Before an imputation by an accused brings him within the ambit of s 3, the State must establish, first, that he imputed that the person indicated used non natural means; and second, that the use of such means caused the particular disease or injury to the person or property alluded to. With regard to the firs requirement, I accept, with respect, the view of TREDGOLD J that it wil suffice if the imputation of the use of non-natural means arises as a matter of necessary implication from the utterance made. Examples of this are to be found in *S v Lekani* A-145-78, *S v Hove* A-140-81 and *S v Zurura & Ano,* S-188-90 (all unreported).

GUBBAY CJ

If the appellants had merely indicated the complainant as a wizard and imputed to him the death of Kudzayi, then, I thinly it would correctly have been held that by implication they were imputing the useby him of some form of wizardry or supernatural power as the cause of death But they went further. By stating in positive teens that the death bad been caused by the complainant's criminal act in adding a poisonous substance to Kudzayi's beer, the appellants were expressly making it known to their listeners that the use of wizardry was not the cause of death. It was due simply to the victim having been murdered by the complainant. The indication of the appellant as a wizard was not, therefore, clearly shown to be associated with the death of Kudzayi.

It is for these reasons that the conviction on count three must be set aside.

Mr *Madzivanzira* was not constrained to press the appeal which had been noted against sentence on count two. If he had bothered to consult the Wading case of *R* v *Fanuel* 1966 RLR 427 (A),in which some of the important factors to be considered in assessing moral blameworthiness for this offence were mentioned, and if, in addition, he had sought guidance from the many subsequent decisions dealing with the bvd of appropriate punishment, his approach would, I feel, have been very different.

In *R* v *Fanuel supra,* BEADLE CJ stressed the most aggravating feature as the danger to human life involved and the degree of the accused's appreciation of that danger (see at p 430B). There was no danger to life involved in the appellants' acdon. Nor was there a political motive behind it (see at p 430H). The appellants had a grievance against the complainant. They genuinely believed he had poisoned their relative. On the other hand, substantial damage to the property of the complainant was caused (see at p 430F:). And the decision to burn his huts was notone mace on the spur of the moment, for there was ample time for reflection while the complainant was removing his belongings (see at p 430I).

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Taking cognizance of the periods of imprisonment which were either confirmed or reduced in such cases as *S v Size* A-169-70, *S v Rangarirayi* A-164-72, *S v Matowo* A-52-81, *S v Mumangatira* HH-371-85, *S v Machingura* S-223-88, *S v Mudzimu & Anor* S-46-90 and *S v Chirongoma* S-142-92, and allowing for a variation of facts, I am satisfied that the punishment imposed by the magistrate is so disturbingly excessive as to warrant interference. In my opinion a sentence of two years' imprisonment, with six months thereof suspended, will achieve a reasonable balance between the triad consisting of

GUBBAY CJ

the crime, the offenders and the interests society. See *S v Zinn* 1969 (2) SA 537 (A) at 540G.

Finally, I am in entire agreement with the view shared by both counsel that the two moths' imprisonment imposed on count we ought to be made to rno concurrently with the effective serdence on count two. After all, the physical aspect of the assault was not serious.

In the result, and in respect of each appellant, I would order as follows:

1. The appeal on count three is allowed and the conviction and sentence are set aside.
2. The appeal against conviction on count two is dismissed, but the sentence is altered to two years' imprisonment with labour of which six months is suspended for three years on condition that the accused is not convicted of any offence involving the wilful destruction of property committed within that period for which he is sentenced to imprisonment without the option of a fine.
3. The appeal against conviction count one is dismissed, but the sentence imposed is altered to the extent of being made to run concurrently with that on count two.

McNally JA: I agree

Korsah JA: I agree

Madzivanzira & Partners, appellants' legal practitioners

S v CHAMUNORWA 1993 (2) ZLR 49 (HC)

Court **High Court, Harare**

Robinson J

Criminal trial

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6, 7, 8, & 15 July 1993

Flynote

Criminal procedure (sentence) **-** theft from employer of items worth a considerable amount-factors to be unto account in determining the length of prison sentence

Headnote

The accused had stolen car parts worth $1 743 171, 90 from his employer. Most of the properly had beck recovered. The accused was a young, manied, first offender who had pleaded guilty to the charge. However, in the light of the breach of trust, the value of the property involved and various other aggravating features the court imposed a sentence of 15 years' imprisonment, 3 years of which were suspended on condition that the accused compensated the employer far the value of the property which had not been recovered. In deciding upon sentence, the court considered the principles and factors which were to tee taken into account in such cases.

Cases cited

A-G v Paweni Trade Corp (Pvt) Ltd 1990 (1) ZLR 24 (S)

S v Maya 1979 (4) SA 61 (ZRA)

R v Sargeant (1974) 60 Cr App Rep 74

S v Chilcopa 1984 (1) ZLR 209 (S)

S v Sparks &: Anor 1972 (3) SA 396 (A)

T Chitapi for the State

J. Samkange for the accused

ROBINSON J

Judgment

Robinson J: The accused has been convicted, in terms of his plea of guilty, of the theft in February, 1993 from his employer, Willowvale Motor Industries (Private) Limited, of property consisting of Peugeot 504 pick-up spare parts valued at $1 743 171,900n the basis of a statement of agreed fasts accepted by the State and the accused which reads as follows:

"(1) The accused resides at number 1213 Old Mabvuku, Harare and is employed by Willowvale Motor Industry as a shipping clerk. He was previously an employee of the Department of Customs Excise.

(2) He is 27 years of age, married with one child and earns a monthly salary of $2 900.

(3) During the month of December, 1992, during the course of his routine duties the accused received f rom his superior a file containing invoices, bills of lading, part handling invoices and rail advice notes forms for a shipment of Mazda spares, for customs clearing.

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(4) Also attached to the rail notes for the Mazda shipment were other rail advice notes for Peugeot 504 Piclc-up spares shipment.

(5) Accused who had noticed the error referred all the papers as they were to Customs for clearing purposes.

(6) Customs having examined the documents only raised duty on the Mazda shipment on which duty was duly paid by Willowvale Motor Industry.

(7) Thereafter Customs stamped all the documents including the rail advice notes for the Peugeot shipment by error.

(8) The accused having noticed the error retained the stamped Peugeot shipment rail advice notes and processed the Mazda shipment accordingly.

(9) Then on the 12th February, 1993, the accused using the erroneously stamped rail advice notes collected the Peugeot shipment from Manica Freight who were responsible for the shipping.

(10) The whole consignunent which was for Peugeot 504 Pick-up spares as outlined in the charge was then unlawfully ferried to Murehwa for concealment.

(11) After some while the consignment was again returned to Harare and firstly stored away in Parley Meadowlands where accused rented the

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house in the name of his brother in law Augustine Rusike.

(12) Thereafter the consignment was again moved to yet another house rented by his brother in law at number 14 Auld Crescent. Eastlea.

(13) Then on the 29th of June, 1993, the Police acting on a tip off conducted a search at number 14 Auld Crescent Eastlea and recovered a very large quandly of new Peugeot 504 pick-up spares which were stored in the main house and the domesthc quarters.

(14) Accused was then subsequently arrested end the spare parts referred to were recovered.

Property stolen is valued at S1 743 171,90 of which property to the value of $1 722 171,90 was recovered."

There is one aspect of the statement of agreed facts on which I would comment. While para 5 says that the accused had noticed the error that attached to the rail notes for the Mazda shipment were other rail advice notes for the Peugeot 504 spares shipment before he referred all the papers to Customs for clearing purposes, para 8 conveys that the accused only noticed the error in question after the papers, including the mil advice notes for the Peugeot 504 spares shipment, had been stamped by Customs and returned to him.

In his evidence in mitigation, the accused testified that the error in question had only come to his notice after all the papers had been returned by Customs and, therefore, I am prepared to give the accused the benefit of the doubt by accepting his evidence in this respect.

A warned and cautioned statement made by the accused on 29 June 1993, that is to say, on the same day that the stolen property was recovered by the Police, which was confirmed by the accused before a magistrate on 1 July 1993, was put in by consent. That statement reads as

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follows:

"I admit the charge that I stole spare parts from my employer. When I submitted documents for a certain Mazda spares shipment, the rail advice note for the Peugeot spares shipment in question accidentally got mixed up with documents for the Mazda shipment and I submitted them to Customs for processing. After the documents had been processed by Customs, I realised that the rail advice note for the Peugeot spares had been stamped as well, yet these documents was not supposed to (be) have been stamped. I kept the stamped rail advice note for the Peugeot

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consignment for about a month. I later decided to attempt to collect these goods using the fail advice note and I succeeded in collecting the goods. I thought instead of handing over the goods I should sell them instead. After having kept the goods for too long hoping to sell them, I realised I could not sell them to anyone and it was too late for me to take the goods back to their owners. I kept the goods until I got caught with them still in my custody.

(signed)

(BYRON CHAMUNORWA)

Is there anything else you would like to say?

No.

QUESTION: Did you manage to sell anything from this Peugeot consignment while in your possession?

ANSWER: I personal did not sell anything but I gave some of the parts to PAUL MUKARAKATI and FREDDY CHIKEYA to sell on my behalf. They brought approximately $21000,00 which we shared amongst ourselves.

(Signed)

(BYRON CHAMUNORWA)"

From the statement of agreed facts and the accused's warned and cautioned statement the following significant points are to be noted:

1. That upon noticing the error by Customs in having stamped the rail advice notes for the Peugeot 504 spares shipment, the accused kept the notes for about a month.
2. That having decided to attempt to collect the Peugeot 504 spares shipment, the accused succeeded in uplifting the shipment from Manica Freight on 12 February, 1993 using the rail advice notes which had been erroneously stamped by Customs.
3. That instead of handing over the Peugeot 504 spares, the accused thought he should sell them instead.
4. That the Peugeot 504 spares shipment was then unlawfully ferried to Murehwa for concealment

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5. That after having kept the spares for "too long"-for over four months in fact-first at Murehwa, next at a house rented in the name of the accused's brother-in-law at Park Meadowlands and then at another house, again rented in the name of the accused's brother-in-law at Eastlea in the hope of selling the spares, the accused realised that he could not sell them to anyone and it was too late for him to take the spares back to their owner.

6. That the accused kept the spares until he got caught with them still in his custody.

7. That the accused gave some of the spare parts to one Paul Mukarakad and one Freddy Chikeya to sell on his behalf, for which they realised $21 000, which was shared amongst them.

The accused's legal practitioner did the accused's cause no favour by electing to put the accused into the witness stand to testify in mitigation. I say this because no sooner had he taken the witness stand than the accused began to undo the initial impression given that he wanted to make a clean breast of his culpability. Instead, the accused tried to retreat from the contents of the statement of agreed facts and his warned and cautioned statement in the following respects, namely:

1. That the accused's idea in taking possession of the Peugeot 504 spares shipment was to acquire spare parts for his 1985 Peugeot 504 station wagon and to sell the remainder.

2. That it was not he who had collected the spares shipment and ferried it to Murehwa for concealment but the said Paul Mukarakati, who had agreed to collect the spares and who had taken it upon himself to convey the spares to Murehwa without the accused's knowledge and that the accused had only become aware of the large size of the shipment when he had seen the spares at Murehwa some four days later. In this regard, it seems incredible to say the least, that the accused should have let the said Mukarakati, whom the accused told the court under cross-examination was just a person "he talked to and knew" but who was not his friend, collect the spares shipment, which he intended to steal, on his behalf.

3. That at Murehwa the said Mukarakad told the accused that he had realised $21 000 from the sale of some of the spares to pay for the costs in transporting the spares to Murehwa Later in his evidence the accused said that the said proceeds of $21 000 had been appropriated by the said Mukarakati

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and Chikeya for transport costs and for their services, with the accused's retaining the balance of $1 000 to cover the cost of conveying the spares from Murehwa to Harare.

4. That upon becoming aware of the large size of the spares shipment, the accused had decided to return the spares to his employer as soon as the time for clearance of the shipment arrived, when he would then have had the opportunity of pretending to deliver the

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spares to his employer after their clearance.

5. That the accused said that during the period he possessed the spares, he could have disposed of them by leaving the whole consignment with a firm like Harare Parts Distributors and then "just go and collect what we'd agreed on at the end of every month".

I do not intend to dwell on the patent untruthfulness of the accused's attempt to change his story at the eleventh hour. As I remarked when hearing argument, the accused's legal practititioner, Mr *Samkange, is* not wont to allow a client of his to concede anything remotely to his detriment or prejudice so that, in view of Mr *Samkange's* assurance to the court at the outset of the trial that he had explained the statement of agreed facts to the accused and that the accused understood the facts and agreed with them, it is futile for either Mr *Samkange* or the accused to try to come up with a version which differs in material respects from what is contoured in the accused's confirmed warned and cautioned statement and the statement of agreed facts.

I turn now to consider the mitigatory and aggravating factors bearing on sentence in this case.

I deal firstly with the mitigatory factors operating in favour of the accused.

1. By the accused's having pleaded guilty, a time-wasting contested trial has been avoided, public money has been saved and the administration of justice has been accelerated.

2. The accused is a first offender aged in his twenties who is married with one child.

3. The accused will be aware of the shame and sorrow visited by him upon his parents, with whom he had been residing at the time he committed the offence.

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4. He will lose the good job which he had at a salary $2 900 per month.

5. The accused appeared genuinely ashamed and remorseful about what he had done.

6. Of the Peugeot 504 spares shipment totalling S1 743 171,90 in value, spares to the value of $1 722 171,90 were recovered, resulting in an actual prejudice to the complainant of $21 000.

7. The accused has expressed willingness to make restitution of the full amount of the actual prejudice caused to the complainant, that is to say, for $21 000.

I do not attach importance to the element of temptation in the sense that the accused found himself presented with the rail advice notes for the Peugeot 504 spares shipment which had been erroneously stamped by Customs in the light of his admission that he did not use the notes immediately but retained I them for about a month before deciding to use them to procure the spares. In any event, it was part of the responsibility of the accused's job to process and use the rail advice notes correctly.

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I cannot accept, as a mitigatory factor, that before he came into unlawful possession of the Peugeot 504 spares shipment, the accused did not realise the size of the shipment and thought he was only acquiring a much lesser quantity of spares. I say this for two reasons.

Firstly, although the accused admitted that the gross weight, including that of the wagons, of a shipment is given on the rail advice notes, he said that he did not observe from the notes for the Peugeot 504 spares shipment that there were two containers and, therefore, he had no idea of the large size of the shipment. I find it difficult to believe and, accordingly, I do not accept that the accused, before collection of the shipment, did not know from the information given on the rail advice notes, which he had kept in his possession for about a month, that the shipment was a large one. It is hardly a conceivable that a shipment of spares which the accused knew was destined for Puzey and Payne comprised only sufficient spares to accommodate those required by him for his Peugeot 504 station wagon with some left over for sale by him, as he tried to make out when he gave evidence in midgadon.

In any event, the accused would and must have become immediately aware of the size of the shipment of spares when the spares were uplifted from

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Manica Freight and ferried to Murehwa for concealment.

In this connection, I would draw attention, in passing, to the accused's evidence, in reply to a question from me, that it would have been "very irregular", to quote the accused's words, for Manica Freight to have released the shipment in question without a bill of entry duly stamped by Customs accompanying the rail advice notes. If as the accused maintains, the Peugeot 504 spares shipment was released without such an accompanying bill of entry, it makes one wonder whether there was not someone on the Manica Freightside who was party to the theft in this matter. However, I only mention this as a point of curiosity.

I return now to examine the aggravating features which are to be weighed against the mitigatory features in striving to arrive at an appropriate sentence for the accused.

In a nutshell, the aggravating features in this case are that the theft involved a serious breach of the trust reposed in the accused by his employer, that it involved a quantity of property valued at the very high figure of $1 743 171,90, that the theft was premeditated, in that the accused kept the rail advice notes for the shipment in question for a month before using them and that, being in receipt of a good salary of $2 900 per month, the accused stole out of greed.

A search for and a review of the case authorities in Zimbabwe involving theft of property to the value of that involved in the present case has not revealed much that is helpful. Suffice it to say that in the case of *Attorney-General v Paweni Trade Corporation (Pvt) Ltd & Ors* 1990 (1) ZLR 24 (S), KORSAH JA, with the concurrence of GUBBAY JA (as he then was) and MANYARARA JA, in setting aside a sentence imposed by this court on the second respondent, who had been convicted of eight counts of fraud relating to drought relief food involving an actual prejudice to the complainant, being the State, of $1 352 906,20, for which the accused had been sentenced to serve a total of 25 years' imprisonment with labour of which 7 years'

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imprisonment was suspended for a period of 5 years, substituted a straight term of 18 years' imprisonment with labour.

While I appreciate that in approaching the matter of sentence for the second respondent in *Paweni's* case, the Supreme Count was not dealing with a case of theft of property but with a carefully designed scheme to defraud a Government Ministry of a large amount of money from public funds connected with the sensitive subject of drought relief food and that the actual

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prejudice in that case was $ 1 352 906,20 as compared to $21 000 in this case, I find it pertinent to refer to certain passages in KORSAH JA's judgment in *Paweni's* case.

At p 41E, the learned judge quoted the following statement by DAVIES JA in *S v Moyo* 1979 (4) SA 61 (ZRA) at 63D:

> "One of the most important considerations in sentencing an offender is his moral guilt, and logically his motive in committing the offence bears strongly upon such moral guilt. "

In this case, in the light of the aggravating factors which I have highlighted, I consider the accused's more guilt to be high.

In approaching the question of sentence for the second respondent in *Paweni's* case, KORSAH JA stated as follows at p 42F:

> "The four classical principles of sentencing are summed up in four words: retribution, deterrence, prevention and rehabilitation. LAWTON LJ, delivering the judgment of the Court of Appeal in *R v Sargeant* (1974) 60 Cr App Rep 74 (CA), said of retribution at p 77:
>
> > 'The Old Testament concept of an eye for an eye end tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked: it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentence they pass. The courts do not have to reflect public opinion. On the other hand the courts must not disregard it. Perhaps the main duty of the court is to lead public opinion.'
>
> These offences perhaps resulted in one of the greatest financial losses to the State perpetrated by one group of persons acting with a common purpose. Any punishment imposed must reflect the abhorrence of society in relation to them."

At p 43E, KORSAH JA stated:

> " In determining what the limits of a proper sentence in respect of the offences of which the second respondent has been convicted, I am influenced by what McNALLY JA said at p 6 of the judgment in *Sharma* v S supra, that:

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> 'These considerations comparisons suggest to me that a twenty year sentence for a crime of dishonesty

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> unaccompanied by violence must be approaching the outer limit of what any court in this jurisdiction would impose for such a crime.'
>
> I am in entire agreement with *Mr Houston* that the instant case is of the gravity envisaged by MCNALLY JA as one deserving of a sentence 'approaching the outer limit of what any court in this jurisdiction would impose', and with his concession that while twenty-five years may be the absolute limit, or even slightly beyond, the effective eighteen years is appropriate."

With the alarming increase in thefts of property and money involving higher and higher values or amounts, society obviously looks to the courts to impose severe sentences to deter persons from committing such offences. However, the question of sentence is always a difficult one for the courts, a sentiment which was expressed by DUMBUTSHENA CJ in *S v Chitopa* 1984 (1) ZLR 209 (S) in the following way:

> "... in determining an appropriate sentence a court must try its best to balance the interests of society which require severe sentences for those who breach the trust placed in them and the interests of the offender which are opposed to those of the society. The balancing of the two opposing interests is a delicate process because the two interests are irreconcilable. But the courts must perforce try to reconcile them."

In the circumstances mentioned by me, the matter of sentence is becoming even more and more problematic, as the Judge President had occasion to remark to the President recently. Obviously the courts cannot be expected to apply some sort of yardstick whereby they simply increase the effective sentence of improvement in proportion to the increasing value of the property or money stolen otherwise the courts would be in danger of coming up with sentences which will be solely destructive of, and soul destroying for, the convicted person.

As stated by HOLMES JA in *S v Sparks & Anor* 1972 (3) SA 396 (A) at 410 G-H:

> " Punishment should fit the criminal as well as the crime, be fair to the State and to the accused, and be blended with a measure of mercy."

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Accordingly, taking all these aspects into consideration and weighing the aggravating factors against the mitigatory factors peculiar to the accused in this case and having particular regard to the fact that the bulk of the shipment of Peugeot 504 spare parts was recovered, I sentence the accused to a term of 15 years' imprisonment with labour, of which 3 years' imprisonment is suspended on condition that the accused compensates the complainant for the actual prejudice suffered by it by paying the complainant through the Criminal Registrar, Harare, the sum of $21 000 by 31 December 1993.

I do not propose to suspend any further past of the sentence on condition of good behaviour in the light of the following remarks of KORSAH JA in *Paweni's* case *supra,* at pp 43G-H and 44A, which I consider to be pertinent to the sentence imposed in this case:

> "I do not think that where a convicted person is to undergo a very lengthy sentence, such as was imposed by the trial court, anything is to be gained by suspending seven years on condition of good behaviour. See *S v Gorogodo* 1988 (2) ZLR 378 (S) at 383. There is no doubt that such suspension was made by the trial court as a matter of personal deterrence. Such personal deterrence is not justifiable because those who have their wits about them usually find the closing of prison gates an experience which they do not want again, and if they do not

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learn their lesson after a lengthy period of incarceration, they can always be dealt with by the courts on the basis of the severity of the offence committed."

Before rising, the court would like to commend the Attorney-General's Office and the police for having caused this case to be brought to court in the month following the recovery of the stolen property and the accused's arrest, both on 29 June 1993. The administration of justice in such a prompt and efficient manner can only hearten the law abiding members of our society and, hopefully, send out a clear and fearful message to would-be offenders.

(After talking instructions from the accused, Mr *Samkange* applied to the court for leave to appeal against sentence but leave was refused on the ground that there was no reasonable prospect of such an appeal succeeding.)

Byron Venturas & Partners, accused's legal practitioners

BANDA v PITLUK 1993 (2) ZLR 60 (HC)

Court **High Court, Harare**

Robinson J

Opposed application

13, 16 & 21 July 1993

Flynote

Civil procedure - default judgment erroneously given when there had been entry of appearance to defend - powers of judge to correct in terms of rule 449(1)(a) of High Court Rules

Headnote

Default judgment had been given against the applicant. His legal practitioner applied in terms of rule 63 of the Rules of the High Court for a setting aside of the default judgment.

The judge dealing with the application discovered from scrutiny of the Registry file that the applicant had in fact entered an appearance to defend in accordance with the Rules before the default judgment had been given. However, a copy of the notice of appearance to defend had not been served on the respondent's legal practitioners in terms of rule 49. The applicant had simply left two copies of the notice with an of official at the High Court who had advised him that a copy would be served upon the respondent's legal practitioners.

The court exercised its powers in terms of rule 449(1)(a) of the Rules of the High Court to rescind the default judgment oaths grounds that the default judgment had been erroneously granted in the absence of the party affected by it. This Rule provided that the court or a judge may rescind the judgment *mero motu.* The failure of the applicant to serve a copy of the appearance to defend on the respondent's legal practitioners I did not affect the position. In deciding whether to set aside the default judgment on this basis, the court was only obliged to

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consider whether the default judgment was erroneously granted; if it was it should be set aside without the court first investigating whether the person against whom it was given had a good *prima facie* defence.

ROBINSON J

Cases cited:

R O Invest (Pty) Ltd v Consol Press of SA Ltd 1949 (4) SA 454 (C)

Ingle v Andrew 1924 CPD 40

Miss L T Mubariki for the applicant

K Laue for the respondent

Judgment

Robinson J: The applicant seeks rescission of a default judgment granted against him in this court on 15 October 1992. The application is made under rule 63 of the Rules of Court and is contested by the respondent, who filed an affidavit in opposition to the applicant's founding affidavit, to which the applicant filed an answering affidavit on the afternoon preceding the date on which this matter was due to be heard as an opposed motion, being 13 July 1993.

Mr *Laue,* for the respondent, rightly objected to the late filing of the applicant's answering affidavit, which I only received just before the

I commencement of the hearing and which was not admissible in terms of the proviso to rule 234(1).

The applicant, who appeared in person, told the court that his answering affidavit had been filed late because of a breakdown in communication with his lawyers, who, it is noted, had renounced agency on his behalf only on 7 July 1993, that is to say, barely a week before the date of hearing of this matter - something which the court strongly censures. However, after initially indicating that he intended to oppose an application for condonation of the late filing of the applicant's answering affidavit, Mr *Laue* withdrew his opposition and said that he would present argument from the Bar on Friday, 16 July 1993, to which date this matter was postponed on the basis that the applicant pay the respondent's wasted costs of the abortive hearing.

When this matter resumed on 16 July 1993, the applicant was then represented by *Miss Mubariki* of Gutu & Associates, the applicant's former legal practitioners. Mr *Laue* immediately registered a strong protest about the failure of the applicant's former legal practitioners to file a notice of resumption of agency or, at the least, to have informed him, as a matter of courtesy, that they would be representing the applicant at the hearing on 16 July 1993.

Miss *Mubariki* said that the failure to file a notice of resumption of agency had been an

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oversight on the part of her firm. She explained that the

ROBINSON J

applicant's failure to attend at their firm's offices to sign the answering affidavit prepared by their Mr Gutu, as requested by them, had prompted them to file the notice of renunciation of agency on 7 July 1993 and to tell the applicant, when he called at their offices and signed the answering affidavit on the afternoon of the day before the hearing, that is to say, on 12 July 1993, that he would have to appear in court in person the next day. Miss *Mubariki* further explained that on the afternoon of 13 July 1993, after the hearing, the applicant had re-approached their firm and had told Miss *Mubariki* that he wanted their firm to resume agency on his behalf and to represent him at the hearing on 16 July 1993. As a result, Miss *Maburiki* prepared and filed the applicant's heads of argument on 15 July 1993 which, of course, was not in compliance with the provisions of rule 238(1).

The court told Mr *Laue* that it was sympathetic about the point raised by him and particularly about his further point that had he known at the last hearing that the applicant intended to re-approach his former legal practitioners and instruct them to act for him, he would not have agreed to withdraw his opposition to the late filing of the applicant's answering affidavit.

After advising the parties' legal practitioners that, upon examining the Registry's file in case no. HC 6515/92 relating to the action in which the respondent had obtained the default judgment in question against the applicant, it had found therein a notice of appearance to defend that action signed by the applicant and stamped by the High Court with the date 23 September 1992, the court queried whether the application for rescission should not have been made under rule 449(1)(a), which provides:

> "449 (1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order -
>
> (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby;"

While Mr *Laue* agreed that the applicant might have been better served by bringing his application for rescission of judgment under rule 449(1)(a), he contended that since the applicant had elected to make his application under rule 63, he was bound by his election and the matter should be dealt with under that rule and that, therefore, the applicant could not now seek relief under rule 449(1)(a). However, the court pointed out that under rule 449 (1)(a), it had the power, *mero motu,* to rescind a judgment "that was erroneously sought or erroneously granted in the absence of any party affected thereby".

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Next, Mr *Laue* argued that since the applicant, on his own admission, had not served a copy of the notice of his appearance to defend on the respondent's legal practitioners in teens of rub 49, having simply left two copies of the notice with an official at the High Court who had advised him

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that a copy would be served on the respondent's legal practitioners, the appearance to defend was irregular; and, therefore, because the applicant had been at fault to that extent, it could not be said that a default judgment had been "erroneously granted" against the applicant.

However, Mr *Laue* admitted that the position would have been different had the applicant served a copy of the notice of his appearance to defend on the respondent's legal practitioners but the copy had been misfiled by the respondent's legal practitioners. In that event, Mr *Laue* accepted that it would be a proper exercise of the court's discretion under rule 449(1)(a) to rescind the default judgment on the ground that it had been "erroneously granted".

Let me consider whether Mr *Laue's* stand is a sound one.

In *The Civil Practice of the Superior Courts in South Africa* 3 ed, Herbstein and van Winsen state as follows, at pp 242 and 243 under the heading "WHEN NOTICE (OF INTENTION TO DEFEND) IS IRREGULAR":

> "(b) A notice of intention to defend will also be irregular if the defendant, having filed the original notice with the registrar, fails to serve a copy on the plaintiff or his attorney.
>
> On the analogy of the former Cape practice [which, I would add, is the practice which was followed by our courts and which, in terms of Cape rule 17(3), required the defendant to give notice in writing of entry of appearance to the plaintiff or his attorney], it is submitted that in the event of such failure the plaintiff will be entitled to assume that notice of intention to defend has not been given. If, however, he does so and moves for judgment, the court will not grant judgment, but will order the defendant to pay the wasted costs occasioned by his omission."

In the footnotes to this statement, reference is made to two cases.

In the first case, RO *Investments (Pty) limited v Consolidated Press of South Africa Limited* 1949 (4) SA 454 (C), the court had previously refused to grant a default judgment against the defendant, who had entered an appearance personally but had not complied with rule 17(3) by failing to give notice of

appearance to the plaintiff's attorneys, on the ground that an appearance had been entered by the defendant.

In the second case, *Ingle v Andrew* 1924 CPD 40, an order previously made against the defendant was cancelled and the defendant was ordered to pay the wasted costs when it emerged that an appearance to defend had been entered by the defendant without notice thereof having been given to the plaintiff's attorneys.

Accordingly, I find the point raised by Mr *Laue* without merit. Although Mr *Laue* concedes that in the event of the court's finding that an appearance to defend had been entered by the applicant notwithstanding his failure to serve a copy of the notice of appearance on the respondent's legal practitioners, the court would be justified in exercising its discretion in favour of the applicant by rescinding the default judgment against him, it remains for me to consider whether, in a case such as this where the grounds on which the applicant intends to defend the

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respondent's action in case no. HC 6516/92 are before the court, the grounds should be taken into account by the court in deciding whether, in the exercise of its discretion, it should rescind the default judgment.

Let me reiterate immediately that rescission of a judgment under rule 449(1)(a) is entirely different and must therefore be distinguished from an application for rescission of a default judgment under rule 63 which requires the court, before it sets aside a judgment under that rule, to be satisfied "that there is good and sufficient cause to do so". Nor is the court concerned with the issue of whether the defendant has "a good *prima facie* defence to the action", the test to be applied by the court under rule 66(1)(b) when considering an application for summary judgment.

In my view, when considering the question of rescission of a default judgment under rule 449(1)(a) on the ground that it was "erroneously granted in the absence of any party affected thereby", once the court finds, as it has found in this case, that the judgment was erroneously granted against the defendant, either because of an error on the part of the judge before whom the application for default judgment was placed in failing to observe the notice of appearance to defend contained in the court file or, as is much more likely, because of the absence of the notice of appearance to defend in the court file through delay on the part of the Registry staff in placing the notice in the court file, then that is an end to the matter and the court should rescind the judgment, as I therefore intend to do in this case.

ROBINSON J

On the issue of costs, Miss *Mubariki* had conceded that, if judgment was rescinded by the court, then the applicant would have to bear the wasted costs for bringing his application under rule 63 instead of relying on the court to save him by intervening and acting *mero motu* under rule 449(1) (a).

In my view, Miss *Mubariki* had no option but to make this concession since, clearly, the first thing a diligent legal practitioner would have done in the matter, after taking instructions from the applicant, would have been to examine the court file case no. HC 6516/92 at the Registry, in which event he would have observed that contained in that file was a notice of appearance to defend entered by the applicant, as the defendant, on 23 September 1992. He would also observed, had he inspected in the appearance book, that there was an entry in it signed by the applicant on 23 September 1992 at 1500 hours indicating his intention to defend and giving his address for service as 33 Harland Court, Fifth Avenue, Harare.

Had the applicant's legal practitioners acted accordingly, they would or should then have become aware that the application for rescission should be brought under rule 449 (1) (a), which came into effect on 15 January 1993, thereby avoiding the unnecessary filing of lengthier papers by both parties on the basis that this was an application under rule 63.

Mr *Laue* had asked for costs to be awarded against the applicant on a punitive basis but I did not consider this to be a matter meriting such an award. However, one hopes that the applicant's legal practitioner will be induced , out of cconscience, not to ask their client to bear

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the wasted costs incurred by their error in bringing the application under the wrong rule, the more so as that might well have led to a different outcome for their client but for court's intervention.

In the result, I make the following order.

1. The default judgment erroneously granted against the applicant, as defendant, at the instance of the respondent, as plaintiff, by this court on 15 October 1992 in case no. 6516/92 is hereby rescinded.

2. The appearance to defend entered by the applicant, as defendant, on 23 September 1992 in cse no. 6516/92 shall be regarded as the entry of a vallid and effective appearance.

ROBINSON J

3. To the extent that the said default judgment against the applicant has been rescinded by the court acting *mere motu* under rule 449(1)(a) of the Rules of Court, the application made under rule 63 is dismissed and the applicant is ordered to pay the respondent's costs.

After the court had delivered judgment, Mr *Laue* advised the court that he and Miss *Mubariki* had agreed that, in the event of the judgment going the way it has gone, the respondent be allowed to apply for, and the applicant be allowed to oppose summary judgment on the basis of the papers presently before the court. However, since an application for summary judgment is a separate and different matter altogether, I was not prepared to follow the course suggested, pointing out that, to save costs, it was open to the parties to incorporate in their founding and opposing affidavits respectively the papers presently before the court, in addition to including such further evidence as they might wish to include therein.

Gutu & Associates, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

WATCHTOWER BIBLE AND TRACT SOCIETY OF PENNSYLVANIA & ANOR v DRUM INVESTMENTS (PVT) LTD & ANOR 1993 (2) ZLR 67 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

McNally JA, Korsah JA & Muchechetere JA

3 June & 26 June 1993

Civil appeal

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Flynote

Town and Country Planning - appeal to Administrative Court in terms of s 63 of Administrative Court Act, 1979 against granting by Rural Council of special consent for change of use - nature of appeal under the provisions of the Rural, Town and Country Planning Act, 1976 - which person bears onus in such an appeal - whether Administrative Court applied wrong principles in reaching its decision

Headnote

A religious organisation wished to build its Zimbabwe headquarters on a site in an area falling under a planning scheme which provided for use for agricultural purposes and for other uses by special consent. It applied to the responsible Rural Council for special consent to build. Two persons living in the vicinity of the site objected to the application. The Rural Council granted special consent for a change of use.

The objectors then appealed in terms of s 63 of the Administrative Court Act, 1979 to the Administrative Court against the granting of special consent. The court upheld the appeal and refused the permit for change of use. The religious organisation and the Rural Council then appealed to the Supreme Court.

Held, that on appeal in such a matter the Administrative Court is authorised under s 39(1) of the Rural, Town and Country Planning Act, 1976 "to make such order as it deems fit". It thus completely re-hears the matter and makes a fresh determination on the merits.

Held, further, that because of the nature of the appeal the Administrative Court had been correct to rule that the onus was on the religious

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McNALLY JA

organisation to satisfy the court that special consent should be given. Although there was merit in the view that the onus should rest upon the objectors who were appealing against the decision, this view was not supported by the relevant decided cases.

Held, further, a decision of fact of the Administrative Court can only be upset on appeal if its decision was "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

Held, further, in dealing with the issue of "need"in such a matter a flexible and not a rigid approach was to be adopted, especially where the development in question was likely only to be minimally obtrusive.

Held, further, that the Administrative Court had applied a number of wrong principles in arriving at its decision and on this basis the Supreme Court allowed the appeal.

Cases cited:

CCSU v Min for the Civil Service [1984] 3 All ER 935 (HL)

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PSC & Anor v Tsomondo 1988 (1) ZLR 427 (S)

Vice - Chancellor, Univ of Zimbabwe & Ors v Mutasah & Ors 1993 (1) ZLR 162 (S)

Salisbury, City of v Sagit Trust Ltd 1981 ZLR 479 (S)

Jones v City of Salisbury 1972 (2) RLR 396 (A)

Salisbury Board of Exors Ltd NO *& Anor v Salisbury City Council* 1959 (1) R&N 454 (ATPC)

Kopje Properties v City Council of Salisbury 1957 R&N 491

Pillay v Krishna & Anor 1946 AD 946

Kriegler v Minitzer 1949 (4) SA 821 (A)

Garment Workers' Union v Min of Labour & Anor 1947 (2) SA 361 (W)

Tselentis v Salisbury City Council 1965 (4) SA 61 (SRA)

Buxton v Min of Housing [1960] 3 All ER 408 (QB)

Tickly & Ors v Johannes & Ors 1963 (2) SA 531 (A)

National Union of Textile Workers v Textile Workers Industrial Union (SA) & Ors 1988 (1) SA 925 (A)

SABC v Tvl Township Bd 1953 (4) SA 169 (T)

J C Andersen SC and *A P de Bourbon SC* for the appellants

M J Gillespie for the respondents

Judgment

McNally JA: The first appellant (the Watchtower Society) applied to the second appellant (the Rural Council) for special consent to build its Zimbabwe Headquarters on a piece of land purchased by it for that purpose. The two respondents (the objectors) objected.

McNALLY JA

The Rural Council, in terms of the powers conferred upon it by s 27 of the Rural, Town and Country Planning Act 22 of 1976, granted special consent for a change of use. The objectors then appealed, in terms of s 39 of the Act, to the Administrative Court. That court upheld the appeal, reversed the decision of the Rural Council, and refused the permit for change of use.

The Watchtower Society and the Rural Council then appealed to this court. That appeal, in terms of s 63 of the Administrative Court Act:

> "may only be made in respect of -

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(a) a matter of law which has arisen for decision; or

(b) a question as to whether a matter for decision is a matter of fact or a matter of law; or

(c) a question which has arisen as to the admissibility of evidence."

An appeal therefore cannot be prosecuted against a decision of fact by the Administrative Court, unless of course, that decision was:

> "... so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

per Lord Diplock in *CCSU v Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 951a-b. See also *PSC & Anor v Tsomondo* 1988 (1) ZLR 427 (S) at 442D-E and *Vice - Chancellor, University of Zimbabwe & Ors v Mutasah & Ors* 1993 (1) ZLR 162 (S).

The three grounds of appeal were, in summary:

1. The Administrative Court erred in law by placing the *onus* on the parties who were in fact the respondents before it;

2. Its decision was not based on reasonable grounds;

3. It applied wrong principles in coming to its decision.

It was not disputed that at least the first and third of these were proper grounds. See *City of Salisbury v Sagit Trust Ltd* 1981 ZLR 479 (S) at 492. I will deal with them in turn.

McNALLY JA

1. THE ONUS

The President of the Administrative Court expressed himself as follows in relation to the incidence of the *onus:*

> "We have heard evidence as to why the authority granted the permit and argument not only about the principles to be applied by it in the exercise of its discretion in determining the application but wherein lies the *onus* in special consent appeals to this court.
>
> Suffice it to say at the outset, because this appeal is in the nature of a first full scale inquiry rather than a re-hearing, this court is not really concerned so much with the reasons why the authority arrived at its decision but what is the correct decision in the light of the evidence placed before it.
>
> If the question of *onus* is of any real significance in this appeal then I am bound to say that I do not regard the decision in *Jones v City of Salisbury* 1972 (2) RLR 396 (A) as being *obiter dicta* and since it is a decision of the Appellate Division it is not only binding on the court but overrules the decision in this regard, in *Salisbury Board of Executors Ltd* NO & *Anor v Salisbury City Council* 1959 (1) R&N 454 (ATPC) at 458, which at best is persuasive only. In any event it is far greater persuasive influence than a decision emanating from the Town Planning Court."

In other words, he was ruling that the Watchtower Society had to satisfy him that special consent should be given. It was not for the objectors, as appellants, to satisfy him that their objections had been wrongly overruled.

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Mr *Andersen*, for the appellants, submitted with some force that this approach was wrong.

First of all, in the ordinary course of events an appellant bears the *onus* of proving what he asserts ie that the decision from which he is appealing was wrong. So one would think that the objectors would have to satisfy the Administrative Court that the Rural Council was wrong. The objectors led their evidence first, which normally indicates an acceptance of the burden of proof.

Secondly, the Rural Council's view cannot be brushed aside as irrelevant. A rural council is a statutory body. It exists (until overtaken by the Rural District Councils set up under Act 8 of 1988) as a body corporate. Its members are

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democratically elected by voters from within its area, to represent them. It is a local planning authority in terms of s 10 of the Regional, Town and Country Planning Act 22 of 1976. It has the statutory power, in terms of s 27 of the Act, more particularly, in terms of subs (3)(a)(ii), to grant special consent for a change of use of land, provided it follows the procedures set out, which it did. The statute requires the local planning authority to take certain factors into account (subs(5)). There is no suggestion that it did not do so.

Thirdly, the Rural Council exercises a discretion. It knows its own area, it represents its area, it speaks for its voters. It weighs up the pros and cons (and there are usually factors which point one way and other factors which point the other way) and it comes to a value judgment. Is it proper that the Administrative Court, hearing an appeal from that judgment, should substitute its own value judgment, rather than ask itself "was that value judgment wrong?"

The one case relied on by Mr *Andersen* was *Salisbury Board of Executors Ltd* NO & *Anor v Salisbury City Council* 1959 (1) R&N 454 (ATCP). This was a decision of Edwards J in the Town Planning Court. He was a judicial officer ranking equally, despite the difference in title, with the current President of the Administrative Court.

This was a case on all fours with the present one. The planning authority had granted special consent. The objectors appealed. At pp 456-457 His Honour made the following statements:

At 456D

> "As the main point at issue in both appeals is the same, namely **whether the respondent was at fault in granting its special consent** to the use of the stand for the religious purposes for which the Assembly desires to use it, they have been heard together by consent"(my emphasis).

At 456F

> "Provision for special consent is made in schemes because it is contemplated that a particular use not conforming with the predominant use of land within a zone may be required in the public interest, and that the grant of permission for such use may not, in particular instances, upset the general amenities of the area. When a person who has been refused special consent by an Authority appeals to this court against such refusal,

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McNALLY JA

> the *onus* is upon him to establish the existence of special circumstances by reason of which special consent ought to be granted in order to bring about a result in conformity with the principles of sound town planning; see *Kopje Properties v City Council of Salisbury* 1957 R&N 491.
>
> Invoking those propositions, Mr *Pittman* has argued that in appeals of the kind now before the court - where objectors appeal against a decision to grant special consent - the *onus* - in the sense of risk of non-persuasion - lies upon the respondent to show that special circumstances warranting the grant of special consent exist.
>
> Mr *Charles* referred to *Pillay v Krishna & Anor* 1946 AD 946, and *Kriegler v Minitzer* 1949 (4) SA 821, (A), and argued that in appeals of this kind the appellant is the *actor* who initiates the proceedings, asks for relief, and asks that the *status quo* be disturbed. Where facts are in dispute, he said, the *onus* - even if it involves proving a negative - lies on the appellant to establish that his version is correct; if, at the conclusion of the case, the matter is left in doubt, the appeal should fail.
>
> Mr *Charles'* contention is clearly correct. The decision of the question whether special consent should be granted has been committed in the first instance to the Authority. The question on appeal is, formally, whether the Authority's decision was right or wrong. The *onus* of proof rests upon the Appellant as the party who contends that it was wrong. Cf *Garment Workers' Union v Minister of Labour & Ors* 1947 (2) SA 361 at 366 (W)."

It must be said that, although the view expressed by EDWARDS J has much to commend it, it departs from previous approaches in cases such as *Kopje Properties* without reference to them and relies on cases (such as *Kriegler v Minitzer* and *Pillay v Krishna*) which do not deal with the question of *onus* in an appeal. He does derive support from some of the words of MILLIN J in the *Garment Workers' Union* case *supra* at p 366 but not, I think, from his concluding words at 367, which are:

> "Thus the court, in determining what decision should have been reached by the Minister, and before him by the Registrar, has to enter upon and decide the case as if it were a court of first instance."

The contrary view was then expressed by two judges of this court's predecessor, the Appellate Division of the High Court of Rhodesia, in *Jones v City of Salisbury* 1972 (2) ZLR 396 (A).

McNALLY JA

Here again the appellant was an objector whose objection had not succeeded when the application was made before the City of Salisbury. His counsel took the point, as set out in the headnote, that:

> "The Town Planning Court erred in its approach to the issue before it and decided the appeal on the basis that if the decision of the City Council as the town planning authority was reasonable, it should not be interfered with. The proper approach was to re-hear the matter afresh."

Counsel cited *Kopje Properties (Pvt) Ltd v City Council of Salisbury* 1957 R&N 491 at p 496, and *Tselentis v Salisbury City Council* 1965 (4) SA 61 (SRA) as authorities for this proposition. It must be noted that in both these cases the appellant was the applicant for special consent. He had failed to convince the planning authority. He then sought to convince the Town Planning Court. Unquestionably he bore an *onus*. The only question was, what kind of *onus*?

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In the *Kopje Properties* case *supra* Advocate Charles submitted to the Town Planning Court that there was a double *onus* on the appellant. First, he had to convince the court that special circumstances existed. Then he had to convince the court that the planning authority had exercised its discretion wrongly. The court accepted the first *onus* but rejected the second: "The court does not accept that the appellant must show that the respondent was unreasonable."

In the *Tselentis* case *supra* the appeal court made the point that the Town Planning Court was "not a court of law in the strict sense. It is an administrative tribunal exercising quasi-judicial functions". It inevitably acquires a certain expertise. The court would not normally interfere with its exercise of a discretion "if the discretion has been judicially exercised within its proper limits."

However, *Tselentis* does not deal directly with the question of *onus* in the appeal to the Town Planning Court. And, of course, in both cases, the fact that the local authority and the Town Planning Court were in agreement distinguishes these cases from the present one.

I return then to the *Jones* case *supra* which, unlike the two cases cited, was a case on all fours with the present one, in that it was the unsuccessful objector who appealed.

McNALLY JA

MacDONALD JP (as he then was) did not cite any authority, although one must assume he gave thought to the two cases cited. In particular he did not refer to, and was not referred to, the *Salisbury Board of Executors* case *supra* decided in 1959. He said, at p 398F:

> "At the stage at which the Town Planning Authority makes its decision under the provisions of Clause 23, only written objections are considered. It is only before the Town Planning Court that *viva voce* evidence is heard and what may be termed 'a full inquiry' is conducted. The proceedings before the Town Planning Court are, therefore, not so much a re-hearing as the first full inquiry, and **there can be no question of an onus on the appellant to show that the decision of the Town Planning Authority was wrong**. On the contrary under Clause 23 the *onus* rests on the applicant in the Town Planning Court no less than at the earlier stage to establish 'reasons for justifying the grant of special consent by the authority'. This is the position even where the applicant for consent is not the Council. Where the Council is the applicant and is in effect, the judge in its own cause, it is of particular importance to bear in mind that **no onus rests on the appellant in the proceedings before the Town Planning Court**."

In this case, as the learned JUDGE PRESIDENT noted, the City Council owned the stands in question. It was applying on behalf of itself to itself. It was both judge and interested party. For that reason alone, one might say, it was properly required to justify its decision in favour of itself before the Town Planning Court. It is true that the learned judge went further than that in his *dictum*, but one might argue that the extension was not strictly necessary for the purposes of his decision.

It must also be said, in fairness to the decision of the learned JUDGE PRESIDENT , that he was clearly aware that the fact that the local authority had made a decision in favour of the applicant was one which had to be taken into account. At p 399E he said:

> "In coming to its conclusion the Town Planning Court must take full account of the representations and evidence of the Council in its capacity as Town Planning Authority ..."

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I think this can be interpreted to mean that, although the onus remained on the applicant, the fact that the local authority was "on his side" was a factor to be weighed in the balance. This is an important consideration in the present appeal.

McNALLY JA

I will refer to one last point which I think supports this line taken by Mr *Andersen*, before I go on to consider the general line taken on administrative appeals in South Africa. It is the position under English town planning law.

In that jurisdiction (although the statute may have been amended) the situation used to be that an **applicant** could appeal against a refusal of town planning permission, but an **objector** could not appeal against the grant of such permission. It is an interesting distinction based, I understand, on respect for the right and liberty of a man to do what he pleases with his own land. If the law restricts him there must be safeguards. But an objector is one who seeks to prevent the exercise of a *prima facie* right. His right need not be so jealously guarded. See *Buxton v Minister of Housing* [1960] 3 All ER 408 (QB) and *Wade Administrative Law* 6 ed p 189.

Much as I am attracted by the argument put forward by Mr *Andersen*, the bottom line is that his suggested approach is supported only by one a typical decision in the Town Planning Court. It is not supported by other reported decisions of that court, and has been at least by inference, positively overruled by the Appellate Division in the *Jones* case *supra*.

Not only that. It seems to me that the *Jones* case *supra* is solidly entrenched in the established line of thinking in South Africa. Traditionally the courts in Southern Africa have divided administrative appeals into three categories, as follows:

1. An appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information;

2. An appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong;

3. A review, that is, a limited re-hearing with or without additional evidence or information, to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly.

This is the list set out by TROLLIP J (as he then was) in *Tickly & Ors v Johannes & Ors* 1963 (2) SA 588 (T) at 590, adopted by the Appellate

McNALLY JA

Division in *S v Mohamed* 1977 (2) SA 531 (A) at 538D-G, and applied in *National Union of*

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Textile Workers v Textile Workers' Industrial Union (SA) & Ors 1988 (1) SA 925 (A) at 937.

I am satisfied that the appeal from the decision of the Rural Council to the Administrative Court is an appeal in the first sense above, an appeal in the wide sense. I accept the comment of the court in the *Jones* case *supra* that we are dealing with "not so much a re-hearing as the first full inquiry". But that comment does not take the case out of the category; it puts it more firmly in it.

The main reasons why the appeal falls into the wide category are that the Act, in providing for the appeal, authorises the Administrative Court to "make such order as it deems fit"(s 39(1) of Act 22 of 1976), and that evidence is for the first time led and examined in accordance with the rules of a court of law.

I do not think it is possible to argue that even though this is a category one appeal, an appeal in the wide sense, the onus may nevertheless be on the objector. The whole point of the formulation which I have set out is that the appellate tribunal (in this case the Administrative Court) is starting again. It is deciding afresh the merits of the application, not the merits of the Rural Council's decision. The formulation makes sense only if one accepts that the *onus* is where it was in the original application.

One might make the point starkly by saying that the question before the Administrative Court is "should the application be granted?"rather than "should the application have been granted?" In answering that question, the Administrative Court will, of course, be aware of, and give proper weight to, the fact that the local authority favours the application or opposes it, as the case may be.

I find support for this approach in a town planning case, in the judgment of MURRAY J, with whom NESER and CLAYDEN JJ agreed (the latter in a separate judgment) in the case of *SA Broadcasting Corporation v Transvaal Townships Board* 1953 (4) SA 169 (T) at p 176. Despite the use of the phrase "should have been" I rely in particular on this passage:

> "... the Board must (despite the City Council's possession of discretionary powers) decide whether on the merits the consent should have been granted or not."

MCNALLY JA

That passage seems to me to reinforce what I said earlier, that "it is deciding afresh the merits of the application, not the merits of the Rural Council's decision."

Accordingly, and not without regret, I conclude that the law does not support the approach suggested by Mr *Andersen.* The President of the Administrative Court directed himself correctly on the question of *onus* and the appeal on that point must fail.

2. DECISION NOT MADE ON REASONABLE GROUNDS?

and

3. WERE WRONG PRINCIPLES APPLIED?

I turn then to the second point raised on appeal. It is only a question of law if the word

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"reasonable"is interpreted in the light of what we call "Wednesbury reasonableness", which in this context means "was the decision irrational?"

In order to examine this question it is necessary briefly to set out the facts and the basis for the decision reached by the Administrative Court. In the process I will inevitably deal also with the third ground of appeal - did the Administrative Court apply wrong principles in coming to its decision?

The Harare West Rural Council area is adjacent to the City of Harare in the Marlborough/Mount Hampden area, and is zoned for agricultural use with various other uses permissible by special consent.

The Watchtower Society, as I have indicated, wished to establish their headquarters for Zimbabwe in the area of the Rural Council. Special consent to allow this was given by the Rural Council, despite the opposition of two objectors. Both objectors were private companies owning properties adjacent to or very close to the property acquired by the Watchtower Society. Both properties were occupied as small holdings by retired businessmen. They were not commercially farmed.

The two objectors set out their objections as follows (I have summarised them):

1. The change of use would cause a nuisance and a security problem, and would not benefit the neighbourhood or advance the general good of the area.

McNALLY JA

2. The project can adequately be established elsewhere.

3. The change of use would not be in accordance with sound town planning principles, in that:

   a there is no need;

   b the development would be obtrusive and not in the interests of harmonious and co-ordinated town planning.

4. Sewerage and kitchen effluent would cause a problem.

5. The use of the premises by large numbers of people would change the character of the neighbourhood.

6. The public would not be disadvantaged by the refusal of permission.

The Administrative Court heard evidence from:

1. Mr W Irvine, representing one of the objectors;

2. Mr GA Taylor, a town planning consultant and engineer, former government Deputy Chief Planning Officer who supported the objection;

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3. Mr J Thomas, former chairman of the Rural Council and a long-standing member of it up to December 1991;

4. Mr AJ Leebo, then the current chairman of the Rural Council;

5. Mr HG Rutten, a water treatment engineer;

6. Mr PB Morris, a public health engineer;

7. Mr TG Lewis, a town planner and consulting engineer, formerly Harare's Assistant Chief Town Planning Officer;

8. Mr Eaton of the Watchtower Society.

I should say that some of these names may be misspelt but that I fear, is the fault of the record which is in many places quite incomprehensible. The first two witnesses spoke for the objectors, the remainder for the appellants.

It will be apparent from this list that the views of the Local Authority were fully presented, and that therefore the Administrative Court was made fully aware both of the views of the local authority and of the reasons why it supported and upheld the application for special consent.

The President, in his judgment, accepted that the proposed development would be unobtrusive. He is recorded as saying it would be "little or unobtrusive" which I take to mean there would be little or no obtrusiveness. But apart from that, he said, "there is little else to commend it". He went on to say "while it may be advantageous to the applicant, no-one else will be adversely affected if it is situated elsewhere".

McNALLY JA

By accepting that for all practical purposes the development proposed would be unobtrusive, the Administrative Court was in effect finding that there was no substance in the complaints of the objectors. There would not be excessive noise or excessive traffic; the evidence made it clear there would not be pollution or contamination; it would not create a security problem.

The judgment then proceeded to justify the rejection of the application, essentially on two grounds:

1. There was no need for the development.

2. To allow it would be to "subtly alter the scheme", to "pre-empt the replanning of the area"and to "erode the purposes of the scheme".

It seems to me that the court fell into a number of errors in this line of reasoning.

In the first place, it overlooked certain factual evidence of major significance. The witness Mr Thomas had been a member of the Harare West Rural Council for 17 years and at the relevant time was its Chairman and a member of the Development Committee which considered the application. He testified that this particular application had been referred to the Government's

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Department of Physical Planning for comment. The Rural Council had been advised that they could go ahead and exercise their discretion in the normal way. In other words, the Government Town Planners were not concerned one way or the other. There were no overall policy reasons to suggest that special consent should not be granted.

This evidence was confirmed by the other member of the Rural Council who gave evidence, insofar as I can understand the almost incomprehensible record of what he appears to have said.

Supporting this evidence was the testimony of Mr Eaton, also uncontradicted, that an earlier application of theirs in respect of another site in the Rural Council area had been abandoned at a preliminary stage because it had been referred to the City of Harare who had indicated that it was not in conformity with their long term development plans. Obviously therefore, neither the Government Town Planners nor the City Town Planners saw this development as "eroding the purposes of the scheme."

In the light of this evidence, and with due deference to its expertise, it was

McNALLY JA

surprising to hear the Administrative Court state, that this particular development was "eroding the purposes of the scheme"or "pre-empting the re-planning of the area"or "subtly altering the scheme".

The second point, which leads to the same conclusion, is this. The scheme specifically provided for use for agricultural purposes and for other uses by special consent. To grant special consent for another use is therefore not properly described as "subtly altering the scheme"or "eroding the purposes of the scheme". The granting of special consent is envisaged in the scheme. The scheme provides for the **controlled** use of land in the area for purposes other than agricultural.

Thirdly, it has clearly been established by this court in *City of Salisbury v Sagit Trust Ltd* 1981 ZLR 479 (S) that there is not any peculiar magic in the use of the phrase "special consent". As FIELDSEND CJ said at 488A:

> "Special consent can as a term mean no more than the consent that is required for putting property to a use to which it cannot be put in the zone in which it is situated without such consent. I do not think that any real significance can be attached to the word 'special', which is merely used to distinguish the consent required under clause 22 of the Scheme from the consent that is required for the erection and use of any building under clauses 18 and 19."

In that case, there was a decisive break with the past - initiated I may say not by this court, but by the Administrative Court itself - to the extent that a more flexible approach was adopted to the question of "need". It was recognised, and this court endorsed the recognition, that the criterion of need varied according to the extent of the obtrusiveness. The more obtrusive the proposal, the more necessary it was to show that the development was needed by the zone's inhabitants. *Per contra,* if there is little or no obtrusiveness, as the Administrative Court found in this case, then the criterion of need is *pro tanto* to be relaxed.

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Obviously, in one sense, no area "needs" the building of the headquarters of the Watchtower Society. But it seems to me that the Rural Council witnesses made some powerful points. I will not quote specific passages because the record is so garbled. But the overall tenor of their evidence is this:

1. We know that our area is primarily agricultural, and indeed we have refused special consent in some cases.

MCNALLY JA

2. At the same time we have to live with the fact that we are adjacent to a big city and that non-agricultural developments are taking place in the vicinity of areas like Mount Hampden and Marlborough.

3. As a matter of fact, and whether lawful or not, because of our proximity to the city, there are undesirable developments taking place which we are in practice unable to eliminate entirely.

4. To that extent we see some advantage in allowing a non-agricultural development which is likely (because it is a highly respectable institutional development) to be tidy, disciplined, handsome and at least partly agricultural.

In other words they were saying - and it is a very reasonable assessment - that it would be of advantage to the area as a whole to have an attractive development of this kind to counter-balance the undesirable use of some of the peripheral small-holdings which they were in practice having difficulty in controlling. In this sense, there was a need.

In my view, and with due deference to an Administrative Court whose members and President are greatly experienced, there has been a wrong principle applied - a principle rejected by that same court in the *Sagit* case *supra* - namely that the criterion of need must be rigidly applied even when the proposed user is unobtrusive or minimally obtrusive. There has been a failure to recognise that a need has been established. There has been a failure to take into account that the Government Town Planners, the relevant Minister and (though this is not entirely clear) the City's Town Planners do not view the development as an undermining of the scheme. The third ground of appeal succeeds.

For these reasons the appeal is allowed with costs and the decision of the Administrative Court is altered to read:

The objections are dismissed and the decision of the respondent is confirmed.

Korsah JA: I agree

Muchechetere JA: I agree

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Kantor & Immerman, appellants' legal practitioners

Winterton, Holmes & Hill, respondents' legal practitioners

MONDERWA FARM (PVT) LTD v B J B KIRSTEIN (PVT) LTD 1993 (2) ZLR 82 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

5 & 26 July 1993

Flynote

Court - ancillary power of retired judge to complete outstanding judgments - different considerations where judge removed from office

Statutes - Constitution ss 79(1), 84(3), 85(3)(b), 86(4) - High Court of Zimbabwe Act 1981, s 3 - Interpretation Act [Chapter 1] - s 20(2)

Headnote

The appellant applied to amend its grounds of appeal to allege that the judge who gave judgment did so after he had retired and that therefore the judgment was null and void.

Held, that a judge who retires has the ancillary power to complete outstanding judgments.

Per curiam, different considerations would apply where a judge has been removed from office.

Cases cited:

Union of India v Gopal Chandra Misra AIR 1978 SC 694

Middleburg Municipality v Gertzen 1914 AD 544

City of Cape Town v Claremont Union College 1934 AD 414

Bloemfontein Town Council v Richter 1938 AD 195

Makoka v Germiston Town Council 1961 (3) SA 573 (A)

A-G v Plangger 1976 (2) RLR 215 (A)

Tribal Trust Land Development Corp v Cone Textiles (Pvt) Ltd 1978 RLR 365 (G); 1978 (4) SA 659 (R)

A-G v Great Eastern Rly Co (1880) 5 AC 437 (HL)

Hatfield Town Mgmt Bd v Mynfred Poultry Farm (Pvt) Ltd 1962 R & N 799; 1963 (1) SA 737

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GUBBAY JA

D P Carter for the appellant

M J Gillespie for the respondent

Judgment

Gubbay CJ: At the inception of this hearing, counsel for the appellant moved an application to amend the notice of appeal by the addition of the following ground:

> "The trial Judge having resigned on 31 January 1992, had no jurisdiction to hand down judgment on 13 May 1992, subsequent to his resignation and cessation of his tenure of office as a judge of the High Court and, accordingly, the judgment in *BJB Kirstein (Pvt) Ltd v Monderwa Farm (Pvt) Ltd* HH-94-92 is null and void and should be set aside."

The amendment sought was opposed by the respondent on the basis that the point taken was bad in law. It was accepted, however, that if held to be good, it would be decisive of the appeal against the respondent.

The factual allegations set out in the proposed ground of appeal were not in contention; only the stated conclusion was. The record of the proceedings revealed that at the closure of evidence MR JUSTICE GREENLAND intimated to counsel that he required their written submissions to be filed on or before 31 December 1991 and that judgment would be delivered by 31 January 1992, on which date his resignation from the office of a judge of the High Court was to take effect. In the event, the undertaking proved far too optimistic for, despite compliance by counsel, it was only on 13 May 1992, that the judgment was handed down by another judge.

The issue now raised before this court of whether the act of resignation *per se* terminates the power of a judge, who had not been appointed for a fixed period, to retain jurisdiction over matters of which he was previously seized, appears devoid of judicial authority. Certainly neither counsel was able to refer to any decision directly apposite and my own research has fared no better.

The occurrence is provided for in the Constitution of Zimbabwe, but only where the judge concerned had been appointed for a fixed period, or in an acting capacity or had retired. The relevant sections are 84(3), 85(3)(b) and 86(4). They read:

> "84 (3) The appointment of a judge in terms of this section, whether made before, on or after the date of commencement of the Constitution

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> of Zimbabwe Amendment (No. 4) Act, 1984, may be made for a fixed period and any judge so appointed may, notwithstanding that the period of his appointment has expired, sit as a judge for the purpose of giving judgment or otherwise in relation to any proceedings commenced or heard by him while he was in office.";

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"85. (3) A person appointed to act under subsection (2) -

(b) may, notwithstanding that the period of his appointment has expired or that his appointment has been revoked, 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 so acting."; and

"86. (4) A judge of the Supreme Court or the High Court may, notwithstanding that he has attained 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."

These provisions deal with the exercise of jurisdiction where the cessation of the tenure of office is involuntary and enforced. They extend the term of office of the fixed period judge, the acting judge and the retired judge, beyond the stipulated date of its cessation.

With regard to a judge, like the former Mr JUSTICE GREENLAND, whose appointment was neither of an acting nor fixed period nature, his tenure endures, subject to good behaviour and an ability to discharge the functions of his office, until his retirement upon attaining the age of sixty-five years, or at his election to retire on attaining the age of seventy years (see ss 86(1) and 87 of the Constitution).

Resignation of a judge is dealt with in s 86(3) of the Constitution, wherein it is stated:

"A judge of the Supreme Court or the High Court may at any time resign his office by notice in writing to the President."

The effect of a similarly worded provision in the Constitution of India, namely proviso (a) to s 217(1), was considered in the case of *Union of India v Gopal Chandra Misra* AIR 1978 SC 694. The Supreme Court held that it gave to the judge a unilateral right or privilege to resign his office, his

resignation becoming effective from, and his tenure of office terminating upon, the date on which he, of his own volition, desires to quit office. No acceptance is required to make the resignation complete. I respectfully agree with this judgment. It means that the President of Zimbabwe may not attach any conditions to the proposed date of resignation, such as that the judge must, prior thereto, complete all matters commenced before him.

Section 79(1) of the Constitution vests the judicial authority of Zimbabwe in the Supreme Court, the High Court and such other courts subordinate thereto as are established under an Act of Parliament. Section 3 of the High Court of Zimbabwe Act 1981 vests the judges of the High Court with judicial authority or power in respect of civil matters, criminal trials, the review of proceedings of inferior courts and other bodies, and appeals. And s 4 makes provision to permit of the continuation of an appeal or application notwithstanding a reduction by whatever cause of the number of judges sitting.

Mr *Gillespie,* who appeared for the respondent, argued that it was reasonably incidental to the carrying out of the judicial authority of a High Court judge, as outlined above, that subsequent to resignation he may complete all outstanding matters with which he alone was seized. He

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stressed that retention of such power arose by necessary implication from -

(a) the judge's oath of office which binds him to do justice;

(b) the judicial duty to pronounce judgment;

(c) the tradition and practice of this country which demands that a judge conclude existing litigation with which he is seized so as to avoid inconvenience to the parties and their witnesses, if any, as well as the wastage of costs; and

(d) an acceptance that the intention to resign upon a specified date does not negate the obligation to complete all outstanding matters.

Section 20(2) of the Interpretation Act [*Chapter 1*] is relevant. It reads:

> "Where an enactment empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to do that act or thing or are incidental to the doing thereof."

GUBBAY CJ

The concept of an implied power may be traced to Roman law, as expressed in *Digest* 2:1:2 in the maxim *"Cui jurisdictio data est, ea quoque concessa esse videntur sine quibus jurisdictio explicari non potuit"* (where jurisdiction is conferred the recipient is deemed also to have been granted all such powers necessary for the exercise of the expressly granted jurisdiction). And it has long been recognised by the courts. See *Middleburg Municipality v Gertzen* 1914 AD 544 at 552; *City of Cape Town v Claremont Union College* 1934 AD 414 at 420-421; *Bloemfontein Town Council v Richter* 1938 AD 195 at 226-227; *Makoka v Germiston City Council* 1961 (3) SA 573 (A) at 581H-582B; *Attorney-General v Plangger* 1976 (2) RLR 215 (AD) at 216 D-E; *Tribal Trust Land Development Corporation v Cone Textiles (Pvt) Limited* 1978 RLR 365 (GD) at 372G-373A; *Attorney-General v Great Eastern Railway Company* (1880) 5 AC 437 (HL) at 478.

But the case that comes closest to the present matter is *Hatfield Town Management Board v Mynfred Poultry Farm (Pvt) Ltd* 1962 R & N 799 (SR). In the course of his judgment MAISELS J (with whom MACDONALD J concurred) held that even though the Magistrates Court Rules provided that a plaintiff may file an objection to a plea only on the ground of non-compliance with such Rules, it was permissible for a plaintiff to object on the ground that the issues raised in the plea were *res judicata*. The learned Judge said at 802B:

> "It has repeatedly been stated that the Magistrate's Court ... has no inherent jurisdiction as is possessed by the Superior Courts and may claim no authority which cannot be found within the four corners of its Statute. ... It is, however, recognised that authority may be implied as well as expressed and when the Act gives jurisdiction to the Court on the main subject in dispute its purpose is not defeated because the ancillary powers which are necessary to enforce that jurisdiction have not been specifically mentioned."

In my opinion, Mr *Gillespie* is correct in his submission that the power to conclude unfinished matters after resignation, as did MR JUSTICE GREENLAND, is reasonably incidental to the proper performance of the judicial authority or power outlined in s 3 of the High Court of

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Zimbabwe Act, which vests in a judge of the High Court. That this is an ancillary power which it is necessary to imply to the function of judicial office is, to my mind, further borne out by the existence of the express provisions in respect of fixed period, acting or retired judges - such provisions being inserted in the Constitution *ex abundante cautela* on account of the enforced termination of office. But, in

GUBBAY CJ

the case of a judge removed from office pursuant to s 87(1) of the Constitution, for inability to discharge the function of his office due to infirmity of body or mind or any other cause, or for misbehaviour, the power to complete outstanding matters subsequent to the date of removal (or suspension by the President pending a decision whether or not to remove for misbehaviour) is not to be implied. If the judge concerned is found to be unfit to discharge the functions of his office then he is obviously unfit to complete matters previously commenced by him.

For the aforegoing reasons I would dismiss this application with costs.

McNally JA: I agree.

Korsah JA: I agree.

Atherstone & Cook, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

S v MATARE 1993 (2) ZLR 88 (SC)

Editor's Note:(2)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA, Korsah JA, Muchechetere JA & Sandura AJA

Criminal appeal

14 June & 13 August 1993

Flynote

Criminal procedure - plea - change of - application after conviction to change plea of guilty to one of not guilty - no onus on accused - all accused must do is give a reasonable explanation - Criminal Procedure and Evidence Act [Chapter 59] -ss 242 (1a), 255 & 255A

Headnote

The appellant pleaded guilty before a regional magistrates court to four counts of fraud. An

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agreed statement of facts was then put in, which repeated and elaborated on the allegations in the charge. The magistrate proceeded, in terms of s 255(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*], to question the appellant who affirmed the essential elements of the charges. The proceedings were adjourned for a week pending sentence. When the proceedings resumed, a legal practitioner appeared on behalf of the appellant and applied for the pleas to be altered to not guilty. The alleged grounds were that the appellant had pleaded guilty as a result of assaults and intimidation and that in any event he was innocent of the offences.

The magistrate held a trial within a trial to determine whether the appellant had discharged the burden of proving his allegations. In placing the *onus* on the appellant the magistrate relied on the decisions in *S v Maseko* 1986 (2) ZLR 52 (S) and *S v Nyajena* 1991 (1) ZLR 175 (S), which held that where, after verdict, the accused wishes to change his unequivocal plea of guilty to one of not guilty, he must prove on a balance of probabilities that the plea was not voluntarily, understandingly and correctly made. It was argued on his behalf that those decisions were wrong.

Held, per GUBBAY CJ (KORSAH JA and MUCHECHETERE JA concurring),

that s 255A of the Criminal Procedure and Evidence Act [*Chapter 59*] did not oust a common law application for a change of plea to not guilty. In the interests of justice the court has an inherent discretion to permit a withdrawal of a plea of guilty. Section 255A merely elevates the previous existing common law discretion to a duty in certain circumstances and on certain grounds; if those circumstances existed, the court was bound to order a change of plea, whether the accused had asked for it or not.

Held, further, that the object of s 255A was to serve as an additional safety mechanism for proceedings under s 255(2)(b), in order to ensure that wrong convictions did not result. There was nothing in the wording of the section to indicate an intention on the part of the legislature to cast an onus on the accused.

Held, further, that as far as a common law application to alter a plea of guilty is concerned, whether made before or after conviction but before passing of sentence, there was no *onus* on the accused to show anything on a balance of probabilities. He must simply offer a reasonable explanation for having pleaded guilty. Unless the court is convinced beyond reasonable doubt that the explanation is not merely improbable but positively false, the accused must be allowed to change his plea.

Held, further, that in the present case, the magistrate had found the appellant's explanation improbable but did not reject it as false. Accordingly it could not be said that the appellant's explanation was false beyond reasonable doubt and the appeal should be allowed.

Held (per McNALLY JA and SANDURA AJA, dissenting), that s 255A of the Criminal Procedure and Evidence Act is not intended to codify the common law and cover all cases where an accused person wants to change his plea of guilty. The section is not worded from the point of view of the accused, but was intended to cover a situation where, in the course of the normally short proceedings on a plea of guilty, something emerges which suggests that there may be a

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defence. The practice and procedure which were applied for many years before s 255A was enacted were that if the accused wished to change a plea after conviction there was an *onus* on him to show that the plea was not voluntarily or knowingly made. This procedure is also in accordance with the Declaration of Rights and with the similar provision in s 242(1a), which deals with the situation where the accused wishes to repudiate a confirmed statement. The 1975 amendment which introduced s 255A had nothing to suggest that the practice, which was eminently sensible, was intended to be altered. To change the practice would be to open the floodgates to spurious applications, easily allow accused persons to take the system

for a ride and cause serious practical difficulties in the administration of justice.

Appeal allowed. Retrial ordered, with pleas of not guilty to be entered. *S v Maseko* 1986 (2) ZLR 52 (S) and *S v Nyajena* 1991 (1) ZLR 175 (S) overruled.

Cases cited:

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

S v Nyajena 1991 (1) ZLR 175 (S)

S v Mbhele 1980 (1) SA 295 (N)

S v Mazwi 1982 (2) SA 344 (T)

S v Dingile en 'n Ander 1986 (3) SA 253 (NC)

S v Haruperi 1984 (1) ZLR 258 (H)

S v Zwela 1981 (1) SA 335 (O)

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

S v Hazelhurst 1984 (3) SA 897 (T)

S v Botha 1990 (1) SA 668 (T)

S v Fourie 1991 (1) SACR 21 (T)

S v Mudimu 1971 (1) RLR 172 (G)

S v de Bruin 1987 (4) SA 933 (C)

S v Booysen 1988 (4) SA 801 (E)

S v van Niekerk 1993 (1) SACR 482 (NC)

S v Malili en n' Ander 1988 (4) SA 620 (T)

S v Moahlodi & Anor 1962 (2) PH H145 (O)

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van Heerden v de Kock & Anor 1979 (3) SA 515 (E)

S v O 1990 (2) SACR 145 (C)

Woolmington v DPP [1935] All ER Rep 1 (HL)

S v Britz 1963 (1) SA 394 (T)

R v Patrick 1962 (1) SA 263 (FS)

S v Mapawara & Ors A-79-71

S v Terblanche 1971 (3) SA 231 (O)

S v Hendriks 1977 (4) SA 78 (C)

S v Strydom & Ors 1980 ZLR 364 (A)

S v Ngara 1987 (1) ZLR 91 (S)

S v Kannigan 1975 (4) SA 639 (N)

S v Nangani 1982 (1) ZLR 150 (S)

GUBBAY JA

S v Dehwe 1987 (2) ZLR 231 (S)

S v Zishumba & Ors 1983 (1) ZLR 10 (H)

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

S v Nyamweda 1983 (1) ZLR 131 (S)

S v Maharangwe S-5-90

A P de Bourbon SC for the appellant

Mrs J Zindi for the respondent

Judgment

Gubbay CJ: The appellant was arraigned before the court of the regional magistrate on four counts of fraud, it being alleged that during the period between 2 October 1986 and 17 June 1987, he unlawfully and fraudulently submitted to Bestafoam (Pvt) Ltd falsified invoices purporting to be for either services rendered or goods supplied by H and B Distributors (Pvt) Ltd, a company in which he was a director, and by such means, on four separate occasions, received payments by cheque totalling $25 168,78, whereas in truth he knew that no services had been rendered or goods supplied to Bestafoam (Pvt) Ltd.

To these charges the appellant, who was unrepresented at that stage of the trial, pleaded guilty.

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The prosecutor then proceeded to read out to the court a statement of agreed facts that had been signed by the appellant. It repeated the allegations in the charge sheet but added that the appellant was, at the relevant period, the general manager of Bestafoam (Pvt) Ltd, with the duty and responsibility of procuring raw materials and authorising payment in respect of expenses legitimately incurred; that having deposited the four cheques, fraudulently obtained, into the bank account of H and B Distributors (Pvt) Ltd, the appellant subsequently withdrew all such monies. That done, the prosecutor, with the consent of the appellant, produced the four cheques and two of the invoices relating thereto. He also tendered the statement of agreed facts.

Thereupon the regional magistrate dealt with the appellant's pleas in terms of s 255(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*]. The following exchange was recorded in that regard:

> "Mr Matare, do you understand the gravamen of the facts that have just been read out by the Prosecutor? ... Yes I do.
>
> And are there any facts that you want to add surrounding the offences themselves? ... No.

GUBBAY CJ

> And in respect of each of these charges ... do you agree that you made out an invoice in the name of H and B Distributors to Bestafoam either for goods delivered or for services rendered? ... Yes.
>
> Whereas in fact on each occasion, no goods had been delivered and no services rendered by H & B to Bestafoam? ... Yes.
>
> And was it your intention to mislead Bestafoam to believe that the goods had been delivered or the services had been rendered? ... Yes.
>
> Do you agree that your actions caused financial prejudice to Bestafoam by paying for goods or services which they never received? ... Yes, I agree your Worship.
>
> Did you have any right to do this, or do you have any defence to the charges? ... I had no right and I have no defence to the charges."

The regional magistrate then formally found the appellant guilty on each count. After receiving an address in mitigation, he adjourned the proceedings for seven days pending consideration of sentence, and remanded the appellant in custody.

At the resumed hearing a legal practitioner appeared on behalf of the appellant and applied for the pleas to be altered to not guilty. The stated grounds were that the appellant had been persuaded to plead guilty by duress in the form of assaults and intimidation by the investigating police officers; and that, in any event, he was innocent of the offences, for his company had in fact rendered the services and supplied the goods to Bestafoam (Pvt) Ltd.

The application was followed by a trial within a trial at which the appellant gave evidence and called two witnesses to testify to the merits of count two. The prosecutor responded by adducing evidence from two police officers and five employees of Bestafoam (Pvt) Ltd.

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After a hearing lasting many days the regional magistrate held that the appellant had failed to discharge the burden of proving his allegations. Accordingly, he dismissed the application and proceeded to pass sentence. Taking the four counts together, he ordered the appellant to undergo seven years' imprisonment with labour. Of this period, eighteen months were suspended for three years on the usual condition of good behaviour, and a further eighteen months were suspended provided the sum of $25168,74 was

GUBBAY CJ

repaid to the complainant company by 31 August 1989. The effective punishment was, therefore, four years' imprisonment with labour.

In placing the onus on the appellant the regional magistrate applied, as he was bound to do, the ruling of this court in *S v Maseko* 1986 (2) ZLR 52 (S); 1986 (4) SA 958 (ZS) (*sub nom S v M*), that an accused who wishes to change an unequivocal plea of guilty after verdict has been pronounced, must prove on a balance of probabilities that the plea was not voluntarily, understandingly and correctly made (see at 60C-F and 964I). That approach was endorsed in *S v Nyajena* 1991 (1) ZLR 175 (S) at 177D. The question of its correctness is central to this appeal.

Counsel for the appellant advanced three legal submissions. First, that under the common law, and at all stages of the trial up to the imposition of sentence, an accused applying to change an initial plea of guilty is only required to offer a reasonable explanation for having pleaded guilty and of desiring to alter that plea. The court must then decide whether the explanation was false beyond reasonable doubt. If there was any reasonable possibility of it being true, the accused should be allowed to withdraw his plea of guilty. Second, that s 255A of the Criminal Procedure and Evidence Act, which came into operation on 19 September 1975, does not oust a common law application for the alteration of a plea of guilty, but deals only with the questioning of an accused under s 255(2)(b). Put differently, the common law and s 255A exist side by side. And third, that in any event, s 255A, properly construed, does not place an onus on the accused. It merely requires him to give an explanation which the court finds reasonable.

When making the application to change the pleas, the appellant's legal practitioner did not expressly invoke s 255A, and in declining to permit a withdrawal thereof the regional magistrate did not specifically refer to the absence of any of that provision's requirements. Nonetheless, insofar as the legal practitioner led the appellant's evidence on the issue of innocence in addition to what had prompted him to plead guilty, he may have had paras (a) or (c) of s 255A at the back of his mind.

Section 255A, with the omission of its proviso, reads:

> "If the court, at any stage of the proceedings in terms of section *two hundred and fifty-five* and before sentence is passed -
>
> (a) is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or

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GUBBAY CJ

(b) is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based; or

(c) is not satisfied that the accused has no valid defence to the charge;

the court shall record a plea of not guilty and require the prosecution to proceed with the trial:"

This section is almost identical in wording to s 113 of the South African Criminal Procedure Act 51 of 1977, and the preceding s 255 sets out the procedure to be applied on a plea of guilty as does s 112 of the South African Act.

The question whether s 113 of the South African Act codifies and replaces the common law power of a court to change a plea of guilty to one of not guilty is the subject of wide controversy in the various Provincial Divisions of the Supreme Court of that country. Such cases as *S v Mbhele* 1980 (1) SA 295 (N), *S v Mazwi* 1982 (2) SA 344 (T) and *S v Dingile en 'n Ander* 1986 (3) SA 253 (NC) hold that s 113 leaves no room for the application of the common law principles pertaining to alteration of pleas of guilty, and that the accused bears an onus to show why he pleaded guilty and why the plea should be changed. In this jurisdiction the High Court in *S v Haruperi* 1984 (1) ZLR 258 (H) came to the same conclusion in relation to s 255A. On the other hand, *S v Zwela* 1981 (1) SA 335 (O), *S v Pillay* 1981 (4) SA 151 (N), *S v Hazelhurst* 1984 (3) SA 897 (T), *S v Botha* 1990 (1) SA 668 (T) and *S v Fourie* 1991 (1) SACR 21 (T) all decide that the common law is still in force, with s 113 having its own field of operation, namely proceedings in terms of s 112. Yet a third line of cases, initiated by *S v Maseko supra* (which relied on *S v Mudimu* 1971 (1) RLR 172 (G)) and followed in *S v de Bruin* 1987 (4) SA 933 (C), *S v Booysen* 1988 (4) SA 801 (E) and *S v van Niekerk* 1993 (1) SACR 482 (NC), lay down that after conviction the standard of proof is the same, regardless of whether the statutory provision or the common law governs the situation. There is an onus on the accused to satisfy the court on a balance of probabilities that it should substitute a plea of not guilty for his plea of guilty. Finally, the opinion is expressed in *S v Malili en 'n Ander* 1988 (4) SA 620 (T) and *S v Fourie supra* that the court's function, whether acting under s 113 or the common law, is precisely the same - to determine whether there is a reasonable explanation for the departure from the accused's earlier plea; there is no question of there being an *onus* to discharge.

GUBBAY CJ

I do not propose to burden this judgment with an analysis of the divergent approaches adopted in the authorities cited. It will suffice if I indicate the conclusions I have reached and the reasons therefor.

I respectfully agree with the view which holds that s 113 (and so s 255A) does not oust a common law application for a change of plea to not guilty. The factors I regard as compelling are these:

(a) In the interests of justice the court has an inherent discretion to permit a withdrawal of a plea of guilty. See *S v Pillay supra* at 153B. A change to this established common law principle requires a clear and positive legislative enactment. Section 255A does not meet that criterion. In *S v Hazelhurst supra* at 909G, it was

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said by HUMAN AJ:

"No other provision in Act 51 of 1977 relates to the amendment of a plea. Section 113 does not cover the whole field of replacement of pleas as it is traditionally understood. There is no express provision to the effect that the common law no longer applies, and there is no provision impliedly repealing the common law"(in translation).

These remarks apply with equal force to s 255A. See also *S v Zwela supra* at 343E-H.

(b) Section 255A can be interpreted in a manner that is not inconsistent with the common law principles governing amendment of pleas. It merely elevates the previously existing common law discretion to a duty in certain circumstances and upon certain grounds, namely, in proceedings in terms of s 255(2)(b) and upon the grounds enumerated in s 255A. This is spoken of by KOTZE AJ in *S v Zwela supra* at 344C-F:

"(The) objective of s 113 is not to regulate exhaustively the question of correcting pleas, but merely to elevate the previous discretion to an obligation in certain circumstances. In other words, in certain circumstances (proceedings following a plea of guilty under s 112) and on certain grounds ... the court will be **bound** - not merely empowered in its discretion - to order a correction of plea, whether the accused has asked for it or not"(in translation)

(c) Situations may arise for which s 255A does not provide (see, for example, those in *S v Pillay, S v Hazelhurst,* and *S v Botha)*. In *S v Pillay supra* at 155F-H, FRIEDMAN J correctly pointed out that:

GUBBAY CJ

"The actual language of s 113 as to when the court must act to record a change of plea seems to me to be particularly appropriate to the sort of information which might be placed before the court at s 112 proceedings, referring as it does to allegations which the accused does not admit or allegations which the accused has incorrectly admitted. That the accused has a valid defence is something which might easily be brought out either during the course of the questioning of the accused or during the course of evidence with regard to sentence.

It is self-evident that s 113 is not prefaced by the words 'if the court is at any stage of the proceedings where an accused has pleaded guilty'. It follows in my view that s 113 has no application where it is sought to change a plea in circumstances which cannot be said to be at a stage of s 112 proceedings."

(d) The object of s 255A is to serve as an additional safety mechanism especially for proceedings under s 255(2)(b), in order to ensure that where the new procedure is brought into operation it does not result in wrong convictions. Section 255(2)(b) was innovative; and s 255A was introduced to supplement and complement it when proceedings thereunder cast a doubt as to the accused's legal guilt, or do not satisfy the judicial officer that the accused admits or correctly admits all the essential elements of the offence or all the acts or omissions on which the charge is based, or has no valid defence to the charge.

(e) In *S v Botha supra* at 673C-F, ELOFF AJP gave the following cogent illustrations of the type of situation contemplated and provided for by s 113 (and thus by its counterpart s 255A):

"After conviction the magistrate reconsiders his findings. He does so either *mero motu* or at the urging of the accused. He comes to the conclusion that the explanation of the plea possibly did not show that the accused was guilty of the offence to which he had pleaded guilty. ... Because it has at least a doubt as to whether the accused

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is guilty in law, the court alters the plea (and by implication the conviction falls away).

After conviction the accused gives evidence in mitigation. Now for the first time he says something in amplification of his explanation of plea, namely, that he did not assault the complainant alone and that it arose out of self-defence. The court may be satisfied that the accused has a valid defence to the charge, and a change of plea follows.

GUBBAY CJ

After conviction the accused's convictions are proved. It appears that he could not have committed the offence to which he pleaded guilty because he was in prison at the relevant time. The court can then be satisfied that the accused mistakenly admitted the allegation that he committed the offence, and a change of plea follows"(in translation).

It necessarily follows that the contrary decision in *S v Haruperi supra* was wrong.

In the second place, I have no hesitation in accepting that insofar as a common law application to alter a plea of guilty is concerned, whether made before conviction or after conviction but prior to the passing of sentence, there is no onus on the accused to show anything on the balance of probabilities. He must simply offer a reasonable explanation for having pleaded guilty. See *S v Moahlodi & Anor* 1962 (2) PH H145 (O); *van Heerden v de Kock & Anor* 1979 (3) SA 315 (E) at 316H-318F; *S v Zwela supra* at 346D-E and 347B-D; *S v Pillay supra* at 152B; *S v Mazwi supra,* at 348F-349E; *S v Hazelhurst supra,* at 910B-E; S v O 1990 (2) SACR 145 (C) at 152e. This is simply in conformity with the general principle to which expression was given by LORD SANKEY LC, and hallowed by repetition in several cases, that:

"Throughout the web of English criminal law one golden thread is always to be seen - that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said to the defence of insanity and subject also to any statutory exception."

See *Woolmington v DPP* [1935] All ER Rep 1 (HL) at 8C.

This court therefore erred in *S v Maseko supra* and *S v Nyajena supra* in confining the test enunciated by CLAASSEN J in *S v Britz* 1963 (1) SA 394 (T) to a common law application to alter a plea of guilty only where made before verdict and in holding that, thereafter, the onus shifts to the accused to prove on a balance of probabilities that his plea of guilty was not voluntarily and understandingly made. (Similar dicta in *S v Mudimu* supra at 175F and *S v De Bruin supra* at 935I-J are also wrong). If CLAASSEN J's misconception concerning the meaning of "judgment"is allowed for (see at 397B) - and certainly the English authorities cited by him used the term in the sense of all stages of the proceedings until the imposition of sentence, then the test was correctly formulated.

Once sentence has been pronounced, however, the trial court has no jurisdiction

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to permit the withdrawal of a plea of guilty since it is *functus officio.* Such power may then be exercised on appeal, which was the situation considered in *R v Patrick* 1963 R&N 893; 1962 (1)

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SA 263 (FS) and *S v Mapawara & Ors* AD-79-71 (not reported).

Third, in my view s 255A, construed in the context against which it was introduced to the Act, contains no indication of an intention on the part of the legislature to cast an onus on the accused. That this is so is evident from the following factors:

(1) The phrase "if the court ... is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty"in para (a), merely requires that a doubt alone, and not a probability, is sufficient to oblige the court to change the plea. No onus of proof needs to be discharged before this safety device becomes operational. See *S v Malili en 'n Ander supra* at 624A

(2) The phrase "if the court ... is not satisfied that the accused has admitted "all the essential elements of the offence"in para (b) requires no more than that the accused reveals that he does not admit an essential element of the offence. See *S v Malili en 'n Ander supra* at 624C.

(3) The phrases "if the court ... is not satisfied that the accused has ... correctly admitted all the essential elements of the offence"and "... has no valid defence to the charge", in paras (b) and (c) respectively, deal with the situation where the accused does not dispute any of the essential elements of his guilt, but during the proceedings it becomes apparent that he has wrongly or mistakenly pleaded guilty. The court is then obliged to change the plea. The word "satisfied"means that the court must have a reasonable doubt about the correctness of an admission or of the conviction it returned. See *S v Malili en 'n Ander supra* at 625F-I.

It is apparent to me that ss 255(2)(b) and 255A were enacted to provide greater protection to the undefended accused by establishing an inquisitorial procedure, as were ss 112(1)(b) and 113 of the South African Act. See *S v Dingile supra* at 258B-G. Not only, therefore, is the placing of an onus of proof on the accused incompatible with such a procedure, it undermines the protection the accused enjoyed prior to 19 September 1975, when guilty-plea proceedings were framed in the adversarial mould. The court placed no onus on an accused who wished to change his plea; a reasonable doubt as to its correctness sufficed. If it became apparent that an undefended accused had wrongly or mistakenly pleaded guilty the court was required to investigate

the matter inquisitorially and, if necessary, change the plea mero motu. See *S v Terblanche* 1971 (3) SA 231 (O) at 235C; *S v Hendriks* 1977 (4) SA 78(C) at 80F.

In sum, I can do no better than to repeat the words of van ZYL J in *S v Fourie supra* at 23h, that:

> "(there is) no more of a burden of proof in an application under s 113 than the burden placed on the accused by the common law in these circumstances. In fact, in my respectful opinion it is even wrong to talk of an onus at all in these circumstances, because this is not like the ordinary case of the burden of proof. All that can be expected of an accused is to give an explanation or clarification of his change of plea, and, if the court is satisfied that it is a reasonable explanation on clarification, then the plea ought to be changed. There is no question of a burden of

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proof that is discharged in such a case" (in translation).

It is, I trust, plain from this survey of the law, as I perceive it to be, that the appellant's allegation that he was prompted to plead guilty to the charges by duress on the part of the investigating officers, amounted to the familiar common law application for an alteration of plea as discussed in *S v Britz supra.* The regional magistrate thus erred, though understandably, in placing the onus on him. The second prong of the application - that of innocence of the commission of the offences - did not fall, as I have endeavoured to show, within the ambit of s 255A. But even if it did, the provision cast no onus on the appellant. The regional magistrate was incorrect in that respect as well. He would have been well advised (as he initially contemplated doing) to have restricted the defence and the prosecution to whether the pleas of guilty had been freely and voluntarily made. It was wholly undesirable and wrong in a determination involving a change of pleas from guilty to not guilty to delve into the appellants actual innocence or guilt of the commission of the offences - an issue that would only arise for resolution consequent upon a withdrawal of the pleas of guilty. For it must not be overlooked that the law recognises the right of an accused, even though guilty, to plead not guilty and to demand proof of guilt. That right cannot be denied to an accused who originally pleaded guilty by reason of an undue and improper influence, such as duress, albeit he happened to be guilty of the offence charged. See *S v Botha supra* at 673G-H.

In the circumstances, I consider that the approach to adopt in this matter is to decide whether notwithstanding the misplacing of the *onus* upon the

appellant, this court can now find, in accordance with s 11(2) of the Supreme Court of Zimbabwe Act, 1981, that no substantial miscarriage of justice resulted therefrom. See *S v Strydom & Ors* 1980 ZLR 364 (A) at 367; *S v Ngara* 1987 (1) ZLR 91 (S) at 97B-C. In other words, upon a reading of the record, unaffected by the misdirection, there is no reasonable possibility of the appellant's explanation as to the cause of him pleading guilty being true. The appellant must be allowed to change his pleas unless this court is convinced beyond reasonable doubt, not that the explanation is improbable, but that it is positively false. See *S v Britz supra* at 398 in fine - 399B; *S v Kannigan* 1975 (4) SA 639 (N) at 640A-B; *S v Botha supra* at 675A-C.

The appellant testified that shortly upon his arrest and detention at the police station, he was assaulted while being interrogated by a number of police officers. He was struck several blows with a length of rubber piping upon the buttocks and was kicked in the groin. He was threatened with further violence and warned that were he to complain to the court about such treatment he would suffer further assaults. Thoroughly intimidated and in fear of the consequences of not complying with what the police required, he felt compelled to plead guilty to the charges.

These allegations were totally denied by the investigating officer Detective Muzondo and, to some extent, he was corroborated by Woman Patrol Officer Mtetwa.

In his assessment of the conflict the regional magistrate said this:

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"The police witnesses were reasonably satisfactory in evidence and gave no indication whatsoever of untruthfulness or bias adverse to the accused. The investigating officer conceded that the accused had initially denied the charges, a concession he did not need to make if he was not an honest witness because it would obviously leave the defence to say or to ask: 'But why did he suddenly change his mind and admit them?'. It is also common cause that the police showed the accused a large number of cheques most of which the accused denied responsibility for, yet there is no hint that the police tried to force the accused to admit responsibility for those cheques. They let the accused deny responsibility for most of the cheques, so why should they have forced him to admit responsibility for four of them? The bringing of the accused to court for a plea rather than, for example, putting him on remand and then bringing him to trial on the basis of a warned and cautioned statement, further indicates the genuineness of the police actions.

GUBBAY CJ

The investigating officer in fact gave evidence quite well and in a fair manner. The accused was certainly no better a witness than the investigating officer bearing in mind the onus on the accused person, and the accused was at times argumentative and evasive."

And concluded:

"The accused's version was improbable in many respects and poorly presented by the accused in at least some respects. The State version was at least as well presented and at least probable and indeed I would venture to say more probable than the accused's. The accused has therefore failed to discharge the onus upon him ..."

It is apparent from these remarks that although the appellant did not succeed in establishing the truth of his explanation for having pleaded guilty, the regional magistrate did not go to the length of saying, as it was open for him to do, that the explanation was beyond doubt false.

In an overall examination of the evidence and bearing in mind that no firm adverse finding of credibility was made against the appellant, it seems to me that what emerges is the improbability of his pleas having been made under duress. But no more than that. I am unable to hold beyond all reasonable doubt that the appellant's explanation was false.

It was suggested, in argument, that the appellant's address in mitigation of sentence makes it clear that he was guilty of committing the offences charged. Even if this were so, and I make no comment upon that proposition, I reiterate that it was the appellant's inalienable right to plead not guilty, irrespective of the lack or paucity of a defence. He was entitled to insist on the State proving its case against him. And that is precisely the right he was desirous of enforcing.

In the result I would order as follows:

1. The appeal is allowed.
2. The conviction and sentence are set aside and pleas of not guilty are to be entered in respect of each of the four counts of fraud.
3. The case is remitted to the Regional Court, Eastern Division, before another regional magistrate for hearing as from the plea stage.

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McNALLY JA

Korsah JA: I agree

Muchechetere JA: I agree

McNally JA: The law of criminal procedure in any country is a compromise between two conflicting objectives. The one is to ensure that criminals are brought to justice quickly and effectively. The other is to ensure that innocent people caught up in the criminal process are not wrongly convicted.

Sadly it is not possible to reach perfection. There will always be cases where criminals go unpunished and there will sometimes be cases where innocent people are punished. Procedural law is deliberately slanted to protect accused persons. The horror of punishing one person unjustly for a crime he did not commit outweighs the frustration of seeing ten men go free when they are in fact guilty.

There is another consideration. A police force unrestricted by laws and rules and regulations can easily become a terror squad, whose sole object is to stop crime and produce a suspect who confesses. Good men in the force will be brushed aside. Those who can achieve confessions by torture, ill-treatment and blackmail will rise to the top.

There is an opposite evil. A police force tied hand and foot by regulations becomes frustrated. Corrupt lawyers and clever criminals treat the police with scorn. The result, although glamorised in a current television series, is not acceptable. The law enforcement agencies become vigilantes, dealing out their own justice. Criminals who cannot be convicted are "shot while trying to evade arrest".

So, if we go too far either way, the result is unacceptable. We have to strike a balance.

In this case we are concerned about a man who pleads guilty before a magistrate. Now it is a fact universally recognised that if we did not have a shortened procedure for dealing with pleas of guilty the criminal justice system in Zimbabwe, and in every country about whose legal system I know, would break down. If, in every case, even where the accused admits his guilt, a full trial had to take place, and all the witnesses had to be called, the judicial system would grind to a halt.

McNALLY JA

So Zimbabwe, in common with other nations, has what is sometimes called a fast-track system to deal with pleas of guilty. But our procedure insists that we take a great deal of care even where someone admits guilt.

The reason for this is that someone may plead guilty who is not guilty. This will happen, not frequently, but not rarely either, because the persons accused think they are guilty when they are not. They plead guilty to assault without realising that they have the defence of self-defence; they plead guilty to rape because they do not understand that consent is a defence; they plead

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guilty to a statutory offence because the statute is complex and they do not appreciate that what they have done is not what the statute prohibits.

Someone may also plead guilty when he is not, because he is beaten, or threatened, or improperly induced to do so -"If you plead guilty you will get a small fine; if you plead not guilty you will spend months in the remand prison before your trial comes up"; or, more simply: "Plead guilty or you will see what will happen".

Finally, someone may plead guilty when he is in fact guilty, but has only admitted it because of torture, threats or improper inducement. Even in such cases the law protects him, because the evil of improper police behaviour must be discouraged even at the price of letting a guilty man go free.

So it is that we have a certain degree of protection for an accused person even when he admits his guilt. In a murder case, if he admits his guilt, a full trial must take place. A plea of not guilty is recorded: *S v Nangani* 1982 (1) ZLR 150 (S); 1982 (3) SA 800 (ZS); *S v Dehwe* 1987 (2) ZLR 231 (S).

In a High Court case there will be an outline of the State case and the judge will ensure that the accused understands and admits all the facts alleged, and that this amounts to an admission of the commission of the crime alleged. If the accused is represented by counsel, the judge will assure himself that counsel has investigated the matter and advised his client accordingly.

In the magistrate's court, a distinction is drawn, purely on the grounds of expediency, between minor cases not meriting more than a fine of $200, and other more serious cases. In the former, the magistrate may convict after the plea without further ado. In the latter case he must question the accused closely, to satisfy himself according to the formula laid down in s 255(2)(b) of the Criminal Procedure and Evidence Act. See *S v Zishumba & Ors* 1983 (1) ZLR 10 (H); *S v Mutadza* 1983 (1) ZLR 123 (H); *S v Nyamweda* 1983 (1) ZLR 131 (S); *S v Maharangwe* S-5-90 (unreported).

GUBBAY CJ

I have made the point earlier about the rôle of expediency in criminal procedure. A man who admits his guilt to some minor offence is treated a great deal more cavalierly than a man who pleads guilty to murder. Yet in principle the pleas could be wrong in either case. In fact people do plead guilty to minor offences in order to avoid the nuisance of going through a trial. But we are not over-concerned about these minor injustices because they are outweighed by the practical advantages.

Against this background I turn to the question of a change of plea:

A man may plead guilty in court and then, at some stage before he is sentenced, he may change his mind. He may tell the court that he now wants to plead not guilty. The question then is "What is the correct attitude for the judicial officer to adopt?"

In my view, s 255A of the Criminal Procedure and Evidence Act is not intended to codify the

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common law and to cover all cases where an accused person in a criminal court wishes to change his plea. For instance, it does not cover the situation where the accused is certainly guilty or almost certainly guilty but wishes to change his plea because his plea was not entered voluntarily, but by reason of threats. But it does not seem to me to make a great deal of difference whether s 255A codifies the common law or not.

Section 255A is not worded from the point of view of the accused person. It does not say: "Where an accused person wishes to change his plea... It says: "If the court is in doubt ... or not satisfied ..."it shall change the plea. This may happen, and often does, without any request for a change of plea.

What we are looking at, therefore, is how the courts, as a matter of practice over the years, have determined the judicial criteria by which the court is to be guided when it is asking itself: "How do I decide what is a reasonable explanation supporting a request to change a plea?"

I have formulated the question in terms of the common law as set out by the learned CHIEF JUSTICE at the top of p 4 of his judgment. *(3) But it can also be formulated by reference to the statutory provisions in a way which is not materially different. One asks: "How and by what criteria do I decide whether I am in doubt, or whether I am not satisfied?"

GUBBAY CJ

The approach in our courts has, as I concluded in *S v Maseko* 1986 (2) ZLR 52 (S), always been to put the onus on the accused. But that was in cases where the accused sought to change his plea after he had already been found guilty. If he sought to do so before he was found guilty I found no authority in our law one way or the other. But, based on what I called the *Britz* principle (ie the principle enunciated in *S v Britz* 1963 (1) SA 394), I concluded that all that was required was an explanation which might reasonably possibly be true.

The distinction which I made in *Maseko* was not one which, as far as I am aware, had been made explicitly before. But I believe that it was implicitly made in the sense that where the one test was applied, in all cases cited the application had been made at the one stage; where the other test was applied, the application had been made at the other stage. In other words, I did no more than formalise a previously existing but unformalised approach.

But certainly, whether I am right or wrong as to the *Britz* principle, it was established as a matter of practice and procedure in our law even before the introduction of s 255A in 1975 that "the onus is on the accused to show that the plea was not voluntarily and understandingly made". This is clear from the decisions in this country going back at least to the Federal Supreme Court decision in *R v Patrick* 1963 R&N 893; 1962 (1) SA 263 (FS) (an appeal from Southern Rhodesia), through the Appellate Division decision in *S v Mapawara & Ors* A-79-71 to S v Mudimu 1971 RLR 172, and finally to Maseko supra.

That practice is thus firmly established in our jurisdiction and there was nothing in the 1975 amendment (the introduction of s 255A) to suggest that the practice was intended to be altered.

I make the point again that s 255A was not framed with the question of onus in mind. It was

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designed essentially to allow a judge or magistrate *mero motu* to change the plea. It envisages a situation where in the course of the (normally fairly short) proceedings on a plea of guilty something emerges which suggests that there is a defence.

I see nothing therefore in the section which compels this court to change the established procedure. As to the common law, I am not sure how appropriate it is to speak in terms of common law. We are dealing here with procedural law, which has been largely statutory since 1832. As Dugard says in Vol IV of *SA Criminal Law & Procedure* at p 26:

GUBBAY CJ

> "The Roman Dutch law of criminal procedure was not however swept away by the enactments of 1827 to 1832 and **in theory if not in practice** it remains the South African common law of criminal procedure."(My emphasis.)

It seems to me to be inappropriate to look back into common law history when dealing with the evolving law of criminal procedure. It is more significant to look to our own practice, which, for the last thirty years at least, has been to require the convicted person to satisfy the court that his request for a change of plea is genuine.

I cannot see anything wrong with the practice. It does not conflict with our Bill of Rights, which provides in s 18(3)(a) that:

> "Every person who is charged with a criminal offence shall be presumed to be innocent **until he is proved or has pleaded guilty.**"(My emphasis.)

So in fact it would not even be unconstitutional to place the *onus* on the accused wishing to change his plea before verdict, though for sound reasons we do not do so.

When an accused person has not only pleaded guilty, but also admitted in open court (and sometimes elaborated on) the facts on which the charge is based, and perhaps even, in mitigation, gone on to explain why his circumstances drove him to commit the crime, why should the court not require him to prove, on a balance of probabilities, the allegations he has suddenly come up with, which are claimed to justify a change of plea?

I drew the analogy, in *Maseko supra,* with the situation where an extra-curial statement is produced which has been confirmed before a magistrate. The onus is there placed on the accused if he wishes to establish that it was not made freely and voluntarily. I know that this is a statutory provision (s 242(1a)) and there is no such provision in the case of an application to change a plea. But the point is, it is a sensible provision. The accused has told a magistrate in open court that he was not forced to make the statement. Now he says he was forced. He should prove that contradictory averment. The situation here is the same. It is eminently sensible to put the onus on the accused when he asserts something which contradicts what he, apparently freely, told the same court a few minutes or a few days earlier.

My concern is that any change will open the floodgates. It is notorious that

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such applications are most often made, either when the accused realises that he is on the verge of going to prison, or when he, for the first time, consults a lawyer. A change of plea will postpone the evil day of retribution; the State may not be able to prove his guilt, even though he is guilty; the longer he delays matters, the greater the chance that the witnesses may die, disappear, emigrate or simply forget; the documents may be lost; anything may happen. While one does not want to deny a genuinely innocent person the right to change a plea based on a mistaken appreciation of the facts, one does not want either to make it needlessly easy for an accused person to take the system for a ride. A balance must be struck.

I am satisfied that the present procedure is in accordance with long-standing practice, in accordance with the Bill of Rights, and in accordance with the similar provision in s 242(1a). I am concerned that a change will only encourage spurious attempts to evade justice, and cause serious practical difficulties in the administration of justice.

In the present case, the magistrate undertook a trial within a trial. He was satisfied that the accused had not shown that his plea was due to improper pressure brought to bear -indeed, as I understand it, the magistrate went further and found positively that the State version was more probable. It was the weight of evidence rather than the weight of the policeman's arm which caused the accused to plead guilty.

I would dismiss the appeal.

Sandura AJA: I have read the judgments prepared by the learned CHIEF JUSTICE and by McNALLY JA. I agree with McNALLY JA's judgment and would dismiss the appeal.

Mugabe, Mutezo & Partners, appellant's legal practitioners

WATTLE COMPANY (Pvt) LTD v INDUCOM (PVT) LTD 1993 (2) ZLR 108 (HC)

Court **High Court, Harare**

Robinson J

Chamber application

18 August 1993

Flynote

Civil procedure - discovery order - service of - return of service - prima facie proof of matters contained therein - default judgment in respect of claim for damages - quantum of damages must be proved

Headnote

In terms of s 20(1) of the High Court of Zimbabwe Act, 1981 an order granted by the High Court

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compelling discovery must be executed by the Sheriff or his deputy. It may not be served upon the party against whom it is made by the legal practitioner of the person who obtained it or by a responsible person in the employment of the legal practitioner.

Whereas s 20(3) of the High Court Act, 1981 provides that the return of the Sheriff or his deputy is *prima facie* evidence of the matters contained therein, there is no similar provision in the Magistrates Court Act, [*Chapter 18*]. The Legislature should amend the latter Act to include such a provision.

When applying for a default judgment in respect of a claim for damages, evidence of the quantum of damages must be adduced before the judgment can be granted.

Case cited:

Gundani v *Kanyemba* 1988 (1) ZLR 226 (S)

Judgment

Robinson J: On 8 April 1993 Adam J granted an order, with costs, compelling the defendant "to file and serve its discovery affidavit within five days of the delivery of this Order at the offices of its legal practitioners of record, failing which a further Chamber Application may be made to strike

ROBINSON J

out the defence and grant default judgment in favour of the plaintiff, with costs"(to which order I refer as "the order compelling discovery").

The plaintiff now applies for an order striking out the defendant's defence and for default judgment, with costs, to be entered against the defendant in terms of the plaintiff's summons by virtue of the defendant's failure to comply with the order compelling discovery.

However, in so applying, on the plaintiff's behalf, the plaintiff's local legal practitioners, who are acting as correspondents for the plaintiff's legal practitioners in Mutare, are faced with a self-created problem which is one of two points which I wish to highlight as a matter of general interest.

In causing the order compelling discovery to be served on the defendant's legal practitioners by a clerk in their employ, the plaintiff's local legal practitioners have disregarded or overlooked, as some legal practitioners are wont to do, s 20(1) of the High Court of Zimbabwe Act 1981, which provides, in peremptory terms, that it is the Sheriff who, by himself or his deputy or an assistant deputy, shall "execute"(which, according to the *Shorter Oxford English Dictionary,* 3 ed, means, *inter alia,* to "carry into effect", "give effect to", "carry out", "pursue judicially") "all sentences, decrees, judgments, writs, summonses, rules, orders, warrants, commands and other process of the High Court, and shall make a return thereof to that court, together with the manner of the execution thereof".

It will further be noted that rule 41 of the Rules of Court expressly excludes orders of court when

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it deals with service of documents by a legal practitioner or by a responsible person in his employ.

Consequently, service of the order compelling discovery by a clerk in the employ of the plaintiff's local legal practitioners was not due and proper service in terms of s 20(1) of the High Court of Zimbabwe Act 1981. It follows that service of the order compelling discovery must be effected by the deputy sheriff or an assistant deputy.

While, on the one hand, it stands to reason that if service of an order of court is to be seen to have been duly and properly effected, this should be done by an independent and impartial official such as the Deputy Sheriff, on the other hand, one can sympathise with local legal practitioners who find themselves in the frustrating position of being unable themselves or through a responsible person in their employ to serve an order of a procedural nature such as the

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present one and of having to submit the order for service by the Deputy Sheriff who is heavily over-burdened with documents for service, with the resultant delays occasioned thereby.

However, unless and until s 20(1) of the High Court of Zimbabwe Act 1981 is amended to allow for such orders to be served by legal practitioners themselves or by a responsible person in their employ, it is incumbent on legal practitioners to observe the provisions of s 20(1) of the High Court of Zimbabwe Act 1981.

Before turning to the other point which I wish to highlight, I take this opportunity of drawing attention to the provisions of another subsection of s 20 of the High Court of Zimbabwe Act 1981, namely, subs (3), which provides as follows:

> "(3) The return of the Sheriff or a deputy sheriff or an assistant deputy sheriff or a person mentioned in subsection (2) of what has been done upon any process of the High Court shall be *prima facie* evidence of the matters therein stated."

I draw attention to this subsection in the light of the judgment of the Supreme Court in *Gundani v Kanyemba* 1988 (1) ZLR 226 (S) which dealt with the evidential weight attaching to the return of service of an officer of the court. At p 229 C-F the court stated as follows:

> "The decisions of the South African courts, which preceded the introduction by the Legislature of that country of provisions dealing with the evidential weight attaching to the messenger's or sheriff's return of service, reveal the existence of two approaches. In earliest times the inclination was to refuse to allow the return to be impeached for want of accuracy or truth, and to leave the aggrieved party to his remedy in damages against the serving officer concerned. See *de Kok v van Niekerk & Anor* (1861) 1 Ros 1; *Haycroft v Filmer* (1863) 1 Ros 98. Subsequently a more rational view was adopted, which recognised that a return of service was not final and conclusive but merely prima facie evidence of the contents thereof. See *Ritchie v Andrews* (1882) 2 EDC 254 at 257; *Wolhuter v Foote* (1883) 2 HCG 258 at 271; *Deputy Sheriff for Witwatersrand District v Goldberg & Ors* 1905 TS 680 at 684; *Lister & Tocknell v Winter* 1906 TS211 at 214; *van Rooyen v Colonial Government* (1906) 16 CTR 296. Confronted with the judicial controversy as to whether a return was impeachable at all, the South African Parliament rightly put to rest the somewhat illogical strict approach.

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ROBINSON J

> But what the second series of cases I have referred to laid laid down, and this is important in the local context, was that the return of service of an officer of the court, whether he be the sheriff, the deputy sheriff or the messenger, was to be accepted as *prima facie* proof of what was stated therein, capable of being rebutted by clear and satisfactory evidence. That is a view with which I respectfully agree."

No doubt the Supreme Court overlooked the legislative provision of s 20(3) of the High Court of Zimbabwe Act, 1981 because, in the case before it, the court was not concerned with a deputy sheriff's return of service but with the return of service of a messenger of court in respect of which there is no provision in the Magistrates Court Act [*Chapter 18*] corresponding to that contained in s 20(3) of the High Court of Zimbabwe Act, 1981.

Accordingly, to redress this omission in regard to the return of service of a messenger of court, I would urge the appropriate authorities to amend the Magistrates Court Act [*Chapter 18*] so as to introduce a provision corresponding to that which applies in the case of the return of service of a deputy sheriff *viz* s 20(3) of the High Court of Zimbabwe Act, 1981.

As regards the other point to which I have referred, even if I had been able to entertain the plaintiff's application, I would not have entered default judgment for the plaintiff because the plaintiff's local legal practitioners appear to have overlooked, as legal practitioners so often do in this situation, the need to adduce evidence on the *quantum* of the plaintiff's claim, which has been pleaded as one for damages and not as one for a debt or liquidated demand.

Although it is true that the situation which arises when a party applies for a default judgment under rule 165 (2) is not covered under that rule as read with rule 60, I do not for one moment think that it was intended that a party applying for a default judgment in respect of a claim for damages under rule 165(2) should be able to obtain judgment without adducing evidence in proof of the *quantum* of his claim. I would accordingly urge that this apparent gap be closed by a suitable amendment to rule 165 (2) as read subject to rule 60.

In the result, I confirm that the plaintiff's Chamber application is dismissed for the reason explained.

Lock Donagher plaintiff's legal practitioners.

LION OF ZIMBABWE INSURANCE COMPANY LTD v TABEX (PVT) LTD 1993 (2) ZLR 112 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

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8 July & 27 August 1993

Flynote

Insurance - tobacco insured - insurance value of property - determined on basis of "auction floor value" - meaning of - how insurance policies to be construed - what information has to be given to insurer - whether insurer knew or should have known of the basis of assessing auction floor value agreed between seller and buyer of tobacco

Headnote

Over a number of years the appellant had provided insurance coverage to the respondent for of tobacco purchased by the respondent and stored at its warehouse. This policy covered against loss by fire. A fire at the warehouse destroyed Green Burley tobacco stored in the warehouse. At the time of the fire the agreed value for Green Burley tobacco for the purposes of this contract was "auction floor value of plus 95%".

The prices for different grades of Burley was negotiated annually by the respondent with the Air Cured Tobacco Association. The agreement between the respondent and the Association in effect at the time of the fire at the warehouse also provided that if the average price for Virginia tobacco on total sales exceeded the price for Burley by more than 15%, the price payable would include an additional amount to bring the price for Burley within 15% of that for Virginia. The respondent maintained that the additional amount payable for Burley based on this clause was part of "the auction floor value."The appellant argued it was not.

Held, that insurance policies were to be construed according to the same principles as are applied to commercial contracts generally. The court must try to ascertain the intention of the parties by examining the

language of the contract itself. If, after doing this, there is still uncertainty about the intention of the parties, the court can then examine the surrounding circumstances.

Held, further, that the insured is not obliged to disclose every single fact in his possession to the the insurer but only material facts. But if the insurer requests information from the insured, the insured must truthfully supply the information, even if the information sought does not relate to material facts. Every insurer is presumed to be acquainted with the practices of the trade he insures.

Held, further, that the appellant had not asked the respondent about the mechanism by the which the auction floor value was fixed and the respondent was under no obligation to disclose this information to the appellant. In the past the appellant had been content to accept insurance premiums based on the prices fixed by agreement between the seller and the purchaser and the appellant had impliedly waived its right to such information.

Held, further, that the appellant knew, or was presumed to have known, that the business practice and custom was that auction floor value was always fixed by agreement between the seller and the buyer. The seller and buyer had agreed that the average auction floor value for Burley tobacco was to be no less than 15% below the auction floor value for Virginia. The

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additional amount resulting from the differential percentage between the price of Virginia and Burley established at conclusion of Virginia sales on Auction Floors was thus part of the auction floor value.

Cases cited:

Quick v Goldwasser 1956 R & N 302 (SR)

Avon Ins Co Ltd v Read RLR 697 (G)

Jason v British Traders Insurance Co Ltd [1969] 1 Lloyds Rep 280

Scottish Union & National Ins Co Ltd v Native Recruiting Corp Ltd 1934 AD 458

Pioneer Shipping Ltd v BPT Tioxide [1981] 2 All ER 1030 (HL)

Dalmas Milling Co v Du Plessis 1955 (3) SA 447 (A)

Prenn v Simmonds [1971] 3 All ER 237 (HL)

Noble v Kennoway (1780) 2 Doug KB 510

Laing v Union Marine Co (1895) 1 Com Cas 11

In re *An Arbitration between Hooley Hill Rubber & Chemical Co Ltd and Royal Ins Co Ltd & Ors* [1920] 1 KB 257

M J Gillespie for the appellant

A P de Bourbon SC for the respondent

KORSAH JA

Judgment

Korsah JA: This is an appeal by an insurance company against the decision of Mtambanengwe J handed down in the High Court, Harare, on 22 October 1992, wherein the appellant was ordered to pay to the respondent:

(a) the sum of $9 145 617,20;

(b) interest in the sum of $9 485 405,32 at the prescribed rate from 22 January 1992 to 13 March 1992;

(c) interest on the sum of $9 145 617,20 at the prescribed rate from 14 March 1992 to the date of payment; and

(d) costs of suit.

The respondent, in its business as tobacco merchants in Zimbabwe, purchases and stores in warehouses in the country both Virginia and Green Burley tobacco. The respondent is the

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owner of a property at Salford Road in Harare upon which a warehouse is situate. The warehouse is leased to Tabex Dibrell Processors (Pvt) Ltd (Tabex Dibrell) in which the respondent has a 50% interest.

In terms of an agreement between the respondent and Tabex Dibrell, tobacco purchased by the respondent is stored for it by Tabex Dibrell. Pursuant to that agreement certain Green Burley Tobacco purchased by the respondent was stored in the warehouse at Salford Road on 1 October 1991.

By a policy of insurance first entered into by the parties herein in 1984 and renewed yearly thereafter, the appellant, as insurers, undertook to indemnify the respondent *inter alia,* in respect of loss or destruction of all its tobacco purchases, whether Virginia or Green Burley, wherever the tobacco might have been stored in Zimbabwe. During the course of the annual renewals, various amendments were made to the contract.

In an insurance policy of such a nature a system of value has to be agreed by the parties as a basis, not only for the determination of loss, but also for the calculation of the premium payable by the insured.

Three bases of value were agreed by the parties as of 1 March 1990. Considered in reverse order they are as follows:

KORSAH JA

(a) As regards the transit risks Free on Rail to final destination in Zimbabwe, the valuation is based on the "FOB price plus 20%". Thus the respondent is covered for all costs up to the FOB stage, together with an additional 20%;

(b) Insofar as what is termed the "Old Crop"is concerned, the value is based on the packed cost plus 100 cents per kilogram. By such evaluation all the costs which went into the acquisition and packaging of the tobacco, whether Virginia or Burley, is covered, inclusive of the price of transportation and storage charges together with an agreed overhead of 100 cents per kilogram; and

(c) In respect of the "New Crop", that is to say, "Green Leaf"or "unpacked stock", it was agreed that the basis of valuation would be the auction floor value plus 95%. This again applied to both Virginia and Burley as the policy was in relation to both.

I mentioned earlier that since the contract was entered into in 1984 it had been subjected to amendments. From its inception in 1984, the basis of valuation of Green Leaf or unpacked stock was "auction floor value plus 75%". The additional percentage remained at 75% up to 1987, but was increased to 80% in 1989. With effect from 1 March 1990 it was agreed this figure be increased to 95%. In similar manner, the Old Crop for which the agreed value was: "Packed cost plus 75 cents per kilo"in 1987 had, by 1990, been altered by the parties by the substitution of 100 for 75. There is thus evidence that the parties from time to time came to a consensus as to how the various species enumerated above were to be valued for the purposes of the policy. It is significant that the three bases of valuation are found under a heading of the

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policy which reads "AGREED VALUE".

In Zimbabwe, by law, all Virginia tobacco is sold by auction on the tobacco floors in the country. The floor value is thus determined by agreement between the seller and the purchaser or, in the absence of agreement, fixed by an arbitrator.

As regards Burley tobacco, on the other hand, no actual auction occurs. It is purchased by a consortium (the respondent), at a negotiated pre-determined price. It is thus strictly a misnomer to apply the term "auction floor value" to the determination of the value of Burley tobacco. The fact, however, is that the parties chose to incorporate the clause "auction floor value"in the determination of the extent of the risk with regard to Burley tobacco.

KORSAH JA

Both counsel agreed that the fact that a formal auction was not held in respect of Burley tobacco was irrelevant. Mr *Gillespie* contended, however, that what was known to the parties and was the basis of the contract and the essence of the calculation of premiums, was that at the auction floor a price was determined, that price was invoiced by monthly declarations. It was on receipt of these declarations as to the value of the tobacco that a buyer had purchased that a premium was determined. Premiums were thus assessed *post facto* the event and were always related to the amount raised on the floor by the sellers to the buyers as evidenced and proven by invoices. The clause "auction floor value" must be thus accordingly restricted.

Mr *de Bourbon,* on the other hand, contended that the concept of "auction floor value" was understood by the parties to mean the price paid by the respondent to the Air Cured Tobacco Association (ACTA), whether the price is paid as a single payment or a series of payments.

Every year the price list schedule for the different grades of Burley tobacco was negotiated between the respondent (the Consortium) and the Air Cured Tobacco Association (ACTA). The price list schedule determined the "agreed value" or "the auction floor value"of Burley tobacco. The appellant was never a party to those negotiations, but was aware that there was a negotiated price list schedule which applied to the different grades of Burley in the determination of their "agreed value"or their "auction floor value".

In the 1991 Burley Price List Schedule to the Agreement between the respondent and ACTA, a condition which hitherto had been conspicuous by its absence from other Price List Schedules, was introduced. It reads:

> "The above price list for the 1991 Selling Season, has the objective of achieving an average of 650c/kg for a good average crop, with the proviso that the average Virginia price must not exceed the average Burley price by more than 15%. If this occurs the Consortium undertakes to award the Burley Marketing Association the differential percentage on total sales within thirty days of the closure of the Tobacco Sales Floor Ltd."

On 1 October 1991, a conflagration occurred at the Dibrell Tabex warehouse in Salford Road. Most of the tobacco stored by the respondent in that warehouse was consumed by the fire. The rest was affected by the fire. The tobacco so destroyed by the fire happened to be Burley. The issue for resolution is whether the differential percentage on total sales to bring the

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KORSAH JA

price of Burley to within 15% of the price of Virginia can be classified as part of the "auction floor value".

The principles of construction applicable to insurance policies are the same as those applied to commercial contracts generally. *Quick v Goldwasser* 1956 R & N 302 (SR) 306-7; *Avon Insurance Co Ltd v Read* RLR 697 (G) at 702I; *Jason v British Traders Insurance Co Ltd* [1969] 1 Lloyds Rep 280 at 290. The task of a tribunal endeavouring to interpret a contract of insurance is to ascertain the intention of the parties as gathered from the language of the contract itself, in relation to the facts in dispute. *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 465; *Pioneer Shipping Limited v BPT Tioxide Limited* [1981] 2 All ER 1030 (HL) at 1035.

If uncertainty as to the intention of the parties persists after a linguistic interpretation of the contract, recourse may be had to the "surrounding circumstances": *Dalmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447(A) at 454F-455C; *Prenn v Simmonds* [1971] 3 All ER 237 (HL) at 239j-240a. The surrounding circumstances, as detailed above, were that the appellant had never interested itself in the agreement between the respondent and ACTA by which the price of Burley is fixed for each year. The papers show that there was no history of notification of the pricing structure to the appellant. The appellant had always accepted without query "the pricing structure" agreed between the respondent and ACTA.

The real point intended to be raised is that of so-called concealment. What the appellant is really saying is that it was not informed of the agreement to apply a differential percentage on total sales to bring the average price of Burley to within 15% of the average price of Virginia.

It appears to me that where the underwriter insures and has notice that he is insuring the total value of a commodity, he takes his chance as to what that liability might be. An insured is not bound to tell the underwriter every fact, but only the material facts. His obligation is to supply truthfully all the information that the underwriter asks for - whether a material fact or not. If he answers it falsely, with an intent to deceive, though it may not be a material fact, it will vitiate the policy. The underwriter has a right to have his questions truthfully answered, but that is not the issue in this case. As Mr de Bourbon rightly observed:

> "The appellant was content to allow the fixing of the price of each grade

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> to be left to ACTA and the Consortium. It sought no part in that process, and was merely content to receive its premiums based on the tobacco as graded and the amount paid for that grade per kilogram."

"Every underwriter,"said LORD MANSFIELD in *Noble v Kennoway* (1780) 2 Doug 510 at 513, "is presumed to be acquainted with the practice of the trade he insures. If he does not know, he ought to inform himself". See also *Laing* v Union Marine Co (1895) 1 Com Cas 11.

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The learned authors of Gordon and Getz *The South African Law of Insurance* (3 ed), list at p 116 of their work, facts which need not be disclosed by the insured to an underwriter, in the absence of enquiry by the underwriter. In that list is included:

> "2. Any circumstances which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of business, as such, ought to know; and
>
> 3. Any circumstances as to which information is waived by the insurer."

This is in accord with the above dictum of LORD MANSFIELD

The appellant knew, or was presumed to know, that the business practice and custom was that the "auction floor value"was always fixed by agreement between the seller and the buyer. Once the seller and the purchaser agreed that the average "auction floor value"for Burley was to be no less than 15% below the average "auction floor value"for Virginia, that became the auction floor value for Burley. Thus the differential percentage on total sales to bring the price of Burley to within 15% of the price of Virginia, was part and parcel of the auction floor value of Burley.

The respondent was not asked, and it was under no obligation to disclose to the appellant the mechanism by which the "auction floor value" of Burley was fixed. The appellant, it seems to me, impliedly waived its right to any such information regarding the fixing of the "auction floor value" and contented itself with receiving premiums on the value of tobacco purchased by the respondent. This had been the practice acted upon by the parties for all the years that the policy had been in force. "It is a salutary rule", said BANKES LJ in In re *An Arbitration between Hooley Hill Rubber and Chemical Company Limited, and Royal Insurance Company Ltd and Ors* [1920] 1 KB

KORSAH JA

257 at 269, "that the courts should be chary in interfering with the interpretation given to a well known document and acted on for any considerable period of time".

As already indicated, premiums were assessed in accordance with monthly declarations of all tobacco purchased. All proper declarations were made by the respondent through its brokers HIB (Pvt) Ltd to the appellant monthly from 30 April 1991 to 30 September 1991. The respondent thought it prudent to include an estimate of the differential percentages on total sales in the declaration of monthly purchases as of 30 September 1991. That declaration was contained in a letter dated 2 October 1991.

The conflagration occurring as it did on 1 October 1991, it was apparent from the date of the letter in which the September declaration was made ie 2 October 1991, that a claim would be made on the appellant in terms of the policy. The differential percentage on total sales could only be established after the conclusion of the sale of Virginia tobacco on the Auction Floors in Harare. This was finally established by the declaration of 5 December 1991, forwarded by the respondent's brokers HIB (Pvt) Ltd, to the appellant by letter dated 12 December 1991.

The appellant by letter dated 22 January 1992, dispatched to HIB (Pvt) Ltd an endorsement

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bearing the date 13 January 1992, on the policy, setting out the premium calculated in respect of the tobacco, taking into account the additional amount resulting from the differential percentage between the prices of Virginia and Burley. A debit note for the premium so assessed was also sent to the respondent's brokers.

Although the appellant contends that the premium assessed on the final declaration of 5 December 1991 was done by it in ignorance of the provision in the agreement between the respondent and ACTA relating to the differential percentage on total sales between auction floor values of Virginia and Burley, such ignorance is suggestive of a conclusion that the appellant understood the policy, and undertook to cover the respondent for whatever value plus 95% of all Burley tobacco purchased by the respondent and stored in its warehouse. Such a conclusion derives support from the fact that the appellant was aware that Burley was not auctioned and the determination of price was a matter for the respondent and ACTA to resolve. The appellant's sole interest was to calculate the premium that should be paid by the respondent to it on whatever value of tobacco the respondent purchased.

KORSAH JA

With the concession on behalf of the respondent that the very earliest date from which interest could run was 22 January 1992, as indicated by the trial court, no other issue remains for resolution.

On my part, I can find no fault with the conclusions arrived at by the learned trial judge, though my reasoning may have been somewhat different.

I would, therefore, dismiss the appeal with costs.

Gubbay CJ: I agree

McNally JA: I agree

Gollop & Blank, appellant's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

FAWCETT SECURITY OPERATIONS (PVT) LTD v DIRECTOR OF CUSTOMS AND EXCISE & ORS 1993 (2) ZLR 121 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Civil appeal

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29 July & 27 August 1993

Flynote

Revenue and public finance - import licence to import vehicles - licence holder purporting to transfer to another - whether Ministry had approved change of importer - whether person to whom transferred had acted illegally

Headnote

A person had been granted a licence to import twenty vehicles. The licence had not specified details of the vehicles to be imported. The licence grantee had then sold that licence so that the appellant could import five vehicles under the licence. The licence grantee had told the appellant that the vehicles could be imported in the appellant's name. At the time it was common practice for the Ministry of Industry and Commerce to allow tranference of an import licence by endorsing on the licence that the second party could import the goods. An endorsement had been made to this licence.

Before paying out the considerable sums owed for import duty and tax on the imported vehicles, the appellant had made enquiries from from the relevant customs authorities about this proposed transaction and had received categorical assurances that it was legal. However, after the vehicles were imported they were seized by Customs on the basis that they had been imported without a valid import licence.

Held, that the probabilities were that the endorsement on the import licence indicated that the Ministry had approved the transfer of the licence to the appellant.

Held, that the appellant had been a *bona fide* purchaser for value and equity was on its side.

McNALLY JA

Held, further, that if anything illegal was done it had probably been done by the licence grantee. On a balance of probabilities the appellant was not involved in wrongdoing. Although it had initially harboured some suspicions about the legality of the transaction, it made enquiries of the proper people in authority who advised that it could go ahead as what it was doing was legal.

In the light of these findings the court ordered the Reserve Bank to give authority to the appellant for the purchase of the vehicles, and the Ministry to issue the import licence for these vehicles on receipt of the authority from the Reserve Bank. In making the order against the Reserve Bank it was not ordering the Reserve Bank expend foreign currence, something which the court could not do. The foreign currency in respect of these vehicles had already been paid.

AP de Bourbon SC for the appellant

MJ Gillespie for the respondents

Judgment

McNally JA: This case demonstrates the triumph of bureaucracy over good sense. It is not

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easy to set out the facts simply. I will begin by saying that I will call the parties respectively "Fawcetts", "Customs", "the Ministry" and "the Reserve Bank".

The story begins with a man who was not a party, and who, strangely, is untouched by any litigation in relation to the facts of this case, although he would seem to be the author of Fawcetts' misfortunes. He is a Mr Eric Nhodza who controlled a company called Selective Business Machines (Pvt) Ltd.

Somehow, it appears, Mr Nhodza managed to obtain an import licence authorising him to import twenty vehicles to a maximum value of $650 000. And he also obtained the necessary foreign currency. It may be noted that this import licence did not specify any particular vehicles. Under the heading "Particulars of goods" it said simply "Twenty motor vehicles". And the licence was issued to "Magnum Distributors" which is not the name of a person or of a company. It is simply a trading name, apparently used by Mr Nhodza. This is significant because the law forbids an importer of motor vehicles in such circumstances to sell the vehicles to another party. This is because the import licence was stamped "goods not for resale" and such a restriction is authorised by the Control of Goods (Import and Export) (Commerce) Regulations 1974 (RGN 766/1974). Was it then not remarkably careless of the Ministry to issue a licence to a non-person and to word

the licence so widely instead of writing "Twenty motor vehicles as per attaced list?"

But let us return to the facts. Mr Nhodza, armed with his licence and his currency, spoke to Mr Collyer, the Cash-in-Transit Manager of Fawcetts. He told Mr Collyer that he could obtain for Fawcetts the 1.3 litre Nissan Sentra motor vehicles they needed. They could be lawfully supplied if Fawcetts simply gave him an order, made out to his company, Selective Business Machines (Pvt) Ltd, to purchase such vehicles.

Mr Collyer was very interested. He had been trying, so far without success, to obtain authority to import five such vehicles. He asked Mr Nhodza how his company could sell them to Fawcetts after bringing them in if restrictions on disposal were placed on the importer.

"No problem" said Mr Nhodza. The vehicles would be imported in the name of Fawcetts. So, a few days later, on 23 May 1991, Mr Collyer gave Mr Nhodza a written order for five Nissan Sentras. But he stipulated orally, that before a binding sale agreement took place, Mr Nhodza would have to produce the customs clearance documents which he, Collyer, would then show to Customs to verify whether the vehicles had been duly imported. He was clearly not entirely happy that the proposal was legal.

On 14 June 1991 five Nissan Sentras were imported via Beit Bridge. They were customs cleared by a reputable firm of clearing agents appointed by Mr Nhodza. The necessary import duties and taxes, amounting to $102 563 were paid. Zimbabwe Bill of Entry 1305 dated 14 June 1991 was issued. The importer was shown as "Fawcett Security". The document is Exh K in the papers. The relevant employee of the clearing agent testified, in an affidavit, that he had gone

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through the normal procedures.

In particular he testified that:

1. Customs always check that the identity of the importer as shown on the Bill of Entry is the same as that of the holder of the import licence;

2. It is common practice for the Ministry to allow the transfer of an import licence, and this is done by a Ministry rubber stamp endorsement on the licence validating the importation of the goods by the other party named in the endorsement.

McNALLY JA

3. There was, in this case, such an endorsement. He produced the licence so endorsed as Exh D 2 The endorsement reads:

> "valid for Customs clearance and payment by Fawcett Security, to be delivered to the importer and to be used by him."

Now it is cunningly argued by the Ministry that this endorsement does not transfer the licence, or part of it, to Fawcetts. It does no more than allow Fawcetts to undertake the customs clearance of the vehicles and to pay the relevant charges.

Grammatically this is a good argument. But it is with great respect, intellectually dishonest. Customs clearing agents normally clear goods for companies. It is not the function of a firm like Fawcetts to do so. Why should Fawcetts want to clear goods and pay over $100 000 in duty and charges for someone called Magnum Distributors?

And in any event, Fawcetts did not clear the goods. The clearance was done by a firm of customs clearing agents, Allen Wack and Shepherd. This would have been apparent to the Customs authorities at Beit Bridge. So they did not act as if Fawcetts were clearing the vehicles for Magnum Distributors. They acted on the basis that Allen Wack and Shepherd were clearing the vehicles on behalf of the importers, Fawcetts. So obviously they understood the endorsement in the (ungrammatical) sense that Fawcetts were the substituted importers. The only other possible explanation is that the Customs official at the border was also a part of the illegal conspiracy, but this seems unlikely.

Why would the name of the importer on the Bill of Entry be shown as "Fawcett Security" if the Ministry's contention is correct? Incidentally the letter from the Ministry to Customs dated 26 September 1991 speaks incorrectly of the licence being issued to Magnum Car Hire. The licence was issued to Magnum Distributors.

It seems much more probable that the clearing agent's explanation is correct. The endorsement was used, whether grammatically correctly or not, to indicate that the Ministry had approved a change of importer. And it was so understood by Customs. If Customs were at fault, in so understanding the endorsement - see s 8 of RGN 766/74 - then they are partly to blame for what has happened.

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In any event the vehicles were imported, and on 17 June 1991 Mr Nhodza delivered to Mr Collyer the Bill of Entry.

McNALLY JA

Armed with this Bill of Entry, Mr Collyer, obviously still not entirely convinced that all was well, proceeded to the Customs Office in South Avenue. He produced the Bill of Entry. He asked a Customs officer on the ground floor if the Bill of Entry was valid. The Customs officer said that it was.

Still not satisfied, Mr Collyer asked to see a senior officer, and was referred to the first floor where he was confronted by a man not in uniform at a counter. He showed him the Bill of Entry. He repeated his enquiry and also asked for confirmation that the full import duty had been paid.

This man studied the document. He asked Mr Collyer if Fawcetts had brought the goods into the country. Mr Collyer said no; they had been brought in by a Mr Eric Nhodza.

The man then took the Bill of Entry and went into a small office. A few minutes later he came back and said all was in order and the full import duty had been paid.

Mr Collyer then did two things to make sure all was well. First he told the man that his company was going to spend a great deal of money based on that assurance. So could the man give him an assurance? The man said yes, and gave him back the Bill of Entry.

Secondly, Mr Collyer asked for his name which he gave as Mr P Pisa. On 26 June he wrote a letter for the attention of Mr P Pisa, to confirm all that had occurred.

None of this is denied by Customs. No affidavit by Mr Pisa was filed. No denial was made that there was such a person in Customs who had authority to speak for Customs.

So, on 17 June 1991, that very same day, Fawcetts paid Selective Business Machines (Pvt) Ltd the sum of $453 000. On that day the vehicles were delivered to Fawcetts. Customs Clearance Certificates were issued in respect of the vehicles and they were registered the next day with the vehicle licensing authorities. The registration books were endorsed with a condition prohibiting transfer without Exchange Control approval.

Then, on 25 July 1991, the vehicles were seized by Customs. The allegation was that they had been imported without a valid import licence. The import

McNALLY JA

licence issued was, so it was said, issued in respect of twenty vehicles, different from those imported. The list of twenty chassis numbers and engine numbers had been provided by Magnum Distributors (or Magnum Car Hire or Selective Business Machines (Pvt) Ltd or Mr Nhodza) but it had not been deemed necessary to attach it or refer to it on the face of the import licence. And anyway the import licence was issued not to Fawcetts but to Magnum Distributors.

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The fact that Magnum Distributors is a non-person does not seem to have been a matter of concern to the Ministry.

The five vehicles in question were quite legitimately purchased in South Africa and paid for, presumably in South African Rands. There is no question of their being stolen vehicles. Payment for them has presumably been made with the consent of the Reserve Bank. No contrary point has been made by any of the respondents.

On the face of it, therefore, if anything unlawful has been done, it has been done by Mr Nhodza conspiring with the official in the Ministry who first granted him the conveniently worded import licence (and has apparently granted him another licence for another thirty vehicles) and later placed the endorsement on it.

No indication is given as to any action taken or investigation made into the activities of this official. Yet the obvious question for him to answer is "why did you place the endorsement on the licence?"

It cannot have been, as the Secretary for Industry and Commerce blandly says, to allow Fawcetts to clear the vehicles on behalf of Magnum Distributors. Fawcetts had no possible interest in clearing the goods on behalf of Magnum Distributors. Moreover Magnum Distributors did not need to ask Fawcetts to clear the vehicles for them. They were using Allen Wack and Shepherd. And Allen Wack and Shepherd do not apparently need any endorsement to enable them to clear the vehicles.

The other question is: "Why was the licence granted for twenty vehicles without qualification when it should have been stated that it was for twenty specific and identified vehicles"? The answer given in the affidavit by the Secretary for Industry and Commerce is "there is no space on the licence to write thirty (he means twenty) engine and chassis numbers". Again, with respect, this is a prevarication. The proper practice would be to write "twenty motor vehicles as per attached list" or words to that effect. See s 5(2)(a) of RGN 766 of 1974.

McNALLY JA

And the final question is: "Why issue an important document like this to a non-entity"? Magnum Distributors is not a person. It is neither a real person nor an artificial person. The licence should have been issued either to "Mr Eric Nhodza" or to "Mr Eric Nhodza trading as Magnum Distributors" or to "Selective Business Enterprises (Pvt) Ltd".

There is no doubt in my mind that, of the parties before us, the Ministry is the main villain of the piece. Its conduct is inexcusable and its explanation of that conduct is unacceptable.

It may be said - what about Fawcetts? Is it not likely that they were a deliberate party to the illegality? And if so, have they not only themselves to blame for the fact that they had lost over $453 000?

On the papers it seems to me that, on the usual test of a balance of probabilities, Fawcetts cannot be accused of complicity in wrongdoing. It is evident that they were suspicious from the

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beginning. But they took reasonable steps to allay that suspicion. They made enquiries of the proper people and they were advised that they could go ahead and pay in the region of half a million dollars, because the purchase was legal.

The most significant point in their favour is that they set out in full detail their consultations, and invited rebuttal, and there was no rebuttal. There is no affidavit from Mr P Pisa. There is no affidavit from someone else in Customs to say that Mr Pisa does not exist. Customs representative, the Acting Director, Mr Marshall, simply does not answer these important points in his paras 11 and 12.

The simple rule of law is that what is not denied in affidavits must be taken to be admitted. Therefore Customs have in effect conceded that they were asked by Fawcetts whether all was well, and they advised that it was. It does not seem to me that Fawcetts could reasonably be expected to do more.

I cannot, therefore, with respect, agree with the finding of the learned judge *a quo* that Mr Collyer was, as a matter of probability, not as ignorant of the law he would have the court believe. Moreover, it is not correct to say that he relied on Mr Nhodza to expound the law. He relied on the assurance of Mr Pisa of Customs. I have concluded it was reasonable of him to do so.

Fawcetts are thus, to use another well established legal term, properly to be described as *bona fide* purchasers for value. Equity must be on their side. And

McNALLY JA

generally speaking, equity is built into Roman-Dutch law. Because Roman-Dutch law is a set of broad principles, whereas English law at one stage became excessively formalised, it has not been necessary in the Roman-Dutch jurisdictions, as it was in England, to introduce a separate system of equity.

Against that background one searches for a solution. And indeed each one of these respondents offers a solution. Customs letter of 7 October 1991 to Fawcetts legal advisers states:

> "If your client wishes to recover these vehicles they should submit a valid import licence and pay the $5 000 fine ..."

The Ministry says it will issue an import licence but first:

> "The Applicant must produce an Exchange Control authority from the Reserve Bank ..."

The Reserve Bank says, in relation to the case as a whole:

> "The Reserve Bank of Zimbabwe will not be filing any pleadings in opposition thereto."

Yet it is averred, and not denied, that Fawcetts applied to the Reserve Bank for Exchange Control authority and was turned down. The application was made on 20 February 1992. The

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statement set out above was made in a letter from the Bank's legal adviser dated 8 May 1992.

One cannot understand the attitude of the Reserve Bank. On the one hand it blocks the relief sought. On the other it says it will not oppose the relief sought.

The solution, it seems to me, lies in taking the Reserve Bank at its word. Its most recent attitude, superseding its refusal to issue exchange control authority, is that it does not oppose the relief sought by Fawcetts. It abides the judgment of the court.

There might be difficulty in ordering the Reserve Bank to issue such an authority if it meant the actual disbursement of what is generally called Forex. The power of the executive to ration and allocate foreign exchange reserves is not one with which generally speaking the Judiciary can interfere.

McNALLY JA

But here we are not concerned with the expenditure of foreign exchange. That has all been done long ago. The exchange control authority required is no more than a formality. The court is not ordering the executive to expend foreign currency.

Nor is it appropriate that Fawcetts should pay a fine to Customs as demanded. They had nothing to do with the importation. Their name was simply used by Nhodza. If Customs had acted as the Ministry says they should have, the importation would never have been allowed and Fawcetts would have lost nothing. So their plight is due, at least in part, to the actions of Customs, both at the border and at Customs Head Office in Harare.

As far as costs are concerned I do not propose to make an order against the third respondent. Although its initial attitude was unhelpful, its decision to abide by the judgment of the court was a proper one and opened the way to a solution.

Although it would seem that the second respondent was more guilty than the first respondent, it would be invidious to distinguish between them in regard to costs.

Accordingly the following order is made:

1. The third respondent is hereby ordered and directed to issue to the appellant, with a copy to the second respondent, an exchange control authority for the purchase of the five vehicles which are the subject of this appeal, in the appropriate form. Such authority may, if required, indicate that no foreign currency is involved or is to be involved.

2. The second respondent is hereby ordered and directed, on receipt of the above authority, to issue to the applicant an import licence in respect of the five vehicles which are the subject of this appeal, subject to such normal conditions as to resale as are appropriate.

3. The first respondent is hereby ordered and directed, on sight of the above import licence, to release the said five vehicles to the appellant without further charge or penalty.

4. The costs of the appellant both in this court and below are to be borne by the first and

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second respondents jointly and severally.

McNALLY JA

Gubbay CJ: I agree

Ebrahim JA: I agree

Atherstone & Cook, appellant's legal practitioners

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

S v NKNOMO & ANOR 1993 (2) ZLR 131 (SC)

Court **Supreme Court, Bulawayo**

McNally JA, Muchechetere JA & Cheda AJA

Criminal appeal

2 & 30 August 1993

Flynote

Criminal procedure (sentence) - death sentence - lengthy delay between passing of sentence and hearing of appeal - effect

Evidence - extra-curial statement - admissibility - confrontation by police - to what extent permissible

Headnote

Confrontation is a permissible element of police interrogation procedures, provided it is not improper or persistent. It is not improper to tell a suspect that his co-accused has confessed where that indeed has happened, nor is it improper for the police to tell the suspect that they know about an incident connected with the alleged crime.

Where the appellants had been sentenced to death on 17 November 1988 and their appeal heard only in August 1993 because of the length of time taken to prepare the record of trial, the appeal against the sentence of death was adjourned for argument to be addressed to the court as to why the death sentences should not be altered to sentences of life imprisonment because of the delay, even though no extenuating circumstances existed.

Cases cited:

R v Hackwell & Ors 1965 RLR 1 (A)

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R v Hlupe 1964 RLR 333 (G)

R v Kuzwayo 1949 (3) SA 761 (A)

CCJP v A-G & Ors 1993 (1) ZLR 242 (S); 1993 (4) SA 239 (ZS); 1993 (2) SACR 432 (ZS)

McNALLY JA

S N Sitole for the appellants

M Majuru for the respondent

Judgment

McNally JA: The two appellants were sentenced to death by Blackie J in Bulawayo in November 1988. The exact date of the sentence is not shown on the record. The cover indicates 11 November. The trial started however only on 14 November. The warrant of execution shows the date as 17 November. The respondent's heads of argument speak of 18 November. The most likely date is 17 November.

The murder for which the two appellants were convicted is alleged to have taken place on 17 April of that same year. On 22 April 1988 a farm labourer on Buyabona Farm, Rosebank, Bulawayo, noticed an unpleasant smell which he traced to a disused well. There was an iron bar near the well and bloodstains on the edge of the well. The body of the deceased, Gideon Ncube, was found in the well, partly decomposed.

The two appellants were arrested and questioned by the police. They fell under suspicion because they had been seen to be associated with the deceased. It was also a fact, and this information had been conveyed to the police, that the deceased had been recognised some nights earlier, stealing potatoes from a neighbouring farm with two (unrecognised) companions.

The arrests took place on 23 April 1988. On 24 April Elijah Moyo, the second appellant, was taken from his cell at Bulawayo Central Police Station and questioned. After a short while it is alleged that he admitted that he committed the murder along with Mbulawa Nkomo. After that Mbulawa Nkomo, who had spent the night in detention at a different police station, was questioned. He, too, admitted that he had murdered the deceased with Elijah Moyo.

Moyo's statement was recorded at 11.40 on 24 April 1988. Nkomo's statement at 14.20 on the same day. On 25 April Moyo was taken out to make indications, which he did. On 26 April both appellants were taken before a magistrate to have their statements and the indications confirmed. As far as Moyo was concerned no problem arose, and his statement and indications were confirmed.

The situation with Nkomo was different. He was asked by the magistrate:

> "Did you make the statement?"

He replied:

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McNALLY JA

"Yes."

He was then asked:

"Did you do so freely and voluntarily without having been unduly influenced thereto?"

He replied:

"Yes. I was beaten on Saturday, soon after arrest. But the beating had nothing to do with my statements."

He was asked:

"Have you in any way been influenced, encouraged or forced by the Police or anyone else to make this statement?"

He said:

"No."

Then he said:

"While we were being beaten nothing was being demanded of us. I thought they were beating us so that we might admit the charge. But I did not admit for that reason. I simply admitted because I had committed the offence and there was nothing I could do. I only admitted after the beating because they had beaten me. When they first asked me whether or not I admitted the charge I denied the truth. If they had not beaten me I was going to tell them the truth anyway."

In the result the magistrate declined to confirm the statement. Accordingly, a trial within a trial became necessary and was conducted.

The three policemen involved gave evidence. In fact, their evidence covered both appellants. The investigating officer said that Moyo, the second appellant, had been questioned first, had denied all knowledge of the offence but had then admitted his involvement. The whole interrogation had been a matter of minutes. Then the first appellant had been brought in. He also initially denied any involvement, but when he was told that the police knew all the facts he "panicked". The investigating officer put it this way:

"When we took him out of the cells and brought him to the office he said: "I do not know anything about this offence". Then I started talking about how they had gone to this farm and this and that, and that was the time

McNALLY JA

that he started admitting that they had done it together with Elijah Moyo."

All three policemen denied any assault. Two of them conceded that it was the police's knowledge of the facts, especially about the potato theft, which caused Nkomo to "crack". The third did not recall that. The first appellant spoke of being assaulted (though the allegations differed from those outlined initially by his counsel). He said he freely admitted the potato theft

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but denied the murder. He was very confused and contradictory. He denied signing his statement, then admitted it. He said he was told not to complain to the magistrate under threat of further assaults. Yet he did complain to the magistrate. He said his admission to the magistrate was only about the potatoes, not about the murder. This was clearly untrue.

He was rightly disbelieved by the trial judge. At the appeal hearing Mr *Sitole* relied more on the confrontation. He conceded that the first appellant made no mention of that, but pointed to cases in which it was said that that consideration, though relevant, was not decisive. He referred us to *R v Hackwell & Ors* 1965 RLR 1 (A) at 5B; *R v Hlupe* 1964 RLR 333 (G) at 335C; and *R v Kuzwayo* 1949 (3) SA 761 (A).

The difficulty about reliance on these old cases is that they were decided, or at least the local ones were, in the era before the confirmation procedure was introduced. But in any event it seems to me to be clear that there was nothing improper in telling the first appellant, Nkomo, that his colleague had admitted and that they, the police, knew about the potato stealing incident. What the cases condemn is not confrontation as such but improper and persistent confrontation. In *Hackwell's* case, the appellants had been questioned and confronted late into the night and had slept handcuffed together on the charge office floor. In *Kuzwayo's* case, there had been a confrontation, a confession and a confirmation and the statement was held to be admissible. In *Hlupe's* case, there was intensive interrogation over three days.

I am satisfied, not only by the evidence as to what took place when the statement was recorded, but even more by the evidence of what took place before the magistrate, that this statement was made freely and voluntarily and without undue influence. I agree with the learned judge's conclusion.

In regard to the second appellant, the State's position is even stronger. He made indications, and both his confession and his indications were confirmed before a magistrate.

McNALLY JA

I can see no reason to interfere with the decision of the learned judge, who concluded that it had not been shown that the confession and indications were inadmissible.

The discovery of the body, which had slight signs of head wounds, the iron bar, and the bloodstains on the edge of the well, are evidence *aliunde* of the commission of the offence. The confessions unambiguously link the two appellants to the murder. Actual intent is established.

There can be no question of extenuating circumstances. The murder was planned deliberately to get rid of a witness who had been recognised during the potato theft. If he was arrested, he would point the finger at them. Therefore he was lured away, on the pretext of looking for honey, and disposed of.

Although the police brought the matter to court with commendable speed - seven months - the same cannot be said about the delay in preparing the record.

The appellants have been on death row since mid-November 1988, a period of over four years

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and nine months, or 57 months.

In these circumstances, it seems to me that I must consider the decision of the Full Bench of this court in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Ors* 1993 (1) ZLR 242 (S); 1993 (4) SA 239 (ZS); 1993 (2) SACR 432 (ZS). The period of delay in that case was 52 months in the one case and 72 months in the other. The present case falls between the two. Similarly, these appellants were represented *pro Deo* and have done nothing to delay their appeals. I can see no distinction between that case and this.

However, since the point was not raised by counsel, and since the Attorney-General is entitled to be heard on matters concerning the Declaration of Rights, I propose to follow the same course as did the CHIEF JUSTICE in *S v Chitiza* S-64-90.

Accordingly I would make the following order:

1. The appeal against conviction is dismissed.

2. The appeal against sentence of death is adjourned to a date to be set by

McNALLY JA

the Registrar of this court, in order for argument to be addressed on the question of whether, for the reasons set out in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Ors* 1993 (1) ZLR 242 (S); 1993 (4) SA 239 (ZS); 1993 (2) SACR 432 (ZS), the sentences of death should not be altered to sentences of life imprisonment.

3. It is certified that in terms of s 3(a)(iii) of the Legal Assistance and Representation Act [*Chapter 66*] the appellants shall have legal assistance in the preparation and presentation of their arguments.

Muchechetere JA: I agree.

Cheda AJA: I agree.

Pro Deo

KUTAMA v TOWN CLERK FOR THE MUNICIPALITY OF KWEKWE 1993 (2) ZLR 137 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

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6 July & 13 September

Flynote

Elections - unsuccessful candidate in municipal elections complaining about irregularities in conduct of elections - petitioning court for investigation - period within which right to petition must be exercised - requirement that service of copy of petition be made on persons about whom complaints made - whether mandatory requirement

Headnote

An unsuccessful candidate in a municipal election petitioned the High Court claiming that the election had not been freely and fairly conducted. In terms of s 48 of SI 210 of 1987 he requested that the court order an investigation into a number of alleged irregularities surrounding the conduct of this election. The High Court declined to order an investigation. The Supreme Court, dismissing the appeal against the decision of the High Court:

Held, the appellant had unjustifiably failed expeditiously to petition the court and to appeal against the refusal to order an investigation. Although no time period was laid down in the provision allowing for petitioning the court concerning irregularities in an election, it was implied in this provision that the right to petition would be exercised within a reasonable period of time. This was so because the end result of this procedure may be to unseat the successful candidate. It was therefore imperative that the petition be launched as soon as reasonably possible after the election. It was also important that any appeal against a refusal to order an investigation be pursued as a matter of urgency.

Held, further, that one of the irregularities complained of, namely the failure to list the candidates names on the ballot paper in alphabetical order, was

KORSAH JA

so minor in the circumstances that it had had no effect on the outcome of the election.

Held, further, that the other alleged irregularities, such as intimidation of voters, were of a serious nature but they were disputed.

Held, further, that under s 48 of SI 210 of 1987 it was a mandatory requirement that a copy of a petition alleging irregularities in the conduct of an election be served on every person complained of in such petition. This provision was there in order to ensure that any person accused of wrongdoing be informed of the accusation and be given an opportunity to answer it. The appellant had failed to comply with this mandatory provision and this was a fatal flaw in his petition which could not now be remedied.

Cases cited:

Hillingdon London Borough Council v Cutler [1968] 1 QB 124

Howard v Boddington (1877) 2 PD 203

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Liverpool Borough Bank v Turner [1968] 1 WLR 1315

Sterling Products Intl Ltd v Zulu 1988 (2) ZLR 293 (S)

Lion Match Co Ltd v Wessels 1946 OPD 376

Maharaj & Ors v Rampersad 1964 (4) SA 638 (A)

AJ Dyke for the appellant

B Mtetwa for the respondent

Judgment

Korsah JA: This is an appeal against the decision of ADAM J declining the appellant's request for an order that an investigation be conducted forthwith by a regional magistrate into the events surrounding the election of councillors for Ward 10 of the Kwekwe Town Council, held on 7 August 1991, and, in the event that it was found that the elections were not free and fair, to have the results declared null and void, and ordering the appellant to bear the costs of the application.

It was common cause that municipal elections were held to elect councillors for Ward 10 of the Municipality of Kwekwe on 7 August 1991 at the Civic Centre. It was also common cause that the four individuals who sought the honour of being elected councillors and offered themselves as candidates were Reginald Gwisai, Knowledge Hlomula, Margaret Musimbe and the appellant. It was conceded that the names of the four candidates should have appeared in alphabetical order on the ballot papers and that if this had been done the appellant's name would have been third on the ballot paper. It was therefore an irregularity to put the appellant's name on the ballot paper as the

fourth candidate. It would appear that the appellant did not immediately take exception to this on polling day.

The appellant was a member of the political party known and styled as ZANU (PF). He, however, was not the chosen of the party, but put himself forward as an independent candidate for election as councillor.

The appellant alleged in his petition that on polling day on 7 August 1991, shortly after the commencement of the polls, a group of about 30 women of the local ZANU (PF) Women's League, accompanied by a member of the local party youths, started singing and shouting abusive and threatening words against him and his family. He alleged that this group, chanting intimidatory songs and threatening him and his family with diabolical consequences, was located barely 50 metres away from the polling station. He alleged that he observed a 25 litre container of opaque beer being taken to the group by a truck whose doors were marked "ZANU (PF) Midlands Province".

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The appellant alleged that he felt so threatened that he sought and was accorded police protection for his family and himself at his residence by Inspector Gatsi of the Zimbabwe Republic Police. The appellant said that he was confident that, but for the intimidation and the resultant tense atmosphere which scared off a large number of his supporters and kept the polling as low as 248, he could have won a seat on the Council.

Other grievances of the appellant were that a Mr Chinyati, who was the ZANU (PF) Provincial Secretary for the Midlands Province, ordered the polling station staff to follow his instructions and ignore whatever they had been told by the returning officer, a Mr Benny Mloyi. He alleged that at one stage a ZANU (PF) Women's League member actually entered a polling booth and instructed a voter as to the procedure for voting and that it was only after he had protested to the polling officer that the said Women's League member was restrained from indulging in such behaviour and the ballot paper in question retrieved and destroyed. For the above reasons the appellant maintains that the elections were not free and fair.

Given no more than that these accusations are true, I would not have hesitated in concluding with regard to their cumulative effect that there was something seriously wrong with the manner in which the elections were conducted, and to grant the appellant the prayer he seeks. But there are weighty matters for consideration, not least among which is the respondent's version of the conduct of the elections.

KORSAH JA

The respondent conceded, as stated earlier, that the failure to list the names of the candidates on the ballot papers in alphabetical order was an irregularity and that his attention was called to it rather late, though not by the appellant. He explained that, bearing in mind the cost of having to reprint the ballot papers, together with the possible postponement of the election on that score, he considered it an immaterial irregularity and, in the exercise of his discretion, instructed that the elections should proceed. The appellant put in issue this irregularity only after losing the election.

It seems to me that where there are more candidates than the number of vacancies to be filled on a council the position in which a candidate's name appears on the ballot paper is irrelevant. Persons enrolled will vote for the candidate of their choice regardless of whether his name comes first or last on the ballot paper. As the appellant himself alleged, if true, but for the intimidation of his supporters by members of the ZANU (PF) Women's League, he would have obtained sufficient votes to win him a seat on the Council. Obviously, even to him, not having the names of the candidates in alphabetical order on the ballot papers was not an irregularity of any significance or consequence.

The respondent averred that he and his deputy, Mr Ben Mloyi, were constantly visiting the polling station during the polls and spoke to some candidates to find out whether the elections were progressing well; and that none of the candidates, including the appellant, made any complaints.

The respondent categorically denied seeing chanting members of the ZANU (PF) Women's

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League pitch their base a mere 50 metres from the polling station and shouting abusive and intimidatory words to the appellant and/or his family and supporters. He said if there had been any such behaviour the appellant should have complained to him there and then on his numerous visits to the polling station. But not a word of complaint was uttered by the appellant, who even signed the seal on the ballot box, when asked to do so by the returning officer, to indicate that he was satisfied with the conduct of the elections.

The respondent said the point of assembly of the members of the ZANU (PF) Women's League who were singing was distant enough from the polling station as to be ineffectual to interfere with people who were desirous of casting their votes at the polling station.

The respondent said that before the returning officer opened the ballot box

KORSAH JA

for counting of the votes he first asked the candidates whether they were satisfied with the conduct of the elections; and that the appellant was present when this occurred, but did not raise any complaint. If the appellant had any misgivings about the manner in which the elections had been conducted, that was the time to give voice to his dissatisfaction, but he said nothing.

The appellant expressed his discontent with the elections some time after the votes had been counted and it was apparent that he had not won a seat on the Council. Even then, he did not immediately express his dissatisfaction with the conduct of the elections to the respondent until a letter written by his legal practitioners, dated 2 September 1991, almost a month after the elections, was received by the respondent. That letter contains all the grievances above recorded.

On 13 September 1991 the respondent's legal practitioners responded to the appellant's accusations, conceding only the fact that the names of the candidates were not in alphabetical order, but refuting all other allegations. They indicated that the respondent could find no reason for nullifying the election results for Ward 10, and pointed out that should the appellant be so inclined he could petition the High Court in terms of the Regulations for an order that the grounds of his complaint be investigated. The appellant did not react immediately to the suggestion to petition the High Court until the lapse of some two months when, on 18 November 1991, he mounted a petition in the High Court claiming that the elections were not freely and fairly conducted and should therefore be declared null and void. It was at the hearing before Adam J that the appellant amended his draft order to seek an investigation into the grounds of his complaint in terms of s 48 of the Urban Councils (Election) Regulations 1987 (SI 210/1987). The relevant section reads:

> "48. (1) Wherever a poll has been held in terms of these Regulations -
>
> (a) any person who is registered or alleges himself to be registered as a voter in the council area or ward in respect of which the poll was taken, and who complains that at such poll-

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(i) ...;

(ii) ...;

(iii) any other irregularity was committed;

may petition the court that the grounds of such complaint may be investigated.

KORSAH JA

(2) Notice of any petition in terms of subsection (1) shall be given to the returning officer, polling officer or other person complained of in such petition."

A stipulated period of time within which the petition is to be lodged after the taking of the poll is conspicuous by its absence in SI 210 of 1987. However, it is the duty of the courts, in the interpretation of statutes, to try to get at the real intention of the law-giver, by carefully attending to the whole scope of the legislation that is to be construed.

It is unusual to find a statute which requires something to be done, but which does not specify the time within which that act is to be done. I am disposed to the view expressed by HARMAN LJ in *Hillingdon London Borough Council v Cutler* [1968] 1 QB 124 at 135 that, as a general rule, when no specific time is fixed by an enactment for the exercise of a right conferred by the legislation then it is implied that that right would be exercised within a reasonable time.

Of course, Harman LJ was considering the meaning to be assigned to the word "forthwith" in a statute. Sometimes a statute requires an act to be done "forthwith" or "immediately". "Forthwith", said Harman LJ,"is not a precise time and, provided that no harm is done, 'forthwith' means any reasonable time thereafter. "It may involve action within days; it may not involve action for years".

What is a reasonable time is relative to the subject matter of the legislation under scrutiny. As was observed by LORD CAMPBELL in *Howard v Boddington* (1877) 2 PD 203 at 211:

"... as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide ...",

what is intended.

The Instrument under consideration relates to Regulations applicable to urban council elections. Section 48 of the Regulations is concerned with irregularities at such elections which may render either the candidacy or such elections null and void because they were not free and fair. In essence what

KORSAH JA

a petitioner seeks from the court is a decision that either a person is unfit to stand for election

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or the election process was so flawed with irregularities that a just result was not arrived at. In either case, the petitioner is saying that the person or persons elected are either unfit or should not be allowed to take their seats. That being so, it is imperative that a petition to unseat any person or persons from taking their seats on the Council be launched at the earliest possible moment.

In the instant case, the appellant should have petitioned the High Court soon after the irregularities complained of on 7 August 1991 were perpetrated. Instead, he chose to lodge his petition on 16 November 1991. The excuse he gives for the delay, that he was intimidated by members of ZANU (PF), of which he is a member, is not a reasonable explanation for the delay. What could they have done to him then that they cannot do now? No cogent reason was advanced as to why the appellant himself did not immediately bring to the notice of the respondent the threats made against him and his family. Nor indeed does he aver, apart from the mistake in not listing the names of the candidates in alphabetical order, that he brought to the attention of the respondent any of the irregularities complained of. That irregularity, in my view, was of so minor a nature that it had no effect on the outcome of the election.

Having the results of an election declared void is of such paramount urgency that delays in mounting applications to set aside such results cannot be brooked. And any appeal from a decision refusing to order an investigation should be pursued as a matter of urgency. By his failure to have this appeal set down as an urgent matter, the appellant has delayed the finalisation of this matter beyond the point where the remedy he seeks can be justified on any ground.

To accentuate the appellant's claim that the election abounded with irregularities, in a supporting affidavit to the appellant's petition deposed to by Edson Gazimbi, the deponent averred that those people suspected by members of the said Women's League of being the appellant's supporters were openly abused and intimidated; that even at the polling desk, the ZANU (PF) election agents, notably Mrs Ivy Hama and Mrs Wachemuka, literally took over the duties of the polling officer and explained all the procedures to the voters.

Edson Gazimbi also deposed that earlier in the morning of 7 August 1991 he had been ordered to produce a ZANU (PF) membership card by some party

KORSAH JA

youths who were stationed about thirty metres away from the polling station. When he told them that he did not possess a party card, he was warned"to stay in the sky since it was ZANU (PF) all over"; and at that time Mr Josiah Chinyati, Ms Eugenia Mazambani, Mr Reginald Gwisai and Mrs Maggie Musimbi approached him and Mr Last Matanhire and demanded to see their identity and party membership cards.

While not discounting the very serious nature of these allegations which, if true, constitute irregularities of grave proportions, the law demands that the person or persons accused of wrongdoing must be given an opportunity to face their accusers, and have a right to answer the charge or charges levelled against them. The question is: is failure to give such notice fatal to

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the petition?

Now, whether procedural requirements are mandatory, or merely directory and open to waiver, has been considered on several occasions by the courts in respect of different statutes dealing with a variety of subjects. In *Liverpool Borough Bank v Turner* 30 LJ Ch 380, quoted with approval by FISHER J in Chapman v Earl [1968] 1 WLR 1315 at 1319, LORD CAMPBELL said:

> "No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be construed directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

In *Sterling Products International Ltd v Zulu* 1988 (2) ZLR 293 (S) at 301 GUBBAY JA (as he then was) observed that:

> "The categorisation of an enactment as 'peremptory' or 'directory', with the consequent strict approach that if it be the former it must be obeyed or fulfilled exactly, while if it be the latter substantial obedience or fulfilment will suffice, no longer finds favour. As was pertinently observed by VAN DEN HEEVER J (as he then was) in *Lion Match Co Ltd v Wessels* 1946 OPD 376 at 380, the criterion is not the quality of the command but the intention of the legislator, which can only be derived from the words of the enactment, its general plan and objects."

It was suggested by van WINSEN AJA in *Maharaj & Ors v Rampersad* 1964 (4) SA 638 (A) at 646D that:

KORSAH JA

> "In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance."

The law, as stated earlier, demands that the person or persons accused of wrongdoing must be given an opportunity to face their accusers, and have a right to answer the charge or charges levelled against them. This has been a basic tenet of all civilised law from time immemorial. To this end, s 48(2) of SI 210 of 1987 provides that every person complained of in a petition shall be served with a copy of the petition. The intention of the Legislature is clear beyond per adventure. While it may be possible to remedy such an omission in the court of first instance, the omission to comply with the mandatory provisions of the said section is a fatal flaw that cannot be remedied on appeal. The appellant, by his failure to comply with that provision, cannot succeed on appeal.

For the above stated reasons the appeal is dismissed with costs.

Gubbay CJ: I agree.

McNally JA: I agree.

Gutu & Jakachira, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

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BLUE RIBBON FOODS LIMITED v DUBE NO & ANOR 1993 (2) ZLR 146 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

McNally JA, Korsah JA & Muchechetere JA

Civil appeal

22 July & 13 September 1993

Flynote

Employment -whether tribunal had jurisdiction in matter -whether decision grossly unreasonable -whether same legal counsel should represent both tribunal and employer or employee

Headnote

Blue Ribbon Foods obtained authorisation from a Labour Relations Officer to dismiss one of its employees. The employee appealed against this decision to the Regional Hearing Officer. The appeal succeeded and the decision was reversed. As, however, the employee had obtained other employment during the appeal hearing, the Regional Hearing Officer ordered reinstatement only up to the date when the employee started in his new job. The employer then took the matter on review to the High Court. The grounds upon which the employer sought to have the decision set aside were that the Regional Hearing Officer had had no jurisdiction to deal with the matter as the ex-employee had already taken up new employment at the time of the appeal, that the Hearing Officer was guilty of bias and that his decision was grossly unreasonable. In the High Court case, the Regional Hearing Officer and the employee were represented by the same lawyer.

The High Court dismissed the employer's application. The employer then appealed against this decision to the Supreme Court.

Held, that although the employee had ceased to be an employee when he took up further employment, his rights as employee existed up to the time he noted his appeal against the decision of the Labour Relations Officer. Once that right had vested in the employee he was entitled to an order from the Regional Hearing Officer. The Hearing Officer officer, however,

would not be able to order reinstatement but only that back-pay be paid up to the time of termination of employment.

Held, further, on the question of whether the Hearing Officer was biased, the court preferred not to decide this matter, although it seemed that it was more a question of animosity which had

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arisen between the Hearing Officer and the employer's legal practitioner.

Held, that the decision taken by the Hearing Officer was grossly unreasonable as the wrongdoing of the employee had been established beyond any doubt and provided ample justification for dismissal. The finding to the contrary could only be described as perverse.

Held, therefore, that the decision of the Regional Hearing Officer must be set aside and the matter remitted for a hearing before a different Regional Hearing Officer.

Held, further, that when such labour cases are taken on review to the courts, the employer and the employee should have their own legal representation and neither should be legally represented by the same legal practitioner as the labour official who had decided the case. Where, for instance, the labour officer and the employee are represented by the same legal practitioner, the employer is likely to gain the impression that the State and the labour official and the former employee are conspiring against him and this will reinforce any belief the employer has that the official is biased against him. Generally it will also not be appropriate for the Civil Division of the Attorney-General's Office to act for either the employer or the employee or to instruct counsel to act jointly for the labour officer and either the employer or employee. To avoid the appearance of partisanship, where the Minister or the Attorney-General wishes to appear in such matters, he should do so only to assist to the court on the matte of interpretion of the legislation.

Cases cited:

Chidyausiku v Nyakabambo 1987 (2) ZLR 119 (S)

Kombayi v Berkhout 1988 (1) ZLR 53 (S)

Mhlanga v Muranda & Ors S-101-93

Premier Wholesalers 1991 (Pvt) Ltd v Regional Hearing Officer (Manicaland) & Ors S-83-93

S v Stead 1991 (2) ZLR 54 (S)

Eagle Tanning (Pvt) Ltd & Anor v Employees of Eagle Tanning (Pvt) Ltd & Anor S-238-91

E Chatikobo for the appellant

B Q P Simelane for the first respondent

A J Dyke for the second respondent

McNALLY JA

Judgment

McNally JA: The first respondent is the Regional Hearing Officer ("the RHO") in the Ministry of Labour who dealt with the case between the applicant ("Blue Ribbon Foods") and the second

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respondent ("Gonyora").

Blue Ribbon Foods had originally applied to a Labour Relations Officer who had authorised the dismissal of Gonyora. But on appeal to the RHO Gonyora succeeded in reversing that decision.

However, during the appeal hearing Gonyora had obtained other employment. So the RHO made an order reinstating him, but only up to the date when he started work for the other firm. Blue Ribbon Foods then sought to reverse the order as to reinstatement. The grounds upon which Blue Ribbon Foods took the matter on review to the High Court may be summarised as follows:

1. Lack of jurisdiction, because once Gonyora took up alternative employment he breached his former contract of employment and could not claim reinstatement; he could only claim damages under common law and in the common law courts;

2. The RHO was biased;

3. The RHO committed gross irregularities; and

4. The decision was grossly unreasonable.

Blue Ribbon Foods' application was dismissed with costs in the High Court, and it now appeals, on essentially the same grounds. I propose to ignore the so-called "cross-appeal" which was addressed, not to the order made, but to the reasons therefor. Such an appeal is not competent. If you win, you win, even if you think you have won for the wrong reasons. See *Chidyausiku v Nyakabambo* 1987 (2) ZLR 119 (S) at 124C-E.

The notice of appeal was out of time, the reason being the common mistake of assuming that the High Court Rules and the Supreme Court Rules computed time in the same way. They did not, in those days. They do now. As a result of this error, the notice of appeal was filed on 11 June 1991 instead of 4 June 1991.

Delay resulting from such an error has often been considered before: *Kombayi v Berkhout* 1988 (1) ZLR 53 (S). The delay was not serious and there were possible merits in the appeal, so it was decided to hear the application and the appeal together.

McNALLY JA

Before proceeding further, I should make one observation. In the court below both the RHO and Gonyora were represented by the same legal practitioner. Moreover, that practitioner was instructed by the Civil Division of the Attorney-General's Office. This has two unfortunate consequences:

First of all, the tax-payer pays for the litigation of a private individual, which I would think is unwarranted. Secondly, the other party, in this case Blue Ribbon Foods, is likely to gain the impression that the State and the RHO and the former employee are conspiring against it. Such an impression would reinforce its belief that the RHO was biased against it. Given that situation, it was inappropriate for one lawyer, and particularly one lawyer instructed by the State, to

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appear for the two respondents. One has only to read the RHO's affidavit in opposition to the application for condonation to see how much he was involving himself in the merits of his own decision. He should have confined himself to setting out his explanations for the allegations of bias and irregularity.

By the time the matter came before us, the two respondents had separate representation. Mr *Simelane* of the Civil Division of the Attorney-General's Office appeared for the RHO, and Mr *Dyke* for Gonyora. Mr *Simelane* persisted, in two sets of heads of argument, and even in a subsequent letter written to the court, in seeking to deal with the merits. We declined to hear him. We declined to read his letter. The only matter on which he might properly have been heard was the question of the alleged bias of the RHO. He did not seek to deal with that.

It may be that this same point could have been taken, though it was not, in such cases as *Mhlanga v Muranda & Ors* S-101-93; and *Premier Wholesalers 1991 (Pvt) Ltd v Regional Hearing Officer (Manicaland) & Ors S-83-93*. But the point did not arise crisply in those cases because only one lawyer appeared for the respondents. In *Mhlanga's* case the Civil Division of the Attorney-General's Office acted for the RHO and the Minister; a private firm acted for Zimbank, the third respondent; but they jointly instructed Mr Carter of counsel. In effect he appeared for Zimbank. We were not asked to apportion costs. We treated him (perhaps erroneously) as Zimbank's counsel.

In *Premier Wholesalers'* case, the argument for the respondents, ie the RHO and the employees, was presented by a representative of the Civil Division of the Attorney-General's Office. No point was taken by the appellant and the matter passed unnoticed.

McNALLY JA

For the future, therefore, it should be noted that in matters such as this the substantive parties, ie the employer and the employee, should have their own legal representation. It will not be appropriate, generally speaking, for the Civil Division of the Attorney-General's Office to act for either of them, or to instruct counsel jointly with either of them.

In review proceedings, where allegations of procedural impropriety or bias are commonly made (those being the common grounds which justify review) the presiding officer whose conduct is in question may, if he wishes, file an affidavit to clarify such matters as he may wish to clarify. And in a proper, though I would think exceptional, case he may be represented by counsel. **But only on that issue.** It is not for him to enter into the merits of the case or to defend his decision. That is the function of counsel for the respondent employer or the respondent employee, as the case may be.

That is not to say that in a proper case where an important point of law or statutory interpretation arises, the Minister or the Attorney-General may not intervene in order to put forward the State's attitude on the point of law or the question of interpretation.

But that is not what happened in the present case. It was quite clear that Mr *Simelane* was attempting to put forward arguments on the merits on behalf of his client, the RHO, with whom it

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appears he was in personal communication by telephone.

Where the Minister or the Attorney-General wishes to appear in such matters we would expect that he would appear in effect as *amicus curiae,* seeking to assist the court on the matter of interpretation. He would avoid the appearance of partisanship. It is this impression of"ganging up"which is, in retrospect, the undesirable feature of the two earlier cases. It may be noted that in *Mhlanga's* case it was the fact that the State and the **employer** were acting through one counsel that was unfortunate. In *Premier Wholesalers* case it was the State and the employee who were jointly represented by counsel. It was worse than Mhlanga's case because State counsel appeared for the **employee**, thus giving an immediate impression that the Tribunal was partisan. The State was paying for the employee's lawyer.

I would add that, since what I have said above relates to matters of practice, I have consulted with the CHIEF JUSTICE, who has authorised me to say that he agrees.

McNALLY JA

I turn then to the merits. The first point taken is a point of law. It is claimed that if a man who is on suspension without pay accepts a new job at any time before his status is resolved by the dispute mechanism under the Labour Relations Act, then the Labour Relations Act ceases to apply to him. He cannot be reinstated in his job because he no longer has that job -he has voluntarily abandoned it, in breach of his contract. He cannot be reinstated up to the time when he took the new job, because that renders the word "reinstatement" meaningless; what the Tribunal would be doing would be awarding him damages for loss of income, not reinstating him. That is not something which the Tribunal (or Labour Relations Officer, or Regional Hearing Officer) can do, because they are creatures of statute. They can only deal with"employees"in dispute with their"employers". Once he takes another job, he is not an"employee"of that original"employer". The Labour Relations Act has no jurisdiction over disputes between former employees"and"former employers".

So runs the argument for Blue Ribbon Foods.

Mr *Chatikobo,* in support of this submission, referred to the Labour Relations Act 1985 ("the Act") and to the Regulations contained in SI 371/1985 ("the Regulations").

In s 109(1) of the Act it was provided (at the relevant time, though no longer) that any employer or employee who is involved in a dispute may refer the matter to a Labour Relations Officer. The words "employer" and "employee" are not defined in the Act in any special way which would indicate that an ex-employee falls under the definition of "employee". Indeed, I notice that in s 13 of the Act, headed "Wages and benefits upon termination of employment", the draftsman has been careful to use the word "person" where he speaks of an ex-employee.

This court has concluded, in a criminal matter, that "employer" does not mean "former employer". See *S v Stead* 1991 (2) ZLR 54 (S) at 57D-59H. In effect, the same point was decided in *Eagle Tanning (Pvt) Ltd & Anor v Employees of Eagle Tanning (Pvt) Ltd & Anor* S-238-91 (not reported).

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It seems to me to be clear therefore that Gonyora ceased to be an employee when he took other employment.

I am not convinced, however, that this is the end of the matter. Gonyora's rights as an employee existed at the time he noted his appeal against the

McNALLY JA

decision of the Labour Relations Officer. He was entitled to a full re-hearing in terms of s 17 of SI 368/85, as read with s 15 of the same Statutory Instrument. Once that right is vested he is entitled to an order, whether or not his status is subsequently altered. Obviously reinstatement would not at that stage be a viable option, but an order that back-pay be paid up to the time of the termination of employment could be made in terms of s 111(2)(a) of the Act.

Although the matter was not dealt with at the hearing quite on this basis, Mr Dyke did make virtually the same point when he submitted that a former employee should be entitled to claim back-pay wrongfully withheld, as long as he instituted proceedings in terms of the Act while he was still an employee.

Blue Ribbon Foods, after all, had sought authority to dismiss him and had been given that authority by the Labour Relations Officer. Gonyora had a right of appeal against the whole, or, presumably, part of that order. Once he exercised that right, and subsequently took alternative employment, it seems to me that he was doing no more than waive part of his right, namely his right to claim reinstatement and his right to claim pay and allowances beyond the date of his assuming other employment. His taking alternative employment was, in short, not to be seen as a breach of contract but as a partial waiver of his right.

Gonyora was no longer entitled to ask for reinstatement, but he was still entitled to claim back-pay. That is what (leaving aside the factual issue as to whether the decision was right) he should have been awarded. So his claim is not to be seen as a claim for damages but as a claim for back-pay up to the date of his accepting other employment.

I would not therefore uphold the first ground of appeal.

The second ground of review and now a ground of appeal was the allegation of bias on the part of the RHO. I must say that my overall impression of the state of mind of the RHO was that he was perhaps excessively ambitious in his efforts to consider every aspect of the enquiry before him. The Act does give its officials wide powers of enquiry and conciliation. It is apparent that some of the RHO's efforts to broaden the enquiry irritated Mr Lloyd who appeared for Blue Ribbon Foods. His reaction in turn irritated and unsettled the RHO.

McNALLY JA

I have studied the various passages in the record referred to by Mr *Chatikobo.* I agree that the RHO did at one stage jump to the conclusion that another employee in the company had not

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been punished for the same sort of conduct because that person was white and Gonyora was black. But in the end it was accepted that the facts in the two matters were entirely different. Gonyora did not press the comparison.

In the final analysis I prefer not to decide the matter on the basis of the allegation of bias. It was more a matter of animosity between the Tribunal and the legal practitioner, and both parties are to be reminded that relationships in court should not be allowed to descend to the level achieved in this case.

The third ground of review and now of appeal is that the RHO committed gross irregularities. But in his heads of argument Mr *Chatikobo* seems to have included part of his argument under this head with his submission on bias, with which I have dealt. The remainder of his submissions fall under the allegations of gross unreasonableness. I shall therefore deal with this aspect under the fourth ground.

The fourth ground is gross unreasonableness. Here it does seem to me that the appellant has a valid point. It seems that the RHO took refuge in generalisations. He was bombarded with vast quantities of paper and with very long -but very closely reasoned - submissions by Mr Lloyd.

I am satisfied that Mr *Chatikobo* is correct when he says, in para D3 of his heads of argument, that:

> "Both Lloyd's and Craig's evidence demonstrates beyond doubt that the evidence put before Dube pointed unmistakably at Gonyora's incompetence and inefficiency. In fact in some cases it revealed a possible collusion between Gonyora and Patel."

In place of "possible" I would say "probable".

Mr *Chatikobo* listed eleven instances where Gonyora's conduct in his capacity as a Senior Credit Controller with Blue Ribbon Foods was simply unacceptable. Whether this conduct was due to incompetence or deliberate dishonesty is immaterial. I am satisfied that these factual allegations were established on the evidence and that together they amounted to ample and overwhelming justification for the dismissal of Gonyora.

McNALLY JA

I do not propose to analyse and explain each allegation. It is enough to set them out as Mr *Chatikobo* did. They are as follows:

"(a) Gonyora's concealment of his dismissal from the Australian High Commission for fraud was material;

(b) He approved credit facilities in excess of his $15 000 limit;

(c) On 1 February 1988 and thereafter he deliberately flouted the COD terms applicable to Vira;

(d) Gonyora was aware of Vira's poor payment record when he approved credit for that company;

(e) Gonyora committed an irregularity when opening a credit account for Vira;

(f) Gonyora caused returned cheques to disappear;

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(g) Dube wrongly disregarded Gorojena's evidence on the circumstances under which sugar beans were removed from the applicant's premises without being paid for;

(h) Gonyora continued to allow Vira credit, in the process even over-riding a decision of his subordinates in March, 1988, to withhold credit control approved for orders of that company, even though postdated cheques for $2 500,00 had been dishonoured;

(i) Dube's finding that there were no credit control procedures in the applicant's company flies in the face of the evidence;

(j) The evidence demonstrated that Gonyora's superior did not authorise the opening of the Big Way Packer's 30 day account; and

(k) It was improper to find in favour of Gonyora that other employees had allowed accounts under their supervision to lapse into eight series accounts. Two wrongs do not make a right."

These allegations are so extensively dealt with in the papers that they should not have been dismissed in two paragraphs by the learned reviewing judge. All he says about the findings of the RHO is:

> "... the RHO after hearing evidence concluded that the credit control system of the applicant was poor. He was not entirely satisfied that all the blame for the loss through the credit allowed to Vira and Big Way could be laid at the door of the respondent **alone**" (my emphasis).

McNALLY JA

The evidence that the credit control system was poor was not substantiated. The evidence that someone else was also guilty of the same offence was not established, and even if it had been it could not excuse Gonyora.

I am satisfied that the findings of the RHO were completely untenable on the evidence. The guilt of Gonyora was established in painstaking detail and beyond any doubt. The finding to the contrary can only be described as perverse.

Since we are dealing here only with an appeal against a review, we cannot make an order finally disposing of the matter. We can only order as follows:

1. Leave to appeal out of time is granted.

2. The appeal is allowed with costs.

3. The order of the court a quo is altered to read-

   a. The application succeeds with costs;

   b. The determination of the first respondent issued on 31 July 1991 relating to the second respondent is set aside;

   c. The matter is remitted for hearing before a different Regional Hearing Officer. For the purpose of time limits the date of this judgment is to be taken as the date of the order by the Labour Relations Officer; and

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d. If the appeal to the Regional Hearing Officer fails, or is not pursued, the order of the Labour Relations Officer will stand.

4. The cross-appeal is dismissed with costs.

Korsah JA: I agree.

Muchechetere JA: I agree.

Atherstone & Cook, appellant's legal practitioners

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

Sawyer & Mkushi, second respondent's legal practitioners

JACKSON v ROTHMANS OF PALL MALL (ZIMBABWE) (PVT) LTD 1993 (2) ZLR 156 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Civil appeal

12 July & 13 September 1993

Flynote

Insolvency - act of insolvency - s 13 - Insolvency Act [Chapter 303] - whether disappearance by debtor in middle of investigations into theft of funds act of insolvency - liquid claim in terms of s 14(1)(a) of Act - whether claim in respect of money allegedly stolen liquid claim.

Headnote

Mrs Jackson suddenly disappeared from her abode, without trace, in the middle of investigations regarding the alleged theft by her of large sums of money from her employer, the respondent. The employer obtained a sequestration order against her estate, in spite of the intervention by the husband of Mrs Jackson to oppose the sequestration of his wife's estate.

The husband then appealed to the Supreme Court against the granting of the sequestration order against his wife's estate. The court, in dismissing the appeal:

Held, that the woman had committed an act of insolvency as defined in s 13(a) of the Insolvency Act. By suddenly disappearing in the middle of investigations into her theft of money from her employee, the probabilities were that she had left her home and secreted herself away with the intention of evading the payment of her debts.

Held, further, that the employer had been entitled to petition for the sequestration under s

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14(1)(a) of the Insolvency Act in that its employee had committed an act of insolvency and the employer had a liquidated claim against her for not less than one hundred dollars. A liquid claim for this purpose is a claim in an amount that can be ascertained by calculation. A claim in respect of an amount of money stolen from an employee can be a liquidated debt, provided that the amount of money stolen can be

KORSAH JA

determined. In the present case there was almost conclusive evidence that the employee had stolen at least the large amount of money estimated by the employer at the time it filed its answering affidavit.

Held, further, that when the employer had applied for a provisional order of sequestration, it had done so in circumstances of urgency in its own interests and those of the public. When it made the application investigations were still going on into the extent of defalcations by its employee. It was therefore impossible for the applicant to have had all the facts at its disposal when it brought the urgent application. In the circumstances the trial court was correct in exercising its discretion to rely upon facts disclosed for the first time in the answering affidavit of the employer.

Cases cited:

Intl Hardware Corp (Rhod) Ltd v Appleton 1971 (1) SA 404 (R)

Polwarth & Co Ltd v Zanombaira & Ors 1972 (2) SA 688 (R)

Colrod Motors (Pty) Ltd v Bhula 1976 (3) SA 836 (W)

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

M J Gillespie for the appellant

J B Colegrave for the respondent

Judgment

Korsah JA: On 29 July 1992 the High Court, Harare, confirmed in terms of the Insolvency Act [*Chapter 303*] a provisional order, made on 20 March 1992 for sequestration of the estate of Elizabeth Jackson, in spite of the intervention by the appellant, who is the husband of the alleged insolvent.

Mrs Elizabeth Jackson was employed by the respondent as the sole cashier at the respondent's Head Office from 1 September 1987 until 20 February 1992, when she failed to present herself at her place of employment without explanation. Her salary at the commencement of her employment was $800 per month. At the time she absented herself from work, her salary was $1 770 per month. She has disappeared.

Before Mrs Jackson's absence from work, she was aware of investigations being conducted by

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the respondent's senior financial staff into misappropriation of certain monies at the Head Office. After her desertion, the respondent employed Coopers & Lybrand, a firm of chartered accountants, to investigate what appeared to be shortages of cash from sales effected by the company. At the time that the respondent filed its answering affidavit it had been established that the defalcations by Mrs Jackson were estimated to be within the region of $1 040 615,00, with investigations continuing.

KORSAH JA

According to Coopers & Lybrand, there was evidence that Mrs Jackson had misappropriated funds belonging to the respondent by the following methods -

(a) cash received by her had not been banked and deposit slips were altered subsequent to banking; and

(b) cheques received were receipted and then exchanged for cash at the company sales kiosk where they were banked. Mrs Jackson retained the cash and subsequently altered or destroyed the Head Office deposit slips.

In addition, their examination revealed that Mrs Jackson had, in certain circumstances, attempted to conceal the above by tampering with bank statements and destroying deposit slips.

Following the failure of Mrs Jackson to return to work, enquiry was made of the appellant regarding the whereabouts of his wife. The appellant disclosed that he did not know where his wife was and had in fact made a report at the Mabelreign Police Station on 20 February 1992 that she was missing. Subsequently, it was given out that she was on holiday at Nyanga. There have also been sightings of her in the streets of Harare, but she has not returned to her home, nor reported at her workplace.

The appellant, however, suggested that a plausible reason for the disappearance of his wife may be a matrimonial disruption resulting from his extra-marital affair, of which she had become aware, and not necessarily because of any alleged misappropriation of the respondent's funds.

Investigations into the affairs of Mrs Jackson revealed her financial interest in the following assets -

(a) Stand 809 Bluff Hill Township 16 of Lot 8A Bluff Hill, purchased on 21 November 1988 for the sum of $90 000, of which a deposit of $30 000 was paid;

(b) Hairdressing salons:

(i) Scruples - situate in Baker Avenue;

(ii) Elly or Ebony 1 - situate in Inez Terrace, between Baker and George Silundika Avenues; and

(iii) Adam and Eve Hair Creations -situate at C&J Building, Avondale, which was

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purchased for cash from Sheryl Oliver for $45 000 with a Central African Building Society cheque;

KORSAH JA

(c) A bank account with Zimbabwe Banking Corporation, account number supplied;

(d) A white Nissan Sunny, registered in her name;

(e) A fleet of emergency taxis commencing from 1989; and

(f) The appellant drives a red BMW 318 (i).

Having regard to the following facts - that Mrs Jackson commenced her employment with the respondent on 1 September 1987; that the appellant is employed by the Ministry of Health on a Government salary; that the defalcations commenced in September 1988, just prior to the acquisition of the Stand 809 Bluff Hill Township property; and that all interests in the above enumerated properties were also acquired subsequent to the commencement of the alleged defalcations - there is a very real suspicion that there is a link between the sudden acquisition of so much property from 1988 to 1992 and the defalcations of the respondent's funds around the same period of time.

I ask myself: would a woman having interests in so much property abandon her vehicle and disappear without trace, leaving everything behind including her children, simply because of the infidelity of her husband? She may leave her husband, but not her children and property. Mrs Jackson's cognisance, as a cashier, must have alerted her to the fact that the investigations by the respondent's senior financial staff might inexorably lead to her complicity in the massive series of thefts that had been perpetrated. Given the extent of the damning documentary evidence against her, it is not surprising that Mrs Jackson did not elect to oppose the grant of the final order herself.

It was contended on behalf of the appellant that the claim by the respondent, being of money allegedly stolen, could not be said to be a liquidated amount unless there is an admission of the theft.

There is respectable authority for the proposition that monies stolen by a defendant may constitute a liquidated amount for which default judgment may be granted in favour of the plaintiff. All that is required is the ascertainability of the amount stolen and the want of denial by the alleged thief that he or she stole the amount claimed: *International Hardware Corporation (Rhodesia) (Pvt) Ltd v Appleton* 1971 (1) SA 404 (R); *Polwarth & Co (Pvt) Ltd v Zanombairi & Ors* 1972 (2) SA 688 (R) at 690E-G; *Colrod Motors (Pty) Ltd v Bhula 1976 (*3) SA 836 (W) at 837H-838A.

KORSAH JA

I agree with Mr *Colegrave* that *Kleynhans v van der Westhuizen* NO 1970 (2) SA 742 (O) is

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authority for the proposition that in appropriate circumstances stolen money may constitute a liquidated debt for the purpose of the Insolvency Act.

Section 13(a) of the Insolvency Act [*Chapter 303*] stipulates that:

> "A debtor shall be deemed to have committed an act of insolvency if -
>
> (a) he leaves Zimbabwe or, being out of Zimbabwe, remains absent therefrom or departs from his dwelling or otherwise absents himself with intent by so doing to evade or delay the payment of his debts."

The circumstances of Mrs Jackson's disappearance, as Mr *Colegrave* urged, speak for themselves. Her sudden disappearance from her abode, without trace, in the middle of investigations regarding defalcations in respect of funds which she handled as a cashier, on a balance of probabilities, points to the conclusion that she had committed an act of insolvency by leaving home and secreting herself with the intention of evading payment of her debts.

By s 14(1)(a) of the Insolvency Act:

> "A petition for the sequestration of the estate of a debtor who is insolvent or who has committed an act of insolvency may be made to the court by-
>
> (a) a creditor who has a liquidated claim for not less than one hundred dollars ..." (my emphasis).

It is apparent from the papers that the respondent did have a liquidated claim for not less than one hundred dollars against Mrs Jackson and thus had the *locus standi* to seek sequestration of her estate.

In *Kleynhans v van der Westhuizen NO supra* at 567B, DE VILLIERS J observed, as is with s 14(1)(a) of our Insolvency Act, that:

> "The phrase 'liquidated claim', as used in sec 9(1) of the Insolvency Act 24 of 1936, is not defined but it has for many years been understood to mean a money claim (cf *Friedberg v Van Niekerk* 1962 (2) SA 413 (C)), the amount of which is fixed and determined either by agreement (actual or implied), judgment or otherwise (cf Mars *Law of Insolvency in South Africa* 6 ed p 84)".

KORSAH JA

As the learned judge pointed out elsewhere in his judgment, a liquidated demand is a claim so expressed that the ascertainment of the amount thereof is a mere matter of calculation. A demand is thus unliquidated if the amount thereof is uncertain and has to be determined by the court.

While the precise amount that Mrs Jackson stole from the respondent is probably unknown, the documentary evidence (ex A) is almost conclusive that she stole as much as from the respondent. That amount, in my view, insofar as Mrs Jackson had not come forward to deny it, must be deemed to have been impliedly agreed as the sum she stole from the respondent, and constitutes a liquidated demand of more than one hundred dollars.

The judgment appealed against was also the subject of criticism, particularly because of the manner in which the case of the respondent is made out in the answering affidavit. In answer to

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this objection, I can do no better than quote, with respect, the observations of DE VILLIERS J in *Kleynhans v van der Westhuizen NO supra*:

> "It is trite law that an applicant should set out in his petition or notice of motion and supporting affidavits a cause of action and, since in application proceedings the affidavits constitute not only the pleadings but also the evidence, such facts as will entitle him to the relief sought. ... Normally the court will not allow an applicant to insert facts in a replying affidavit which should have been in the petition or notice of motion (cf *Manerberger v Manerberger* 1948 (3) SA 731 (C); *de Villiers v de Villiers* 1943 TPD 60; *John Rodericks Motors Ltd v Viljoen* 1958 (3) SA 575 (O); *Berg v Gossyn* (1) 1965 (3) SA 702 (O); *van Aswegen v Pienaar* 1967 (1) SA 571 (O)), but may do so in the exercise of its discretion in special
>
> circumstances (cf *Bayat & Ors v Hansa & Anor* 1955 (3) SA 547 (N); *Schreuder v Viljoen* 1965 (2) SA 88 (O)). Once such a discretion has been exercised in favour of an applicant a Court of Appeal will only interfere if it comes to the conclusion that the court *a quo* has not exercised its discretion judicially."

In the present appeal, as in the case that the venerable judge made the above-cited remarks, the application for a provisional order of sequestration was placed before the court as a matter of urgency in the interests, not only of the applicant (respondent), but of the public generally. Mrs Jackson had committed an act of insolvency by disappearing from her home and workplace when investigations were afoot to determine the extent of the defalcations committed

KORSAH JA

by her. It was impossible for the respondent to have all the facts at its disposal before mounting its application: *Registrar of Insurance v Johannesburg Insurance Co Ltd* (1) 1962 (4) SA 548 (W).

In the circumstances of this case, I am of opinion that the trial court exercised its discretion judicially in relying upon facts disclosed for the first time in the answering affidavit of the respondent, as the investigations were continuing at the time of launching the urgent application for the provisional order.

In the result, the appeal is dismissed with costs.

Gubbay CJ: I agree.

Muchechetere JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

PICHANICK NO v PATERSON 1993 (2) ZLR 163 (HC)

Court **High Court, Harare**

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Smith J

Application for leave to appeal

20 June & 15 September 1993

Flynote

Employment - contract - breach - remedies - specific performance - employer terminating services of an employee - when reinstatement should be ordered rather than damages

Appeal - interlocutory order - what constitutes - referring of matter to trial - leave to appeal - when should be granted

Headnote

The respondent, a legal practitioner, was employed as a professional assistant by the firm of which the applicant was the senior partner. Differences arose between them which resulted in the firm suspending her without pay and making an application to the Ministry of Labour for her dismissal. She applied for and was granted (by ADAM J) a provisional order that she should continue to receive her salary and other benefits. Some months later, Smith J issued an order referring the questions of the validity of her suspension and dismissal and of her reinstatement to trial and continuing in effect the order that she continue to receive her salary.

The applicant applied for leave to appeal against that part of the order which was interlocutory in nature, such leave being necessary in terms of s 43(2)(d) of the High Court Act 29 of 1981. He argued that reinstatement was inappropriate due to the breakdown in the relationship between the parties. She had also shown wilful disobedience sufficient to justify her suspension without pay and dismissal. He noted an appeal against that part of the part of the order requiring the firm to continue to pay the respondent, on the basis that that part of the order was not interlocutory in nature.

1993 (2) ZLR p164

The respondent opposed the application on the ground that reinstatement would be a possible remedy and it was therefore appropriate to refer the matter to trial. She claimed that her alleged disobedience did not justify her suspension and that it was just and equitable that she should continue to receive her salary.

Held, that the order referring the matter to trial was an interlocutory order and leave to appeal against it was required.

Held, further, that leave to appeal should be granted where there is a reasonable prospect of success, the amount in dispute is not trifling and the matter is of substantial importance to one or both of the parties. The court must also consider the balance of convenience, as between an immediate appeal on the interlocutory matter and the immediate prosecution of the action.

Held, further, that in view of the authorities on the question of whether and when reinstatement should be ordered, which were generally though not conclusively against ordering reinstatement, it was quite possible that the Supreme Court would hold that the respondent's

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remedy lay in a claim for damages.

Held, further, that the amount in dispute was not trifling and the matter was of substantial importance to both parties.

Held, further, that the facts on which the applicant had lodged an appeal were inextricably interwoven with those relating to the question of the suitability of an order of specific performance. It would save a great deal of time and money for that aspect to be settled now rather than wait for the trial and then proceeding on appeal. The balance of convenience would thus favour the granting of leave to appeal.

Cases cited:

Mahomed v Ghoogaree 1943 NPD 349

Gerst v Swede 1948 (4) SA 205 (N)

Palmer v Goldberg 1961 (3) SA 692 (N)

Rood v Broderick Properties Ltd 1962 (2) SA 434 (T)

Seloadi & Ors v Sun Intl (Boph) Ltd 1993 (2) SA 174 (B)

Schierhout v Min of Justice 1926 AD 99

Johnson v Shrewsbury & Birmingham Rly Co (1853) 22 LJ Ch 921; 43 ER 358

Grundling v Beyers & Ors 1967 (2) SA 131 (W)

National Union of Textile Workers & Ors v Stag Packings (Pty) Ltd & Anor 1982 (4) SA 151 (T)

J C Andersen SC for the applicant

Respondent in person

SMITH J

Judgment

Smith J: The respondent was employed as a professional assistant by the applicant. On 9 December 1992 she was suspended without pay, pending approval from the Ministry of Labour, Social Welfare and the Public Service for her dismissal. She made an application to this court for an order that her suspension be declared unlawful and that she be paid her salary with effect from the date of her suspension (case no. HC 9817/92). A provisional order was granted by ADAM J on 24 December 1992, in which it was ordered that the applicant continue to pay the respondent her salary and other benefits of office pending the confirmation or discharge of the provisional order. After hearing the parties, on 2 June I issued an order (HH-113-93) referring the question of the validity of the respondent's suspension and dismissal and of her reinstatement to trial and continuing in effect the order that she be paid her salary and other

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benefits pending the conclusion of the matter. There was no order as to payment of costs.

The applicant has applied for leave to appeal against that part of the order which is interlocutory in nature. The contentions of the applicant are as follows. It should have been held, on the facts which are not in dispute, that the respondent was not entitled to be reinstated, due to the breakdown in the relationship between the parties. Furthermore, her refusal to discuss the fee she had charged in one instance, as directed by the applicant, constituted a wilful disobedience of a valid order which was sufficiently serious to justify her suspension without pay and termination of her employment. With regard to the payment of her salary and other benefits, since she was not entitled to her reinstatement, the contract of employment was terminated and therefore she was not entitled to receive any salary. Her remedy is a claim for damages. With regard to the referral of the matter to trial, the respondent's application should have been dismissed as she was well aware of the disputes of fact which would arise and therefore she should have instituted proceedings by way of summons. Alternatively, the applicant's claim for repayment of the amounts it was ordered to pay should also have been ordered to trial. With regard to costs, the respondent should have been ordered to pay the costs incurred in choosing to proceed by way of application instead of summons or, alternatively, costs should have been reserved for decision at the trial or ordered to be costs in the cause.

The respondent opposes the application on the following grounds. Reinstatement would be a possible remedy and therefore it was appropriate to refer the matter to trial. The fee in question which she charged was not excessive and her alleged disobedience did not justify her suspension. It was just and equitable that she be paid her salary and other benefits in the interim.

SMITH J

It was not for the applicant to require her to seek alternative employment.

A litigant who wishes to appeal against an order of this court in a civil matter has a right of appeal to the Supreme Court in terms of s 43(1) of the High Court Act 29 of 1981, subject to the limitations set out in s 43(2). The only limitation relevant to this case is that set out in para (d) of subs (2), which provides that no appeal shall lie from an interlocutory order without the leave of the judge who made the order or, if he refuses, the leave of a judge of the Supreme Court. It is clear that the order referring the matter to trial is an interlocutory order. The applicant, acting on the basis that that part of the order which requires that the firm continues paying the respondent her salary and other benefits of office in the interim is not an interlocutory order, has noted an appeal against that part of the order. As the noting of the appeal has the effect of suspending the order concerned, payment of the salary and other benefits of office to the respondent has ceased. With regard to that portion of he order which is interlocutory, leave to appeal will be granted when there is a reasonable prospect of success, the amount in dispute is not trifling and the matter is of substantial importance to one or both of the parties concerned, Herbstein and van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed p 714-716. In this case, the amount in dispute is not trifling and the matter is of substantial importance to both parties. In considering an application of this nature the court must also consider where the balance of convenience lies, as between an immediate appeal on the interlocutory matter and

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the immediate prosecution of the action. Such balance of convenience has been regarded as decisive in certain cases: for example *Mahomed v Ghoogaree* 1943 NPD 349, *Gerst v Swede* 1948 (4) SA 205 (N) and *Palmer v Goldberg* 1961 (3) SA 692 (N). In *Palmer's case supra* at 699A Henochsberg J said:

> "It is undoubted that the balance of convenience, in which is included the desirability of avoiding unnecessary litigation, is always of importance on the question whether leave should be given to appeal against an interlocutory order."

In *Rood v Broderick Properties Ltd* 1962 (2) SA 434 (T) at 435C-D ROBERTS AJ expressed himself as follows with regard to the application of the general tests:

> "Applying the general tests in connection with applications for leave to appeal (Herbstein and Van Winsen, pp 556-7), it is common cause that the amount of the dispute is not trifling and that the matter is of

SMITH J

> substantial importance to both parties. As to the third test, ie the reasonable prospect of success, after making full allowance for 'the natural reluctance (of a judge) to say that his own judgment is so inevitably correct that the Judges of Appeal will concur therein' (*R v D Baloi* 1949 (1) SA 523 (A) at 525) I am satisfied 'that there is substance in the argument advanced on behalf of the applicant'."

Because he came to the conclusion that the balance of convenience was in favour of allowing the matter to proceed to trial, he refused leave to appeal.

With regard to the question of whether there is a reasonable prospect of success, the basis of the application is that the respondent is not entitled to be reinstated due to the breakdown of the relationship between the parties and, more particularly, the conduct of the respondent in the proceedings instituted by her. In this connection Mr *Andersen* referred to *Seloadi & Ors v Sun International (Bophuthatswana) Ltd* 1993 (2) SA 174 (B). In that case, Lawrence AJ, at p 188, after referring to a number of cases, reaffirmed that where a contract of employment has been wrongfully rescinded the court has a discretion whether to grant specific performance or **not having regard to all the circumstances** (emphasis by the learned judge) and that the court must exercise its discretion in a judicial manner, not capriciously or upon a wrong principle. In *Schierhou*t v *Minister of Justice* 1926 AD 99 at 107 INNES CJ said that the practice of issuing a decree of specific performance against an employer had long been abandoned for two reasons, which he expressed as follows:

> "the inadvisability of compelling one person to employ another whom he does not trust in a position which imparts a close relationship; and the absence of mutuality, for no Court could by its order compel a servant to perform his work faithfully and diligently."

However, the practice has been introduced in South African law and in our law in suitable cases as shown in *Seloadi's case supra*.

In *Johnson v Shrewsbury & Birmingham Railway Co* (1853) 22 LJ Ch 921 43 ER 358 KNIGHT BRUCE LJ refused specific performance of a contract of service for the management of a railway company, saying:

> "We are asked to compel one person to employ against his will another as his confidential servant, for duties with

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respect to the due performance of which the utmost confidence is required. Let him be one of the best and

SMITH J

most competent persons that ever lived, still if the two do not agree, and good people do not always agree, enormous mischief may be done."

This statement was quoted with approval by TROLLIP J in *Grundling v Beyers & Ors* 1967 (2) SA 131 (W), when he refused to order specific performance in a service contract. One of the reasons given by TROLLIP J in so doing was expressed at p 147 as follows:

"(iii) Meiring states categorically that the Executive Committee is antagonistic towards him and will not have him back under any circumstance. He, therefore, should not be thrust back on them (see *Johnson's case supra)*. It seems obvious too that he is also *persona non grata* with the General Council. In view of that, the history of the events leading up to his dismissal, and his launching these proceedings, his submission that he could still work in harmony with those bodies, if Beyers' influence were removed, seems unduly optimistic ..."

It seems to me that van DIJKHORST J in *National Union of Textile Workers & Ors v Stag Packings (Pty) Ltd & Anor* 1982 (4) SA 151 (T) set out the position succinctly at 158D where he said:

"This does not mean that the considerations mentioned in *Schierhout's* case why in such a case an order for specific performance should generally speaking not be granted, should be disregarded. They are weighty indeed and in the normal case they might well be conclusive. But that is a far cry from saying that the court should therefore close its eyes to other material factors and refuse to evaluate them."

In this case the applicant has filed a notice of appeal in respect of part of the order granted. The Supreme Court, if seized of the matter, might well hold that the considerations in this case are such that an order for specific performance should not be granted and that the respondent's remedy is a claim for damages. This is a matter which the Supreme Court may feel that it can decide on the papers. I consider that the applicant's prospects of success on this point are reasonable.

Furthermore, I consider that the balance of convenience is in favour of the granting of the application for leave to appeal for the following reasons. The applicant has lodged an appeal against part of the order. The facts on which he will rely are inextricably interwoven with those relating to the question of the suitability of an order of specific performance. It would save a great deal

SMITH J

of time and expense for that aspect to be settled at this stage rather than waiting for the trial and then proceeding to the Supreme Court on appeal. The grant of leave to appeal might well lead to a more speedy and inexpensive settlement of the issues between the parties because the Supreme Court would be able to deal with all the issues. It is not likely to lead to any significant increase in the costs incurred by the parties since the costs of an appeal will have to be incurred whether or not the leave sought is granted. In granting leave to appeal, this court

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may fix such conditions as it thinks fit in the circumstances. If discovery is made and the matter is set down for trial on a date after the hearing of the appeal, it would mean that the hearing of the matter would not be unduly delayed if the Supreme Court does not determine the matter on the basis that in the circumstances an order for specific performance would not be appropriate.

For the reasons set out above, it is ordered that:

1. leave to appeal against the order, in cases HC 9817/92 and HC 1107/93, that the matter be referred to trial and the fact that no order as to costs was made in those cases is granted;

2. the applicant's notice and grounds of appeal be filed with the Supreme Court and a copy served upon the respondent within 15 days of this order being handed down;

3. the noting of the appeal shall not suspend the order given in judgment HH-113-93 that discovery must be made and a pre-trial conference held as soon as possible and then the matter be set down as soon as possible for trial after the appeal has been finalised;

4. the costs of this application be determined at the hearing of the appeal.

Winterton, Holmes & Hill, applicant's legal practitioners

SCOTFIN LTD v AFRI TRADE SUPPLIES (PVT) LTD 1993 (2) ZLR 170 (HC)

Court **High Court, Harare**

Robinson J

Application for summary judgment

10 December 1992 & 15 September 1993

Flynote

Contract - breach - penalty - forfeiture of amounts paid under hire - purchase agreement and return of goods - whether a penalty stipulation in terms of the Contractual Penalties Act 1992

Practice and procedure - summary judgment - evidence - applicant filing affidavit in answer to respondent's opposing affidavit - when allowed

Words and phrases - "out of proportion"

Headnote

The respondent entered into two hire-purchase agreements for the purchase of a truck and a trailer, respectively. The agreements were ceded to the applicant finance company. Certain sums of money, but not the full amounts due under the agreements, were paid by the respondent but credited only to the agreement in respect of the truck. In respect of the trailer, no payments were made. After about six months, the applicant cancelled both agreements and

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instituted an action for summary judgment, claiming, *inter alia*, the delivery of the truck and trailer and forfeiture of the instalments paid under both agreements.

The respondent filed a notice of opposition to the application and supported the notice with an affidavit. The applicant disputed certain of the several allegations made by the respondent, among them -

(1) that the applicant had indicated that it would withdraw proceedings against the respondent; and

(2) that notice of cancellation of the agreements had not been given.

The applicant filed an answering affidavit, which the respondent sought to have struck out.

Among the defences raised in the respondent's opposing affidavit was an allegation that the relief being sought was in effect an excessive penalty which was in contravention of the Contractual Penalties Act 1992 and thus not susceptible to summary judgment.

Held, that this was a case where it was in the interests of justice for the court to allow the applicant to submit an answering affidavit. The applicant could not have known that the respondent would have raised the points it did. This approach was supported by the subsequent amendment to rule 67 of the Rules of the High Court, promulgated in SI 25 of 1993.

Held, further, that the evidence showed that the respondent's defence that the applicant had agreed to withdraw proceedings was false and that due notice terminating the agreements had been given to the respondent.

Held, further, that the provision of the hire-purchase agreement whereby the applicant could claim the return of the goods and the forfeiture of all moneys paid could, in terms of s 4(2) of the Contractual Penalties Act 13 of 1992, amount to a penalty which was out of proportion to the prejudice suffered by the applicant by reason of the respondent's default. Such a matter could not be decided at the summary judgment stage and leave would be granted to the respondent to defend that part of the claim relating to the truck. In respect of the trailer, however, since no instalments at all had been paid and since the amount paid as a deposit, spread over the period during which the respondent had had the use of the trailer, would have been less than the monthly rental for the trailer, there was no question of the penalty being out of proportion to the prejudice suffered and summary judgment would be entered against the respondent in respect of the trailer.

Cases cited:

Chinaire t/a Lewisam Svc Station v Ednewgnam (Pvt) Ltd HH-493-87

NRZ Contributory Pension Fund v K D Systems Intl (Pvt) Ltd HH-153-90

Beresford Land Plan (Pvt) Ltd v Urquhart 1975 (1) RLR 260 (A)

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Venetian Blind Entprs (Pvt) Ltd v Venture Cruises Boatel (Pvt) Ltd 1973 (1) RLR 229 (G)

Salisbury Financial Hldgs Ltd v van Niekerk 1974 (1) RLR 333 (G); 1974 (3) SA 836 (R)

Western Bank Ltd v Meyer & Ors 1973 (4) SA 697 (T)

Peters v Janda NO 1980 ZLR 553 (G)

Gandenzara v Matienga HH-167-86

Premier Finance Corp (Pty) Ltd v Steenkamp & Ors 1974 (3) SA 141 (D)

ROBINSON J

A P de Bourbon SC for the applicant

A Ebrahim for the respondent

Judgment

Robinson J: This application for summary judgment involves two separate hire-purchase agreements entered into by the respondent as the purchaser, in regard to which the hire-purchase owners sold and ceded their rights to the applicant on the same date that each agreement was concluded.

The first agreement was entered into by the respondent with Hubert Davies & Co (Pvt) Ltd on 30 September 1991, the subject of the agreement being a new ERF 66CU truck, registration number 522-720J ("the truck agreement"), which was sold to the respondent for a total purchase price of $909 460,52.

The second agreement was entered into by the respondent with Maids (Pvt) Ltd on 24 October 1991, the subject of the agreement being a new tri-axle dropside trailer, registration number 509-054T/S/No. M/41/93/91 ("the trailer agreement"), which was sold to the respondent for a total purchase price of $146 640,48.

Following upon its cancellation of both agreements on the ground that the respondent had defaulted in paying its instalments thereunder, the applicant instituted action against the respondent claiming -

(a) confirmation of the termination of both agreements;

(b) delivery up of the truck and trailer;

(c) forfeiture of the instalments paid under both agreements;

(d) costs of suit on an attorney and client scale and collection commission calculated under the Law Society of Zimbabwe Bye - Laws 1982.

Consequent upon the respondent's entering an appearance to defend the applicant's action and after furnishing the respondent, in terms of its request for such particulars, with copies of both agreements and of statements of account reflecting the payments made and the amounts

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in arrear under both agreements, the applicant filed its present application for summary judgment for the relief particularised in its summons, as set out above

In response, the respondent filed a notice of opposition, together with an affidavit by the respondent's managing director, Frederick Musiwa Shava, opposing the application on the following grounds:

ROBINSON J

(i) that the amounts reflected in the statements of account furnished by the applicant were incorrect, in which connection the respondent annexed certain receipts purporting to indicate that the amounts recorded therein had not been credited to the respondent's account;

(ii) that the applicant had clearly conveyed to Mr Shava personally that no action would be taken in this matter and that the applicant had instructed its legal practitioners to withdraw all proceedings on accepting the payments covered by the receipts which, the respondent alleged, were not accepted on a without prejudice basis and were accepted in reduction of both hire-purchase agreements;

(iii) that no notice had been given to the respondent informing the respondent that both agreements were to be cancelled

(iv) that the relief sought by the applicant is in effect an excessive penalty which contravenes s 6 of the (then) Conventional Penalties Act [*Chapter 42*] and which was not susceptible to resolution in summary judgment proceedings;

(v) that both agreements clearly indicated that the action should have been brought in the magistrate's court, which had a bearing on the question of costs.

At the hearing of this matter, Mr *Ebrahim*, who appeared for the respondent, wisely abandoned ground (v), *supra*, which was clearly without substance in that both agreements expressly provide that it shall be in the sole discretion of the seller to have any matter in dispute determined in the High Court and in that event the costs shall be those prevailing in the High Court tariff of costs.

Although rule 67 of the Rules of the High Court provides in specific terms that no evidence may be adduced by an applicant otherwise than by the affidavit of which a copy was delivered with the notice of application, the applicant, without leave of the Court, filed an answering affidavit to which, at the hearing, the respondent raised an objection *in limine*.

In this regard, Mr *Ebrahim* made the following submissions in his heads of argument.

"In Limine

A1 In summary judgment proceedings there is no provision for the filing by the applicant of answering affidavits. The applicant's application must stand or fall on its founding affidavit. See Rule 67 of the High Court Rules.

ROBINSON J

2. The court has inherent jurisdiction to depart from the rules and to permit the filing of answering affidavits

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but this discretion should be exercised sparingly and in exceptional circumstances.

See *Venetian Blind Enterprises (Pvt) Ltd v Venture Cruises Boatel (Pvt) Ltd* 1973 (1) RLR 229; *Chinaire v Ednewgnam (Pvt) Ltd* HH-493-87; *National Railways of Zimbabwe Contributory Pension Fund v KD Systems International (Pvt) Ltd* HH-153-90.

3. It is therefore submitted that the answering affidavits and annexures be entirely disregarded and struck out."

In reply, Mr *de Bourbon*, for the applicant, countered in succinct manner, thus:

"The answering affidavit should be admitted in this case, as an exception to the general rule, because of the various nature of the defences raised. Compare *National Railways of Zimbabwe Contributory Pension Fund v KD Systems International (Pvt) Ltd* HH-153-90 and *Chinaire v Ednewgnam (Pvt) Ltd* HH-493-87. Mr Shava is being deliberately untruthful in his opposing affidavit."

I have considered the authorities cited by Mr *Ebrahim* in support of his submission that the applicant's answering affidavit should not be admitted. However, even before the gazetting of SI 25/93, with which I shall deal shortly, I was satisfied that this was a case in which, in the interests of justice, the court should exercise its discretion in favour of the applicant under rule 4C(a) of the Rules of the High Court by authorising a departure from rule 67 and admitting the applicant's answering affidavit with the documentary evidence annexed to it. I did so on the ground that at the time the applicant signed its affidavit in support of its application for summary judgment on 26 May 1992, the applicant had no foreknowledge that the respondent would raise the defence it did in para 5 of its opposing affidavit of an indication allegedly given by the applicant that it had instructed its legal practitioners to withdaw proceedings against the respondent or that, after having failed to ask for particulars in its request filed on 22 May 1992 in regard to the applicant's allegation in para 10 of its declaration that it had given notice cancelling the hire-purchase agreements, the respondent would, in para 6 of its opposing affidavit, deny that notice of cancellation of the agreements had been given to it.

Such an approach was entirely in line with the just approach adopted by the

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Cape Provincial Division in *Consolidated Press of SA Ltd v van der Merwe* 1951 (1) SA 337, in which the court admitted a replying affidavit by the plaintiff where the defence amounted to a compromise allegedly reached between the parties after the issue of summons and the filing of the application for summary judgment which, therefore, it would have been impossible for the plaintiff to have dealt with at the time when it filed its affidavit in support of its application for summary judgment.

This approach was also consistent with what was said in this court by CHIDYAUSIKU J in *Chinaire, trading as Lewisam Service Station v Ednewgnam (Pvt) Ltd* HH-493-87 (unreported) and by GIBSON J in *National Railways of Zimbabwe Contributory Pension Fund v KD Systems International (Pvt) Ltd* HH-153-90 (unreported).

Moreover, and in any event, this approach is now fully justified by the amendment introduced by s 7 of SI 25/1993, which took effect on 15 January 1993, whereby the proviso to rule 67 of the

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Rules of Court was altered to permit this court to allow the plaintiff to supplement his founding affidavit with a further affidavit dealing with "any matter raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his first affidavit".

Accordingly, leave is granted for the admission of the applicant's answering affidavit.

In this regard, I would observe that whereas, at first sight, rule 64 would seem to envisage that the only other evidence which an applicant for summary judgment may rely upon in his supporting affidavit are documents attached to it which verify the applicant's cause of action or his belief that there is no *bona fide* defence to the action, the proviso to rule 67, as amended by s 7 of SI 25/1993, is wider in its ambit. It allows the court to permit the applicant to supplement his supporting affidavit with a further affidavit dealing with "any matter raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his first affidavit", without requiring such evidence to be in documentary form.

However, as I understand the judgment of MacDONALD ACJ (as he then was) in *Beresford Land Plan (Pvt) Ltd v Urquhart* 1975 (1) RLR 260 (A), seeing that, apart from those circumstances now covered by the proviso to rule 67, an applicant for summary judgment may not file an answering affidavit, our courts, in approaching applications for summary judgment, have moved

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away from the rigid and inflexible approach adopted by the South African courts and have opted for the more flexible and, I would add, with respect, more commendable and sensible approach and practice of the English courts, by allowing an applicant for summary judgment to rely upon documentary and other evidence in his supporting affidavit to show that the respondent does not have a *bona fide* defence to his claim. In this connection I can do no better than refer to the following extract from the judgment of MacDONALD ACJ in *Beresford's case supra* at 273E-H & 174A-E.

> "In *Venter v Kruger* 1971 (3) SA 848 (N) at 851, the judgments of HERBSTEIN J, GALGUT J and DE WET JP were relied upon as making it clear: 'That in an application for summary judgment a plaintiff should not give evidence as to the facts supporting his case in his affidavit'. And it was held that a letter annexed to the summons 'in order to establish that the defendant had no defence to the action' could not be verified by the affidavit and must be struck out as inadmissible. In the summons, the letter had not been relied upon as constituting in itself the plaintiff's cause of action and in these circumstances it should not have been annexed to the summons, but for the reasons given earlier in this judgment and in the English cases it was highly relevant to the question of whether or not there was a *bona fide* defence to the action and should for this reason, with respect, have been admitted as evidence in the proceedings for summary judgment. The purpose of the affidavit is to transform the allegation of fact made in the declaration or particulars to the summons into evidence. In consequence it is not possible to object to the contents of an affidavit on the grounds that they constitute 'evidence', but only on the basis that the deponent, in verifying the facts on which his cause of action is based, has gone into unnecessary detail. The dividing line between a concise and clear statement of the plaintiff's case and a statement which involves unnecessary detail cannot be drawn with scientific accuracy. The line can certainly not be drawn by categorizing some of the facts sworn to as constituting 'evidence' and other facts sworn to as falling outside that category. As in pleading, the duty of an applicant for summary judgment is to avoid prolixity, but what would properly be regarded as prolix in a declaration is not necessarily prolix in an affidavit filed in support of such an application, for the simple reason that a declaration and an affidavit in support of an application for summary

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judgment are intended to serve entirely different purposes. It is for this reason that a letter which constitutes evidence that the defendant has no *bona fide* defence is likely to be struck out as irrelevant if annexed to the declaration, but will be regarded as relevant

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and therefore admissible if annexed to the affidavit filed in support of an application for summary judgment.

It is sometimes said (see, for example, the judgment of GALGUT J in *Kosak & Co (Pty) Ltd v Keller & Anor supra*), that summary judgment proceedings should not be allowed to develop into 'motion proceedings in the fullest sense'. With respect, there is no possibility of this ever happening, for the simple reason that the applicant under the South African and Rhodesian Rules is not allowed to reply to the respondent's affidavit. Indeed, the fact that the applicant may not reply makes it highly desirable that he should not be unduly curbed in making the only affidavit permitted under the order."

A further observation I would make in regard to an application for summary judgment is that, where, as in this matter, particulars have been requested by the respondent (as defendant) and furnished by the applicant (as plaintiff), then such particulars become part of the summons and may properly be taken into account by the court when dealing with the application. See *Venetian Blind Enterprises (Pvt) Ltd v Venture Cruises Boatel (Pvt) Ltd* 1973 (1) RLR 229 at 233H & 234A.

Let me say, in passing, that I consider that the stage has now been reached where an applicant for summary judgment should always be allowed to file a replying affidavit to show that a respondent's opposition to his application is not *bona fide* or is ill founded. In this regard, I can see no good reason for distinguishing any longer between an applicant for summary judgment and any other applicant insofar as the filing of a replying affidavit is concerned. Accordingly, I would strongly recommend that our Rules of Court be amended to entitle an applicant for summary judgment to file a replying affidavit if he so elects.

I turn now to consider the defences raised by the respondent to the applicant's action.

In support of his contention that the amounts reflected in the applicant's pleadings and statements of account are incorrect, the respondent attaches copies of receipts purportedly to indicate that the amounts represented by the receipts have not been credited to his account. However, it will be seen that only one of the receipts is relevant to either agreement, namely, receipt no. 04290767 dated 29 April 1992 for the sum of $14 257,94 which was credited to the truck agreement. Furthermore, and in any event, even if all the amounts

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reflected in those receipts had been credited to one or other of the agreements in question, that would not have liquidated the payments which were in arrear under those agreements as at the date of their cancellation by the applicant and which the respondent remained liable to pay notwithstanding cancellation of the agreements. Moreover, the respondent is unable to point to any payments having been made by it in respect of the arrear instalments due under the trailer

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agreement after payment of the deposit and delivery of the trailer to it.

If the respondent's Mr Shava was unhappy about the way in which the amount of the respondent's cheque for $27 610 had been appropriated by the applicant to the amounts owing under four of the five different hire-purchase agreements the respondent had with the applicant, including the said sum of $14 257,94 which had been credited to the amount in arrear under the truck agreement, then Mr Shava should have taken up the matter immediately with the applicant instead of seeking to mislead the court into believing that the total amount of $27 610 was destined for either or both of the agreements in question.

With regard to the defence advanced in para 5 of the respondent's opposing affidavit that "the applicant company clearly indicated to me personally that no action would be taken in this matter and that they had instructed their legal practitioners to withdraw all proceedings on accepting the payment for which the receipts are enclosed herewith", one cannot help being suspicious about the following aspects.

(a) Mr Shava conspicuously fails to give the name of or to identify the person in the applicant company who is alleged to have spoken to him personally and to say on what date, where and in what manner the conversation is alleged to have taken place, without which information it was, of course, impossible for the applicant to investigate the matter on its side to verify Mr Shava's allegations or to advise whether the person in question had the authority to agree on the applicant's behalf to discontinue proceedings against Mr Shava; as Mr *de Bourbon* put it in para 7 of the applicant's heads of argument:

> "The defence raised of a novation cannot succeed. Not only is the allegation made in the most scanty and bald terms (compare *Phillip Properties (Pvt) Ltd v Alpha Bricks (Pvt) Ltd* HH-11-92), it is not alluded to when it should reasonably have been mentioned in the letter at p 20. At the very least the respondent could have identified the date of the agreement, and the name of the persons who represented the parties. The

> vagueness of its allegations in this regard tell against the truth of its allegations;"

(b) Mr Shava leaves one wondering what exactly he meant when he said that the applicant indicated to him"that no action would be taken in this matter"and why it was that the applicant had instructed its legal practitioners to withdraw all proceedings"on accepting the payment for which the receipts are enclosed herewith"when just one of those receipts reflected a payment only partially reducing the arrears due under the truck agreement and when no payment had been made towards the arrears due under the trailer agreement, which dated back to the first instalment due after payment of the deposit;

(c) Mr Shava is unable to point to any written document confirming what he alleges was indicated to him personally by the applicant;

(d) In his letter to the applicant's legal practitioners dated 13 May 1992, following service of summons on the respondent at its registered office on 8 May 1992, apart from trying to make out that the arrear instalments due by the respondent under both agreements had been"redressed "by a cheque for the said amount of $27 610 paid direct to the applicant on

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Saturday, 25 April 1992, as represented by the receipts in question, Mr Shava, most surprisingly, fails to confirm the arrangement whereby he alleges the applicant indicated to him personally that it would"withdraw all proceedings "against the respondent -this in the face of a summons which, to Mr Shava's knowledge, had been served upon the respondent five days earlier claiming confirmation of the termination of both agreements and delivery up of the truck and trailer;

(e) If Mr Shava's version were true, it is again surprising that he should have concluded his said letter to the applicant's legal practitioners on 13 May 1992 in the way he did. Surely, if, as Mr Shava contends, the applicant had already agreed to"withdraw all proceedings"in view of the fact that the respondent had regularised its accounts in respect of the truck and trailer agreements, Mr Shava would simply have confirmed this instead of concluding his letter by expressing the"hope that Scotfin will agree that we regularise our account and we continue to pay to them"(my emphasis);

(f) Again, if Mr Shava's version were true, then one wonders why, if he believed that the applicant had agreed to"withdraw all proceedings"against the respondent and to re-instate its accounts in respect of the truck and trailer agreements, he should have caused his legal practitioner to enter an appearance

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to defend on the respondent's behalf on 15 May 1992, that is to say, two days after his said letter to the applicant's legal practitioners. Presumably, if the applicant's legal practitioners had notified the respondent, in response to Mr Shava's letter dated 13 May 1992, that it was proceeding with its action to recover the truck and trailer, the respondent would have referred such letter immediately to its legal practitioner and instructed him to refer to the applicant's agreement to"withdraw all proceedings"against the respondent. Had such a letter been addressed by the respondent's legal practitioner to the applicant's legal practitioners, no doubt the respondent's legal practitioner would have relied uon it and attached it to the opposing affidavit sworn by Mr Shava on behalf of the respondent.

In the light of these observations, the court has no hesitation in finding that Mr Shava's allegation that the applicant agreed to withdraw its proceedings against the respondent and to re-instate the respondent's accounts in respect of the truck and trailer agreements is false ad is simply an attempt to put forward a bogus defence in order to buy time.

Another respect in which it appears that Mr Shava has been untruthful relates to his denial in para 6 of his opposing affidavit that no notice had been given to the respondent by the applicant that the agreements in question "were to be cancelled".

However, little did Mr Shava realise when he made this denial that the court would admit the answering affidavit made by the applicant, to which were attached copies of the "Final Demand" letters addressed by the applicant to the respondent on 27 February 1992 and 10 March 1992, cancelling the truck and trailer agreements, respectively. Both letters were addressed to the respondent at PO Box 189, Ruwa, the address given by the respondent at the top of and in the

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body of both agreements in question as its postal address.

While it may be asking too much of the court to believe that both the said letters went astray, the legal position is that clause 13 of both agreements provides expressly that "any notice to be given under these terms will be sufficiently given by one party to the other party by **posting** a notice to his or their usual or last known residence or place of business"(my emphasis).

In my view, a notice posted by the applicant to the respondent at the postal residential address given by it on and in the agreements in question, which postal address is also endorsed at the top of the first receipt attached to the respondent's opposing affidavit (at p 14 of the record), constitutes a sufficient

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and proper giving of notice to the respondent. Accordingly, irrespective of whether both the said letters were received by the respondent, I find that due notice was given by the applicant to the respondent terminating both the truck and trailer agreements.

Furthermore, insofar as the applicant pleaded in para 10 of its declaration that it "gave notice cancelling "both agreements and" calling for the return of"the truck and trailer, one wonders why, if the respondent denied receiving such notices of cancellation, the respondent's legal practitioner did not, in the request for further particulars filed by him on 22 May 1992, before the applicant filed its application for summary judgment, ask for particulars of such notices of cancellation.

Again, the only conclusion to which the court is driven is that Mr Shava was untruthful in denying that the respondent had received the letters of cancellation addressed by the applicant to him as the respondent's manager.

The respondent submitted, in para 5 of its opposing affidavit, that the payments reflected in the receipts in question"were not accepted on a without prejudice basis and were accepted in reduction of the Hire Purchase Agreements". This is without substance. Ignoring for the moment that only one such payment was applied to one of the two agreements in question, once it is accepted (as it is by the court) that due notice of cancellation of both agreements was given by the applicant to the respondent, then, insofar as the agreements entitle the applicant to recover from the respondent all arrear instalments which were unpaid at the date of termination of the agreements, it was in order for the applicant to receive and appropriate the sum of $14 257,94 (from the amount of $27 610 paid by the respondent in April 1992) and the further sum of $14 257,94 (from the second amount of $27 610 paid by the respondent by cheque dated 25 May 1992) in reduction of the arrear instalments due under the truck agreement, as reflected in the relevant statement of account annexed to the applicant's further particulars and application for summary judgment. In this regard, it is important to note that no payments were destined for and appropriated by the applicant in reduction of the arrear instalments due under the trailer agreement, the significance of which will emerge when I deal with the issue of whether it can be said that a penalty existed in the case of the trailer agreement.

It remains for me to consider the final defence raised by the respondent in para 7 of its

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opposing affidavit, which is worded thus:

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"I confirm the relief sought by the applicant is in effect an excessive penalty which is in contravention of s 6 of the Conventional Penalties Act [*Chapter 42*]. The penalty is not susceptible to summary judgment."

Clearly the respondent's legal practitioner, Mr *Ebrahim,* regards this defence to the applicant's action as the respondent's main defence, since the major part of the respondent's heads of argument is addressed to this defence. I quote below the submissions made on the respondent's behalf.

"5. The respondent also relies on s 6 of the Conventional Penalties Act [*Chapter 42*], which Act has since been replaced with (sic) the Contractual Penalties Act 13 of 1992 which came into operation on 23 October 1992. The relevant section in the new Act is s 4(2) of Act 13 of 1992. When the opposing affidavit was drawn on 9 June 1992 the new Act had not come into force.

6. It is submitted that applicant's request to cancel the agreements and the return of the goods which is implicit from applicant's summons is clearly a penalty stipulation as defined in s 2 of the Conventional Penalties Act [*Chapter 42*] as read with s 2 of the Contractual Penalties Act 13 of 1992.

7. It is clear from the papers that the respondent has paid a considerable sum of money towards both agreements. When the applicant purported to cancel those agreements no tender was made for the return of monies paid to date.

8. It is respectfully submitted that in the circumstances this Honourable Court is duty bound to act under s 6 of the Conventional Penalties Act [*Chapter 42*] or s 4(2) of the Contractual Penalties Act 13 of 1992. The authority for this proposition is *Salisbury Financial Holdings Ltd v van Niekerk* 1974 (3) SA 836 (R) and *Western Bank Ltd v Meyer & Ors* 1973 (4) SA 697. In the latter case a three judge Court of the Transvaal Provincial Division held that the word 'may' as used in s 6 did not confer a discretion but a power coupled with a duty, and that a court must apply the provisions of the section in an action for enforcement of the penalty where it appears to it that there is a disproportion of penalty to prejudice suffered by the creditor, even where the debtor is in default. It is submitted that in the instance (sic) case the respondent is not in default.

9. It was held by DAVIES J in *Salisbury Financial Holdings Ltd v van*

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Niekerk that since the provisions of our Chapter 42 was (*sic*) similar to the South African Conventional Penalties Act 15 of 1962 the approach of the South African Courts could and should be applied in this country.

10. It is submitted that once the provisions of s 6 of the Conventional Penalties Act is (*sic*) raised this Honourable Court is duty bound to determine what amounts to excess of penalty and this (*sic*) is not possible to determine what amounts to excess of penalty in summary judgment proceedings. This proposition is found in *Peters v Janda NO* 1980 ZLR 553 and in particular at 559 C to E

11. In *Premier Finance Corp Ltd v Steenkamp* 1974 (3) SA 141, HOWARD J concluded that in summary judgment proceedings it is not possible nor practical for a court to decide the questions mentioned in s 6 of Chapter 42 and that in that case accordingly, once the question of penalty was raised the application was

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bound to fail.

12. Further authority is to be found in Christie *The Law of Contract in South Africa* 1 ed at p 541."

Mr *de Bourbon's* response to these submissions was a short and sharp one, expressed thus:

"The amount of money paid by way of instalments relates only to the first agreement, and totals $60 216,75. Such a claim is an enforceable penalty: see *Clyde - Wiggins v Maba Estates (Pvt) Ltd* 1966 RLR 677 (G) at 682C-E. The decision in *Peters v Janda NO* 1980 ZLR 553 (G) at 558-559 is distinguishable. In that matter there was some basis suggested as to why summary judgment should not be granted because of a penalty. Here there is merely a bald assertion of the existence of a penalty. It is respectfully submitted that in any event such a penalty (without conceding such a penalty exists) would relate only to the first agreement and not to the second."

I shall now deal with these submissions.

1. The Conventional Penalties Act [*Chapter 42*] ("the old Act") was replaced by the Contractual Penalties Act 13 of 1992 ("the new Act") with effect from 23 October, 1992 and the latter Act is the Act which governs this matter.

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2. In s 2 of the new Act the following meanings are ascribed to "penalty" and "penalty stipulation":

"'penalty' means -

(a) any money which a person is liable to pay; or

(b) anything which a person is liable to do or perform; or

(c) any money, right, benefit or thing which a person is liable to forfeit;

under a penalty stipulation."

"'penalty stipulation' means a contract or provision in a contract under which a person is liable -

(a) to pay any money; or

(b) to do or perform anything; or

(c) to forfeit any money, right, benefit or thing;

as a result or in respect of -

(i) an act or omission in conflict with a contractual obligation; or

(ii) the withdrawal of any person from a contract;

whether the liability is expressed to be by way of penalty, liquidated damages or otherwise."

3. Section 3 of the new Act provides:

"3 (1) This Act shall apply in respect of

(a) all penalty stipulations; and

(b) ...

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entered into on or after the 9th November, 1973.

(2)This Act shall not apply to any contract to which the Hire - Purchase Act [*Chapter 284*] applies, to the extent that the provisions of this Act are inconsistent with the provisions of that Act."

4. Section 3 of the Hire-Purchase Act [*Chapter 284*] provides that, except for the provisions of ss 4, 22 and 23, which apply to every agreement or, as the case may be, to the parties to every agreement, the provisions of Part I (which deals with "General Provisions Relating to Agreements") shall not apply to an agreement under which the purchase price exceeds the sum of $3 000. This means that the provisions of the new Act, insofar as they apply to both the truck and trailer agreements, are not affected by the provisions of Part I of the Hire-Purchase Act (except for the provisions of ss 4, 22 and 23).

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At this point I feel constrained to say that I believe the time is long overdue for the limit of $3 000 prescribed in s 3 of the Hire - Purchase Act to be increased to a much more realistic figure, having regard to present-day prices for goods.

5. Section 4 of the new Act provides as follows:

"4 (1) Subject to this Act, a penalty stipulation shall be enforceable in any competent court.

(2) If it appears to a court that the penalty is out of proportion to any prejudice suffered by the creditor as a result of the act, omission or withdrawal giving rise to liability under a penalty stipulation, the court may -

(a) reduce the penalty to such extent as the court considers equitable under the circumstances; and

(b) grant such other relief as the court considers will be fair and just to the parties.

(3) Without derogation from its powers in terms of sub-section (2), a court may -

(a) order the creditor to refund to the debtor the whole or any part of any instalment, deposit or other moneys that the debtor has paid; or

(b) order the creditor to reimburse the debtor for the whole or part of any expenditure incurred by the debtor in connection with the contract concerned.

(4) In determining the extent of any prejudice for the purposes of subsection (2), a court shall take into consideration not only the creditor's proprietary interest but every other rightful interest which may be affected by the act, omission or withdrawal in question.

6. In line with the approach laid down by the South African courts, as applied by Davies J (as he then was) in *Salisbury Financial Holdings (Pvt) Ltd v van Niekerk* 1974 (1) RLR 333 (G); 1974 (3) SA 836 (R), I agree that the word"may", where it features in s 4(2) of the new Act and where it featured in s 6 of the old Act (both of which sections were substantially similar to s 3 of the South African Conventional Penalties Act 15 of 1962), confers upon the court not merely a discretion, but a power, coupled with a duty, to apply the provisions of subsections (2) and (3) of s 4 of the new act if it appears to the court that a penalty is out of proportion to any prejudice suffered by the creditor as a result of the act, omission or withdrawal giving rise to liability under a penalty stipulation.

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As stated by the full Bench of the Transvaal Provincial Division in *Western Bank Ltd v Meyer & Ors* 1973 (4) SA 697 (T) at 699E-F:

> "The word 'may' in s 3 (of the South African Conventional Penalties Act 15 of 1962) does not merely confer a discretion, but a power coupled with a duty. See *Western Credit Bank Ltd v Kajee* 1967 (4) SA 386 (N) at 393B [sic - it should be 391B]. The Court must apply the provisions of s 3 where it appears to it that there is a disproportion such as is visualised by that section. The Courts will therefore apply s 3 even where, in an action for enforcement of a penalty, the debtor is in default of appearance. See *Ephron Bros Holdings (Pty) Ltd v Foutzitzoglou* 1968 (3) SA 226 (W)."

7. In *Peters v Janda* NO 1980 ZLR 553 WADDINGTON J (as he then was) held that where, in an application for summary judgment, a *bona fide* defence is raised in terms of s 6 of the Conventional Penalties Act [*Chapter 42*], it will not usually be possible or practicable for a court to determine the questions raised by that section; accordingly, the application for summary judgment was refused on that account and the defendant was given leave to defend.

That decision was approved by MFALILA J in *Gandenzara v Matienga* H-167-86 (not reported).

It is of interest to note that in *Peters v Janda NO supra*, Mr *de Bourbon,* in opposing an application for summary judgment, successfully raised the defence, in the last resort, that the remedy relied upon by the plaintiff amounted to a penalty which was out of proportion to the prejudice suffered by the plaintiff by reason of the omission in respect of which the penalty was stipulated. It was therefore incumbent on the court, so Mr *de Bourbon* submitted, to exercise its discretion in terms of s 6 of the Conventional Penalties Act [*Chapter 42*] to reduce the penalty to an equitable level.

8. In *Peters v Janda NO supra* WADDINGTON J stated as follows, at p 559 C-G:

> "The attitude of the courts hitherto has been that summary judgment proceedings are wholly inappropriate to determine whether a penalty claimed is out of proportion to the prejudice suffered or the extent to which the penalty should be reduced (*per* HOWARD J in *Premier Finance Corp Ltd v Steenkamp* 1974 (3) SA 141 at 144A; and see *Commonwealth Shippers Ltd v Jankelow* 1960 (3) SA 669 (W)). In the *Premier Finance*

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> *Corp* case HOWARD J concluded that in summary judgment proceedings it is not possible nor practicable for a court to decide the questions mentioned in s 6 of Chapter 42 and that in that case accordingly, once the question of penalty was raised, the application was bound to fail. I would not be prepared to go so far as to say that this would be the inevitable result in every such case but in this case I would hesitate to find that the defence now under consideration is not *bona fide*, although on the merits a court may find no justification for reducing the penalty. It may be that the forfeiture of $6782, for nothing more than the occupancy of the premises in question since 1 July 1978, is unreasonably high and so inequitable as to justify a reduction in the penalty in terms of s 6 of Chapter 42. On the other hand it may not. But this is not a question that is possible to determine at this stage because there are obviously insufficient facts before me which would enable me to assess the reasonable value of the occupancy and any other relevant factors."

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9. In that case WADDINGTON J concluded thus at p 560C:

> "In summary judgment proceedings, it is not necessary for the court to determine whether the defence raised is good or the extent to which it may be so; if the defence raised by respondent is shown to be *bona fide*, that is sufficient. There is in my view a *bona fide* dispute as to whether the penalty should be reduced and I am satisfied that there is a triable issue which justifies granting defendant leave to defend."

10. I agree with the remarks and ruling of WADDINGTON J quoted in para 8, supra, and , accordingly, in the case of the truck agreement, I find it to be a *bona fide* defence, giving rise to a triable issue, that to order the return of the truck and to allow the applicant to retain all payments received to date in respect of the truck could, in terms of s 4(2) of the new Act, amount to a penalty which is out of proportion to the prejudice suffered by the applicant by reason of the respondent's default. Since I further find that it is not possible or practical for this court, at the summary judgment stage, to apply the provisions of s 4(2) of the new Act on the basis of the papers before the court, the application for summary judgment for the return of the truck and forfeiture of the instalments paid under the truck agreement is dismissed and the respondent is given leave to defend that part of the claim in case number HC 2118/92.

11. However, the position is different in the case of the trailer. As pointed out earlier, no payments stand to the credit of the trailer account since the time

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the cash deposit of $15180 was paid on 24 October 1991 and, therefore, the respondent has had the use of the trailer since 24 October 1991 without having paid any monthly instalments of $3651,68 under the trailer agreement up to the time of the cancellation of the agreement on 10 March 1992. This means, in effect, that if the trailer is returned to the applicant and one has regard to the deposit of $15180 paid to the applicant by the respondent, the respondent will have had the use of the trailer at a rental of about $3000 per month for the period 24 October 1991 to 10 March 1992, when the trailer agreement was cancelled, which is almost $600 per month less than the monthly instalment which the respondent was liable, but failed, to pay under the trailer agreement.

In this connection, it is pertinent to quote what the full Bench of the Transvaal Provincial Division had to say in *Western Bank Ltd v Meyer & Ors supra* at 699 F:

> "Section 3 empowers the court to exercise the equitable jurisdiction only 'if it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor ...'
>
> The meaning to be assigned to the words 'if it appears to the court' in this context has been discussed in *Maiden v David Jones (Pty) Ltd* 1969 (1) SA 59 (N) at 64. There is no reason to differ from what is there said. It follows that a Court will not reduce the penalty unless it is clear or plain to the court that the penalty is 'out of proportion to the prejudice suffered.' The words 'out of proportion' have also been interpreted. It seems that by the use of these words it was intended that the penalty is markedly, not infinitesimally, beyond the prejudice suffered, and that the excess is such that it would be unfair to the debtor not to reduce the penalty. (See *Western Credit Bank Ltd v Kajee supra* at 391C-D). In this regard the Legislature has not provided any yardstick by which the 'proportion' is to be measured, or to be determined. It is a matter left entirely to the discretion of the court which, so it seems to us, should only interfere if, bearing in mind that an object of a penalty clause is to compe the debtor to implement his obligations under the contract by providing harsh consequences should he default, it nevertheless is of the opinion that the penalty is unduly severe to an extent that it offends against one's sense of justice and equity.

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> Naturally each case depends on its own circumstances and no hard and fast rules to cover all cases are capable of being formulated.

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> If the court is left in doubt as to whether or not the penalty is markedly or unfairly out of proportion to the prejudice, then the penalty falls to be enforced in accordance with the agreement. (See *Maiden v David Jones (Pty) Ltd supra* at 63E-F)".

In the case of the trailer, there can be no question, in my view, of there appearing to be any penalty which is out of proportion to the prejudice suffered by the applicant as a result of the respondent's default and, consequently, I am satisfied that the respondent has no *bona fide* defence on that account to a claim by the applicant for the return of the trailer. Accordingly, summary judgment is entered against the respondent for the return of the trailer to the applicant.

In view of the split decision at which I have arrived on the application for summary judgment, I think the fairest order to make on the question of costs is for that question to be reserved.

Before I confirm the entire order made by me, which Mr *de Bourbon* appears to have anticipated in the last sentence of para 9 of the applicant's heads of argument, let me say that, as matters presently are, I find it of no little concern that in cases such as the present one, hire-purchaser owners or finance houses may find themselves at the mercy of debtors who can only too easily fall back on the provisions of s 4(2) of the new Act to defeat an application for summary judgment. Indeed, in *Premier Finance Corp (Pty) Ltd v Steenkamp & Ors* 1974 (3) SA 141(D) at 144D-G HOWARD J went so far as to say that where a creditor ought reasonably to have expected the question of a penalty to be raised, whether by the debtor himself or by the court *mero motu*, then if the creditor launched an application for summary judgment without giving due consideration to that possibility, he deserved to be ordered to pay the defendant's costs.

I confirm that it is ordered as follows:

1. That the application for summary judgment for, *inter alia,* delivery up of the ERF 66 CU truck, registration number 522-720 J, subject of the hire-purchase agreement entered into by the respondent with Hubert Davies & Co (Pvt) Ltd on 30 September 1991, which agreement was assigned by the latter to the applicant with the respondent's acknowledgment on the same date, is dismissed and the respondent is given leave to defend that part of the claim in case number HC 2118/92.

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2. That summary judgment is entered for the applicant for the delivery up forthwith by the respondent to the applicant of the tri-axle dropside trailer, registration number 509-054/S/No M/41/93/91, subject of the hire-purchase agreement entered into by the respondent with Maids (Pvt) Ltd on 24 October 1991, which agreement was assigned by

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the latter to the applicant with the respondent's acknowledgment on the same date.

3. That the question of costs be reserved.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Ali Ebrahim, respondent's legal practitioner

FILM & VIDEO TRUST v MAHOVO ENTERPRISES (PVT) LTD 1993 (2) ZLR 191 (HC)

Court **High Court, Harare**

Robinson J

Application for ejectment

23 September 1993

Flynote

Contract - option - what is - lease agreement giving lessee option to renew at rental to be agreed on - effect - no rights given to lessee - no obligation imposed on lessor to negotiate or agree to new rental - no implied term that only a fair and reasonable rent could be demanded

Landlord and tenant - Commercial Premises (Rent) Regulations 1983 - statutory tenant - ejectment - grounds on which may be refused - intended use of premises by lessor - good and sufficient grounds on part of lessor sufficient - needs of lessee irrelevant - bona fides of lessor - proof of

Headnote

The respondent occupied premises owned by the applicant under an agreement of lease which expired in June 1992. One of the terms of the agreement was that the respondent had an"option to renew the lease for a further five year period, at a rental to be mutually agreed on". Before the expiry of the lease, the applicant informed the respondent that, since no agreement had been reached on a renewal of the lease, it had decided to develop the premises by converting them to shops and offices. The respondent disputed the applicant's right to require it to vacate the premises and remained in occupation as a statutory tenant under the Commercial Premises (Rent) Regulations SI 676/1983. The respondent also disputed the *bona fides* of the applicant, claiming that the rent being demanded was excessive and that the applicant did not really want the premises for the purpose stated.

The applicant applied for an order of ejectment.

Held, that the so-called option to renew, which did not specify a rental, gave the respondent no rights at all against the applicant. It was of no force or effect until a rental was agreed upon between the parties, but it did not oblige either of them to negotiate at all, let alone agree to

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anything. Nor was there any room for the implication of a term that the agreement provided for a reasonable rental nor that such rent should be ascertainable by reference to the rent board. In short, the"option"was worthless because it was unenforceable.

Held, further, that under s 22(2) of the Regulations an order for the ejectment of a statutory lessee may be made once the lessor satisfies the court that it is has good and sufficient grounds to require an order for ejectment. The needs of the lessee are irrelevant in this regard. While ejectment may not be ordered if the lessor's grounds for requiring it are that the lessee has declined to accept an increase in rent or because the lessor wishes to lease the premises to another person, the fact that other grounds for requiring ejectment may be motivated by one of those factors is immaterial as long as the other grounds are genuine.

Held, further, that all that the lessor is required to do is assert his good faith and bring some small measure of evidence to demonstrate the genuineness of his assertion. This the applicant had done. Order accordingly granted.

Cases cited:

Brown v Hicks (1902) 19 SC 314

Biloden Properties (Pty) Ltd v Wilson 1946 NPD 736

Hattingh v van Rensburg 1964 (1) SA 578 (T)

SA Reserve Bank v Photocraft (Pty) Ltd 1969 (1) SA 610 (C)

Wasmuth v Jacobs 1987 (3) SA 629 (SWA)

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

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

Boka Entprs (Pvt) Ltd v Joowalay & Anor 1988 (1) ZLR 107 (S)

Rudder v Wright 1928 NPD 303

Guthrie Hldgs (Pvt) Ltd v Arches (Pvt) Ltd 1989 (1) ZLR 184 (S)

S Goulding (Pvt) Ltd t/a Moonlight Magic v A & L Hldgs (Pvt) Ltd S-233-91

Mobil Oil Zimbabwe (Pvt) Ltd v Chisipite Svc Station (Pvt) Ltd 1991 (2) ZLR 82 (S)

Newman v Biggs 1945 EDL 51

A P de Bourbon SC for the applicant

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A J Dyke for the respondent

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Judgment

Robinson J: I heard this application on 23 September 1993. I had no hesitation in granting it and making the following order:

> "That the respondent shall vacate the premises presently occupied by it on Stand 164A, Strathaven Township by not later than 31 October 1993, failing which the Deputy Sheriff or his lawful assistant is authorised and directed, at the instance of the applicant, to evict the respondent from the said premises.
>
> 2. That the respondent shall pay the costs of this application, including any costs on a legal practitioner and client scale incurred by the applicant in causing the Deputy Sheriff or his lawful assistant, if need be, to evict the respondent from the said premises."

The application was for an order to eject the respondent from a property in Strathaven, Harare, being Stand 164 A ("the property"), which, on the applicant's view of the matter, the respondent was occupying as a statutory lessee under the Commercial Premises (Rent) Regulations SI 676 of 1983 and on which the respondent was running a night club called Circus Night Club.

The application was opposed by the respondent.

The applicant's counsel, Mr *de Bourbon*, asked me to provide in the order for its enforcement at the instance of the applicant if an appeal was noted against it by the respondent. However, I told Mr *de Bourbon* that I preferred not to make such an order at that stage but that if the respondent did note an appeal against the order, then, in view of what I considered to be the hopeless grounds on which the respondent had opposed the application, I was prepared to give sympathetic consideration to an application by the applicant for it to enforce the order of eviction, notwithstanding the noting of such an appeal.

On 4 November 1993, the Registrar received a letter from legal practitioners, Chirunda, Chihambakwe & Partners, who had replaced the respondent's former legal practitioners, Winterton, Holmes & Hill. They advised that they had been instructed to note an appeal against the judgment delivered by me"on the 23rd day of October, 1993"(sic) and requested that they be furnished with the reasons for judgment so that they could"note the appeal within the prescribed time period".

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However, since I delivered my judgment *ex tempore* on 23 September 1993, the respondent is out of time to note an appeal. According to its new legal practitioners, the respondent instructed them to do so only on 26 October, 1993. Nevertheless, since it will be necessary for the respondent's current legal practitioners to be apprised of the reasons for my order to enable them to advise the respondent on its prospects of success on appeal if an application for the condonation of the late noting of an appeal by the respondent is to be filed, I now record the full reasons for the order made by me.

Briefly stated, the salient facts in this matter are-

(a) that the lease between the parties in respect of the property was extended for five

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years from 1 July 1987 to 30 June 1992;

(b) that the respondent had a so-called"option to renew the lease for a further 5 year period, at a rental to be mutually agreed upon"

(c) that the parties failed to reach an agreement on the amount of rent to be paid for the further five year period of renewal;

(d) that on 2 June 1992 the applicant's lawyers, Kantor and Immerman, addressed a letter to the respondent advising that, since no agreement had been reached on the renewal of the lease, the applicant had"decided to redevelop the property by converting it into four shops and six offices"that the applicant was prepared, however, to allow the respondent to remain on the property until 31 August 1992 to enable the respondent to obtain alternative premises; and that the applicant would provide the respondent with proof of its redevelopment in the form of plans if this was required by the respondent;

(e) that the applicant submitted a copy of its redevelopment plan to the respondent under cover of a letter dated 3 July 1992;

(f) that by a letter dated 6 August 1992 the respondent's legal practitioners advised the applicant's legal practitioners that the respondent did not consider that the applicant had the right to require the respondent to vacate the property, for the occupation of which the respondent was prepared to pay the applicant a fair rental.

It was because of this impasse that the applicant filed its application seeking an ejectment order against the respondent.

I proceed now to deal with the grounds on which the respondent opposed the order of ejectment sought by the applicant.

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The first ground upon which the respondent relied is that, while it is common cause that the parties failed to reach agreement on the rentals for the period of renewal of the lease, the applicant frustrated the option to renew by its unreasonable demands for new rentals which constituted an increase of 400% over the previous rental payable. It was submitted by the respondent that in granting the option to renew the lease, the applicant impliedly granted the option on the basis that a fair and reasonable rental would be paid for the renewal period, which, in the event of disagreement, was"ascertainable by reference of the matter to the Commercial and Industrial Rent Board".

The attitude of the law to a so-called option to renew a lease for a certain period "at a rent to be mutually agreed upon" is quite clear. Indeed, so clear is it that one trusts that a University law student, at the completion of his or her course on the law of contract, would have been able, easily and summarily, to put paid to the respondent's first ground of opposition and, in doing so, would also have been able to point out that the respondent's counsel had completely misconstrued the meaning of a *pactum de contrahendo*.

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For the benefit of the respondent, let me now spell out fully the law on the point in issue.

As long ago as 1902, DE VILLIERS JP observed as follows in *Brown v Hicks* (1902) 19 SC 314 at 315 & 316:

> "Until the rent, or some definite mode of fixing the rent, is agreed upon, there is no contract of letting and hiring of the house. The letting of services stands upon the same footing."

The following is the headnote to that case:

> "The defendant, having engaged the plaintiff's services at a rate of remuneration to be fixed when the profits were ascertained, shortly afterwards informed him that his services would not be required."
>
> *Held,* on appeal, that as there was no concluded contract between the parties, as the rate of wages was not determined, nor any definite basis fixed upon which they could be calculated, the plaintiff could not claim damages."

Next I would like to refer to the following extract from the judgment of BROOME J (as he then was) in *Bilodeh Properties (Pty) Ltd v Wilson* 1946

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NPD 736 at 744:

> "A true option is nothing more than an offer by one party to a contract to the other, which offer remains open according to the terms of the contract. The option-holder has merely to accept the offer, in the manner and within the time prescribed by the contract, and a new contract comes into existence between him and the other party. But in the present case the giving of notice under clause 11 does not bring a contract into existence, for all the terms, other than the period, have still to be arranged. And unless those terms are agreed upon there will be no contract at all. **In my opinion the true effect of clause 11 is that the due exercise by the lessee of the so-called option is nothing more than a notice to the lessor that he wishes to renew and desires to negotiate. The parties are then in the position of negotiators, but neither is obliged to agree to anything.** It may be that some duty to act in good faith is cast upon the lessor, but the exact nature and extent of that duty, if it exists at all, are imposible to define."(My emphasis).

In the same vein, in *Hattingh v van Rensburg* 1964 (1) SA 578 (T) it was held that "a right and option to purchase" in a lease "at such price as they may agree upon" is of no force or effect until a price is agreed upon by the lessee and the lessor.

In *Reserve Bank v Photocraft (Pty) Ltd* 1969 (1) SA 610 (C) the court was concerned with the meaning to be ascribed to clause 23 of the lease, which read as follows:

> "The lessor hereby grants the lessee an option to renew this lease for a further period of three (3) years, at a rental to be mutually agreed upon, under the same terms and conditions as herein contained, provided the lessee notifies the lessor in writing of his intention to exercise such option on or before 31st January, 1969."

The lessee exercised the option timeously but the applicant, who had purchased the building of which the leased premises, being a shop, were a part, replied that it was unable to negotiate in regard to any extension of the lease beyond 30 April 1969, being the date on which the lease was due to terminate, as the building was to be demolished.

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In the course of his judgment, STEYN J stated at 613D-E:

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> "I think that, as the cited authorities indicate, an option to purchase like any agreement of sale, in order to be binding and enforceable, must contain as one of its provisions a determined or readily determinable purchase price. This 'option' to lease, in the nature of things also requires certainty as to price; in this case the rental (sic) contains no such provision and is accordingly in my view of no force or effect in the absence of any agreement as to the contract price."

After saying that, for the reasons set out by TROLLIP J in *Hattingh v van Rensburg supra* at pp 582 and 583, with which reasoning he was in respectful agreement, he was of the opinion that there was no room in the case before him for the implication of a term in clause 23"that the agreement provided for a reasonable rental", STEYN J continued as follows:

> "I am also of the opinion that an agreement to negotiate is so vague as to its import, significance or consequence as to be unenforceable ...
>
> For these reasons I have come to the conclusion that there is no valid and subsisting option which respondent could exercise as it sought to do in the correspondence to which I have referred. Neither, in my opinion, was there any obligation on applicant 'to negotiate' with respondent in order to determine a rental for any further period. It seems to me to be quite irrelevant that this provision is contained in an existing contract providing for a possible renewal of terms in certain respects should the parties agree on a rental."

In *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) the court was looking at a clause which provided that if the lessee wished to renew the lease for a further period of five years, the rent would be subject to review.

LEVY J stated at 633D:

> "An option constitutes nothing more than an offer coupled with an agreement (express or implied) to keep the offer open for a certain period of time. *Thompson v van der Vyver* 1954 (2) SA 192 (C); *Boyd v Nel* 1922 AD 414 at 421; *Hersch v Nel* 1948 (3) SA 686 (A) at 695.

It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when it is accepted it will bind the offeror. *Efroiken v Simon* 1921 CPD 367 at 370; *Finestone v Hamburg* 1907 TS 629 at 632."

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The learned judge continued as follows at 633G-J and 634A-C:

> "Therefore, if an offer which is an essential element of any option is vague or capable of more than one meaning, it is open to the offeror to contend that it is not capable of being accepted and thereby converted into a binding contract. Where there is an 'offer' which provides that certain terms are to be 'reviewed' or to be 'negotiated' or 'to stand over' for decision at a later stage, then pending agreement on such outstanding terms neither party has any rights against the other. *OK Bazaars v Bloch* 1929 WLD 37; *Wilson Bros Garage v Texas Co (SA) Ltd* 1936 NPD 386; *Scheepers v Vermeulen* 1948 (4) SA 884 (O); *Potchefstroom Municipal Council v Bouwer NO* 1958 (4) SA 382 (T).

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In *Hattingh v van Rensburg* 1964 (1) SA 578 (T), a provision in a lease, which provided that the lessee had the right and option to purchase certain premises at such price as the parties may agree upon, was held to be of no force or effect until a price had been agreed upon. There was a similar decision in *Biloden Properties (Pty) Ltd v Wilson* 1946 NPD 736, where the provision for the court's consideration was 'upon terms to be arranged' while in *Reserve Bank v Photocraft (Pty) Ltd* 1969 (1) SA 610 (C) the court held that an agreement which purported to give the tenant an option 'at a rental to be mutually agreed upon', in fact did not give the tenant a 'valid and subsisting option' which he could exercise. In the *Reserve Bank* case (at 613 H) STEYN J added:

> 'Neither, in my opinion, was there any obligation on applicant"to negotiate"with respondent in order to determine a rental for any further period. It seems to me to be quite irrelevant that this provision is contained in an existing contract providing for a possible renewal of terms in certain respects should the parties agree on a rental.'

I respectfully agree with this. In the present case, there was no obligation on appellant to engage in any negotiations (review proceedings) in order to arrive at a rental whether such rental was to be fair and reasonable, or not. (See also *Trook t/a Trook's Tea Room v Shaik & Anor* 1983 (3) SA 935 (N); *Aronson v Sternberg Bros (Pty) Ltd* 1985 (1) SA 613 (A)).

For these reasons I have come to the conclusion that there was no valid and enforceable option contained in the original agreement of lease concluded by the parties. Furthermore respondent's purported exercise of the option did not create a valid and binding contract."

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In the light of the authorities cited *supra,* it will be seen that by accepting the so-called option supposedly in his favour "to renew the lease for a further 5 year period, at a rental to be mutually agreed upon", the respondent was placing himself at the applicant's mercy. The respondent cannot therefore be heard to cry that the applicant" was in fact not really interested in renewing the option", that "the applicant approached the question of the renewal with a lack of good faith and with a view to frustrate the respondent in its efforts to renew the lease"and that the rental was "deliberately pitched with a high figure to frustrate the finalisation of a final agreement of lease"(see para 7 of the respondent's opposing affidavit).

The harsh truth is that the applicant was under no legal obligation whatsoever to enter into negotiations with the respondent on the question of rent for the period of renewal, let alone to agree on an amount of rent, whether fair and reasonable or not. Nor is there any basis for importing into the so-called option an implied term that a fair and reasonable rent, ascertainable by reference to a commercial and industrial rent board, would be paid for the period of renewal. Indeed, it would have been artificial in the extreme to have foisted upon the applicant a rent board which, one imagines, is the very last body the applicant would have wanted to determine the amount of rent for the period of renewal.

In summary, the so-called option granted by the applicant is not worth a row of beans because of its unenforceability and, accordingly, the respondent has no alternative but to lump it.

Consequently, with the expiry of the principal lease, by the effluxion of time, on 30 June 1992, the position of the lessee became that of a statutory tenant.

It is therefore appropriate here to cite the provisions of s 22 (2) of SI 676 of 1983 which govern

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the case of a lessor who wishes to eject from commercial premises a lessee who has become a statutory lessee after the principal lease has expired by effluxion of time.

"(2) No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee

(a) continues to pay the rent due, within seven days of due date; and

(b) performs the other conditions of the lease;

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unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that-

(i) the lessee has declined to agree to an increase in rent; or

(ii) the lessor wishes to lease the premises to some other person."

The second and remaining ground of opposition relied upon by the respondent appears to have been raised by it only half-heartedly, in the last resort, in a desperate attempt to stave off the spectre of eviction. That ground, as stated in para 14 of the respondent's heads of argument, is that the applicant's:

"wish to redevelop the premises is not *bona fide* in that:

14.1 applicant called upon respondent to elect to exercise the option to renew the lease;

14.2 excessive rentals were demanded for the period of renewal;

14.3 applicant had tried to sell the property but had not done so because of the respondent's occupation thereof;

14.4 applicant's purported intention to redevelop the premises is indicated only with architectural sketch plans; no local authority permission appears yet to have been obtained or sought;

14.5 a reason 'thrown in' by the applicant is the allegedly excessive noise emanating from the premises (which is irrelevant to the issue before the court)."

However, to the extent that it may be argued that, insofar as the respondent declined to agree to an increase in rent for the property or that the applicant wishes to sell the property to terminate the respondent's occupation thereof, the applicant cannot contend that it has good and sufficient grounds for obtaining an order for the respondent's ejectment from the property in terms of s 22(2) of SI 676 of 1983, I find it opportune and useful to set out the following points and rulings which emerge from the decisions of our Supreme Court in this regard.

(a) In *Moffat Outfitters (Pvt) Ltd v Hoosein & Ors* 1986 (2) ZLR 148 (S) at 154C-D Gubbay JA (as he then was) stated as follows:

"It is hardly possible and, in my opinion, certainly undesirable, to attempt any definition of the words 'good and sufficient grounds' which appear in the latter part of the s 22(2) of the Regulations. Whether a lessor

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> succeeds in overcoming the burden they create depends on the particular circumstances of each case, viewed against the real purpose behind the Regulations. That purpose, as expressed by the learned judge, is 'to prevent unscrupulous landlords from taking advantage of the shortage of commercial premises by increasing their tenants' rents unjustifiably.'. **The court is enjoined to exercise a value judgment, which if arrived at without caprice or bias or the application of a wrong principle, will not lightly be interfered with"**(my emphasis).

(b) In *Moffat Outfitters supra* the court held that, in refusing to vacate the commercial premises after being given reasonable notice by the lessors to do so to permit the lessors, at common law, to effect necessary repairs to the premises during the currency of the lease, the lessee was in breach of its implicit duty under the lease to allow the lessors the opportunity of executing the necessary repairs, a duty which remained binding after the contractual relationship between the parties had ended and the lease had been converted into a statutory one. Consequently, by refusing to vacate the premises after having been given reasonable notice by the lessors to do so to permit the necessary repairs to be done, the lessee breached the implied term of the original contract which, as a statutory lessee, it was bound to perform under s 22(2)(b) of SI 676 of 1983, thereby disqualifying itself from protection as a statutory tenant.

However, GUBBAY JA (as he then was) preferred to base his decision additionally on the ground relied upon by the court *a quo*, namely, that, once satisfied that the lessors "were *bona fide* in their desire and intention to undertake necessary, urgent and substantial renovations" to the premises, the court was justified in holding that good and sufficient grounds had been shown for its ordering the ejectment of the lessee from the premises.

GUBBAY JA held, further, that for the reasons applicable in *Moffat Outfitters supra* and always provided the necessity for the repairs could not reasonably have been foreseen when the lease was entered into, the court *a quo* had been entitled to order the permanent ejectment of the lessee.

(c) In *Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd* 1986 (2) ZLR 246 (S), Gubbay JA (as he then was) highlighted another principle when he stated as follows at 250E-F:

> "The fact that a property is transferred upon sale from one related company to another with the consequent effect that the new owner which

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> wishes to enjoy its occupation, thereby obtains a ground for the eviction of the statutory lessee not available to the former owner, cannot be viewed as an indirect or circuitous manoeuvre of achieving that which the Regulations prohibit. **There is no fetter placed by the Regulations on a landlord's right to sell commercial premises occupied by a statutory lessee.** Their real purpose is to prevent unscrupulous landlords from taking advantage of the shortage of such premises by increasing their tenants' rents unjustifiably (see *Moffat Outfitters (Pvt) Ltd v Hoosein Bros* 1986 (2) ZLR 148 (S)" (my emphasis).

(d) In *Boka Enterprises (Pvt) Ltd v Joowalay & Anor* 1988 (1) ZLR 107 (S) at 114G-H & 115A-C,

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GUBBAY JA (as he then was) expanded on the decision in *Checkers Motors supra* as follows:

> "In the *Checkers Motors* case *supra,* the view was expressed that if an owner is able to prove that he reasonably requires the use of the leased premises for the operation of his business, a court would be justified in attaching substantial weight to such factor in determining whether there are good and sufficient grounds for an eviction order. The decision did not, however, lay down that it is incumbent upon the owner to establish that he 'requires' the premises for his personal use, in the sense of 'needs', though on the particular facts Karoi Farmtech did so require them.
>
> Each case of an owner genuinely seeking the use of leased premises for himself must be assessed on its own merits. It will not be enough for him somewhat naively to proclaim: 'The premises belong to me and I now desire to use them for my own purposes'. That would not constitute good and sufficient grounds. The court would want to know the precise use to which it was intended to put the premises. If that use were found to be illegal or frivolous or, having regard to the owner's circumstances, unreasonable, the eviction of the lessee would be refused.
>
> In the present case the learned judge placed considerable weight upon the *bona fide* intention of the respondents to utilise the premises in order to conduct a general dealer's business thereon - a perfectly proper and reasonable use, and one no less laudable than that of the appellant. He was right to do so."

After all, as DOVE-WILSON JP so truly remarked in *Rudder v Wright* 1928 NPD 303 at 305:

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> "I do not think that it can be said that it is unreasonable for a person who is the owner of suitable premises to prefer to occupy them and not to go elsewhere."

(e) In *Boka's* case *supra* GUBBAY JA (as he then was) clarified a point which he had left open in *Checkers Motors'* case *supra,* when, at 115F-H & 116A-D, he stated as follows:

> "In coming to this conclusion, I have not overlooked the further submission of Mr *Donagher* that in determining the existence of good and sufficient grounds it is not only the needs and circumstances of the lessor that are to be considered; regard must also be paid to those of the lessee; and depending upon which are the most telling and persuasive, the eviction of the lessee be either granted or refused. The point was left open in *Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd supra* and it is now opportune to decide it.
>
> Section 22(2) of the Regulations provides that no order for the recovery of possession of commercial premises or for the ejectment of the lessee therefrom shall be made 'unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order' (my emphasis). I share the view of the learned judge that the wording is clear and unambiguous. **It is the position of the lessor that is to be looked to. If he has good and sufficient grounds that is the end of the matter.** Nothing is said about the lessee, his needs or any other circumstances. That this is the meaning intended by the law-maker is fortified by reference to paras (i) and (ii) of subs (2) of s 22, both of which relate solely to grounds for requiring the order.
>
> I am also in agreement with the learned judge that s 24(2)(e) of the Rent Regulations 1970, which was considered by BEADLE CJ in *The Trustees in Mashonaland of the Church of the Province of Central Africa v Timms* 1973 (1) RLR 307 (g), differs markedly from the provision now under consideration, for it empowered the court to order the ejectment of the lessee 'if the court is satisfied that, **regard being had to all the circumstances,** some other sufficient ground therefor has been established by the lessor' (my emphasis). The enquiry envisaged was thus much wider than under s 22(2) of the present Regulations. It clearly enjoined the court to have regard to the circumstances affecting both the lessor and the lessee. Accordingly, the remarks of the learned CHIEF JUSTICE at p 314H of the Report are not germane to the interpretation of s 22(2)."

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(My emphasis where not attributed to the learned JUDGE OF APPEAL within the quotation supra.)

(f) In *Guthrie Holdings (Pvt) Ltd v Arches (Pvt) Ltd* 1989 (1) ZLR 184 (S), the Supreme Court was faced with the situation where the lessor was seeking the eviction of a statutory lessee so that it could fulfil its intention to carry out much-needed repairs to, and renovation of, the premises, after which the lessor intended to let three shops to outsiders and to let other parts of the building to associated companies.

DUMBUTSHENA CJ proceeded to clarify another point when, at 193A-D, he stated as follows:

> "It is clear from the papers and from the facts recited above that the respondent's primary purpose is to effect renovations and repairs.
>
> I do not agree with Mr *de Bourbon's* contention that one of the purposes of the Regulations is to prevent landlords evicting statutory tenants in order to lease to third parties and that this intent applies whether or not there is a plan by the landlord to renovate the premises. It is true that s 22(2)(b)(ii) prohibits the ejectment of a lessee just because 'the lessor wishes to lease the premises to some other person'. But that is not the case here.
>
> In this case that is not even the dominant purpose. The respondent wants the appellant to vacate the premises in order to effect much needed repairs and make some renovations. The works to be carried out by contractors are not small when one considers the cost of materials, estimated at $63 820, of which materials valued at $45 110 have already been purchased.
>
> In these circumstances the respondent is entitled in terms of the provisions of s 22(2) of the Regulations to give notice to the appellant to vacate the premises. It has shown good and sufficient grounds for requiring the court to issue an order of eviction."

(g) In the course of his judgment in *S Goulding (Pvt) Ltd T/A Moonlight Magic v A & L Holdings (Pvt) Ltd* S-233-91 (not reported) at p 5 of the cyclostyled judgment, McNALLY JA noted two points concerning the law on the validity of the lessor's grounds for ejectment.

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> "The first is that our regulations, unlike those in South Africa, do not require the reasons for the ejectment to be specified by the lessor. Compare *Lawson & Kirk (Pty) Ltd v Phil Morkel Ltd* 1953 (3) SA 324 (A) at 329F. The second is that "the material date for ascertaining whether the lessor reasonably required the premises for its own use was the date of the hearing of the application for ejectment and not the date of the expiry of the notice of ejectment [*sic* - the words"of ejectment"have been incorrectly quoted and should be replaced by the words"to vacate"] (ibid p 333H)'. The same must be true in relation to any other grounds of ejectment."

(h) In *Goulding's* case *supra,* McNALLY JA accentuated the following point towards the very end of his judgment, at pp 7 and 8:

> "It may well be that the reconstruction proposals were motivated wholly or partly by what was seen as an inadequate rental return. But, as I have endeavoured to show earlier, that motivation does not bar a lessor from evicting so long as 'he has good and sufficient reason for requiring such order other than that the lessee has declined to agree to an increase in rent'. The intention to rebuild or redevelop the site may in a proper case be such a reason. Whether that intention has been formulated because rental income is unacceptably low, or for some other reason, is immaterial, so long as the intention to reconstruct is genuine. Compare *Guthrie Holdings*

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(Pvt) Ltd v Arches (Pvt) Ltd 1990 (2) SA 62 (ZS) at 676."

(i) Although not to do directly with s 22(2) of SI 676 of 1983, I think it worthwhile to direct attention to the following ruling by MANYARARA JA in *Mobil Oil Zimbabwe (Pvt) Ltd v Chisipite Service Station (Pvt) Ltd* 1991 (2) ZLR 82 (S) at 97B-D:

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

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

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Accordingly, it was held that there was no power vested in a court to give a statutory lessee a reasonable period to vacate the premises in question.

I turn now to address the grounds on which the respondent relied in submitting that the applicant's wish to redevelop the property is not *bona fide.*

The first ground is that the applicant called upon the respondent to exercise the option to renew the lease.

Frankly, I do not understand this ground and, therefore, am unable to deal with it. I can see no reason for faulting the applicant because of its approach to the respondent about the matter of renewal of the lease, which was, surely, only a natural and logical step for the applicant to take so that it knew where it stood in regard to the future of the lease.

The second ground is based on the applicant's demand for"excessive rentals"for the renewal period of the lease.

As has already been noted, given the unenforceable terms of the so-called option to renew, the applicant was at large to name the figure he wanted as rent for the period of renewal. If that figure was unacceptable to the lessee, then that was an end of the matter so far as the renewal of the lease was concerned.

It therefore remains for me to determine whether there was any question of the applicant's seeking to have the respondent evicted simply because of the respondent's refusal to pay the increased amount of rent, which the respondent describes as excessive, required by the applicant, which is, of course, prohibited by s 22(2)(i) of SI 676 of 1983.

In this connection it is pertinent to have regard to what the parties each have to say in their affidavits.

Attached to the applicant's founding affidavit is a letter which its legal practitioners addressed to the respondent on 2 June 1992 in which they advised that, the lease not having been renewed, their client, the applicant, had decided to redevelop the property by converting it into four shops

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and six offices.

In para 7 of its opposing affidavit, the respondent refers to a meeting which

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took place between its director, Mr Mahovo, and the applicant's Mr Lionel Marks, at the latter's home prior to 1 April 1992 and states:

> "During the meeting at the home of Lionel Marks, the latter was most evasive regarding the question of the rental for the option period and the said Marks indicated that the premises were to be sold and enquired whether or not the respondent was interested in the acquisition thereof. The price mentioned namely $2 500 000 was in the respondent's view excessive. The said Marks indicated that the figure was not negotiable. It became apparent to the respondent that the applicant was in fact not really interested in renewing the option but at the time, was more interested in disposing of the leased premises, by way of a sale by sectional title. It is respectfully submitted that the applicant approached the question of the renewal with a lack of good faith and with a view to frustrate the respondent in its efforts to renew the lease. The amount of the rental for the renewal period was discussed and the applicant indicated that it would require not less than $20 000 per month as and by way of rental of the premises. uch rental was in the respondent's view deliberately pitched with a high figure to frustrate the finalisation of a final agreement of lease. It is significant that at the relevant time the rental was $5567,20 per month and the increase demanded represented an increase of about 400%."

In response, the applicant replied as follows in paras 1 and 2 of its answering affidavit:

> "1. I have read the affidavit of Kizito Solomon Mahovo on behalf of the respondent and I state, in regard to paragraph 7 of the respondent's affidavit that when the respondent visited me at my home in the early part of 1992 I advised him that since the property Stand 164A Strathaven had been sub-divided by sectional title it was my intention either to sell the property under the certificate of sectional title or to re-develop the property entirely. At no time was there any discussion between us concerning the extension of the lease as the respondent had not renewed the lease as stipulated by the agreement reached in terms of Annexure 'A' of the applicant's founding affidavit. I recall that I informed Mr Mahovo that the market rental value of the property which he occupied was in excess of $20 000 a month and I indicated to him that on the basis of the return that any purchaser could expect from the lease of the property that the value of the property was approximately $2 500 000. Indeed, I have ascertained that another nightclub in Harare pays a rental

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> of $30 000 a month which gives some idea of what rentals in respect of such premises command.
>
> 2. I cannot understand why the respondent alleges that my reference to the rental value of the property and the potential purchase price of the property was raised to frustrate him in his efforts to renew the lease as this was simply not so. I was being frank and candid with the respondent about the applicant's intentions in regard to the property and the discussion which I had with the respondent's representative was to advise him that if the respondent was interested in acquiring the property I was perfectly prepared to sell the property to the respondent for the price which I had indicated. Indeed, the respondent called at my offices some time later with his accountant to discuss the purchase of the property and to ascertain how the purchase could be financed but the accountant some two weeks later phoned me and concluded that it would not be possible for the respondent to finance the purchase of the property."

As already observed, there is no objection to a lessor's being wholly motivated to rebuild or redevelop the premises because of an inadequate rental return, which is no bar to his obtaining

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an order for the lessee's eviction so long as the lessor has good and sufficient grounds for requiring such order other than that "the lessee has declined to agree to an increase in rent". As McNALLY JA put it in *Goulding's* case *supra,* at p 8 of the cyclostyled judgment, the intention to rebuild or redevelop the premises may in a proper case be a good reason for requiring an order for eviction.

> "Whether that intention has been formulated because rental income is unacceptably low, or for some other reason, is immaterial, **so long as the intention to reconstruct is genuine**" (my emphasis).

Accordingly, the next and remaining question to be determined in this matter is whether the applicant's intention to redevelop the building on the property is genuine. In answering this question I shall deal with the respondent's fourth and third grounds for submitting that the applicant's wish or intention to redevelop the premises is not genuine in that order.

The respondent's fourth ground is that the"applicant's purported intention to redevelop the premises is indicated only with architectural sketch plans; no local authority permission appears yet to have been obtained or sought".

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This criticism immediately prompts the response that if the respondent had real doubts about the applicant's intention to redevelop the premises, then why did not the respondent voice or raise its queries, including its query whether local authority permission had been obtained or sought for the alterations, when, in the letter which the applicant's legal practitioners addressed to the respondent on 2 June 1992, the applicant's legal practitioners offered to provide proof of the applicant's redevelopment plans if the respondent required this?

Further, why did not the respondent take up with the applicant any queries it had at an earlier stage instead of only doing so for the first time in its heads of argument by lamely saying that"no local authority permission **appears** yet to have been obtained or sought"? (my emphasis).

If the respondent required more than the sketch plans reflecting the proposed alterations to the building and the list of names of persons who had responded to an advertisement placed by the applicant inviting applications for leases of shops and offices in the building after the alterations to it had been carried out in order to verify the applicant's *bona fides,* then the respondent could and should have asked for this information.

In this connection, I find apposite the following statement of PITTMAN JP in *Newman v Biggs* 1945 EDL 51 at 54 and 55, an authority referred to with approval in Boka's case supra:

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

In the present case, whereas the applicant has certainly brought a measure of evidence to demonstrate the genuineness of its assertion that it intends to redevelop the premises, the respondent instead of bringing"forward circumstances casting doubt upon the genuineness"of

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the applicant's claim that it intends to redevelop the premises, does no more than say, in para 9 of its opposing affidavit, that it is its **contention** (my emphasis) that the applicant wishes to sell the property and has no real intention of developing it; that it is the respondent's **contention** (my emphasis) that at all material times the applicant wished to sell the property and prospective purchasers

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had been shown the premises; and that it **respectfully submitted** (my emphasis) that the alleged development scheme is merely a ruse to obtain vacant possession of the premises so as to facilitate the sale of the premises; and that it is **suggested with respect** (my emphasis) that no development scheme is seriously intended for the premises.

In advancing these contentions and submissions, the respondent has overlooked the point that it was, as it still is, bearing in mind that the material date for ascertaining whether the lessor has good and sufficient grounds for requiring the order for eviction is the date of hearing of the application for ejectment (see *Goulding's* case *supra* at p 5 of the cyclostyled judgment) perfectly in order for the applicant to sell the property occupied by the respondent and to leave it to the new owner to show good and sufficient grounds for requiring the respondent to vacate the premises.

Consequently, there was and is no reason for the applicant to resort to the "ruse" of "the alleged development scheme" to "obtain vacant possession of the premises so as to facilitate the sale of the leased premises".

As regards the respondent's fifth and final ground, namely, that "a reason 'thrown in' by the applicant is the allegedly excessive noise emanating from the premises (which is irrelevant to the issue before the court)", the factor of noise is not, in fact, raised as such by the applicant in its affidavits except, possibly, indirectly when, in para 6 of its founding affidavit, the applicant explains why it decided not to sell the property but decided" to redevelop it because of public demand in the area for shop and office premises and the fact that residents have in the past objected to the respondent's carrying on of a night club in an area which is a prominent residential area".

However, when the respondent talks about this being a reason "thrown in" by the applicant, the respondent itself seemingly accepts that to the extent that the factor of noise is raised, it is only a reason incidental to the dominant reason for the applicant's wish to re-possess the property, which is to re-develop the property.

In any event, I would have thought that the factor of noise, if it is still a problem, would have been a good additional reason for the applicant's wishing to take back the property to redevelop the building on it into shops and offices in place of a night club.

Accordingly, in the circumstances I was satisfied that the applicant's intention

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to redevelop the building on the property is genuine and that the applicant has good and sufficient grounds for requiring an order evicting the respondent from the property, an order which I therefore made in the terms set out in the first paragraph of this judgment. I should add that the date by which the respondent was ordered to vacate the property was fixed with the agreement of the applicant's counsel.

Kantor & Immerman, applicant's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

MPEHLANI v EXPERT PANEL BEATERS AND SPRAY PAINTERS (PVT) LTD 1993 (2) ZLR 212 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

16 & 27 September 1993

Flynote

Practice and procedure - onus of proof - negligence - defendant in default at trial and appeal hearings but plea had been filed and there had been no successful motion to have plea struck out - plea standing and negligence put in issue - plaintiff obliged to prove negligence despite default of defendant

Headnote

The plaintiff claimed damages against the defendant for alleged negligent performance of repairs to his car carried out by the defendant. The defendant filed a plea denying that the repair work had been negligently performed. The defendant, however, was in default at the trial hearing. Relying presumably upon rule 60 of the High Court Rules, counsel for the plaintiff called evidence of damages only and then closed his case. The trial judge dismissed the claim on the basis that the plaintiff had failed to prove negligence.

The appeal against the decision of the trial court was dismissed.

Held, that rule 60 of the High Court Rules related only to cases where either there has been no appearance to defend or there has been no plea filed. Here a plea had been filed putting in issue the matter of negligence. As there had been no successful motion to strike out the plea, the plea stood and thus the plaintiff had to prove negligence. He had failed to do so and therefore the trial court had correctly dismissed his claim.

Cases cited:

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Vista Ests (Pvt) Ltd v Animal Breeders Co-op Ltd 1974 (2) RLR 147 (G)

McNALLY JA

Dunlop v West 1974 (1) RLR 89 (G)

Munemo v Muswera 1987 (1) ZLR 20 (S)

EWW Morris for the appellant

No appearance for the respondent

Judgment

McNally JA: This is a civil appeal from the High Court (Adam J). The plaintiff, whom I will call "Mpehlani", sued the defendant, whom I will call "Expert Panel Beaters", for damages in the sum of $5 193,41 plus interest and costs.

The declaration alleged that Expert Panel Beaters repaired Mpehlani's car for $3 500 in July 1989. The repairs were allegedly carried out, the car was returned, and the $3 500 was paid. But the work was done inefficiently and ineffectively, and had to be done again by another firm who reasonably charged $ 5 193,41.

Expert Panel Beaters admitted the contract, the repairs and the payment. (Actually they admitted receiving payment only of $2 500, but they discovered their receipt book showing the receipt of $3 500 so this is in reality a non-issue.) They denied that the repair work was anything but good and workmanlike and put Mpehlani to the proof of the allegation that he had to have it redone at a cost of $5 193,41.

At the trial Expert Panel Beaters were in default, as indeed they were at the appeal hearing. Counsel for Mpehlani, relying presumably on rule 60 of the High Court Rules, called evidence of damages only. He called a witness from the second panel-beating company. That witness testified that in August 1989 he made a list of repairs required in respect of the same car, and carried out those repairs and charged a reasonable amount of $5 193,41. The work was done in October 1989.

The trial judge indicated to counsel that it would be necessary "to prove his case" as well as to prove damages. But counsel cited *Vista Estates (Pvt) Ltd v Animal Breeders Co-operative Co Ltd* 1974 (2) RLR 147 (G) as authority for the proposition that he needed to prove damages only, and proceeded to close his case.

I must say I can find nothing in the *Vista Estates* case to justify counsel's contention. But in *Dunlop v West* 1974 (1) RLR 89 (G) the same learned judge gave a ruling which was exactly in point, and on which ADAM J relied in dismissing Mpehlani's claim with costs.

McNALLY JA

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The point made is simply that rule 60 relates only to cases under rules 58 and 59. In other words, it relates only to cases where either there has been no appearance to defend or there has been no plea filed. But here a plea was filed. There had been no successful motion to have the plea struck out. Therefore the plea stood. Negligence was put in issue. It was for the plaintiff to prove that negligence.

Mr *Morris,* who appeared for Mpehlani on appeal, though not in the court below, conceded the correctness of *Dunlop v West supra.*

This left Mr *Morris* with virtually no room for argument. He suggested that the evidence led had in fact, albeit by accident, proved negligence. But it had not. Surprisingly perhaps, the witness said nothing about noticing previous inadequate repair work.

Mr *Morris* suggested that counsel below had not actually closed his case and so the matter could be remitted. But in fact counsel, after making it clear that he considered he had no duty to call evidence on liability, called his one witness on *quantum* and then said: "My Lord, that is the plaintiff's case on damages". He closed his case. It may have been the wrong case, but he closed it, and opened no other.

It may or may not be useful to note that an order dismissing the plaintiff's claim is in effect an order of absolution from the instance - see *Munemo v Muswera* 1987 (1) ZLR 20 (S) and the cases there cited. And, there being no appearance for the respondent, no order as to costs is required.

The appeal is dismissed.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Atherstone & Cook, appellant's legal practitioners

GWALAZIMBA v PG MERCHANDISING LTD & ANOR 1993 (2) ZLR 215 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

16 & 27 September 1993

Flynote

Employment - Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371/1985) - s 2 - no appeal to Labour Relations Tribunal against decision of Minister to give written approval for termination of employment.

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Headnote

Acting under s 2 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, the Minister gave his written approval for the termination of employment of the appellant. The Labour Relations Tribunal had then purported to hear an appeal against this decision.

Held, that as there was no provision for such an appeal, the proceedings of the Labour Relations Tribunal were a nullity.

Case cited:

Blue Ribbon Foods Ltd v Dube & Anor 1993 (2) ZLR 146 (S)

R Moyo - Majwabu for the appellant

J R Devittie for the first respondent

Mrs S C Mavingira for the second respondent

Judgment

McNally JA: In this appeal from a decision of the Labour Relations Tribunal, Mr *Devittie,* who appeared for PG Merchandising Ltd ("the employer"), took a point *in limine.* Mrs *Mavingira,* who appeared for the Minister, indicated that she supported Mr *Devittie's* submission. Then, mindful of the remarks in *Blue Ribbon Foods Ltd v Dube & Anor* S-133-93

McNALLY JA

(not yet reported) *(4), she sought leave to withdraw, which was granted.

Mr *Devittie's* point was a simple one. The employer had wanted to terminate the services of Mrs Gwalazimba. In accordance with the provisions of s 2(1)(a) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations (SI 371 of 1985), it had obtained the prior written approval of the Minister to do so. There is no provision for an appeal from such a decision of the Minister to the Labour Relations Tribunal. He can only be taken on review to the High Court. So the hearing before the Tribunal was a nullity (although in fact it had upheld the Minister's decision). Therefore in effect the appeal before us was a nullity.

This submission is undoubtedly correct. The Tribunal is a creature of statute and can only hear appeals as provided for in the Labour Relations Act 16 of 1985. Section 106 of the Act (unamended by Act 12 of 1992 because the Tribunal hearing was over seven months before Act 12 of 1992 came into effect) provides specifically for it to hear appeals from any determination, direction or decision of the Minister in terms of ss 25, 55, 84 and 86 of the Act. None of these is relevant.

The section further provides for it to hear and determine appeals "in terms of any section of the Act where an appeal lies to the Tribunal".

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The Regulations to which I have referred above, contained in SI 371/1985, do not provide for an appeal under s 2, although they do so provide in matters arising under s 3. Nor is any general provision for an appeal made in s 17 of the Act, in terms of which these Regulations were made.

Nor does s 8 of SI 369 of 1985 help the appellant, because that section merely sets out the procedure to be followed where there is an appeal from the Minister to the Tribunal.

Mr *Moyo-Majwabu,* belatedly informed of this point *in limine* just a day before leaving Bulawayo to attend the appeal, was quite properly constrained to admit that he had no answer to the point. He pointed out, however, that the point was taken very late and that his client should not have to pay costs which could have been avoided if the point had been taken at the door of the Tribunal.

McNALLY JA

In the circumstances we make the following order:

1. It is declared that the proceedings in the Labour Relations Tribunal in the matter between the parties were a nullity since no appeal lay from the decision of the Minister to the Tribunal.

2. In the event the appeal to this court falls away.

3. There will be no order as to costs.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

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

Atherstone & Cook, first respondent's legal practitioners

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

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DIRECT RESPONSE MARKETING (PVT) LTD v SHEPHERD 1993 (2) ZLR 218 (HC)

Court **High Court, Harare**

Adam J

Opposed application

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15 June & 29 September 1993

Flynote

Contract - restraint of trade - reasonableness of - partial enforcement of clause - when should be ordered

Practice and procedure - pleading - allegations - locus standi of director of company - need for director to allege that he is authorised to depose to affidavit on behalf of company

Headnote

The respondent began work with the applicant company as general manager in May 1990 and remained in that post until January 1993. The company's business was in the field of direct marketing. It was one of the terms in the respondent's contract of employment that, for a period of three years from the date of termination of his employment, he would be restrained from soliciting business from or providing services to any existing client of the company or from any other person with whom he had established contact as a potential client of the company.

In spite of that term of his contract, the respondent, after he had left the employment of the applicant, undertook direct marketing work for former clients of the applicant company. In so doing he acted through a private company. The applicant company applied for an order to restrain the respondent from soliciting business of a direct marketing nature from and providing services of that nature to any person who was a client of the applicant at 31 January 1993 and that this restraint should operate throughout Zimbabwe until 31 January 1996.

The respondent claimed that the clients were not solicited by him but came to him of their own accord because the applicant company could not

provide the services. He argued that -

(1) in any event the restraint clause was unreasonable and therefore void;

(2) the way the covenant was written, it was capable of different interpretations and he would never know whether he was in breach of it; and

(3) the contract of employment was between the respondent and the applicant company's parent company and could not be enforced by the applicant.

The point was also taken *in limine* on his behalf that the founding affidavit by the applicant's chief executive did not show that the deponent had *locus standi.*

Held, dismissing the point *in limine,* that while it would be wiser for the director of a litigant company to aver in his founding affidavit that the company has resolved to institute proceedings and has authorised him to make the affidavit on its behalf, it would be carrying formality too far to rule that *ex facie* the documents the director was not authorised.

Held, further, that the onus would be on the respondent to establish that the restraint was contrary to public policy or the public interest. It would be open to the court to enforce the restraint partially, as where the breach of the clause was not in flagrant and defiant violation of

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his former employer's legitimate interests, but this power was not unrestricted. Any amendment by the court of the restraint clause should not be so far-reaching as to materially alter the contract.

Held, further, that the restraint clause in the contract between the respondent and the applicant's parent company was a contract for the benefit of a third party.

Held, further, that because the covenant was far from ideal as written, it was appropriate to spell out the ambit of the restraint. The court was not limited to finding the clause enforceable or unenforceable as a whole. Accordingly, the order applied for should be granted.

Cases cited:

Alino & Anor v Alino; Frylink v Dudhia & Anor HH-181-90

Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd 1972 (4) SA 249 (C)

Mall (Cape) (Pty) Ltd v Merino Ko-op Bpk 1957 (2) SA 347 (C)

Thelma Court Flats (Pty) Ltd v McSwigin 1954 (3) SA 457 (C)

Natal Land Colonization Co Ltd v Pauline Colliery & Development Synd Ltd [1904] AC 120 (PC)

Kelner v Baxter (1866) LR 2 CP 174

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McCullogh v Fernwood Est Ltd 1920 AD 204

Mangwana v Mparadzi 1989 (1) ZLR 79 (S)

Book v Davidson 1988 (1) ZLR 365 (S)

Roffey v Catterall, Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (A)

Katz v Efthimiou 1948 (4) SA 603 (O)

Magna Alloys & Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A)

Sunshine Records (Pty) Ltd v Frohling & Ors 1990 (4) SA 782 (A)

Gorfil & Anor v Marendaz & Anor 1965 (1) SA 686 (T)

Standard Bank Financial Svcs Ltd v Taylam (Pty) Ltd 1979 (2) SA 383 (C)

Acting Min of Industry & Technology & Anor v Tanaka Power (Pvt) Ltd 1990 (2) ZLR 208 (S)

Madan v Macedo Heirs & Anor 1991 (1) ZLR 295 (S)

Herbert Morris Ltd v Saxelby [1916] 1 AC 688; [1916-17] All ER Rep 305 (HL)

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Fitch v Dewes [1921] 2 AC 158 (HL); [1921] All ER Rep 13

E W W Morris, for the applicant

Mrs J B Wood, for the respondent

Judgment

Adam J: The applicant brought a chamber application on a certificate of urgency and obtained a provisional order from Smith J The applicant and respondent were represented by counsel before Smith J, who ordered the respondent to show cause why a final order should not be made restraining him from soliciting business of a direct response marketing nature from and providing services of a direct response marketing nature to any person who was a client of the applicant at 31 January 1993 and that the said restraint shall operate throughout Zimbabwe until 31 January 1996. The provisional order was to operate as a temporary interdict in the meantime restraining the respondent.

The respondent opposed the application. In his opposing affidavit he avers that the deponent to the applicant's founding affidavit, Walter Slawski, described as the Chief Executive of the applicant, does not state that he is authorised to depose to that affidavit. Mrs *Wood* has taken the point *in limine* that Walter Slawski lacks the requisite *locus standi* and relies on *Alino & Anor v Alino; Frylink v Dudhia & Anor* HH-181-90. Mr *Morris* submits that Walter Slawski is the Chief Executive and a director of the applicant and as such has authority to protect that company's interests. He argues that *Alino v Alino; Frylink v Dudhia supra* was not brought in the name of the corporate entity but by Frylink in her own name. In that case, it was the respondent's

contention that Frylink did not have *locus standi* to institute proceedings since the property concerned in the proceedings was owned by a company. I held that the company, as the owner of the property as a distinct legal personality rather than the registered majorty shareholder and beneficial owner of all the shares, was entitled to institute proceedings. *Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd* 1972 (4) SA 249 (C) at 251-252 was mentioned by me where CORBETT J (as he then was) relied on *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C). In that judgment WATERMEYER J, for the Full Bench of the Cape Provincial Division, stated the position at 351-352 as follows:

> "I proceed now to consider the case of an artificial person, like a company or co-operative society. In such a case there is judicial precedent for holding that objection may be taken if there is nothing before the court to show that the applicant has duly authorised the institution of motion proceedings ... Unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolutions in the manner provided by its constitution. An attorney instructed to commence notice of proceedings by, say, the secretary and general manager of a company would not necessarily know whether the company has resolved to do so, nor whether the necessary formalities had been complied with in regard to the passing of the resolution. It seems to me, therefore, that in the case of an artificial person there is room for mistakes to occur and less reason to presume that it is properly before the court or that proceedings which purport to be brought in its name have in fact been authorised by it.

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> There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorised by the company to do so ... This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorised would be to provide by an affidavit made by an official by the company annexing a copy of the resolution but I do not

ADAM J

> consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the court, then I consider that a minimum of evidence will be required from the applicant (cf *Parsons v Barkly East Municipality* 1952 (3) SA 595 (E); *Thelma Court Flats (Pty) Ltd v McSwigin* 1954 (3) SA 457 (C))."

In *Thelma Court Flats (Pty) Ltd v McSwigin supra,* there was no allegation in the supporting affidavit that the applicant company had authorised the institution of the proceedings but the deponent did aver that he was a director. WATERMEYER AJ agreed that it would be wiser for a director, in his founding affidavit, to aver that the company has resolved to the institution of proceedings and has authorised him to make the affidavit on its behalf, but in the matter before him, as there were allegations and factors present in the supporting affidavits, he was of the opinion that it would be carrying formality too far to uphold the point *in limine* that *ex facie* the documents filed that the application was not duly authorised.

SMITH J was satisfied that the applicant's chamber application was properly brought before him. Even if it was open to me, in light of this finding, to reconsider the matter, from the allegations in the annexures to Slawski's founding affidavit, it would be carrying formality too far to uphold the applicant's point *in limine*.

In his founding affidavit, Slawski states that the respondent commenced employment with the applicant on 14 May 1990 and was engaged in the capacity of General Manager/Director. Annexure"A"to his founding affidavit is addressed to the respondent and dated 8 May 1990 on"SVH Group (Private) Limited"(SVH) letterhead. The letter is as follows:

> "This is to confirm our previous discussions regarding your employment by and share holding in our subsidiary company, Direct Response Marketing (Pvt) Ltd (DRM). Your employment will commence on 14 May 1990 in the capacity of General Manager/Director.
>
> Detailed below are your terms of employment:
>
> 1. Your compensation package will, in the aggregate, amount to $60 000 per annum.

ADAM J

> 2. There will be a three month probationary period which will take effect from your date of commencement

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during which time either party may give the other 24 hours written notice of intention to terminate employment.

3. Once the probationary period expires, 24.9% of the shares of DRM will be issued to you.

4. As soon as practical after the expiration of the probationary period, DRM will provide you with a company vehicle for your use in relation to your responsibilities in your company capacity.

5. You will be reimbursed for all approved travel expenses on the company's behalf after commencement of employment.

6. Working hours are: Monday to Friday 08:00-12:45, 14:00-16:30. You may be requested to work after hours by the company should the need arise.

7. Leave will be accrued at the rate of 2 days per month (24 working days per annum), and may not be taken during the first 6 months of service.

8. Should you decide on some point in the future during your employment with DRM to sell your shares in DRM, you will be required to offer them only to SVH Group (Pvt) Ltd at a price equal to the net asset value attributable to your shares in DRM determined by its appointed auditors. During your employment, in the event of your death, your successor or representative will also be bound by the same right of option for the majority shareholder. The aforegoing right of option over your shares in DRM in favour of SVH Group (Pvt) Ltd shall also apply, even if you do not wish to dispose of your shares, in the event of termination for whatever reason, and by whomsoever initiated, of your contract of employment with DRM.

8a. Should SVH Group (Pvt) Ltd decide at some point to sell its shares in DRM (Pvt) Ltd, these shares will be offered to you on a first refusal basis.

9. Upon termination of and during your employment you will be constrained from soliciting business from and/or providing services to any existing client of DRM or SVH Group (Pvt) Ltd, or from any entity with which you had established contact as a potential client of DRM for three years from said termination.

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10. You will devote the whole of your time, attention and ability to the business of DRM and will at all times promote the interests of that company, to the exclusion of the interests of any third party or yourself, in any transaction which involves or may affect that company or any other company within the group of companies of SVH Group (Pvt) Ltd ('the Group'). You may not become involved or continue to be involved in any other business, whether in an active or passive capacity, or in any other profession, calling or employment without the prior written consent of DRM. Furthermore, and notwithstanding the granting of such written consent for your involvement in any other business, profession, calling or employment, you will be required to make full disclosure in writing to DRM (to its Board of Directors unless some other official within the company is designated for that purpose) of any particular transaction in which you propose to have or have any interest, either directly or indirectly through your relationship with any other person, and which involves DRM or any company within the Group.

We trust our association with you will be a long and happy one of mutual benefit.

Please sign and return the attached copy of this letter as soon as possible, if the terms are acceptable to you.

Yours sincerely

WALTER X SLAWSKI

I am agreeable to the terms and conditions outlined in my letter of employment.

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Signed: ..... Date: ....."

It should be noted that the bottom portion asks that the respondent sign and return a copy of that letter as soon as possible if the terms are acceptable to the respondent. That bottom portion was signed by the respondent on 19 May 1990.

It is not disputed that the respondent commenced employment on 19 May 1990 in the capacity of general manager and was so employed until 31 January 1993; that the applicant was incorporated on 17 May 1990 and that the letter of employment was signed by the respondent on 19 May 1990. Slawski wrote the respondent a letter on 5 May 1992, addressed to DRM (Pvt) Ltd at the same box number as SVH Group (Pvt) Ltd, which indicated that

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as far as DRM was concerned he was employed as General Manager of DRM under a letter of agreement signed by the respondent outlining the terms and conditions of employment accepted by him. A copy of that 8 May 1990 letter was attached. In his opposing affidavit, the respondent admits that the letter of 5 May 1992 confirmed his actual position as an employee of the applicant.

It is common cause that when the letter of 8 May 1990 was signed by Slawski, DRM had not yet been incorporated and registered and therefore was non-existent. At common law an agent cannot contract on behalf of a non-existent principal: *Natal Land & Colonization Co Ltd v Pauline Colliery & Development Syndicate Ltd* [1904] AC 120 (PC), approving the English doctrine in *Kelner v Baxter* (1866) LR 2 CP 174. This means that, from the application of that doctrine, a principal (DRM) not in being at the date of the conclusion of the agreement cannot be in a position to be bound by it: *McCullogh v Fernwood Estate Ltd* 1920 AD 204. It follows that, since the terms and conditions were only accepted by the respondent on 19 May 1990, it was only from that date that the agreement was concluded, by which date DRM had been registered. In those circumstances the doctrine in *Kelner v Baxter supra* has no application. Further, it is clear from the papers in this matter that both parties - DRM and the respondent - have conducted themselves at least as from 19 May 1990 as though the respondent's employment was governed by the terms and conditions of the 8 May 1990 letter of employment. In fact, in his opposing affidavit the respondent admits that he became progressively more unhappy working for the applicant and in part such unhappiness was caused by his dissatisfaction with having a minority shareholding.

On 25 February 1993 (Annexure "K" to Slawski's founding affidavit) the applicant's legal practitioners wrote to the respondent, drawing attention to clauses 9 and 10 of the letter of employment and informing him that, in breach of the covenants in restraint of trade, he made arrangements to solicit work from clients of DRM whilst still employed by it and he was currently providing services to certain of DRM's clients. In response to that letter, the respondent's legal practitioner (Annexure"L"to Slawski's founding affidavit) stated that out of courtesy the respondent informed DRM's clients of his pending resignation; that the respondent admitted that, on being requested to do so, he agreed to provide services for certain clients of DRM, after his resignation, instead of DRM and was currently doing so; and that clause 9 is null and void

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because it is unreasonable.

In his opposing affidavit, the respondent denies that he solicited work from

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the applicants' customers but that they came of their own accord. He also denies that he was providing services to its erstwhile clients. He states that his counsel has advised that, even if the restraint could be regarded as reasonable and comprehensible (which is denied), it could not be construed as a restraint on Shepherd Marketing (Pvt) Ltd The respondent reiterates further in his affidavit that he was not providing those services and that he wished to form another company so that Shepherd Marketing (Pvt) Ltd could have a shareholding in it instead of himself personally. He maintains that the restraint of trade clause is unreasonable and therefore not binding. He submits that there is no substantial prejudice to the applicant financially as alleged by it. He states that he was only shown the letter of employment after he had started working and since he had committed himself and could not withdraw without prejudice to his intersts he therefore signed under duress. He avers that he cannot see how the restraint can be upheld when the applicant has ceased to be operational and when there is no question of competition as the applicant is neither willing nor able to provide the services. He asserts that circumstances have changed drastically since the signing of the restraint, in that the applicant is effectively winding up. He states that, if the restraint were upheld, the clients of the applicant would be severely prejudiced because they would not be provided with continuity of service and would not be able to employ the agent of their choice (which the respondent seems to suggest would be himself). He avers that the applicant is not in a position to and clearly does not intend to continue to provide direct response marketing services to the clients in question as it does not have the staff and offices. He avers that he is of the opinion that Slawski is not concerned with those clients or with providing services but simply wants to gain financially from the purported covenant in restraint of trade.

In his answering affidavit, Slawski points out that the respondent alleges that the restraint of trade clause is unreasonable, without elaborating or giving reasons for this view. He emphatically rejects the allegation of duress and emphasises that the respondent had never previously complained of duress. He states that although the applicant's operations have been severely prejudiced by the respondent's actions, it is not correct that the applicant has no business. The applicant , he says, is willing to provide the services to its clients and is determined to do so. He avers that the applicant has recently completed in collaboration with SVH Group, a direct response marketing service on behalf of the Automobile Association of Zimbabwe and attaches a brochure and questionnaire distributed by it in May 1993.

In her heads of argument, the respondent's counsel, Mrs *Wood,* submits that

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the phrase "for three years from the said termination" in clause 9 does not make sense in the above context. She argues that to read "existing client" in clause 9 as"any person who was a

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client of the applicant at the 31st January 1993,", as it has been read, is not justified having regard to the context and that, as the term"services of a direct response marketing nature"appears to be capable of different interpretations, the respondent will never know whether he is in breach of the covenant. Mrs *Wood* also argues that to make the covenant completely comprehensible and reasonable it would necessitate a re-writing thereof and this is not permissible: *Mangwana v Mparadzi* 1989 (1) ZLR 79 (S) at 86. She submits that even if re-written the covenant will not be reasonable or in the public interest in the current circumstances: *Book v Davidson* 1988 (1) ZLR 365 (S). She maintains that covenants in restraint of trade are only regarded as vald to the extent that they protect a proprietary interest of the former employer. She argues that the applicant does not have a proprietary interest to protect.

In his heads of argument Mr *Morris,* for the applicant, submits that it is open to this court to determine which part of a restraint of trade covenant will be enforced: *Mangwana v Mparadzi supra.* He argues that the extent to which the restraint should apply has already been determined by SMITH J in the provisional order. He asserts that the proprietary interest that the applicant seeks to protect was argued before the provisional order was granted and that the proprietary interest is what the terms of the employment contract represents.

In *Roffey v Catterall, Edwards & Goudre (Pty) Ltd* 1977 (4) SA 494 (N) it was pointed out that Roman-Dutch law was not averse to covenants in restraint of trade and that (relying on *Katz v Efthimiou* 1948 (4) SA 603 (O) at 610) Roman-Dutch authorities did not regard covenants in restraint of trade as being foreign to Roman and Roman-Dutch systems of law. DIDCOTT J felt that whether covenants in restraint of trade were *prima facie* valid or *prima facie* void depended upon which of the two ideas - freedom of trade or sanctity of contracts - took precedence over the other. South African law preferred the sanctity of contracts. He concluded that public policy in South Africa did not condemn covenants in restraint of trade and, therefore, they are not *prima facie* void. *Magna Alloys Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) decided that in determining whether a covenant in restraint of trade is enforceable a court must have regard to two considerations: (1) that public interest requires, in general, that partes should comply with their obligations; and (2) that all persons should be allowed as far as possible to engage in commerce or the profession and that is detrimental to societal interests if an unreasonable fetter is placed on freedom of trade. The *onus* of

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proving that enforcement of the covenant in restraint of trade would be against public policy is on the party opposing enforcement. RABIE CJ at 897-8 held that a court is not limited to a finding that a restraint clause is enforceable or unenforceable as a whole. It also has the power to hold that a part is enforceable or unenforceable.

Our Supreme Court in *Book v Davidson supra* at 385, following *Magna Alloys supra,* put the onus on the party in breach of the restraint to establish that the restraint was contrary to public interest or public policy. In *Mangwana v Mparadzi supra,* McNALLY JA, approving the approach of RABIE CJ, said at 87:

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"Accordingly it must be held that the learned judge *a quo* was right in approaching the problem, not in terms of rewriting the restraint clause, but in terms of deciding the extent to which it had been shown that the court should not enforce the contract of restraint.

The appellant really made no effort to suggest in his affidavits where the line should be drawn between the reasonable and unreasonable elements of the restraint clause ...

If he had given serious consideration to the lawfulness and morality of his decision to break the contract, he might have been expected to look at the recent cases before reaching his decision. He might have noted, for example, BOTHA J's remark in the *National Chemsearch* case (1979 (3) SA 1092 (T)) at p 1117G that-

> '... it may be that the court will decline to enforce the restraint partially ... where the employee's conduct is not in flagrant or obviously defiant conflict with his former employer's legitimate interests.'

The facts of this case, however, reveal the most flagrant and blatant and unrepentant rejection of the whole concept of the restraint clause and of the sanctity of contracts. The employer was hit at his most vulnerable spot. It was the employer who had taken the risk of opening up the practice in Chinhoyi. The appellant was, for practical purposes, the embodiment of Brian Mparadzi and Co in Chinhoyi for the whole seventeen months of its existence. If the restraint had validity anywhere it had validity in Chinhoyi "

Yet, as I have said, the appellant made no attempt to suggest that the restraint clause was partially unenforceable. Perhaps he realised that having done what he did, it was all or nothing."

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It must be remembered that, as stated in *Sunshine Records (Pty) Ltd v Frohling & Ors* 1990 (4) SA 782 (A) at 796, although a court may, when public interest requires it, order that a restraint clause be only partially enforced, while having regard *inter alia* to matters such as whether the restraint was designed to be unduly oppressive or to act *in terrorem* and whether partial enforcement would not operate harshly or unfairly towards the party bound by the restraint, such power of the court was not unrestricted, and the amendments suggested should not be so far-reaching as to materially alter the contract.

Mrs Wood argues that the provisional order shhould not be confirmed as the respondent has not been seen to have breached or to be about to breach the restraint clause since it is Shepherd Marking (Pvt) Ltd that has been providing the services. But this is contrary to the reply given by the respondent's legal practitioners in their letter of 17 March 1993 (Annexure "L" to the founding affidavit). It is also, as correctly pointed out by Mr Morris, contrary to what the respondent said in his own opposing affidavit in response to what Slawski said in his founding affidavit. Slawski said there that the respondent arranged to solicit work whilst still with the applicant and upon termination of his employment commenced provinding services to certain of the applicant's clients. In his opposing affidavit, the respondent denied the allegation that he had solicited work but claimed that the clients came to him of their own accord. He also claimed that it was not who was providing services but Shepherd Marketing (Pvt) Ltd.

The point raised in the respondent's opposing affidavit about Slawski's affidavit being sworn when he was the sole director has been adequately answered by Mr *Morris* pointing out that the respondent has not alleged what the quorum of the applicant's directors meeting is supposed to be: *Gorfil & Anor* v Marendaz & Anor 1965 (1) SA 686 (T) at 689. Mr *Morris* also relies on the fact that Slawski clearly had the power to act as a *negotiorum gestor.* On this aspect, reference

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should be made to *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd* 1979 (2) SA 383 (C).

Mrs *Wood* submits that the contract was made with the SVH Group Ltd and not the applicant and it has not been ratified by the applicant. She also argues that, in any event, the covenant cannot be said to have been made for the benefit of the applicant when relates to SVH Group Ltd. In making this submission she relies on *Acting Minister of Industry & Technology & Anor v Tanaka Power (Pvt) Ltd* 1990 (2) ZLR 208 (S) at 213. Mr Morris submits that, by writing on 19 January 1993 to remind the respondent of the restraint, to that extent it might be argued that the restraint wass a contract for the benefit

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of the applicant as a third party and that the 19 January 1993 letter would be evidence of ratification: *Madan v Macedo Heirs & Anor* 1991 (1) ZLR 295 (S) at 300.

As for *Acting Minister of Industry & Technology & Anor v Tanaka Power (Pvt*) Ltd *supra*, which referred to a *stipulatio alteri*, McNally JA indicated that one of the essential features of a *stipulatio alteri* is that the stipulator and promissor must intend to create into between Willowvale Motors and Renault Agriculture after being prompted by Tanaka Power and was made in order to benefit. McNally JA found that this did not mean that the contract between them was entered into with the intention of enriching Tanaka Power to adopt and become a party to the contract. McNally JA did not hold, as it is clear from the foregoing, that a contract cannot be amde for the benefit of a third party because it related to Willowvale Motors as well. It follows that had the contract, which was for the benefit of Willowvale Motors, also made provision with the intention of enriching Tanaka Power or had Willowvale Motors intended when contracting to empower Tanaka Power to adopt and become a party *stipulatio alteri* would have applied. *(5)

As for proprietary rights, in *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 (HL) LORD PARKER observed at 709 and 710:

> "Wherever such covenants have been upheld it has been on the ground ... that he might obtain such personal knowledge of and influence over the customers of his employers, or such acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilize information confidentially obtained.
>
> ...
>
> In fact the reason, and the only reason, for upholding such a restraint on the part of the employee is that the employer has some proprietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which such restraint is - having regard to the duties of the employee - reasonably necessary."

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In *Fitch v Dewes* [1921] 2 AC 158 (HL) LORD BIRKENHEAD elaborated on this at p 165:

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> "He might claim, in my judgment, for his protection, that that business which was his, and to which he had admitted the appellant in the manner defined by the successive agreements, should continue to be his, and that if at any time the contract of employment between himself and his employee came to an end, on such determination the latter should not be in the position to use the intimacies and the knowledge which he had acquired in the course of his employment in order to create a practice of his own in that same place and by doing so undermine the business and the correction of the respondent."

But the foregoing has to be approached on the basis that"the principle that contracts are to be obeyed takes precedence over the principle of freedom of trade": *Mangwana v Mparadzi supra,* at 83.

Mr *Morris* asserts that the applicant places reliance on the terms of the employment contract as the proprietary interest that it seeks to protect.

It is true that para 9 of that employment contract is far from ideal but it does prohibit the respondent upon termination of employment soliciting business from or providing services to any client of the applicant for a period of 3 years.

SMITH J in the provisional order has circumscribed the extent of the restraint. He also found no difficulty with the services of the specialized field of direct response marketing that was being provided by the respondent, more particularly as the applicant has not disputed the annexures to the respondent's opposing affidavit on this.

It is clear to me that after 31 January 1993 services have been provided by the respondent to the applicant's client contrary to the restraint clause. Therefore, the onus was cast upon the respondent to show that it was not reasonable or in the public interest.

Mrs *Wood* has submitted that the restraint clause is not reasonable because it has been re-written or if it has not been re-written it will necessitate a re-writing.

In *Mangwana v Mparadzi supra* McNALLY JA adopted the attitude of the Appellate Division in *Magna Alloys supra* that a court is not limited to

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finding that a restraint clause is enforceable or unenforceable as a whole, nor does it have to approach it with the artificiality of the test of severability. A court can decide that a part of the restraint is enforceable or unenforceable. In my view, it was proper for SMITH J to spell out the ambit of the restraint.

Accordingly, it is ordered that -

(1) the respondent be restrained from soliciting business of a direct response marketing nature from and providing services of a direct response marketing nature to any person who was a client of the applicant at 31 January 1993;

(2) the said restraint shall operate throughout Zimbabwe until 31 January 1996; and

(3) the respondent pay the costs of this application.

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Honey & Blanckenberg, applicant's legal practitioners

Stumbles & Rowe, respondent's legal practitioners

S v MANDWE 1993 (2) ZLR 233 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Criminal appeal

20 & 30 September 1993

Flynote

Criminal procedure - outlines of State and defence cases - purpose of and difference between

Evidence - admissions - conclusiveness of - admission made on incorrect appreciation of facts - effect

Evidence - witness - credibility - witness departing from facts stated in outline of State case - effect

Roads and road traffic - culpable homicide - negligence -failure to foresee folly of other road users - duty of driver approaching known crossing point for pedestrians

Roads and road traffic - drunken driving - evidence - blood/alcohol test - test authorised by person below rank of inspector - results inadmissible - Road Traffic Act 1976 - s 68(1)

Roads and road traffic - negligence - duty of driver - driver dazzled by lights of oncoming vehicle

Roads and road traffic - sentence - culpable homicide- no evidence of drunkenness and accused a professional driver - appropriate sentence and length of prohibition from driving

Headnote

The outlines of the State and defence cases in a criminal trial are similar in function to pleadings in a civil trial, serving to identify what may be in issue and advising each side of the substance of the matters in issue. Further, because the defence outline is a categorical assertion by the

accused person of facts on which he relies for his defence, any significant and unexplained departure by the accused in evidence from the outline may be a matter for comment or even adverse conclusion. On the other hand, because the outline of the State case is often a prècis compiled by a policeman with no legal training in the event of a departure by a State witness from the outline of the State case, the divergence between the State outline and the testimony of a State witness must be so gross as to be utterly irreconcilable before an adverse conclusion should be drawn.

The appellant was driving a bus through a suburb of Chitungwiza in the early evening. Shortly

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after the bus passed over a speed hump, it collided with the deceased's bicycle, which was unlit. The deceased was crossing the road at right angles and crossing the appellant's path from right to left. The deceased was sent flying by the collision and sustained severe injuries from which he died on the way to hospital. In a warned and cautioned statement, the appellant stated:"The cyclist died as a result of this accident". The accused admitted that he did not see the deceased, because he was dazzled by the lights of an oncoming vehicle and had averted his head slightly towards the left side of the road to avoid the glare. He only saw the deceased when it was too late to take any avoiding action.

The appellant was seen at the scene by a police sergeant, who formed the impression that the appellant had been drinking. He ordered the appellant to go to Chitungwiza hospital for a blood test. The test showed a blood/alcohol level of 109 mg of alcohol per 100 ml of blood. The report was tendered at the trial and admitted without objection, the appellant stating that he did not dispute the results of the test. The magistrate sentenced the appellant to five months' imprisonment and prohibited him from driving buses for life.

It was argued on the appellant's behalf that the appellant's admission that the deceased had died as a result of the accident did not absolve the State from the onus of establishing by evidence that the deceased had died as a result of the accident. It was also argued that the appellant was not negligent, because the deceased had created a sudden emergency. Finally, it was argued that the magistrate should have placed no reliance on the results of the blood/alcohol test.

Held, that the appellant's admission as to the cause of death should be accepted, there being no suggestion that the deceased died from any other cause.

Held, further, that a reasonable driver, recognising the possibility of incorrect behaviour by other persons, should allow a reasonable margin of safety for, and pay due regard to, that possibility, particularly when approaching

danger spots such as intersections. In this case, the appellant knew that that portion of the road was a crossing point for pedestrians and had been alerted by the presence of the speed hump to the fact that this was a danger spot. He was thus obliged to anticipate any act which was reasonably foreseeable, even if that act was itself a negligent one. The fact that the deceased may have contributed to the accident had no relevance in determining whether the appellant drove negligently.

Held, further, that when the appellant found himself dazzled by the lights of the oncoming vehicle, he should have slowed or even stopped. By not doing so, he incapacitated himself from taking effective evasive action.

Held, further, that because the police officer who directed the taking of a blood test was below the rank of inspector, the exercise of that authority by him was incurably defective and the evidence relating to the blood test had to be excluded.

Held, further, that without evidence of intoxication the evidence did not establish that the appellant was reckless or grossly negligent. A custodial sentence was thus inappropriate.

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Similarly, without evidence of intoxication, because this was the appellant's first conviction and driving buses was his livelihood, a prohibition for life was also inappropriate.

Cases cited:

S v Seda 1980 ZLR 109 (G)

S v Ramotale 1992 (2) ZLR 397 (S)

S v Tanga S-37-93

S v van der Mescht 1962 (1) SA 521 (A)

S v Bernardus 1965 (3) SA 287 (A)

S v Baker S-263-92

London Passenger Tpt Bd v Upson & Anor [1949] 1 All ER 60 (HL); [1949] AC 155

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

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

S v Ferreira 1992 (1) ZLR 93 (S); 1992 (2) SACR 425 (ZS)

S v Mauwa 1990 (1) ZLR 235 (S)

S v Mazorwe S-92-91

S v Miller A-85-81

S v Lusenge A-138-81

Miss JTP Shava for the appellant

GTV Mamvura for the respondent

KORSAH JA

Judgment

Korsah JA: On 19 March 1993, in the court of the provincial magistrate held at Chitungwiza, the appellant was convicted of culpable homicide arising from the driving of a Nissan Minibus, despite his plea of not guilty to the charge. He was sentenced to undergo imprisonment for a period of five months with labour and, in addition, he was prohibited: (a) from driving vehicles other than omnibuses for six months; and (b) from driving omnibuses for life. He appeals against both conviction and sentence.

At about 6.45 pm on 22 August 1991 the appellant was driving a ZUPCO minibus registration number 518-451H due west along Hadzinanhanga Road in Unit K, Seke, a suburb of Chitungwiza. After the appellant's minibus had passed over a speed hump prior to crossing a

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small bridge, it came into collision with a cycle ridden by Kimpton Mashanda from north to south in front of the appellant's approaching bus, when Kimpton Mashanda had almost finished crossing the road. The impact knocked Kimpton Mashanda off his bicycle, hurling him through the air ahead of the minibus before landing on the road. Kimpton Mashanda sustained severe injuries as a result of this accident and died while being conveyed to Chitungwiza Hospital for treatment. On arrival at the hospital he was certified dead by a doctor. The appellant conceded in a warned and cautioned statement recorded on 22 April 1992 that: "The cyclist died as a result of this accident".

The appellant, in his outline of defence, told the trial court that the first attending detail at the scene asked him to breathe to determine whether he had imbibed alcohol. This was Sgt Mutambanadzo. The attending detail testified that there was a distinct smell of alcohol on the appellant's breath, and that the appellant told him that he had consumed two pints of beer. The appellant said he was ordered to drive his minibus to Chitungwiza Hospital where, upon arrival, a sample of his blood was taken. A blood alcohol analysis, tendered in evidence without objection at the trial, revealed that the appellant had a concentration of not less than 109 mg of ethyl alcohol in 100 ml of blood. The appellant, in his defence outline, further informed the court that he was not disputing either the findings of the doctor or those of the forensic expert because he did not know what was contained in his blood at the relevant time of the accident. Nowhere in his testimony did the appellant lay challenge either to the cause of death or to the forensic expert's report on his blood alcohol level. He merely denied telling Sgt Mutambanadzo that he had imbibed alcohol that day.

Now, the relevance of the respective outlines of the State and the defence cases were succinctly spelt out by SQUIRES J in *S v Seda* 1980 ZLR 109 (G)

KORSAH JA

at 110H when he said:

> "... the importance of the part played by the respective outlines of case in a criminal trial cannot be overstated. They perform a similar function to the pleadings in a civil trial, and serve not only to identify what may be in issue between the State and accused, but to advise each of the substance of the matters that are in issue, with the obvious advantages this affords of avoiding delay in completing the trial. In addition, it must always be appreciated that just as any significant and unexplained departure by the accused in his evidence from the outline of the defence which he makes, may be a matter for comment or even adverse conclusion, so does such a consequence affect what is said by the State witnesses."

It is, however, incumbent to caution that, as the State outline is often a prècis of the testimony of the State's witnesses, often compiled by a policeman with no legal training (as opposed to the defence outline being a categorical assertion by the accused person of facts upon which he relies for his defence), the divergence between the State outline and the testimony of a State witness must be so gross as to be utterly irreconcilable, so as to invite an adverse conclusion. As SQUIRES J clearly stated, the departure by a witness in his evidence from the outline must be significant and unexplained to be deserving of an adverse conclusion.

Miss *Shava* urged on this court that the appellant was a self-actor and so his admission that the deceased died as a result of the collision should not be accepted as absolving the State

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from the onus of establishing by evidence that the deceased died as a direct result of the accident.

My difficulty with this submission is that, taking the appellant as an honest person who knew that the cause of the death of the deceased was the result of the impact of his vehicle with the deceased, he would have admitted as much to a legal practitioner representing him, and that legal practitioner, as an officer of the court, would have been duly bound to make such an admission in any outline of defence which he filed on behalf of his client.

I accept that counsel may, on an interrogation of his client, on good ground advise that such an admission be not made, because the death does not appear to have resulted as a direct consequence of the accident, but it does not seem to me that a self-actor who knows and accepts the truth can be permitted to later turn round and say that he told the truth because he was unrepresented.

KORSAH JA

Having regard to the admission made by the appellant as to the cause of death, there was no onus on the State to adduce evidence of a causal link between the death of the deceased and the accident. In my view, the learned trial magistrate did not fall into error in accepting the appellant's admission that the death of the deceased was as a result of the accident.

The two cases, *S v Ramotale* 1992 (2) ZLR 397 (S) and *S v Tanga* S-37-93, which Miss *Shava* cites in support of her submission that the State failed to discharge the onus of establishing a causal link between the death of the deceased and the accident, are distinguishable from the facts of this case.

In the *Ramotale* case, no evidence was led as to death or the cause of death. As McNALLY JA commented:

> "In this case the prosecutor produced by consent four post-mortem reports, and the police witness spoke of 'bodies scattered on the road'. No-one said they were dead bodies. And if they were, no-one said they were the same dead bodies as those referred to in the post-mortem reports and named in the charge.
>
> Either the defence should have been asked to make a formal admission, or the deaths should have been properly proved."

The difference between that case and the present seems to me obvious. In the instant case there was but one dead body, and the appellant admitted that the deceased died as a result of the collision between his vehicle and the bicycle the deceased was riding. There was thus no need to make any formal admissions.

In the *Tanga* case the death of the drunken deceased occurred shortly after a fight with the appellant. Apart from evidence that the deceased was the aggressor and the appellant was in self-defence repelling an attack, there was also evidence that after the fight had been stopped, the deceased, in his drunken stupor, fell and hit his head against a fence post. The appellant made an admission in his warned and cautioned statement that he hit the deceased and the deceased died. The post mortem report, however, revealed that the death of the deceased was

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due, not to the injuries inflicted by the appellant, but to the inhalation by the deceased of his own vomit. The appellant tried to withdraw his admission by making false allegations of coercion which were rightly rejected by the trial court. On his appeal against conviction this court considered that, in the circumstances of that case, the trial court should have

KORSAH JA

applied the test of reasonable foreseeability laid down in the leading cases of *S v van der Mescht* 162 (1) SA 521 (A) and *S v Bernardus* 1965 (3) SA 287 (A), that:

> "... if someone unlawfully assaults another and in so doing causes his death, but under circumstances in which he could not reasonably have foreseen the death, then he is not guilty of culpable homicide."

What must be appreciated was that the admission by the appellant (unrepresented) in the *Tanga* case was not held to be vitiated because he was unrepresented. But, having regard to the post mortem report, it was unclear whether the vomiting was a result of the assault or as a result of the drunkenness or as a result of the combination of the two. Without the evidence of an expert, it was impossible to determine whether the appellant could be linked in any way to the death of the deceased. His admission was, therefore, clearly made on an incorrect appreciation of the facts, but it was nonetheless accepted as such and on a proper interpretation of the facts the conviction for culpable homicide was upheld though not the sentence.

In the instant case the appellant's admission as to the cause of death was made where there was no suggestion that the death of the deceased was due to any other cause than the collision with the appellant's vehicle. While it may be desirable to lead medical evidence in substantiation of the cause of death in cases where the cause of death is not directly and clearly linked with the conduct alleged to have caused the death, such evidence is unnecessary if the cause of death is admitted and there is no suggestion that death could have resulted from any other cause. Of what use would be medical evidence if the accused admits that the death of his victim was occasioned by hitting him on the head with a hammer, and the medical report is to the effect that the deceased died as a result of a fractured skull?

Did the appellant drive negligently?

The collision between the appellant's vehicle and the deceased's bicycle occurred about 40 metres after the appellant had passed over a speed hump. As everyone knows, or ought to know, speed humps are placed at portions of the road notorious for accidents, or where children usually cross the road, to remind drivers of the need to exercise extra caution while driving along that stretch of the road. The appellant had plied that route for at least two years and was aware that this was an unofficial crossing point for pedestrians. There are footpaths on both sides of the road to indicate as much.

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The appellant alleged that he was blinded by the lights of approaching vehicles and had

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averted his head slightly towards the nearside of the road to avoid the glare of lights. He, therefore, saw the deceased suddenly appear in front of his vehicle and he struck the rear side of the deceased's bicycle when the deceased had almost finished crossing the road. He said that, because of pedestrians to his left and approaching vehicles on his right, the unexpected appearance of the deceased created a sudden emergency and he could not take evasive action.

In *S v Baker* S-263-92 (unreported) I made the following observations which I think apposite:

> "Now, what is the duty of the driver of a motor vehicle in these circumstances? In *Woods v Administrator, Transvaal & Anor* 1960 (1) SA 311 (T) at 314 WILLIAMSON J adopted the conclusions of the learned authors of the work *Negligence in Delict* by Macintosh and Scoble 4 ed at p 24 that:
>
> > '... a driver may regulate his conduct on the general assumption of correct behaviour by others; but that recognising the possibility of incorrect behaviour, he will so far as is reasonably possible allow a margin of safety for, and pay due regard to, that possibility particularly when approaching danger spots such as intersections.'"

In the instant case, a speed hump was in place to remind the appellant, who had plied that route for more than two years, that he had arrived at a danger spot and was to exercise extra care and attention. Instead, he drove with his head slightly averted to the nearside of the road and so did not see the deceased crossing the road.

LORD UTHWATT in *London Passenger Transport Board v Upson & Anor* [1949] 1 All ER 60 (HL) at 70F, subscribing to a similar view to that adopted by WILLIAMSON J in the *Woods* case *supra,* expressed himself thus:

> "I dissent from the view that drivers are entitled to drive on the assumption that other users of the road, whether drivers or pedestrians, will behave with reasonable care. It is common experience that many do not. A driver is not of course bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the forms those follies commonly take."

KORSAH JA

In view of the appellant's admission that the portion of road where the accident occurred was a crossing point for pedestrians and that he had been alerted by the presence of the speed hump on the road to proceed with caution as this was a danger spot, he was bound to anticipate any act which was reasonably foreseeable, that is to say, anything which the experience of road users teaches them that people do, such as the deceased did, albeit negligently.

And when the appellant found himself dazzled by approaching headlights, he should at once have stopped or slowed down to a very slow pace in case there should be someone, such as the deceased, or something in his path, so that he could stop or take evasive action. As GUBBAY ACJ (as he then was) remarked in *S v Ruzario* 1990 (1) ZLR 359 (S) at 366E-F:

> "... if at that stage he found that his vision was somewhat impaired, his duty was to instantly pull up and wait until he could see properly before proceeding further, or reduce his speed so as to be able to stop within the range of his vision" (my emphasis).

The appellant contended that he had slowed down. The fact is, he was proceeding without a

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clear vision of what was in front of him and was unable to stop within the range of his vision. As McNALLY JA observed in *S v Duri* 1989 (3) ZLR 111 (S):

> "... slowing down is merely a preparatory step - it is a step which makes it possible to take evasive action if need arises."

The same view was expressed by GUBBAY CJ in *S v Ferreira* 1992 (1) ZLR 93 (S) at 97; 1992 (2) SACR 425 at 428g-h (ZS) when he said:

> "... in not significantly slowing down, the appellant incapacitated himself from taking effective evasive action."

The accident occurred when the deceased had almost completed crossing the road. Support for this may be derived from the appellant's admission that he did not take the evasive action of swerving but only braked when he saw the deceased, and from the damage that impact with the deceased occasioned to the appellant's vehicle. There was damage to the "left front indicator, windscreen and a dent on the left front part of the bus". Such damage to a bus, resulting from an impact with a cyclist, not riding in a direction opposite to the line of travel of the bus but across the path of the bus, bespeaks not only of the force of the impact but also the speed at which the appellant was driving.

KORSAH JA

Given that the appellant knew the area of the road where the accident occurred was a danger spot, and taking into account his admission that he was blinded by the lights of approaching vehicles, and regard being had to the fact that the impact hurled the deceased through the air to such a distance ahead of the bus that the bus was able to stop without running over him, there can be but no doubt that the appellant was not only driving at a speed excessive in the circumstances, but also failed to keep a proper look-out. In short, having regard to all the circumstances of this case, I am left in no doubt that the appellant, by not significantly slowing down, incapacitated himself from taking effective evasive action and was negligent as to the manner he drove along the stretch of road where the accident occurred.

It was contended on behalf of the appellant that, by appearing from behind a vehicle and riding a cycle which had no lights, the deceased created a sudden emergency for the appellant. As was observed in *S v Mauwa* 1990 (1) ZLR 235 (S) at 242A: "It is not every emergency that will exculpate a driver of a vehicle from negligence". The appellant had been plying that route for over two years. He knew that stretch of the road was a danger spot, in place was a speed hump reminding him of it, he was dazzled by the lights of approaching vehicles, yet he drove on at a speed at which he could not stop within the range of his vision. If he had stopped within the range of his vision he would not have come into collision with the deceased.

I am painfully aware of the dangers posed to drivers by cyclists who ride at night without lights or reflectors on their bicycles. If there is a law against this practice it should be enforced. But, as was said in the *Baker* case *supra,* at p 6:

> "The fact that the deceased may have contributed to the accident is a matter for the civil courts, and has no relevance in the determination in criminal proceedings of whether or not the appellant drove negligently *S v Gomendo* S-177-89 at p 2; *S v Ndadzimudzwa* S-19-92; *R v Tatham* 1968 (2) RLR 1 (A). The appellant should

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have foreseen that given the circumstances above described, proceeding at the speed he drove, 'something untoward and unexpected but within the range of human experience might happen', such as the deceased crossing the road at the time he did."

The above citation applies with equal force in the instant case.

Miss *Shava* submitted, with justification, that the learned trial magistrate erred and misdirected himself on the law in placing reliance on and attaching

KORSAH JA

weight to the forensic scientist's report on the concentration of alcohol in the appellant's blood.

Section 68 (1) of the Road Traffic Act provides that only an officer of or above the rank of a section officer, ie an inspector or higher, may direct a suspect driver to undergo a blood test, for purposes of determining his blood alcohol level. The only evidence on record is that Sgt Mutambanadzo directed that the appellant be taken to the hospital for a blood alcohol test. He is not authorised by the section to give such directions. In *S v Mazorwe* S-92-91, it was held that such an exercise of authority by a policeman below the rank of inspector is not in compliance with s 68 and that the defect was incurable and fatal. Thus the evidence that the appellant was driving under the influence of alcohol must be excluded on the ground that it is inadmissle. What is more, the police details allowed the appellant to drive his minibus from the scene to the hospital to have a sample of his blood taken and then to the police station.

Now, this brings me to the question of sentence. It has for long been the view of the courts that a sentence of imprisonment without the option of a fine will not normally be imposed for culpable homicide resulting from the driving of a vehicle, unless it was found that the accused was driving under the influence of alcohol at the time, or was reckless or grossly negligent: *S v Miller* A-85-81; *S v Lusenge* A-138-81.

Even though the accident occurred in a restricted zone, the evidence before the trial court, the blood alcohol evidence excluded, does not go far enough to establish that the appellant was reckless or grossly negligent. There was evidence that he had slowed down, but apparently not significantly enough for him to be able to stop within the limits of his vision.

It is, of course, necessary to impose a sentence which will bring home to the appellant and the general public the seriousness of failing to exercise extra caution when driving in a zone designated a danger zone by the mounting of road humps. In my view, insofar as drunkenness is excluded, a custodial sentence would, on the facts of this case, be inappropriate, and this court is at large as to sentence.

The appellant has been driving for thirteen years without mishap. Driving is his profession. The imposition of a life ban could only have been justified on the basis that he was driving a bus while under the influence of alcohol. The facts clearly do not support such a finding. While, therefore, upholding the

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conviction for culpable homicide, the sentence imposed is hereby set aside and in its place is substituted the following:

> "The accused is sentenced to a fine of $600, and to imprisonment with labour for three months which is suspended for three years, on condition that he is not convicted of any offence involving negligent or reckless driving during that period for which he is subsequently convicted. In addition, the appellant is prohibited from driving for six months."

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

L PIRAS & SON (PVT) LTD & ANOR (INTERVENING) v PIRAS 1993 (2) ZLR 245 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

7 & 21 October 1993

Flynote

Company - director - authority - meeting of directors - lack of quorum - effect - wrongs committed by directors - derivative action - purpose of - when may be brought by shareholder to protect company

Headnote

The respondent and Dr Mudekunye, the intervening party in the appeal, were the two directors of the appellant company. In 1988 Dr Mudekunye had purchased a piece of land on which were two half-completed houses. The property was registered in the respondent's name, but a year later it was transferred to the company. The two directors agreed that the respondent was to complete the buildings at their joint expense. In 1991 the respondent claimed various sums of money from Dr Mudekunye for work done and materials supplied. The claim was disputed. The respondent then issued summons against the company for the sums claimed. The summons was served on the respondent's wife. The respondent did not, as director, enter appearance to defend on behalf of the company but instead applied for and obtained default judgment. Dr Mudekunye did not become aware of this action until afterwards and took steps to have the judgment set aside.

In his application, Dr Mudekunye averred that the respondent had committed a fraud on the company by suing the company for a debt which had previously been claimed against Dr

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Mudekunye, by not advising Dr Mudekunye of the issue of the summons and by not defending the action on behalf of the company. The judge *a quo* upheld the objection that Dr Mudekunye had not been authorised to act on behalf of the company and dismissed the application. The company, Dr Mudekunye intervening, appealed.

KORSAH JA

Held, that the respondent, as director, stood in a fiduciary relationship to the company and was in grave breach thereof. He further compounded the wrong done to the company by withholding his authority from Dr Mudekunye to bring proceedings on behalf of the company.

Held, further, that Dr Mudekunye was not empowered to resolve that the company institute the action for rescission. There were only two directors and a quorum for a decision was two.

Held, further, however, that Dr Mudekunye was entitled, as an intervening party, to pursue the derivative action as a shareholder in his own name on behalf of the company to protect its interests, such an action being a device designed to enable the court to do justice to a company controlled by its wrongdoers and to prevent a serious wrong from going unremedied.

Held, further, that the application for rescission of the default judgment should be allowed.

Cases cited:

Mall (Cape) (Pty) Ltd v Merino Ko-op Bpk 1957 (2) SA 347 (C)

Robinson v Randfontein Ests GM Co Ltd 1921 AD 168

SA Fabrics Ltd v Millman NO & Anor 1972 (4) SA 592 (A)

Novik & Anor v Comair Hldgs Ltd & Ors 1979 (2) SA 117 (W)

Fisheries Development Corp of SA Ltd v Jorgensen & Anor 1980 (4) SA 156 (W)

Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & Ors 1981 (2) SA 173 (T)

Gundelfinger v African Textile Mfrs Ltd & Ors 1939 AD 314

Trek Tyres Ltd v Beukes 1957 (3) SA 306 (W)

Re Greymouth Point Elizabeth Rly & Coal Co Ltd [1904] 1 Ch 32

Blythe v Phoenix Foundry Ltd, Wilson & Muir 1922 WLD 87

Gorfil & Anor v Marendez & Ors 1965 (1) SA 686 (T)

Foss v Harbottle (1843) 2 Hare 461; 67 ER 189

Wallersteiner v Moir (No 2) [1975] 1 All ER 849 (CA)

Beattie v E & F Beattie Ltd [1938] 3 All ER 214 (CA)

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Miller v Miller 1963 R&N 60; 1963 (2) SA 199 (SR)

Edwards & Anor v Halliwell & Ors [1950] 2 All ER 1064 (CA)

Prudential Assurance Co Ltd v Newman Industries & Ors [1980] 2 All ER 841 (ChD)

AP de Bourbon SC for the appellant and the intervening party

No appearance for the respondent

GUBBAY JA

Judgment

Gubbay CJ: This is an appeal against an order of the High Court dismissing with costs an application for rescission of a default judgement granted on 28 February 1992, in favour of the respondent, in an amount of $209 100,53, with interest thereon a *tempore morae* and cost of suit. The respondent has not sought to oppose the appeal.

Within a few days of the noting of the appeal, Dr William Hamadziripi Mudekunye applied to a judge of this court for leave to intervene in support of a derivative action in this appeal. His application was not contested by the respondent and was allowed, with the costs thereof to be costs in the cause of the appeal.

Before the High Court the respondent opposed the grant of rescission of judgment solely on the procedural ground that Dr Mudekunye had no authority to represent the appellant since there was no resolution of the Board of Directors authorising him to do so. He did not put in issue the relevant events deposed to by Dr Mudekunye in his founding affidavit. These reveal the following scenario.

In early January 1988, Dr Mudekunye purchased the Remaining Extent of Stand 1795 Salisbury Township ("the property") on which had been erected a structure comprising two half-built town houses. He registered it in the name of the respondent, who was his friend and nominee. The property belonged exclusively to him and the respondent had no beneficial interest in it.

On 6 November 1989, the property was transferred to the appellant, the directors of which were Dr Mudekunye and the respondent and, ultimately, of the two issued shares in the appellant, one was held by the respondent and the other by Dr Mudekunye.

Thereafter, Dr Mudekunye and the respondent entered into a written agreement, in terms whereof the latter was to complete the building of the two town houses at the joint expense of both parties, and would be able to administer one of them as his own and retain any rental received in respect thereof.

On 6 February 1991, the respondent wrote to Dr Mudekunye demanding payment of the sum of $190 245,78. The claim was for work done and materials supplied in respect of both a house

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which had been purchased in the name of the respondent with monies provided by Dr Mudekunye, and a

GUBBAY JA

creche he had completed constructing on a property owned by Dr Mudekunye. Included in the claim was $32 325,92, being Dr Mudekunye's half-share of the mortgage bond repayments made by the respondent in respect of the appellant's liability to a building society. In a letter dated 2 March 1991 the respondent indicated to Dr Mudekunye that an additional amount of $147 236,21 was owing to him.

Dr Mudekunye's reaction to these claims for payment, which were made against him in his personal capacity, was to request the provision of supporting documents in verification thereof. This resulted in much correspondence passing between himself and the respondent, who did not make any documents available.

When payment was not forthcoming from Dr Mudekunye, the respondent issued summons on 28 January 1992, against the appellant as the defendant, claiming $209 110,53, which sum had been the subject of the dispute between himself and Dr Mudekunye. The particulars of the claim read:

> "... being the amount due and owing by defendant to plaintiff in respect of materials supplied, bond repayments made on behalf of defendant and interest on the aforesaid bond repayments during the period February 1989 to date, which amount defendant has failed and/or neglected to pay".

The summons was served at the registered address of the appellant, being the residence of the respondent, upon the respondent's wife. It was not brought to the attention of the remaining director and shareholder, Dr Mudekunye. The respondent did not enter appearance to defend the summons on behalf of the appellant, but instead applied for and obtained default judgment. Dr Mudekunye only became aware that judgment had been granted against the appellant on 7 April 1992, and on 5 May 1992 took steps on behalf of the appellant to set the judgment aside.

The founding affidavit averred, at least by necessary implication, that the respondent, by suing the appellant for a debt which previously had been claimed against Dr Mudekunye personally, in not advising Dr Mudekunye of the issue of summons, and in not defending the action on behalf of the appellant, had perpetrated a fraud on the appellant; and that if the judgment were allowed to stand, the appellant would be seriously prejudiced by being held liable in law to pay a considerable sum of money which to the knowledge of the respondent it did not owe.

GUBBAY CJ

Although expressing some sympathy for the appellant's predicament, the learned judge felt himself bound to uphold the objection that Dr Mudekunye had not been authorised by the appellant to act on its behalf. There was no evidence placed before him to show that the appellant had resolved to make the application. In mind, no doubt, were the observations of WATERMEYER J in *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at

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351G-352A.

The first argument addressed by Mr *de Bourbon,* who appeared for both the appellant and the intervening party, Dr Mudekunye, was that, having regard to the unusual situation to which the matter gave rise, the learned judge had erred in failing to recognise the authority of Dr Mudekunye, as the only available director of the appellant, to act on its behalf. Counsel emphasised that the respondent, in his capacity as a director, stood in a fiduciary relationship to the appellant. He was under an obligation to observe the utmost good faith towards the appellant; to exercise his powers for the benefit, not of himself, but of the appellant; and to ensure that he avoided a conflict between his own interests and those of the appellant. Cited to the court were such cases as *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177-179; *South African Fabrics Ltd v Millman NO & Anor* 1972 (4) SA 592 (A) at 596D-F; *Novik & Anor v Comair Holdings Ltd & Ors* 1979 (2) SA 117 (W) at 151D-153F; *Fisheries Development Corporation of SA Ltd v Jorgensen & Anor* 1980 (4) SA 156 (W) at 163E-G; and *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & Ors* 1981 (2) SA 173 (T) at 197G-H.

This exposition of the principles relating to the duties of a director I unhesitatingly accept, as well as the corollary that the respondent, on the facts disclosed, was in grave breach thereof. By withholding his authority from the only other director to bring proceedings on behalf of the appellant to set aside the judgment he had so surreptitiously obtained, the respondent further compounded the wrong he had done the appellant.

But, in my opinion, it does not follow, as Mr *de Bourbon* contended, that such conduct on the part of the respondent entitled Dr Mudekunye to act in the interests and name of the appellant, albeit he was the sole director who had not precluded himself from so acting.

Section 146(1) of the Companies Act [*Chapter 190*] requires that every company shall have not less than two directors. Directors are appointed to manage the business of the company, make its contracts, and take care of its

property, for the benefit of themselves and all the other shareholders. They cannot conduct the business of the company unless a quorum is present which, once established, must be maintained throughout the meeting. The quorum is usually fixed in the company's Articles of Association and, unless so fixed, shall be two (see Table A, Art 100 of the Companies Act).

If a quorum is not present, the proceedings at the meeting are invalid. Where a director is disqualified from voting on account of a personal interest in the business at hand, he cannot be counted in reckoning a quorum. See *Gundelfinger v African Textile Manufacturers Ltd & Ors* 1939 AD 314 at 323; *Trek Tyres Ltd v Beukes* 1957 (3) SA 306 (W) at 310B-C. If, as a result of the withdrawal of the interested director, the remainder constitute less than the minimum, there is no quorum and the business cannot be transacted. See *Re Greymouth Point Elizabeth Railway & Coal Co Ltd* [1904] 1 Ch 32 at 34; *Blythe* v P*hoenix Foundry Ltd, Wilson & Muir* 1922 WLD 87 at 91 in fine- 92. However, the articles of association usually provide that the remaining

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directors may act, but only for the purpose of making up the quorum or of convening a general meeting of the company. See Table A, Art 101 of the Companies Act; *Gorfil & Anor v Marendez & Ors* 1965 (1) SA 686 (T) at 689G-690A.

In the absence of any reference in Dr Mudekunye's founding affidavit to the articles of association of the appellant, the quorum must be taken as two. By his conduct the respondent effectively and meaningfully precluded himself from voting in favour of the appellant taking proceedings to set aside the default judgment. There was in consequence no quorum. It could not be convened. A deadlock ensued.

Taking account of the law as I perceive it to be, it is clear to my mind that Dr Mudekunye was not empowered to resolve that the appellant institute the application for rescission. In my view, the learned judge was correct in concluding that it was not the appellant that was litigating but the unauthorised Dr Mudekunye on its behalf.

It remains to consider whether the appeal should be allowed on the ground that Dr Mudekunye, as an intervening party, is entitled to pursue the derivative action as a shareholder in his own name on behalf of the appellant in order to protect the interests of the latter.

The derivative action is an exception to the rule in *Foss v Harbottle* (1843) 67 ER 189 and was expounded thus by LORD DENNING MR in *Wallersteiner*

GUBBAY CJ

v *Moir* (No 2) [1975] 1 All ER 849 (CA) at 857d-f:

> "It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v Harbottle.* The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs -by directors who hold a majority of the shares - who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them temselves. Yet the company is the one person who is damnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress."

See also *Beattie v E & F Beattie Ltd* [1938] 3 All ER 214 (CA) at 216 (cited with approval by YOUNG J in *Miller v Miller* 1963 R&N 60 at 62I-63D; 1963 (2) SA 199 (SR) at 202B-F); *Edwards & Anor v Halliwell & Ors* [1950] 2 All ER 1064 (CA) at 1067A-B; *Prudential Assurance Co Ltd v Newman Industries & Ors* [1980] 2 All ER 841 (ChD) at 861c-e.

The nature, then, of a derivative action is that it is a device designed to enable the court to do justice to a company controlled by its wrongdoers and prevents a serious wrong from going unremedied. A shareholder is allowed to appear as the plaintiff. He acts, not as representative of the other shareholders, but as a representative of the company to enforce rights derived from the company. The action is brought by him in his own capacity to vindicate the company's

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rights.

I see no reason to deny Dr Mudekunye the right to pursue a derivative action in his name, and in his capacity as the remaining shareholder, on behalf of the appellant. A wrong of a fraudulent nature was done to the appellant, the details of which I have already outlined. By virtue of the lack of a quorum, for which the respondent was responsible, the appellant has been rendered unable to bring proceedings itself to redress that wrong.

GUBBAY CJ

Although the intervening party has been successful in obtaining the relief sought, his intervention in the appeal was not opposed by the respondent. Accordingly, there is no warrant to order that the respondent bear the costs of the application. Insofar as the appeal is concerned, however, but for the intervention of Dr Mudekunye the appeal would have been dismissed. The costs awarded against the appellant by the court *a quo* should therefore stand.

In the result I would order as follows:

(1) The appeal by the intervening party is allowed, with the costs thereof to be borne by him.

(2) Save for the award of costs granted in the respondent's favour, the order of the court *a quo* is altered to read:

" (1) The application for rescission of judgment is allowed.

(2) The intervening party is to file his plea to the summons or a request for further particulars thereto within twelve days."

McNally JA: I agree.

Korsah JA: I agree.

Gollop & Blank, appellant's and intervening party's legal practitioners

S v KUNESU & ORS 1993 (2) ZLR 253 (HC)

Court **High Court, Harare**

Bartlett J

Criminal review

27 October 1993

Flynote

Criminal procedure (sentence) - fines - principles to be applied when determining level of fines - fine must be

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real option and not excessive

Headnote

Where the offence warrants the imposition of a fine, the fine imposed must take into account the accused's means, resoures and financial responsibilties. The fine must not be set at a level patently beyond the means of the accused persons. If an excessive fine has been imposed justice will not be done. Excessive fines lead to people going to prison unnecessarily. This results in drastic overcrowding in the prisons. Whilst fines should not be so low as to make serious offences appear trivial, the imposition of fines patently beyond the means of accused persons is an exercise in futility. The fine must be a real option for the accused. This does not always mean that the fine must be within the immediate means of the accused persons, though this should normally be so where the offence is not a serious one.

Magistrates should not impose excessive fines and then try to ameliorate the effect of these fines by getting poor persons to pay off the fines in instalments over a long period of time. Although fines may be increased somewhat if the accused persons are permitted to pay the fines in instalments, if this option is taken too far it is, in effect, punishing poor persons substantially more severely than rich persons.

Where there is an apparently unbridgeable gap between the accused person's available resources and the appropriate fine for his offence, the court may consider imposing a fine which is suspended on condition the accused carries out appropriate community service.

1993 (2) ZLR p254

BARTLETT J

On the other hand, if the accused person has made illicit profit out of his offence and that profit has not been recovered, that it is a legitimate factor for increasing the level of the fine imposed.

Cases cited:

S v Manwere 1972 (4) SA 425 (RA)

S v Mushongwe HH-58-93

R v Motlagomang 1958 (1) SA 626 (T)

S v Kekana 1989 (3) SA 513 (T)

Judgment

Bartlett J: The accused in this matter were each convicted of theft and sentenced to a fine of $1 000 or 4 months' imprisonment with labour. In addition a suspended sentence of 3 months' imprisonment with labour was imposed in respect of each of the three accused.

The facts of the matter reveal that the three accused were employed in the Horticulture Department of the Farmers' Co-op as till operators in the case of the first and third accused and as the department cashier in the case of the second accused. On 13 September 1993 the three accused, acting together, stole a total amount of $792 from the day's takings which should have

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been banked. Although the agreed facts are not clear, it would seem likely that the money would have been shared equally between the three accused which would have resulted in each profiting to an amount of $264 from his dishonesty. It would appear that the magistrate assumed that the money was shared equally as identical sentences were imposed in respect of each of the three accused.

The accused, who were first offenders, pleaded guilty to the offence. Each is married with family responsibilities and earning approximately $600 per month. It is of course very likely that each of the accused will have lost his employment as a result of his dishonesty.

The magistrate was clearly correct in deciding that the offence warranted the imposition of a fine. The magistrate having decided, however, that a fine was appropriate should have ensured that the fine constituted a real option when considered against the accused persons' means and resources - *S v Manwere* 1972 (4) SA 425 (RA) at 427B-C. This does not mean that the fine must be within the immediate means of the accused person, though this will usually be the case where the offence is not a serious one - *S v Manwere* supra.

Although the accused persons in this case may well have actually paid the

BARTLETT J

fine, I do not consider that, taking into account their means and resources as established by the magistrate, the fine constituted a real option. I am of the view that the fine was manifestly excessive taking into account the overall circumstances of the accused persons. They are all, as I have indicated, family men earning just under $600 per month - a very limited salary for a man with a family to support in times of high inflation. A further factor limiting the means of the accused is that - albeit as a result of their own blameworthiness - they had almost certainly lost their employment and would in fact have no monthly earnings. Although this is of course the fault of the respective accused it is nevertheless a factor which affects their ability to pay a fine and a factor which is a punishment in itself.

A further factor which needs to be taken into account in assessing the appropriate fine in respect of these matters is that the accused had made an illicit profit from their dishonesty - which profit had not been recovered. This is a legitimate factor for increasing the level of the fine imposed - see *S v Manwere* supra and *S v Mushongwe* HH-58-93. Taking into account the illicit profit, which as I have indicated would have been an amount of $264 in respect of each accused, I am of the view that the fine which should have been imposed in respect of each of the accused was $500.

This fine would have removed the illicit profit from each of the accused and imposed a substantial punishment in excess of that profit. The fine would also be a real option and be within the means of the accused assessed against all the factors to which I have referred. I am of the view that the fine of $1 000 went far beyond meeting the various criteria to which I have referred.

The facts of this matter provide a useful example of all the competing criteria to be taken into account in assessing an appropriate fine in terms of the principles laid down in *S v Manwere*

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supra.

The reviewable limit in respect of fines has recently been increased to $1 000 which means that a large number of matters which previously came to the High Court on review in respect of fines are now scrutinised by the Regional Court. I have, however, noticed from the matters which have come before me where fines have been imposed, that there still appears to be a definite tendency by magistrates not to apply the principles laid down in *S v Manwere supra* and *S v Mushongwe supra.* I accordingly think it appropriate to reiterate the relevant passages from *S v Manwere* supra as they are of considerable importance in ensuring that justice is done and that the prisons are not unnecessarily crowded with persons who should not be there.

BARTLETT J

The words of MacDONALD ACJ emphasising these principles are as eloquent as when they were first uttered over 20 years ago:

> "The magistrate errs when he suggests that a fine which is related to the offender's capacity to pay may in certain circumstances make 'a mockery of the sentence'. A fine of $10 will punish a poor man no less severely than a fine of $100 will punish a person of moderate means. Inability to grasp this point and to have the courage to give effect to it can only result in grave injustice to poorer sections of the community, and in the accommodation in our prisons being taken up by persons who would be at liberty if the fine imposed had constituted a real option."

(at p 428A-B) and:

> "With respect, whether a fine is extremely small or extremely heavy, can only properly be judged by reference to the means and resources of the person on whom it is imposed. A millionaire fined $10 would regard the fine not only as extremely small but trifling. A family man earning as little as $10 per month might find such a fine not only extremely heavy but crippling."

(at p 429A-B).

It is important to note that in *S v Manwere supra* MACDONALD ACJ specifically disagreed with the sentiment expressed in *R v Motlagomang* 1958 (1) SA 616 (T), where it was stated that a serious offence should not be made to look trivial by imposing a small fine merely to stay within the limits of the accused's resources.

While it is appreciated that a fine should not make a serious offence look trivial, it must be realised that the overriding factor is the sentiments as expressed by MacDONALD ACJ. The comments made by KRIEGLER J (as he then was) in *S v Kekana* 1989 (3) SA 513 (T) at p 518E-F are perhaps apposite in this regard:

> "But when all is said and done the discretionary imposition of a fine patently beyond the means of an accused is open to the criticism that it is an exercise in futility - if not cynicism."

An approach which may assist magistrates in imposing a fine which they feel is adequate considering the seriousness of the offence is of course to permit

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the fine to be paid in instalments. There is, however, a definite limit to this approach as it would be incorrect to impose a fine way beyond the accused's means by simply giving him an opportunity to pay it off over a substantial number of months. Accordingly, although a fine may be increased somewhat by permitting payment in instalments, it must be realised that if this option is taken too far it is in effect punishing a poor man substantially more severely than a rich man.

A further option magistrates may consider where there is"an apparently unbridgeable gap between the accused's available resources and an appropriate fine having regard to the gravity of the offence"is the imposition of a suspended fine on condition the accused carries out appropriate community service. Community service is of course a new alternative option as a sentence in Zimbabwe. As this alternative is developed, the imposition of suspended fines conditional on the carrying out of community service may provide a further valuable option for magistrates in the sentencing process.

In all the circumstances, the fines in the present matter in respect of each accused are reduced to $500 and the alternative period of imprisonment is reduced to 2 months' imprisonment with labour. The suspended sentences imposed are appropriate and they are confirmed.

The magistrate is to ensure that if any accused has managed to pay the full fine originally imposed, the balance is refunded to him.

Smith J: agrees.

1993 (2) ZLR p258

S v WOODS & ORS 1993 (2) ZLR 258 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Criminal appeal

4, 5, 6 & 28 October 1993

Flynote

Constitution - s 13(3) - effect of blatant refusal by police to allow access by detained person to his legal practitioner

Criminal law - conspiracy to murder - significant aid given to principal offenders by accomplices - steps required in order for accomplices to dissociate from crime

Criminal law - murder - intent - constructive intent - person other than intended victim being killed by bomb

Criminal law - conspiracy to kill - person dying in the attack not person whom had planned to kill - whether constructive intent to kill deceased

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Criminal procedure (sentence) - death sentence - statement made in answer to allocutus - whether such statement can be taken into account by trial or appeal court in deciding whether extenuating circumstances exist

Evidence - extra-curial statement - confirmed statement - challenge to propriety of confirmation proceedings where nothing in record of proceedings evidencing impropriety - onus where accused raises potentially sustainable challenge to admissibility of confirmed statement

Evidence - extra-curial statement - admissibility - undue influence - denial of access to legal practitioner

Headnote

The court cannot condone a blatant refusal of access to their lawyers of prisoners held in police custody. Such refusal violates the fundamental right granted by s 13(3) of the Constitution and brings the administration of justice into disrepute. Where there has been a wilful and flagrant

denial of access, this will warrant the exclusion of evidence in any extra-curial statement or indication made prior to the allowing of access to the lawyers.

Where an accused's warned and cautioned statement has been confirmed by a magistrate and there is nothing in the transcript of the confirmation proceedings evidencing impropriety, it is still open to the accused to contend at his trial that the statement was not properly confirmed. He may rely on external factors, such as a denial of legal representation, or a threat by the police that any resistance to confirmation would attract a resumption of torture. Where the accused raises a potentially sustainable challenge to the propriety of the confirmation proceedings based on such factors, the court is obliged to determine the validity of that challenge as a separate preliminary issue of fact. In such a case the onus is on the State to prove the absence of any irregularity. If the State discharges the onus the statement is provisionally admissible and the onus is on the accused to rebut the presumption. If the accused's challenge is upheld, then the onus remains on the State to prove beyond a reasonable doubt that the accused made the statement and that he made it freely and voluntarily. In the present case, however, the challenge to the confirmation was not reasonably sustainable in the light of the failure of the appellants to bring these matters to the attention of their legal representatives and to give any explanation for such failure in their defence outlines.

Where persons have participated in a conspiracy to kill and have rendered significant assistance to the actual perpetrators prior to the murder, the conspirators are guilty of murder as accomplices even though they were not present at the scene of the murder. For such conspirators to dissociate from the crime and escape liability for murder they would have to take steps to neutralise the significant aid they had given previously.

In respect of the murder charge the Supreme Court found that the trial court had been correct in convicting the appellants on the basis of constructive intention to kill. It found that in lending their assistance to an explosives attack upon an occupied residence, the appellants must have foreseen the possibility of killing some person other than their intended victim.

In terms of rule 49 of the Criminal Procedure (High Court) Rules, 1964, when the sentence of death is about to be passed in a capital case the Registrar of the High Court must ask the

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accused whether he knows of any reason why the death sentence should not be passed upon him. This is known as the *allocutus.* This question is asked of the accused after a finding by the court that no extenuating circumstances exist. If no good reason is forthcoming from the accused the judge will proceed to pass the death sentence. If the accused puts forward a good reason the court must

consider it. If at this stage the accused raises for the first time some factor which might be extenuating, the trial judge must recall the finding of the non-existence of extenuating circumstances and reconsider the issue of extenuation afresh. The court only becomes *functus officio* once sentence has been finally pronounced. It is therefore not *functus officio* at the stage of the *allocutus.*

Cases cited:

Min of Home Affairs & Ors v Dabengwa & Anor 1982 (1) ZLR 236 (S)

S v Slatter & Ors 1983 (2) ZLR 144 (H)

S v Sibanda 1989 (2) ZLR 329 (S)

A-G v Slatter & Ors 1984 (1) ZLR 306 (S)

S v Kuraza 1967 RLR 225 (A); 1967 (4) SA 260 (RA)

R v Second 1969 RLR 285 (A); 1969 (4) SA 255 (RA)

S v Seheri & Ors 1964 (1) SA 29 (A)

S v Wessels & Anor 1966 (4) SA 801 (E)

S v Blooms 1966 (4) SA 417 (C)

S v Nqula 1974 (1) SA 801 (E)

S v Khumbusa & Anor 1977 (1) SA 394 (N)

S v Mkhize 1978 (3) SA 1065 (T)

S v Baloyi 1978 (3) SA 290 (T)

R v O'Connor (1964) 48 DLR 110

S v Molefe & Ors 1991 (4) SA 266 (E)

S v Woods & Ors S-60-93

S v Gwaze & Anor 1978 RLR 13 (A)

S v Beahan 1991 (2) ZLR 98 (S)

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R v Mbande & Ors 1933 AD 382

S v Tepeson 1965 (2) SA 761 (SRA)

S v Mudimu 1974 (1) RLR 13 (A)

R v Eric 1965 RLR 642 (A)

S v Simbi 1975 (2) RLR 50 (A)

S v Matare 1993 (2) ZLR 88 (S)

S v Mahungu 1981 (1) SA 56 (A)

S v Tissen 1979 (4) SA 293 (T)

S v Nkombani & Anor 1963 (4) SA 877 (A)

S v Nhlapo 1981 (2) SA 744 (A)

S v Mpala 1986 (2) ZLR 93 (S)

S v Phineas 1973 (1) ZLR 260 (A)

JS Sayce (with him *MRD Stonier*) for the appellants

Y Omerjee for the respondent

GUBBAY JA

Judgment

Gubbay CJ:

INTRODUCTION

On 18 November 1988, the three appellants were convicted in the High Court (SANDURA JP and assessors) of the crime of murder and were sentenced to death. It was found that they, with certain others, had conspired to kill, by means of a Renault 5 motor vehicle, registration number 329-229G, booby-trapped with explosives, six persons believed by them to be members of the military wing of the African National Congress of South Africa, who happened to be residing in a house at 16A Jungle Road, Trenance, Bulawayo. In the execution of this plan, on 11 January 1988, the deceased, Amon Obert Mwanza, an elderly unemployed man, was blown up and killed.

THE EVENTS RELATING TO THE FATEFUL OCCURRENCE WHICH WERE EITHER COMMON CAUSE OR CONCLUSIVELY ESTABLISHED

On 6 January 1988, the third appellant, a resident of Harare, travelled to Bulawayo. It was the

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day on which Francis Kapfidze had advertised his wife's Renault 5 motor vehicle, registration number 329-229G, for sale in the Bulawayo *Chronicle* newspaper.

The next morning, at 0900 hours, the third appellant called to see Kapfidze at his place of employment in Africa House. He introduced himself as James Sibanda and intimated that he was interested in purchasing the Renault 5. Kapfidze took the third appellant to view the vehicle which he had parked in a nearby street. He advised that the purchase price was $6 000 and enquired if the third appellant wished to start the engine. The third appellant responded that this was unnecessary as he was familiar with such vehicles and that whatever was required to be done to it would be attended to. The two arranged to meet again in the early afternoon.

On that occasion Kapfidze drove the third appellant in the Renault 5 to the hospital where Mrs Kapfidze was employed. It was necessary to obtain her consent to the sale. The third appellant declined the offer to test-drive the Renault. Asked why he was desirous of purchasing it, the third appellant explained that he possessed a truck and had been working for the Ministry of Health at Gwanda, but as he had been recently transferred to Harare, he was in need of a smaller vehicle for daily use. After discussing the purchase price with Mrs Kapfidze, it was agreed that the Renault be sold to the third

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GUBBAY CJ

appellant for $6 000. The two men then returned to Africa House to complete the transaction. Kapfidze filled out the required form giving notice to the Registry Office of the sale of the Renault. He recorded the purchaser's name as Mr C Sibanda and his residential address as Stand 29/985 Mpopoma, Bulawayo, which information had been furnished by the third appellant. His offer to provide the third appellant with a signed letter evidencing the sale by him of the Renault 5 was refused. The third appellant handed over $6 000 in bundles of $20 notes and drove away in the vechicle.

During the morning of Friday, 8 January 1988, the third appellant drove in the Renault 5 to the Bulawayo Employment Exchange. He indicated that he wished to engage a driver. The deceased, who was in the company of Christopher Muchatisi, was the person chosen by the third appellant. They left together, but the deceased returned to the Employment Exchange towards noon.

Early on the morning of Monday, 11 January 1988, Muchatisi again met with the deceased at the Employment Exchange. They waited there until the third appellant arrived later that morning. He asked the deceased why he was still at the Employment Exchange when his job was elsewhere and involved Europeans. Muchatisi observed the third appellant hand the deceased some dollar notes. They then left. The deceased returned that afternoon and remained for an hour. He was wearing a blue outfit comprising of a jacket and trousers. It was the last time for Muchatisi to see him alive.

Shortly before 2100 hours the deceased drove the Renault 5, alone, to 16A Jungle Road, Trenance. He was totally unaware that it had been primed with a powerful explosive device capable of being detonated by remote control. Upon arrival at the front of the premises he

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sounded the hooter and then drove to the rear. When the hooter was blown for the second time, the remote control was activated. The vehicle exploded into a huge ball of fire and smoke. It resulted in the instantaneous death of Mwanza, whose body was horrifically mutilated beyond recognition, and in one of the residents sustaining severe injuries, including the loss of an eye. The house was extensively damaged, its rear being totally demolished. Adjacent to the house was a crater about two-and-a-half metres in diameter and twenty centimetres deep. Parts of the bodywork of the Renault 5, the remnants of a human body, pieces of flesh and the torn blue clothing worn by the deceased, were scattered over a radius of fifty metres. A search of the scene evealed the vehicle's front bumper, with the number-plate still affixed, as well as a badly dented registration card and a medical form, both bearing the name "Amon Obert".

GUBBAY CJ

The third appellant departed from Bulawayo on 12 January 1988, arriving in Harare the following afternoon. He did not return to his residence at Waterfalls but went to stay at the house of a relative in the high-density suburb of Mabvuku. He was arrested there in the early evening of 15 January 1988, and conveyed by the police to Bulawayo.

On 16 January 1988, and following upon his interrogation by the police, the third appellant agreed to make telephonic contact with a woman in South Africa, who went by the name of Mary Baker. Subsequent to such initial contact, two more telephone calls were made to the third appellant from South Africa, by a man known as Brian.

Consequent upon information conveyed to the third appellant by Mary Baker during a fourth telephone conversation on 17 January 1988, the police recovered $1 000 in cash, wrapped in a plastic bag, from a lavatory cistern in the gentlemen's toilet at Mactec Garage in 15th Avenue, Bulawayo. It had been hidden there a short while before by the first appellant, who was arrested later that afternoon. A text-tell telecommunications machine was found at his residence.

An examination of the first appellant's passport revealed that he had entered South Africa via Beitbridge on 8 January 1988, and had returned to Zimbabwe through the same border post on 12 January 1988.

The arrest of the second appellant was effected on 19 January 1988.

THE EXTRA-CURIAL STATEMENTS AND INDICATIONS MADE BY THE APPELLANTS

During the period 21 January 1988 to 7 February 1988, the police recorded a number of warned-and-cautioned statements and indications from the appellants. It was accepted, however, by Mr *Omerjee,* who appeared for the State, that as proper and meaningful access to their legal practitioners had been denied to the first and second appellants by the police until, respectively, 3 and 2 February 1988, those statements and indications made prior thereto, namely, Exhibits 7, 8 and 10, should have been excluded at the trial as being inadmissible against their makers.

The failure to accord to the first and second appellants their constitutional right to proper and

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meaningful access to a legal practitioner was a serious violation. It was deliberate, and motivated by an apprehension that the

consequence of such access might possibly hinder or delay the progress of the investigations, or might even cause these two appellants to become unco-operative. There is no question here of the breach being of a technical nature, being committed in good faith or due to inadvertence. It was wilful and flagrant. And what made it all the more reprehensible was the grave nature of the charges for which the two appellants had been arrested and the magnitude of their criminal liability if convicted.

The importance that attaches to the fundamental right granted by s 13(3) of the Constitution of Zimbabwe,"to obtain and instruct without delay a legal representative of his own choice and hold communication with him", was recognised at an early stage in a number of decisions by the courts of this country. See *Minister of Home Affairs & Ors v Dabengwa & Anor* 1982 (1) ZLR 236 (S) at 242B; *S v Slatter & Ors* 1983 (2) ZLR 144 (H) at 152H-155D; *S v Sibanda* 1989 (2) ZLR 329 (S) at 333G-334F.

But the judgment to which I wish to refer in detail is that of BECK JA in *Attorney-General v Slatter & Ors* 1984 (1) ZLR 306 (S) where at 309G-311B the following was said:

> "In *S v Kuraza* 1967 RLR 225 (A); 1967 (4) SA 260 (RAD) and in *R v Second* 1969 (2) RLR 285 (A); 1969 (4) SA 255 (RAD) this court's predecessor emphasised the fundamental nature of this inherent right. In *S v Seheri & Ors* 1964 (1) SA 29 (A), *S v Wessels & Anor* 1966 (4) SA 89 (C), *S v Blooms* 1966 (4) SA 417 (C), *S v Nqula* 1974 (1) SA 801 (E), *S v Khumbusa & Anor* 1977 (1) SA 394 (N), and *S v Mkhize* 1978 (3) SA 1065 (T), proceedings were held to be vitiated because there had been an irregular deprivation of the accused's right to legal assistance. In *S v Baloyi* 1978 (3) SA 290 (T) at 274B, MARGO J was of the view that the right is breached where an accused has been 'in any way prevented from having legal assistance', even though there is no allegation that he wished to be legally represented.
>
> In the Canadian case of *Regina v O'Connor* (1964) 48 DLR 110 HAINES J said at 115:
>
> > 'It is the early participation of counsel both in fact development and fact presentation which lends some semblance of reality to the concept of the balance existing between the accused and the otherwise irresistible forces of the State. To waylay counsel in this crucial and vital stage of fact development, as the police in this instance would seem to have desired to do, is tantamount to waylaying the cornerstone of our

> > concept of criminal justice so painstakingly assembled through almost countless generations. Proper police processing as a facet of criminal procedure is no less an aspect of criminal justice; indeed it is integral because the liberty of subjects is safeguarded in the procedure as well as in the substance of law. This belief was inherent in the remarks of Mr JUSTICE ROACH in his report in the "Matter of an Investigation into the Arrest and Detention of Robert Wright and Michael Griffin", *Law Society of Upper Canada Special Lectures* at p 57; His Lordship spoke of police processing as follows:
> >
> > > "They should also understand that it is their duty, once they arrest a citizen, to tell him at once the

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> charge on which he is arrested. Arrested with or without a warrant, the subject is entitled to know why he is deprived of his freedom, if only in order that he may, without a moment's delay, take such steps as may enable him to regain it.
>
> They should understand, too, that there can never be any justification for holding a prisoner incommunicado. We are told that such practice exists behind the Iron Curtain. There is certainly no room for it under our system of freedom under the law. If that were permitted, then a citizen could simply disappear for a day or several days, and no (one) would know of his whereabouts except the police who had him in custody. The prisoner, if he has to remain in custody, is certainly equally entitled, through his relatives or friends, to gather up evidence that will prove him innocent, as the police are entitled to gather up evidence that will prove him guilty.
>
> The suggestion that any detective or other police officer is justified in preventing or attempting to prevent a prisoner from conferring with his counsel is a most shocking one. The suggestion that counsel, if he is permitted to confer with his client who is in custody, might thereby obstruct the police in the discharge of their duties is even more shocking. The prisoner is not obliged to say anything and the lawyer is entitled to advise him of that right.
>
> The lawyer is an officer of the court and it is the function of courts to administer justice according to law. To prevent an officer of the court from conferring with the prisoner who in due course may appear before it, violates a right of the prisoner which is fundamental to our system for the administration of justice."

The prisoner's right to silence to which reference is made in the extract from what was said by ROACH J is not without considerable qualification

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GUBBAY CJ

> in our procedure. That does not, however, undermine the importance of the prisoner's right of access to his legal advisers. If anything it strengthens it. One only has to consider the provisions of s 242A(1) of the Criminal Procedure and Evidence Act to appreciate how necessary professional assistance is for a proper understanding of their operation."

One simply cannot condone this blatant refusal of access by the police. It was conduct which brings the administration of justice into disrepute. As correctly conceded by Mr *Omerjee,* it warrants the exclusion as evidence of any extra-curial statement or indication made prior to the first and second appellants being allowed proper communication with their lawyers. To hold otherwise would be, so it seems to me, prejudicial to the public interest in the integrity of the judicial system.

The statements recorded from the first appellant after he had been afforded access to his legal practitioner, Mr Bisset, are Exhibits 5 and 6. They had been written out by him, at his own instigation, on 25 January 1988, but only formally recorded by the police under warn and caution on the afternoon of 3 February 1988. They were confirmed two days later in compliance with s 105(1) of the Criminal Procedure and Evidence Act [*Chapter 59*].

The sole warned and cautioned statement made by the second appellant after consulting his legal practitioner, Mr Nish, is Exhibit 9. It was confirmed by a magistrate on 5 February 1988.

The position of the third appellant was very different. The acceptable evidence was that at no

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stage prior to 5 February 1988, did any legal practitioner endeavour to secure physical access to the third appellant. It was only on 22 January 1988, that the third appellant informed Detective Inspector Liberman Ndlovu that he wished to contact his legal practitioner in Harare, a Mr Chikumbirike. Detective Inspector Ndlovu then telephoned Mr Chikumbirike and permitted the third appellant to speak to him. Thereafter, the third appellant met and consulted with that legal practitioner on 5 February 1988.

It was admitted by Detective Inspector Ndlovu that he had not suggested to the third appellant that it was in his interests to obtain the services of a legal practitioner. He contended, justifiably so in my opinion, that he was under no legal obligation to do so. After all, the third appellant was known to him as an intelligent person who had been a member of the police force and special branch for many years. He was fully aware of his rights. See *S v Molefe & Ors* 1991 (4) SA 266 (E) at 270I-J and 271H-I.

GUBBAY CJ

THE PROCEEDINGS RELATING TO THE CONFIRMATION OF THE EXTRA-CURIAL STATEMENTS AND INDICATIONS MADE BY THE THREE APPELLANTS

At the inception of the trial the prosecutor, in accordance with the provisions of s 242(1)(a) of the Criminal Procedure and Evidence Act, tendered a large number of extra-curial statements and indications which had been recorded from the three appellants. Each had endorsed upon it by the magistrate presiding the word"Confirmed"and so, *ex facie,* was receivable in evidence upon its mere production by the prosecutor, without further proof.

Defence counsel, however, immediately directed the attention of the trail court to the defence outlines filed on behalf of the appellants. In these the propriety of the confirmation proceedings was challenged by reason of the existence of latent and patent irregularities. The latent irregularities were: (a) that prior to the holding of the confirmation proceedings the appellants had been denied any, or any proper, access to a legal practitioner; and (b) that the investigating police officers had remained in the court building while the confirmation proceedings were taking place and the appellants were returned to their custody immediately thereafter. The patent irregularities concerned the second and third appellants, the contention being that having regard to their recorded complaints, the magistrates who presided ought not to have confirmed their statements and indications.

The JUDGE PRESIDENT ruled that the statements and indications which the prosecutor was seeking to produce had been validly confirmed and were admissible in evidence on production by the prosecutor.

In the light of Mr *Omerjee's* concession, it is only necessary to consider whether that ruling was correct in relation to the two statements made by the first appellant on 3 February 1988 (Exhibits 5 and 6), and the one made by the second appellant on 2 February 1988 (Exhibit 9). With regard to the third appellant, a number of warned and cautioned statements recorded from him on 6 and 7 February 1988 (Exhibits 13 to 16), though confirmed, were of no assistance to

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either the State or the defence. These may be disregarded. Relevant only are the two statements of 21 January 1988, and the indications made on 31 January 1988.

The judgments of DUMBUTSHENA JP (as he then was) in *S v Slatter & Ors supra*, at 158C-G and 160D-161B and of BECK JA in *Attorney - General* v *Slatter & Ors supra*, at 316E-F make it clear that although there may be

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nothing in the transcript of the confirmation proceedings evidencing impropriety in the confirmation of a warned and cautioned statement, it is still open to the accused to contend at his trial that the statement was not properly confirmed. He may rely upon external factors, not recorded for one reason or another, such as a denial of legal representation, or a threat by the police that any resistance to confirmation would attract a resumption of torture.

In *S v Woods & Ors* S-60-93 (not reported) I ventured to suggest that:

> "If ... at the stage the prosecutor seeks to tender a confirmed extra-curial statement to the court, the defence is able to raise a potentially sustainable challenge to the propriety of the confirmation proceedings, even though there is nothing *ex facie* the record to support it, I consider that the court is obliged to determine the validity of that challenge as a separate preliminary issue of fact."

I went on to say:

> "If the challenge is rejected by the court, and the *onus* is on the State to prove the absence of any irregularity, then s 242(1a) is satisfied and the statement is provisionally admissible with the onus upon the accused to rebut the presumption. No separate trial on the issue of admissibility is required. See *S v Gwaze & Anor* 1978 RLR 13 (A) at 17H. If, on the other hand, the challenge is upheld, then the onus remains on the State to prove beyond a reasonable doubt that the accused made the statement and, if he did, that it was made freely and voluntarily and without undue influence. See *S v Gwaze & Anor* supra at 18D-E."

In considering whether the two alleged latent irregularities amounted to a potentially sustainable challenge to the propriety of the confirmation proceedings, which obliged the trial court to determine the validity of that challenge as a separate preliminary issue of fact, it is necessary to take account of the weighty indisputable factor that each appellant was represented thereat by an experienced legal practitioner; and that no explanation was given in their defence outlines as to why these complaints had not been communicated to the confirming magistrates.

I am bound to conclude that if, at the time of the proceedings, the appellants, who are intelligent and worldly persons, entertained these fears or believed them to be well founded and were genuinely aggrieved by them, they would inevitably have brought them to the attention of their legal practitioners.

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After all, the legal representative is present in court to protect his client's interest and to ensure

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that no unfair advantage is taken of him by the State.

Against the background of legal representation, the failure to mention what are now termed by the defence to be latent irregularities, taken in conjuction with the omission to advance any explanation therefor in the defence outlines, in my view, rendered the challenge in respect of them not a potentially sustainable one.

At the confirmation proceedings relating to the warned and cautioned statement marked Exhibit 9, the presiding magristrate recorded the second appellant as saying:

> "I was influenced to make the statement. I was unaware and enquired reason (sic) for warned and cautioned statement. Detective Inspector Mutarah said it was in my interest to make the statement and was an opportunity to defend myself; this would prevent court from drawing inferences against me. I made statement under the above conditions. I made it through what Mutarah had told me that it was to my benefit. I then made the statement. I was never assaulted by the police."

He later added:

> "I was told trial would be quick."

After due consideration, the magistrate confirmed this extra-curial statement. He was of the opinion that the information conveyed to him did not reflect that at the time of its making the second appellant was not acting freely and voluntarily or that any undue influence had been brought to bear upon him. The JUDGE PRESIDENT shared that view. I, too, am satisfied that the magistrate was justified in dismissing the challenge made and in confirming Exhibit 9 in terms of s 105(3) of the Criminal Procedure and Evidence Act.

It is important to note that the remarks attributed to Detective Inspector Mutarah were prompted by the second appellant's enquiry. They amounted to no more than sound advice that the second appellant should avail himself of the opportunity to answer the charge; and that it would be to his benefit to do so, for otherwise his refusal could attract an adverse inference at the trial. They were not an inducement to the second appellant to confess or incriminate himself in any way, and did not signify that the making of a statement would result in his being dealt with more leniently. Nor did the use of the word

"opportunity" imply any form of compulsion to abide the advice. And, finally, the indication that the trial would be quick, was also not necessarily misleading. It was but a personal assessment that the making of a warned and cautioned statement would shorten the proceedings.

On 9 February 1988, the third appellant appeared before a magistrate for confirmation of two warned and cautioned statements, Exhibits 11 and 12, and indications, Exhibit 17. Mr Chikumbirike, who represented him, informed the magistrate that his client had complaints to make concerning his treatment by the police. The third appellant then testified that on 23 January 1988, he had been assaulted at Stops Police Camp, Bulawayo. He said he did not know why he had been assaulted because: "I had already told them what they wanted to know". He ended by addressing these words to the magistrate: "I want you to tell my why I was treated

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in this way?".

Clearly, no objection was being taken by the third appellant, in his evidence, to either Exhibits 11 or 12, both of which were made on 21 January 1988, two days before the assault; and no suggestion to the contrary was raised before the court by Mr Chikumbirike.

With regard to the confirmation of the indications, Mr Chikumbirike informed the magistrate:

> "I have confirmed with my client that he has gone through the indications. He adheres to every single indication thereto."

Although these indications were made on 31 January 1988, that is, eight days after the assault complained of, Mr Chikumbirike, having held a consultation with the third appellant, did not submit that they ought not to be confirmed. To the contrary, he indicated that the third appellant adhered to them. In the circumstances, I think the magistrate was correct in assuming that if it was considered that the volition of the third appellant in making the indications had been affected by the assault he had suffered, that objection would have been advanced by Mr Chikumbirike. I would repeat here what I said in *S v Woods & Ors supra,* that where an accused is legally represented at confirmation proceedings, there is no obligation upon a magistrate to be as astute, and to be on guard to the same degree, as he should be if the accused were unrepresented.

I am not persuaded, therefore, that the magistrate's decision to confirm the indications was wrong.

1993 (2) ZLR p271

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THE ADMISSIBILITY AGAINST THE THIRD APPELLANT OF THE TRANSCRIPTION OF THE TAPE RECORDED TELEPHONE CONVERSATION BETWEEN HIM AND PERSONS IN SOUTH AFRICA

At the trial the admissibility of the audio tape recording of the telephone conversations which took place on 16 and 17 February 1988, was challenged on the ground that the third appellant's participation was not free and voluntary. He had been instructed on what to say by the police. After holding a trial within a trial, the Judge President ruled in favour of the State. He accepted the evidence of the police officers that the third appellant had not been coerced into participating. Furthermore, on listening to the audio recording he gained the firm impression that the third appellant had spoken without falter to persons whom he knew well. There was no sign of his having been prompted as to what questions to ask or how to reply.

The background to the telephone calls was given by Detective Inspector Ndlovu. He testified that at about 1700 hours on 16 January 1988, he entered the interrogation room where the third appellant was being held. He spoke to him, for they were well known to one another. During the course of conversation the third appellant intimated that he wanted telephone contact to be made with a person in South Africa so that the whites involved in the bomb attack could be apprehended. He provided the telephone number and suggested that a police officer should telephone, say that he was John and convey a message from the third appellant that he was in

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trouble in Zimbabwe. The co-operation offered by the third appellant was accepted and acted upon. The response from the person spoken to in South Africa was that the third appellant was to telephone Mary Baker. This was the start of the four telephone calls which passed between the third appellant and Mary Baker and Brian, all of which were recorded on tape by Detective Inspector Ndlovu.

Detective Inspector Ndlovu readily conceded that prior to speaking to the South Africans the third appellant had not been warned and cautioned that anything he said could be used in evidence against him. There was in Detective Inspector's Ndlovu's mind no need to issue such a warning as there was no intention on the part of the police to use the recordings of the telephone conversations as evidence against the third appellant. He had simply offered to assist the police in their investigations and, as it transpired, the tape recordings made of those conversations proved to be an invaluable aid to the investigations. Detective Inspector Ndlovu was surprised that the prosecution had called for the tape recordings and had decided to use them against the third appellant.

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Faced with this evidence, Mr *Omerjee* advised this court that it was not the present intention of the State to rely on the transcription of the telephone calls as evidence against the third appellant. To do so, he said, would be to take an unfair advantage over the third appellant, since the absence of a warn and caution may well have led him to believe that whatever he said to the South Africans would be treated as privileged. Mr *Omerjee* is to be commended for adopting that attitude.

THE ADMISSIBILITY OF THE EXTRA-CURIAL STATEMENTS, EXHIBITS 5, 6, 9, 11 AND 12 AND THE INDICATIONS EXHIBIT 17

(a) The First Appellant

The two statements, Exhibits 5 and 6, were written out by the first appellant on 25 January 1988, a day after the release from police custody of his former wife, Jane, with whom he had been cohabitating at the date of his arrest. They were not formal statements made under warn and caution. At his request he had been provided with a pen and writing paper, and while in his cell at Luveve Police Station had commenced to write out his story, in his own time, and without any interrogation or interference.

These statements were formally recorded by the police on 3 February 1988, but only after the first appellant had been afforded proper and privileged access to his legal practitioner, Mr Bisset. The latter testified that the first appellant appeared to him to be calm and relaxed. He consulted with him for between twenty and thirty minutes. He was shown the handwritten statements which he briefly perused. He asked the first appellant some questions about them and was satisfied that his client, being an ex-police officer of standing and experience, was aware of his rights. He was content for the first appellant to proceed to make the warned and cautioned statements in his absence.

Prior to the termination of the interview, the first appellant had indicated that he had better make

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a statement because were he to refuse: "Jane is history". Mr Bisset obviously did not attach much significance to the first appellant's belief. In any event, any fear that the first appellant may have entertained about the safety of his divorced wife, was self-induced. It was not the result of any threat to harm her conveyed to him by the police. Moreover, the first appellant did not express any fear about Jane to Mr Phillips before to the confirmation proceedings on 5 February 1988. And, of course, it was not mentioned to the magistrate.

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It follows that insofar as these two statements are concerned, I am in agreement with the finding of the JUDGE PRESIDENT that the first appellant failed to discharge the onus resting upon him of proving them to be inadmissible.

(b) The Second Appellant

Exhibit 9 was recorded from the second appellant on 2 February 1988, after he had held a consultation in private at Stops Police Camp with his legal practitioner, Mr Nish. The latter was aware that it was the intention of the police to record warned and cautioned statements from his client. He held a full discussion with the second appellant about the merits and seriousness of the charges and the consequences attaching to the making of statements. The second appellant raised no complaint to Mr Nish. He was worried about his wife, who was pregnant and in custody. Mr Nish tried to reassure him that he was having reasonable access to Mrs Smith and that she had been allowed to see a doctor. He was satisfied that there was no basis to advise the second appellant not to make a statement. The relevant passage in his evidence reads:

> "Q. Would you indicate to the court Mr Nish as to why you left prior to the recording of the warned and cautioned statement from your client? A Yes, I discussed the matter with him. ... I explained to him the nature and the requirements of the warned and cautioned statement. I asked if he was able to give such a statement, if his mind was clear on the events. He indicated that he was in a position to give such a statement and so I left.
>
> Q. In other words, you were fully satisfied, first, that your client fully understood what his rights were in (regard) to the recording of the warned and cautioned statement. Secondly, that your client was aware, sorry, that there was nothing as far as you were concerned that would militate against the recording of the warned and cautioned statement from your client. Is that the position? A I would say that is correct."

There is, in my view, no warrant to find that the trial court erred in holding that the second appellant had failed to discharge the burden of proving the statement, Exhibit 9, to be inadmissible.

(c) The Third Appellant

The statements, Exhibits 11 and 12, were made by the third appellant on 21

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January 1988, between 10.55 and 13.00 hours, and recorded by Detective Inspector Ndlovu. Their admissibility was challenged by the third appellant on the grounds that: (a) he had been secured in leg irons from the date of his arrest until placed on remand on 12 February 1988; (b) he was subjected to continuous interrogation from 16 to 20 January 1988, during the course of which the handcuffs on his wrists were excessively and painfully tightened and he was struck with a strip of rubber by Superintendent Jambavu; (c) a member of the Central Intelligence Organisation had made threats concerning the well-being and safety of his detained wife and son, should he refuse assistance; (d) he was deprived of food until 19 January 1988; and (e) ten minutes before the recording of the statements commenced, one KK, a notorious member of the Central Intelligence Organisation, had warned him that if he did not co-operate with Detective Inspector Ndlovu, he (KK) would deal with him severely.

Save that the third appellant was leg-ironed, the allegations of ill-treatment were denied by Detective Inspector Ndlovu, Chief Superintendent Mwandiambira, Superintendent Jambavu, Assistant Commissioner Ndove, Detective Inspector Mutarah and Senior Assistant Commissioner Mleki. All these witnesses made a favourable impression on the trial court. In essence their evidence was that no pressure whatsoever had been applied by them upon the third appellant, who until he consulted with his legal practitioner on 5 February 1988, had co-operated fully.

On the other hand, the third appellant was found to be an evasive and unreliable witness. Having read his evidence with some care, I am unable to say that the criticisms levelled at it were unjustified.

It was the evidence of the third appellant that on 31 January 1988, he was told by Detective Inspector Ndlovu that if he refused to make indications he would be handed over to KK and he "was not going to live again on this land". Notwithstanding the threat, he did not give any directions to Detective Inspector Ndlovu as to where to go. The latter drove where he wanted to. In particular, the third appellant did not indicate the house at 16A Jungle Road as he had never been there before, and he made none of the explanatory statements which were recorded as accompanying that indication.

All this was adamantly denied by Detective Inspector Ndlovu, who had taken the precaution of arranging for the indications to be filmed by video-camera.

The video film was viewed by this court. It depicts a congenial atmosphere

between the third appellant and Detective Inspector Ndlovu. The third appellant showed no signs of stress but appeared comfortable and relaxed when making the indications and in speaking to them.

The recording confirms the veracity of Detective Inspector Ndlovu's evidence and the patent untruth of the third appellant's allegations.

In my view, the trial court had no option but to hold that the two confirmed extra-curial

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statements and the confirmed record of indications, had not been shown, on a balance of probabilities, to be inadmissible.

THE EVIDENCE LINKING THE APPELLANTS
WITH THE ATTACK UPON 16A JUNGLE ROAD

(a) The First Appellant

The warned and cautioned statements of the first appellant, being Exhibits 5 and 6, the genuineness of which was not in issue, reveal that he had been recruited as a paid South African agent in 1983. Being still an officer in the Central Intelligence Organisation, he learned that members of the military wing of the African National Congress were residing at 16A Jungle Road. He passed this information to two other South African agents operating in Zimbabwe, Kit Bawden and Barry Bawden.

In 1985 the first appellant pointed out the house at 16A Jungle Road to Kit Bawden, and the following year again indicated it to him. Kit Bawden photographed the residence. The third appellant also indicated the property to Barry Bawden.

In 1987 the first appellant became aware that a South African agent was to infiltrate Zimbabwe over the week-end after Christmas and that his mission was to assist Kit Bawden in an attack on the house at 16A Jungle Road. Barry Bawden had been tasked to find a dropping zone for this agent in the Fort Rixon area. He did so and discussed the locality with the first appellant. He then passed full directions to one Alan Trousdale, a resident of South Africa, by means of a text-tell machine which had been issued to him by yet another South African agent, Alick West. It was Alick West who had given the first appellant brief instructions on the use of the machine.

The agent, Henry Thompson, landed in Zimbabwe as arranged and planned. He was introduced to the first appellant on 28 December 1987. Over the next

two days the third appellant met with Thompson and Kit Bawden and was told that they had had a"night look"at 16A Jungle Road and were formulating a plan to attack it.

On 7 January 1988, Kit Bawden told the first appellant that a Renault 5, which had been purchased, was to be equipped with explosives and driven to the house by someone whom "Charlie" was to recruit. He said that the vehicle would be blown up by remote control and that the actual attack would take place over the coming week-end.

On the same day Kit Bawden purchased a Renault 18 sedan from a former girl-friend of the first appellant. He informed the first appellant that the intention was to use it as a command vehicle.

On 8 January 1988, the first appellant left Zimbabwe to take his son to school in South Africa. On his return, on 12 January 1988, he found the Renault 18 parked at his house and his Datsun motor vehicle missing. Kit Bawden arrived later in the Datsun and told the first appellant that he had been frightened to drive around in the Renault. Kit Bawden discussed the operation in brief

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and said that he had taken Thompson to Beitbridge where he had been uplifted by helicopter to South Africa.

This, then, was the extent of the first appellant's involvement in what can only be described as a heartless and cowardly criminal enterprise perpetrated by his co-conspirators.

Although the first appellant was absent from the country on 1 January 1988, there is no doubt, to my mind, that in the knowledge that an attack on 16A Jungle Road was imminent, he did nothing to dissociate himself from that objective. There was no voluntary action on the part of the first appellant which in law was such as to terminate his relationship with the conspiracy. He took no steps to neutralise the significant aid he had given the South African agents. See, generally, S v Beahan 1991 (2) ZLR 98 (S) at 118B-121F.

(b) The Second Appellant

The second appellant's warned and cautioned statement, Exhibit 9, was made in answer to the allegation that he had set explosives in the Renault 5 which had been detonated by a remote control device. He responded in these terms:

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> "I would like to say that 16A Jungle Road was given to us as a definite ANC target; the names of the occupants were not known to us. While I did assist I played no part in the planning or actual detonation of the car-bomb. Although it was known the car would be destroyed and the house partially destroyed, it was not intended to harm any Zimbabwean in any way."

To the question who actually detonated the car-bomb, the second appellant replied that: "It was detonated by Kit Bawden".

The only reasonable inference to be drawn from this statement is that the assistance afforded by the second appellant was his physical presence at the moment the explosive device was detonated by Kit Bawden. He had accompanied Kit Bawden to 16A Jungle Road, but sought to differentiate his personal actions from those responsible for planning the attack or detonating the device.

This is exemplified by the following passage in the evidence of the second appellant under questioning from the Judge President:

> "Q. And before your arrest, did you have any knowledge of 16A Jungle Road? A I do not wish to answer that, my lord.
>
> Q. And before you were arrested, did you have any knowledge relating to the identity of a person who drove the motor vehicle which eventually was blasted at 16A Jungle Road? A I did not.
>
> Q. Are you prepared to say where you were on the evening of Monday the 11th of January, 1988? A I am not.
>
> Q. Are you prepared to say whether or not you met Mr Christopher (Kit) Bawden on Monday the 11th of January, 1988? A I am not.
>
> Q. Are you prepared to say whether or not on Monday the 11th of January, 1988 you drove Mr Christopher

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Bawden's Renault 18 motor vehicle? A I am not prepared to answer that.

Q. Are you prepared to say when it was that you first had knowledge a house at 16A Jungle Road had been bombed? A I am not prepared to say that."

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If the second appellant had not been with Kit Bawden at the moment of the attack, why did he not say so rather than refuse to answer the question? The stance he adopted is inconsistent with innocence.

I consider that the second appellant was proved by the State to be a *socius criminis* of the actual perpetrator of the crime. He accompanied Kit Bawden to 16A Jungle Road fully appraised of what was intended. His presence gave encouragement. It must have been of assistance and comfort to Kit Bawden to know that he had a friend nearby who might give warning or come to his aid if need be. See *R v Mbande & Ors* 1933 AD 382 at 392-393; *S v Tapeson* 1965 (2) SA 761 (SR AD) at 767A-E; *S v Mudimu* 1974 (1) RLR 13 (A) at 15B-16D.

(c) The Third Appellant

As far as the third appellant is concerned, the picture that emerges from his two warned and cautioned statements (Exhibits 11 and 12), the indications made and the verbal statements accompanying them (Exhibit 17), is this:

The third appellant assisted Henry Thompson and Mary Baker by purchasing the Renault 5. This assistance was rendered at a time when he knew that these persons were South African agents who were operating in Zimbabwe, bombing African National Congress targets. He was aware that Thompson had infiltrated the country for the purpose of eliminating members of the military wing of the African National Congress. He drove with the deceased in the Renault 5 to 16A Jungle Road and pointed the house out to him. He advised that he (Amon) would be going there with John. Later, the third appellant and the deceased drove past the house for the second time. The third appellant enquired whether the deceased now knew the place; the latter responded that he did. The third appellant did this because Thompson had instructed him to make certain that"the driver"would be able to find 16A Jungle Road.

The third appellant had not been told specifically that the plan was to booby-trap the Renault 5 with explosives, but he"thought as a person who sometimes did some confirmation of houses in Harare that this place belonged to ANC people".

That the third appellant was a South African agent is unquestionable. It was he who provided the police with a contact telephone number which resulted in the communication with Mary Baker. Nor can there be any doubt that, in the knowledge that Henry Thompson had entered Zimbabwe with the object

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of killing personnel of the African National Congress, the third appellant willingly lent his assistance. He was responsible for procuring the Renault 5, in respect of which he sought to lay a false trail. It was he who engaged the driver. It was he who took the deceased to 16A Jungle Road and, on the instruction of Thompson, made sure that the deceased would later be able to find his own way there; and he suspected that the house had been marked as a target by Thompson.

Against this background it was quite futile for the third appellant to protest that in acting as he did, over the critical few days he spent in Bulawayo, he remained totally ignorant of the intention to effect an attack, with the use of the Renault 5, on 16A Jungle Road. I am convinced that the assistance he afforded was a necessary preliminary to the success of the enterprise, and was so appreciated by him.

THE *ALLOCUTUS*

Rule 49 of the Criminal Procedure (High Court) Rules, 1964 (SRGN 452/1964) provides that where sentence of death is about to be passed the registrar of the court is to ask the accused whether:

> "... you know of any reason or have anything to say why the sentence of death should not be passed upon you."

This is known as the *allocutus.* If no"good reason"is given, the judge is to pass the sentence of death.

In the present matter both the first and second appellants made statements in answer to the allocutus. The first appellant said:

> "My lord, I speak on behalf of Michael Smith and myself. We have no quarrel with Zimbabwe and at no time intend sabotaging or injuring any Zimbabwean. We are sorry that the man who died on the night of the 11th of January at 16A Jungle Road was not a member of the military wing of the ANC. The six people present at that house on that night were no more refugees than anybody in this court today. Our only motivation is on behalf of the people of South Africa who suffer mayhem and death nearly on a daily basis at the hands of these ANC murderers and for us to suffer conviction because we pursue that motive whilst the ANC perpetrators roam the streets of this country in clover is morally injustice in its extreme. And the countries that harbour these murderers must look first at their own conscience before pointing fingers at us."

The second appellant then followed on:

> "My lord, my co-accused has spoken on my behalf. I would just like to add that I also regret the death of Mwanza. There was not any intention to kill him or to kill or harm any Zimbabwean in any way or to carry out any act of sabotage or terrorism against the government of Zimbabwe."

In so speaking, these two appellants availed themselves of the opportunity to explain that in their minds the rôle they played in the attack upon 16A Jungle Road was justified as retaliation for the mayhem and death caused to the people of South Africa by the military wing of the African National Congress. Their actions were not morally wrong. Only the death of the

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deceased was to be regretted.

That this was the purport of the appellants' words was not disputed by their counsel. The sole submission advanced, in part reliance on the decision in *R v Eric* 1965 RLR 642 (A), was that, as the *allocutus* procedure takes place after a finding that an absence of extenuating circumstances existed, anything said in answer thereto should be discounted by the trial court and no regard paid to it by the appeal court.

In *R v Eric supra,* the situation which arose before the High Court was that after the appellant had been convicted of murder and a finding made that there were no extenuating circumstances, he admitted for the first time, in answer to the *allocutus,* that he had killed the deceased woman, and gave a description of the occurrence with circumstances which might have been regarded as extenuating. The trial judge was uncertain as to whether it was permissible at that stage of the proceedings to consider the issue of extenuating circumstances afresh in the light of the appellant's final statement. The prosecutor contended that having given its finding, the court was *functus officio* and had no jurisdiction to reconsider the matter. In the circumstances the trial judge refused to re-open the issue.

In commenting on the predicament of the trial judge, BEADLE CJ said at 644C-E:

> "In view of the fact that counsel for the Crown adopted this attitude, in strict law I cannot see how the trial court could have proceeded differently from the manner in which it did. Had counsel for the Crown not objected and had it made the concession that the case, on extenuating circumstances, could be reconsidered, then the obvious practical solution would have

> been to have reconsidered the matter. But, in the face of the opposition by counsel for the Crown, the trial court, it seems to me, had no option but to apply the strict letter of the law and in applying this strict letter of the law, it was right in coming to the conclusion that it could not take this final statement into account and that, therefore, the sentence of death imposed should stand."

However, by virtue of the concession, made by the Crown during the course of the appeal, that the trial court should be allowed to reconsider the question of extenuating circumstances with regard to the appellant's answer to the *allocutus,* the matter was remitted to the trial court for that purpose. In a short separate judgment, QUENET JP indicated that he preferred to leave open the matter of whether the trial judge had taken a correct view of his power to hear the appellant's statement in answer to the allocutus.

With due deference, it seems to me that the doubt entertained by QUENET JP was well-founded.

It is a settled principle of the common law that a court only becomes *functus officio* once sentence has been finally pronounced. See *S v Simbi* 1975 (2) RLR 50 (A) at 52A-F; *S v Matare* 1993 (2) ZLR 88 (S) *(6). The trial judge in Eric's case supra, was, therefore, at liberty to recall the decision on extenuating circumstances and reconsider the issue afresh. That this is so is borne out by the express invitation contained in the *allocutus* to state why sentence of death should not be passed. It is only if no good reason is forthcoming from the accused that the

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judge may proceed to pass that sentence. If there is good reason he must not do so, for otherwise rule 49 would be pointless. Consider, for instance, where in a final statement the accused reveals that she is pregnant, or over the age of seventy years, or under the age of eighteen years at the time of the offence, all such contingencies having been previously overlooked. If any one were true then, in terms of s 314B of the Criminal Procedure and Evidence Act, it would be impermissible for the death sentence to be passed. In such a situation it would be, in my view, incumbent upon the trial judge to recall the finding of the non-existence of extenuating circumstances and try the new issue. To take another example: suppose that in his final statement the accused raises the alibi that at the date of the commission of the murder he had been incarcerated in prison, and produces in confirmation a certified extract from the prison's register. It would be totally wrong for the trial judge to hold, nonetheless, that the verdict had to

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stand and sentence of death pronounced. He would be obliged to set the verdict aside in order that the veracity of the new information be determined.

If I am correct, as I believe I am, then it necessarily follows that statements made in answer to the *allocutus,* being part of the proceedings before the trial court, may be taken account of by an appeal court.

The final statements of these two appellants underline their involvement in the fateful incident of 11 January 1988.

THE VERDICT

The trial court found each of the appellants guilty on the basis of a constructive intention to kill the deceased.

It held that at the time the first appellant rendered assistance in the mission to kill the African National Congress residents at 16A Jungle Road by means of a bomb or other explosive device, he must have foreseen the possibility of such a devasting attack resulting in the unlawful killing of persons unconnected with them, and was reckless as to whether such deaths ensued or not; that in the knowledge that Kit Bawden intended to detonate a highly explosive device in the Renault 5, once that vehicle had been driven onto the premises at 16A Jungle Road, the second appellant foresaw and was indifferent to the possibility that someone other than the African National Congress members might be killed in the execution of the enterprise; that the third appellant, in aiding and assisting the South African agents, whom he knew were present in the country to eliminate members of the African National Congress' military wing, and operated by bombing such targets, was aware that the plan involved 16A Jungle Road, the Renalt 5 and the driver; and foresaw the possibility of such attack causing the death of persons other than the African National Congress residents, but was heedless whether that possibility eventuated or not.

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Counsel for the appellants contended that in order to secure a conviction of murder it was necessary for the State to prove that each appellant in fact subjectively foresaw the possibility of the deceased being killed in the explosion, rather than a member of the African National Congress or some other innocent passer-by.

While that proposition may correctly state the law (see *S v Mavhungu* 1981 (1) SA 56 (A) at 67H), I entertain no doubt that each appellant, in lending his assistance to an explosives attack upon an occupied residence, must have

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foreseen the possibility of killing or injuring some person other than their intended victims. This was not a case of the negligent killing of a person. What was done at 16A Jungle Road was akin to shooting at an intended victim in a crowded street. See *S v Tissen* 1979 (4) SA 293 (T).

Hunt, *South African Criminal Law and Procedure* 2 ed vol 2 at p 342, after citing *S v Nkombani & Anor* 1963 (4) SA 877 (A) at 892A, points out that:

> "The case where X explodes a bomb in a crowd is closely analogous. Though X may be ignorant of the identity of his intended victims, he has intent to kill; there is *dolus indeterminatus."*

In *S v Nhlapo* 1981 (2) SA 744 (A) three security guards had been attacked by three robbers and during the shooting affray that ensued one of the security guards was killed by a shot fired either by one of the robbers or by one of the other security guards. In dismissing the appeal from the conviction of murder, VAN HEERDEN JA, who delivered the judgment of the court, said at 751B-C that the appellants:

> "... planned and executed the robbery with dolus indeterminatus in the sense that they foresaw the possibility that anybody involved in the robbers' attack or in the immediate vicinity of the scene, could be killed by cross-fire.
>
> ... the shooting of one guard by another was, as far as the robbers were concerned, 'an envisaged incident or episode' in the crime planned by them."

See also *S v Mpala* 1986 (2) ZLR 93 (S) at 99G-100D.

In like vein, the deaths of persons other than the African National Congress victims were, to repeat the words of HOLMES JA in *S v Nkombani & Anor supra,* at 896B, "an envisaged incident or episode" in the execution of the attack to which the appellants were a party.

It follows that the appellants were rightly convicted by the trial court.

SENTENCE

Extenuating circumstances have more than once been defined by this court as any facts bearing upon the commission of the murder which reduce the moral blameworthiness of the offender as distinct from his legal culpability.

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In deciding whether or not extenuating circumstances exist which allow of the imposition of a sentence other than death, the trial court exercises what is essentially a moral judgment. On appeal, this court cannot substitute its own view. It may only interfere if persuaded that the conclusion of the trial court could not reasonably have been reached; or where that court had regard to wrong factors, or had mistakenly excluded factors proper to be taken into account, or had, in some other way, erred in principle.

In this appeal, the ground of challenge relied upon was that the trial court's finding of an absence of extenuation was one which no reasonable court would have made; that it is so startingly inappropriate as to warrant interference.

I do not think it may be gainsaid that the trial court considered, in respect of each appellant, the mitigatory factors urged on his behalf, and then weighed them against the aggravating factors of the case. It concluded that the aggravating factors outweighed those which lessened the moral reprehensibility of each appellant. That, of course, was a permissible approach to adopt. See *S v Phineas* 1973 (1) ZLR 260 (A) at 263E-H.

Counsel reiterated in favour of the appellants all the features advanced before the trial court. In particular, that a constructive and not an actual intention to kill had been proved; second, that in the rôles they played, the appellants were not the principal offenders; and third, that it was believed, certainly by the first and second appellants, that the type of action resorted to would serve to protect the lives of the people of South Africa.

To my mind, the finding of *"dolus eventualis"* is a generous one. It seems to me almost inconceivable that the intention was not to actually kill the deceased as well as the African National Congress personnel. To have allowed the deceased to leave the scene would have resulted in a substantial risk of the third appellant's identity being exposed to the police and, through him, the involvement of the first and second appellants and the other South African agents. Furthermore, the very essence of the plan, which comprised the loading of the Renault 5 with explosives and the hiring of a totally innocent person to drive it to the target area, strongly suggests that the driver was regarded as expendable in the interests of the success of the enterprise. And that is exactly what happened. No sooner had the vehicle reached the rear of the premises than the explosive device it was carrying was detonated. In short, I find the protests that it was never intended to harm the deceased somewhat hollow.

GUBBAY CJ

Be this as it may, I cannot fault the opinion of the trial court. It was convinced that the part played by each appellant was significant, and that the manner of execution of the attack of which the appellants had been made aware, was cold-blooded, cowardly and callous, with total disregard for the safety of the deceased. His survival, at best, was of the lowest priority. In the event, he died a gruesome death.

It should be underscored that what was perpetrated was not only an act of terrorism on Zimbabwean soil against Zimbabwean property, but a deliberate attempt to assassinate persons

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to whom this country was offering sanctuary. The appellants were enthusiastic participants and deserve to pay the price of their folly.

THE ORDER

In respect of each appellant, his appeal is dismissed and the conviction and sentence of death are confirmed.

McNally JA: I agree.

Korsah JA: I agree.

Winterton, Holmes & Hill, first and second appellant's legal practitioners

Coghlan, Welsh & Guest, third appellant's legal practitioners

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FERNANDES v SIEMERS 1993 (2) ZLR 286 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Civil appeal

21 & 28 October 1993

Flynote

Statute law and interpretation - Fencing Act 1976 - s 15 - contribution from neighbour for erection of fence along common boundary - s 26(2) - whether impracticable or undesirable for fence to be erected along common boundary

Headnote

The presence of an existing hedge and old chicken wire fence had made the erection of a new, more secure fence exactly along the common boundary impracticable or undesirable. The fence was clearly to the advantage of both parties. The appellant had therefore been correctly held liable by the fencing court to pay a contribution towards the costs of the erection of the fence in terms of the Fencing Act 1976.

Case cited:

Jayne v National Coal Board [1963] 2 All ER 220 (QB)

CT Mantsebo for the appellant

AJ Dyke for the respondent

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Judgment

Gubbay CJ: The parties to this unfortunate appeal are neighbours. They are owners of adjoining residential stands in the suburb of Milton Park, in Harare. The respondent has lived there for twenty-four years and the appellant for about half that period. Both acknowledge that the common boundary between the two pieces of land is demarcated by a four foot"chicken"wire fence, contiguous to which, and growing through which, is a hedge. This fence was constructed by the respondent soon after he

purchased the property. Until such time as the appellant became his neighbour, it had successfully served to prevent the intrusion of dogs from the one side to the other.

The appellant's occupation brought about a change in the peaceful situation which had reigned between the respondent and his former neighbours. The appellant's dogs, which numbered between four and six, repeatedly pushed their way through the hedge and under the bottom of the wire fence and came onto the respondent's property. On occasions one or more would leap over the hedge and fence. They would kill the respondent's rabbits, plunge into the pond in an endeavour to catch the gold fish, go onto the verandah, eat the food which had been left outside for the respondent's own pets, excrete on the lawn and attack and bark loudly at the dogs on the other side of the respondent's property. These activities sometimes occurred in the hours of darkness and caused the respondent and his wife a deprivation of sleep and distress.

All reasonable measures taken by the respondent to prevent the intrusion of the dogs by repairing the gap made by them under the fence and strengthening the wire in the ground with steel pegs and reeds, proved of no avail. The steadfast determination of the appellant's dogs remained unabated.

Complaints addressed to the appellant received an unsympathetic hearing. The degree of co-operation and understanding customarily exercised in a spirit of good neighbourliness was totally absent.

As the years passed the extent of the frustration, personal discomfort and inconvenience to which the respondent and his wife were being subjected, became intolerable. Their patience was worn thin. Something had to be done.

And so in May 1989, the respondent decided that the only option available to him was to have a six foot diamond mesh fence constructed. After obtaining quotations from a number of suppliers, he wrote to the appellant on 9 June 1989, detailing the proposed type of fence, where it was to be sited, the approximate date of erection and the proportionate cost to be paid by the appellant.

As no reply was received to his letter, or to the one that followed seven days later, the respondent went ahead and commissioned the construction of the fence by the least expensive firm. It was in place by 21 June 1989, being sited on the respondent's property at a distance of

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between fifteen and twenty centimetres from the boundary line of the old fence and hedge.

GUBBAY CJ

On 17 July 1989, the respondent wrote to the appellant informing him that the new fence was functioning well and that the dogs were"no longer a hazard or nuisance". In courteous terms he requested payment of $452,50 being the appellant's proportionate share of the cost of the fence. A subsequent letter warned the appellant that if payment was not forthcoming, an application would be made to the fencing court for a contribution order.

Good sense did not, however, prevail. The appellant was undaunted by the prospect of legal proceedings. If anything, he seemed to welcome it.

In the fencing court (a magistrate's court) the appellant opposed the grant of the order on two main grounds. First, he testified that he had indicated to the respondent his preference for the construction of a "durawall" instead of a fence, but, notwithstanding, the respondent went ahead with the fence. This was disputed by the respondent. He deposed that it was only after the fence had been constructed that the appellant mentioned the durawall. The magistrate presiding found in favour of the respondent's account.

Second, the appellant argued that as the new fence had not been constructed on the common boundary of the properties, the respondent was not entitled, in terms of s 15 of the Fencing Act 1976, to a contribution towards the cost incurred. This point fared no better.

In the result the fencing court made a contribution order in the amount claimed by the respondent.

Before this court the appellant persisted solely with the contention that as the new fence had been constructed on a different line to that of the old fence and hedge, the fencing court had erred in holding him liable under the Fencing Act to contribute to the cost thereof.

Section 26(1) of the Fencing Act 1976 provides that subject to subs (2) and s 33 of the Land Survey Act [*Chapter 147*] (which is of no application) a"dividing fence"shall be constructed on the common boundary between the pieces of land concerned. The germane issue between the parties, therefore, was whether the circumstances under which the new fence was constructed on the appellant's side of the boundary, fulfilled the conditions specified in subs (2), which reads:

> "If the boundary referred to in subsection (1)-

GUBBAY CJ

> (a) passes through or over any physical feature; or
>
> (b) crosses any water body or terrain;
>
> whether natural or otherwise, rendering the construction of a dividing fence on that boundary impracticable or

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undesirable, the line of the dividing fence may, in terms of a contribution order or an order made in terms of subsection (6), be sited to one side, or partly to one side and partly to the other side, of that boundary."

Since the common boundary between the properties passes through the natural physical feature of the hedge, it was incumbent upon the respondent, in seeking a contribution order, to establish that the construction of the new fence on that boundary was rendered"impracticable or undesirable".

In the context of s 26(2) the word "impracticable" has a meaning different from that of "impossible"; the latter is absolute, whereas the former signifies some degree of reason and invokes some regard for practice. See *Jayne v National Coal Board* [1963] 2 All ER 220 (QB) at 223F. In my view the meaning "unreasonably difficult of performance", given in Funk & Wagnall's *International Dictionary,* Vol I at p 636, most aptly conveys the intention of the legislature in its use of this word.

The word "undesirable" means something which, objectively considered, is "not to be wished for" - something which is"disadvantageous"or"inadvisable". See *Oxford English Dictionary*, Vol 9 at p 156.

I am satisfied that having regard to the respondent's predicament, it was both impracticable and undesirable for him to remove the hedge and the old chicken wire fence in order to be able to construct the new fence on the common boundary line.

It was "impracticable" in the sense of being"unreasonably difficult of performance", because of the appellant's obvious lack of consent. The old fence could not be removed without disturbing the hedge; and the removal of the hedge necessitated trespassing upon the appellant's property in order to completely cut it away and dig out the roots. To pull down the wire fence would also have involved some degree of encroachment.

Furthermore, the removal of the hedge was "undesirable" as being to the disadvantage of both parties. It forms a natural barrier between the two

properties, giving each occupant an enviable measure of privacy and seclusion that would be lost to them were the hedge uprooted and replaced by a wire fence.

It is necessary, also, to allude to s 20 of the Fencing Act. This provision obliges the fencing court, in making a contribution order, to take intoaccount, *inter alia,* the extent to which the dividing fence confers, or is likely to confer, any advantage or benefit on each of the parties to the proceedings.

I consider the new fence to be to the clear advantage of both parties. It affords far more effective security against intruders passing between the properties. It confines the appellant's dogs to his property, thereby ensuring him greater protection, and at the same time fulfils the respondent's wish to be rid of interference from these animals.

It is for these reasons that I would dismiss the appeal with costs. In doing so I hope that the

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parties have learned just how little is to be gained from litigating to the extent they have done over so relatively insignificant an amount. The legal costs incurred by the appellant are now bound to be substantial. Even the respondent's costs, since no award in respect of them was made by the fencing court, are likely to exceed his claim. In the event, victory has been somewhat pyrrhic. There comes a time when principles are to be sacrificed in the interests of economic reality. This is especially so where the contestants happen to be neighbours, for the consequent stress of a trial and the ultimate decision in favour of one and against the other, can only drive a deeper wedge between them and make any semblance of harmony and co-operation even less attainable.

McNally JA: I agree

Ebrahim JA: I agree

Gollop & Blank, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

S v DONGA & ANOR 1993 (2) ZLR 291 (SC)

Court **Supreme Court, Bulawayo**

Gubbay CJ, McNally JA & Ebrahim JA

Criminal appeal

22 October & 4 November 1993

Flynote

Evidence - extra-curial statements - admissibility of unconfirmed statement to police by accused - whether State had proved admissibility - whether statement whose admissibility is in issue should be produced during trial within trial to determine its admissibility

Evidence - witness - State witness's testimony in court more favourable to accused than that contained in extra-curial statement - witness denying that she made extra-curial statement - whether court can accept as true contents of extra-curial statement and not evidence in court

Headnote

A State witness testified in a murder case. The evidence she gave in court was more favourable to the appellants than that contained in an extra-curial statement made by her to the police. The State produced her extra-curial statement in terms of s 293 of the Criminal Procedure and Evidence Act [*Chapter 59*]. The witness denied that she had made that statement.

The trial court decided that the contents of the extra-curial statement were true instead of her evidence in court. The trial court had also ruled to be admissible an extra-curial statement made by one of the appellants, which a magistrate had refused to confirm. This ruling had been made after a trial within a trial had been held to determine the issue of the admissibility of this

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statement. The statement whose admissibility was in issue had been produced during the trial within the trial.

Held, that the procedure followed in respect of the State witness had been wrong and this had been prejudicial to the accused. Section 293 of the

McNALLY JA

Criminal Procedure and Evidence Act deals with impeachment. If a witness departs materially from a previous statement to the police, she can be impeached. If she is impeached her evidence in court is normally discarded entirely. However, if she tries to shield the accused but also says things against the interests of the accused, the latter things may be accepted by the court as true. The court cannot during impeachment proceedings decide that her extra-curial statement contains the true facts and her testimony in court is false.

Held, further, that the trial court had erred in finding that the State had discharged the onus resting on it of proving the admissibility of the unconfirmed statement. The onus resting on the State in this case was particularly heavy as the magistrate had declined to confirm it. The State had not called the police witnesses whom the appellant had alleged had mistreated her.

Held, obiter, that although the practice is sanctioned by legal authority, that it is very doubtful that it is advisable that a statement whose admissibility is in doubt should be produced during the trial within a trial.

Cases cited:

S v Chari 1989 (1) ZLR 231 (S)

S v Banda & Anor S-73-89

S v Lubu S-56-89

S v Chawundura S-95-89

S v Machakata S-106-89

S v Millar 1971 (1) RLR 159 (A)

S v John 1970 (2) RLR 232 (G)

R v Werekwere A-115-66

A-G v Slatter & Ors 1984 (1) ZLR 306 (S)

S v Gaba 1985 (4) SA 734 (A)

S v Woods & Ors S-60-93

TA Cherry for the appellants

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M Majuru for the respondent

Judgment

McNally JA: The two appellants were convicted of murder with actual intent and were sentenced to death. It was alleged that they had killed an eight-year-old mentally retarded girl in October 1988.

This is a case in which there is really no significant evidence apart from the confessions by the two appellants. What can be said to have been established is as follows.

1993 (2) ZLR p293

McNALLY JA

The first appellant is an old woman, conceded by the State to be aged 71 at the time of her trial which began on 15 October 1991. The second appellant is a younger male relative of hers, aged about 37 at the time of the trial. I will call them "Evah" and "Bhebhe" respectively.

The two of them lived at Mxotshwa Kraal near Gwanda. The deceased was the great-grandchild of Evah. The deceased's mother, Cecilia Ndlovu, worked in Bulawayo and had virtually abandoned her child.

The child had a tendency to wander off into the bush and return after some time. Sometimes she would do so when she was meant to be at school. She would stay away overnight, sometimes with neighbours.

On this particular occasion she had gone off to herd goats. It was September/October 1988. She did not come back. She had been sent by her great-grandmother, Evah.

Some unspecified time later some bones were found in the bush by a five-year-old boy (who was eight when he gave evidence). He identified the bones by the dress he found nearby, which was the deceased's dress. He reported this fact to Evah, who went with him to the scene, gathered up the bones in a sack and buried them in her garden.

He said that Evah made no secret of the fact that the bones had been discovered. She told the neighbours. He was not asked whether any hue and cry had been raised when the child went missing. So we know nothing one way or the other about that.

It was impossible for the forensic report to reach any conclusion as to how the child had died. There were wild animals in the area. And obviously no-one had tried to bury or conceal the bones or the dress.

The mother of the deceased gave evidence. Her evidence in court was more favourable towards the appellants than what was contained in her sworn statement to the police. But, when the statement was put to her, she denied that she had made it. She admitted her thumb-print on it but said the police had simply asked her to record her thumb-print. After she had completed her evidence, in which she said nothing to cast suspicion on the two appellants, her sworn statement was produced and she was re-called and examined on it. She denied saying anything about suspicious behaviour on the part of the two appellants. And, of course, she was

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away in Bulawayo when the child disappeared.

McNALLY JA

It seems to me that the procedure followed in relation to her evidence and her extra-curial sworn statement was wrong. The statement was produced in terms of s 293 of the Criminal Procedure and Evidence Act [*Chapter 59*].

This section deals with impeachment. But in general the rule is that where a State witness is shown to have deviated materially from a previous statement to the police, the evidence of that witness is discarded entirely. The court may not, as it did here, decide that the extra-curial statement contains the real truth. See *S v Chari* 1989 (1) ZLR 231 (S); *S v Banda & Anor* S-73-89; *S v Lubu* S-56-89; *S v Chawundura* S-95-89; and *S v Machakata* S-106-89.

It was said in *S v Millar* 1971 (1) RLR 159 (A) at 160 that impeachment of a witness's evidence does not necessarily mean that all of her evidence must be rejected. If, in spite of her attempts to shield the accused, she says in her evidence things which are against the interests of the accused, those things may be accepted as true. But that is not what happened here. The learned judge said:

> "In the circumstances our view is that the contents of Exhibit 6 are reliable."

In short, the affidavit of the witness was treated just as if it had been a warned and cautioned statement and she had been the accused. That was a material misdirection. The contents of the sworn statement were prejudicial to the appellants, to the extent that they suggest conduct on the part of the appellants which was inconsistent with innocence. This prejudicial evidence might well have influenced the court.

If one rejects the evidence of the deceased's mother, Cecilia Ndlovu, one is left only with the evidence of the eight-year-old boy, speaking of a period three years earlier. All he said was that the child went missing, as it frequently did, and some time later he found the bones and the dress. He was not very clear as to whether Bhebhe was or was not present at the kraal when the child went missing. He said he, Bhebhe, was there when the bones were buried.

It will be apparent then that everything depends on the admissibility of the confessions. The history of the two confessions is as follows.

Bhebhe made a confession to Detective Constable Nyoni on 20 April 1989. It was witnessed by Detective Constable Hlongwane. Five days later he was taken before a magistrate, Mr Sibanda, and his statement was not confirmed because he alleged he had been assaulted by the police and forced to make

McNALLY JA

it. He said his eardrum had been damaged and his feet had been swollen but were now better. He was taken before a doctor the next day and found to be unmarked. Wax was removed from

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one ear, but both ears were otherwise normal, with intact tympanic membranes.

Evah made her confession only on 19 May 1989, to Detective Constable Hlongwane, witnessed by Detective Constable Chihota. She was taken before a magistrate, Mr J Mkandla, on 15 June 1989, almost a month later. She alleged she had been pressured and assaulted by the police. Her statement was not confirmed. She was medically examined on 3 May 1989 (long before she made her statement). No injuries were found.

Now, it is interesting to note that, in the trial within a trial, which the learned judge conducted in the absence of the assessors, only three witnesses were called by the State. They were the policemen involved in recording or witnessing the statements. None of those three was involved in the arrest and interrogation of the two appellants. We do not know on what date they were taken into custody.

A reference to the outline of the State case is also illuminating. The contents of that document are not, of course, evidence in the sense that one cannot rely on the statements in that document as evidence.

But it is extremely pertinent to observe that the State was proposing to call - but never did call - Detective Sergeant Matsike, Sergeant Shumba and Detective Constable Musonza. Their evidence would have been that Evah, having previously been arrested by "another police section", was first seen by Detective Sergeant Matsike on 14 April 1989. Presumably she had been arrested on or before that date. What happened in the five weeks between 14 April and 19 May? Why were Matsike, Shumba, Musonza and Constable Dube (who was also mentioned) not called in the trial within a trial, when it was the allegation of Evah in her defence outline that she had been assaulted by officers other than those who recorded her statement? Why was no attempt made to produce the indications she allegedly made? What happened to the bottle which she apparently indicated? And, finally, in regard to Evah, why did Detective Sergeant Hlongwane first say that he never saw Evah before 19 May, when he took her statement, and later admit that he ad signed a Form 86 to have her released from gaol and taken into police custody, as early as 11 May? What was she doing in police custody for eight days before she made her statement? (Hlongwane may be a woman constable, in which case my references to "he" should be read as "she".)

McNALLY JA

I do not see how the State could have discharged the onus upon it of proving the admissibility of Evah's statement, when it failed to call the witnesses against whom her allegations were made. Compare *S v John* 1970 (2) RLR 232 (G) at 234A and 234H-I. And one must bear in mind that the onus on the State in this case was particularly heavy because the statement was not merely unconfirmed, in the sense that no attempt had been made to confirm it. It was, as it were, positively unconfirmed. The magistrate had refused to confirm it.

In my view, the State failed even to begin to discharge the onus upon it of showing that Evah's statement was admissible. It should not have been admitted into evidence. Without it, the State case against her collapses.

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In relation to Bhebhe the position is not dissimilar. We do not know when he was arrested. We do know that he was not arrested by Detective Constable Nyoni or Detective Constable Hlongwane, who recorded his statement. Assuming that he was arrested on 14 April as alleged in the State outline, and that he was arrested, according to the State outline by Detective Sergeant Matsike, Detective Constable Musonza and Detective Constable Dube, the question is - what happened to him in the six days between his arrest and his statement, between 14 and 20 April? It is fairly clear from the evidence of Detective Constable Nyoni and Detective Constable Hlongwane that Bhebhe was only handed over to them on 20 April, the date on which they recorded the statement.

The point is that in his defence outline Bhebhe said he confessed (1) because he had been told his co-accused had confessed and (2) because he had been severely assaulted by unknown policemen at Gwanda while he was hooded. In order to rebut this allegation, and to discharge the onus on the State arising out of the magistrate's refusal to confirm the statement, the prosecutor was bound to call the policemen with whom he had been in contact since his arrest. Yet the prosecutor called only those who spoke to him on 20 April, the morning of his confession.

On that ground alone, it seems to me, the admissibility of the statement was not established, despite Bhebhe's refusal to give evidence in the trial within a trial.

In relation to Bhebhe, it may also be said that at all times (except in his inadmissible confession) he claimed he was away at Kezi when the deceased disappeared. Yet no witness was called to disprove that allegation.

McNALLY JA

One final comment must be made. The learned trial judge, during the trial within a trial, allowed, indeed insisted on, the production of the statement whose admissibility was in issue. I know that this is commonly done, and sanctioned by authority - see *R v Werekwere* A-115-66 and *Attorney-General v Slatter & Ors* 1984 (1) ZLR 306 (S) at 315E - but I must confess that I have considerable doubts about the advisability of this practice.

The reason for my unease is that the trial within a trial is about the admissibility of the statement and not about its truth. It may well be perfectly true, but if it was obtained by improper means the law says it is not admissible in evidence.

The justification for producing the statement in the trial within a trial is in three parts -

1. The police witnesses must be allowed to see it, so that they know what they are talking about;

2. The judge, as a trained judicial officer, will not allow himself to be influenced by the fact - if it is a fact - that the statement is obviously true; and

3. The content of the statement may be useful in determining whether it is admissible or not.

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I would comment on those points as follows -

1. As long as prosecution and defence can see the statement, there is no real need for the judge to see it as well;

2. Judges are human; and

3. I find it very difficult to envisage a statement whose very contents proclaim its admissibility. Very often, the form and content of a statement will proclaim its truthfulness (or untruthfulness). But it is for that very reason that, in my view, the danger of prejudice to the accused will usually outweigh the advantage obtained by the judge in relation to admissibility by seeing it.

In this connection I refer to the South African Appellate Division judgment in *S v Gaba* 1985 (4) SA 734 (A). This was a case where the trial judge had

insisted on the production of the statement before him sitting alone, overruling the prosecutor in the process. VILJOEN JA said of this:

> "The practice followed by some courts (see for instance S v Mahlala and Ors 1967 (2) SA 401 (W) at 403B) not to have regard to the contents of the confession before the issue referred to (ie admissibility) has been decided, seems therefore to be a salutary one, because there is always the danger that if this is not done the accused may be prejudiced in some way or another, particularly when the presiding judge does not É deem it necessary, in the interests of justice, to sit alone."

In that case, however, the court held that there had been no prejudice. The same conclusion was reached in this court recently over the question whether cross-examination as to the truth of the statement is permissible during the trial within a trial. It is not - see *S v Woods & Ors* S-60-93, and the cases cited at p 27 of the judgment.

In the present case the learned judge allowed the prosecutor to cross-examine Evah on the truth of her confession during the trial within a trial. He should not, in my opinion, have allowed this. It is highly prejudicial because such questions can embarrass an accused person and thus lead to him or her making a bad impression on the judge.

However, as I have indicated, the case against the two appellants falls at an earlier hurdle.

The appeals of both appellants are allowed and their convictions and sentences are set aside.

Gubbay CJ: I agree.

Ebrahim JA: I agree.

Pro Deo

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LIQUIDATOR OF M & C HOLDINGS (PTY) LTD v GUARD ALERT (PTY) LTD 1993 (2) ZLR 299 (HC)

Court **High Court, Harare**

Robinson J

8 & 9 November 1993

Civil trial

Flynote

Insolvency - undue preferences - test to be applied - onus - defendant to prove both payment in ordinary course of business and absence of intention to prefer - Insolvency Act [Chapter 303] - s 44

Company - winding-up - commencement date of winding up - presentation of petition - when filed in proper form with registrar - Companies Act [Chapter 190] - s 183(2), 242

Practice and procedure - admission - in pleadings - binding nature

Headnote

The plaintiff liquidator sued the defendant for payment of $40 000, being the total of three payments made by the insolvent company to the defendant. The defendant admitted receipt of the money, but asserted that the payments were made in the ordinary course of business and without any intention to prefer.

Held, the defendant bore the onus of establishing both the requirements of the defence to the claim of an undue preference in terms of s 44 of the Insolvency Act [*Chapter 303*] (the statement by BEADLE AJ in *Eliasov NO* v *Arenel (Pvt) Ltd* 1979 RLR 123 (G) at 127H; 1979 (3) SA 415 (R) at 418F to the contrary not followed).

Held, on the facts the defendant had not discharged the onus.

Cases cited:

Tweefontein United Collieries Ltd v Lockers Engrs SA (Pty) Ltd 1964 (1) SA 186 (W)

ROBINSON J

Taylor and Steyn NOv Koekemoer 1982 (1) SA 374 (T)

Meaker NO v Campbell's New Quarries (Pvt) Ltd 1973 (1) RLR 168 (G); 1973 (3) SA 157 (R)

Wolhuter Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd (In Provisional Liq) 1983 (3) SA 815 (O)

Rance v Union Mercantile Co Ltd 1922 AD 312

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van Deventer v De Villiers 1953 (4) SA 72 (C)

Canaric NO v Shevil's Garage 1932 TPD 196

Eliasov NO v Arenel (Pvt) Ltd 1979 RLR 123 (G); 1979 (3) SA 415 (R)

Nicholls & Whitelaw NO v Akoo 1948 (4) SA 197 (N)

Dreyer's Trustee v Hanekom 1919 CPD 196

Ensor NO v New Mayfair Hotel 1968 (4) SA 462 (N)

Malherbe's Trustee v Dinner & Ors 1922 OPD 18

Est van Schalkwyk v Hayman & Lessem 1947 (2) SA 1035 (C)

Herrigel NO v Bon Roads Construction Co (Pty) Ltd & Anor 1980 (4) SA 669 (SWA)

Giddy, Giddy & White's Estate v Du Plessis 1938 EDL 73

Pretorius NO v Stock Owners' Co-op Co Ltd 1959 (4) SA 462 (A)

Malk (Pty) Ltd v Franks & Solomon NO 1935 TPD 85

Giddy, Giddy & White's Est v Hughes & Co 1937 EDL 335

Swanepoel NO v National Bank of SA 1923 OPD 35

Pretorius' Trustee v van Blommenstein 1949 (1) SA 267 (O)

Venter v Volkskas Ltd 1973 (3) SA 175 (T)

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

S v Makda 1973 (2) RLR 244 (A); 1974 (1) SA 177 (RA)

A P de Bourbon SC for the plaintiff

A J Dyke for the defendant

Judgment

Robinson J: At the conclusion of this trial I delivered an *ex tempore* judgment, giving only in very cursory fashion my reasons for granting judgment for the plaintiff as claimed. I now give the full reasons for my judgment.

This is an action brought by the plaintiff in his capacity as the liquidator of M & C Holdings (Private) Limited ("M & C Holdings"), which was placed in final liquidation on 21 November, 1990, against Guard Alert (Private) Limited ("the defendant"), a company which provides security services, for the recovery, as voidable preferences in terms of s 242 of the Companies Act [*Chapter 190*] ("the Companies Act"), of dispositions of its property made by M & C Holdings to the defendant.

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ROBINSON J

Particulars of the plaintiff's cause of action are pleaded thus in paras 4-7 inclusive of the plaintiff's declaration:

" 4. Within the period of six months immediately preceding the liquidation of M & C Holdings (Private) Limited that company made a disposition of its property to the Defendant as follows:

4.1 On or about 24th August, 1990, the sum of $15 000,00

4.2 On or about 7th September, 1990, the sum of $10 000,00

4.3 On or about 12th September, 1990, the sum of $15 000,00

5. The aforesaid payments constituted dispositions which had the effect of preferring the Defendant, as a creditor of M & C Holdings (Private) Limited, above other creditors.

6. At the time of the aforesaid payments by M & C Holdings (Private) Limited to the Defendant, the liabilities of M & C Holdings (Private) Limited exceeded the value of its assets.

7. Despite demand made of the Defendant on the 12th December, 1990 the Defendant has failed or refused to pay the sum of $40 000,00 to the Plaintiff."

In its plea, the defendant admits para 4 of the plaintiff's declaration but in regard to the remaining paragraphs, pleads as follows:

" 2. Defendant denies paragraph 5 of Plaintiff's Declaration. The said dispositions were made in the ordinary course of business, in terms of section 44(2) of Chapter 303, and it was not thereby intended to prefer Defendant above other creditors.

3. Defendant has no knowledge of the allegations contained in paragraph 6 of Plaintiff's Declaration, does not admit them and puts Plaintiff to the proof thereof.

4. Defendant admits paragraph 7 of Plaintiff's Declaration.

5. In the premises Defendant denies that it is indebted to Plaintiff in the sum of $40 000,00, or in any sum."

On 12 May, 1993 the plaintiff filed the following request for particulars for trial:

" 1. At the time of each of the three payments did M & C Holdings (Pvt) Ltd owe any money to the Defendant?

2. If so, was such money owed in respect of goods supplied or services rendered to M & C Holdings (Pvt) Ltd or to some other company?

3. What was the full extent of the alleged indebtedness of M & C Holdings (Pvt) Ltd to the Defendant at the time of each payment?

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4. As at what date did M & C Holdings (Pvt) Ltd become indebted to the Defendant in a sum in excess of $40 000,00?

5. The date on which each indebtedness arose is required to be stated, giving the amount thereof and details

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of the services provided to M & C Holdings (Pvt) Ltd.

6. What were the circumstances which led to the payment of the three sums to the Defendant in August and September 1990?

7. Was any demand made by the Defendant of M & C Holdings (Pvt) Ltd prior to the payments being made?

8. The Defendant is required to particularise the facts giving rise to the assertion that the three payments were made in the ordinary course of business of M & C Holdings (Pvt) Ltd.

9. Is it alleged by the Defendant that other creditors of M & C Holdings (Pvt) Ltd were being paid a similar percentage of their indebtedness at the same time that the Defendant was paid the three sums by M & C Holdings (Pvt) Ltd? If so, those other creditors are required to be identified."

On 21 September, 1993 the defendant replied as follows:

"Defendant furnishes the following further particulars in response to Plaintiff's request.

1. Yes.

2. Security services supplied to M & C Holdings (Private) Limited and its subsidiary companies.

3. $59 161,69 at 24th August, 1990;

   $44 565,69 at 7th September, 1990;

   $34 759,69 at 12th September, 1990.

4. October 1989.

5. The dates and amount of each indebtedness is listed below. Each sum due arose from security services rendered.

5.1.	Date:	Invoice:	Amount
	11.5.90	53720	17 069,00
	31.5.90	53805	15,75
	31.5.90	54038	962,00
	31.5.90	53910	230,00
	11.6.90	55217	15 883,00
	29.6.90	56027	66,00
	11.7.90	55824	18 107,50
	31.7.90	56379	450,00
	10.8.90	57941	600,50

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10.8.90	57940	231,00
10.8.90	57939	142,60
10.8.90	57945	462,00
10.8.90	57946	1 201,00
21.8.90	57953	13 397,43
31.8.90	59524	108,00
31.8.90	59554	296,00
11.9.90	58982	194,00

6. RI Robinson for Defendant approached Mr Fewster in June 1990 requesting payment of the sum due to Defendant because the balance on the account had exceeded $75 000,00, being approximately 4 months' security services rendered by Defendant. Fewster indicated that, although he had a temporary cash flow problem, he wished the security services provided by Defendant to continue and would in future pay for the services in the month that they were provided and would repay the sum due at that time by way of monthly instalments of $15 000,00. Defendant accepted this arrangement.

7. No. Demand was made of Lorac (Private) Limited verbally as indicated in paragraph 6 hereto as well as in writing in the form of monthly invoices and statements.

8. The facts upon which the Defendant relies in asserting that the disputed payments were made in the ordinary course of business are as follows:

8.1. Security services were required in order to protect the assets of the group of companies against loss.

8.2. Defendant provided the security services in order to achieve the protection of the group's assets.

8.3. The motive in making the disputed payments to Defendant was not to prefer Defendant above other creditors of the group but to simply ensure the protection of the group's assets against loss.

8.4. Had Defendant not provided the security services in question, Defendant avers that no other security company registered in Zimbabwe would have provided similar services by virtue of the outstanding indebtedness to Defendant.

9. Ad paragraph 8(2): No."

It is significant here to highlight the following point which arises from the pleadings, the minute of the pre-trial conference held between the parties' legal representatives and the defendant's reply to the plaintiff's request for particulars for trial.

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In para 5 of the plaintiff's declaration it is alleged that the three payments which constituted the dispositions ("the payments in issue") had the effect of preferring the defendant, **as a creditor of M & C Holdings** (my emphasis), above other creditors. Although, in reply, it denies this paragraph, the defendant obviously admits, impliedly, that it was a creditor of M & C Holdings when it avers that the payments in issue were made in the ordinary course of business, in terms

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of s 44(2) of the Insolvency Act [*Chapter 303*] ("the Insolvency Act"), and that it was not thereby intended to prefer the defendant above other creditors.

This admission clearly emerges from the first issue agreed between the parties' legal representatives in para 2.1 of the pre-trial conference minute, namely - "Whether the payments which are set out in para 4 of the Declaration were dispositions which had the effect of preferring Defendant over the other creditors of M & C Holdings (Private) Limited?" Moreover, in answer to the plaintiff's request for particulars for trial, the defendant replies that M & C Holdings owed money to it at the time M & C Holdings made the payments in issue to the defendant, being allegedly in respect of security services supplied to M & C Holdings and its subsidiary companies, and the defendant goes on to furnish details in regard to M & C Holdings' indebtedness to it in response to paras 3, 4 and 5 of the plaintiff's request for particulars for trial.

Accordingly, when the trial commenced, it did so on the basis of the parties' pleadings (which, of course, do not include the particulars for trial filed by the defendant: see *Tweefontein United Collieries Ltd v Lockers Engineers SA (Pty) Ltd* 1964 (1) SA 186 (W)) that a debtor/creditor relationship existed between M & C Holdings and the defendant; and, notwithstanding the parties' evidence in court to the contrary, the trial proceeded throughout and the defendant's counsel, Mr Dyke, argued his client's defence on this basis, an important point to which I shall return later.

Before proceeding further, I wish to refer to the statutory provisions which are pertinent to my decision in this case.

Section 242 of the Companies Act provides as follows:

> "(1) Every disposition of its property which, if made by an individual, could for any reason be set aside in the event of his insolvency may, if made by a company, be set aside in the event of the company being wound up and unable to pay its debts and the provisions of the law

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> relating to insolvent estates shall, mutatis mutandis, apply to any such disposition.
>
> (2) For the purposes of subsection (1), the event which shall be deemed to correspond with the sequestration order in the case of an individual shall be -
>
> (a) in the case of a winding up by the court, the presentation of the petition, ...
>
> (b) ...
>
> (3) ..."

Section 183(2) of the Companies Act provides that the winding up of a company by the court in a case such as this shall be deemed to commence at the time of the presentation of the petition for the winding up.

In *Taylor & Steyn NO v Koekemoer* 1982 (1) SA 374 (T) it was held, in my view correctly, that

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with regard to s 415(1) of the South African Companies Act (the equivalent of s 241(1) of our Companies Act), the relevant date by reference to which it is to be determined whether a company which is being wound up is unable to pay its debts is the date when it is sought to invoke that section and not the date of commencement of the winding up. In my view, the same interpretation applies in the case of s 242(1) where the words "the company being wound up and unable to pay its debts" crops up again and, in this connection, I fully subscribe to the comment made by MARGO J in *Koekemoer's* case *supra,* at 378C that if"the insolvency law were not applied by s 339 (the equivalent of s 243(a) of our Companies Act) to such a situation, there would be no other provisions to govern those aspects of the winding-up which are wholly dependent on the Insolvency Act".

The meaning of the words, "the presentation of the petition", which are used in ss 183(2) and 242(2)(a) of the Companies Act, had to be interpreted by DAVIES J (as he then was) in *Meaker NO v Campbell's New Quarries (Pvt) Ltd & Ors* 1973 (1) RLR 168 (G); 1973 (3) SA 157 (R) in order to determine the time of the commencement of the winding up of a company in relation to the provision in the Companies Act that the winding up of a company "shall be deemed to commence at the time of the presentation of the petition for the winding up".

In interpreting the words,"the presentation of the petition", in that case, DAVIES J (as he then was) stated as follows at 171H and 172A-F (159F-160C):

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"Under the South African Companies Act, as under our Act, a winding up is deemed to commence 'at the time of the presentation of the petition for the winding up', but in South Africa there is a specific rule promulgated under the Act which provides that presentation of the petition is effected by the filing of the petition with the Registrar, accompanied by proof of the lodging of the petition and affidavit with the Master and a certificate by the Master that due security has been found for the costs. The only relevant South African decision to which I was referred is *Lief NO v Western Credit (Africa) (Pty) Ltd* 1966 (3) SA 344 (W). At p 347 of that report SNYMAN, J, states:

> 'From the scheme of arrangement under the Act, it would seem that s 113 provides for the initiation of proceedings for the winding-up of a company and that s 115 supplements it by ante-dating the commencing date of the order. The mischief aimed at by s 115 is a possible attempt by a dishonest company, or directors, or creditors or others, to snatch some unfair advantage during the period between the presentation of the petition for a winding-up order and the granting of that order by a Court.'

The view of the learned judge would thus appear to be that even without reference to Rule 3 of the South African rules a petition is 'presented' when it is lodged in proper form with the Registrar, and that accordingly when the application is later heard in court and an order made, the order is back-dated to the time when the petition was lodged.

Mr Pringle referred me to a large number of English decisions on analogous provisions of the English Companies Acts. It is, I think, sufficient to note that in all these cases the approach of the court was that winding up commences when the petition is lodged with the court in proper form.

Giving the words their plain meaning, it seems to me that a petition is 'presented' to the court when it is filed with the Registrar in proper form. It is at that moment that the court is formally requested to consider the matter, and the fact that delay necessarily occurs before the court can actually adjudicate on the matter is, in my view, irrelevant."

See also *Wolhuter Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd (In Provisional*

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Liquidation) 1983 (3) SA 815 (O) at 816D (per Lichtenberg J).

Accordingly, I adopt, as correctly applicable to this case, the interpretation that a petition is "presented" to the court when it is duly filed with the

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Registrar, meaning, in my view, that the petition must be filed in the appropriate form, accompanied"by a certificate of the Master, Assistant Master or a magistrate that due security has been found for payment of all fees and charges necessary for the prosecution of all proceedings until the appointment of a liquidator", as required by s 180(1) of the Companies Act.

That being so, in the light of the unchallenged statement contained in the paragraph numbered 5 of the letter which the plaintiff's legal practitioners, Coghlan, Welsh & Guest, addressed to the defendant's legal practitioners, Gill, Godlonton & Gerrans, on 10 October 1991, which the plaintiff tendered to the court as Exhibit 10, that an application was lodged for M & C Holdings' liquidation on 11 September 1990, it will be seen that the material time, in relation to the setting aside of the three payments in issue as voidable preferences, is when the petition for the winding up of M & C Holdings was filed on 11 September 1990. This was when the winding up is deemed to have commenced in terms of s 183(2) of the Companies Act.

It therefore follows that the payment made on behalf of and debited to M & C Holdings on 12 September 1990 in terms of the cheque for $15 000 dated 11 September 1990 drawn by Zimac (Pvt) Ltd ("Zimac") in favour of the defendant, was made to the defendant only after the winding up of M & C Holdings was deemed to have commenced, as is evidenced by the date stamp of the defendant's collecting bank on the cheque, a photocopy of which is included in Exhibit 2 at p 3, and also by Exhibit 7, being the detailed statement prepared by the defendant reflecting the debits and credits between it and Lorac (Pvt) Ltd ("Lorac"). I shall return to the effect of this payment in due course.

Section 186(c) of the Companies Act provides that, in a winding up by the court,"every disposition of the property, including rights of action, of the company É made after the commencement of the winding up, shall, unless the court otherwise orders, be void".

Section 44 of the Insolvency Act, as applied by s 242 (1) of the Companies Act, provides:

> "(1) Subject to the provisions of this section, every disposition of his property made by a debtor within the period of six months immediately preceding -
>
> (a) the sequestration of his estate; or
>
> (b) .. .

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which has the effect of preferring one of his creditors above another may be set aside by a court if,

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immediately after the making of the disposition, the liabilities of the debtor exceeded the value of his assets.

(2) A disposition shall not be set aside in terms of subsection (1) if the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.

(3) ...".

In s 2(1) of the Insolvency Act "disposition" is defined as meaning "any transfer or abandonment of rights to property, and includes a sale, lease, suretyship, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor but does not include a disposition in compliance with an order of a court ".

"Property" is defined as meaning "movable or immovable property wherever situated within Zimbabwe, and includes contingent interests in property other than the contingent interest of a fideicommissary instituted by will or deed *inter vivos"*.

At the outset of the trial, Mr de Bourbon, who appeared for the plaintiff, put in, as Exhibit l, a document headed "Agreed Statement of Facts", which was signed by both counsel, and a bundle of documents, which was marked Exhibit 2.

The agreed statement of facts reads as follows:

"1. The Plaintiff, Mr Michael Harvey Field, was appointed as the liquidator of M & C Holdings (Private) Limited, together with thirteen other companies within that group and was also appointed as the trustee of the insolvent estates of Michael Fewster and Carol Fewster, who were the directing shareholders and directors of the M & C group of companies.

2. The application for the liquidation of the companies and the sequestration of the two estates was made by the Merchant Bank of Central Africa Limited and a provisional order was granted on 23 October 1990. The final order was granted on 21 November 1990.

3. As at 31 March 1990, the assets of M & C Holdings (Private) Limited (and the group as a whole) totalled $11 386 894. As at that date its liabilities were not less than $15 724 011, giving a shortfall of assets to meet liabilities of at least $4 337 117.

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4. Between 31 March 1990 and the date of liquidation, the group disposed of many of its assets, and utilised the funds to pay some creditors. As at the date of liquidation, the accountant of the group estimated a deficiency of assets to meet liabilities of $9 361 384. Subsequently, three creditors have proved claims totalling $2 453 090, which claims did not appear in the statement of affairs lodged as at liquidation. Accordingly, the shortfall of assets over liabilities was approximately $11 814 474.

5. The three payments in the present case were made in respect of guard services provided by the Defendant at the instance of Lorac (Private) Limited to companies and persons with (sic) the group.

6. In order to make the payments and also payments to certain other creditors, assets belonging to the group which had been secured to banks by cession were sold, and the cash so realised paid to two companies called Zimac (Private) Limited and Olray Enterprises (Private) Limited.

7. On 7 September 1990 a cheque was drawn by Zimac (Private) Limited in favour of the Defendant in the

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sum of $10 000. This cheque was deposited on the same day by the Defendant into its bank account.

8. On 11 September 1990 a cheque for $15 000 was drawn by Zimac (Private) Limited in favour of the Defendant, which the Defendant paid into its bank on 12 September 1990.

9. At no time did Zimac (Private) Limited owe any money to the Defendant.

10. Zimac (Private) Limited debited the total sum of $25 000 paid to the Defendant against the monies that it was holding on behalf of M & C Holdings (Private) Limited from the sale of the assets.

11. Certain vehicles belonging to the group were sold, and instead of the proceeds being paid to Zimbabwe Banking Corporation Limited, who in terms of a general covering notarial bond were entitled to the proceeds thereof, the proceeds were paid to Olray Enterprises (Private) Limited. On 24 August 1990 a cheque for $15 000 was drawn by Mrs Scott of Olray Enterprises (Private) Limited in favour of the Defendant, and deposited by the Defendant in its bank account on the same day.

12. Olray Enterprises (Private) Limited did not owe any money to the Defendant.

13. At that time, M & C Holdings (Private) Limited had entered into an agreement for informal judicial management and had agreed that administration and Management Services (Private) Limited (AMS)

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were to act as the informal judicial managers. The assets were sold without reference to AMS, and the payments were made without reference to that company. The sale of the assets and the failure to account for the proceeds thereof was in addition a breach of the agreement requiring M & C Holdings (Private) Limited to conduct all its financial affairs through AMS."

Before I proceed to apply the law to the material facts as they emerged from the agreed statement of facts and the other evidence led at the trial, which was largely common cause, I wish to return to the matter of the parties' pleadings.

As already pointed out, the parties both chose to come to trial and to do combat with each other on the basis that a debtor/creditor relationship existed between M & C Holdings and the defendant.

This I found most surprising and incongruous having regard to the evidence led by the parties themselves, as referred to below.

Although there was no need for the defendant's counsel to pursue the point in the light of the plaintiff's allegation, in para 5 of his declaration, that the defendant was a creditor of M & C Holdings and the defendant's admission that a creditor/debtor relationship existed between it and M & C Holdings, the following exchange took place when Mr *Dyke* cross-examined the plaintiff.

"Q: As regards the relationship between M & C Holdings and the defendant, what is it that you are saying, that the defendant was not a creditor of M & C Holdings?

A: Yes.

Q: Paragraph 5 of your declaration indicates otherwise, it seems to be accepted there that the defendant was a creditor of M & C Holdings?

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A: It was a creditor of the M & C Holdings group but not of the Company itself and it proved its claim against Lorac.

Q: A creditor of the group? Can you be more specific in your meaning, seeing that you say a claim was proved against Lorac, are you saying that no claim was proved against M & C Holdings by the defendant?

A: There was no claim against M & C Holdings.

Q: Are you saying that the defendant may not claim against M & C Holdings because its claim should be against Lorac?

A: Yes, unless there was a guarantee of which I am unaware."

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(The word "disposition" is defined in the Insolvency Act to include a suretyship.)

In view of this exchange, one is left wondering why it is that the plaintiff's legal practitioners elected to have the payments in issue set aside as voidable preferences as opposed to dispositions without value. On the other hand, this may explain why it is that the defendant admitted and its legal practitioners and Mr *Dyke* have argued and insisted at all times that a creditor/debtor relationship existed between the defendant and M & C Holdings.

Apropos of the defendant's claim to be a creditor of M & C Holdings, the defendant's financial director, Richard Ian Robinson, testified that the security services rendered by the defendant in respect of the various properties of the M & C group were rendered at the instance of Lorac and that separate contracts for such security services had been entered into by the defendant with Lorac (there being fourteen agreements listed in Part I of the Schedule to the defendant's discovery affidavit), on the terms contained in the contract put in as Exhibit 4, under which the fees were "payable within not more than thirty (30) days after presentation of an account therefor" by the defendant to the client. Further, when asked in cross-examination by Mr *de Bourbon*,"Do you agree that your company did not provide any services to M & C Holdings (Private) Limited?", Mr Robinson replied, "From the information I have now, M & C Holdings did not own any properties, so yes. "Mr Robinson also agreed that at no time had the defenant received any cheque drawn on the account of M & C Holdings.

Thus, it is evident that the creditor/debtor relationship which arose from the security services supplied in respect of the various properties of the M & C group arose between, on the one hand, the defendant and, on the other, Lorac and not M & C Holdings, which it would therefore appear never became indebted to the defendant for any security services supplied by the defendant.

In this connection, it seemed to me, from his argument, that Mr *Dyke* was under the belief that because the security services had been provided by the defendant for the M & C Holdings group of companies, that was sufficient to establish a creditor/debtor relationship between the defendant and the holding company, M & C Holdings, notwithstanding the fact that the separate contractual arrangements for the security services were between the defendant and Lorac. In

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other words, Mr *Dyke* did not appear to be concerned about distinguishing between the different corporate entities within the M & C Holdings group.

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I pause here to point out that the plaintiff was mistaken when, in his evidence- in-chief, he said that M & C Holdings did not own any immovable property. The defendant's Mr Robinson was likewise mistaken when, under cross-examination, he made the same statement, since at p 17 of the petition presented by the Merchant Bank of Central Africa Limited ("the Merchant Bank") for the winding up of M & C Holdings and its thirteen subsidiary companies, which was put in by the plaintiff as Ex 3, M & C Holdings is reflected as the title holder of Lot l of Lot 36, Glen Lorne ("the said property"), otherwise described as l Coombehead Road, Glen Lorne (see annexure S to Ex 3). See also the schedule headed"Schedule of Immovable Property"annexed to annexure A to Ex 3. However, in consistency with the evidence led, as confirmed by the agreements listed in the defendant's discovery affidavit, it will be observed from item 14 of the defendant's discovery affidavit that it was Lorac, and not M & C Holdings, which entered into n agreement with the defendant relating to the said property, presumably for the provision of security services.

Nevertheless, even though the defendant might have provided security services for M & C Holdings at the said property, the fact remains that no creditor/debtor relationship was created between the defendant and M & C Holdings in respect of the supply of such security services. In any event, according to Mr Robinson's evidence, the security services provided for the said property were dispensed with by Lorac in a letter which it submitted to the defendant on 21 August 1990, so that there can be no question of M & C Holdings having derived any benefit from security services supplied by the defendant after 21 August 1990, thereby putting paid to any possible argument by the defendant that M & C Holdings had received, to some extent, a quid pro quo for the payment, debited to M & C Holdings' account, of $15 000 made on behalf of Lorac to the defendant on 24 August 1990, allegedly in advance for security services to be supplied by the defendant for September 1990.

To return to the matter of the pleadings, from what has been said above, it will be seen that the court is confronted with the peculiar state of affairs that, while the evidence points to the absence of any creditor/debtor relationship between the defendant and M & C Holdings, the defendant has insisted on adhering to its admission that such a relationship did exist between it and M & C Holdings, a relationship which has underpinned the presentation and argument of its defence to the plaintiff's action.

In order to determine the stand which I should take on the admission in

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question made by the defendant, it is necessary to have recourse to the Civil Evidence Act 1992 ("the Civil Evidence Act"), the Rules of this court and the case authorities in point, from

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which the following points emerge:

(a) A party who makes an admission in a plea is bound to the extent of the admission as long as the admission stands. See *Rance v Union Mercantile Co Ltd* 1922 AD 312 at 315 (per DE VILLIERS JA) and 319 (per JUTA JA) and *van Deventer v de Villiers* 1953 (4) SA 72 (C) at 75G (per HERBSTEIN J).

(b) It is not necessary for any party to prove any fact so admitted in a plea by a defendant. See s 35(3) of the Civil Evidence Act.

(c) An admission in a plea, once made, can be withdrawn only with leave of the court, see the proviso to s 35(4) of the Civil Evidence Act, rule 189 and Beck's *Theory and Principles of Pleading in Civil Actions,* 5 ed at p 69 (para 38).

(d) Although, in general, a court may not go behind an admission and give a finding of fact at variance with an admission made on the pleadings, if a court is to disregard such an admission, it will do so only where it is clear after a full investigation that the admission is contrary to the facts and where injustice would result from an adherence to the admission. See *Canaric NO v Shevil's Garage* 1932 TPD 196 at 199 (per GREENBERG J) and van *Deventer's* case supra at 76A.

In the light of these points, I turn now to consider the issue of whether I should go behind the admission in question tely that, in my view, for the reasons which follow, there is no justification for me to disregard the admission in question.

In the first place, I would reiterate that the defendant has at all times adhered to the admission in question, to the point of insisting on conducting and arguing its defence on the basis of this admission. Accordingly, if by virtue of its decision to engage in litigation with the plaintiff within the confines and rules of combat chosen by it, the defendant loses the combat, it cannot be heard to complain that it has been hoist by its own admission.

Secondly, and in any event, I do not consider that this is a case entitling the court to go behind the admission in question on the test postulated by GREENBERG J in *Canaric's case supra.* I am prompted to say this for a couple of reasons. Firstly, as I have already pointed out, both parties were mistaken in their evidence that M & C Holdings owned no immovable property since, as shown, M & C Holdings owned the immovable property at 1 Coombehead

Road, Glen Lorne, for which it appeared that security services were provided by the defendant up to 21 August 1990. Consequently, to the extent that the defendant had supplied security services for the direct benefit of M & C Holdings up to 21 August 1990, it might be argued that M & C Holdings was in debt to the defendant. Secondly, when, in answer to Mr *Dyke's* question put to him in cross-examination,"Are you saying that the defendant may not claim against M & C Holdings because its claim should be against Lorac?", the plaintiff replied,"Yes, unless there was a guarantee of which I am unaware", this was an indication of a possible basis on which a

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debtor/creditor relationship could have arisen between M & C Holdings and the defendant.

In this regard, it must, of course, be appreciated that we are not here dealing with a party who should have been aware of all facets of its indebtedness to the defendant, but with a person who had to step into the shoes of M & C Holdings and try to familiarise himself with the financial affairs of that Company, by no means an easy or enviable task when account is had to the evidence led on some of the devious ways in which M & C Holdings' controlling shareholder and director, the notorious Mr Fewster, conducted the business operations and financial affairs of M & C Holdings and its thirteen subsidiary companies.

Consequently, it follows that I cannot be persuaded, in the absence of a full investigation into the matter, that the court should disregard the admission in question made by the defendant.

In any event, even if I am wrong in arriving at this decision, before the court may disregard an admission made in the pleadings, it must also be persuaded that an injustice would result from an adherence to the admission.

In this respect, while, on the one hand, it may be considered unjust that the defendant should have to refund the payments in issue if it was not in fact a creditor of M & C Holdings for purposes of s 44 of the Insolvency Act, *mutatis mutandis,* on the other hand, I believe that the court must also consider the question of any injustice or prejudice to the plaintiff if the court were to disregard the admission in question, which leads me on to my third and final point.

However, before moving on to that point, let me say that when considering the question of injustice on the defendant's side, I think it highly relevant to have regard to the question of the defendant's good faith in the matter. It is

precisely in this respect that doubts were raised in my mind as I observed the defendant's financial director, Mr Robinson, seeking to explain, when he was under cross-examination by Mr *de Bourbon,* how it was that the defendant, in submitting its claim for guard services against Lorac (in liquidation), had failed to set out the full history of its account, including its omission to reflect any payments received, in particular, the payments in issue.

Certainly, I was not impressed by the unconvincing explanation offered by a person who is a chartered accountant, as Mr Robinson is, as recorded in the following exchange between Mr *de Bourbon* and Mr Robinson:

"Q: Attached to the claim submitted by you against Lorac was a Statement dated 20 April, 1991?

A: It was.

Q: Listing a series of invoices from 31 May, 1990 to 11 October, 1990?

A: Yes.

Q: But this statement does not list a single payment?

A: Correct, because when the debtors' clerk prepares a Statement like this one he would have allocated the

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payments against the longest outstanding invoices.

Q: That couldn't be right if what you've told the court is correct, you've referred to payments in advance?

A: We did not like this, so claims would be allocated to specific invoices, the agreement with Fewster was for general payments.

Q: You've just contradicted yourself.

A: When I used the word general, when we agreed that payments would be in advance for the month, the balances every month are very different depending on the different jobs we do. As a financial director I was concerned with the recovery of as much money as possible and therefore I came to the agreement with Fewster that he would pay $15 000 as a round figure for services rather than to the cent.

Q: You say that you are a chartered accountant. When you received moneys in advance for services, what gives you the right to credit that amount against an old outstanding debt?

A: We are receiving money for purposes of putting in our claim, I felt it was better that specific invoices could be quoted and handed in rather than a five page document."

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I now move to my third reason for not being prepared to disregard the admission in question. In considering the question of any injustice which would result from an adherence to an admission which is contrary to the facts, I believe that the court must take an overall view of the picture since, for it to disregard an admission made by one party in the pleadings could work an injustice to, or prejudicially affect the other party if the latter is not first given the opportunity of amending his pleadings or of leading evidence which he would not otherwise have led, so as to take account of the court's intended disregard of the admission.

In this respect, I can do no better than refer to the following remarks of GREENBERG J in *Canaric's* case *supra,* at 199:

> "At no stage of the proceedings in the present case was any application made to amend the pleadings in order to withdraw the admission that a contract had been entered into between Miss Canaric and respondents and that the Durant car and the £20 had been paid to respondents on her behalf, nor was the evidence of Laden and Miss Canaric put before the court on these points nor indeed did respondents advance the contention themselves. One can understand the appellant not producing these witnesses as on the state of the pleadings they were unnecessary, but if the magistrate intended to decide the issue whether there was in fact a contract between Miss Canaric and respondents I do not think he should have done so without an amendment of the pleadings or without clearly giving the appellant an opportunity of putting all the evidence before him."

Thus, in the present case, on the approach which I take to the matter, it would have been both unjust and prejudicial to the plaintiff for the court to have disregarded the admission in question without first having given the plaintiff the chance of amending his declaration by pleading, in the alternative, and of leading such evidence as he might have wished to lead to show that the payments in issue constituted dispositions without value in terms of s 42 of the Insolvency Act, *mutatis mutandis.*

On the question of injustice generally, it is important to bear in mind that the plaintiff is seeking

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to recover the payments in issue not for himself but as the liquidator of M & C Holdings on behalf of and for the benefit of the creditors of that company; and that it was accepted by Mr *Dyke* in his closing address to the court that the payments in issue constituted dispositions of M & C Holdings' property which had had the effect of preferring the defendant

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above other creditors at a time when the liabilities of M & C Holdings had exceeded the value of its assets.

Accordingly, the court should not be seen to lean over backwards to assist one creditor of M & C Holdings retain monies, at the expense of other creditors, all the more so when, according to the plaintiff, five other creditors who were also paid in the same unusual manner as the defendant, had seen fit to refund the plaintiff the monies claimed from them as voidable preferences, without being forced to do so by order of court.

In the premises, I do not consider that I can or should go behind the defendant's said admission in determining the main question of whether the payments in issue should be set aside as constituting voidable preferences under s 44 of the Insolvency Act, *mutatis mutandis.*

I therefore proceed to address the main question by letting the said admission remain undisturbed.

In his closing address, Mr *Dyke* accepted that the plaintiff had discharged the *onus* resting upon him under s 44(1) of the Insolvency Act, *mutatis mutandis,* of proving that there had been a disposition, in the form of the payments in issue, of M & C Holdings' property by M & C Holdings to the defendant, as its creditor, within the period of six months immediately preceding the date of the winding up of M & C Holdings which had had the effect of preferring the defendant above the other creditors of M & C Holdings at a time when the liabilities of M & C Holdings had exceeded the value of its assets.

In the circumstances, the key question for decision is whether, to avoid the payments in issue being set aside as voidable preferences under s 44(1) of the Insolvency Act, *mutatis mutandis,* the defendant has succeeded in discharging the onus upon it under subs (2) of proving, on a balance of probabilities, that the said dispositions were"made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another".

When dealing with s 44(2) of the then Insolvency Act 13 of 1973 (the wording of which section was identical to that of the present s 44(2)), in *Eliasov NO v Arenel (Pvt) Ltd* 1979 (3) SA 415 (R) at 418F; 1979 RLR 123 (G) at 127H, a case in which I notice that Mr *de Bourbon* appeared for the defendant, BEADLE AJ stated:

> "In terms of the Act as it exists today the onus is on the creditor receiving

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> the payment to show either that the debtor, when he made the payment, did not intend to prefer him, or else to show that the transaction was one done in the ordinary course of business. The defendant company has leaded both these defences."

With respect, I do not subscribe to the interpretation placed on the section in question by BEADLE AJ and am of the firm view that s 44(2) of the Insolvency Act requires the creditor to prove both that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another. I therefore agree with the South African authorities who take the same view. See *Nicholls & Whitelaw NO v Akoo* 1948 (4) SA 197 (N) at 203, where SELKE J stated:

> "That being so, if the defendant is to defeat the claim of the plaintiffs, it is incumbent upon him, in terms of s 29(1) of the Act, to prove that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another. As I read the subsection, it seems clear that if the defendant fails to prove either of these things, his defence fails."

See also *Dreyer's Trustee v Hanekom* 1919 CPD 196 at 204 (per GARDINER J) and *Ensor NO v New Mayfair Hotel* 1968 (4) SA 462 (N) at 467D, where MILNE JP said:

> "In any event, as I have said, the burden is upon the respondent to prove that there was no intention to prefer and there is no such proof. In the absence of such proof the disposition must be set aside even if the payment, regarded objectively, was in the ordinary course of business, as to which see *Hendriks NO v Swanepoel* 1962 (4) SA 338 (AD)."

See also Mars *The Law of Insolvency in South Africa,* 8 ed at p 218, para 12.19 and Catherine Smith *The Law of Insolvency,* 3ed at p 132.

Consequently, should the defendant fail to surmount the first hurdle of proving that the payments in issue were made in the ordinary course of business, then it will fail in its bid to have the said dispositions set aside as voidable preferences.

In considering whether the defendant has discharged the onus resting upon it, I wish to stress that the matter must be approached on the basis of the admitted debtor/creditor relationship between M & C Holdings and the

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defendant and not on the basis of any debtor/creditor relationship between Lorac and the defendant, since there is no evidence to show that, in its dealings with the defendant, Lorac was acting in any way for or on behalf of M & C Holdings.

Accordingly, the question of what took place between Lorac and the defendant and whether, in terms of any agreement reached between them, the payments in issue can be said to have been made in the ordinary course of business without the intention to prefer the defendant above other creditors of Lorac is not relevant to the question of whether, as between M & C Holdings and the defendant, the payments in issue were made in the ordinary course of business without the intention to prefer the defendant above other creditors of M & C Holdings.

The principles which have been evolved by the courts when determining whether a particular transaction was made"in the ordinary course of business"are admirably and succinctly

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summarised in Catherine Smith *The Law of Insolvency* 3 ed at pp 128 to 129 as follows (I have taken the liberty of correcting certain errors which appear in the text and in respect of the case citations):

> "The words ordinary course of business' have been the subject matter of much judicial comment but a conclusive and comprehensive definition is, necessarily, difficult of formulation. Business is a variable concept; business methods vary from place to place, time to time and transaction to transaction. Business is, so said de VILLIERS JP:
>
> > 'progressive, and it would no doubt be hard to find many business transactions which are exact replicas. Some variation in one feature or other may be expected to occur, or some combinations of previously well known features.' (*Fourie's Trustee v Van Rhijn* 1922 OPD 16.)
>
> Our courts have over the years evolved the following principles which serve as a guide in determining whether or not a particular transaction falls within the ambit of these words.
>
> The approach of the court must be objective, that is, the decisive consideration is not the attitude or opinion of the insolvent or debtor but that of the ordinary man of business; the court must ask itself whether if regarded objectively solvent persons would in the normal course of business act in the same way as the parties concerned in the transaction. *(Hendriks v Swanepoel* 1962 (4) SA 338 (A) 342 et seq; *Pretorius' Trustee*

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> v *Van Blommenstein* 1949 (1) SA 267 (O) 273.) DE VILLIERS JP said that the test is:
>
> > 'whether the disposition is in accordance with ordinary business methods and principles obtaining amongst solvent men of business; that is to say that a disposition, in order to be in the ordinary course of business, must be one which would not to the ordinary man of business appear anomalous or unbusinesslike or surprising. *(Malherbe's Trustee v Dinner* 1922 OPD 18 22. See also *Dreyer's Trustee v Hanekom* 1919 CPD 196 204 where Gardiner J said:"it seems to me that the test of this is, what would an ordinary, upright and straight-forward man of business have done if he had been in Dreyer's position? ")'
>
> This is the measuring stick against which the transaction in question must be evaluated. In short a person, even if his liabilities exceed his assets at the moment, is entitled to run and maintain his business in a usual and proper manner, no doubt in the hope of recovering solvency, provided he follows the normal ways of doing so. If this favours one creditor rather than another, that is then irrelevant.
>
> Whether the transaction complies with this requirement must be determined by reference to the manner in, and the circumstances under which the disposition was made, disregarding those factors which point to an intention to prefer (*Van Eeden's Trustee v Pelunski and Mervis* 1922 OPD 144 149), or the fact that the debtor's liabilities exceeded his assets at the time he entered into the contract *(Hendricks v Swanepoel* 1962 4 SA 338 (A) 345; *R v Myers* 1931 TPD 304 309; *Fourie's Trustee v Van Rhijn* 1922 OPD l 4 & 5). The court must be in possession of all relevant facts; as DE WET J said:
>
> > 'the transaction must not be regarded as standing by itself, but must be considered in the light of all the surrounding circumstances. (*Malk (Pty) Ltd v Franks and Solomon* 1935 TPD 85 91. See also *Giddy, Giddy and White's Estate v Hughes & Co* 1937 EDL 335 353, where it was pointed out that an otherwise ordinary disposition might in the light of surrounding circumstances bear quite another complexion.)'
>
> Not only must the court have regard to all the surrounding circumstances but it must also consider the actions of both parties to the transaction. A disposition necessarily involves two persons and no satisfactory overall picture of the transaction can be obtained if the actions of one party are considered and those of the other ignored. (*Estate Hunt v De Villiers* 1940 CPD 79 110 & 111.)"

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ROBINSON J

Guided by the principles enunciated above, I now proceed to consider whether the payments in issue were made in the ordinary course of business, to which end I shall start by looking to the nature of the business carried on by M & C Holdings, although I appreciate that this is not something which is to be regarded as a decisive factor.

Paragraph 5(a) of Ex 3 states that in terms of its memorandum of association, the principal object of M & C Holdings is-

> "To carry on business of an investment, investment trust, finance and holding company and to undertake and transact all kinds of trust and agency business and to act as consultants and to render services for profit".

As described by Mr *de Bourbon*, the plaintiff's evidence was to the effect that the business of M & C Holdings was of a three-fold nature in that-

(a) it was the holding company of shares in thirteen other companies in the group;

(b) it was the holder of certain movable assets in the form of motor vehicles;

(c) it was the umbrella organisation for loan accounts within the group which were channelled through it.

Mr *de Bourbon* then went on to point out that the defendant had led no evidence to show how the payments in issue were treated within the M & C Holdings group, that M & C Holdings did not owe any money to the defendant and that it was not part of the business of M & C Holdings to pay the debts of a subsidiary company without reflecting the transaction as a loan. Thus, Mr *de Bourbon* argued, this was a case of M & C Holdings having dispossessed itself of moneys without reference to Lorac, which could not be regarded as a disposition by M & C Holdings in the ordinary course of business.

In the absence of any evidence from the defendant to show how it can be said that the payments in issue had been made in the ordinary course of business when M & C Holdings caused payment to be made to the defendant for security services provided by the defendant at the instance of Lorac, for the payment of which M & C Holdings was not liable, I cannot but agree with Mr *de Bourbon's* submission.

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However, before moving to another point which, additionally and in any event, I consider effectively demolishes the defence relied upon by the defendant, it is pertinent for me to highlight a piece of evidence which the plaintiff gave about the main actor in the unfortunate M & C Holdings' saga who was "calling the tune" for M & C Holdings, namely, Mr Fewster ("Fewster").

In answer to a question from Mr *de Bourbon* as to whether, from his investigations, he was able

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to say whether the Merchant Bank was being paid back its indebtedness in August/September, 1990, the plaintiff replied:

> "No, my inquiries show that the Merchant Bank was not getting part of its debt paid at the same rate as other creditors, the Fewsters were using various means, for example, Olray, to pay ordinary concurrent or unsecured creditors, which had the effect of prejudicing the two Banks, particularly the Merchant Bank. There were also monies paid to another company which does not feature in this case which were used to pay creditors as opposed to the Merchant Bank."

I would also refer to the following paragraph contained in the letter from Zimac's director, Mr S H Rodger, to Coopers & Lybrand dated 26 November, 1990, relating to M & C Holdings which is to be found at p 4 of Ex 2:

> "As part of the ordinary course of our business we maintain an account with Beverley Building Society containing clients funds for investment. Mrs Fewster paid to us the proceeds of certain sales of assets to hold for the company for the purpose of paying off staff and so on prior to the liquidation order, as far as we are aware the revenue paid to us was the proceeds of sales of vehicles made by them, although most likely not the whole proceeds. However, no sooner had the funds been paid to us than we were instructed by Mr Fewster to pay creditors on his behalf. We felt that he was making voidable dispositions and we are not in any event prepared to be his bank and we terminated the arrangement."

Let me say at once that I am convinced that, objectively viewed, no solvent "ordinary, upright and straight-forward man of business"(see *Dreyer's Trustee supra,* at 204) would have, in the normal course of his business, resorted to the underhand method used by Fewster to cause the payments in issue to be made to the defendant, that is to say, from the sale of assets of M & C Holdings and other subsidiary companies of the group, which should

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have been disposed of through Administration and Management Services (Private) Limited ("AMS"), which was supposed to be acting as an informal judicial manager of M & C Holdings in terms of a temporary moratorium granted by the Merchant Bank and Zimbabwe Banking Corporation Limited ("Zimbank") to M & C Holdings, and the proceeds of which should have been paid over to AMS for the benefit of the Merchant Bank and Zimbank and not to two companies operating outside the M & C Holdings group, namely, Olray Enterprises (Private) Limited ("Olray") and Zimac.

Certainly, the court can confidently say that, when regard is had to the manner in which and the circumstances under which the payments in issue were made, these dispositions would have appeared to a solvent businessman "anomalous", "unbusinesslike" and "surprising" (see *Malherbe's Trustee v Dinner & Ors* 1922 OPD 18 at 22), if not fraudulent or dishonest or, at least, highly irregular.

I feel it both pertinent and instructive here to refer to the case of *Est van Schalkwyk v Hayman & Lessem* 1947 (2) SA 1035 (C), the headnote of which reads as follows:

> "What is covered by the phrase 'in the ordinary course of business' in s 29(1) of Act 24 of 1936 must of necessity in each case depend on its own special circumstances.
>
> A disposition made in fraud of the rights of a third party cannot possibly be held to be a payment to a creditor 'in

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the ordinary course of business'.

Although the mode only and not the intention of a disposition is relevant in deciding whether it was made in the ordinary course of business, nevertheless the consequences - whether intended or not - which follow from the mode employed must in the absence of other evidence be relevant in determining whether a disposition is in accordance with the principles, practices and methods which would be adopted by solvent men of business in the given circumstances.

Where therefore a roundabout way of effecting a comparatively simple transaction was adopted which led to anomalous and unbusinesslike results,

Held, in the absence of a satisfactory explanation by the defendants, that they had not discharged the *onus* of proving that the transaction was performed in the ordinary course.

Held, further, that the fact that the payment was made by the insolvent in fraud of the rights of third parties, though the defendants were not

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knowingly a party to the fraud, made it impossible to hold that it was made in the ordinary course of business.'

Likewise, in the present case, in which the plaintiff testified that when he took office after the liquidation of the M & C Holdings' group of companies,"it was clear that there had been deliberate attempts to mislead creditors and there were substantial sums of money unaccounted for"and in which Fewster had been dishonest, if not fraudulent, in his conduct towards the Merchant Bank and Zimbank, the court would be placing the stamp of approval upon dishonest, if not fraudulent, acts in business to use the words of SEARLE AJ in van *Schalkwyk's* case *supra,* if it were to hold that the payments in issue had been made to the defendant in the ordinary course of business, even though the defendant was completely ignorant of the dishonest acts of Fewster.

Further difficulties confront the defendant even if, *vis-à-vis* M & C Holdings, the defendant could have relied upon the agreement recorded in the letter from the defendant's Mr Robinson to the managing director of Lorac dated 14 June 1990 that the defendant was to be paid $15 000 in advance by the first day of each month for security services to be provided for that month and $15 000 on the 15th day of each month towards the arrears account for security services until such time as the arrears were settled and even if it had been assumed that, as a *quid pro quo* for the security services supplied by the defendant at M & C Holdings' property at l Coombehead Road, Glen Lorne, M & C Holdings could be treated as a debtor of the defendant.

In the first place, as regards the payment of $15 000 made to the defendant on 24 August 1990 by way of a cheque drawn by Olray in favour of the defendant, which was debited to M & C Holdings' account at Fewster's instance and which the defendant's Mr Robinson said in evidence was a payment made in advance for services to be provided in September 1990, the fact is that the letter under cover of which the cheque was forwarded to the defendant by Lorac stated that the cheque from Olray was"in part payment of Lorac (Pvt) Limited's account"and not an advance payment for security services to be provided in September 1990.

In any event, in the light of Mr Robinson's evidence that the security services for M & C Holdings' said property had been cancelled on 21 August 1990, clearly M & C Holdings derived

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no benefit from the advance payment of the said $15 000 made to the defendant for security services to be supplied in September 1990.

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Secondly, as regards the cheques for $10 000 and $15 000 drawn by Zimac in favour of the defendant, dated 7 September 1990 and 11 September 1990 respectively, which were both debited to M & C Holdings' account at the instance of Fewster, the first one, according to Mr Robinson's evidence, being a payment to replace a dishonoured cheque and the second one being the September instalment towards the arrears owing in terms of the agreement between Lorac (Private) Limited and the defendant, in the absence of any evidence to say how the said cheques were appropriated by the defendant, it is not possible to know whether either cheque was applied to the amount due for the security services provided for M & C Holdings' said property and, if it was, to what extent.

In any case, because the cheque for $15 000 drawn by Zimac in favour of the defendant on behalf of M & C Holdings was paid and the amount thereof debited to M & C Holdings' account on 12 September 1990, that is to say, on the day after the winding up of M & C Holdings was deemed to have commenced in terms of s 183(2) of the Companies Act (failing any evidence to the contrary, it is presumed that the petition by the Merchant Bank for the winding up of M & C Holdings and its thirteen subsidiary companies was presented, in the sense that it was duly filed with the Registrar of this court, on 11 September 1990), that payment, in the absence of any court order to the contrary, is rendered void by s 186(c), as read with s 183(2), of the Companies Act and therefore the defendant has no right to retain it. See *Herrigel NO v Bon Roads Construction Co (Pty) Ltd & Anor* 1980 (4) SA 669 (SWA) at 675A-G *(per* LICHTENBERG J).

Consequently, because of the defendant's failure to discharge the onus of proving that the payments inuperior Courts in South Africa 3 ed p 302-309.

He further sub issue were made in the ordinary course of business, allied to the consequence that the third payment of $15 000 is, in any case, void due to its having been made after the winding up of M & C Holdings was deemed to have commenced, the defendant must fail completely in its defence seeking to justify its retention of the payments in issue. Accordingly, there is no need for me to go on to consider whether the defendant has satisfied the second requisite of proving that, in making the payments in issue, M & C Holdings did not intend to prefer the defendant above other creditors.

However, I wish to add that even if it had satisfied the first requisite by showing that the payments in issue were made in the ordinary course of business, the defendant, in my view, fails to satisfy the second requisite for the reasons explained below.

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The main legal factors bearing on the question of "the intention to prefer" can be summarised

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briefly as follows:

1. The test is a subjective one. As PITTMAN AJP said in *Giddy, Giddy & White's Estate v du Plessis* 1938 EDL 73 at 79:

   "The intention to prefer must reside in the mind of the debtor, and its presence there is ordinarily to be inferred from his conduct."

See also *Eliasov NO v Arenel (Pvt) Ltd supra,* at 418F (127G) (*per* BEADLE AJ).

2. Where there is no direct evidence of the intention to prefer, the court will be influenced in inferring such an intention if it finds that at the material time the debtor contemplated sequestration in the sense that he knew that sequestration was"substantially inevitable". See *Pretorius NO v Stock Owners' Co-operative Co Ltd* 1959 (4) SA 462 (A) at 472H & 473 (per RAMSBOTTOM JA).

3. "If the debtor when paying a debt must have realised that sequestration was inevitable, and that the consequence would be to prefer one creditor above the others, he must be taken to have had an intention to prefer". See Mars, *The Law of Insolvency in South Africa,* 8 ed at 226, *Malk (Pty) Ltd v Franks & Solomon NO* 1935 TPD 85 at 93 (per dE WET J), *Giddy, Giddy & White's Estate v Hughes & Co* 1937 EDL 335 at 355 (per GANE J) and *Pretorius NO's case supra*, at 476F-G (per RAMSBOTTOM JA).

4. There can be no intention to prefer if the debtor had no freedom of choice in making the disposition, in other words, that he was placed under pressure to pay the creditor. See *Swanepoel NO v National Bank of South Africa* 1923 OPD 35 at 39 (per DE VILLIERS JP), *Pretorius' Trustee v Van Blommenstein* 1949 (1) SA 267 (O) at 279 (per HORWITZ J), *Pretorius NO's case supra,* at 476D (per RAMSBOTTOM JA) and *Venter v Volkskas Ltd* 1973 (3) SA 175 (T) at 181A (per BOSHOFF J).

5. The intention to prefer must be"the dominant, operative or effectual intention in substance and in truth". See *Pretorius' Trustee's case supra,* at 279 (per HORWITZ J) and *S v Ostilly & Ors* (1) 1977 (4) SA 699 (D) at 731A-B & F (per KUMLEBEN J)). In *S v Makda* 1974 (1) SA 177 (RA) at 178F-H & 179A; 1973 (2) RLR 244 (A) at 247B-F, BEADLE CJ, after noting that to constitute an "undue preference" in terms of the Insolvency Act [*Chapter 53*], the disposition must be made with the"intention"of preferring one creditor above another, said that it seemed to him that, in that context, the word "intention" must be read in the sense of "motive"

ROBINSON J

and not in the usual sense of knowing that you are doing the act complained of.

Let me first deal with Mr *Dyke's* submission that because of Fewster's anxiety, if not obsession, to retain security services for his group's properties, which I am told Fewster would have been unable to secure had the defendant withdrawn its services and reported the group to the Security Association of Zimbabwe as a defaulting client, Fewster had no choice but to cause

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payment to be made to the defendant in the manner agreed with the defendant in June 1990.

Insofar as I am not satisfied that it would not have been possible for Fewster, had the defendant withdrawn its security services, to have engaged another security firm to provide adequate security services by offering to pay them up front for their services, I do not accept that Fewster was driven to conclude the agreement in question with the defendant under which the payments in issue were made, so that it can be said that because the payments in issue were not made voluntarily, Fewster did not have an intention to prefer.

All the same, it is not clear whether, in manipulating things as he did, Fewster caused the payments in issue to be made in pursuance of the agreement concluded by the defendant with Lorac in June 1990. Certainly, the covering letter from Lorac addressed to the defendant on 24 August 1990 saying that the cheque for $15 000 drawn by Olray was "in part payment of Lorac (Pvt) Limited's account" (Ex 2, p l), conflicting with the evidence of the defendant's Mr Robinson that the cheque was an advance payment for security services to be supplied by the defendant for September 1990, indicates that the payment of $15 000 was not made in pursuance of the said agreement; and, therefore, there is no reason to accept that the other two payments in issue, which were made in September 1990, were made in terms of the agreement in question any more than the payment of $15 000 in August was.

Next I wish to refer to a most revealing and significant portion of evidence given by the defendant's Mr Robinson.

When asked by Mr *de Bourbon* in cross-examination whether he accepted that at the time the three payments in issue were made to his company, the Fewsters must have known that they were on the brink of liquidation, Mr Robinson replied: "I don't know, **from the evidence today it is probable that they did**, there were schemes going on" (my emphasis).

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In the light of this reply and in view of all the evidence, in particular, the evidence on (a) the devious ways in which Fewster was causing M & C Holdings to make payment to certain creditors through Olray and Zimac in preference to the Merchant Bank after the Merchant Bank had demanded payment of the sum of $4 972 158,52, together with interest thereon at the rate of 14% *per annum* calculated from l May 1990, from M & C Holdings in a letter addressed and delivered by its legal practitioners, Coghlan, Welsh & Guest, to M & C Holdings on 24 May 1990; and (b) the subsequent temporary moratorium which the Merchant Bank and Zimbank granted to Fewster for the M & C Holdings group under the intended informal judicial management of AMS, it seems clear, in all the circumstances, that, at the time the payments in issue were made, Fewster must have known that the winding up of M & C Holdings was inevitable and that the result of making the payments would be to prefer the defendant above other creditors of M & C Holding.

Accordingly, I find that the defendant has also failed to discharge the onus of proving that M & C Holdings did not intend to prefer the defendant above other creditors when it made the payments in issue to the defendant.

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In the result, I confirm having set aside the payments in issue (it is, of course, not necessary to set aside the third payment of $15 000 since it is void) and having made an order in the following terms:

> "Judgment, with costs, is entered for the plaintiff in the sum of $40 000 together with interest thereon at the prescribed rate a *tempore morae,* that is to say, at the rate of 10% *per annum* from 13 December 1990 to 5 September 1991, at the rate of 12,5% *per annum* from 6 September 1991 to 9 September 1993 and at the rate of 25% *per annum* from 10 September 1993 to the date of payment."

Coghlan, Welsh & Guest, plaintiff's legal practitioners

Gill, Godlonton & Gerrans, defendant's legal practitioners

MUTSOTSO & ORS v COMMISSIONER OF POLICE & ANOR 1993 (2) ZLR 329 (HC)

Court **High Court, Harare**

Robinson J

Application for spoliation order

6, 9 & 10 November 1993

Flynote

Spoliation - interdicts - requisites - illegality of occupation irrelevant

Headnote

The applicants were residents of a farm acquired by the Government. They alleged that they had been forcibly removed from the farm by police officers and sought a provisional order allowing them to return to the farm.

Held, a provisional order granting a spoliation order would be granted, even if the applicants were in unlawful possession of the property. *(7)

Cases cited:

Nino Bonino v de Lange 1906 TS 120

De Jager & Ors v Farah & Nestadt 1947 (4) SA 28 (W)

Fredericks & Anor v Stellenbosch Divisional Council 1977 (3) SA 113 (C)

Admin, Cape & Anor v Ntshwaqela & Ors 1990 (1) SA 705 (A)

BW Elliot for the applicants

F Zenda for the respondents

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Judgment

Robinson J: This matter came before me as an urgent chamber application. The object of the application was to obtain an order, including an interim order, restoring to the applicants, together with their families, immediate possession of their dwellings on Churu Farm ("the Farm") and allowing them

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ROBINSON J

to remain in peaceful occupation thereof and, in the case of four of the applicants, restoring to them immediate possession of their household goods at the Farm.

All the applicants, except for the seventh applicant who is the wife of the sixth applicant, are elected office holders or members of the Churu Village Committee, who represent the occupants of the Farm, and lessees of stands allocated to them on the Farm on which they have put up dwellings. They all state that from the time they moved onto the Farm until towards the end of October 1993 they were never informed by the Government that they were in unlawful occupation of the Farm - in fact, it was their understanding from their dealings with Government officials that the Government was allowing them to stay on the Farm. The only notice which had been served on them was the one ordering them to leave the Farm by 2 November 1993, failing which they would be forcibly removed.

On 1 November 1993, my brother Bartlett granted a provisional order by consent, at the instance of two occupants of the Farm, temporarily interdicting the first and second respondents from evicting all persons occupying the Farm until the respondents had obtained an eviction order of a competent court.

According to the applicants, on the afternoon of 2 November 1993, more than three hundred police in riot gear arrived at the Farm in trucks. Besides having teargas, many of them were armed with rifles and others with long baton sticks. They cordoned off the entire Farm.

The gist of what all the applicants described as having next happened on the same date or a couple of days thereafter is best told in the words of the first applicant as they appear in paras 9 to 14 inclusive of his founding affidavit.

> "9. On the afternoon of 2nd November, 1993, in excess of three hundred police in riot gear arrived on the farm in trucks. Many were armed with rifles. Others had long baton sticks. They had teargas. They cordoned off the entire farm.
>
> 10. After dark on 2nd November, 1993, two members of the police came to my stand. Both had long baton sticks in their hands. They ordered me to remove my possessions from my house within thirty minutes and leave the farm within two hours.

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> 11. They further threatened me that if I did not comply with this order bulldozers would come and destroy my

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house with everything in it.

12. They told me that we had been given one warning in terms of the notice of eviction and this was now the second warning. They said that they did not want anybody to stay on the farm.

13. I enquired where I was supposed to go to. They replied that I should go where I came from. If necessary, I should live in the streets.

14. I was afraid of this order and threat. I therefore collected my belongings and left the farm during the night together with my family."

The first respondent filed a replying affidavit stating that since the Farm was the property of the State as the authority which had acquired it (under the Land Acquisition Act 1992), the matter was one between the applicants and the acquiring authority, the police presence at the Farm being merely to maintain law and order in the interests of State security. The first respondent therefore contended that he had been wrongly cited in the application.

Alternatively, while admitting that riot police, armed as alleged, had arrived at the Farm in trucks on the afternoon of 2 November 1993, their number, however, being "slightly inflated", and that they had cordoned off the entire Farm, the first respondent alleged that the police deployed at the Farm were not under instructions to evict residents thereof and denied that the riot police had acted unlawfully as alleged since he had no evidence thereof.

The first respondent averred that residents of the Farm were leaving the Farm on the strength of notices issued by the acquiring authority and that re-entry to the Farm was prohibited since it was not practically possible to identify who should and who should not re-enter the Farm. According to the first respondent, "blanket permission for re-entry would open the flood-gates for re-entry by unruly and other illegal elements, thereby endangering State security".

In the circumstances the first respondent denied that the police had in any way defied the order of this court made by Bartlett J on 1 November 1993.

The first respondent accordingly asked that the applicants' prayer for a spoliation order be refused on the following grounds:

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" (a) I, as the Commissioner of Police, am not the correct respondent cited in the applicants' application.

Alternatively,

(b) The applicants were not evicted from Churu Farm by the police but that they left on their own volition on the strength of notices issued by the acquiring authority, and

(c) their return to Churu Farm is not in the interests of State security until the issue of an eviction order from a competent court is finalised, and also that their return would be in contravention of the relevant provisions of the Public Health Act as they would be amenable to arrest under that Act."

Mr *Zenda,* who appeared for the respondents, indicated that his instructions were not to oppose the application, thereby opening the way for me to grant the applicants the provisional order sought by them, including an interim spoliation order requiring the respondents immediately to

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restore to the applicants, together with their families, possession of their dwellings on the Farm and, in the case of four of the applicants, possession of their household goods at the Farm unless and until a court order was obtained for the applicants' eviction from the Farm.

Since there has been such widespread publicity about and continuing interest in the Churu Farm saga, I think it important for me to explain both the effect of the provisional order which I have made and the basis on which a spoliation order is sought and granted.

As already mentioned, the respondents' stance at this stage was not to oppose the provisional order sought by the applicants. This meant that there was no need for me to go into the merits of the matter, that is to say, into the question of whether the allegations made by the applicants about the unlawful behaviour of the riot police towards them are true or not. This question will stand over pending the filing of affidavits by the respondents opposing the confirmation of the provisional order.

I turn now to explain the basis on which a spoliation order is sought and granted.

If, when this matter ultimately comes before it, the court were to find that the riot police had behaved towards the applicants in the manner alleged and that

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the applicants had thereby been cowed into leaving their dwellings and the Farm against their will, so that they had been dispossessed of their dwellings and, in the case of certain of the applicants, their household goods through the duress applied by the servants of the first respondent, for the benefit of the second respondent, then the law to be applied in such a situation is clear. The general principle was stated by INNES CJ in *Nino Bonino v de Lange* 1906 TS 120 at 122 thus:

> "It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the status quo ante, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute."

As explained by MILLIN J in *De Jager & Ors v Farah & Nestadt* 1947 (4) SA 28 (W) at 35, a case where demolition of premises was undertaken without legal process:

> "What the court is doing is to insist on the principle that a person in possession of property, however unlawful his possession may be and however exposed he may be to ejectment proceedings, cannot be interfered with in his possession except by the due process of law, and if he is so interfered with the court will restrain such interference pending the taking of action against him for ejectment by those who claim that he is in wrongful possession. The fact that the applicants have no legal right to continue to live in this slum and would have no defence to proceedings for ejectment, does not mean that proceedings for ejectment can be dispensed with, nor does it make any difference to the illegality of the respondents' conduct that the occupation by the applicants carries with it penal consequences."

In that case the court held that by their conduct in proceeding to demolish certain premises, which were dilapidated, verminous and generally unsanitary, without legal process in order to secure the ejectment of the occupiers, the respondents had committed acts of spoliation and

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they were therefore interdicted from further demolishing those premises.

As stated by DIEMONT J in *Fredericks & Anor v Stellenbosch Divisional Council* 1977 (3) SA 113 (C) at 117C:

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> "This Court is not concerned with the nature of the applicants' occupation. What it is concerned with is that the respondent should not take the law into its own hands ... Such conduct cannot be countenanced or condoned."

The more so, one might add, if the people taking the law into their own hands are the police, the very people to whom members of society look to observe and uphold the law.

In *Fredericks'* case *supra,* where the respondent was found to have unlawfully demolished the applicant squatters' houses on the respondent's land without having first given the squatters written notice of its intention to do so in terms of the South African Prevention of Illegal Squatting Act 1951, the court made an order, which was to be carried into effect forthwith,"directing respondent immediately to restore to the applicants and put them in possession of all their possessions and building materials removed by respondent on 18 February, 1977 **and directing them immediately to re-erect the homes of the applicants forthwith**" (my emphasis).

Although in some quarters there may be sympathy for the authorities because of the way in which they are being frustrated over the Farm, especially given the health hazard allegedly posed, this is irrelevant. If it is found that the applicants have been despoiled of possession of their dwellings and household goods, the rights and wrongs of the applicants' possession and the problems and difficulties which the respondents fact have no bearing on the applicants' immediate entitlement to a spoliation order or, as it is otherwise described, a *mandament van spolie*. See *Administrator, Cape & Anor v Ntshwaqela & Ors* 1990 (1) SA 705 (A) at 718B, a case in which a spoliation order was granted in favour of certain squatters who, together with their possessions, had been removed from the site which they had been occupying in an operation carried out by numerous members of the South African Police, in conjunction with the Cape Provincial Administration, who had provided the transport for the squatters' removal to a towship.

I set out below the terms of the order made by me in the provisional order:

1. That the respondents show cause to this Honourable Court why a final order should not be made in the following terms:

   (a) the respondents are ordered to restore forthwith to the applicants, together with their families who were residing therein, occupation and possession of their dwellings on Churu Farm and to allow them to remain

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in peaceful and undisturbed occupation and possession thereof unless and until a court order has been obtained for their eviction from Churu Farm.

(b) The respondents are ordered to restore forthwith to the fifth, sixth, seventh and eighth applicants and to put them in possession of their household goods at Churu Farm and to allow them to remain in possession thereof peacefully and without interference or hindrance unless and until a court order has been obtained for their eviction from Churu Farm.

(c) The respondents shall pay the applicants' costs of suit on a legal practitioner and client basis.

2. That pending the confirmation or discharge of the order sought in para 1, this order shall serve as an interim order requiring the respondents forthwith to comply with and give effect to the provisions of sub-paras (a) and (b) of para 1.

Scanlen & Holderness, applicants' legal practitioners

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

S v AITKEN 1993 (2) ZLR 336 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Application for leave to appeal

5 & 15 November 1993

Flynote

Criminal law - statutory offences - Exchange Control Act [Chapter 170] - s 5(4) - purpose of section - accused assisting in unlawful sale of foreign currency to the benefit of the buyers - no currency acquired by accused outside Zimbabwe and no currency exported - not an offence involving the acquisition of foreign currency outside Zimbabwe and thus no requirement for accused to repatriate the equivalent sum

Interpretation of statutes - penal provisions - court should strive to avoid a construction which penalises a person in a way not made clear by the legislature

Headnote

The applicant, a legal practitioner, pleaded guilty to three charges under the exchange control legislation. All three charges arose out of transactions in connection with the purchase of motor vehicles, for which payment had to be made to the manufacturer in Germany. Holders of bank accounts in Europe, who wished to acquire money in Zimbabwe to buy immovable property, agreed to sell the currency to persons in Zimbabwe who wished to buy Mercedes - Benz vehicles. The applicant's role was essentially to assist in these transactions, by allowing

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payments of the Zimbabwean currency to be made through his trust account and his firm's building society accounts. For this assistance he received a percentage of the interest earned on the building society accounts.

The JUDGE PRESIDENT, having convicted the applicant, raised the question of the applicability to this case of s 5(4) of the Exchange Control Act. In spite of defence counsel's objections, he held that the three offences

involved the acquisition of foreign currency outside Zimbabwe and adjourned the proceedings to give the applicant an opportunity to satisfy the court that foreign currency, equivalent to the sums acquired for the purchase of the motor vehicles, had been received in Zimbabwe. An application to the Judge President for leave to appeal against the interlocutory judgment was refused and a further application was made to the Supreme Court. There it was argued that the provisions of s 5(4) apply only where the particular contravention of the Act or Regulations is one in which the exportation from, or acquisition outside, Zimbabwe, of the subject property is an essential element or ingredient of the offence.

Held, that the primary purpose of s 5(4) of the Act is to ensure, by the sanction of a mandatory period of imprisonment (where the property exceeds $200), that the State is not deprived by means of unlawful exportation from, or acquisition outside, the country, of any gold, currency, security, goods or other property. The person convicted must be deprived of the use, benefit and enjoyment of the property or its equivalent value in foreign currency.

Held, further, that the court should strive to avoid a construction which penalises a person in a way which was not made clear by the legislature.

Held, further, that the offence of which the applicant was convicted, in order to fall within the provisions of s 5(4) of the Act, must encompass the exportation or acquisition outside Zimbabwe of foreign currency. The act of which he was convicted was one in association with or preparatory to buying, selling or lending foreign currency to a person other than an authorised dealer. Such an act could be one in which the foreign currency is neither exported from nor acquired outside the country. The fact that it may happen that such an act resulted in the currency being subsequently exported from Zimbabwe or that it necessitated the foreign currency being acquired outside Zimbabwe did not bring the exportation or acquisition within the purview of s 5(4).

Application for leave to appeal granted and appeal allowed.

Cases cited:

R v Kamunjoma 1967 RLR 178 (G); 1967 (3) SA 623

S v Manzira 1972 (2) RLR 155 (A); 1972 (4) SA 418 (RA)

S v Muringi 1974 (1) RLR 358 (G); 1974 (4) SA 161 (R)

S v Chifamba 1977 (1) RLR 46 (G)

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S v Saungweme 1977 (1) RLR 143 (G)

R v Beer 62 JP 120

Ex p Bennett 1978 (2) SA 380 (W)

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Spinnaker Invtms (Pty) Ltd v Tongaat Group Ltd 1980 (2) SA 245 (W)

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

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

S v Stead 1991 (2) ZLR 54 (S)

AP de Bourbon SC for the applicant

RH Goba for the respondent

Judgment

Gubbay CJ: This is an application presented to this court in terms of s 44(5a) of the High Court of Zimbabwe Act 1981 for leave to appeal against an interlocutory judgment given by SANDURA JP in the course of criminal proceedings brought against the applicant and at which leave to appeal was refused.

The applicant was indicted before the High Court on seven counts of contravening s 5(1)(a)(i) of the Exchange Control Act [*Chapter 170*] ("the Act"), as read with s 3(1)(a)(ii) of the Exchange Control Regulations 1977 ("the Regulations"). He pleaded not guilty to each count.

After three witnesses had testified on behalf of the State, the prosecutor and defence counsel agreed upon two matters: first, that the number of counts be reduced to three by consolidating in a single count what had formerly been counts two to six; and, second, that the particulars set out in the indictment be amended to reflect that during the period between 26 November 1991 and 13 April 1992, the applicant had assisted Andrew McGeoch, Mr and Mrs Dorianno - Rizzo and Jonathan Upton to sell or exchange foreign currency in varying amounts totalling DM209 264,68 (Z$650 550,69) to and for the benefit of Donald Edgerton and Timothy Milwarde, which foreign currency was transferred by McGeoch, the Dorianno - Rizzos and Upton, to the bank account of Mercedes Benz AG at the Deutsche Bank, Stuttgart, Germany, in payment for Mercedes Benz motor vehicles imported into Zimbabwe through the agency of Zimoco (Pvt) Ltd for the benefit of Edgerton and Milwarde. Whereupon the applicant tendered unequivocal pleas of guilty to the three counts.

Upon consideration of the effect of the viva voce evidence, a joint minute of admissions made in terms of s 291(1) of the Criminal Procedure and Evidence Act [*Chapter 59*], and the statement of agreed facts put before him, SANDURA JP returned a verdict of guilty on each count.

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In essence the facts so established were these.

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AS TO COUNT ONE

The applicant was approached by McGeoch. He was informed that McGeoch had £17 000 available in Scotland which he was willing to sell at the rate of Z$17 to £1, as he was desirous of purchasing a property in Zimbabwe with the proceeds. The applicant was aware at the time that Edgerton was prepared to pay a large amount in Zimbabwe dollars in order to finance, in part, the purchase of a Mercedes Benz 500 SEL motor vehicle. So he, Geoffrey Dartnall of Zimoco (Pvt) Ltd and Edgerton decided that an account with Beverley Building Society be opened in the applicant's name, upon which all three would be signatories. The applicant advised McGeoch that if he were to transfer his foreign currency to the bank account of Mercedes Benz AG in Stuttgart, he would ensure that McGeoch received the agreed equivalent in Zimbabwe. The applicant prepared a typed facsimile instruction to McGeoch's bank in Scotland to pay £17 000 to the bank account of Mercedes Benz AG in Stuttgart. McGeoch signed the facsimile and handed it to Dartall who arranged for its despatch. Dartnall later confirmed to the applicant that the money had been received by Mercedes Benz AG. Thereupon the applicant withdrew $289 000 by cheque from the DW Aitken Account "Wunderkin", No. 4-04-01031L, with the Beverley Building Society and, on 19 February 1993, placed it in a new account with Beverley Building Society styled DW Aitken Account "AMCG", No. 4-04-01053B. On 8 June 1993, $324 273,33, inclusive of interest, was paid by the applicant to McGeoch.

AS TO COUNT TWO

In January 1992, Nigel Hodder, with the knowledge and consent of the applicant, opened the DW Aitken Account"GDM", No 4-04-010505, at Beverley Building Society, with a cheque of $500 000 drawn on the account of First Mutual Life Assurance Society of Zimbabwe, of which company Edgerton was the Chief Executive. The applicant, Hodder and Dartnall, were signatories to this account. A further deposit thereto of $419 490 was made by cheque, again drawn on the aforementioned company. From their bank account in France the Dorianno - Rizzos transferred, upon five dates between 24 February 1992 and 13 April 1992, a total amount of DM88 930,98 to the bank account of Mercedes Benz AG in Stuttgart. On six occasions the applicant withdrew the sum of $50 000 from account number 4-04-010505 when advised by Dartnall that money from the Dorianno - Rizzos had been received by Mercedes Benz AG in Stuttgart. These monies were handed by the applicant to one Benard, the Sales Manager of Zimoco (Pvt) Ltd At the applicant's arrest on 1 March 1992, the sum of $296 490 remained in the

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account. The foreign currency purchased from the Dorianno - Rizzos was utilised to finance the

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acquisition of the aforementioned Mercedes Benz 500 SEL motor vehicle for Edgerton.

AS TO COUNT THREE

On 15 November 1991, the applicant deposited a cheque for $522 476, drawn in favour of his firm by Milwarde, to the DW Aitken and Co Account "Showers P/L", No 4-04-010360C, with Beverley Building Society. On 2 December 1991, the account was closed and an amount of $525 730,77 was withdrawn by two cheques paid into DW Aitken Trust Account at Standard Chartered Bank. A cheque for $500 000 was then drawn on that account, made payable to Johnny Mathews Estate Agency, and sent to Dartnall to be handed to Upton. Dartnall gave the cheque to Upton, who paid it to Johnny Mathews Estate Agency as part of the contract price of $675 000 due for the purchase of a residential property. The money paid to Upton represented the amount in local currency agreed between Upton and Milwarde, through the agency of Dartnall, for the sum of DM71 765 transferred by Upton, on 26 November 1991, from his account with the Bank of Scotland to the bank account of Mercedes Benz AG in Stuttgart. The foreign currency was in payment of a Mercedes Benz 300 GD motor vehicle which was purchased by Milwarde from Zimoco (Pvt) Ltd This motor vehicle was in the Zimoco bonded warehouse in Harare and could only be purchased in foreign currency payable to Mercedes Benz AG. When payment was received from Upton, Dartnall was informed by telex. He, in turn, advised the applicant to release the local funds to Upton. Milwarde then took delivery of the vehicle.

It is apparent from this recitation of the facts that foreign currency was neither exported by the applicant from, nor **personally** acquired by him outside, Zimbabwe. As the amended indictment alleged, he assisted in the sale of foreign currency from McGeoch, the Dorianno - Rizzos and Upton, to Edgerton and Milwarde, for the benefit of the latter. In return for his involvement, the applicant retained a percentage of the dividend (interest) earned on the various accounts with Beverley Building Society.

During the prosecutor's address on sentence the JUDGE PRESIDENT raised the applicability of the provisions of s 5(4) of the Act to the matter. His query took counsel somewhat by surprise as the statement of agreed facts indicated that the State both accepted that the offences did not require a custodial sentence and was not minded to oppose the submission, to be made on behalf of the applicant, that special reasons existed which would permit of the

imposition of a fine less than the value of the foreign currency concerned. Although it is not apparent to this court how the prosecutor responded to His Lordship, defence counsel certainly argued strongly against the proposition.

In a reserved judgment, SANDURA JP held that as the three offences involved the acquisition of foreign currency outside Zimbabwe and as the applicant had assisted Edgerton and Milwarde in unlawfully acquiring such foreign currency, without which the two Mercedes Benz motor vehicles would not have been purchased, the provisions of s 5(4) applied. He accordingly adjourned the proceedings to 6 December 1993, in order to afford the applicant an opportunity

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to satisfy the court that foreign currency in an amount equivalent to Z$650 550,59 had been received in Zimbabwe.

The application for leave to appeal was based upon the following contention. The general power given to a court under s 5(4) of the Act to adjourn the proceedings before passing sentence, so as to give the person convicted of an offence in terms of s 5(1)(a) an opportunity of satisfying the court, on the resumption of the proceedings, that foreign currency in an amount of not less than the value of the property which was exported from, or acquired outside, Zimbabwe, has been received in Zimbabwe, only arises where the particular contravention either under the Act or the Regulations in respect of which he was charged and convicted, is one in which the exportation from, or acquisition outside, Zimbabwe, of the subject property is an essential element or ingredient of the offence.

If this construction of the phrase "an offence ... which involves the exportation from, or acquisition outside, Zimbabwe"in s 5(4)(a)(i) of the Act is correct, the application must be granted by this court and the consequent appeal allowed.

In *R v Michaelis* 1950 SR 27; 1950 (2) SA 353 (SR) it was held that the general power of the court to order a suspension of a driver's licence, or to order that a person be disqualified from obtaining a driver's licence if he did not possess one, which vested where the person concerned"is convicted of an offence against this Act or of an offence under any other law or at common law in connection with the driving of a motor vehicle"(see s 99 of the repealed Roads and Road Traffic Act [*Chapter 257*]) could not be employed where the offence was the failure of a driver to report an accident in which he was involved. It was not an offence"in connection with the driving of a motor vehicle".

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This decision was approved in *R v Kamunjoma* 1967 RLR 178 (G); 1967 (3) SA 623, where the offence under debate was the use of a motor vehicle upon a road without the requisite policy of insurance. LEWIS J (as he then was), with whom FIELDSEND J (as he then was) concurred, held that this, too, was not an offence "in connection with the driving of a motor vehicle", since the words meant an offence, the circumstances of which related to the manner of driving of a motor vehicle - the handling or manipulation in the process of driving it. In the words of the learned judge at 181E:

> "The essence of the offence is the use of an uninsured vehicle, and the offence has no connection, either directly or indirectly, with the manner of driving it."

And at p 182B-C:

> "It is quite clear that the offence can be committed by a person who never drives at all but uses a motor car by employing a chauffeur. **The fact that the accused happens to be actually driving his car at the time of his apprehension by the police is not a necessary element in the offence at all.** He would be equally guilty if he were to leave it stationary in a parking lot at the time of being so apprehended"(emphasis added).

See also *S v Manzira* 1972 (2) RLR 15 (A); *S v Muringi* 1974 (1) RLR 358 (G); *S v Chifamba*

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1977 (1) RLR 46 (G); *S v Saungweme* 1977 (1) RLR 143 (G).

These decisions, in my view, provide valuable guidance in the interpretation of the phrase "an offence ... which involves the exportation from, or acquisition outside, Zimbabwe". Although they turn on the meaning of the expression"in connection with", what is plainly indicated is that the offence of which the accused has been convicted must encompass, as an essential element, the manner in which he handled or manipulated the vehicle in the process of driving it.

I do not consider that the word "involves" imparts a meaning materially different from the expression "in connection with". If anything, "involves" points more directly to the requirement that the exportation or acquisition must be an essential element of the offence in respect to which the person has been convicted.

In Funk and Wagnall *Standard Dictionary - International Edition* Vol I at p 670, the first meaning given, which is the one most appropriate to the

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context of s 5(4)(a)(i) is: "To have as a necessary circumstance, condition or implication". *Chambers 20th Century Dictionary* 1983 ed at p 664, is to similar effect: "Bring as a consequence; to be bound up with". *Stroud's Judicial Dictionary* 5 ed Vol 3 at p 1355 states that:" A thing is only said to be "involved' in another when it is a necessary resultant of that other", and cites in support the case of *R v Beer* 62 JP 120. In *Ex p Bennett* 1978 (2) SA 380 (W) LE GRANGE J, at 384C-D, interpreted the word in the phrase "offence involving dishonesty" as meaning: "an offence of which dishonesty is an element or ingredient". And in *Spinnaker Investments (Pty) Ltd v Tongaat Group Ltd* 1980 (2) SA 245 (W), the contention that the words"a scheme involving "meant" having as a necessary constituent of", was not disapproved by FRANKLIN J (see at 252F).

Before proceeding to determine whether exportation or acquisition is a necessary element or ingredient of the offence of contravening s 3(1)(a)(ii) of the Regulations, I would wish to make certain general observations.

First, the primary purpose of s 5(4) of the Act is to ensure, by the sanction of a mandatory sentence of imprisonment (where the property exceeds two hundred dollars), that the State is not deprived by means of unlawful exportation from, or acquisition outside, the country, of"any gold, currency, security, goods or other property whatsoever". It seems to me that what is envisaged is that the person convicted must be deprived of the use, benefit and enjoyment of the property or its value in foreign currency; there is an obligation on him to repatriate and that obligation persists notwithstanding that he may have disposed of the property in question.

Second, a court should strive to avoid adopting a construction which penalises a person in a way which was not made clear by the Legislature. See *R v Milne & Erleigh* (7) 1951 (1) SA 791 (A) at 823C-F; *R v Moosa & Ors* 1960 (3) SA 517 (A) at 528C; *S v Stead* 1991 (2) ZLR 54 (S) at 58E.

An examination of s 3(1)(a)(ii) does not, to my mind, reveal an exportation from, or acquisition

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outside, Zimbabwe, to be an essential element or ingredient of the offence. The act"in association with or preparatory to buying or borrowing any foreign currency from, or selling or lending any foreign currency to, or exchanging any foreign currency with, any person other than an authorised dealer", may be one in which the foreign currency in question is neither exported from nor acquired outside this country. The accused person would be equally guilty, for instance, if he did an act in association with the buying of foreign currency from a person who possessed

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such currency in Zimbabwe. The fact that it may happen that an act in association with or preparatory to the buying, borrowing, selling, lending or exchanging, of foreign currency, resulted in it subsequently being exported from Zimbabwe, or that the transaction necessitated the foreign currency being acquired outside Zimbabwe, does not bring the exportaton or acquisition within the purview of s 5(4)(a)(i) of the Act, as the JUDGE PRESIDENT believed it did.

Accordingly, I would order as follows:

1. The application for leave to appeal against the interlocutory judgment of 23 September 1993 is granted and the appeal therefrom allowed.

2. It is declared that the three contraventions of s 3(1)(a)(ii) of the Exchange Control Regulations 1977 of which the applicant was convicted do not constitute offences which involved the acquisition of foreign currency outside Zimbabwe for the purposes of s 5(4) of the Exchange Control Act [*Chapter 170*].

McNally JA: I agree.

Korsah JA: I agree.

Atherstone & Cook, applicant's legal practitioners

CHITSAKA & ORS v PUBLIC SERVICE ASSOCIATION 1993 (2) ZLR 345 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Civil appeal

18 October & 2 & 15 November, 1993

Flynote

Appeal - application for reinstatement of appeal after dismissal of appeal on grounds of failure to provide

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security for costs - whether court functus officio after order dismissing appeal

Costs - security for - failure to provide - whether notice of application to dismiss appeal on grounds of failure to provide security for costs must specify date upon which matter will be heard

Headnote

Rule 36 of the Rules of the Supreme Court 1964 specifically deals with dismissal of an appeal on the grounds of failure to provide security for costs, whereas rule 39 is the general rule applying to all applications. Rule 36 provides that the notice of an application to dismiss an appeal on the grounds of failure to provide security for costs must specify the date on which the application will be made. Rule 39, on the other hand, lays down that notice of an application may state the date of the hearing if a suitable date has already been arranged with the registrar or, if it has not, the registrar may appoint a date and notify the parties. However, there is a practical reason why strict compliance with rule 36 should not be required in respect of the notice of an application of dismissal on the grounds of failure to provide security for costs. If the registrar was obliged to allocate a date and time in advance of the notice being sent, and no appearance was made by the party to whom such notice was given, thi would be wasteful as a judge would have allocated the time to hear such matter unnecessarily. To avoid this inconvenience the registrar invites applicants for dismissal under rule 36 to make an

McNALLY JA

application under rule 39. If there is a response, the matter is set down and goes before a judge for hearing. If there is no response and the appellant is in default, the need for a court hearing falls away and the matter will be dealt with in Chambers at the convenience of the judge.

It may well be (although the point was left open) that an order dismissing an application by a judge in Chambers is final when such order is made after an appearance and argument by both sides and the court is thus *functus officio* after this order is made.

But in a case where the order is made in default of appearance, the court will not have made the order after considering the merits and weighing the default and the excuse offered against the possible chances of success on appeal. Thus any judgment given on the grounds of default may be reinstated on good cause shown.

Case cited:

Chetty v Law Society, Tvl 1985 (2) SA 756 (A)

Mrs JB Wood for the appellants

AP de Bourbon SC for the respondent

Judgment

McNally JA: On 17 March 1993 Chidyausiku J made a declaratory order at the instance of the respondent (which I will call "the PSA") against the appellants (whom I will call "the members").

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In brief he ruled that the members were not members of the Executive Committee of the PSA and restrained them from acting in that capacity. He ordered them to pay the costs of the PSA.

On 30 March 1993 the members noted an appeal to this court. They failed to provide security for the PSA's costs of appeal within the time provided by rule 46(5) of the Rules of this court, ie within one month of the date of filing of the notice of appeal. However, since the *quantum* of that security was fixed by the registrar only on 12 May 1993 the period was accepted as running only from that date.

On 22 July 1993 the PSA's lawyers wrote to the registrar of this court to say they had had no notification that the security for costs had been lodged. Accordingly "we request that you determine that the appeal has lapsed for want of prosecution".

They wrote to the members' lawyers on 30 July 1993 giving notice in terms of rule 36(1) that on a date to be advised an application for dismissal would be made, by reason of the failure to furnish security.

McNALLY JA

This, it is now claimed, was a mistake because, in terms of rule 36, a date should be specified in the notice. That date, according to rule 36(2) "shall be a date which the registrar has previously signified to the respondent as being a suitable date".

In fact no date was ever specified. What happened was that a notice of motion in terms of rule 39 was filed by the PSA on 2 August 1993 (a Monday) saying that it proposed to apply **on a date to be advised,** for the dismissal of the appeal, and calling on the members, if they intended to oppose the motion, to file replying affidavits within three days of receipt of the notice. There was no response. Had there been a response a date would of course have been fixed for a hearing.

Because of the failure of the members to respond to the notice of motion, the CHIEF JUSTICE on 13 August 1993 made an order in Chambers dismissing the appeal and ordering the members to bear the costs of the application.

It is now contended that the order dismissing the appeal was null and void because no date was fixed on which the members could have appeared and opposed the order. The matter of the dismissal of an appeal on the grounds of failure to provide security is specifically dealt with in rule 36 as amended. It was therefore wrong to proceed in terms of rule 39 which is the general rule applicable to all applications.

It will be noted that it is nowhere alleged that the members or their legal representatives were waiting to be notified of the date of the hearing. In fact they consistently failed to respond to all the letters addressed to them by the registrar and by the lawyers representing the PSA. The application for reinstatement consists entirely of legal argument. No affidavit was filed to allege that, for example, the failure to respond to letters or to the notice of motion was a deliberate policy decision because the members were insisting on their right to be told of a date of hearing. Nor is there any hint as to what they would have said at the hearing. They were months out of

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time and the security required was minimal.

The rules of this court are no doubt imperfect and in need both of consolidation and re-drafting. But a consideration of both the rules involved, that is, rule 36 and rule 39, convinces me that the members' argument is unsound.

Of course, the members are correct in what they say about rule 36. It clearly requires that a date be specified. If their contention had been that they were

McNALLY JA

misled by the rule into thinking that they were entitled to sit back and wait for a date to be notified, the case might have been different. But they do not make that case. To judge from their complete failure to respond either to the notice of motion or to the correspondence, they could not honestly have made that case.

The members rely on the letter of the law. Let us examine that letter.

Rule 36 provides as follows (as amended by SI 796/79):

> "(1) If an appellant who is required to furnish security for the respondent's costs of appeal fails to furnish such security within the period prescribed in sub-rule (5) of rule 46, the respondent may forthwith give notice to the appellant that, on the date specified in the notice, being not less than five days after service of the notice, he will apply to a judge for dismissal of the appeal by reason of such failure, and for such other order specified in the notice as he may require.
>
> (2) The date specified in the notice given in terms of sub-rule (1) shall be a date which a registrar has previously signified to the respondent as being a suitable date.
>
> (3) The judge, on an application for dismissal by the respondent brought in terms of sub-rule (1), may dismiss the appeal ..."

Rule 39 provides as follows:

> "(1) Subject to the provision of rules 31, 36, 37 and 38, applications shall be by notice of motion signed by the applicant or his legal representative and accompanied by an affidavit setting out any facts which are relied upon.
>
> (2) The respondent shall have the right to serve replying affidavits within three days of receipt of notice in terms of this rule and, thereafter, the applicant shall have the right of filing replying affidavits within a further period of three days calculated from the date of receipt of the respondent's replying affidavits.
>
> (3) The notice of motion and any affidavits or other documents served in terms of sub-rules (1) and (2) shall be served both on a registrar and on the opposite party.
>
> (4) ... (Not relevant).

McNALLY JA

> (5) When making an application the applicant shall, if he wishes to state the date of hearing in his notice of motion, arrange a suitable date with a registrar prior to serving such notice. Where no such date has been

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arranged the registrar shall appoint a date of hearing and notify the parties of the date.

(6) ... (Not relevant)."

It will be seen that rule 39 is general for all applications. Rule 36 is specifically for applications for dismissal of appeals by reason of a failure to provide security for costs.

The members are therefore *prima facie* correct when they say that the strict procedure in terms of rule 36 was not followed. There is, however, a practical reason for this.

If the registrar is to allocate a date and time he must in practice ensure that a judge is available on the date and at the time required. Yet in many, if not most of, such cases the exercise will be in vain. There will be no appearance. The judge will have cleared his desk and prepared himself unnecessarily.

To avoid this inconvenience the registrar invites applicants for dismissal under rule 36 to make an application under rule 39. If there is a response, the matter is set down and goes before a judge for a hearing. But if there is no response and the appellant is in default, the need for a date and time falls away, and the matter can be dealt with by a judge at his convenience in Chambers without an appearance.

The arrangement is a practical one. The appellant is given an opportunity to indicate opposition (or to lodge the security required). If the appellant remains in default the need for the full procedure under rule 36 is avoided. There is no point in advising the appellant of a date and time when the appellant has indicated by his failure to respond to the notice of notion that he does not intend to appear because he is not opposing the application.

In my view, the application was properly dealt with by the CHIEF JUSTICE on 13 August 1993 when he ordered:

"That the application to dismiss the appeal noted by the respondents be and is hereby granted.

"That the respondents bear the costs of this application."

McNALLY JA

The application for reinstatement was made on 19 August 1993. It was granted, on 25 August 1993, in terms of an order made, again by the CHIEF JUSTICE, in Chambers to the following effect:

"That the application for the reinstatement of the appeal be and is hereby set down for hearing by the court on 18 October 1993, provided that the applicants:

(a) deposit security for the costs of the appeal in the sum of $5 000 with the registrar of the High Court within three days of the date of this order;

(b) pay the taxed costs awarded in favour of the respondent on 13 August 1993 by not later than 30 September 1993."

When the parties appeared on 18 October 1993 the CHIEF JUSTICE was presiding. Subsequently he recused himself and the matter was submitted to a different panel of judges on

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2 November 1993 for a decision, not on the merits, but simply on the propriety of the orders made in Chambers.

The application for reinstatement relied primarily on the irregularity to which I have already referred, and which I do not consider to be an adequate ground for reinstatement. But it must also be stated that, although the $5 000 by way of security for costs was paid on 27 August 1993, the taxed costs of the application had not been paid by 30 September 1993 as ordered. In fact they had not been paid by the date of the hearing, 2 November 1993, apart from a payment of $5 000 on 4 October 1993 which was out of time.

Those costs were taxed by the registrar on 10 September 1993 in the sum of $9 842,33. The members' legal representative did not attend the taxation. He was advised by letter dated 13 September 1993 to pay that amount by 30 September 1993 in terms of the court order. He did not do so. He paid $5 000 on 4 October 1993, and has made no further payment.

I must say that on these facts I can see no further basis for the granting of indulgence to the members. Through their legal representative they have consistently failed to respond to letters, or to pay what they were required to pay.

The stark fact is that they should have lodged security for costs within a month of noting the appeal, ie on or before 30 April 1993. They did not. The *quantum* was fixed (very moderately) by the registrar on 12 May 1993. They should have paid by 12 June 1993. They did not. They were then given three days notice on 2 August 1993 to indicate whether they would oppose an order

striking out their appeal. They did not respond. They received a copy of the registrar's letter of 9 August 1993 advising the PSA's lawyers that they were now at liberty to apply in terms of rule 39. They did not react. The order was made on 13 August 1993. Only then did they react, not by tendering payment, but by seeking an indulgence in a notice of motion filed on 19 August 1993. The indulgence was granted conditionally. The conditions were not met.

The conduct of the members' legal practitioner, Mr Samukange, has not been in accordance with the standards required of a legal practitioner. He was advised at every stage of what was being done and what was proposed to be done, from 12 May 1993 onwards. Yet his first reaction was the notice of motion dated 19 August 1993. His explanation does not even attempt to excuse his inaction prior to 2 August 1993.

Mr Samukange's explanation as to what he did about the notice of motion dated 2 August 1993, and obviously served on his office the same day, is this:

> "On the 2nd of August 1993, I was attending at Rotten Row Magistrates Court. During the tea break I 'phoned my office and I was informed that a notice of motion in respect (of) this case had been served on us."

He must have been advised, and if he was not he should have asked, what period of time he was given to respond, but he says nothing of this and continues:

> "I immediately instructed my secretary to send a brief to Advocate Chatikobo, with instructions that he deal with

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the matter."

It is difficult to understand what counsel could do. All that was needed was a response within three days, either paying the security or excusing the failure to pay. Yet, incredibly, his affidavit continues:

> "On the 11th day of August 1993 I was looking through all our files, and I noted that Advocate Chatikobo had actually returned the brief with the following remarks: 'I can see no defence to this. I think you should apply for condonation'. The brief was dated (presumably by counsel) the 5th of August, and since it was a public holiday (ie the 11th was a public holiday) there was nothing I could do about it."

Why did he not see the brief on the 5th or 6th (Thursday or Friday)? He would still have been in time. Or on the 9th or 10th (Monday or Tuesday), when he could still have saved the day? Why, even if he saw the brief only on the 11th, did he not react urgently on the morning of Friday the 13th, when he might

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McNALLY JA

still have averted disaster? None of this is explained. It is inexplicable and inexcusable.

Yet, despite all this, Mr Samukange was granted a conditional indulgence: Pay the security, pay the taxed costs before 30 September 1993, and your application will be heard. And again he failed. He did not bother to attend the taxation on 13 September 1993. He merely telephoned the PSA's lawyer late in the afternoon of 30 September 1993 to seek a further indulgence, which was refused.

There is, however, a concern which has arisen in regard to the taxation. It is not a point raised by the members until it was raised by Mrs *Wood* in her submissions. It is a point which should have been raised by Mr Samukange when he attended the taxation as he should have done, or when he studied the taxed bill as he should have done.

The PSA's legal adviser included in the costs taxed not only the costs of the application, but the costs of the appeal. Had these been omitted, the taxed bill would have amounted only to some $1400 instead of $9 842,33. Had that been the case, the amount could have been paid by 30 September 1993.

That being the case, it seems to me we must deem the conditions to have been fulfilled. This does not mean that reinstatement must be granted. It means simply that the application is *prima facie* properly before us.

I say "*prima facie*" because the first point taken by Mr *de Bourbon,* for the PSA, is that this court has made an order (albeit by a single judge in Chambers) and is therefore *functus officio.* He points to the fact that rule 36 contains no provision for reinstatement in relation to a dismissal for want of security, whereas it specifically provides for reinstatement in relation to a dismissal for want of appearance under rule 36(4). Similarly, default under rule 34 results in an appeal being deemed to have lapsed unless **a judge grants relief on cause shown.**

It may well be, although I leave the point open, that an order dismissing an application by a

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judge in Chambers is final when such order is made after an appearance and argument by both sides. But the essence of the order in this case is that it was an order made in default of appearance. It was an order made, not after a consideration of the merits, which would have involved a weighing of the undoubted failure to pay and the excuse, if any, for such failure, against the possible chances of success of the appeal; but on the basis solely of the unexplained default.

McNALLY JA

In general principle, any judgment given on the grounds of default may be reinstated on good cause shown. Therefore I consider that this point must fail. See *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764.

Accordingly I rule, at this stage, merely that the application for reinstatement is properly before us. The matter will have to be set down again for substantive argument as to whether the application should be granted.

The remaining question is that of the costs occasioned by the proceedings so far in this court. An order has already been made in regard to the costs of the application to dismiss the appeal. The members should bear these costs since it was their failure to provide money for security that led to the need for the application.

As far as the application for reinstatement is concerned, that remains to be heard. The only way that costs and time can be saved is to order that the appeal itself be set down provisionally for hearing immediately after the application is heard. In practice, given the level of negligence so far displayed, it is clear that reinstatement will only be allowed if the members' case is enormously strong.

In other words, if we grant reinstatement we will immediately enrol the appeal and allow it. If reinstatement is refused, we will strike the appeal from its provisional enrolment.

In the circumstances, the question of costs will stand over until the final hearing. But our provisional view at this stage is that some of the costs will have to be borne by the members' legal representative, Mr Samukange, *de bonis propriis*.

In the result at this stage no order is made, save that the court declares that the application for reinstatement of the application is properly before it and is to be set down by the registrar for hearing. It is further directed that the appeal be set down provisionally for hearing immediately after the application.

Korsah JA: I agree.

Ebrahim JA: I agree.

Byron Venturas & Partners, appellants' legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

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S v KWAINONA & ORS 1993 (2) ZLR 354 (SC)

Court **Supreme Court, Harare**

Korsah JA, McNally JA & Muchechetere JA

Criminal appeal

1 & 15 November 1993

Flynote

Appeal - criminal case - conviction - conviction on basis of guilty plea - when such appeal will be entertained

Headnote

Even where a person has been convicted on the basis of a guilty plea he may still appeal against that conviction. Such an appeal will be treated as an application for change of plea. But such an appeal will only be entertained in exceptional circumstances. It will only be entertained if the words used by the accused when pleading guilty indicate that he was raising some defence which could legitimately be raised in defence of the charge.

The appellants had pleaded guilty to three counts of malicious injury to property. Their pleas amounted to an unqualified confessions that they committed these crimes and that they had had no right to cause the damage in question. They sought to appeal against their convictions on the basis of a *bona fide* claim of right. The appeal was dismissed, the court finding that their unqualifed confessions established that they had not acted on the basis of a *bona fide* claim of a right to cause the damage.

Cases cited:

S v Matare 1993 (2) ZLR 88 (S)

R v Mambo 1957 (2) SA 420 (A)

S v Johnson 1977 (2) RLR (RA)

S v Muzuzu A-67-80

S v Latham 1979 RLR 458 (A)

KORSAH JA

E Chatikobo for the appellants

Mrs J Zindi for the respondent

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Judgment

Korsah JA: The purported appeals in this matter are against the conviction of the appellants, and sentences imposed consequent upon their convictions, for three counts of malicious injury to property. I use the word "purported" in relation to these appeals advisedly, for reasons which shall hereinafter appear.

Each of the appellants was convicted on his own plea of guilty to the offences. The trial court, in compliance with the mandatory provisions of s 255(2)(b) of the Code, meticulously canvassed the facts and essential elements of the offences. The appellants, cognisant of what they had done, admitted the facts unreservedly and conceded that they had no right to cause the damage they did to the properties of the three complainants. Upon their convictions, they were each sentenced to 36 months' imprisonment with labour, of which 12 months' imprisonment with labour was suspended on conditions.

Mr *Chatikobo*, who did not file the notice nor grounds of appeal, was alive to there being nothing remiss in the manner in which the learned trial magistrate had explained the facts and the essential elements of the offences to the appellants. Consequently, he indicated in the appellants' heads of argument that he did not intend to make any submissions concerning the alleged non-compliance with s 255(2)(b) of the Code.

Mr *Chatikobo's* argument before us was based mainly on an amendment to the notice of appeal which, not objected to by Mrs *Zindi,* we allowed. The amendment reads:

> "The learned magistrate erred in not altering the appellants' pleas of guilty to not guilty in view of the fact that the State outline reveals that the apellants were raising a claim of right."

Now, it is entirely a matter for the discretion of the trial magistrate to decide whether a plea of guilty tendered upon arraignment may be withdrawn before sentence: *S v Matare* 1993 (2) ZLR 88 (S). After sentence has been imposed the trial court becomes *functus officio* and cannot re-open the matter.

If a prisoner pleads guilty, and it appears to the satisfaction of the trial magistrate that he rightly comprehends the effect of his plea, his confession, for such it is, is accepted as an admission either of guilt or of any fact which

may tend to prove guilt at his trial. His plea is thereupon recorded, and sentence may forthwith be passed, as was done in the instant case.

There is no rule that a prisoner upon whom sentence has been imposed on his own plea of guilty to the charge cannot appeal against conviction. There is nothing in the Criminal Procedure and Evidence Act which precludes an accused person from appealing against his conviction on a plea of guilty.

The procedure seems illogical, because a plea of guilty indicates that the accused does not join issue with the State. There is no issue between them, no dispute requiring resolution. On what

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grounds, then, does he appeal? Is he not, in reality, making an application for a change of plea?

Despite the apparent logic of this reasoning, and despite the fact that the "appeal" is treated as an application for a change of plea, the practice has been to allow such a person to appeal. The matter is considered at some length by SCHREINER JA in *R v Mambo* 1957 (2) SA 420 (A). He refers to English law authority. He comments that ordinarily such a person, wrongly convicted because he wrongly pleaded guilty, should make representations to the Executive for a free pardon. In exceptional circumstances, however, an appeal will be entertained.

But such an appeal will only be entertained if it is demonstrated that, from the words accompanying the plea tendered, the accused was raising some defence which could legitimately be proffered in defence to the charge. In making such a determination recourse must be had to the facts as alleged and to which the accused made his responses.

The appellants reside in Mazowe Village under Chief Dotito in the Mount Darwin area. The three complainants, who are peasant farmers, reside in Chitsato Village, also under Chief Dotito in the Mount Darwin area.

On the morning of 22 February 1993, the appellants and three of their brothers ("the raiding party") gathered at their village and, in conformity with an agreed plan, drove their cattle to Chitsato Village. The raiding party was armed with two rifles and a pistol. On their arrival at Chitsato Village they found the complainants in their fields. The raiding party drove their cattle into the fields of the complainants and warned the complainants not to drive the cattle out of their fields. The raiders being armed, the complainants had no option but to comply with their demands. After the cattle had completely destroyed the maize fields of the complainants, the appellants drove their

cattle away and ordered the complainants not to grow crops in that area as they (the appellants) were desirous of using the land as their grazing area.

After destroying the entire maize crop of the complainants, the raiding party proceeded to the home of the village head and issued him with a warning that his people should desist from using the land for growing crops as they were laying claim to it as their grazing area. While they were at the home of the village head, the appellants also shot and killed a goat which they claimed belonged to them.

There was no dispute that the three appellants, with others, acted in concert. It was not in dispute that they achieved their purpose through the illegal possession of firearms.

Mr *Chatikobo's* contention was that, since it appears in the outline of the State case and in the appellants' pleas in mitigation that the appellants claimed that the area where the complainants' maize fields were situate was their grazing area, a plea of not guilty should have been substituted for their voluntary confessions, as they were raising the defence of a claim of right.

In support of this contention, Mr *Chatikobo* submitted that whenever a man *bona fide* believes

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that he has a lawful claim he is entitled to an acquittal even though his belief is completely unfounded in law or in fact. In support of this submission he cites the cases of *S v Johnson* 1977 (2) RLR 3 (RA); *S v Muzuzu* A-67-80; and *S v Latham* 1979 RLR 458 (A).

When canvassing the essential elements of the offences with the appellants, the appellants admitted to the trial magistrate that they acted as they did because they intended to injure the complainants in their property. Each of them also admitted that they had no right to do what they did.

As regards this last confession as to their having no right to destroy the crops of the complainants, support for it can be derived from the fact that the appellants, who were resident at Mazowe Village, committed these offences at Chitsato Village, where they could not entertain a *bona fide* belief in their right to grazing land.

A court will not consider a defence of a claim of right unless the accused has laid a foundation by leading evidence of its existence. Where, therefore, an accused person's unqualified confession to the magistrate is that he had no right to act as he did, it seems to me that his conviction cannot be attacked on

the basis that he entertained a *bona fide* belief in his right to cause such malicious injury to the property of the complainant.

As regards sentence, the property destroyed by the appellants was alleged to be valued at $4 900 - a loss which is not inconsiderable for peasant farmers. The learned trial magistrate also rightly took into account the fact that six persons acted in common purpose in committing these offences; that they achieved their purpose through the illegal possession of firearms; and by such means subdued any likely opposition to their action even by the village head. We would be pandering to anarchy if the courts of this country were to give their blessing to persons who illegally employ the use of firearms to get their own way.

It is for the above reasons that I would dismiss the appeals of the appellants, both against conviction and sentence.

McNally JA: I agree.

Muchechetere JA: I agree.

Muvingi & Machaya, appellants' legal practitioners

AURIDIAM ZIMBABWE (PVT) LTD v MODUS PUBLICATIONS (PVT) LTD 1993 (2) ZLR 359 (H)

Court **High Court, Harare**

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Annotations Link to Case Annotations

Robinson J

Exception

3 & 17 November 1993

Flynote

Delict - actio injuriarum - defamation - defamatory nature of statement - innuendo - pleading -"quasi innuendo" relied on - plaintiff bound by specific meanings of words selected by him as being defamatory - test of whether matter is defamatory - exception stage of proceedings - article published in newspaper circulating among people of higher education and intelligence

Practice and procedure - defamation action - exception to claim as disclosing no cause of action - exception successful - effect on claim

Headnote

The defendant published in *The Financial Gazette* an article which the plaintiff company, which carried on the business of diamond mining, alleged was defamatory of it. The plaintiff alleged that the words used in the article implied that -

(1) it had undervalued diamonds intended for export in order to retain the difference between the real value and the stated value in foreign currency outside Zimbabwe;

(2) it was guilty of improper dealings with diamonds, by failing to deliver some diamonds mined by it to the Minerals Marketing Corporation of Zimbabwe;

(3) it had improperly secured the intervention of a Government Minister in order to frustrate investigations being made by the Zimbabwe Republic Police.

It did not rely on a true innuendo, but alleged that the words used carried the meaning attributed to them.

1993 (2) ZLR p360

The defendant excepted to the plaintiff's declaration as disclosing no cause of action. It said that the article gave the impression that the plaintiff was actively helping the police in their enquiries and that another, unnamed, mining house, or the Minerals Marketing Corporation itself, was involved in some sort of improper dealings.

Held, that in pleading a "quasi-innuendo", as it had, the plaintiff was bound by the specific meanings selected by it as being defamatory of it and the defendant had to meet those limited charges only.

Held, further, that the test to be applied at the exception stage in deciding whether the words complained of were defamatory was whether a reasonable person of normal intelligence and with knowledge of the circumstances could or might reasonably regard the statement as defamatory. The test is objective. The reader must be an ordinary person with no legal training or other special discipline. It would probably be fair to impute to the reader of the *Financial*

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Gazette a somewhat higher standard of education and intelligence and a greater interest in and understanding of political, financial and business matters than newspaper readers in general have, but one should not impute to him the training or habits of mind of a lawyer.

Held, further, that, applying this test, the words used were not reasonably capable of conveying to the reasonable reader of the *Financial Gazette* the defamatory meanings assigned to them by the plaintiff and the exception should be upheld.

Held, further, that upholding the exception did not mean that the plaintiff's claim was to be dismissed. The normal practice, which would be followed, was that the plaintiff should be given leave to file amended pleadings within 21 days, if so advised.

Cases cited:

National Union of Distributive Workers v Cleghorn & Harris Ltd 1946 AD 984

Demmers v Wyllie & Ors 1978 (4) SA 619 (D)

Moyse & Anor v Mujuru HH-269-92

Wallwork v Guardian Security Svcs (Pvt) Ltd & Anor S-87-93

Visse v Wallach's P & P Co Ltd; Visse v Pretoria News & Printing Works Ltd 1946 TPD 441

Zvobgo v Mutjuwadi & Ors 1985 (1) ZLR 333 (H); 1985 (3) SA 1055 (ZH)

Bassner v Trigger 1945 AD 22

Demmers v Wyllie & Ors 1980 (1) SA 835 (A)

Botha en 'n Ander v Marais 1974 (1) SA 44 (A)

ROBINSON J

Conroy v Stewart Printing Co Ltd 1946 AD 1015

Channing v SA Financial Gazette Ltd & Ors 1966 (3) SA 470 (W)

Group Five Bldg Ltd v Govt of the Republic of SA (Min of Public Works & Land Affairs) 1993 (2) SA 593 (A)

Green v Lutz 1966 RLR 633 (G)

Adler v Elliot 1988 (2) ZLR 283 (S)

Trope & Ors v SA Reserve Bank 1993 (3) SA 264 (A)

E W W Morris for the excipient (defendant)

J C Andersen SC for the respondent (plaintiff)

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Judgment

Robinson J: The court is required to adjudicate upon an exception taken by the defendant to the plaintiff's declaration in an action for defamation between the parties in which the plaintiff is claiming from the defendant damages in the sum of $50 000.

The plaintiff, which, in its declaration, is described as a company which carries on the business of mining for diamonds at River Ranch near Beitbridge, complains that it was defamed in an article published by the defendant on 26 November 1992 in a local weekly business and financial newspaper, the *Financial Gazette*, which is owned by the defendant and which is alleged to have an extensive circulation both within and without Zimbabwe. I quote below the text of the offending article which appeared on the front page of the journal, in two columns at the top lefthand side.

> "ZRP FRAUD SQUAD IMPOUNDS DIAMOND BUT SURRENDERS THEM TO MMCZ
>
> Police fraud squad on Wednesday last week impounded from the Minerals Marketing Corporation of Zimbabwe diamonds worth several millions of dollars but surrendered them back to the parastatal after a ministerial directive.
>
> The MMCZ general manager, Mrs Liz Chitiga, confirmed the incident yesterday saying: 'On Wednesday, November 18, 1992 two officials of Auridian Zimbabwe and two police officers came to our offices and collected a parcel of diamonds which Auridian had deposited with us.'
>
> Mrs Chitiga would not disclose the quantity nor the value of diamonds involved. She would also not give reasons why police had impounded the precious stones.
>
> The MMCZ chief, without explaining, said the police returned the parcel

> of diamonds two days later.
>
> The MMCZ is the sole agency responsible for the marketing of minerals in Zimbabwe save for gold.
>
> The Financial Gazette reliably understands that the diamonds were returned on the instructions of an unnamed government minister - a move that left the police perplexed.
>
> The Criminal Investigations Department (Gold Squad) had been investigating reports that some quantities of minerals grossly undervalued, were being exported to unnamed countries.
>
> Last week's swoop is said to have netted 2 000 carats of diamonds at MMCZ head office in Harare and another undisclosed quantity of the precious stones from a local mining house.
>
> Police are said to have queried valuation of the stones. Mrs Chitiga refused to comment on the issue, saying it would jeopardise the corporation's marketing operations.
>
> Because of loose monitoring of the precious stones, it is reliably understood that some diamonds are being openly sold on some Harare streets.
>
> Police are said to have stumbled on diamonds, one stone of which was worth more than $70 000.
>
> Auridian Zimbabwe, a subsidiary of an Austrian mining giant, is the sole diamond mining company in Zimbabwe. It has rights over the River Ranch claims. The company has continued sending 200 carats of diamonds to

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Mauritius for cutting and MMCZ said the marketing of the stones was in progress."

In para 5 of its declaration, the plaintiff alleges that the article defames it by imputing that -

"5. By the said article defendant intended to mean and was understood to mean that:

(a) plaintiff had undervalued diamonds intended for export in order to retain the difference between their true value and the value stated, in foreign currency outside Zimbabwe.

(b) plaintiff had failed to deliver some of the diamonds mined by it to the Mineral Marketing Corporation of Zimbabwe, as was its duty, in order to engage in improper dealings with the diamonds.

ROBINSON J

(c) that plaintiff had improperly and corruptly secured the intervention of a Government Minister in order to frustrate the Zimbabwe Republic Police from carrying out proper investigations into whether any offences had been committed in respect of the diamonds which had been seized."

The defendant filed an exception to the plaintiff's declaration which counsel were agreed purported to except to the plaintiff's declaration as disclosing no cause of action on the ground that the words in the article, which is attached to the plaintiff's declaration as annexure A, are not capable of conveying to the reasonable reader the meanings attributed to them in para 5 of the declaration. The defendant accordingly prays that its exception be upheld with costs and that the plaintiff's claim be dismissed with costs.

In paras 3.1 and 3.5 inclusive of the defendant's heads of argument, Mr *Morris*, who appeared for the defendant, contends as follows:

"3.1 The first mention of the plaintiff in the article complained of occurs at the end of the second paragraph where it is said that two officials of the plaintiff **and** two police officers came and collected some diamonds from the MMCZ that had previously been deposited by plaintiff. The only impression that a reasonable reader would get from reading this passage is that the two officials from the plaintiff company are actively and public spiritedly helping the police in tracking down some sort of knavery.

3.2 The knavery in question is disclosed in the 7th paragraph of annexure A as being the exporting of undervalued diamonds to foreign countries.

3.3 There might be some suggestion in paragraph 8 that a 'local mining house' is involved in chicanery because it has been 'swooped on'. However, plaintiff is named throughout the offending article and accordingly, the reference to an unnamed local mining house can grammatically only mean an entity other than plaintiff.

3.4 In para 5 it is stated that the MMCZ is the sole agency responsible for marketing minerals, which must include diamonds, (otherwise the reference is meaningless).

3.5 Accordingly, the average reader, possessing normal intelligence would, when reading annexure A discover and deduce as follows:

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3.5.1 Plaintiff is the only miner of diamonds in the country (para 12).

3.5.2. Plaintiff has deposited diamonds with the MMCZ (para 2).

3.5.3. Minerals, presumably including diamonds are being sold in other countries at grossly undervalued prices and this is a Bad Thing (para 7).

3.5.4 The MMCZ is the only authority responsible for marketing minerals, presumably including diamonds (para 5).

3.5.5 Plaintiff's officials together with the police (note the emphasis) go to the MMCZ and retrieve certain diamonds that had previously been deposited (para 2).

3.5.6 Ergo, the MMCZ are up to No Good and the plaintiff is helping the police get to the bottom of everything."

In para 4.1 of the defendant's heads of argument, Mr *Morris* submits that there is simply nothing in the article that would suggest to an ordinary reader that the plaintiff was being investigated.

On the other hand, in paras 3 to 7 inclusive of the plaintiff's heads of argument, which were not prepared by the plaintiff's counsel, Mr *Andersen*, but by a member of the firm of legal practitioners briefing him, it is submitted as follows:

"3. It is submitted that it is implicit from the article, Annexure 'A' to the declaration, that the plaintiff was being accused of grossly undervaluing the diamonds, which were to be exported and by so undervaluing the diamonds would be able to retain in foreign currency the difference between the true value and the value stated. This is an exercise known commonly as transfer pricing.

4. The following paragraph in the article, being the eighth paragraph, states that the swoop netted two thousand carats of diamonds at the MMCZ Head Office and a further quantity of diamonds from a local mining house. Previously in the article, it had been alleged that the MMCZ is the sole agency responsible for the marketing of *inter alia* diamonds in Zimbabwe and accordingly the sting of the eighth paragraph is that the plaintiff had failed to deliver some of the diamonds mined by it to the MMCZ. It is stated specifically in the final paragraph of the article that the plaintiff is the sole diamond mining company in Zimbabwe. It is in addition alleged that the Police have 'stumbled' on diamonds which clearly should have been delivered to the MMCZ and had not been.

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5. It is respectfully submitted that the sting of the article when read as a whole is that the plaintiff had secured the intervention of a Government Minister in order to frustrate the Police. It is clear that the Police were intending to investigate but that their investigations had been summarily halted by the instruction of an unnamed Government Minister. The comment that this was a move which left the Police perplexed give *(sic)* rise to such sting.

6. The publication in which the article appeared, namely the Financial Gazette, is a newspaper with some intellectual appeal. In that way it can be distinguished for example from a magazine such as *Horizon* and that referred to in *Demmers v Wyllie & Ors* 1978 (4) SA 619 (D) at 624-625. And see also *Moyes & Anor v Mujuru supra* at p 10 of the cyclostyled judgment.

7. It is respectfully submitted that the article taken as a whole and with the sting pleaded by the plaintiff is capable of the defamatory meaning imputed to it. The article manifestly alleges that the plaintiff is involved in some form of illicit activity. *Chesterton v Gill & Ors* 1970 (2) SA 242 (T) at 246."

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In reinforcing these submissions, Mr *Andersen* submitted that the reading of the article should be approached as one to do with corruption, dishonesty or, to use Mr *Morris's* expression, knavery, which led on to the question of the nature of that corruption, the answer to which, in Mr *Andersen's* view, pointed to the plaintiff as being the implicated party, the more so when one has regard to the report that an undisclosed quantity of diamonds had been netted by the Police in a "swoop" on a "a local mining house" which, Mr *Andersen* argued, is a clear reference to the plaintiff in the light of the statement in the last paragraph of the article that the plaintiff is "the sole diamond mining company in Zimbabwe".

Mr *Andersen* further submitted that it is implicit that it was the plaintiff, and not the Minerals Marketing Corporation of Zimbabwe ("the MMCZ"), which had "improperly and corruptly secured the intervention of a Government Minister in order to frustrate the Zimbabwe Republic Police from carrying out proper investigations into whether any offences had been committed in respect of the diamonds which had been seized".

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In his reply, Mr *Morris* reiterated his reasons for contending that there is nothing in the article to suggest that the plaintiff was being investigated as one who had done anything unlawful in respect of the sale of diamonds.

Mr *Morris* did not believe that, within the context of the article, any reasonable reader would take the reference to an unnamed local mining house to mean the plaintiff seeing that the name of the plaintiff had been given in the article.

Both counsel have argued their respective cases, correctly in my view, on the understanding that the plaintiff's complaint about the article is not based on an innuendo in the true sense, but on the so-called innuendo pointing the sting to the defamation. See *National Union of Distributive Workers v Cleghorn Harris Ltd* 1946 AD 984 at 992 and *Demmers v Wyllie & Ors* 1978 (4) SA 619 (D) at 622C-D. In other words, the plaintiff complains that the article is libellous of it *per se,* in that the article conveys the defamatory meanings ascribed to it in para 5 of the plaintiff's declaration; or, to adopt the words of DIDCOTT J in *Demmers'* case *supra*, at 662D, the so-called innuendo pointing the sting of the imputation or, as it has sometimes been described, the "quasi-innuendo" (see Burchell *The Law of Defamation in South Africa* at 92 and 93; *Moyse & Anor v Mujuru* HH-269-92 (unreported) at p 9 of the cyclostyled judgment) - "is merely a semantic exercise, purporting to be a paraphrase or elaboration of the words to which objection is taken. It does not profess to stray beyond their normal connotation, but draws from them and accentuates what are alleged to be the libellous implications already lurking there".

What is of importance in regard to the pleading of a "quasi-innuendo" is that the plaintiff is bound by the specific meanings selected by him as being those defamatory of him, those therefore being the limited charges which the defendant has to meet. See *Demmers'* case *supra*, at 622F.

I pause here to say that I share Mr *Morris's* dislike for the inelegant term "quasi-innuendo". However, to replace that term with an expression such as "sting-pointing imputation" is just as

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inelegant even though, perhaps, the expression may be more apposite in conveying that this is the charge or, if more than one, these are the charges levelled against the defendant in a defamation suit directed against the "primary" meaning of the language alone.

It is trite law that where a defendant excepts to the plaintiff's declaration in a case such as this on the ground that the article complained of cannot be

ROBINSON J

construed as being defamatory of the plaintiff in the sense alleged by the plaintiff, the test to be applied by the court, when deciding the matter, is whether the words complained of are reasonably capable of conveying to the ordinary reader the defamatory meaning or meanings attributed to them by the plaintiff. See *Wallwork v Guardian Security Services (Pvt) Ltd & Anor* S-87-93 (not reported); or as succinctly stated by MURRAY J in *Visse v Wallach's Printing & Publishing Co Ltd; Visse v Pretoria News & Printing Works Ltd* 1946 TPD 441 at 447:

> "It is the function of the court or a judge thereof as a question of law, and not as a question of fact to be decided on trial, to determine in the first instance whether the words complained of are reasonably capable of a defamatory meaning."

In dealing with an exception to the plaintiff's declaration by the fourth defendant on the ground that the declaration was bad in law because it disclosed no cause of action in that the words relied upon were not reasonably capable of conveying a defamatory meaning, SANDURA JP, in *Zvobgo v Mutjuwadi & Ors* 1985 (1) ZLR 333 at 336B, said that what he had to decide is made quite clear by Burchell *The Law of Defamation in South Africa* at pp 102-3 where the learned author says:

> "Where exception is taken to the plaintiff's declaration, the test of what constitutes defamatory matter is different from that at the trial stage.
>
> TINDALL JA said in *Basner v Trigger* 1945 AD 22 at 32: 'In other words all the court is called on to decide at this stage is whether a reasonable person of ordinary intelligence, having heard the defendant's words and having knowledge of the circumstances ... **might** reasonably understand these words as meaning that the plaintiff had been guilty of illegal and criminal conduct.'
>
> The test on exception is, therefore, whether a reasonable person of normal intelligence and with knowledge of the circumstances **could or might** regard the statement as defamatory, whereas at the trial stage the test is whether a reasonable person **would** regard it as defamatory."

Since the test formulated by Burchell in the immediately preceding paragraph as quoted by SANDURA JP in *Zvobgo's* case *supra*, is relied upon in para 1.2 of the plaintiff's heads of argument, I would point out that the significant word "reasonably", which appears in the statement of TINDALL JA in *Basner's*

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case *supra*, quoted by Burchell, has been omitted after the words "**could**" or "**might**" which

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have been emphasised by Burchell.

Accordingly, the paragraph in question should commence - "The test on exception is, therefore, whether a reasonable person of normal intelligence and with knowledge of the circumstances could or might reasonably regard the statement as defamatory ..." (my emphasis). See *Demmers v Wyllie & Ors* 1980 (1) SA 835 (A) at 842H (to which I shall refer as "*Demmers* on appeal").

The test is undoubtedly an objective one. See *Botha en 'n Ander v Marais* 1974 (1) SA 44 (A) at 48E and Demmers on appeal *supra*, at 842A-B.

In *Visse's* cases *supra* at 447, MURRAY J went on to say:

> "The test to be applied by the court in determining whether these words are reasonably capable of the alleged defamatory meaning is the effect on the mind of the ordinary newspaper reader, an average reasonable person of ordinary intelligence - *Basner v Trigger* 1945 AD at p 32 - who reads the article with ordinary care, but not as 'an astute lawyer or a super critical reader would read the passage' - *per* WESSELS JA in *Johnson v Rand Daily Mails* 1928 AD at p 204."

See also *Conroy v Stewart Printing Co Ltd* 1946 AD 1015 at 1018.

Or as DIDCOTT J put it in *Demmers'* case *supra* at 624F-G:

> "One must try not to approach this task like a lawyer poring over a contract, a will or a statute. A 'coldly logical cast of mind', according to COLMAN J in *Hassen v Post Newspapers (Pty) Ltd & Ors supra* at 564E-G, would not be a recommended tool, even if one had it. The standard is that of the ordinary reader instead, who has no legal training or other special discipline. He is taken to be a reasonable person of average intelligence and education."

In dealing with the hypothetical reader who so frequently features in defamation suits, DIEMONT JA had this to say in *Demmers* on appeal *supra* at 847G-H:

> "He has been described as: 'a reasonable reader of average intelligence and education' (*per* TINDALL JA in *Basner v Trigger* 1945 AD 22 at 35);

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> 'a reasonable reader with normal intelligence and development' (*per* STEYN CJ in *SA Associated Newspapers Ltd v Schoeman* 1962 (2) SA 613 (A) at 616); 'a reasonable reader having average intelligence and knowledge' (*per* WESSELS JA in *South African Associated Newspapers Ltd & Anor v Estate Pelser* 1975 (4) SA 797 (A) at 811); ....
>
> On the other hand the courts have on occasions described the newspaper reader in more modest terms as simply 'the ordinary reader' (*per* WESSLES JA in *Johnson v Rand Daily Mails* 1928 AD 190 at 204) ..."

And at 848A-H:

> "This hypothetical figure is an immigrant; he has been imported from the English law where he has stood high in judicial favour particularly when juries are instructed to resolve problems in the sphere of negligence. But whether the case be one of negligence or defamation, this 'complex creature', as he has been called, does not always provide a ready solution to the question before the court, as was pointed out by LORD COLERIDGE over a century ago:
>
> > 'I have used language which, or the equivalent of which, is to be found, I believe, in cases of undoubted

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> authority - cases which have been described as giving rules for the guidance of Judges in the performance of their difficult duty. To me, the entire uselessness of such rules as practical guides lies in the inherent vagueness of the word "reasonable", the absolute impossibility of finding a definite standard, to be expressed in language, for the fairness and the reason of mankind, even of Judges. The reason and fairness of one man is manifestly no rule for the reason and fairness of another, and it is an awkward, but as far as I see, an inevitable consequence of the rule, that in every case where the decision of a Judge is overruled, who does or does not stop a case on the ground that there is, or is not, reasonable evidence for reasonable men, those who overrule him say, by implication, that in the case before them the Judge who is overruled is out of the pale of reasonable men.' (*Dublin, Wicklow and Wexford Railway Co v Slattery* (1878) 3 App Cas 1155 at 1197.)

Many years later LORD GODDARD put forward the same idea with characteristic bluntness:

> 'Of course, different minds have different ideas as to what is moderate, and seeking for a mean, a normal or an average where there is really no guide is very like LORD BOWEN'S illustration of a blind man looking

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ROBINSON J

> for a black hat in a dark room.'(*Mills v Stanway Coaches Ltd* [1940] 2 KB 334 at 349.)

In the same year, 1940, MACKINNON LJ, in determining whether words were defamatory, accepted 'the reasonable man' as the criterion with marked reluctance:

> 'What type of mind or intelligence ought the Judge to impute to the audience? Not, I think, that they are of the class who accept and act on the wickedest proverb that was ever invented: 'There is no smoke without fire.' On the other hand, perhaps he should not impute to them the charitable decency of gentlemen. I can only suppose that one must have recourse again to that elusive being 'the reasonable man', and assume that the audience consists of 'reasonable people' (*Newstead v London Express Newspaper Ltd* [1940] 1 KB 377 at 390).

Whether that paragon, the reasonable man, is the same individual as the ordinary man or the average reader, may be a matter for debate; whatever the answer to that question may be, it seems to me that it is wrong to overlook the shortcomings of the average reader - the fact that he does not concentrate but skims through his newspaper, the fact that he has a capacity for implication and is prone to draw derogatory inferences, the fact that he is guilty of loose thinking and will jump to a conclusion more readily than a man trained in the caution of the law."

In *Demmers* on appeal *supra*, at 842H, MULLER JA thought it clear "that the words 'reasonable person' or 'reasonable man' referred to in the decisions cited is a person who gives a reasonable meaning to the words used within the context of the document as a whole and excludes a person who is prepared to give a meaning to those words which cannot reasonably be attributed thereto."

In the present case I am concerned not with a newspaper which, to quote DIDCOTT J in *Demmers'* case *supra* at 624G, "belongs to the popular press, not among highbrow journals or those with intellectual appeal", but with a newspaper with, as submitted in para 6 of the plaintiff's heads of argument, "some intellectual appeal" which has a limited circulation largely amongst regular subscribers of a generally higher standard of education and intelligence who have a particular interest in political, financial and business affairs.

In this regard, it is pertinent to have regard to what COLMAN J had to say in *Channing v SA*

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Financial Gazette Ltd & Ors 1966 (3) SA 470 (W) when

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considering an article, claimed to be defamatory of the plaintiff, which had appeared in the weekly *South African Financial Gazette.* The learned judge stated as follows at 474A-C:

> "In order to assess the soundness of this contention it is necessary to consider the attributes 'ordinary reader' through whose eyes I must strive to read the article. I was referred to the familiar authorities in which that reader is described. They include *Conroy v Nicol supra; Johnson v Rand Daily Mails Ltd* 1928 AD 190, and *Borkum v Cline & Anor* 1959 (2) SA 670 (N). From these and other authorities it emerges that the ordinary reader is a 'reasonable', 'right-thinking' person, of average education and normal intelligence; he is not a man of 'morbid or suspicious mind', nor is he 'super-critical' or abnormally sensitive; and he must be assumed to have read the articles as articles in newspapers are usually read. For that assumption authority is to be found in *Basner v Trigger* 1945 AD 22 at pp 35-6. It is no doubt fair to impute to the ordinary reader of the *South African Financial Gazette* a somewhat higher standard of education and intelligence and a greater inerest in and understanding of financial matters than newspaper readers in general have. But this, I think, is clear: one may not impute to him, for the purposes of this inquiry, the training or the habits of mind of a lawyer."

Mr *Andersen* has invited me to approach the article as one concerned with corruption or dishonesty. From there, he says, I must then look to the question of the nature of that corruption which, he contends, will point to my concluding that the plaintiff is the party imputedly implicated in unlawful conduct. However, this analytic and discerning approach to the reading of the article which Mr *Andersen* has enjoined me to adopt is instructive, in that it clearly betrays the training and habits of mind of a lawyer and is the very approach which the ordinary reader of the *Financial Gazette* would not take and which, therefore, I must avoid taking.

Accordingly, putting aside, as I am told I must do, my training and my logical, critical and analytic habits of mind as a lawyer and stepping into the shoes of the ordinary reader of the *Financial Gazette,* the question which I must answer is - what immediate impact would the contents of the article in question have on the mind of such a reader and what would be the overall impression gained by him? Or put another way, in the context of the article as a whole, are the words used reasonably capable of conveying to the reasonable reader the defamatory meanings ascribed to them by the plaintiff in para 5 of his declaration?

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Let me say right away that, in my view, upon seeing and reading the rather disjointed article in question on the front page, before passing on to articles of greater interest to him, the reasonable reader, after reading that the plaintiff had approached the MMCZ with the Police to retrieve a parcel of diamonds which the plaintiff had deposited with the MMCZ as the authority solely responsible for the marketing of minerals, save for gold (which the average reader would no doubt take to mean the marketing of minerals by the MMCZ outside Zimbabwe for the best price obtainable for the minerals having regard to their value as approved by the MMCZ), would be left with the impression that the plaintiff was in fact assisting the Police in their inquiries about the sale of diamonds. It would not occur to the reader that any finger was being pointed at the plaintiff as one who had done anything wrong or unlawful in that regard. Indeed, if one were

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to have asked the ordinary reader immediately after he had read the article what he made of it, he would probably have replied that he found the article confusing; and if one had pressed upon him the question whether he thought the article was derogatory of anyone, he would probably have mentioned only the MMCZ, possibly, also, the unnamed Cabinet Minister.

Of course, once one pores over the article, which a reasonable reader would not do, and studies its contents critically, analyses them astutely and dissects them minutely, to use the language of DIDCOTT J in *Demmers'* case *supra* at 624H, one is bound to start asking questions.

The thrust of the article, however, certainly appears to be aimed at the MMCZ, whose general manager is most cagey in her replies to the press, and not at the plaintiff.

As regards the eighth paragraph about which the plaintiff complains, I agree with Mr *Morris* that insofar as the plaintiff is named in the second and final paragraphs of the article, it would not strike the average reader that the reference to a "swoop" by the CID on a local mining house is a reference to the plaintiff. In any event, even if the unnamed local mining house were linked to the plaintiff, there is no reason why a reader should think that the plaintiff was holding the precious stones for an improper purpose, as opposed to being in possession of them preparatory to handing them over to the MMCZ. To be frank, the suggestion that the plaintiff was holding back diamonds to sell them on the black market locally, as opposed to having them marketed overseas, is fanciful and, given the thrust of the article as mentioned earlier, no reasonable reader, in my view, would have regarded he plaintiff as being responsible for improperly seeking the intervention of the unnamed

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Cabinet Minister to frustrate the Police in their investigations. Again, given the fact that the MMCZ is the sole authority which is entrusted with the marketing of precious stones, I do not believe it would have occurred to the average reader that there was any question of the plaintiff's being guilty of under-pricing the value of diamonds, an exercise which would mean that the MMCZ was not doing what it was appointed to do or that the plaintiff was acting dishonestly in concert with the MMCZ.

Accordingly, I am of the firm view that, within the context of the somewhat disjointed article as a whole, the words used are not reasonably capable of conveying to the reasonable reader of the *Financial Gazette* the defamatory meanings assigned to them by the plaintiff. In a nutshell, I believe that this is a case of the plaintiff's looking for smoke where there is no fire.

In the premises, the defendant's exception is upheld with costs and the plaintiff's declaration is set aside, it not being the correct procedure to dismiss the plaintiff's claim, as prayed by the defendant, since, as Mr *Andersen* pointed out, in the event of an exception such as this being upheld, it is the invariable practice for the plaintiff to be given leave to file, if so advised, an amended pleading within a certain period of time. See *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works & Land Affairs)* 1993 (2) SA 593 (A) at 602D, 602J & 603A. See also *Green v Lutz* 1966 RLR 633 (G) at 641A; *Adler v Elliot* 1988 (2)

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ZLR 283 (S) at 292B; *Trope & Ors v SA Reserve Bank* 1993 (3) SA 264 (A) at 269G-I & 270A-H.

Accordingly, the plaintiff is given leave to file, if so advised, an amended declaration within 21 days of the date of this judgment.

Winterton, Holmes & Hill, plaintiff's (respondent's) legal practitioners

Atherstone & Cook, defendant's (excipient's) legal practitioners

S v BASSOPO & ANOR 1993 (2) ZLR 374 (HC)

Court **High Court, Harare**

Sandura JP

Criminal review

24 November 1993

Flynote

Criminal procedure - review - request by Attorney-General that High Court use powers of review to set aside acquittals of accused by trial court because of want of prosecution by State - proper procedure to be used to bring before High Court

Headnote

The trial magistrate acquitted the accused because of want of prosecution of the case. The Attorney-General requested the High Court to use its review powers to set aside these acquittals. He argued that the trial magistrate should have discharged the accused for want of prosecution instead of finding the accused not guilty and acquitting them.

The High Court declined to deal with the matter as it had not been properly placed before it. It ruled that the relief sought can only be considered if formal proceedings are instituted and due notice thereof is given to the accused who were acquitted. For the court to consider this matter without notice to the accused would be to breach the fundamental principles of natural justice.

Cases cited:

S v Howe HH-469-86

S v Markriel & Ors 1986 (3) SA 932 (C)

S v Lubisi 1980 (1) SA 187 (T)

Judgment

Sandura JP: This matter was sent to the Registrar of this court by the Attorney-General with the

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request that this court, in the exercise of its review powers, should set aside the acquittal of the two accused and order that the

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trial of the two men should proceed before the provincial magistrate who acquitted them for want of prosecution. What happened in this case is clearly set out by the Attorney-General in his letter to the Registrar. The relevant part of that letter reads as follows:

> "The two accused persons initially appeared in the Magistrates Court at Harare on the 8th of June, 1992. They were facing a charge of theft of goods valued at $3 119. Their trial commenced on the 22nd of July, 1992 before the learned Provincial Magistrate Mr Musakwa. The second accused was being represented by Mr Gula-Ndebele while the first accused was appearing in person.
>
> The State led evidence from two witnesses then the matter was postponed to the 14th of August for continuation. On that date, the second accused defaulted and the matter could not continue. A warrant for the second accused's arrest was issued and accused one was remanded to the 2nd of October, 1992. Accused one was further remanded to the 23rd of the same month. There are no notes in the record on this point but it seems that accused two was now also on remand by that date although the warrant of arrest was still in force. The case was again postponed to the 30th of November, 1992. The record cover is endorsed with the words 'Last Remand' against that date. Apparently the prosecutor had made an undertaking to the court that he would be ready to proceed with the trial on 30 November, 1992.
>
> Unfortunately, the trial magistrate was away on leave on the 30th of November, 1992. As a result the case was postponed to the 4th of February, 1993.
>
> On the 4th of February, 1993, the prosecutor was unable to continue with his case. This was because his witnesses had not turned up and he had no return of service to prove that they had been subpoenaed. The warrant of arrest in respect of accused two was cancelled on this date. The magistrate did not write any notes relating to the reason for cancellation of the warrant of arrest.
>
> It was on the 4th of February, 1993, that Mr Gula-Ndebele applied to the court for the discharge of his client. His argument was that the delay in finalising the trial was causing his client great prejudice and that it was the State which was causing the delay by not having its witnesses available. In reply, the prosecutor indicated that his witnesses had been available on 30 November but had not turned up on the 4th of February. He applied for a final chance to secure the witnesses. The learned

SANDURA JP

> magistrate then put a number of questions to the prosecutor which elicited the response that the absence of the witnesses was the State's problem. After that exchange the prosecutor indicated that the court could refuse a further remand and made reference to the case of S v Howe HH-469-86.
>
> The learned Provincial Magistrate ruled that:
>
> > 'The State has failed to produce witnesses. The case has to have an end. Application by defence granted.'
>
> He proceeded to enter a verdict of 'not guilty' in respect of both accused persons and 'acquitted them for want of prosecution'."

In the circumstances, the Attorney-General submitted that the provincial magistrate ought to have discharged the accused for want of prosecution instead of finding the two men not guilty

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and acquitting them.

The issue raised in this case is whether this court has the power to set aside an acquittal in the exercise of its powers of review. A similar question arose for determination in *S* v *Markriel & Ors* 1986 (3) SA 932 (C). In that case MARIAS J declined to make an order setting aside an acquittal which had occurred *per incuriam.* The learned judge said the following at 933B-C:

> "It seems to me that however plain it may be that the acquittal occurred *per incuriam,* this court should decline to formally set it aside unless formal proceedings designed to achieve that result are taken and due notice thereof is given to the accused who were acquitted. To make an order of this kind without any notice to the accused would be a breach of one of the cardinal rules of natural justice."

Commenting on *S* v *Lubisi* 1980 (1) SA 187 (T), a case in which an acquittal was set aside, the learned judge said the following at 93 E-I:

> "This decision runs counter to what was decided in S v Lubisi 1980 (1) SA 187 (T), but with respect to the learned judges who presided in that matter, they do not appear to have taken into account that the invocation and exercise of the court's inherent powers of review without any notice whatsoever to a vitally interested party, namely the accused, was fundamentally irregular and a breach of the rules of natural justice ...
>
> Lest what I have said be misunderstood, I emphasise that I express no opinion at all upon the question of whether, and in what circumstances,

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> this court has the power to set aside an acquittal in the exercise of an inherent power of review. My refusal to make any order is based solely upon the breach of the audi alteram partem rule which such course would entail."

I entirely agree with those comments.

In the circumstances I decline to make any order. The relief sought can only be considered if formal proceedings are instituted and due notice thereof is given to the accused who were acquitted.

LEVY v TUNE-O-MIZER CENTRE (PVT) LTD 1993 (2) ZLR 378 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA, Muchechetere JA

14 October & 25 November 1993

Civil appeal

Flynote

Practice and procedure - discovery - use of documents discovered as privileged - High Court of Zimbabwe

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Rules 1971 - rule 163

Evidence - expert - opinion - need to base opinion on facts given at trial

Negligence - inevitable accident - meaning

Headnote

The appellant had deposited his motor vehicle with the respondent for repair. Whilst the respondent's servant was test driving the vehicle, a crash occurred. The appellant sued for the value of the car. In the High Court (Chidyausiku J), the claim was dismissed. On appeal:

Held, that a report of a loss assessor was wrongly admitted by the trial court as the facts on which the assessor's opinion was based were not given in evidence.

Held, further, that the respondent could not rely on the defence of inevitable accident.

Cases cited:

R v Abadom (1982) 76 Cr App R 48 (CA)

Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd 1979 (3) SA 754 (A)

The Schwan -The Albano [1892] P 419

Bell Telephone Co of Canada v The Ship 'Mer - Tireno' (1975) 52 DLR (3d) 702 (Fed Ct)

Henderson v Henry E Jenkins & Sons [1970] AC 282; [1969] 3 All ER 756 (HL)

KORSAH JA

A P de Bourbon SC for appellant

M J Gillespie for respondent

[Facts not material to the issue reported have been omitted from the judgment.]

Judgment

Korsah JA: This case has arisen from an accident which occurred on 2 June 1988, involving the appellant's 1968 Lincoln Continental Mark III motor vehicle, which he had deposited with the respondent for reward.

[The learned Judge set out and analyzed the evidence given at the trial. In dealing with the argument that a report by a loss assessor was inadmissible to rebut a suggestion of recent fabrication, he said:]

It is this vacillation about the cause of the accident proffered by the respondent that appears to give substance to Mr de Bourbon's accusation that the last cause, put forward by the respondent at the trial, was of recent fabrication.

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In its discovery affidavit the respondent disclosed that it was in possession of a report prepared by Motor and Engineering Claims (Private) Limited, but objected to the production of such document on the grounds that it was privileged. This was the report prepared by Mr David Thompson alluded to earlier.

In an attempted rebuttal of the allegation of recent fabrication, Mr *Gillespie* sought to introduce into evidence the report compiled by Mr David Thompson. The production of this report as an exhibit was strenuously objected to by Mr *de Bourbon*, but his objection was overruled and the document admitted as Exhibit A Mr *de Bourbon* contended that the learned trial judge was in error in admitting the report as an exhibit.

Discovery of Exhibit A was made in terms of rule 161 of the High Court Rules 1971 by the respondent, although it was claimed to be privileged. Rule 163 provides that"a document which has not been disclosed"in discovery"may not, save with the leave of the court granted on such terms as to it may seem just, be used for any purpose at the trial by the party who was obliged but failed to disclose it, but any other party may use such document".

My understanding of rule 163 is that once a document has been disclosed in a party's discovery affidavit, **provided the other rules regarding its**

KORSAH JA

introduction into evidence are satisfied, it may be used by any party to the action. It is true that privilege was claimed in respect of this document. Nevertheless, once the document was disclosed, the appellant, if he so desired, could have applied for an order for inspection of it in terms of rule 164. That no such application was launched does not bar the use of Exhibit A by the respondent, if it is otherwise admissible in evidence, to rebut the allegation of recent fabrication. Disclosure having been made of the report by an expert in the respondent's discovery affidavit, there was no element of surprise or unfair advantage in the production of it, if it is admissible in evidence; for one purpose of discovery is the ascertainment of truth at the time of the trial itself.

It is, of course, a basic rule of evidence that statements contained in documents may be given in evidence only by the maker or any person who heard or otherwise perceived the statement being made. Where, however, the maker of the document is dead or beyond the seas, as in this case, the document is receivable in evidence if such facts be proved, but it is for the court to determine what weight it would place on it and the extent to which it will allow its use. If, as submitted by Mr *Gillespie,* Exhibit A was only introduced to rebut the allegation of recent fabrication then, if it is otherwise admissible, I see no reason why it should not be admitted for that limited purpose, when disclosure has been made of it in the discovery affidavit.

Mr *de Bourbon*, on the other hand, argued that an attempt was made by the witnesses to tailor their evidence to conform with the opinion expressed by Mr David Thompson in Exhibit A That document contains the opinion of the maker of the document, based not only on facts which he himself had established, but also on statements made to him by agents of the respondent and other persons. The question is whether, insofar as the document contains statements which are

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made by agents of the respondent and other persons, it should be excluded as being "hearsay-upon-hearsay". The issue is not without difficulty.

The law accepts the opinion of experts to be an exception to the hearsay rule, even though the facts or some facts to which he testifies are known to him only upon the authority of others. This is generally because the professional competency of an expert gives him a knowledge of trustworthy authorities and the proper sources of information, and an extent of personal observation in the general subject enables him to estimate the general plausibility, or probability, of the views expressed, without which information it would be impossible for him to express an expert opinion one way or the other.

KORSAH JA

However, before receiving such expert opinion in evidence, the facts upon which he relies to form that opinion must themselves be proved in the trial by admissible evidence. As was observed in *R* v *Abadom* (1982) 76 Cr App R 48 (CA) at p 52:

> "First, where an expert witness relies on the existence or non-existence of some fact which is basic to the question on which he is asked to express his opinion, that fact must be proved by admissible evidence; see English *Exporters* v *Eldonwall* [1973] Ch 415; [1973] 1 All ER 726 per Megarry J at p 421E and p 731g and *Turner* [1975] 1 QB 834, 840B. Thus, it would no doubt have been inadmissible if Mr Cooke had said in the present case that he had been told by somebody else that the refractive index of the fragments of glass and of the control sample was identical, and any opinion expressed by him on this basis would have been based on hearsay. If he had not himself determined the refractive index, it would have been necessary to call the person who had done so before Mr Cooke could have expressed any opinion based on this determination. In this connection it is to be noted that Mr Smalldon was rightly called to prove the chemical analysis made by him which Mr Cooke was asked to take into account. Secondly, where the existence or non-existence of some fact is in issue, a report made by an expert who is not called as a witness is not admissible as evidence of that fact merely by the production of the report, even though it was made by an expert: see for instance *Crayden* (1978) 67 Cr App R 1, 3, 4; [1978] 2 All ER 700, 702d."

Exhibit A comprises information gathered from various persons and sources, some of whom were not called as witnesses, to testify to the veracity of the information which they furnished to Mr David Thompson to enable him to arrive at his opinion. Furthermore, the facts upon which Mr David Thompson expressed an opinion in Exhibit A were all in issue, and Mr David Thompson could not be called. The requirements for the report of an expert to be admitted in evidence were, therefore, not satisfied by Exhibit A, and so despite its disclosure on discovery it is inadmissible as evidence therein stated by its mere production. For evidence of any form or quality, whether documentary or otherwise, it remains equally possible that the specific piece of evidence offered may be absolutely true or completely or partly fabricated. If Mr David Thompson could not be called due to his absence, another expert could have been called to give an opinion on the cause of the accident.

Consequently, I am of the view that the trial court fell into error when it admitted Exhibit A into evidence.

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KORSAH JA

[The learned judge held that the evidence for the respondent was to the effect that the throttle of the car had jammed open. However the appellant had used the car for nearly a year without the throttle jamming. He continued:]

From the evidence adduced on behalf of the respondent, the probabilities are that it was something which the respondent did during the tune up and adjustments which caused the jamming of the throttle resulting in the accident which occurred.

Inevitable accident is where a person does an act, which he lawfully may do, but causes damage, despite there having been neither negligence nor intention on his part. This is a defence available to a depository. See *Stocks & Stocks (Pty) Ltd* v *TJ Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A). But as LORD ESHER observed in *The Schwan -The Albano* [1892] P 419 at 429:

> "In my opinion, a person relying on inevitable accident must shew that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill."

Indeed, the defence cannot be relied upon where the risk is reasonably foreseeable: *Bell Telephone Co of Canada* v *The Ship "Mer - Tireno"* (1975) 52 DLR (3d) 702 at 710; *Henderson* v *Henry E Jenkins & Sons* [1970] AC 282 (HL) at 291E-H; [1969] 3 All ER 756 (HL) at 758F-H.

In its defence the respondent admitted that the accident occurred as a result of a brake failure triggered off by the jamming open of the throttle. There was no history of this defect in the vehicle until the respondent commenced work on the vehicle. There exists a strong probability that this defect was occasioned by the respondent. A mechanic of Mr Lombard's acclaimed experience and expertise must, or ought reasonably to, have foreseen the possible consequences which would flow from such jamming of the throttle. His parting words of caution to Mr Allmark that:"For God's sake don't have an accident", may be supportive of the view that he was aware of the possibility of the recurrence of the throttle jamming open during the test-drive resulting in such an accident as occurred.

The jamming open of the throttle, which the respondent proffers as the cause of the accident, was clearly and distinctly foreseeable and, in fact, foreseen as it had been observed by Mr Lombard during the tune up. From the premonition that Mr Lombard said he had the resulting damage was also clearly foreseeable. The accident was, therefore, not of the type of rare

KORSAH JA

occurrence which normally typifies an inevitable accident at law.

The rule is often expressed in simple terms that foreseeability goes to culpability. In view of this, the burden on the respondent of establishing that "it could not possibly prevent the accident by the exercise of ordinary care and skill" is greatly compounded, and, for the same reasons mentioned above which constitute negligence on its part, the respondent also did not discharge the onus of proving that the accident was inevitable.

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[The learned judge then analyzed the evidence on quantum. The appeal was allowed with costs and damages of $150 000 were awarded to the appellant.]

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

S v BALL 1993 (2) ZLR 384 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Criminal appeal

18 & 25 November 1993

Flynote

Roads and road traffic - culpable homicide - negligence - child - child of about 12 years apparently seeing oncoming car, but then suddenly running in front of it - motorist not liable

Headnote

The courts have consistently emphasized the standard of care which must be observed by motorists when passing children on the side of the road. There is, however, no absolute liability; each case must be decided on its own facts. The age of the child is a relevant factor. Where the child is around twelve years of age, the motorist is entitled to expect a higher degree of common sense or rationality than from a younger child. The fact that the child has apparently noticed the oncoming vehicle and given the appearance of taking precautions would also be relevant. Where these two factors were present and the deceased child suddenly and without warning attempted to run across the road and was killed by the vehicle driven by the appellant, Held, that the appellant was not negligent.

Cases cited:

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

S v Ferreira 1992 (1) ZLR 93 (S)

S v Beets S-90-93 (not reported)

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

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R v Momberg 1953 (2) SA 685 (O)

Mrs J B Wood for the appellant

Mrs J Zindi for the respondent

McNALLY JA

Judgment

McNally JA: In a series of cases involving the unintentional killing of children this court has emphasised the high standard of care that must be exercised by motorists when passing children on the side of the road. See *S* v *Duri* 1989 (3) ZLR 111 (S); *S* v *Ferreira* 1992 (1) ZLR 93 (S) and *S* v *Beets* S-90-93. But there is no absolute liability. Each case turns on its own facts.

In each of the cases to which I have referred, it could be said that, when the crisis occurred, there was no way the driver could avoid the child. In each case, therefore, the court was in effect, ruling that a properly cautious driver would have done something before the crisis arose to ensure either that he could avoid it, or that he could prevent it, or both.

By slowing down considerably or moving to the centre or far side of the road when this is possible, one may be satisfied that even if the child does suddenly dash into the road one will be able to avoid him. By hooting or flashing one's lights one may be satisfied that the child is aware of one's presence. With a small child one may need to take both avoiding and preventive action. With an older child one or other may be an adequate and reasonable precaution.

In the present case, the motorist was travelling along a major road (Chivhu - Gutu) in conditions of good visibility. There was a blind rise, but it is irrelevant because she came over it and saw the three children 60-70 metres ahead of her. It was soon after 8 am. There may well have been a "danger" sign, but this is of no consequence because she saw the children. They were walking in the same direction as she was travelling. She was travelling at 100 km/h, but she decelerated on seeing the children. She decelerated further and moved to her right when she saw one of the children (the deceased) put one foot on the road as if to cross.

But then he apparently noticed her. He abandoned his move to cross the road and continued walking with his friends. She therefore continued at her reduced speed of approximately 80 km/h and on her course near the centre of the road. At the last moment and without warning he ran under her wheels and was killed. The point of impact was 1,2 metres from the edge of the tarmac and was on the left front headlight of the car. Curiously, neither the TAB nor the plan show the important distance from the point of impact to the side of the road, but it seems to have been accepted as 1,2 metres.

Two factors distinguish this case from the others to which I have referred.

The first is that the child actually looked at the appellant's car, desisted

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McNALLY JA

from his apparent intention to cross the road, and then suddenly did so.

The second is that the evidence shows that the child was not ten, as the State outline suggests, but eleven or twelve years old. This is so, because the one witness, a child who was there, but had already crossed the road, said the deceased was his elder brother. The witness, giving evidence on 21 July 1993, said he himself was twelve years old. Therefore, at the date of the accident, 6 June 1991 he was ten. Therefore his older brother, the deceased, must have been eleven or twelve when he met his death.

I recall that the child in *Duri supra* was five; in *Ferreira supra* he was seven; in *Beets supra* he was also seven. The age of the child is highly relevant - see eg the *dicta* of Holmes JA in *Levy NO v Rondalia Assurance Corp of SA Ltd* 1971 (2) SA 598 (A), cited in *Ferreira supra*.

In *R v Momberg* 1953 (2) SA 685 (O), where the facts were not dissimilar, the appellant, who had been convicted in a magistrates court, was acquitted on appeal. The learned judge (HORWITZ J) remarked, as nearly as my faulty Afrikaans enables me to translate, as follows at 689A:

> "It is noteworthy that in nearly all the cases dealt with in our courts, and where the negligence of the injured party is not held against him, the child concerned was under the age of ten years. This age is naturally not a fixed boundary; each case depends on its own circumstances, and in each case the development and reasoning powers of the child must be investigated ..."

In *Momberg* the child was thirteen; she had looked at the appellant's car in response to a hoot; she could not reasonably have been expected to do what she did - dash across the road as the car was almost upon her. The case is one of many cited in Cooper *Motor Law* Vol 2 p 216.

Accordingly the fact that the child in question was at least eleven or twelve years old means that the appellant was entitled to expect a higher degree of common sense or rationality than might reasonably have been expected of a younger child.

It is in the light of that fact that one looks at the other fact - the child started to cross the road; looked in the direction of the approaching motor vehicle; and desisted from his attempt.

McNALLY JA

This was specifically accepted as a fact by Mrs *Zindi,* who appeared for the State. Indeed she had to accept it, because the appellant had consistently said so from her statement to the police at the scene onwards. The only other witness at the scene, the deceased's younger brother, was understandably vague two years after the event, and probably only looked around when he heard the impact. He had already crossed the road and was ahead of the deceased. His evidence on this point is unhelpful.

In my view, these two factors, the age of the child and the fact that he apparently looked and saw the oncoming motorist, are decisive in favour of the appellant. It may be, and frequently is,

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necessary to hoot when approaching children in these circumstances. It may indeed be desirable to hoot even when they appear to have seen you. But it is difficult to say that failure to hoot was negligent when the purpose of hooting is to attract the child's attention, and that attention was apparently already focused on the car approaching.

The dangerous practice of dashing headlong and heedlessly across roads has caused a number of tragic deaths. It is to be hoped that schools will train their pupils not only to look both ways but also to walk, not run, across the road.

The appeal must succeed. The conviction and sentence are set aside.

Korsah JA: I agree

Ebrahim JA: I agree

Winterton, Holmes & Hill, appellant's legal practitioners

S v TOMS 1993 (2) ZLR 388 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Criminal appeal

22 & 30 November 1993

Flynote

Roads and road traffic - negligence - duty of driver - signalling intention to turn

Roads and road traffic - evidence - extra-curial statement - statement made by motorist to police officer after accident - admissibility - Criminal Procedure and Evidence Act [Chapter 59] - s 242(1)

Headnote

The object of a motorist signalling is to tell other road users what the driver is about to do, not what he is doing. A turning signal given at the same time as the turn begins is of no use whatever and other drivers cannot be blamed for failing to act as though the signal were given timeously. A statement made by a person involved in a road accident is commonly recorded by the attending police officer in a traffic accident report book. There is nothing special about such statements. They are no different from any other pre-trial statements recorded from accused persons by persons in authority. A warning and caution, though, is not normally necessary because the police officer does not regard the person as a suspect. The officer is simply gathering information; the decision to prosecute will normally be left to his superiors. If the person making the statement is subsequently prosecuted, the statement may be used in evidence if the requirements of s 242(1) of the Criminal Procedure and Evidence Act [*Chapter*

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59] are complied with. The State must show that the statement was made voluntarily.

Cases cited:

R v Barlin 1926 AD 459

McNALLY JA

S v Yolelo 1981 (1) SA 1002 (A)

MRD Stonier for the appellant

GTV Mamvura for the respondent

Judgment

McNally JA: The appellant was involved in a motor vehicle accident and was charged with and convicted of negligent driving. She was fined $400 or, in default of payment, two months' imprisonment with labour. She now appeals against conviction.

The other person involved in the accident was quite badly hurt and has no memory at all of the events to which I will refer. So when I refer, as I will, to the apparent negligence of the complainant, it must be remembered that we do not have her version of events. The appellant was convicted in effect on her own version.

The appellant was driving a 2.5 ton Isuzu truck loaded with compost and carrying four workers along Drew Road in Highlands in the direction of the Enterprise Road. It was shortly after 8 am on 1 August 1990. The weather was fine and clear. She was travelling at about 65-70 km/h.

A side road, Maranzi Road, comes in from the right (her right). It is governed by a "Give Way" sign. As she approached it, a Mazda 323 came down Maranzi Road and without stopping, turned to travel in front of her. All this happened quite close in front of the appellant, and she gained the impression that the driver of the Mazda had not noticed her. So now it was travelling in front of her, quite slowly, and she was rapidly catching up on it. Either she had to brake and fall in behind it, or pull out and overtake. She decided on the latter, after initially slowing down a little.

She put on her indicator, moved on to the right hand side of the road (there was no on-coming traffic) and began to overtake. As the front of her vehicle was almost level with the back of the complainant's Mazda she saw the latter's indicators come on and almost simultaneously the Mazda began a right turn into the gates of the Montessori School. These gates were measured by her to be 70 paces from Maranzi Road (64 paces at the inspection in loco). So all these events took place within the short distance of 64-70 paces.

The truck drove into the driver's door area of the Mazda and pushed it sideways past the entrance to the school and on to the verge, colliding with the culvert.

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McNALLY JA

The particulars of negligence were set out as follows:

1. Travelling at an excessive speed in the circumstances;

2. Failing to keep a proper look out;

3. Overtaking at a junction or intersection.

1. EXCESSIVE SPEED

There was no evidence at all of excessive speed. Obviously the Isuzu was moving faster than the Mazda but the severity of the impact was largely because the Isuzu was so much heavier. In fact the Mazda was pushed sideways only six paces. The appellant said she was travelling, while overtaking, at 65-70 km/h.

2. FAILING TO KEEP A PROPER LOOK OUT

The only evidence available is that the complainant signalled virtually as she turned. Every day experience is that this is an astonishingly common practice. The object of a signal is to tell people what you are going to do, not what you are doing. They can see that for themselves. Yet a remarkably high percentage of drivers have developed the technique of turning the wheel and putting on their indicators in almost the same movement. This kind of signal is of no use whatever.

Assuming - and there is no other evidence - that this is what the complainant did, it is impossible to say what the appellant should have been looking out for. There was no hand signal; there was no timeous flashing light; there was no on-coming traffic; the road was clear; the complainant's vehicle was moving slowly; she was entitled to overtake. It is not alleged that she should have hooted.

And, of course, the complainant should have seen the appellant's vehicle both when she turned into Drew Road and 64-70 paces further on when she started to turn into the driveway.

Mr Mamvura, on appeal, made much of the fact that at the inspection *in loco* the appellant indicated the distance from the point where she first noticed the complainant signalling, to the point of impact, as 23 paces. This distance, he said, was enough for the appellant, had she been keeping a proper look out, to swing left and pass on the inside.

McNALLY JA

This overlooks a number of factors. First, the distance is only an estimate made two years after the accident. Second, 70 km/h equals 19 metres per second, 60 km/h equals 17 metres per second, so we are looking at a time period of just over one second. See Cooper *Motor Law* Vol 2 p 435.

Third, the relevant distance is probably half of 23 paces because the complainant's vehicle was

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not at the point of impact when the appellant was 23 paces from that point. The Mazda was also moving. So when the Isuzu was 23 paces from the point of impact the Mazda was possibly 5 or 10 paces from it, and correspondingly nearer the Isuzu.

In other words, the Isuzu was not 23 paces from the Mazda. It was much closer. Given that normal reaction time is in the region of three quarters of a second (*Cooper op cit p 442*) one can see that the suggested manoeuvre was not practicable.

3. OVERTAKING AT A JUNCTION OR INTERSECTION

There was no junction or intersection.

It does not seem to me, therefore, that the particulars of negligence were established.

Two aspects of the proceedings call for comment.

When an inspection in loco takes place, the findings at that inspection should be placed on the record and the agreement of both parties to the facts so recorded should also be placed on record. This was not done. The facts allegedly established appear for the first time in the judgment. The trial appears to have taken place on 3 August 1992. The inspection was on 17 November 1992. The judgment is dated 25 November 1992. The charge sheet is (I presume, wrongly) dated 25 March 1993.

Secondly, the appellant's legal practitioner launched a fairly sustained attack on the magistrate on the basis that the policeman who gave evidence should not have been allowed to put in evidence what was recorded in his Traffic Accident Book as the statement of the appellant, because he had not warned and cautioned her.

The magistrate was commendably patient and entirely correct. But his attitude seemed to be that if the statement was in the Traffic Accident Book

McNALLY JA

it was admissible. This is an over simplification. I think one has to go back to first principles in analysing the situation.

The common law situation, as set out in *R* v *Barlin* 1926 AD 459 at 462, and repeated in *S* v *Yolelo* 1981 (1) SA 1002 (A), is:

> "The common law allows no statement made by an accused person to be given in evidence against himself unless it is shown by the prosecution to have been freely and voluntarily made - in the sense that it has not been induced by any promise or threat proceeding from a person in authority. ... That is a principle covering all admissions or statements made by the accused."

That position has been overtaken by statutory provisions both in South Africa and Zimbabwe. The provisions are different from each other. In our law, as in South Africa, a person involved in an accident is required by statute -in Zimbabwe Part VIII of the Road Traffic Act 48 of 1976 -to do certain things. But he/she is not required to make a statement relating to the accident.

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There is, of course, no law to say that a policeman investigating the accident may not invite the parties involved to give their version of how the accident happened. This is commonly and properly done by reference to the contents of the standard Traffic Accident Book.

Normally, although I do not say there may not be exceptions, a warning and cautioning is not necessary, for the simple reason that the policeman does not regard the person as a suspect. He is simply gathering information in the course of his investigation, from all the parties involved. (In this case the one party was badly hurt and could not be interviewed.)

The admissibility of that statement will then be determined in accordance with the provisions of s 242 (1) of the Criminal Procedure and Evidence Act [*Chapter 59*]. The onus of proof of voluntariness is on the State.

To that extent, the legal practitioner was correct. But in practical terms the objection was over zealous. There was no suggestion either that the policeman regarded her as a suspect or that she wrote her statement under any compulsion. She wrote it and signed it herself; it is not a confession, it is only an admission in the sense that it involves an admission that she was there and was the driver of one of the vehicles. It is consistent with her evidence in court.

1993 (2) ZLR p393

McNALLY JA

If the legal practitioner had wished to make an issue of the production of the Traffic Accident Book he should have laid a foundation by alleging that his client was treated as a suspect and improperly induced or threatened or forced to make the statement. In the absence of any such allegation, the demand that a warning and cautioning should have been administered was calculated only to sow doubt and confusion.

Nonetheless, judicial officers should be alive to the fact that there is nothing special about statements recorded in a Traffic Accident Book. They are no different from any other pre-trial statements recorded from accused persons by persons in authority. A warning and caution will normally be unnecessary because junior policemen at the scene are normally instructed to collect the facts and leave the decision to prosecute to their superiors. This appears from p 35 of the Traffic Accident Book, headed "Instructions by Officer/Member in Charge".

The fact that (at p 28 of the Traffic Accident Book) the investigating officer is asked for his opinion does not mean he has taken the decision to prosecute. And in any event, that opinion is only formed **after** he has recorded the versions of the parties.

However, where a party challenges the admissibility of his statement, and makes out a *prima facie* case for that challenge, the State should be required to prove in the usual way that s 242 has been complied with. Magistrates may not say "you can't challenge that; it's in the Traffic Accident Book", as if the Traffic Accident Book has some special magic quality.

I have dealt at some length with what was, in this case, a red herring. I have done so because I have not found any recent or readily accessible decision on the question of statements in a Traffic Accident Book, and I think some guidance may be useful.

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The appeal succeeds and the conviction and sentence are set aside.

Gubbay CJ: I agree

Korsah JA: I agree

Winterton, Holmes & Hill, appellant's legal practitioners

COMMERCIAL BANK OF ZIMBABWE LTD v MASHAIRE 1993 (2) ZLR 394 (HC)

Court **High Court, Harare**

Robinson J

Civil application

1 December 1993

Flynote

Practice and procedure -judgment - superannuated judgment - summons for civil imprisonment issued before judgment became superannuated - judgment must be revived before becoming enforceable - Rules of High Court - rules 324 and 448

Headnote

Where a judgment has become superannuated in terms of rule 448 of the Rules of the High Court, it may not be enforced by the sanction of civil imprisonment unless it has been revived. This applies even though the summons for civil imprisonment was issued before the judgment became superannuated.

Miss JC Mesu for the plaintiff

No appearance for the defendant

Judgment

Robinson J: When the plaintiff's legal practitioner applied for this matter, in which the defendant had been summoned to appear before this court to show cause why an order for civil imprisonment should not be made against her for her failure to pay a judgment debt, to be removed from the roll, I pointed out that the judgment which the plaintiff was seeking to enforce had become superannuated in terms of rule 448 of the Rules of Court, which provides as follows:

> "A judgment shall become superannuated after six years from the date thereof but may be revived on a court application but in such case no new proof of debt shall be required. In the case of a judgment for periodic

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ROBINSON J

> payments the six years shall run in respect of any payment from the due date thereof."

I further pointed out that, although the civil imprisonment summons in this matter had been issued before the judgment had become superannuated, there is no provision in the case of a civil imprisonment summons which corresponds to that contained in rule 324 which applies to a writ of execution and which provides as follows;

> "No writ of execution shall be issued after the judgment has become superannuated, unless the said judgment has first been revived, but a writ of execution once issued shall remain of force until such time as the judgment has been satisfied."

Accordingly, I advised the plaintiff's legal practitioner that the plaintiff could not seek to enforce the judgment in question by the sanction of civil imprisonment proceedings unless and until the judgment had first been revived.

Gollop & Blank, plaintiff's legal practitioners

S v KAMUSISI 1993 (2) ZLR 396 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Criminal appeal

22 November & 2 December 1993

Flynote

> Criminal procedure (sentence) - common law offences - robbery - stock stolen during robbery - accused liable to increased penalties provided for in Stock Theft Act [Chapter 72]

Headnote

Section 3(2) of the Stock Theft Act [*Chapter 72*] confers special jurisdiction on magistrates to impose sentences of up to four years' imprisonment on persons convicted of an offence referred to in s 11 of the Act (of which theft of stock or produce is one offence). This jurisdiction is conferred whether or not the Act is referred to in the charge. Theft is an essential element of the crime of robbery. It would be wholly repugnant to the scope and purpose of the Stock Theft Act to hold that the increased penalties applicable to stock thieves were not applicable to persons who stole stock during the course of a robbery.

Cases cited:

S v Mbabvu & Anor 1980 ZLR 515 (G)

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Ex p Min of Justice, in re *R v Gesa; R v de Jongh* 1959 (1) SA 234 (A)

R v Takawira & Ors 1965 RLR 162 (A)

S v Takaendesa 1972 (1) RLR 325 (A)

S v Matimbe & Ors HH-251-92

S v Musimbe S-6-88

S v Munyembe S-21-93

VS Nyangulu for the appellant

GTV Mamvura for the respondent

GUBBAY CJ

Judgment

Gubbay CJ: The appellant and two other accused, Tichaona Chitekero and Richard Ruzive, were jointly charged in the court of a magistrate with the crime of robbery. The allegation was that during June 1992, and at Manyene in the district of Charter, one or more or all of them, unlawfully assaulted Dzingirai Ruzive, and by means of force and violence to induce submission, took and stole from him one goat and two head of cattle. The appellant and Chitekero were convicted of theft in terms of s 197(1)(f) of the Criminal Procedure and Evidence Act [*Chapter 59*]. They were each ordered to undergo thirty-six months' imprisonment with labour, of which six months were conditionally suspended for five years. Richard Ruzive was found not guilty and discharged. Aggrieved by the outcome of the trial, the appellant, but not Chitekero, now comes before this court.

Mr *Nyangulu*, who appeared for the appellant, advised that upon closer consideration of the record he was unable to advance any substantive argument in support of the appeal against conviction. His concession was proper and entirely justified. The conviction is accordingly confirmed.

The challenge to the propriety of the sentence was, however, vigorously pursued. It was submitted that the term of imprisonment imposed exceeded the magistrate's jurisdiction; alternatively, that taking account of the unusual facts of the case, the sentence was disturbingly inappropriate.

The thrust of counsel's first argument proceeded along these lines. Under s 54(2)(a) of the Magistrates Court Act [*Chapter 18*], the jurisdiction on summary trial of a magistrate, other than a regional, provincial or senior magistrate, in relation to a period of imprisonment is limited to twelve months. If, therefore, the magistrate had convicted the appellant of robbery, she could not have ordered her to serve more than twelve months in prison. But because she had convicted the appellant on the competent verdict of theft of the stock, the magistrate erroneously assumed the special increased jurisdiction provided in s 9(b) of the Stock Theft Act

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[*Chapter 72*] which, upon conviction for any offence referred to in s 11 (of which theft of stock or produce is one), permitted of the imposition of imprisonment for a period not exceeding four years. In the premises, the law-maker in enacting ss 9(b) and 11 of the Stock Theft Act, could not have intended such an anomalous and inequitable result to occur.

This argument finds support in the review judgment of WADDINGTON J in *S* v *Mbabvu & Anor* 1980 ZLR 515 (G). In that case the second accused had been convicted of robbing the complainant of two head of cattle. He was

GUBBAY CJ

sentenced to nine years' imprisonment with labour, which at that time was the minimum mandatory punishment prescribed for the theft of stock, in terms of s 8A of the Stock Theft Act (subsequently repealed by Act 10 of 1982). In setting aside the sentence, the learned judge, with whom Horn AJ concurred, expressed the view that the reference to the *eo nomine* offences of "theft or attempted theft of any horse or bovine", by its clear language, precluded the court from extending its effect to other offences (see at 518A).

While I readily understand the reluctance of WADDINGTON J to implement such a Draconian punishment, which no doubt offended his sense of justice, I do not, with respect, find his reasoning for avoiding doing so convincing.

Section 3(2) of the Stock Theft Act confers special jurisdiction, whether or not the Act is referred to in the indictment, summons or charge concerned; and ss 11(1) and (2) lay down the maximum penalties on conviction.

Robbery consists in the theft of property by intentionally using violence or threats of violence in the taking of it from another. See Hunt *SA Criminal Law and Procedure* 2 ed Vol 2 at p 680. The description,"theft by violence", though incomplete, reflects the essence of the crime of robbery -theft being an essential element. See *Ex p Minister of Justice:* In re *R v Gesa, R v De Jongh* 1959 (1) SA 234 (A) at 238C-D.

In my view, it would be wholly repugnant to the scope and purpose of the Stock Theft Act to hold that the penalties are applicable to cattle thieves but not, for instance, to armed cattle rustlers who are charged with robbery. I consider that the presumption against such a glaring absurdity being intended by the law-maker is to be invoked. See *R v Takawira & Ors* 1965 RLR 162 (A) at 166C-E; *S v Takaendesa* 1972 (1) RLR 325 (A) at 334C-D.

For these reasons I am satisfied that if the appellant had been convicted of robbery she would have been liable to the penalties provided for in s 11(1) as read with s 9(b) of the Stock Theft Act.

The magistrate was thus entirely correct in not limiting her jurisdiction in terms of s 54(2)(a) of the Magistrates Court Act.

The next question is whether the lengthy term of imprisonment to which the appellant was subjected, was justified.

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If this were one of the usual cases of theft of stock, I would have found that

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the appellant's sentence fell within the usual range and did not warrant interference. See *S v Matimbe & Ors* HH-251-92; *S v Musimbe* S-6-88; *S v Munyembe* S-21-93. But it is not, as the following brief outline of the facts will show.

The appellant and Chitekero are members of ZINATHA. At the request of Richard Ruzive they proceeded to the village of his uncle, Dzingirai Ruzive, and conducted a cleansing ceremony there in order to remove the prevailing evil spirits. Having done so, they took and slaughtered one of the complainant's goats, in spite of his protests. Not content with a single animal, the appellant and Chitekero, again in the face of strong objection from the complainant, removed two head of cattle from the pen and drove them to a butchery where they were sold. The complainant estimated his total loss at $1 000.

The weighty mitigating feature, and one which was overlooked by the magistrate, was that the theft was committed quite openly. The thieves made no attempt to conceal their identities. Plainly, the complainant was deprived of his property because that was the fee the appellant and Chitekero had decided to exact for their services. Such high-handed and overbearing action was, however, symptomatic of some colour of justification in their minds.

In the special circumstances of this case, therefore, I would allow the appeal against sentence and substitute the following for that imposed by the trial court:

> "Twenty-four months' imprisonment with labour of which period: (i) ten months is suspended on condition that the accused or Tichaona Chitekero or one or other or both of them pay the sum of $1 000 to the complainant through the clerk of court, Chivhu, by not later than 30 June 1994; and (ii) a further six months is suspended for three years on condition that the accused is not convicted of any offence of which dishonesty is an element, committed within that period, for which the sentence is imprisonment without the option of a fine."

Tichaona Chitekero's sentence cannot be allowed to stand. There is no warrant to differentiate his situation from that of the appellant, for their moral blameworthiness was at least equal.

Accordingly, utilising my powers of review under s 23(1) of the Supreme Court of Zimbabwe Act 1981, the sentence imposed upon Tichaona Chitekero by the magistrate on 18 January 1993, is set aside. Save for replacing

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the name"Tichaona Chitekero "with" Jessie Kamusisi", the order in respect of him will be as above.

McNally JA: I agree.

Korsah JA: I agree.

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VS Nyangulu & Associates, appellant's legal practitioners

HUNDAH v MURAURO 1993 (2) ZLR 401 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

25 November & 2 December 1993

Flynote

Sale - land - land belonging to local authority located in high density suburb - where seller is tenant-to-buy, prior written consent of Municipality required for cession of rights to buyer

Practice and procedure - parties - citing of - tenant-to-buy of land belonging to local authority selling land to buyer - buyer applying for order transferring land to him - local authority must be cited as a party in any such action

Headnote

Land in the high density suburbs belongs to the local authority or, occasionally, to central government. Occupants of the houses built in these suburbs fall into three categories, namely

1. simple tenants under lease agreements with the local authority;
2. tenants-to-buy under agreements which permit them to take title once the property is surveyed and the full price is paid;
3. occupiers who were previously tenants-to-buy and have become owners.

Where the occupier is a simple tenant, the standard agreement of lease contains a clause designed to prevent the tenant from entering into an agreement to sell the leased property.

Where the occupier is a tenant-to-buy, the lease-to-buy agreement contains a clause that the occupier may not cede or assign the agreement or any rights acquired by him under the agreement without the prior written consent of the local authority.

Where there is a dispute relating to the purported sale of such property, the lawyers dealing with the matter should always first ascertain what sort

McNALLY JA

of an occupier the seller was.

In any action seeking an order of transfer of such property from the occupier to a third party, the

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local authority must always be cited as a party as the local authority has a real interest in the property. The citation of the local authority will, however, not be necessary if it has indicated beforehand in writing that it is happy to accept whatever the court decides.

Cases cited:

Munemo v Muswera 1987 (1) ZLR 20 (S)

Ncube v Mkandla S-123-89

Dube v Khumalo 1986 (2) ZLR 103 (S)

Majura v Maposa S-172-91

Pedzisa v Chikonyora 1992 (2) ZLR 445 (S)

Parish v King 1992 (1) ZLR 216 (S)

The appellant in person

T Biti for the respondent

Judgment

McNally JA: In this matter the appellant appeared in person. He had lost his case in the High Court. In setting out the facts I will refer to the parties by name, as Mr Hundah and Mr Murauro respectively.

Mr Murauro applied to the High Court on notice of motion on 14 October 1991, for an order that Mr Hundah transfer to him Stand 5301 Mufakose Township, otherwise known as No. 6 Mususa Road, Mufakose. He also sought ancillary relief and asked that a copy of the order made be served on the City of Harare's department of Housing and Community Services and on the Registrar of Deeds.

Mr Murauro alleged (in brief) that he had entered into a deed of sale with Mr Hundah, that he had made all the necessary payments, and that Mr Hundah was wrongfully refusing"to pass transfer of the property to myself".

Mr Hundah's defence was not easy to understand because of his poor English, but basically he seemed to be saying that the full price had not been paid. His final paragraph read:

> "There are also by laws on paragraph 7 clause E affecting property. This property I have no title deeds. It is still property of the City of Harare."

Mr Hundah was properly disbelieved on the question whether or not he had

been paid. The estate agent who had drawn the deed of sale confirmed that all the payments

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had been made through him. Judgment was given in favour of Mr Murauro.

Before he was finally left to his own legal devices Mr Hundah had consulted two firms of legal practitioners. So this matter has been dealt with by three firms of legal practitioners and one registered estate agent. Not one of them has thought to ask themselves what right the seller had to sell this property.

It is surely a matter of general common knowledge, at least among lawyers, that land in the high density suburbs belonged to the local authority or, occasionally, to central government. Occupants of the houses built in these suburbs fall into three categories (ignoring the fourth category of lodgers or dependants). They were:

1. simple tenants under a lease agreement with the local authority or central government;
2. tenants-to-buy, under an agreement which permitted them to take title once the property was surveyed and the full price paid;
3. owners, who graduated from category two, in the fullness of time.

It is astonishing that no one thought to ask Mr Hundah into which of these three categories he fell. Even more astonishing when one remembers that he actually alleged"It is still property of City of Harare". Mr Murauro's lawyer was so pre-occupied with the form of Mr Hundah's affidavit (he contended vigorously that it was not properly sworn) that he omitted to look at its content.

Mr Hundah was not the owner of the property. Mr Hundah is not now the owner of the property. At the time the estate agent drew up the agreement of sale (1 February 1985) he was not even a tenant-to-buy. He was just a simple tenant. His agreement to buy was signed only on 8 November 1990.

In this situation we regularly hear the submission -"But Roman-Dutch law does not require a seller to own the property he sells. He can enter into a valid agreement of sale as long as he realises he may face an action for damages if he is unable to give good title to the purchaser when the time comes to hand over vacant possession and, in the case of immovable property, give transfer".

This answer may score well in an examination, but it overlooks the fact, which should be common knowledge among practitioners, that the standard

agreement of lease or lease to buy used by the Harare and Chitungwiza Municipalities (and many others) contains a clause designed to prevent such agreements.

We do not have a copy of Mr Hundah's lease agreement, as we should have, but we do have a copy of the lease-to-buy agreement dated 8 November 1990. We can be sure that a similar clause was in his lease agreement.

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Clause 14 of the lease-to-buy agreement between Mr Hundah and the Municipality reads as follows:

> **"The Purchaser** (ie Mr Hundah) **shall not,** prior to transfer to himself -
>
> (a) **cede or assign** this agreement or any rights acquired by him hereunder; or
>
> (b) part with the possession of the property or any part thereof; or
>
> (c) alienate, donate or otherwise dispose of the same; or
>
> (d) reconstruct, alter, add to, demolish or erect any improvement of whatever nature on the property; without the prior consent in writing of the Municipality."

I emphasize these words in the hope that they will be read and memorised by high-density property purchasers, estate agents, lawyers, magistrates and judges. We have drawn attention to this point previously on a number of occasions (see eg *Munemo* v *Muswera* 1987 (1) ZLR 20 (S) at 21G-H), often in conjunction with the other important point that the local authority should be cited in proceedings of this kind since it has a real interest in the property in dispute (see eg *Ncube* v *Mkandla* S-123-89). If it indicates in writing beforehand that it is happy to accept whatever the court decides, well and good. But otherwise it should be cited, if only to ensure that it is bound by whatever judgment is given. It is no good asking that a copy of the court's order be served on the local authority. Such an order does not bind it if it was not a party. See *Dube* v *Khumalo* 1986 (2) ZLR 103 (S) at 111; *Majura* v *Maposa* S-172-91 (both of which were decided and published before the decision in the court a quo in this matter) and *Pedzisa* v *Chikonyora* 1992 (2) ZLR 445 (S), which was published well before the present appeal was argued before us.

In the light of *Pedzisa supra* the appeal must succeed unless some distinguishing feature can be pointed out. The agreement between Mr

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McNALLY JA

Hundah and Mr Murauro is invalid. That is the end of the matter. But Mr *Biti,* for Mr Murauro, argues that the Municipality has cured the invalidity. He has produced a letter dated the day before the postponed hearing of the appeal on 25 November 1993. The letter contains the following relevant sentence:

> "Please be advised that Council will abide by the Supreme Court's decision just as it has done with the High Court's order."

The letter is signed on behalf of the Director of Housing and Community Services of the City of Harare. As evidence of its compliance with the High Court order there is annexed to the letter a copy of an agreement. This is an agreement of assignment between Mr Hundah and Mr Murauro to which the Municipality consents. It is signed by the Deputy Sheriff on behalf of Mr Hundah, by Mr Murauro (though the signature does not look like"Murauro") and by someone quite illegible purporting to be the Director of Housing and Community Services, on the 10th, 1st and 11th of November 1993 respectively.

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This is not a waiver of rights, it is a compliance with a court order. Moreover since the court order was under appeal, it should not have been put into effect without leave.

It does not seem to me that either the letter or the purported agreement of assignment made any difference to the invalidity of the agreement relied upon. It may also be mentioned that what was asked for and ordered was "transfer". A copy of the order was served on the Deeds Office. "Transfer" is impossible until:

1. the City Council has been fully paid;
2. the property has been surveyed;
3. the City Council has consented.

We do not know whether 1 and 2 have occurred. And submission of the City Council to an order of court cannot be called "consent".

It is most distressing that this conclusion must be reached, and the unfortunate and ill-advised Mr Murauro may well have a claim for damages against Mr Hundah and possibly others. As to the quantum of those damages, see *Parish* v *King* 1992 (1) ZLR 216 (S) at 225E.

However, he should not have succeeded in the court *a quo*. The appeal must

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succeed. Since Mr Hundah appeared in person in both courts he incurred no costs apart from the costs he incurred in instructing legal practitioners to draw his supplementary grounds of appeal. The court has no hesitation in marking its disapproval of his conduct in approaching this court initially on totally inadequate grounds of appeal by disallowing those costs.

Accordingly the appeal is allowed, with no order as to costs, and the order of the court *a quo* is altered to read:

> "The application is dismissed with no order as to costs."

Gubbay CJ: I agree

Korsah JA: I agree

Honey & Blanckenberg, respondent's legal practitioners

R M INSURANCE CO (PVT) LTD v G C M (PVT) LTD 1993 (2) ZLR 407 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

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Civil appeal

25 November & 2 December 1993

Flynote

Insurance - insurer - liability - repudiation - aviation policy excluding liability where accident caused "directly or indirectly" by breach of Aviation (Air Navigation) Regulations - causation not thereby excluded

Practice and procedure - exception - plaintiff successfully excepting to defendant's plea - effect - defendant must have opportunity to amend its plea

Headnote

The respondent (plaintiff) company carried on business as an air carrier. It entered into a written policy of insurance with the appellant (defendant) insurance company, in terms of which it obtained personal accident cover in respect of specified persons employed by it. One of the clauses in the policy provided that the defendant would not be liable in respect of bodily injury resulting from an accident sustained "directly or indirectly by an insured person by any breach on the part of the insured person" of any provisions of the Aviation (Air Navigation) Regulations. One of the insured persons was the deceased. He was the pilot of an aircraft that crashed at Buffalo Range Airport, Chiredzi, killing all on board. It was not disputed that the Regulations were breached in three ways by the deceased: he did not have a valid licence; he had not made the requisite number of takeoffs and landings within the preceding 90 days; and the aircraft had no valid radio station licence. The defendant repudiated liability, claiming that the words "directly or indirectly" meant that no causal connection need be shown between the regulatory breach and the accident giving rise to the claim. Its contention

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GUBBAY CJ

was rejected by SMITH J, who upheld the plaintiff's exception to the defendant's plea and gave judgment for the plaintiff. *(8) On appeal,

Held, that the *onus* of proving the applicability of the exclusion clause to the claim addressed rested with the defendant.

Held, further, that the words "directly or indirectly" do not have the effect of excluding causation. Although the concept of a proximate cause is excluded, the need to prove a causal link, as a *sine qua non* between breach and loss, is maintained. It was therefore incumbent on the defendant to aver in its plea that the breaches committed by the deceased contributed, in some material respect, to the accident which led to his death.

Held, further, that because no express indication had been given to the Judge *a quo* that in the event of the exception succeeding the defendant did not wish to amend its plea, the Judge should not have given judgment for the plaintiff. The order awarding judgment would be substituted with an order giving the defendant leave to file an amended plea.

Cases cited:

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Eagle Star Ins Co Ltd v Wiley 1956 (1) SA 330 (A)

Aswanestaal CC v SA Eagle Ins Ltd 1992 (1) SA 662 (C)

Rabinowitz & Anor NOv Ned - Equity Ins Co Ltd & Anor 1980 (1) SA 403 (W)

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

Spinneys (1948) Ltd & Ors v Royal Ins Co Ltd [1980] 1 Lloyd's Rep 406

Oei v Foster & Anor [1982] 2 Lloyd's Rep 170

Turner v Northern Life Assurance Co [1953] 1 DLR 427

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

Taylor NO v National Mutual Life Assn of Australasia 1988 (4) SA 341 (E)

Green v Lutz 1966 RLR 633 (G)

Adler v Elliot 1988 (2) ZLR 283 (S)

D P Carter for the appellant

M J Gillespie for the respondent

Judgment

Gubbay CJ: This is an appeal against an order of the High Court, allowing, with costs, an exception taken by the plaintiff, the present respondent, to the plea filed by the defendant, now the appellant, and in consequence thereof, awarding judgment in favour of the plaintiff in the sum of $50 000, with

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interest thereon at the rate of 12,5 per centum per annum from the date of judgment to the date of payment, and costs.

The plaintiff carries on the business of an air carrier under the name Cane Air Services. On 8 March 1984, it entered into a written policy of insurance, No. 663-700-716, with the defendant under which it obtained personal accident cover in respect of specified insured persons, upon the conditions therein contained. One such condition, being s 1A as amended by endorsement F, provided:

> "The insurer will pay to the insured on behalf of the insured person or in the event of the death of the insured person his dependants or if there be no dependants on behalf of his estate or legal representative the compensation specified in the Schedule in the event of the insured person suffering accidental death or disablement or receiving medical attention as a direct result of an accident causing bodily injury whilst as a member of the aircrew carrying out the duties stated, in mounting into or dismounting from any fixed wing standard type of civil aircraft being used for personal pleasure private business and industrial aid."

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The deceased, Bruce Smith, was an insured person duly endorsed in the schedule to the policy and having the duties of a pilot for the purposes of the policy. The amount of compensation specified in the schedule was $50 000.

At 1925 hours on 4 May 1989, while the policy of insurance was fully operative, the deceased was the pilot of a Cessna 401 aircraft, registered as Z-YTL that crashed at Buffalo Range Airport, Chiredzi, causing his death and those of seven passengers.

All these facts, which were set out in the plaintiff's declaration, were admitted by the defendant in its plea. The defence to the claim that it was obliged to pay to the plaintiff on behalf of the dependants of the deceased, the sum of $50 000, was that it was entitled to, and did, repudiate liability in terms of an exclusion clause in the policy, headed Exception C3. This, in relevant part, read:

> "The insurer shall not be liable to pay any compensation under this policy in respect of bodily injury 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

GUBBAY CJ

> 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 went on to aver that at the material time the insured person was in breach of the Aviation (Air Navigation) Regulations 1988 (SI 79 of 1988) in that:

(i) he flew 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 flight;

(iii) the aircraft was flown without a valid radio licence.

The ground upon which the plaintiff excepted to the plea was that Exception C3 provided an exclusion of liability only where there was a causal link between the loss resulting and the particular breach of the policy by the insured person that was relied upon.

The learned judge held that the wording of Exception C3 did not exclude the principle of causation, and that it was therefore necessary for the defendant, in order to avoid liability, to plead and establish some causal *nexus* between the breaches of the policy alleged in the plea and the accident which caused the death of the insured person and, thus, the loss. Was he correct in that view?

Exception C3, having been inserted in the policy for the purpose of exempting the defendant from liability for a loss which, but for its provision, would have been covered, was to be construed against the defendant with the utmost strictness; for it was the duty of the defendant, in framing the policy, to exempt its liability in clear and unambiguous terms. Plainly the onus of proving the applicability of the exclusion clause to the claim addressed, rested with the

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defendant. See *Eagle Star Insurance Co Ltd v Wiley* 1956 (1) SA 330 (A) at 336C-D; *Aswanestaal CC* v *SA Eagle Insurance Ltd* 1992 (1) SA 662 (C) at 664E-F.

It is a fundamental principle of insurance law that in the absence of a clearly expressed intention to the contrary, the insurer is only liable for a loss proximately caused by the peril insured against. The time-honoured maxim causa proxima non remota spectatur applies. See Gordon and Getz *The South African Law of Insurance* 3 ed at p 172; Ivamy *General Principles of Insurance*

GUBBAY CJ

Law 4 ed at pp 404-405; Collinvaux *Law of Insurance* 5 ed at p 79 para 4-32. This means that the insurer is liable if the direct, dominant, effective or operative cause falls within the risk covered by the policy and not liable if it is within the perils excepted.

If Exception C3 had simply read" ... resulting from an accident sustained by an insured person by (reason of) any breach on the part of the insured person ...", it would be properly construed as relating to the proximate cause. See *Rabinowitz & Anor NNO v Ned - Equity Insurance Co Ltd & Anor* 1980 (1) SA 403 (W) at 428G. But the inclusion of the words"directly or indirectly"were of critical significance.

It was the submission of Mr *Carter,* who appeared for the defendant, that where the words"directly or indirectly"are used in a personal accident policy, the doctrine of causation is excluded and no causal connection need be shown between the alleged breach and the accident giving rise to the claim. *Per contra*, Mr *Gillespie,* on behalf of the plaintiff, contended that the words show clearly that whereas the concept of proximate cause is excluded, the need to prove a causal link, as a *causa sine qua non* between breach and loss, is maintained. Both counsel sought to enlist support from the judgment in *Cox v Employer's Liability Assurance Corporation Ltd* [1916] 2 KB 629.

In that case the deceased (for it was a life assurance policy) was a military officer who had insured his life with the defendant against death caused accidentally within the United Kingdom by violence. There was, however, a clause excluding death"directly or indirectly caused by arising from or traceable to war". During the period of the 1914-1918 war the deceased was engaged, in the course of his military duties, on guarding a section of the old South-Eastern Railway. While doing that he was walking alongside the railway line in order to visit sentries posted at various points along the line, and was run down by a train and killed. The dispute was whether his death was directly or indirectly caused by, arising from, or traceable to the war. The arbitrator who heard the matter at first instance found that the death was indirectly traceable to war. In upholding that decision SCRUTTON J (as he then was) observed at 634:

> "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

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> 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 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."

He went on to say that a line must be drawn somewhere and gave instances of this at 634-635:

> "If war had merely placed Captain Ewing in a position not specially exposed to any danger, and in that position a particular incident not connected with war caused his death, I think that most probably in that case the matter would not come within the condition. For instance, suppose that, in connection with the war, the assured had gone to a military camp not in any way specially exposed to lightning, but where lightning had struck and killed him, I should be disposed to think that the war was so remote from the death that in that case it could not be said that the death was indirectly caused by the war. If, however, the war had placed the assured in a position specially exposed to danger, as for instance in a place where he was specially exposed to being struck by lightning -if such a place can be conceived -and he was there struck and killed by lightning, it appears to me to be a question of fact, not of construction, whether the death was indirectly caused by war."

See also *Spinney's* (1948) *Ltd & Ors v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406; *Oei v Foster & Anor* [1982] 2 Lloyd's Rep 170*; Turner v Northern Life Assurance Co* [1953] 1 DLR 427.

Nearer home, too, the approach of SCRUTTON J was specifically approved and applied in *Agiakatsikas NO. v Rotterdam Insurance Co Ltd* 1959 (4) SA 726 (C). VAN WINSEN J, in dealing with a clause in an insurance policy which excluded liability where death or disablement was directly or indirectly caused by intoxicating liquor, said this at 730B:

> "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 ... 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."

See also, *Taylor NO v National Mutual Life Association of Australasia* 1988 (4) SA 341 (E) at 347D.

These authorities satisfy me that the language in Exception C3 did not exclude the principle of causation. I am in respectful agreement with the learned judge *a quo* that it was incumbent upon the defendant to aver in its plea that the breaches committed by the deceased contributed, in some material respect, to the accident which lead to his death.

It necessarily follows that the appeal in so far as it upheld the plaintiff's exception, falls to be dismissed.

The alternative argument advanced by Mr *Carter* was that the learned judge had erred in granting judgment in the plaintiff's favour, instead of affording the defendant the opportunity to amend its plea.

This court was informed that no express indication had been given to the learned judge that in

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the event of the exception succeeding the defendant did not wish to amend its plea. Mr *Carter* assures that the defendant intends to do so. In the circumstances, the order awarding judgment must be set aside. See *Green* v *Lutz* 1966 RLR 633 (G) at 641A; *Adler v Elliot* 1988 (2) ZLR 283 (S) at 292B.

On 21 September 1993, the plaintiff lodged with this court an application for condonation of the late noting of a cross appeal against that portion of the order of the learned Judge which specified that interest on the sum of $50 000 was to commence from the date of judgment, as opposed to 4 May 1989, the date of the accident. The application was opposed by the defendant.

Since, for the reasons aforegoing, the plaintiff ought not to have obtained judgment, the application which implicitly supported the order but sought a more favourable rectification of it, was entirely misconceived.

In the result I would order as follows:

1. The appeal is dismissed with costs.

2. The second sentence of the order of the High Court is deleted and substituted with:

"The defendant is given leave to file an amended plea within fourteen days of 2 December 1993."

GUBBAY CJ

3. The application for condonation of the late noting of a cross appeal is dismissed with costs.

McNally JA: I agree

Korsah JA: I agree

Atherstone & Cook, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

ROBERTSON v ERICKSEN 1993 (2) ZLR 415 (HC)

Court **High Court, Harare**

Adam J

Civil action

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29 September & 8 December 1993

Flynote

Delict - defamation - damages - factors to be considered

Headnote

In assessing damages awardable for defamation the court will consider the nature and content of the defamation, the plaintiff's status and reputation, the extent of the publication, the defendant's conduct and the recklessness of the publication.

It should also pay heed to the levels of awards in previous cases.

The court awarded the plaintiff, a medical doctor, $5 000 for defamation. The defendant had defamed him by writing to the Registrar of the Health Professions Council complaining that the plaintiff was rude, incompetent, activated by mercenary motives, overcharged, assaulted the defendant, made false accusations against her to other persons and had generally acted unprofessionally and unethically.

Cases cited:

McCarey v Assd Newspapers Ltd & Ors [1964] 3 All ER 947 (CA) Cassele & Co Ltd v *Broome & Anor* [1972] 1 All ER 801 (HC)

Uren v John Fairfax & Sons Pty Ltd (1967) 117 CLR 118

Manas Buthelezi v Poorter & Ors 1974 (4) SA 608 (E)

Mavromatis v Douglas 1971 (1) RLR 119 (G)

ARNI & Ors v Brookes & Anor 1972 (2) RLR 1 (G)

Smith v Fourie & Anor GS 130-77

Assd Mine Workers Union v Gwekwerere & Ors GS-202-81

Birchall v Mararike HH-43-86

Tekere v Zimbabwe Newspapers (1980) Ltd 1986 (1) ZLR 275 (H)

ADAM J

Arnold v Majome HH-431-86

Zvobgo v Kingstons Ltd 1986 (2) ZLR 310 (H)

Nyamwanza v Kambadza HH-104-87

Mupita v Bayayi HB-31-89

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Dabengwa v Bushu HB-68-89

Tabanie v Chimanzi HB-75-90

Madaka v McLean HB-86-91

Bikwa v Ndhlovu HB-18-92

Chinengundu v Modus Publications (Pvt) Ltd HH-135-92

Judgment

Adam J: This is an application for judgment in default of entry of appearance to defend whereby the plaintiff seeks damages in the amount of $20 000 for defamation. His declaration states that the plaintiff is a gynaecologist and that on 8 September 1992, the defendant maliciously addressed and published a letter to the Registrar of the Health Professions Council, as well as to seven other persons, and a copy of the letter was attached to the declaration. By terms of that letter the defendant meant and was understood to mean that the plaintiff was rude, incompetent, activated by mercenary motives, overcharged, assaulted the defendant, made false accusations against her to other persons and had generally acted unprofessionally and unethically; and in consequence of that letter, the plaintiff was injured in his good name and reputation as a result of which he has suffered damages for which the defendant is liable.

In the plaintiff's affidavit of proof of damages he attached a letter dated 24 September 1992 from his legal practitioner to the defendant which states that she had seriously defamed the plaintiff and that the purpose of his letter was to afford the defendant an opportunity to apologise and retract her letter in the form of a letter to be drafted in terms acceptable to the plaintiff for dispatch to the persons to whom the plaintiff had communicated. If such apology and retraction were sent immediately, some of the damage done to the plaintiff's reputation would be timeously rectified and he would not pursue an action for damages. He avers that the defendant did not reply and that neither he nor his legal practitioners had heard anything from her and that there is no doubt that her defamation did receive the widest possible audience within the medical profession and that it succeeded in its aim of doing a lot of damage to his reputation. He states that the defendant did not take advantage of his legal practitioners' offer and the damages claimed are reasonable.

In *McCarey v Associated Newspapers Ltd & Ors* [1964] 3 All ER 947 (CA) at 959 DIPLOCK LJ (as he then was) stated:

ADAM J

> "In an action for defamation, the wrongful act is damage to the plaintiff's reputation. The injuries that he sustains may be classified under two heads: (i) the consequences of the attitude adopted to him by other persons as a result of the diminution of the esteem in which they hold him because of the defamatory statement; and (ii) the grief or annoyance caused by the defamatory statement to the plaintiff himself. It is damages under this second head which may be aggravated by the manner in which, or the motives with which, the statement was made or persisted in...
>
> Under head (i) ... it may be possible to prove pecuniary loss, such as loss of practice or employment, or liability to

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obtain fresh appointments. No attempt has been made in this case to prove that. The major consequence under (i), however, may be purely social and lie in the attitude shown to the plaintiff by persons with whom he comes into social or professional contact. Neither this kind of injury under head (i), nor grief or annoyance caused to the plaintiff himself under head (ii), involves pecuniary loss. In putting a money value on these kinds of injury, as the law requires damage-awarding tribunals to do, they are being required to attempt to equate the incommensurable. As in the case of damages for physical injuries, it is impossible to say that any answer looked at in isolation is right, or that answer is wrong. Nevertheless, justice is not justice if it is arbitrary or whimsical; if what is awarded to one plaintiff for one injury bears no relation at all to what is awarded to another plaintiff for anther injury of same kind ...

I am convinced that it is not just ... that, in equating incommensurables when a man's reputation has been injured, the scale of values to be applied bears no relation whatsoever to the scale of values to be applied when equating those other incommensurables, money and physical injuries. I do not believe that the law today is more jealous of a man's reputation than of his life or limb. That is the scale of value of the duel."

Damages have been defined in delict as"the pecuniary compensation, obtainable by success in an action, for a wrong ... the compensation being in the form of a lump sum"(McGregor on Damages 15 ed at 3). In *Cassell & Co Ltd v Broome & Anor* [1972] 1 All ER 801 (HC) at 823-824 LORD HAILSHAM LC adopted the above definition and said:

"... in many actions for tort, the principle of *restitutio in integrum* is an adequate and fairly easy guide to the estimation of damage, because the damage suffered can be estimated in relation to some material loss. It is

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ADAM J

true that where loss includes a pre-estimate of future losses, or an estimate of past losses which cannot in the nature of things be exactly computed, some subjective element must enter in ...

In many torts, however, the subjective element is more difficult ... Nor, so far as I can judge, is there any purely rational test by which a judge can calculate what sum, greater or smaller, is appropriate. What is surprising is not that there is difference of opinion about such matters, but that in most cases professional opinion gravitates so closely to conventional scale. Nevertheless, in all actions in which damages, purely compensatory in character, are awarded for suffering, from the purely pecuniary point of view the plaintiff may be better off. The principle of *restitutio in integrum,* which compels the use of money as its sole instrument for restoring the status quo, necessarily involves a factor larger than any pecuniary loss.

In actions of defamation ... where damages for loss of reputation are involved, the principle of *restitutio in integrum* has necessarily an even more highly subjective element. Such action involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong ... As WINDEYER J well said in *Uren v John Fairfax & Sons* (Pty) Ltd (1967) 117 CLR 118 at 150):

> 'It seems to me that, properly speaking, a man defamed does not get compensation **for** his damaged reputation. He gets damages **because** he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways -as a vindication of the plaintiff to the public, and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.'

This is why it is not necessarily fair to compare awards in this field with damages for personal injuries. Quite obviously, the award must include factors for injury to feelings ... the absence of apology ... what is awarded is thus a figure which cannot be arrived at by any purely objective computation. This is what is meant when the damages in defamation are described as being at large."

Lord Reid at 836 observed:

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'"Damages for any tort are or ought to be fixed at a sum which will compensate the plaintiff, so far as money can do it, for all the injury which he has suffered. Where the injury is material and has been

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ascertained it is generally possible to assess damages with some precision. But this is not so where he has been caused mental distress or when his reputation has been attacked -where to use the traditional phrase he has been held up to hatred, ridicule or contempt. Not only is it impossible to ascertain how far other people's minds have been affected, it is almost impossible to equate the damage to a sum of money. Any one person trying to fix a sum as compensation will probably find in his mind a wide bracket within which any sum could be regarded by him as not unreasonable - and different people will come to different conclusions. So in the end there will probably be a wide gap between the sum which on an objective view can be regarded as the least and the sum which could be regarded as the most to which th plaintiff is entitled as compensation."

The circumstances relevant to the assessment of damages have been categorised as (1) the nature and content of the defamation; (2) the plaintiff's status and reputation; (3) the extent of the publication; (4) the defendant's conduct; and (5) recklessness of the publication: *Manas Buthelezi v Poorter & Ors* 1974 (4) SA 608 (E) at 614-616.

Looking at previous awards in our courts reveals the following. In *Mavromatis v Douglas* 1971 (1) RLR 119 (G) a successful owner seeking $2 000 for the defamatory statement of hiring a gang to break in and steal from the chemist shop of the defendant was awarded $450. In *ARNI & Ors v Brookes & Anor* 1972 (2) RLR 1 (G) an executive officer of ARNI claimed $20 000 for a defamatory article that foreign currency allocation procedures had been flouted by him and was awarded $700 against the editor. In *Smith v Fourie & Anor* GS-130-77 the then Prime Minister claimed $25 000 for a defamatory statement that he was personally involved in the alleged abduction of Dr Edson Sithole and was awarded $15 000. In *Associated Mine Workers Union & Anor v Gwekwerere & Ors* GS-202-81 a union official was awarded in default of entry of appearance to defend $8 000 for defamatory utterances that he was a habitual thief. In *Birchall v Mararike* HH-43-86 an electrical engineer was awarded $400 against a lawyer for imputing the commission f a crime by the electrical engineer. In *Tekere v Zimbabwe Newspapers* (1980) *Ltd* 1986 (1) ZLR 275 (H) a former Minister and provincial chairman of ZANU(pf) at that time claimed $30 000 for two defamatory articles that he was lazy, irresponsible, inefficient, inattentive to his duties as party secretary-general, spending most of his time drinking, consorting illicitly with women and driving cars at excessive speed and at tax-payers' expense. He was awarded $20 000. In *Arnold v Majome* HH-431-86 a finance house director and chairman of a co-operative society claimed $25 000 for a defamatory

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broadcast that he had been suspended by the Department of Co-operatives because funds donated to the co-operative society could not be accounted for. He was awarded $3 500. In *Zvobgo v Kingstons Ltd* 1986 (2) ZLR 310 (H) a former Minister of Justice claimed $40 000 for a defamatory statement that his conduct had not always been suitable or seemly and fallen below those expected by the Prime Minister and that he was an unashame regionalist from the influential Karanga grouping of Shonas. He was awarded $14 000. In *Nyamwanza v Kambadza*

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HH-104-87 a headman claimed $50 000 for two publications that falsely accused him of inefficiency, sexual impropriety and dereliction of duty and was awarded, in default of entry of appearance to defend, $5 000. In *Mupita v Bayayi* HB-31-89 a store manager claimed $5 000 for publicly being accused of theft in front of subordinates and was awarded $750. In *Dabengwa v Bushu* HB-68-89 a factory manager claimed $10 000 for being falsely accused publicly of unjustly demoting a supervisor on the grounds that the supervisor had queried the factory manager of having gone fishing during working hours with his girlfriend. In default of entry of appearance to defend he was awarded $5 000. In *Tabanie v Chimanzi* HB-75-90 a policeman claimed $3 000 for being falsely accused by a member of the CIO of providing assistance to two armed bandits and sharing in the spoils of the robbery and attempted murder committed by them and was awarded $3 000. In *Madaka v McLean* HB-86-91 the defendant obtained a default judgment against a farmer (after the farmer had in fact paid in full) and caused publication of the judgment in *Dunn's Gazette*, inducing the AFC to threaten foreclosure against the farmer. The defendant refused to apply to rescind the judgment, publish the rescission in *Dunn's Gazette* and to AFC and to apologise and unsuccessfully opposed the farmer's application for rescission. On failure to enter appearance to defend, $7 000 was awarded to the farmer. In *Bikwa v Ndhlovu* HB-18-92 a Community Court presiding officer claimed $10 000 against the defendant who published to the plaintiff's superiors and others a number of false allegations of an immoral relationship between the plaintiff and the defendant's wife and abusing his office for that purpose. In default of entry of appearance to defend he was awarded $5 500. In *Chinengundu v Modus Publications (Pvt) Ltd* HH-135-92 a former Senator and Deputy Minister of Justice (and no a judge of the High Court) claimed $50 000 for a defamatory statement imputing that he was dishonest and corrupt in that he was prepared to obtain votes by grossly improper means. He was awarded $23 000.

Taking all the factors into account, I am of the view that the plaintiff's claim can be described as excessive. In commencing this action the plaintiff, I must assume, had the prime objective of vindicating his reputation and not

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monetary gain. I think that justice will be met by this court awarding him $5 000.

I accordingly grant judgment to the plaintiff in the sum of $5 000 with costs.

Surgey, Pittman & Kerswell, plaintiff's legal practitioners

NKOMO & ANOR v ATTORNEY-GENERAL & ORS 1993 (2) ZLR 422 (SC)

Court **Supreme Court, Harare**

Annotations **Link to Case Annotations**

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

10 & 19 November & 10 December 1993

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 15(1) - protection against inhuman or degrading punishment or treatment - delay in carrying out death sentence - whether amendment to Constitution providing that delay does not constitute inhuman or degrading punishment precludes relief to prevent execution

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights -s 24 - application to Supreme Court to grant stay of execution on constitutional grounds - application to Executive for clemency pending -jurisdiction of court not ousted

Constitutional law - Constitution of Zimbabwe 1980 - s 31I - prerogative of mercy - application for - does not prevent application to Supreme Court under s 24

Constituional law - Constitution of Zimbabwe 1980 - amendment - procedure for - insufficient members voting on amendment - further vote being taken when error noted - effect

Interpretation of statutes -presumption -against retrospective operation -existing rights secured by litis contestatio -retrospective legislation presumed not to affect existing rights

Headnote

The two applicants had been sentenced to death in November 1988. They sought a declaratory order similar to that in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Ors* *(9). After the papers had been filed and the matter postponed, the Constitution of

Zimbabwe Amendment (No. 13) Act 1993 was promulgated on 5 November 1993. The respondents sought to argue that the effect of the amendments to s 15 of the Constitution was to deprive the applicants of the remedy they sought. On behalf of the applicants it was argued that the passing of the amendment bill was contrary to the provisions of the Constitution, and that in any event the amendment did not affect existing rights vested in the applicants.

Held, the effect of s 15(5) was prospective and therefore the existing rights of the applicants were preserved.

Held, (MUCHECHETERE JA dissenting), s 15(6) did not apply to the sentence of death since to apply it to the death sentence would result in an unintended tautology.

Held, further (per MUCHECHETERE JA), that once the Speaker of Parliament had certified, as he did, that the amendment had received the affirmative votes of not less than two-thirds of the total membership of Parliament, the court was precluded from inquiry into the validity of the proceedings.

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Bindura Town Mgmt Bd v Desai & Co 1953 (1) SA 358 (A)

Welkom Village Mgmt Bd v Leteno 1958 (1) SA 490 (A)

Reid-Daly v Hickman & Ors 1980 ZLR 540 (A); 1981 (2) SA 315 (ZA)

SA Technical Officials' Assn v President of the Industrial Ct & Ors 1985 (1) SA 597 (A)

Kehar Singh & Anor v Union of India & Anor (1989) 1 SCJ 126

Mohinder Singh v State of Punjab AIR 1976 2299

Madhu Metha v Union of India [1989] 3 SCR 774

United States v Benz (1931) 282 US 304; 75 L Ed 354 (US Sup Ct)

Pratt & Anor v A-G for Jamaica & Anor [1993] 4 All ER 769 (PC)

Milne NO v Shield Ins Co Ltd 1969 (3) SA 352 (A)

Potgieter v Rondalia Assurance Corp of SA Ltd 1970 (1) SA 705 (N)

Govt of the Republic of SA v Ngubane 1972 (2) SA 601 (A)

Potgieter v Sustein (Edms) Bpk 1990 (2) SA 15 (T)

Agere v Nyambuya 1985 (2) ZLR 336 (S)

Bell v Voorsitter van die Rasklassifikasieraad en Andere 1968 (2) SA 678 (A)

Bellairs v Hodnett & Anor 1978 (1) SA 1109 (A)

Pretorius v Min of Defence 1980 ZLR 395 (A); 1981 (1) SA 1174 (ZA)

Adampol (Pty) Ltd v Admin, Tvl 1989 (3) SA 800 (A)

Attwood v Min of Justice & Anor 1960 (4) SA 911 (T)

Lentell v Registrar - General & Anor (2) 1979 RLR 465 (A)

GUBBAY CJ

A-G v Vernazza [1960] AC 965; [1960] 3 All ER 97 (PC)

Zainal bin Hashim v Govt of Malaysia [1980] AC 734; [1979] 3 All ER 241 (PC)

Hewitt v Lewis [1986] 1 All ER 927 (CA)

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R v Jessie 1964 RLR 412 (A); 1965 (1) SA 325 (SRA)

Conway v Conway 1966 RLR 369 (A); 1966 (4) SA 225 (RA)

S v Meredith 1981 ZLR 123 (A); 1981 (3) SA 29 (ZA)

Min of Home Affairs & Ors v Dabengwa & Anor 1982 (1) ZLR 236 (S); 1982 (4) SA 301 (ZS)

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R v Standard Tea & Coffee Co (Pty) Ltd & Anor 1951 (4) SA 412 (A)

CIR v Southern Life Assn Ltd 1986 (4) SA 717 (A)

CIR v Golden Dumps (Pty) Ltd 1993 (4) SA 110 (A)

Casely NO v Min of Defence 1973 (1) SA 630 (A)

IRC & Anor v Rossminster Ltd & Ors [1980] AC 952; [1980] 1 All ER 80 (HL)

S v Takaendesa 1972 (1) RLR 325 (A); 1972 (4) SA 72 (RA)

Nxasana v Min of Justice & Anor 1976 (3) SA 745 (A)

Poovalingam v Rajbansi 1992 (1) SA 283 (A)

Ex p Wilson 1936 SR 76

Chikerema & Ors v United African National Council & Anor 1979 RLR 291 (A); 1979 (4) SA 258 (ZRA)

A P de Bourbon SC for the applicants (at the request of the court)

A V M Chikumira (with him B Patel) for the respondents

Judgment

Gubbay CJ:

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THE CHRONOLOGY

On 17 November 1988, the two applicants were convicted of murder with an actual intention to kill, and were sentenced to death. It was proved that, on

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17 April 1988, they had beaten Gideon Ncube to death with an iron bar and placed his body down a disused well. The motive for this brutal killing was that the applicants believed that the deceased would be able to identify them as having stolen part of a crop of potatoes from a nearby farm a few days previously. He was, therefore, lured away on the pretext of searching for honey, and disposed of.

The appeal brought by the applicants against conviction was dismissed on 30 August 1993. Notwithstanding confirmation of the finding made by the trial court that no extenuating circumstances existed, this court decided to adjourn the appeal against sentence of death to allow argument to be addressed on the question of whether, for the reasons pronounced by the Constitutional Bench of this court in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe, & Ors* 1993 (1) ZLR 242 (S); 1993 (4) SA 239 (ZS), it should not be altered to life imprisonment. This was because, as at the date the convictions were upheld, the applicants had been incarcerated on death row for a period of fifty-seven months.

On 26 October 1993, an application framed in terms of s 24(1) of the Constitution of Zimbabwe was filed with this court and served upon the three respondents, who are the Attorney-General, the Minister of Justice, Legal and Parliamentary Affairs, and the Director of Prisons. In their supporting affidavits the applicants deposed to the demeaning factor of prolonged delay and the harsh and degrading conditions under which they are confined in the condemned section of Harare Central Prison. The relief claimed is the grant of:

(a) a declaration that execution of sentence of death upon each applicant would now constitute inhuman or degrading punishment or treatment in contravention of s 15(1) of the Constitution; and

(b) an order that the sentence of death imposed upon each applicant be set aside and substituted by a sentence of life imprisonment.

As the applicants are without means, Mr de Bourbon undertook the preparation of the application and the presentation of argument on their behalf. This court is indebted to him for having done so.

Subsequent to the lodging of the application, but a few days before it was due to be heard by this court, the Constitution of Zimbabwe Amendment (No. 13) Act 1993, came into force on 5 November 1993, being the day it was published in the Government *Gazette* Extraordinary.

GUBBAY CJ

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THE FIRST ISSUE

The position of the applicants differs from that of the four condemned prisoners considered in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe & Ors supra.* In that case the President, acting on the advice of the Cabinet, had declined to exercise the prerogative of mercy and dates had been appointed upon which the condemned prisoners were to be hanged. In the present matter, although the first applicant petitioned the President for mercy on 17 November 1992, the grant or refusal of clemency in respect of both himself and the second applicant has not yet been debated or determined by the Cabinet.

It is this feature that gives rise to the first issue. It is whether this court, sitting not in its capacity as an appellate court but as a court with original jurisdiction possessing the power under s 24(4) of the Constitution to hear and determine an alleged contravention of the Declaration of Rights, should refuse to entertain the particular complaint of the applicants until Executive intervention has proved unavailing. Simply put, whether that type of relief should first be exhausted before recourse is had to the Supreme Court.

In *Bindura Town Management Board v Desai & Co* 1953 (1) SA 358 (A) -an appeal from the High Court of Southern Rhodesia -VAN DER HEEVER JA pointed out at 362H that there is no general rule of law:

> "...that a person who considers that he has suffered a wrong is precluded from having recourse to a Court of law while there is still hope of extra-judicial redress."

See also *Moyo v Ndhlovu* 1971 (2) RLR 50 (G) at 54D.

The enquiry, primarily, is whether the statutory provisions of the extra-judicial redress are such as to oust the jurisdiction of the court. That will occur either because of an express statement to that effect, or by necessary implication if that is the only reasonable conclusion to be drawn from the particular provisions under consideration; and then merely to the extent indicated by such necessary implication. See *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 502G-H; *Reid - Daly v Hickman & Ors* (2) 1980 ZLR 540 (A) at 545G-546A; 1981 (2) SA 315 (ZA) at 318F-H; *South African Technical Officials' Association v President of the Industrial Court & Ors* 1985 (1) SA 597 (A) at 613C-D.

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The exercise of the prerogative of mercy in terms of s 31I of the Constitution is, to my mind, in the nature of an automatic review of the death sentence. It takes place whether the condemned prisoner seeks it or not. Apart from presenting a petition for mercy which, in any event, is not a prerequisite to the grant of clemency, there is no right in the condemned prisoner to insist on a hearing before the Cabinet in order to deliver an oral argument, or to be present at its deliberations. As observed by PATHAK CJ in *Kehar Singh & Anor v Union of India & Anor* (1989) 1 SCJ 126 at 136 para 15:

> "The manner of consideration of the petition lies within the discretion of the President, and it is for him to decide how best he can acquaint himself with all the information that is necessary for its proper and effective disposal."

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See also the remarks in the *Catholic Commission case supra* at 271A-B.

I respectfully disagree with the decision in *Mohinder Singh v State of Punjab* AIR 1976 SC 2299, insofar as it held that an application for clemency under consideration by the President effectively ousted the power of the court to grant a stay of execution of sentence of death on the ground of inordinate delay. It is inconsistent with the relief given in the later case of *Madhu Mehta v Union of India* [1989] 3 SCR 774. And it fails to take cognisance of the difference between the judicial remedy and the executive power, to which attention was directed in *Kehar Singh & Anor v Union of India & Anor supra* at 132 para 10, and by SUTHERLAND J in *United States v Benz* 282 US 304 (1931) at 311.

In *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe & Ors supra* at 270G-H it was reiterated that s 24(4) of the Constitution vests extraordinarily wide powers in the Supreme Court to redress a contravention of a fundamental right or freedom of the individual. The same view was expressed recently by the Judicial Committee of the Privy Council in *Pratt & Anor v Attorney General for Jamaica & Anor* [1993] 4 All ER 769 (PC) with regard to the similarly worded s 25(2) of the Jamaican Constitution. The purpose is to enable the Supreme Court to afford relief where such is necessary. Even where other adequate means of redress are open to the aggrieved complainant, it is not mandatory that the Supreme Court decline to exercise its powers. The discretion to do so remains.

Against the contextual backdrop of ss 24 (1) and (4) of the Constitution, I can find no reason to imply that by virtue of the existence of the prerogative of

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mercy in s 31I, the jurisdiction of the Supreme Court should be limited, in the sense that it is only entitled to grant an application by a condemned prisoner for commutation of sentence of death to life imprisonment based upon the factor of prolonged delay, after Executive clemency has been refused.

In my view, the phrase "adequate means of redress" in the proviso to s 24(4) of the Constitution is to be construed as referring to judicial remedies and does not embrace executive acts. Where one of the provisions of the Declaration of Rights is being, or is likely to be, infringed, it is the Supreme Court that is mandated by the Constitution to fulfil its protective rôle and enforce the particular fundamental human right or protection to which the individual is entitled. In doing so it exercises a judicial power. It is the arbiter.

Save for the recent amendments to s 15 of the Constitution, the meaning of which I am shortly to consider, this court would have had no hesitation in applying the reasoning in the *Catholic Commission* case *supra* and in *Pratt & Anor v Attorney General for Jamaica supra* and ordering that the death sentences passed upon the two applicants be set aside and substituted with life imprisonment.

I should perhaps add that in respect to this issue no argument to the contrary was presented

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by the respondents' counsel.

THE SECOND ISSUE

What falls to be determined in consequence of the addition by the Constitution of Zimbabwe Amendment (No. 13) Act, of subs (5) and (6) to s 15, is whether these provisions must be read as extinguishing the pre-existing right of the applicants to obtain relief for an accepted violation of s 15(1).

It was not in contention that prior to the passing of the amendments, the respondents had joined issue with the applicants' claim that they were being subjected to inhuman or degrading punishment or treatment. Accordingly, as litis contestatio had occurred, the respective rights of the parties were frozen as at that moment. See with regard to modern practice, *Milne NO v Shield Insurance Co Ltd* 1969 (3) SA 352 (A) at 358C; *Potgieter v Rondalia Assurance Corporation of SA Ltd* 1970 (1) SA 705 (N) at 710A-C; *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) at 608C-E; *Potgieter v Sustein (Edms) Bpk* 1990 (2) SA 15 (T) at 18H-19C.

It is a cardinal rule in our law, dating probably from *Codex 1:14:7*, that there

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is a strong presumption against a retrospective construction. See *Agere v Nyambuya* 1985 (2) ZLR 336 (S) at 338G-339G. Even where a statutory provision is expressly stated to be retrospective in its operation, it is not to be treated as in any way affecting acts and transactions which have already been completed, or which stand to be completed shortly, or in respect of which action is pending or has been instituted but not yet decided, unless such a construction appears clearly from the language used or arises by necessary implication. See *Bell v Voorsitter van die Rasklassifikasieraad en Andere* 1968 (2) SA 678 (A) at 684E-F; *Bellairs v Hodnett & Anor* 1978 (1) SA 1109 (A) at 1148 F-G; *Pretorius v Minister of Defence* 1980 ZLR 395 (A) at 401F-G, 1981 (1) SA 1174 (ZA) at 1177H; *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A) at 805F-806D. Care must always be taken to ensure that the retrospectivity is confined to the exact extent which the section of the Act provides. See *Attwood v Minister of Justice & Anor* 1960 (4) SA 911 (T) at 914F; *Lentell v Registrar-General & Anor* (2) 1979 RLR 465 (A) at 470F-G.

There are cases where the presumption against the removal or impairment of a vested or existing right or obligation has yielded to the clear language of the enactment which has been held to extend to pending proceedings.

In *Attorney-General v Vernazza* [1960] 3 All ER 97 (PC) at 101E-G LORD DENNING said that it was:

> ". . . clear that in the ordinary way the Court of Appeal cannot take into account a statute which has been passed in the interval since the case was decided at first instance, because the rights of litigants are generally to be determined according to the law in force at the date of the earlier proceedings . . . But it is different when the statute is retrospective either because it contains clear words to that effect, or because it deals with matters of procedure only, for then Parliament has shown an intention that the Act should operate on pending proceedings,

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and the Court of Appeal are entitled to give effect to this retrospective intent as well as a court of first instance."

Well illustrative of this principle is the case of *Zainal bin Hashim v Government of Malaysia* [1979] 3 All ER 241 (PC). The appellant, a police constable in the Malaysian police force, had been convicted of an offence and dismissed from the Force by a chief police officer on 20 January 1972. The Police Force Commission, under power conferred on it by the Constitution, had delegated to chief police officers power to dismiss but no power to

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appoint. The appellant brought an action against the Government claiming a declaration that his dismissal was void and inoperative. On 21 March 1975, the trial judge found in his favour on the ground that the dismissal contravened art 135(1) of the Constitution, because a chief police officer had no power to appoint constables. One year later, art 135(1) was amended by the addition of the proviso:"that this clause shall not apply to a case where a member (of the police force) is dismissed . . . by an authority in pursuance of a power delegated to it by (the Police Force Commisson), and this proviso shall be deemed to have been an integral part of this clause as from Merdeka Day"(ie 31 August 1957). Relying on the amendment, the Government appealed against the decision of the trial judge to the Federal Court. It allowed the appeal on the ground that the proviso operated to validate the appellant's dismissal. In a further appeal to the Judicial Committee of the Privy Council, it was contended that the amendment could not apply as the appellant's action had been commenced, and judgment given on his claim, before the amendment came into force. In dismissing the contention, VISCOURT DILHORNE, speaking for the Judicial Committee, posed the question at 244g:

> "Did the Legislature mean by the amendment to the Constitution to go so far as to deprive the appellant of his entitlement to a declaration that his dismissal was void and, consequently, to the pay and emoluments which but for his dismissal he would have received? Recognising that the amendment has a retrospective effect, is it possible and right to draw a distinction between a case where a dismissed constable has such a claim, a case where he has commenced an action to establish his entitlement and a case where he has obtained judgment on the trial of such a claim?"

and provided the answer at 245f-g:

> "The effect of the amendment was to deprive a constable dismissed for misconduct by a chief police officer, to whom power to dismiss him had been properly delegated, of the right to maintain that his dismissal was invalid owing to the omission to delegate to the chief police officer power to appoint constables. If the appellant had started his action after the operative date of the amendment, their Lordships think that in consequence of the amendment it would have been bound to fail. Otherwise the reference to Merdeka Day would have no legislative content. Can the amendment be construed so that a different result would follow if such an action had been started by a wrongly dismissed constable before the Constitution was amended? In their Lordships' opinion the answer must be in the negative. If this is right, it can make no difference that the action started had got to the stage of judgment being given for the constable and under appeal when

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> the amendment was made. In their Lordships' view the conclusion is inscapable that the legislature intended to secure that no such actions started after Merdeka Day, whether proceeding, or not started, when the amendment

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was made, should succeed on the ground that the power to dismiss had not been exercised by someone with power to appoint"(emphasis added).

See also *Hewitt* v *Lewis* [1986] 1 All ER 927 (CA) at 930f-g.

It is in the light of these interpretational guide-lines that the necessary intendment of the Legislature in enacting subss (5) and (6) is to be ascertained. In doing so account must be taken of the statement of LORD DENNING in *Escoigne Properties Ltd v Inland Revenue Commissioners* [1958] 1 All ER 406 (HL) at 414D that:

> "A statute is not passed in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used; and what was the object, appearing from those circumstances, which Parliament had in view. That was emphasised by LORD BLACKBURN in *River Wear Comrs v Adamson* ((1877) 2 App Cas 743 at pp 763-765) and by the EARL OF HALSBURY LC in *Eastman Photographic Materials Co v Comptroller-General of Patents* [1898] AC 571 at pp 575, 576 in passages which are worth reading time and again."

This *dictum* was approved of and applied in *R* v *Jessie* 1964 RLR 412 (A) at 416E-F; 1965 (1) SA 325 (SRA) at 328A-B; and in *Conway v Conway* 1966 RLR 369 (A) at 371C-D; 1966 (4) SA 225 (RA) at 229C-D. See also *S v Meredith* 1981 ZLR 123 (A) at 127H; 1981 (3) SA 29 (ZA) at 33E-G.

It was generally known to well-informed persons that the decision in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Ors supra* which was handed down on 24 June 1993, met with the disapproval of Government. The rationale was publicly criticised on two grounds: first, that it was illogical to mark prolonged delay in carrying out a sentence of death as inhuman or degrading, for by its very nature delay lengthened the life of the condemned prisoner, an occurrence that he would desire, and did not shorten it; and second, that in altering the sentence to life imprisonment the Supreme Court had arrogated to itself the Executive power of the prerogative of mercy that vested in the President. So, with comparative expedition, the Constitution of Zimbabwe Amendment (No. 13) Act was passed.

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I think it may be said, on applying LORD DENNING's approach, that the object of Parliament was to remedy a perceived "mischief" that the judgment had caused, by enacting that any delay in the execution of sentence of death would no longer be unconstitutional. But must one assume that it was minded to defeat a vested or existing right, so occasioned, as well? In this respect the"framework of circumstances", against which the amendments to s 15(1) came into force, gives no firm lead.

The above historical setting provides something of a starting place for ascertaining the intention of the Legislature in adding subs (5) and (6). It points to the circumstances with reference to which the words were used, and the object that the law-maker, using them, wished to achieve. It is yet another interpretational aid.

Finally, before turning to an examination of the amending provisions, I would stress that where fundamental human rights or freedoms are conferred on individuals under a Constitution,

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derogations therefrom, as far as their language permits, should be narrowly or strictly construed. See *Minister of Home Affairs & Ors v Dabengwa & Anor* 1982 (1) ZLR 236 (S) at 244B-C; 1982 (4) SA 301 (ZS) at 306H; *S v Ncube & Ors* 1987 (2) ZLR 246 (S) at 264F; 1988 (2) SA 702 (ZS) at 715C; *African National Congress (Border Branch) & Anor v Chairman, Council of State of the Republic of Ciskei & Anor* 1992 (4) SA 434 (CkGD) at 447G-I.

Subsections (5) and (6) read:

> "(5) Delay in the execution of a sentence of death, imposed upon a person in respect of a criminal offence of which he has been convicted, shall not be held to be a contravention of subsection (1).
>
> (6) A person upon whom any sentence has been imposed by a competent court, whether before, on or after the date of commencement of the Constitution of Zimbabwe Amendment (No. 13) Act, 1993, in respect of a criminal offence of which he has been convicted, shall not be entitled to a stay, alteration or remission of sentence on the ground that, since the sentence was imposed, there has been a contravention of subsection (1)."

Unlike the constitutional amendment considered by the Judicial Committee of the Privy Council in *Zainal bin Hashim v Government of Malaysia supra* which set Merdeka Day (the country's Independence Day on 31 August 1957) as the date from which the law was stated to operate, subs (5) fixes no

specific date. In contrast is the deeming date of commencement formula employed in the Constitution of Zimbabwe Amendment (No. 3) Act 1983 s 15(2), and the Constitution of Zimbabwe Amendment (No. 8) Act 1989, s 3(2).

Both the phrase "shall not be held "and the omission to utilise the same wording as in subs (6), so as to read: "Delay . . . whether (occurring) before, on or after the date of commencement . . . ", are persuasive indications that the provision is to be viewed as prospective in its operation.

This conclusion is underscored when account is taken of the well-established rule that a statute should be interpreted, where possible, so as not to impair or extinguish substantive rights actually vested at the time of its promulgation. Courts will only find that such an inequitable result was intended when compelled to do so by language so clear as to admit of no other inference. See *Curtis v Johannesburg Municipality* 1906 TS 308 at 311. The supposition is that the Legislature intends to deal with future events and circumstances and not with those pertaining to the past. See *Principal Immigration Officer v Purshotam* 1928 AD 435 at 450; *R v Margolis & Ors* 1936 OPD 143 at 144; *Bartman v Dempers* 1952 (2) SA 577 (A) at 580C; *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A) at 884D.

In my opinion, it cannot be said that the effect of subs (5) is, by necessary implication, expressed to be back-dated to destroy the vital fundamental right to obtain the substitution of a sentence of life imprisonment for that of death, that vests as soon as the delay in carrying it out becomes inordinate.

In the premises, subs (5) must be taken to mean that delay occurring on or after the date of commencement of the Constitution of Zimbabwe Amendment (No. 13) Act shall not be held to

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be a contravention of subs (1).

In the absence of subs (5), the ambit of subs (6), by its use of the words "any sentence", would extend to "a sentence of death". As subs (6) removes the entitlement of a person sentenced before, on or after the date of commencement to a stay, alteration or remission of sentence, on the ground that subsequent to the imposition of such sentence he was "subjected to torture or to inhuman or degrading punishment or other such treatment" in contravention of subs (1), the question that immediately comes to mind is: why did the law-maker enact subs (5)?

It is a foremost principle of interpretation that a court must give effect to every

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word appearing in a statute unless necessity or absolute intractability of language dictates otherwise. Recognising this, KOTZE JA in *Attorney-General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 said at 436:

> "'A statute . . . should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.' To hold certain words occurring in a section of an Act of Parliament as insensible and as having been inserted through inadvertence or error is only permissible as a last resort."

See also *R v Standard Tea and Coffee Co (Pty) Ltd & Anor* 1951 (4) SA 412 (A) at 416F; *Commissioner for Inland Revenue v Southern Life Association Ltd* 1986 (4) SA 717 (A) at 729J-730B; *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 (4) SA 110 (A) at 116F-117A.

To ascribe a sensible meaning to subs (5) and to avoid superfluity necessitates the legitimate recourse of construing the general words "any sentence" in subs (6) as excluding the specific reference to "a sentence of death" in subs (5). This is no more than an application of the rule embodied in the maxim *"expressio unius, exclusio alterius".* It draws attention to the fairly obvious linguistic point that in many contexts the mention of some matters warrants an inference that other cognate matters were intentionally excluded. See Maxwell on *The Interpretation of Statutes* 12 ed at p 293.

Under subs (5) delay in the execution of a sentence of death shall not be held to be a contravention of subs (1). It follows that no remedy exists at all. The court cannot grant "a stay, alteration or remission" or even an interdict, damages or other relief, for an infringement of subs (1) based on delay. The provision has completely removed the right and remedy for delay in the execution of a sentence of death. The fundamental right that previously existed and the remedy that was afforded, have been totally extinguished.

Subs (6), on the other hand, in providing that a person upon whom any sentence has been imposed shall not be entitled to a stay, alteration or remission of sentence, on the ground that since the date of imposition there has been a contravention of subs (1), leaves open and still available to him other remedies, such as the grant of an interdict or damages.

To read subs (6) as encompassing the deprivation of the remedy of a stay, alteration or

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remission of a sentence of death on the ground of delay, would

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render subs (5) entirely redundant. It would also lead to an apparent inconsistency. Whereas subs (5) allows a condemned prisoner who, prior to 5 November 1993, had been subjected to prolonged delay in the execution of sentence, to obtain redress on the basis of a pre-existing right, subs (6), being retrospective as well as prospective in its operation, would defeat that right.

Although tautology is not uncommon in legislation (see for example, *Casely NO v Minister of Defence* 1973 (1) SA 630 (A) at 639B-C), there is no mere tautology between subss (5) and (6). The former relates to a sentence of death and delay in its execution; the latter to all other sentences. This is the only logical way in which these two provisions may be reconciled.

THE CONCLUSION

The conclusion reached that the pre-existing right of the applicants to obtain relief for a violation of s 15(1) remains unaffected by the Constitution of Zimbabwe Amendment (No. 13) Act 1993, makes it unnecessary to decide whether subs (6), as a matter of language, was intended to operate on pending proceedings. I would also leave open consideration of the third issue argued before this court, namely, whether the passage of the Bill through Parliament had been conducted in compliance with governing Parliamentary procedures and the requirements of the Constitution and, thus, was validly enacted.

THE ORDER

In the result:

1. The application is allowed with costs to be paid by the second respondent.
2. It is declared that execution of sentence of death upon each applicant would constitute inhuman or degrading punishment or treatment in contravention of s 15(1) of the Constitution of Zimbabwe.
3. It is ordered that sentence of death passed upon each applicant be set aside and substituted with a sentence of imprisonment for life.

McNally JA: I agree.

Korsah JA: I agree.

Ebrahim JA: I agree.

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MUCHECHETERE JA

Muchechetere JA: I agree with the learned CHIEF JUSTICE on his exposition of the law involved in this case and the conclusion he arrived at on the first issue. It is, however, in connection with the conclusion he arrived at on the second issue that I, with respect, find myself unable to agree on that issue. I am of the view that subs (6) of the Constitution of Zimbabwe Amendment (No. 13) Act of 1993 has extinguished the pre-existing right of the applicants to obtain relief for an accepted violation of s 15(1) of the Constitution. My view is based mainly on the fact that I accept Mr *Chikumira's* analysis of the amendment.

In the first instance, I would add to the historical setting of the amendment which has been outlined above by the learned Chief Justice the factor that at the time of the decision in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe & Ors supra* and indeed after, it was also well known that there were many persons convicted and sentenced to death who had also suffered prolonged delay and harsh and degrading conditions in the cells in which they were confined. Some of these persons had filed affidavits in support of the applicants' position in that case. The only reason why these persons could not at the time be joined in the case was that in the cases of some of them - the applicants fell in this category - their appeals against the death penalty had not been confirmed by the Supreme Court. In some cases the Executive had not yet considered whether the sentence of death would be carried out.

In the circumstances, it was known to Parliament at the time it passed the amendment that there were already persons who stood to benefit from the decision in the above case - persons who already had pre-existing rights. This factor should therefore, in my view, be considered to have been taken into account when Parliament set about to remedy the perceived "mischief".

From the outlined historical setting, it is clear that the intention of the Legislature was to reverse the application of this court's decision in the said case. In this connection I agree with the submission that, although the diminution of an individual's fundamental rights, such as is the case here, is something tended to be frowned upon, they are nevertheless bound by legislative intention. I also agree that in determining the intention of the Legislature in an enactment, the fact that the courts are not in sympathy with the policy to which the Act appears to give effect should not be a hindrance. See *Inland Revenue Commissioners & Anor v Rossminster Ltd & Ors* [1980] AC 952 (HL) at 998A, where LORD WILBERFORCE states the following:

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> ". . . while the courts may look critically at legislation which impairs the rights of citizens and should resolve any doubt in interpretation in their favour, it is no part of their duty, or power, to restrict or impede the working of legislation, even of unpopular legislation ..."

In the same case at 1008D-E LORD DIPLOCK stated the following:

> ". . . judges in performing their constitutional function of expounding what words used by Parliament in legislation mean, must not be over-zealous to search for ambiguities or obscurities in words which on the face of them are plain, simply because the members of the court are out of sympathy with the policy to which the Act appears to

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give effect."

See also the following cases cited by Mr *Chikumira: S v Takaendesa* 1972 (4) SA 72 (RA) at 77; 1972 (1) RLR 325 (A) at 334D; and *Nxasana v Minister of Justice & Anor* 1976 (3) SA 745 (D) at 747-748.

It is with the above considerations in mind that I agree with Mr *Chikumira's* submission that subs (5) has the effect of preventing a person who on a future date after the coming into operation of the amendment has been convicted of murder and sentenced to death coming to court and raising delay in execution of sentence to be a contravention of subs (1). Subsection (5) does not therefore apply to persons such as the applicants, who were convicted before the coming into operation of the amendment. The subsection is therefore prospective in nature. It does not, in the circumstances, have the effect of taking away the vested rights of persons.

On the other hand, I agree that applicants or persons who were convicted and sentenced to death before the commencement of the amendment, are nevertheless, by the provisions of subs (6), deprived of the remedy of "a stay, alteration or remission of sentence on the ground that, since the sentence was imposed, there has been a contravention of subsection (1)". The subsection speaks of "any sentence", which I agree includes that of death, passed "before, on or after" the date of commencement of the amendment. The inclusion of the word "before" in the subsection in my view indicates that the subsection, unlike subs (5), is retrospective. It therefore operates to deprive applicants of the remedies mentioned.

I agree that subs (6) is also prospective in nature, but consideration should be given to the fact that it deprives applicants of a remedy, whilst subs (5) deprives applicants of the right to a finding that there has been a contravention

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of subs (1). Further, in my view, subs (6) by its use of the words "any sentence", operates to include any other sentences besides the death sentence and therefore is wider in scope than subs (5). In the circumstances, I am, respectfully, of the view that subs (6) does not render subs (5) entirely redundant. I am also, respectfully, of the view that there has been to some extent the factor of tautology, as submitted by Mr *Chikumira,* and referred to by the learned CHIEF JUSTICE.

I also agree that the respondents having joined issue with the applicants in this matter before 4 November 1993 *litis contestatio* had occurred. This fact was therefore properly conceded by Mr *Chikumira*. In addition, this court held that to be the case in an application for an urgent hearing of the matter by the applicants. The position was therefore that at the time the amendment became operative the applicants' case was still to be fully heard before this court. This court had therefore not yet pronounced on whether or not there had been delay which contravenes s 15(1) of the Constitution.

In my view, what the applicants achieved was to preserve their right to aver delay and use it as a factor in determining breach of s 15(1) of the Constitution. Subsection (5) does not therefore deprive them of the right to aver delay because it is not retrospective and was not meant to

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deprive accrued rights.

The applicants are, however, caught by subs (6). As I have endeavoured to explain above, that subsection deprives any person who was sentenced to death before the commencement of the Act of the remedy of stay of execution. The applicants are such persons. They may have acquired rights but they have been deprived of a meaningful remedy. That this was deliberately so stems from the use of the word"before"in subs (6).

If I understood Mr *de Bourbon's* submissions correctly during his address, he at some stage stated that the conclusion I have reached above in connection with subs (6) could have been achieved if the words "whether before, on or after the date of the commencement of the Constitution of Zimbabwe Amendment (No. 13) Act 1993" were inserted immediately after the word "entitled". In my view, such a construction would not have altered the subsection's effect, which, as I have concluded, would have been to deprive the applicants of the remedy they seek.

Lastly on the above issue, I should state that, in my view, the reason why the amendment under consideration is unlike that considered by the Privy Council in *Zainal bin Hashim v Government of Malaysia supra* the Constitution

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of Zimbabwe Amendment (No. 3) Act 1983, s 15(2), and also the Constitution of Zimbabwe Amendment (No. 8) Act 1989, s 3(2), in that it does not fix a specific retrospective date from which it operates, is because subs (6) states the retrospective provisions. Setting a date would in the circumstances have added to the amount of tautology in the amendment.

The third issue raised by Mr *de Bourbon* was that the said amendment was invalidly enacted. In this connection he submitted that s 52(2a) of the Constitution of Zimbabwe requires a constitutional amending Bill, at its final vote in Parliament, to receive the affirmative vote of not less than two-thirds of the total membership of Parliament. In the present Parliament that means an amendment must receive the affirmative vote of at least one hundred members at its final reading.

Mr *de Bourbon* further stated that the final reading in respect of the said amendment took place on 28 September 1993. He stated that *Hansard* of that date, column 2451, records that the second respondent (the Minister of Justice, Legal and Parliamentary Affairs) moved that the Bill be read for the third time. The motion was put and agreed to. The Bill was then read for the third time. This, according to Mr *de Bourbon,* was the final reading of the Bill in Parliament. He added that there is nothing in *Hansard* to show that the Bill received the affirmative vote of at least one hundred of the members of Parliament.

After the said voting it was, later that day, pointed out to the Deputy Speaker of Parliament by a Member of Parliament that the passing of the Bill was wrong. After considering the matter, the Deputy Speaker concluded that "the proceedings on the Bill after the Second Reading are not therefore in conformity with the provisions of the Constitution. I therefore declare these proceedings on the Bill null and void and the Third Reading stage will appear on the Order

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Paper tomorrow". A fresh third reading was purportedly held on 6 October 1993.

One Austin Muranganwa Zvoma, the Secretary to Parliament, filed a respondents' supporting affidavit by consent. He did not dispute what had been stated by Mr *de Bourbon,* but explained that on 28 September 1993 the Bill was read for the third time and passed without a vote count. He went on to state that as there was no vote count it was not possible to indicate how many Members voted and that it was not even possible to tell how many Members were in the Chamber at the time of the reading. He stated that the reason why the Deputy Speaker made a ruling declaring the third reading null

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and void was because there was no count of votes and that consequently the procedure did not comply with the provisions of s 52(2a) of the Constitution. The procedure which had been followed was that of ordinary bills and not amendments of the Constitution. This, he said, was irregular.

Mr Zvoma went on to state that on 6 October 1993 the Bill was read for the third time and passed, having received one hundred and one votes in favour. He annexed to his affidavit the Speaker's Certificate dated 6 October 1993, stating that the Bill had been passed by Parliament in accordance with the law. He stated that on 2 November 1993 the President gave his assent to the Bill. On 4 November 1993 it was dispatched to the High Court for enrolment and on 5 November 1993 it was promulgated as an Act of Parliament when it was published in the *Gazette* Extraordinary.

Mr *de Bourbon* submitted that Parliament had no power to adopt the course it did. He also submitted that there was no provision in the Standing Orders of Parliament for a question to be put a second time. He cited Erskine May *Parliamentary Practice* 17 ed at p 412, where the learned author states:

> " . . . in no circumstances is it competent for the House to rescind a resolution during the sitting when the resolution was agreed to."

He thereafter submitted that, based on *Hansard,* the court should hold that the amendment was not passed in accordance with the provisions of s 52(2a) of the Constitution and is therefore not valid.

I am, however, in agreement with the submissions of Mr *Patel* on this issue, especially his main submission that this court is not competent to enquire into the internal proceedings relating to the third reading of the amendment. His alternative submission was that even if such enquiry is competent the passage of the amendment was conducted in full compliance with the governing Parliamentary procedures and the requirements of the Constitution.

Mr *Patel* submitted that what was really being challenged in this case was the power of Parliament to set aside the first set of proceedings relating to the third reading of the Bill and to institute fresh proceedings at a later stage in order to rectify an obvious irregularity in its proceedings. I agree. He thereafter argued that Parliament has powers to act as it did because

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the matters complained of above are in their nature internal to Parliament.

Mr *Patel* stated that s 51(7) of the Constitution, as read with Schedule 4

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thereto, gave the general framework of the procedure to be applied with respect to Bills and that s 57(1) empowers Parliament to make Standing Orders for the passing of Bills and the regulation of proceedings and business in Parliament. There is also s 3 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 10*] which provides that Parliament shall hold, exercise and enjoy privileges, immunities and powers as were applicable to the British House of Commons on 18 April 1980. He thereafter argued that in the circumstances the law and practice in Zimbabwe in this sphere derives from English law and practice and that, unless expressly altered or modified by statute, English law and practice should continue to apply.

Mr *Patel* also submitted that s 5(1) of Chapter 10 reaffirms that the freedom of speech and debates or proceedings in or before Parliament shall not be liable to be impeached or questioned in any court or place outside Parliament. He thereafter argued that despite differences in wording s 5(1) of Chapter 10 has the same general effect as Article IX of the English Bill of Rights 1689 which is set out in Erskine May *Parliamentary Practice* 21 ed at p 84. See *Poovalingam v Rajbansi* 1992 (1) SA 283 (A) at 289 where CORBETT CJ said:

> "The preamble to the Act (Cape Act No. 1 of 1854 which is reproduced in our Privileges and Parliament Act 1924) recites that it is essential for the due functioning of Parliament and the promotion of wise legislation that there should be freedom of speech and the Act then proceeds to enact (in s 1):
>
> > ' . . . that there shall be freedom of speech and debates, or proceedings in Parliament, and that such freedom of speech and debates, or proceedings in Parliament, shall not be liable to be impeached or questioned in any Court or place out of Parliament.'
>
> This enactment is obviously modelled on art 9 of the Bill of Rights but unfortunately the draftsman appears to have misunderstood the syntax of art. The latter seemingly conveys that what may not be impeached or questioned are freedom of speech, debate and proceedings. In fact *Blackstone* (*op cit* at 132) quotes art 9 as providing:
>
> > 'that the freedom of speech, and debates, and proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.'
>
> In Act 1 of 1854 (Cape), s 1 appears to link 'freedom' with speech, debates and proceedings."

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See also Erskine May *op cit* at pp 90-91 where the learned author states the following:

> ".. the right of both Houses to be sole judge of the lawfulness of their own proceedings, or to settle - and depart from - their own codes of procedure is fully established";

and that, accordingly, the courts recognise:

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"... their incompetence to inquire into the internal proceedings of a House of Parliament."

See also Ex p *Wilson* 1933 SR 76 at 78; *Chikerema & Ors v UANC & Anor* 1979 RLR 291 (A) at 303-304; 1979 (4) SA 258 (ZRA) at 264-265; and *Poovalingam's* case *supra.*

After considering the above statutory provisions which were ably set out by Mr *Patel* and the cases he has cited, I am of the view that once the Speaker has certified, as he did, in terms of s 52(5) of the Constitution that the Bill has received the requisite majority on the final vote thereon in Parliament this court is precluded from inquiring into and pronouncing upon the validity of the Parliamentary proceedings.

In view of the above finding, I will not deal with Mr *Patel*'s alternative submission.

In the result I would dismiss the application.

Pro Deo

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

WOODS & ORS v MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS & ORS 1993 (2) ZLR 443 (SC)

Court **Supreme Court, Harare**

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

Application in terms of s 24(1) of Constitution

22 November & 10 December 1993

Flynote

Constitution - prolonged delay in carrying out death sentence - whether the carrying out of sentence after prolonged delay would violate s 15(1) of the Constitution - whether right of applicants to obtain relief had been extinguished by amendment of s 15(1) by Constitution of Zimbabwe Amendment (No. 13) Act - failure to assert constitutional rights - failure due to lack of awareness of right - effect

Human rights - inordinate delay in carrying out death penalty - whether will lead to substitution of sentence of life imprisonment

Headnote

The applicants had been found guilty of murder and sentenced to death. Their appeals against conviction and sentence were dismissed.

The applicants applied to the Supreme Court in terms of s 24(1) of Constitution of Zimbabwe for a declaration that the execution of the death sentence after a delay of some five years from the date they were sentenced would violate s 15(1) of the Constitution. They argued that the delay was inordinate, that they had suffered mental anguish as a result and that they had been

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held under harsh prison conditions throughout this time. They also sought an order setting aside the death sentences and substituting a sentence of life imprisonment.

Held, that, although the applicants had been responsible for about six months of the delay period, the remainder of the delay was attributable to the State and this remaining period of delay was inordinate.

Held, further, that the failure on the part of the applicants to assert their

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constitutional right at an earlier stage was due to lack of awareness that such right existed. Before the Supreme Court handed down its decision in the case of *Catholic Commission for Justice and Peace in Zimbabwe* v *Attorney-General, Zimbabawe & Ors* 1993 (1) ZLR 242, the case law did not recognise the right to apply for the death penalty to be vacated on the grounds of inordinate delay.

Held, further (MUCHECHETERE JA dissenting), that the pre-existing right of the applicants to obtain the relief sought had not been extinguished by the amendments to s 15(1) of the Constitution effected by the Constitution of Zimbabwe Amendment (No. 13) Act and therefore the applicants were entitled to the declaration and order for which they had applied.

Cases cited:

CCJP v A-G & Ors 1993 (1) ZLR 242 (S); 1993 (4) SA 239 (ZS)

Dhlamini & Ors v Carter NO & Anor (1) 1968 (1) RLR 136 (A)

Riley & Ors v A-G of Jamaica & Anor [1982] 3 All ER 469 (PC)

J S Sayce for the applicants

A V M Chikumira for the respondents

Judgment

Gubbay CJ: On 18 November 1988, the three applicants were convicted in the High Court of the crime of murder and were sentenced to death. It was found that they, with others, had conspired to kill, by means of a Renault R5 motor vehicle booby-trapped with explosives, six persons believed by them to be members of the military wing of the African National Congress of South Africa, who happened to be residing at 16 Jungle Road, Trenance, Bulawayo. The plan was put into operation on 11 January 1988. The deceased, Obert Mwanza, an unemployed person, was engaged to drive the Renault, alone, to the address in question. He was totally unaware that it had been primed with a powerful explosive device. Upon arrival at the front of the premises he sounded the hooter and then drove to the rear. When the hooter was blown for the second time there was a huge explosion. It resulted in the instantaneous death of Mwanza, whose body was mutilated beyond recognition, and in one of the residents sustaining the loss of an eye. The house was extensively damaged. Pieces of the bodywork of the Renault, as well as

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remnants of human flesh and clothing worn by the deceased, were scattered over a radius of fifty metres.

The record of evidence in respect of the appeal was lodged with the registrar of the Supreme Court on 6 September 1991. It comprised seven volumes and a total of 1 184 typewritten pages. The appeal itself, which was brought by

the applicants against both conviction and sentence, was heard on 4 and 5 October 1993. It was dismissed in its entirety on 28 October 1993.

On 17 September 1993, an application framed in terms of s 24(1) of the Constitution of Zimbabwe was filed with this court. In the single founding affidavit deposed to by the three applicants, mention is made of the prolonged delay (five years has elapsed since they were sentenced), the resultant mental anguish they are suffering, and the harsh conditions under which they are confined in the condemned section of Chikurubi Maximum Security Prison. The relief claimed is the grant of:

(a) a declaration that execution of sentence of death upon each applicant would now constitute inhuman or degrading punishment or treatment in contravention of s 15(1) of the Constitution;

(b) an order that the sentence of death imposed upon each applicant be set aside and substituted by a sentence of life imprisonment; and

(c) an order that the first respondent pay the costs of the application.

It was submitted by Mr *Chikumira,* who appeared for the respondents, that portion of the delay with which this court is concerned was due to the passivity of the applicants and their legal practitioners in failing to ensure that their appeal against the death sentence was heard sooner than it was. More particularly, it was pointed out that it was the deliberate decision of the first and third applicants that another criminal appeal, in which they and one Bawden were involved, should be heard before the death sentence appeal; and that if the latter appeal had been heard first it would have been disposed of instead of the other appeal, probably during April 1993.

I am prepared to accept that the applicants were actively responsible for a delay in the disposal of their appeal against the death sentence to the extent of about six months. Nonetheless, the remaining period cannot be said to be anything but inordinate. The appeal record took close on three years to prepare and, thereafter, neither the applicants nor the State requested an urgent hearing of the matter.

Be this as it may, what must be appreciated is that passivity in the assertion of a constitutional right necessarily implies an awareness that there has been a breach and that a meaningful remedy is available.

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GUBBAY CJ

Insofar as the applicants are concerned, it was not until 24 June 1993, the day the decision in *Catholic Commission for Justice and Peace in Zimbabwe* v *Attorney-General, Zimbabwe and Ors* 1993 (1) ZLR 242 (S); 1993 (4) SA 239 (ZS) was handed down, that there was any reason to believe that delay in the execution of a sentence of death, however inordinate, would permit the Supreme Court, in terms of its powers under s 24(4) of the Constitution, to commute that sentence to one of life imprisonment.

The Appellate Division of the High Court of Rhodesia in *Dhlamini & Ors* v *Carter NO & Anor (1)* 1968 (1) RLR 136 (A) had held that such form of relief was not open to a condemned prisoner, and that judgment had stood as a correct exposition of the law for twenty-five years. Moreover, a somewhat similar conclusion had been reached by the Judicial Committee of the Privy Council in *Riley & Ors v Attorney-General of Jamaica & Anor* [1982] 3 All ER 469 (PC), albeit by a majority.

In short, it was only as a result of the overruling of *Dhlamini*'s case *supra* that the legal profession became aware that the law in this country had been changed.

It follows that the relevant delay on the part of the applicants must be taken to have commenced on 24 June 1993, when their legal advisers would have first known of the judgment in the *Catholic Commission* case *supra*. Within three months the present application was lodged. That period cannot be regard as being of sufficient duration to warrant the inference that the applicants adopted a passive approach to the assertion of their constitutional rights. To the contrary, in my view they proceeded to seek relief with reasonable expedition.

Accordingly, it is the finding of this court that the applicants suffered a violation of s 15(1) of the Constitution.

The second issue that was argued was whether the legal effect of subss (5) and (6) of s 15 of the Constitution, which were added by the Constitution of Zimbabwe Amendment (No. 13) Act on 5 November 1993, was such as to extinguish the pre-existing right of the applicants to obtain relief for a contravention of s 15(1).

For the reasons set out in the majority judgment of this court in *Nkomo & Anor* v *Attorney-General & Ors* 1993 (2) ZLR 422 (S) the answer must be in the negative.

GUBBAY CJ

In the result:

1. The application succeeds with costs to be paid by the first respondent.

2. It is declared that execution of sentence of death upon each applicant would constitute inhuman or degrading punishment or treatment in contravention of s 15(1) of the Constitution of Zimbabwe.

3. It is ordered that sentence of death passed upon each applicant be set aside and

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substituted with a sentence of imprisonment for life.

McNally JA: I agree.

Korsah JA: I agree.

Ebrahim JA: I agree.

Muchechetere JA: I agree with the learned CHIEF JUSTICE on his finding in connection with the first issue in this case. On the second issue I, with respect, find myself unable to agree with him, for the reasons I gave in my judgment in *Nkomo & Anor* v *Attorney-General & Ors* 1993 (2) ZLR 422.

In the result I would dismiss the application.

Coghlan, Welsh & Guest, applicants' legal practitioners

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

S v WEINBERG 1993 (2) ZLR 448 (HC)

Court **High Court, Harare**

Adam J

Criminal review

31 December 1993

Flynote

Criminal procedure - trial - in absentia under s 336(6) of the Criminal Procedure and Evidence Act [Chapter 59] - limits to applicability of procedure - jurisdiction to proceed under section - cannot be assumed on basis of agreement between prosecutor and accused's legal representative

Criminal procedure - trial - judicial officer - trial beginning before one magistrate but second magistrate continuing hearing in terms of s 336(6) of Criminal Procedure and Evidence Act [Chapter 59] - no grounds to take over case - effect

Headnote

Section 336(6) of the Criminal Procedure and Evidence Act [*Chapter 59*] allows an accused person to be convicted and sentenced in *absentia* in very limited circumstances. Firstly, the accused must have been summoned. Secondly, the penalty for the offence with which he is charged must be one of a fine, with imprisonment only in default of payment of the fine. Thirdly, the court must be satisfied that the ends of justice will be met if the procedure is adopted. Where an enactment provides for imprisonment or a fine or both, the procedure may not be

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adopted. The consent of the prosecutor and the accused's legal representative to the procedure does not make the use of the procedure proper or competent.

A trial began before one magistrate but was brought before another magistrate in order for the matter to be dealt with under the procedure provided for in s 336(6) of the Criminal Procedure and Evidence Act.

ADAM J

Held, that apart from the fact that this was not, for the reasons set out above, a case which could have been dealt with under that procedure, there was no basis upon which the second magistrate could have taken over the case. The proceedings before the second magistrate had to be set aside.

Judgment

Adam J: The accused pleaded not guilty to a charge under s 43(1) of the Road Traffic Act 48 of 1976. The magistrate who conducted the trial adjourned the proceedings before giving his judgment. On the date when the judgment was to be delivered the accused's legal practitioner appeared, but the trial magistrate, as well as the prosecutor who conducted the prosecution, were absent. On that particular date, the proceedings were brought before another magistrate, at which time another prosecutor and the accused's legal practitioner advised that it was agreed between them that s 336(6) of the Criminal Procedure and Evidence Act [*Chapter 59*] applied in the matter. The other magistrate ordered that the provisions of s 336(6) be applied in the matter. It appears this application was made since the accused was a foreigner, was returning to his country and was prepared to pay any fine in the event of his conviction and comply with the judgment that would be delivered in his absence.

The trial magistrate refuses to accept the order made by this other magistrate and maintains that his judgment cannot be delivered in the absence of the accused.

Now s 336(6) of the Criminal Procedure and Evidence Act [*Chapter 59*] relates to where a summons is issued in a case before a court of summary jurisdiction and in which the penalty prescribed is a fine only and, in default of payment of such fine, imprisonment. In this situation the accused need not appear personally and may appear through a legal practitioner duly authorised by him. If the accused fails to appear, either personally or through his legal practitioner, the court may, if satisfied that the ends of justice will be met, proceed to hear such a case and adjudicate as fully and effectively as if the accused had appeared.

The penalty prescribed under s 43(1) of the Road Traffic Act is imprisonment not exceeding 5 years or a fine not exceeding $1 000 or to both such fine and such imprisonment.

The provisions of s 336 as a whole concern the payment by the accused of fines which may be imposed for minor offence and includes what are termed as deposit fines in lieu of appearance in court. Section 336(6) has specific

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ADAM J

terms which must be satisfied before a court that has summary jurisdiction can proceed.

Had the accused's legal practitioner, the standby prosecutor and this other magistrate taken the time just to look at the Criminal Procedure and Evidence Act and the Road Traffic Act 1976, they would have learnt that what was being contemplated on behalf of the accused and the prosecution was not proper. The conduct of this other magistrate, without ascertaining for himself the statutory provisions that he was going to apply, is most deplorable. This court has on a number of occasions admonished presiding officers to make certain that the order that they are about to give is lawful and just not to rubber-stamp what is agreed between the accused's legal practitioners and the prosecutor. The order that is issued is that of the presiding officer and it must be competent in terms of the law.

It is not apparent in the record of proceedings on what basis this other magistrate felt that it was competent for him, instead of the trial magistrate, to consider whether s 336(6) of the Criminal Procedure and Evidence Act was applicable in this case.

In this matter the trial magistrate has not completed the trial since his judgment has not been delivered which he can only do in terms of the law.

In all the circumstances the order making s 336(6) applicable in this matter is set aside.

Mtambanengwe J: I agree.

Kantor & Immerman, defendant's legal practitioners

S v JASI 1993 (2) ZLR 451 (HC)

Court **High Court, Harare**

Adam J

Criminal review

31 December 1993

Flynote

Criminal law - statutory offences - Concealment of Birth Act [Chapter 57] - s 2 - concealment of birth of child - "child" - means a fetus which has reached a stage of development which makes it capable of being born alive, irrespective of duration of pregnancy

Family law - child - concealing birth - when a fetus is regarded as a child for purposes of Concealment of Birth Act [Chapter 57]

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Headnote

The accused woman pleaded guilty to contravening s 2 of the Concealment of Birth Act [*Chapter 57*], which penalises any woman who is delivered of her child, if she by secret burial or other disposal of the dead body of the child, endeavours to conceals its birth. The medical evidence confirmed that she had given birth but that the child, which was small, was still-born and had died of intra-uterine poisoning, probably from herbal medicine used to procure an abortion. There was no evidence as to the age of the child. The case was referred to the High Court for review on the ground that it was an essential element of the offence that the fetus be more than 28 weeks old.

Held, that there being no definition in the Act of "child", it was inappropriate to look in such legislation as the Births and Deaths Registration Act 11 of 1986 or its predecessors for the meaning of the word. There, an age was specified for still-birth but the purpose of the legislation was different. The Concealment of Birth Act was concerned with the disposal of infants and applied only to infants which would have been viable if born alive. There was no presumption as to viability based on gestational

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age and no generalization could be made. A child, for the purposes of the Act, was one which had reached a stage of development, irrespective of the duration of the pregnancy, which made it capable of being born alive, that is, after separation from its mother it could breath independently, whether naturally or with the aid of a ventilator.

Held, further, that there was no evidence that the fetus in this case was capable of being born alive in the above sense and the conviction should be set aside.

Decision of WHITAKER J in S v *Madombwe* 1977 (1) RLR 325 (G) disapproved.

Cases cited:

S v Madombwe 1977 (1) RLR 325 (G)

R v Matthews 1943 CPD 8

R v Waterage (1846) 1 Cox CC 338

R v Berriman (1854) 6 Cox CC 388

R v Colmer (1864) 9 Cox CC 506

R v Hewitt & Smith (1866) 4 F & F 1101; 176 ER 923

R v George (1868) 11 Cox CC 41

Roe v Wade 410 US 113 (1973)

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C & Anor v S & Ors [1987] 1 All ER 1230 (QB)

Rance & Anor v Mid - Downs Health Authority & Anor [1991] 1 All ER 810 (QB)

Judgment

Adam J: The accused was convicted on her guilty plea of the contravention of s 2 of the Concealment of Birth Act [*Chapter 57*] by a magistrate who has left the service prior to sentencing the accused. The record of proceedings reveal that in March 1992, the accused was given some unknown herbal medicine to procure an abortion. On 16 March 1992 she gave birth. It is not known whether the child was dead or not on delivery, but it was put and carried by the accused in a pink plastic bag. The accused later threw this plastic bag into a toilet pit in a house in Epworth. As a result of a report made the plastic bag was recovered. A post-mortem affidavit tendered at the trial indicated that the examination carried out on 23 March 1992 revealed a female measuring 26 cm in length, with an estimated weight of 1650 g. The umbilical cord and placenta were unseparated. As a result of his examination, the medical doctor formed the opinion that the cause of death, which he confirmed from circumstantial evidence, was intra-utrine poisoning. He also commented that, as admitted by the accused, this was an intra-uterine fresh still-birth as a result of criminally induced premature delivery and that it was not an abortion. A medical affidavit of 17 March 1992 concerning the examination of the accused showed evidence of recent criminal abortion,

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with a foul smelling and bulky uterus 16/40 and open cervix. During the proceedings the accused stated that her pregnancy was 41/2 months old.

The Provincial Magistrate has written to this court that in view of the lack of evidence on the age of the child, the conviction cannot stand as an essential element of the charge had not been established as the fetus was less than 28 weeks since in *S* v *Madombwe* 1977 (1) RLR 325 at 326 WHITAKER J held that a fetus of less than 28 weeks should not be regarded as a child within the provision of the Act.

It is true that "child" is not defined in the Act. WHITAKER J, in arriving at his decision, relied on *R* v *Matthews* 1943 CPD 8 where DAVIES J looked at the South African Births, Marriages and Death Act 1923, which required the birth of a still-born to be reported. "Still-born" was defined as a fetus of over 6 months intrauterine existence. DAVIES J could not envisage that there had been any concealment of a fetus where the law imposed no necessity of reporting in regard to it. He acknowledged that in an English case a view was expressed that a fetus of less than 6 months might be a child but in South Africa, according to him, the better opinion is that a fetus "is not a child unless it has reached a stage of development sufficient to have rendered its separate existence apart from its mother a reasonable probability." WHITTAKER J also considered Milton & Fuller *South African Criminal Law and Procedure* Vol 3 where such an approach was approved, due to the offence in question being closely related to the registration of births. This approach commended itself to Whitaker J He said that s 2 of the Births and Registration Act [*Chapter 30*] defined "still born" as applying to any child born after 28 weeks of

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pregnancy. Therefore, it seemed to him that a fetus of less than 28 weeks should not be regarded as a child.

However, in examining our legislative history it will be seen that initially the Cape Colony's Ordinance for punishing the Concealment of Birth of Children was made applicable in this country. This 1845 Ordinance (No. 10 of 1845) made it an offence "if any woman shall be delivered of a child and shall by secret burying or otherwise disposing of the dead body of the said child endeavoured to conceal the birth thereof" (s 1). It also provided that at the trial it was not necessary to prove whether the child died before, at or after its birth (s 2). It did not have any definition for "child" or "dead body". In addition s 9 of the Cape Colony's Ordinance 104 of 1833, made applicable here, provided *inter alia* that whenever any death had occurred the nearest relative of the deceased must cause a death notice to be given and a death register must be kept in the office of the Master of the High Court. Thereafter, s 3 of the

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Southern Rhodesian Births and Deaths Registration Ordinance of 1902 defined "body" as meaning nd including "any human dead body and the body of any still-born child" and "birth" as meaning and including "the birth of any viable child, whether such child shall be living or dead at the time of birth". It also provided in s 13 that notice must be given to the police or a justice of peace where any live new-born child or any body is found exposed. In s 22 (1), the Ordinance provided that in the case of any still-born child a medical certificate was required that such child was not born alive. It did not contain a definition of "still-born". The 1939 Revised Statutes in the Concealment of Birth Act [*Chapter 32*] merely stated in s 2 that any woman who is delivered of a child shall be deemed to be guilty of concealing the birth of her child, if she by secret burial or other disposal of the dead body of the said child endeavoured to conceal the birth thereof. This Act did not contain any definitions. Further, the 1939 Revised Statutes in the Births and Deaths Registration [*Chapter 149*] , in the definition of "birth" and "body" just took out the words "and includes", but otherwise maintained the 1902 Ordinance definitions. Later, the Births and Deaths Registration (Southern Rhodesia) Act (Federal Act 35 of 1962), provided that "born" did not include still-born and that "birth" should be construed accordingly; and that "still-born" should apply to any child which has issued forth from its mother after the 28th week of pregnancy and which did not any time after being completely expelled from its mother breathe or show any signs of life and that "still-birth" should be construed accordingly. The 1974 Revised Statutes, in the Concealment of Birth Act [*Chapter 47*], re-enacted the previous statute without any definitions, while the Birth and Deaths Registration Act [*Chapter 30*] did not in any meaningful way alter the definitions of "born" and "still-born". The Births and Deaths Registration Act 11 of 1986 replaced the previous statute but did not alter the definitions of "born" and "still-born".

The 1845 Cape Ordinance was largely adopted from the English Offences against the Person Act 1828 which made it an offence for the mother by secret disposition of the dead body to conceal the birth of her child: *R* v *Waterage* (1846) 1 Cox CC 338. The development of the Act in England concerned the unsatisfactory state of law as it applied to the killing of infants with the juries and the courts reluctant to convict mothers of killing their new-born babies

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It is clear from the foregoing that it would not be correct to equate the offence under the Concealment of the Birth Act in this country with legislation closely related to the matter of registration of births.

In *R* v *Berriman* (1854) 6 Cox CC 388, ERLE J said in dealing with

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concealment of birth:

> ". . . this offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth that it might have been a living child. It is not necessary that it should have been born alive, but it must have reached a period when, but for some accidental circumstances, such as disease on the part of itself, or of its mother, it might have been born alive . . . if she had miscarried at a time when the foetus was but a few months old, and therefore could have had no chance of life, you could not convict her upon this charge. No specific limit can be assigned to the period when the chance of life begins. but it may, perhaps, be safely assumed that, under seven months, the great probability is that the child would not be born alive."

But in *R* v *Colmer* (1864) 9 Cox CC 506 at 507 MARTIN B said that he:

> " . . . saw nothing to limit the word 'child' in the statute to a child likely to live or likely to die, but as soon as the foetus had the outward appearance of a child it was sufficient."

There the mother had delivered in the fourth or fifth month and the child was about the length of a man's finger and had the shape of a human being.

In *R* v *Hewitt & Smith* (1866) 4 F&F 1101; 176 ER 923, where the mother delivered a child which had not attained 7 months from conception, SMITH J left it to the jury to determine whether the offspring had so matured as to become a child, or was only a fetus, or the unformed subject of a premature miscarriage.

In *R* v *George* (1868) 11 Cox CC 41 the mother had delivered a 6 months' miscarriage. BOVILL CJ left it to the jury to determine whether placing of the dead body of her child in the box was for the purposes of concealing the birth or for inviting some one to look for it.

In *Roe* v *Wade* 410 US 113 (1973) BLACKMUN J said at 161-163:

> "Texas urges that . . . life begins at conception and is present throughout pregnancy . . . We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, there has always been strong support for the view that life does not begin until live

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> birth . . . common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the foetus becomes 'viable', that is, potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks . . .

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> With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the foetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of foetal life after viability thus has both logical and biological justifications."

In *C & Anor v S & Ors* [1987] 1 All ER 1230 (QB) the expression "a child capable of being born alive" in the English Infant Life (Preservation) Act 1929 was considered. In that case in an affidavit presented by Mr Norris, a emeritus consultant gynaecologist at St Peter's Hospital, Chertsey, stated that an unborn child of eighteen weeks gestation, were it to be delivered by hysterotomy would be live born. He referred to the definition of "live born" used by the World Health Organisation as

> "the complete expulsion or extraction from its mother of a product of conception irrespective of the duration of pregnancy, which after such separation breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord or definite movement of voluntary muscle whether or not the umbilical cord has been cut or the placenta is attached."

In a replying affidavit, Professor Newton, Professor of Obstetrics and Gynaecology at the Birmingham University Medical School, after mentioning the 1985 report prepared by a representative committee on behalf of a number of British medical organisations, said the purpose behind the WHO definition was to standardise the perinatal statistics for member countries of births. It was specifically not meant to define independent fetal viability which he believed to be the important concept. He said fetal viability means that the fetus is capable of independent human existence separate from the mother. He referred to the survey of 29 pre-natal intensive care units during 1982 in Britain where no fetus of less than 23 weeks survived. It was his conclusion, therefore, that a fetus of anything below 23 weeks cannot survive independent, of its mother and so there was no viability. In a further affidavit in response,

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Mr Norris said in his opinion any fetus of 18 weeks or longer gestation is capable of being born alive an that by "alive" he meant showing real and discernable signs of life within the WHO definition. In his further replying affidavit, Professor Newton stated the expression "born alive" raises difficulties before the expiration of 28 weeks of gestation; that each individual fetus in each individual mother develops differently and at different rates and for this reason it is difficult to generalise, but "after 8 weeks of gestation some fetuses will exhibit some primitive fetal movement, have a primitive heart tube which contracts and the circulation has started to develop but these fetuses will be quite incapable of life separate from the mother." He mentions that there are some firm generalisations on development which could be made:

> "In a fetus of 18-21 weeks' gestation the cardiac muscle is contracting and a primitive circulation is developing";

but, in his opinion,

> "lung development does not occur until after 24 weeks gestation; before this time the major air passages have been formed and there is gradual development of the bronchioles but these terminate in a blind sac incapable of gas exchange prior to 24 weeks".

He accepted that a fetus of 18-21 weeks' gestation can be delivered by hysterotomy. However,

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"once placenta separation occurs, whether the delivery has been by hysterotomy or vaginally, it will not be able to respirate". His opinion is that a fetus up to 24 weeks of gestation after delivery will not be capable of surviving once the placenta separation occurs because the lungs are incapable of sustaining life as they are not adequately developed. Professor Rivers, a reader in pediatrics at St Mary's Hospital with a special interest in new-born under intensive care, in his affidavit said that a fetus of 18-21 weeks' gestation displays some sign of life in the womb, but in his opinion, such fetuses are unable to perform the function of lung respiration without which these fetuses cannot live separately from the mother once the umbilical cord is detached or the placenta removed. HEILBRON J concluded that "capable of being born alive" did not have a clear and plain meaning in the 1929 Act. It was ambiguous and the phrase was capable of different interpretations. She pointed out, at p 1240C, that "though the reference to a fetus of 28 weeks or more being deemed 'capable of being born alive' is referable to the burden of proof, it is probably dealing with a fetus of an age that would be known or expected to be viable in 1929". Also, HEILBRON J

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was not greatly attracted to Mr Norris' very limited definition and did not accept it as realistic.

In the Court of Appeal SIR JOHN DONALDSON MR said at 1242 of the same report:

> ". . . by the 18th to 21st week . . . the fetus, even if then delivered by hysterotomy, would be incapable ever of breathing either naturally or with the aid of a ventilator. It is not a case of the fetus requiring a stimulus or assistance. It cannot and will never be able to breathe . . . it is not in our judgment 'a child capable of being born alive' within the meaning of the 1929 Act."

In *Rance & Anor v Mid - Downs Health Authority & Anor* [1991] 1 All ER 801 (QBD) Brooke J at 817-819 observed:

> ". . . the words used by Parliament in 1929 extended to cover not only the actual period of birth but also the period when the child capable of being born alive, was still in its mother's womb.
>
> . . . Parliament created the rebuttable presumption that a child of over 28 weeks' gestation was capable of being born alive, but it was otherwise silent on matters of evidential proof. Therefore, if the Crown succeeded in proving . . . that a particular child of under 28 weeks' gestation had been capable of being born alive, the defendant would be convicted . . .
>
> In my judgment the meaning of the words 'born alive' are clear and the meaning of the words 'capable of being born alive' are also clear. The . . . child is . . . born alive if, after birth, it exists as a live child, that is to say breathing and living by reason of its breathing through its lung alone, without deriving any of its living or power of living by or through any connection with its mother . . . Once the foetus has reached a state of development in the womb that it is capable, if born, of possessing those attributes, it is capable of being born alive within the meaning of the 1929 Act. My confidence in this conclusion is strengthened by reference to *C* v *S* [1987] 1 All ER 1230 at 1242; [1988] QB 135 at 151 . . . I do not believe for one moment that Parliament intended the protection it was affording the children in the course of being born to be limited to the class of healthy children . . . and to be denied to those children where expectation of life was not so assured at the moment of birth. Nor do I consider, particlarly in light of the historical background to the Act, that Parliament intended the concept of 'capable of being born alive' to be left to be

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ADAM J

> decided by different juries' views of what period of survival after birth should be regarded as reasonable in order to qualify the child for the protection of the Act.
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> . . .
>
> The later Supreme Court decision of *Webster* v *Reproductive Health Services* (1989) 109 S Ct 3040 shows the difficulties courts and legislatures on the other side of the Atlantic are experiencing in identifying the moment of viability in the absence of any simple conclusive presumption founded on probable gestational age."

In Michael Powers and Nigel Harris *Medical Negligence* (1990), at para 22.33 the authors state:

> "The prognosis for very tiny infants born at the limits of viability has altered most dramatically as have our concepts of viability, now identified at approximately 23-24 weeks gestation age and not the 28 weeks still identified in many statistical surveys."

In Glanville Williams *Textbook of Criminal Law* 2 ed at p 303 the author mentions "that babies that are as much as three months premature have a 90 per cent chance of survival under intensive care (though premature babies who survive have a high incidence of mental deficiency)." He is of the view that "capable of being born alive" in the 1929 Act "must surely mean capable of being born with a reasonable chance of survival".

It is a truism that there have been rapid, extensive and most remarkable developments in the medical field, including obstetrics and gynaecology, since 1977. I cannot, therefore, accept that WHITAKER J was correct when he held that a fetus of less than 28 weeks should not be regarded as a child within the provisions of the Act. In my view, a child within the provisions of the Act is one that has reached a stage of development, irrespective of the duration of the pregnancy, which makes the child capable of being born alive, that is to say, after separation from its mother the child breathes independently either naturally or with the aid of a ventilator.

In this case there is no evidence that the intra-uterine still birth fetus was capable of being born alive in the above sense. Accordingly, the conviction is set aside

Mtambanengwe J: I agree.

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Endnotes

1 (Popup - Popup)

See 1992 (1) ZLR 339 (H) - *Editor.*

2 (Popup - Popup)

Since ths judgment was delivered, the Appellate Division of the Supreme Court of South Africa delivered a judgment, unanimously upholding the decision in *S v Botha* 1990 (1) SA 668 (T), one of the cases on which the majority relied. The Appellate Division's judgment is reported in 1993 (2) SACR 587 and 1994 (1) SA 306.

3 (Popup - Popup)

See p93 above - *Editor*

4 (Popup - Popup)

See p 146 *ante* - *Editor*

5 (Popup - Popup)

In this connection see also *Graphics Africa (Zim) Ltd v Rank Xerox Ltd* 1989 (2) ZLR 292 (H) - *Editor.*

6 (Popup - Popup)

See *ante* - *Editor*

7 (Popup - Popup)

Portions of the judgment have been ommitted from this report - *Editor*

8 (Popup - Popup)

See 1993 (1) ZLR 103 (H) - *Editor.*

9 (Popup - Popup)

1993 (1) ZLR 242 (S)

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