ATTORNEY-GENERAL v CHIWASHIRA & ORS 1994 (1) ZLR 1 (HC)

Court **High Court, Harare**

Chidyausiku J

Appeal by Attorney-General against grant of bail

21 July 1993 *(1)

Flynote

Criminal procedure - bail - grant of - by magistrate - offences for which magistrate may not grant bail without consent of Attorney-General - offences under enactments dealing with illicit dealing with currency - charges of corruption and fraud arising out of illicit dealings with currency not included - consent by State to grant of bail or terms of bail - whether magistrate bound by such consent - Criminal Procedure and Evidence Act [Chapter 59] - s 106(1)(b) - para 9 of Eighth Schedule

Headnote

The respondents were granted bail by a magistrate, the grant of bail and the terms of bail having been agreed to by the local public prosecutor. The first two respondents were charged with offences under the Preventio n of Corruption Act 1985, it being alleged that they made false entries regarding foreign currency earned by fictitious companies. It was alleged that the foreign currency, worth $1,3 million, was then sold to another company not entitled to it, and that the respondents were paid some $3 000 by that other company. The second two respondents were charged with 23 counts of fraud. They were alleged to have falsely acquitted forms in the names of real companies, which showed that those companies were entitled to receive foreign currency under the Export Retention Scheme then in operation. As a result, the Reserve Bank authorized the payment of some $8,5 million worth of foreign currency to those companies, which money the respondents sold to third parties.

The magistrate granted bail in the sum of $1000 to the first two respondents

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and $3 000 to the third and fourth respondents. The Attorney-General appealed against the grant of bail, on the grounds that the magistrate was precluded from granting bail without his consent, which had not been given. He argued that the offences were Eighth Schedule

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offences, in respect of which a magistrate may not, under s 106(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*], as amended, grant bail. Paragraph 9 of that Schedule refers to "any offence under any enactment relating to the illicit possession of or dealing in . . . any currency . . ."

Held, that although the offences both involved foreign currency, they were not offences under enactments relating to illicit dealing in foreign currency. The first two respondents' offence was under an enactment relating to the prevention of corruption, while the third and fourth respondents' offences were under the common law.

Held, further, that the fact that the State did not oppose bail or that it agreed to the conditions of bail did not bind the magistrate. The magistrate has a discretion. The State's consent is a factor that should weigh heavily in favour of the grant of bail, and it is only in exceptional circumstances where the magistrate should go against such consent. In view of the amounts involved in the offences, this was a case where the magistrate should at least have refused to accede to the agreed conditions of bail. The magistrate accordingly exercised his discretion wrongly.

Held, further, that the matter should be remitted for the bail application to be heard *de novo.*

R H Goba for the Attorney-General

G Chikumbirike and *G Masimirembwa* for the respondents

Judgment

Chidyausiku J: This is an appeal by the Attorney-General against the decision of a magistrate in granting bail to the respondents. The appeal is by way of a court application in terms of s 111A of the Criminal Procedure and Evidence Act [*Chapter 59*] as read with s 7 of the High Court of Zimbabwe (Bail) Rules 1991 (SI 109/1991).

The first and the second respondents are on remand on allegations of having contravened s3(1)(a) as read with s 3(2) of the Prevention of Corruption Act 34 of 1985. It was alleged that they, in the course of their employment as bank employees, made certain false entries regarding foreign currency earned by fictitious companies that never exported anything. As a result of the false entries, certain foreign currency to the amount of $1,3 million was paid to companies that were not entitled to such foreign currency. For their efforts, the respondents were paid $3 000 as a bribe.

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The third and fourth respondents are on remand on allegations of 23 counts of fraud involving the unlawful sale of foreign currency, to the prejudice of the Government, in the amount of $8,5 million. The respondents were granted bail by a magistrate. Bail in the amount of $1 000 was granted to the first two respondents and in the amount of $5 000 to the third and fourth respondents. It is common cause that bail was granted to the respondents with the consent of the local public prosecutor attached to the magistrates court at Rotten Row, Harare.

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The Attorney-General now contends that the local public prosecutor had no authority to consent to bail without the specific authority of the Attorney-General, in view of the provisions of s 106(1)(b) of the Criminal Procedure and Evidence Act, as amended by s 7 of the Criminal Procedure Amendment Act 1 of 1992. This section prohibits the granting of bail to persons charged with offences set out in the Eighth Schedule without the consent of the Attorney-General.

In my view, there are two crisp issues in this case. The first issue is whether or not the offences the respondents are charged with fall into that category of offences where the Attorney-General's consent is necessary before bail can be granted by a magistrate. The second issue is, if the offences do fall into that category, was the consent of the local prosecutor the consent of the Attorney-General provided for in s 106(1)(b) of the Act?

Section 106(1)(b) of the Act, as amended by s 7 of Act 1 of 1992, reads as follows:

> "Subject to the provisions of this section, a person may be admitted to bail or have his conditions altered -
>
> (a) . . .
>
> (b) in respect of any offence, except an offence specified in the Eighth Schedule, by a magistrate within whose area of jurisdiction the accused is in custody at any time after he has appeared in court on a charge and before sentence is imposed:
>
> Provided that, with the consent of the Attorney-General, a magistrate may admit a person to bail or alter a person's conditions of bail in respect of any offence . . ."

The Eighth Schedule lists a number of offences such as treason, murder and housebreaking with intent to commit an offence. Paragraph 9 of the Eighth Schedule lists:

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> "any offence under any enactment relating to the illicit possession of or dealing in or the unlawful importation or exportation of any precious metal, currency, bill of exchange, travellers cheques, letter of credit, bank draft or promissory note."

Mr *Goba* argued that the offences the respondents committed are covered by the above section.

The respondents contend that they are not. It is common cause that the first two respondents are charged with contravening s 3(1)(a) as read with s 3(2) of the Prevention of Corruption Act, while the last two respondents are charged with twenty-three counts of fraud. Mr *Goba's* argument, as I understand it, is that it is apparent from the summary of the facts in the request for remand that, in respect of the respondents, the offences they committed involved dealing in foreign currency. The request for remand form for the first two respondents reads as follows:

> "Offence(s) C/S 3(1) ARW Section 3(2) of the Prevention of Corruption Act, Number 34 of 1985. (Accepting a bribe or gift)
>
> Allegation(s): On (date) September 1992: at (place) Zimbank International, First Street, Harare, the accused (state what the accused did). The accused are both clerks in Zimbank International's Export Retention Scheme section where they were responsible for issuing export licences and export retention scheme passbooks to

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applicants who wish to export goods out of Zimbabwe. The Export Retention Scheme passbooks are obtained by clients of the bank who have been authorised 50% of their export value. The accused thus connived to commit the offence resulting in accused one issuing an unendorsed passbook to African Machinery Distributors (Pvt) Ltd for an amount of $5000 000. Accused two then sold the foreign currency to Fidelity Printers and Refiners for $1300 000. Both accused knew that their actions were corrupt as the alleged African Machinery Distributors is fictitious or never made such an application. They also knew that they could not have handed over an unendorsed export retention passbook. This resulted n the State being prejudiced by $1300 000 worth of foreign currency."

The request for remand for the other two respondents provides as follows:

"Allegation(s) - on (date) between September 1992 - March 1993 at Zimbank, First Street branch CD1s and ERS sections respectively. Their roles were to check to ensure that information as furnished by the Bank's

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clients/exporters on CD1 Forms and ERS applications forms was correct. Accused one fraudulently acquitted 23 CD1 Forms in the names of Collins Technical Sales, Plastifab, Mashonaland Suppliers, Fashion Originators, African Clothes, Fashion House and Ethnic Wear purporting that these companies had earned and received funds under the Export Retention Scheme from abroad for their exports, yet no exports had been made and no funds received by such purported companies. Working on the false information supplied by accused one, The Reserve Bank of Zimbabwe authorised Zimbank to credit the above companies' ERS accounts with various large amounts of foreign currency. With the connivance of accused two, the purported companies sold the foreign currency allocated to them to third parties which resulted in the State being prejudiced to the tune of $8 548 086,89. Most of these companies are either non-existent or are brief-case companies."

It is quite apparent from the above that the offences committed by each of the respondents had something to do with illegal dealing in foreign currency. The question is, is that sufficient to bring them within the ambit of para 9 of the Eighth Schedule? The golden rule of statutory interpretation is that words are given their ordinary meaning. In my view the words "any offence under any enactment relating to the illicit possession of . . ." means that for an accused to fall under this provision the accused must be charged with contravening a **statute** relating to illicit possession or illicit dealing etc in currency or metals. The third and fourth respondents are charged with 24 counts of fraud. Fraud is a common law offence. The commission of the offence of fraud is not a contravention of any enactment. That offence cannot therefore fall under the ambit of para 9 of the Eighth Schedule.

The first and second respondents are charged with contravening s 3(1)(a) of the Prevention of Corruption Act. A perusal of this Act clearly establishes that it is an enactment relating to prevention of corruption. It is not an enactment relating to the illicit possession of or dealing in or the unlawful importation or exportation of any precious metal, currency, etc. They too do not fall within the ambit of para 9 of the Eighth Schedule. As I said, Mr *Goba*'s argument is that, because the particulars in the request for remand show that the offences committed by the respondents involve the illicit dealing in the foreign currency, they are therefore covered by para 9 of the Eighth Schedule. I am unable to accept this argument. To accept that argument would in fact be effecting an amendment to para 9. The first line of that section reads, "Any offence **under any enactment** relating to the illicit possession . . ." (the emphasis is mine). To accept Mr *Goba*'s argument

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would be tantamount to deleting the emphasised words n the above section. Indeed, if the above paragraph merely referred to **any offence** relating to the illicit possession, dealing etc, then the respondents would be covered.

It follows from the above that the accused are not being charged with an offence in respect of which the Attorney-General's consent is required before a magistrate can assume jurisdiction to grant bail. The magistrate had jurisdiction to consider the question of bail. The question of whether the Attorney-General consented or not therefore falls away.

There is, however, a very serious misdirection which is apparent on the record. The magistrate, in para 3 of a document headed "comments on the appeal", clearly approached the question of bail on the wrong basis. He thought he was "estopped", to use his own words, from refusing to grant bail to the respondents because the State was consenting to or not opposing bail. This is not so. Whether or not an accused person should be granted bail is a matter to be determined by the magistrate where he has jurisdiction. The fact that the State is consenting to bail is a factor that should weigh very heavily in favour of the accused. It is only in exceptional circumstances that the presiding magistrate should go against such consent. The present case eminently qualifies for an instance where the magistrate should have refused to accede at least to the agreed conditions of bail. The respondents are facing charges involving prejudice to the complainants to the tune of $1,3 million and $8,5 million, respectively. To grant hem bail in the amounts of $1 000 and $5000 respectively is ridiculous. I have no doubt that if the magistrate was not under the misapprehension that he was bound to accept those conditions he would not have granted bail, at least on those conditions. The proviso to s 106(1)(b), as amended by s 7 of Act 1 of 1992, clearly gives the magistrate the discretion, even where the Attorney-General has consented to bail in respect of Eighth Schedule Offences. He can exercise that discretion against the granting of bail despite the Attorney-General's consent to bail.

In the result the proper course to follow in this case is to set aside the bail proceedings which have been vitiated by the serious misdirection of the presiding magistrate and remit the matter back to the magistrate for the hearing of the bail application *de novo*. MTAMBANENGWE J, with whom I discussed this matter, is in agreement.

Respondents' legal practitioners

(1) *Chikumbirike & Associates*

(2) *Masimirembwa & Associates*

(1) S v GATSI (2) S v RUFARO HOTEL (PVT) LTD T/A RUFARO BUSES 1994 (1) ZLR 7 (HC)

Court **High Court, Harare**

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Sandura JP, Smith J & Adam J

Criminal review

31 December 1993

Flynote

Statutes - regulations - validity - requirement that regulations be laid before Parliament - failure to lay regulations before Parliament within time specified in enabling statute - effect - Presidential Powers (Temporary Measures) (Control of Omnibuses and Heavy Vehicles) Regulations 1991 (SI 226A/91) - expiry of due to failure to be laid before Parliament

Statutes - Presidential Powers (Temporary Measures) Act 1 of 1988 - power delegated by Parliament to President to make laws in defined circumstances - not an abdication of Parliament's fundamental lawmaking authority and not a breach of maxim delegatus non potest delegare

Statutes - Presidential Powers (Temporary Measures) Act 1 of 1988 - s 6 - provision that re-enacted regulations shall be deemed to have been made when initial regulations made and to expire 180 days afterwards - regulations made in August but expiring in September due to non-tabling before Parliament - regulations re-enacted in November - deemed to have come into effect on date August regulations made

Headnote

Both accused were convicted of offences in terms of the Presidential Powers (Temporary Measures) (Control of Omnibuses and Heavy Vehicles) Regulations 1991. The first accused's offence occurred on 3 October 1991 and the second accused's on 3 September 1991. The regulations were published in the *Government Gazette* on 19 August 1991.

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Section 4 of the Presidential Powers (Temporary Measures) Act 1 of 1988, under which the regulations were made, provides that regulations made under s 2 of the Act "shall" be laid before Parliament no later than the eighth day on which Parliament next sits after the regulations were made. Parliament may resolve that the regulations be amended or revoked and the President is obliged to give effect to such a resolution. If this occurs, the President may not, for 6 months thereafter, make further substantially similar regulations.

Unless earlier repealed, regulations made under the Act expire on the 181st day following their commencement. If regulations are repealed and re-enacted in substantially similar terms, the subsequent regulations are deemed to have commenced when the original regulations were made. If regulations expire, substantially similar regulations may not be made for six months thereafter.

In terms of s 5 of the Act, regulations made by the President under the Act shall, to the extent of any inconsistency, prevail over any other law to the contrary, apart from regulations made under the Emergency Powers Act [*Chapter 83*].

Parliament sat for 9 days in late August and early September 1991, the last day of sitting being 2 September. By this date, the regulations had not been laid before Parliament. Further

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regulations, the Presidential Powers (Temporary Measures) (Control of Omnibuses and Heavy Vehicles) (No.2) Regulations 1991, which were substantially similar to the August regulations, were published on 7 November 1991. These regulations were laid before Parliament within the requisite time and were not revoked or amended by Parliament.

On review, it was argued on the accused's behalf that -

(i) it was not competent for Parliament to delegate its lawmaking powers to the President, such delegation being contrary of s 51 of the Constitution and a serious infringement of the doctrine of separation of powers because it effectively made the President a new legislative body;

(ii) even if Parliament could so delegate its powers to the President, the failure to table the August regulations within the specified time was fatal to their continued existence, and the accused's convictions could accordingly not stand, since they were committed after the last day by which the regulations could be laid before Parliament.

Held, that Parliament could competently delegate legislative powers to the President. Parliament's power to legislate is a plenary, not a delegated, power. There could be no question that Parliament can delegate its lawmaking power to some extent; the question was, the extent to which

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it could do so without delegating its fundamental authority. The provisions of the Act, though extensive and wide-ranging, are contingent upon the existence of defined circumstances and are made subject to the control of Parliament itself by the tabling procedure. The doctrine of separation of powers was of little relevance, since the Constitution is the supreme law against which the question of any encroachment on Parliament's powers had to be determined. The Constitution gave Parliament power to make such laws as it considers to be necessary for the peace, order and good government of Zimbabwe. This was a very wide, all-embracing power, the only limitation being that it must be exercised subject to the provisions of the Constitution. There was nothing in the Constitution which had the effect of incorporating the maxim *delegatus non potest delegare* to restrict the powers of Parliament, and accordingly the Act was not *ultra vires* the Constitution.

Held, further (SMITH J dissenting), that failure to lay the August regulations before Parliament within the specified time was fatal. The language of s 4 of the Act was categorical and imperative. There were no valid considerations which would prevent the regulations being visited with invalidity. Tabling of the regulations during at least 8 days of the parliamentary session was essential for their continued validity. On the eighth day, at midnight, they lapsed. Such a conclusion was in accordance with the intention of the Legislature. The purpose of the tabling procedure was to allow Parliament the opportunity to amend or revoke regulations which could be very wide and which could prevail over any other law. Parliamentary scrutiny of delegated legislation had to be respected and the tabling procedure provided for it.

Held, further, that the August regulations ceased to have effect after 3 September 1991 and

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accordingly the conviction of the first accused had to be set aside, as his offence was committed after that date and before the November regulations came into effect.

Cases cited:

Starey v Graham [1899] 1 QB 406

Biggs v Comr of Police (1982) 8 CLB 576

R v Daniels & Anor 1936 CPD 331

Metal & Allied Workers Union & Anor v State President & Ors 1986 (4) SA 358 (D)

Bloem & Anor v State President & Ors 1986 (4) SA 1064 (O)

Sutter v Scheepers 1932 AD 105

Panama Refining Co v Ryan 293 US 388 (1934)

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Municipal Corp of Delhi v Birla Cotton & Weaving Mills Ltd (1968) 3 SCR 251

Johannesburg Consol Invtms Co Ltd v Marshalls Township Synd Ltd 1917 AD 662

Van Heerden NO & Ors v Queen's Hotel (Pvt) Ltd & Ors 1972 (2) RLR 472

Special Reference No. 1 of 1964 [1965] 1 SCR 413

Smith v Mutasa NO & Anor 1989 (3) ZLR 183 (S)

Gumbo v Norton Selous Rural Council 1992 (2) ZLR 403 (S)

Leibbrandt v SA Rlys 1941 AD 9

Messenger of the Magistrate's Ct, Durban v Pillay 1952 (3) SA 678 (A)

R v Sheer Metalcraft Ltd & Anor [1954] 1 All ER 542 (Surrey Assizes)

R v Sec of State for Social Svcs, ex p *Assn of Metropolitan Authorities* [1986] 1 All ER 164 (QB)

Arenstein v Sec for Justice 1970 (4) SA 273 (T)

Justus v Stutterheim Municipality 1962 (4) SA 499 (E)

Nzimande v Durban County Rural Licencing Bd & Anor 1969 (3) SA 35 (D)

Aluchem (Pty) Ltd & Anor v Min of Mineral & Energy Affairs 1985 (3) SA 626 (T)

Min of Trade & Industry & Anor v Nieuwoudt & Ors 1985 (2) SA 1 (C)

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In re *The Initiative & Referendum Act* [1919] AC 935 (PC)

Lion Match Co v Wessels 1946 OPD 376

Nkisimane & Ors v Santam Ins Co Ltd 1978 (2) SA 430 (A)

B Patel for the State

G S Wernberg for the accused

Judgment

Adam J: Both accused were convicted of the contravention of s 6 of the Presidential Powers (Temporary Measures) (Control of Omnibuses and Heavy Vehicles) Regulations, 1991 (SI 226A of 1991) (published in the Government *Gazette* on 19 August 1991) - hereinafter called the "August 1991 Regulations". The offence, in the case of Gatsi, was committed on 3 October 1991, with the conviction entered on 9 October 1991, and for Rufaro Buses the offence was committed on 3 September 1991 with the conviction entered on 12 September 1991. Subsequently, further regulations, the Presidential Powers (Temporary Measures) (Control of Omnibuses and Heavy Vehicles) (No. 2) Regulations, 1991 (SI 330A of 1991) published in the Government *Gazette* on 7 November 1991) - hereinafter called the "November 1991 Regulations" - were promulgated.

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Both regulations were made in terms of s 2 of the Presidential Powers (Temporary Measures) Act 1 of 1986, which provides as follows:

> "2 (1) Whenever it appears to the President that -
>
> (a) a situation has arisen or is likely to arise which needs to be dealt with urgently in the interest of defence, public safety, public order, public morality, public health, the economic interest of Zimbabwe or the general interest; and
>
> (b) the situation cannot adequately be dealt with in terms of any other law; and
>
> (c) because of the urgency, it is inexpedient to await the passage through Parliament of an Act dealing with the situation;
>
> then, subject to the Constitution and this Act, the President may make such regulations as he considers will deal with the situation.
>
> (2) Regulations made in terms of subsection (1) may provide for any matter or thing for which Parliament can make provision in an Act:
>
> Provided that such regulations shall not provide for any of the following matters or things -
>
> (a) authorising the withdrawal or issue of moneys from the Consolidated Revenue Fund or prescribing the manner in which withdrawals are to be made therefrom; or
>
> (b) condoning unauthorised expenditure from the Consolidated Revenue Fund; or

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(c) providing for any other matter or thing which the Constitution requires to be provided for by, rather than in terms of, an Act; or

(d) amending, adding to or repealing any of the provisions of the Constitution."

Section 3 of the Act makes provision for the President to cause a notice of intention to make regulations in terms of s 2 to be published in the *Gazette,* but failure to do so does not invalidate any regulations made under s 2.

Section 4(1) of the Act provides that regulations made under s 2 shall be laid before Parliament no later than the eighth day on which Parliament next sits after the regulations were made. Section 4(2) states that if Parliament resolves that the regulations be amended or revoked the President shall forthwith amend or revoke the regulations. Section 4(3) lays down that when regulations have been amended or revoked by Parliament, the President cannot for 6 months thereafter make further substantially similar regulations.

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Section 5 states that regulations made shall, to the extent of any inconsistency, prevail over any other law to the contrary, apart from regulations that have been made in terms of the Emergency Powers Act [*Chapter 83*].

Section 6(1) of the Act provides that unless they are earlier repealed, regulations made shall expire and cease to be of any force or effect on the 181st day following the commencement of the regulations. Section 6 (2) states that where regulations are repealed and re-enacted in substantially identical terms by other such regulations, the second-mentioned regulations shall be deemed to have been made when the first regulations were made. Section 6(3) provides that, where regulations have expired, the President cannot for 6 months thereafter make further substantially identical regulations.

It is common cause that Parliament sat on 20, 21, 22, 23, 27, 28 and 29 August and 3 and 4 September 1991 and so this made 3 September 1991 as the last date on which the August 1991 Regulations could have been laid before Parliament. This was never done.

The November 1991 Regulations were identical, with certain amendments to a few sections, to the August 1991 Regulations. The November 1991 Regulations were laid before Parliament within the period required and were not amended or revoked by Parliament.

The issue for determination is whether such Regulations have any validity.

Mr *Patel* in the heads of argument for the State submits that the August 1991 Regulations came into force and effect upon their publication in the Government *Gazette* on 19 August 1991. He relies on s 18(1) of the Interpretation Act [*Chapter 1*]. He asserts that they remained valid despite the failure to lay them before Parliament, because s 4(1) of the Act is not imperative but merely directory and failure to comply with s 4(1) did not result in automatic lapsing or invalidity. He argues that s 4(1) prescribes what is termed a negative resolution procedure. This means that the regulations are subject to a condition subsequent, whereby Parliament may call for the amendment or revocation of the regulations: *Halsbury's Laws of England* 4 ed vol 34 at para

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1436. Mr *Patel* argues that there is nothing in that Act to suggest that the regulations made under s 2 cannot become operative until they are laid before Parliament and that, as far as their validity after the last date upon which they should have been so laid is concerned, the Act is silent. He maintains that the requirement to lay before Parliament, which is subject to a negative resolution procedure, is directory. He states that in England

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there is no definitive authority except *Starey v Graham* [1899] 1 QB 406 at 412. There it was doubted whether the obligation to lay before Parliament was more than directory and whether it was necessary to prove compliance. He points out that in *Biggs v Commissioner of Police* (1982) 8 CLB 576 the Barbados Supreme Court held that the duty to lay before Parliament was mandatory not merely directory and that the requirement was laid down in the Extradition Act 1979, as read with the Interpretation Act. Non-compliance was held fatal to the validity of the subsidiary legislation. He argues that the decision in that case is distinguishable on two grounds. Firstly, the requirement to lay before Parliament was to be "as soon as may be after they are made", but the Designated Commonwealth Extradition Order 1980 had not been laid before Parliament as at the time of its enforcement in April 1981. He submits that "as soon as may be" must mean within a reasonable time, having regard to the care and the dispatch with which Parliament's business should be conducted. Secondly, the decisive factor according to him appears to have been the impact of the Barbadian Interpretation Act, which provided that in any enactment the expression "shall" must be construed as imperative.

Mr *Patel* asserts further that in South Africa the weight of authority is in favour of the view that the requirement to lay before Parliament is merely directory. He cites *R v Daniels & Anor* 1936 CPD 331 at 334-36; *Metal & Allied Workers Union & Anor v State President & Ors* 1986 (4) SA 358 (D) at 361-364 and *Bloem & Anor v State President & Ors* 1986 (4) SA 1064 (O) at 1080-81 and 1085-91. He points out that in *R v Daniels supra* reliance was placed on the law being rendered uncertain and that the statute itself had no provision which rendered the regulations invalid for failure to table. Further the requirement to table was couched in positive language, without any sanctions added to it. In that case *Sutter v Scheepers* 1932 AD 165 was applied. As for *MAWU's* case, the court held that the statute itself did not contain anything to suggest that the consequence of non-tabling was an automatic nullity. DIDCOTT J considered the question of remedies and concluded that these did not appear particularly effective. In *Bloem's* case, the court concluded that mandamus and internal parliamentary procedures were effective remedies and therefore the Legislature did not intend any invalidation or lapsing for non-compliance. There it also applied the test laid down in *Sutter v Scheepers supra*.

Mr *Patel* argues that if one follows the South African authorities it must be concluded that -

(i) the sole purpose of tabling is to inform Parliament

(ii) the power to enforce tabling rests exclusively in Parliament

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(iii) the courts cannot question the propriety or regularity of Parliament's internal procedure concerning the tabling procedure and so cannot effectively adjudge the validity of the regulations for non-compliance

(iv) if the regulations were to be invalidated, the law would be rendered uncertain, as the public at large cannot ascertain whether, and if so, when the regulations have been tabled

(v) s 4 of the Act is couched in positive form, with no sanction for non-compliance added and nothing in the Act states that the regulations shall lapse if not tabled, which makes the requirement merely directory and not imperative.

Mr *Wernberg*, in the accuseds' heads of argument, submits that the Presidential Powers (Temporary Measures) Act 1986 is unconstitutional and objectionable on a number of grounds, since the Constitution is the supreme law and any other law inconsistent with it shall be void. The grounds are, firstly, that it amounts to a delegation of lawmaking power, which is contrary to the provisions of s 51 of the Constitution and, secondly, that it amounts to a serious infringement of the separation of powers. He accepts that this does not preclude the creation of subsidiary legislation under Acts of Parliament, but such subsidiary legislation can only be validly created if it is on matters subordinate or ancillary to matters referred to in the parent Act. He argues that the Presidential Powers (Temporary Measures) Act 1986 does not restrict lawmaking to matters incidental, but is so widely framed as to in effect, make the President a new legislative body. He submits that delegation is only permissible where the parent Act provides adequate policy and restricts or confines lawmaking within a specified framework. It is on that basis that in the USA delegation has been justified: *Panama Refining Co v Ryan* (1934) 293 US 388 at 421. The policy approach has also been adopted by India: *Municipal Corporation of Delhi v Birla Cotton & Weaving Mills Ltd* (1968) 3 SCR 251 at 268-269. He submits that, in the event that this court should hold that the Act is valid, the failure to table the regulations is fatal to their continued existence. He states that in *MAWU's* case, DIDCOTT J's reasoning in finding that non-compliance was not fatal, essentially because Members of Parliament could waive their right to see the regulation, was open to question. He argues that Members of Parliament should at the very least be given an opportunity of deciding whether they wish to avail themselves of such a right. He points out that in *Bloem's* case M T STEYN J held that, since a remedy of mandamus is available, the Legislature could not have intended invalidation due to non compliance. He points out that DIDCOTT J found such a remedy dubious in the extreme. The other basis for his finding, relying on *R v Daniels supra*, was that invalidity would leave the law in a state of flux.

ADAMS J

Mr *Wernberg* submits that the position is different in the case before this court because of the

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wording of the Act concerned. As regards couching in negative and positive forms, he argues that this rule of construction is not absolute and would depend upon the circumstances of the case. He maintains that tabling is so fundamental in the present context that in our Act it is peremptory and not merely directory.

In his further submissions Mr *Patel* argues that s 51 of the Constitution is merely procedural. It relates to the mode of exercising such power and does not define or impinge upon the nature and scope of that power. He submits that s 50 of the Constitution provides the substantive lawmaking power of Parliament, which is for the peace, order and good government of Zimbabwe. In determining the scope and purport of s 50, its precursors and the forms of legislation thereunder have to be considered. Of this the framers of our Constitution must be taken to have been fully aware where, it is clear, such legislation conferred extensive subordinate lawmaking powers. He maintains that it follows that Parliament's power of delegation is by necessary intendment recognised and reaffirmed in s 50. Mr *Patel* points out that it is true that the Constitution, for instance, in ss 102 and 103, does give exclusive legislative power to Parliament that cannot be delegated, but there are also other provisions, like ss 75, 96 and 100, where the Constitution confers lawmaking powers directly upon authorities (like various Commissions) other than Parliament. This form of legislative power, although not plenary, is an original and not a delegated authority: *Johannesburg Consolidated Investment Co Ltd v Marshalls Township Syndicate Ltd* 1917 AD 662 at 666. He argues that as s 109(2) of the Constitution enables an Act of Parliament to make provision for the powers and functions of the various Commissions it would be absurd to hold that an Act of Parliament cannot delegate subsidiary legislative power to those Commissions which already enjoyed lawmaking capacity that is actually conferred by the Constitution. He also refers to the Zimbabwe Constitution (Transistional Supplementary and Consequential Provisions) Order 1980 (SI 1980/35 of the United Kingdom) which, although designed primarily to provide for orderly transition to independence, is in certain respects of continuing significance in the interpretation and application of the Constitution. He states that s 4(8) of that Order preserves the pre-existing powers of any person or authority to make provision for any matter, including the amendment or repeal of existing law, while s 4(1) and (2) of the Order continues in force existing laws as if they had been made in pursuance of the Constitution by Parliament. He argues that if an Act of Parliament can be amended by a subordinate authority, it cannot be denied that an Act of Parliament may devolve lawmaking capacity to such a subordinate authority.

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He submits the true question is not whether Parliament may delegate legislative powers - that capacity being inherent in its plenery legislative authority - but the extent to which it may do so without abdicating its sovereign authority. He concedes that the Act in question does confer extensive and wide-ranging powers of subordinate legislation to the President, but these are contingent upon the existence of a clearly defined set of circumstances. The policy of Parliament has been spelt out and may only be carried out within a specified framework. He accepts that regulations under the Act may modify existing laws, but this is not beyond the authority of Parliament to delegate: *van Heerden NO & Ors v Queen's Hotel (Pvt) Ltd & Ors*

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1972 (2) RLR 472 (A) at 496. He mentions that a factor of considerable importance is the purely temporary nature and duration of such regulations that are made. These are intended to deal with an urgent situation, pending the enactment of an appropriate Act by Parliament itself. Further regulations are subject to the Constitution. Further, he says, delegated power cannot be exercised for making provision for any other matter or thing which the Constitution requires to be provided for by, rather than in terms of, an Act. Nor can the regulations modify the Constitution. He submits that regulations can be challenged as being *ultra vires* the Act or as being void for inconsistency with the Constitution. But, in construing a statute, the presumption of constitutionality applies. Where necessary a statute should be narrowly construed so as to sustain its constitutionality.

I am not persuaded by Mr *Patel's* argument that the power to enforce tabling rests exclusively in Parliament and that this court cannot question the regularity or propriety of Parliament's internal procedure concerning tabling and so cannot effectively adjudge the validity of the regulations for non-compliance. As so clearly enunciated by GAJENDRAGADKAR CJ in *Special Reference No. 1 of 1964* [1965] 1 SCR 413 at 445 that:

> ". . . it is necessary to remember that though our Legislatures have plenary powers, they function within the limits prescribed by the material and relevant provisions of the Constitution."

The foregoing was cited and approved in *Smith v Mutasa NO & Anor* 1989 (3) ZLR 183 (S) at 192 by our Supreme Court, which held that where there is a conflict between the Constitution and the privileges of Parliament the conflict can be resolved by the courts.

Mr *Wernberg* concedes that Parliament is allowed to some extent to delegate legislative authority. It should be mentioned that the Constitution of Zimbabwe

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Amendment (No. 12) Act 1993 itself provides, in an amendment to s 32 of the Constitution (which section vests legislative authority in Zimbabwe in the Legislature, consisting of the President and Parliament) that "this provision shall not be construed as preventing the Legislature from conferring legislative functions on any person or authority." Mr *Patel's* submission, which has not been challenged, is that Parliament's capacity to delegate power is clearly inherent in its plenary authority and that the important question is not about delegation but the extent to which Parliament may do so without abdicating its fundamental authority in that field. I agree with him that the provisions of the Presidential Powers (Temporary Measures) Act 1986, though extensive and wide ranging, are contingent upon the existence of defined circumstances and, it should be added are made subject to the control of Parliament itself by the tabling procedure. It follows that, in my view, Parliament has not by the enactment of the Act abdicated its fundamental legislative authority. In *Gumbo v Norton Selous Rural Council* 1992 (2) ZLR 403 (S) McNALLY JA stated that it is not the regulations promulgated which override the provisions of an Act; it is the provision of the statute providing for delegation that does so. Further, I am not persuaded by the argument of Mr *Wernberg* based on the separation of powers, since the Constitution is the supreme law against which the question of any encroachment has to be determined.

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In *MAWU's* case, when dealing with the consequence of the failure to comply with the tabling procedure, DIDCOTT J narrowed the question to whether the "consequence is an automatic invalidity of the regulations, not an invalidity restrospective to the day they were made, but an invalidity arising when the 14 days expired" without tabling. He found that the Act was silent on the answer to that question. He considered Parliament's powers of internal discipline, which might provide a remedy to those who wanted an opportunity for Parliament to consider the annulment procedure, and concluded that this remedy did not appear to be particularly effective and speedy. He looked at mandamus as a remedy and found that this was not enormously attractive when looked at as an effective alternative. He pondered whether a lack of any really satisfactory remedy unquestionably strengthened the argument for invalidity or lapsing. He found that one could not get a mandamus on a Member of Parliament. Further, as he says, if all Members of Parliament were free to decline to move an annulling resolution "they must surely be free to say that they do not wish to have the opportunity of doing so"; and such Members of Parliament may be aware of the regulations, having read the Government *Gazette*. He concluded that if the Members of Parliament can waive their right then there were extraordinary difficulties about automatic

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lapsing. He found that the whole purpose and the only purpose of the tabling was to inform Members of Parliament and, with some hesitation, that it was "conceived for the benefit of, and enforceable by, them only". He held that, bearing "in mind that Parliament had applied its mind to the very question of validity and had provided a machinery for achieving it" without at the same time saying anything that would suggest automatic nullity for non-compliance this meant there was no automatic invalidity.

On the other hand, in *Bloem's* case M T STEYN J felt that Parliament needed to be kept informed by the tabling procedure so as to enable it to exercise some measure of control. The way it was done was a domestic procedure of Parliament itself. He held that a court had no jurisdiction, even where Parliament, in dealing with its own internal affairs, violated statutory provisions. But he found that "the effective remedies of either a mandamus in a court of law or a Parliamentary resolution" which could compel tabling was available and therefore he was of the opinion that the Legislature did not intend any invalidation or lapsing for non-compliance. He also considered whether tabling is imperative or merely directory. Applying the test in *Sutter v Scheepers supra*, as considered in *R v Daniels supra* he found that the provisons in the statute in question were couched in positive form with no sanction added for non-compliance and with no statement that the regulations would lapse and be of no further force or effect. He was therefore satisfied that they were "merely directory, aimed at expediting" the laying of the regulations before Parliament "but not intended to annul or invalidate them for non-compliance". In *R v Daniels supra*, uncertainty in the state of the law was said to arise since very few people would know if it was or was not tabled and when. However, this would still be the position where the statute concerned expressly provided that there would be automatic invalidity if it was not tabled within the period stipulated. Also, it is not correct to say that legislation was being invalidated in a haphazard manner since Parliamentary sessions are held regularly, with *Hansard* available daily, together with extensive publicity and media coverage of

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such sessions. It is not as if one would not be able to ascertain whether and when tabling had or had not been done within the stipulated time period.

It would be appropriate for us to show what WESSELS JA in fact said in *Sutter* v *Scheepers supra*. At 173-174 he observed:

> "Now it is admittedly a difficult matter to lay down any conclusive test as to when a provision is directory and when it is peremptory. A long series of cases both here and in England have evolved certain guiding principles.

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> Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive, but as useful guides. The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction: *Standard Bank Ltd v van Rhyn* (1925 AD 266).
>
> (1) If a provision is couched in a negative form it is to be regarded as a peremptory rather than as a directory mandate. To say that no power of attorney shall be accepted by the Deeds Office unless it complies with certain conditions rather discloses an intention to make the conditions peremptory than directory: though even such language is not conclusive.
>
> (2) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory. . .
>
> (3) If, when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.
>
> (4) The history of the legislation will also afford a clue in some cases."

Similarly in *Leibbrandt v South African Railways* 1941 AD 9 at 12-13 DE WET CJ said:

> "The cases on the subject show that it is impossible to lay down any conclusive test as to when a legislative provision is directory and when it is peremptory. In the case of *Liverpool Bank v Turner* 30 LJ Ch 379, LORD CAMPBELL summed up his conclusion as follows:
>
> > 'No universal rule can be laid down as to whether mandatory enactments shall be considered 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 Legislature by attending to the whole scope of the statute to be construed.'
>
> In the case of *Howard v Bodington* 2 PD 203, LORD PENZANCE, after stating that he had considered the principal cases on the subject and as a result agreed with the conclusion expressed by LORD CAMPBELL, went on to say:

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> > 'I believe 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 that has been disregarded and the relation of that provision to the general object intended to be secured by the Act; and upon review of the case in these aspects decide whether the matter is what is called imperative or only directory.'"

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Further, in *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A) VAN DEN HEEVER JA at 682-683 pointed out:

> "In *Sutter v Scheepers* 1932 AD 165 at p 173, WESSELS JA stated certain rules as guidance in determining whether a statute is peremptory or directory but, as he himself observed, his rules were not intended to be an exhaustive list or a comprehensive guide. The cardinal rule is that stated in *Standard Bank v Estate van Rhyn* 1925 AD 266 at p 274: 'After all what we have to get at is the intention of the Legislature' or as VISCOUNT CAVE LC observed in *Salford Guardians v Dewhurst* [1926] AC 619 at p 626:
>
> > 'I base my decision upon the whole scope and purpose of the statute, and upon the language of the sections to which I have specifically referred.'
>
> . . .
>
> In the first place the sub-rule with which we are concerned is couched in peremptory terms: the messenger 'shall cause the sale to be advertised. . .' The Afrikaans has the categorical imperative 'moet'. If a statutory command is couched in such peremptory terms it is a strong indication, in the absence of considerations pointing to another conclusion, that issues of the command intended disobedience to be visited with nullity.
>
> . . . As is pointed out in Maxwell *Interpretation of Statutes* 7 ed p 316:
>
> > 'Where powers are . . . granted with a direction that certain regulations or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a vigorous observance of them as essential to the acquisition of the...authority conferred, and it is therefore probable that such was the intention of the legislature.'"

Both *MAWU's* and *Bloem's* cases can be distinguished from this case. The South African Public Safety Act intially provided in s 6 that if the regulations are not approved by Parliament such regulations shall cease to have effect. This was amended in 1986 by an amendment which said that the regulations shall be tabled within the period specified and that Parliament may annul

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them. This 1986 amendment could indicate that the legislature did not intend automatic invalidity for the regulations not being tabled.

It is true that in *Starey v Graham supra* CHANNELL J did indicate that on his part he doubted whether such a provision was more than directory. But in *R v Sheer Metalcraft Ltd & Anor* [1954] 1 All ER 542 (Surrey Assizes) at 545 STREATFIELD J held that after a statutory instrument had been made by the Minister and laid before Parliament, it became a valid statutory instrument within the Act.

In *R v Secretary of State for Social Services*, ex p *Association of Metropolitan Authorities* [1986] 1 All ER 164 (QB) at 165 in dealing with a section in the Act before him which said that when making regulations the Minister "shall consult with organisations appearing to him to be representative of authorities concerned", WEBSTER J looked at the whole scope and purpose of the Act and came to the conclusion that the obligation placed on the Minister to consult was mandatory and not directory.

It should be noted that the above cases and subsequent cases and subsequent cases that will be mentioned by me are couched in positive terms without any sanctions added but which have

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been treated as mandatory and not as directory provisions.

In *Arenstein v Secretary for Justice* 1970 (4) SA 273 (T) a provision in the Act which stated that "the court . . . shall, in an application . . . order that the name of any person be struck off . . ." was held, despite arguments that there was the use of positive language in the section with no sanction added, by the court as imposing an obligation on it to make the order concerned.

In *Justus v Stutterheim Municipality* 1962 (4) SA 499 (E), WYNNE J, when considering the provision that the "town clerk shall give notice in writing to every councillor", held that the section used the word "shall" which was "manifestly peremptory in its terms".

In *Nzimande v Durban County Rural Licencing Board & Anor* 1969 (3) SA 35 (D), in dealing with the requirement in regulations that "notice shall occupy a space . . . shall be in bold and legible Roman characters . . . and shall be so conspicuously placed as to be clearly visible", MILLER J held that there did not appear to him to be any justification for regarding that a "notice shall . . ." as anything other than mandatory in s 4(2).

Further, once the regulations have been tabled, s 4(2) in specific terms

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provides that if Parliament resolves that the regulations be amended or revoked the President shall forthwith amend or revoke the regulations. This is couched in positive terms, without any sanctions added to it. Surely there is no justification for regarding "shall" as anything other than mandatory under s 4(2).

I would now like to refer to the dissenting judgment of SMITH J He indicates that if he were to find the August 1991 Regulations invalid for non-tabling, s 6 would not be applicable and therefore the President could make substantially identical regulations (which he says was done with the November 1991 Regulations) and that such regulations could have effect for 6 months from date of promulgation. Therefore, Parliament's intention that they have effect for 6 months could be easily circumvented. Am I to assume that SMITH J is of the view, although it is couched in positive language with no sanctions added to it, that s 6(1) is peremptory? With due respect to him, the only way the November 1991 Regulations can be treated would be to hold that they have impliedly repealed all the provisions of the August 1991 Regulations which were re-enacted in the November 1991 Regulations. This means that s 6(2) would apply. This lays down that where regulations are repealed and re-enacted in substantially identical terms, the second- mentioned re-enacted regulations shall be deemed to have been made on the same date as the first-mentioned repealed regulations. Therefore, it seems to me that SMITH J is incorrect when he states that, by re-enacting the November 1991 Regulations, Parliament's intention that regulations shall not have effect for more than 6 months can be easily circumvented. On the contrary, in my view, the effect of s 6(2) on the November 1991 Regulations is to curtail the time to less than 6 months. Further, s 4(2) allows regulations tabled to be made subject to Parliamentary resolution that could amend or revoke them and the President has to act accordingly. Section 4(3) lays down that once the President has amended or revoked such tabled regulations, he shall not, within a period of 6 months thereafter, make

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any substantially identical regulations.

In light of the foregoing, if a situation were to arise where a court has held that regulations made under s 2 were subsequently invalid for non-tabling and this invalidity was declared soon after the eighth day on which Parliament sits after the commencement of the regulations and if substantially identical regulations were to be re-enacted by the President, then in my view such re-enacted regulations would be deemed to have been made on the same date as the first-mentioned regulations.

Also, SMITH J states that, if s 4 tabling is mandatory, it seems to him that

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failure to do so means that the regulations become null and void. He therefore fails to see how it can be held that they are valid until the eighth sitting day of Parliament and then expire. What SMITH J appears not to have considered is that Parliament, again using positive language without sanctions added to it, has in express terms provided in the Interpretation Act [*Chapter 1*] that every statutory instrument shall come into operation on the date of its publication in the Government *Gazette* unless some other date is fixed in the statutory instrument. It is Parliament that has enacted the date of the operation of the August 1991 Regulations. I have not, in this judgment, held that tabling is essential to the validity of the August 1991 Regulations *ab initio*. To do so would be contrary to the express language of the Interpretation Act. It is my view that what is required in terms of s 4(1), during at least 8 days of Parliamentary session, is the subsequent tabling of the regulations after they come into operation. Failure to satisfy such a tabling affects the continued validity of the August 1991 Regulations. In other words, tabling during at least 8 days of Parliamentary session of the regulations after their promulgation is essential for their continued validity. On the eighth day at midnight they lapse. Such an interpretation of the Act accords with the intention of Parliament. In my view, contrary to that of SMITH J, s 4 does impose a duty for the regulations made to be tabled during the requisite Parliamentary session. It is true that the Act does not state that the regulations tabled must be approved or be ratified. However, the Act does give Parliament the power to amend or revoke regulations that are tabled. This cannot be said to be insignificant. The failure to provide in the Act that Parliament must meet within a specified period does not in itself mean that the requirement for tabling during the requisite Parliamentary session was not imperative for the continued validity of such regulations. I fail to see the importance of Parliament not sitting for 6 months or that there are not 8 sittings days in the period when Parliament is in session. The Act, in express language, has selected when tabling is to be done and the legislators in their wisdom chose the eighth day on which Parliament next sits after the regulations are made. It must be accepted that the Act was only concerned when Parliament was only in session for at least 8 days. Further, what must not be forgotten is that the purpose of the tabling procedure during at least 8 days of parliamentary session is to allow Parliament the opportunity to amend or revoke regulations that could be very wide and could prevail over any other law to the contrary. To that extent, parliamentary scrutiny of delegated legislation has to be respected and the tabling procedure selected can be said to provide for it.

Looking at the whole scope and purpose of the Presidential Powers (Temporary Measures) Act

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1986 and upon the specific language of s 4, it is undoubtedly

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couched in the categorical imperative: "Copies of all regulations shall be laid". This, as mentioned by VAN DEN HEERVER JA, "is a strong indication, in the absence of considerations pointing to another conclusion", that the legislature intended non-compliance to be visited with nullity. In arriving at his decision MT STEYN J was obviously influenced by his finding that there were effective remedies at hand for Parliament, since the period for tabling was intended at expediting this and not for purposes of invalidity, along with the language being couched in positive form without any sanctions added. As the test laid down by WESSELS JA was not an exhaustive list or a comprehensive guide, both DIDCOTT and MT STEYN JJ should have directed their attention to an option which was still available to the Government of making new regulations of the same kind, since compliance with the imperative terms of the statute would not have been unjust. In my view, there were no valid considerations (apart from the 1986 amendment argument) before them pointing to another conclusion, just as there are none in this case which would prevent the regulations from being visited with invalidity. Also, the enactment of the November 1991 Regulations is of some significance. Surely, if it was unnecessary for the August 1991 Regulations to be tabled, why were the November 1991 Regulations promulgated?

Accordingly, I hold that Statutory Instrument 226A of 1991 came into effect upon its publication in the Government *Gazette* on 19 August 1991 and ceased to have full force and effect upon failure to lay it before Parliament by 3 September 1991. Statutory Instrument 330A of 1991 came into effect on 7 November 1991 and continued to be valid from that date for the period specified in its parent Act, which is 6 months from 19 August 1991. It follows that the conviction and sentence of Rufaro Buses is confirmed and that of Enos Gatsi is set aside.

Smith J: I have read the judgment of ADAM J and respectfully differ from the conclusion he reached. The facts are set out in his judgment. The question for determination by this court is whether the Presidential Powers (Temporary Measures) (Control of Omnibuses and Heavy Vehicles) Regulations, 1991 - "the August 1991 Regulations"- were valid and in force on 3 September 1991 and on 3 October 1991. Mr *Wernberg* argued that the said regulations are *ultra vires* on the grounds that Parliament could not delegate its authority to make laws to the President. Section 51 of the Constitution requires that the power to make laws must be exercised by Bills passed by Parliament and assented to by the President. Therefore Parliament cannot exercise the power to make laws by empowering the President to make the laws. Alternatively, he argued that the August 1991 Regulations ceased to be of force and effect

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when they were not tabled in accordance with the requirements of s 4 of the Presidential (Temporary Measures) Act 1 of 186 (hereinafter referred to as "the Act").

With regard to the question of *ultra vires*, Mr *Wernberg* has based his argument mainly on cases

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from the United States, Ireland and Nigeria. In my view, because a federal system of government exists in the United States of America and in Nigeria and also because of the importance given in the United States of America to the doctrine of the "Separation of Powers", cases in those countries dealing with aspects of the legislative competence of Parliament or its equivalent are of little value in determining the question before this court. In this country, as in the United Kingdom and South Africa, the courts have consistently held that the Legislature is the sovereign law-making body. In terms of s 50 of the Constitution, Parliament may, subject to the provisions of the Constitution, make laws for the peace, order and good government of Zimbabwe. Section 51 provides that the power of Parliament shall be exercised by Bills passed by Parliament and assented to by the President. That section, in my opinion, merely sets out the manner in which Parliament exercises its power to make laws and does not curtail the powers conferred by s 50 of the Constitution. In view of the detailed provisions set out in Part 5 of Chapter V of the Constitution relating to the procedure for passing Bills, especially those in force prior to the abolition of the Senate, the provisions of s 51 are essential for the introduction to the procedure. In my view, the maxim *delegatus non potest delegare* has no application in relation to the power of Parliament to make laws. The Constitution confers on Parliament power to make such laws as it considers to be necessary for the peace, order and good government of Zimbabwe. That is a very wide, all-embracing power. The only limitation is that the power must be exercised subject to the provisions of the Constitution. I do not find anything in the Constitution which would have the effect of incorporating the maxim *delegatus non potest delegare* to restrict the powers of Parliament. That maxim was discussed in *Aluchem (Pty) Ltd & Anor v Minister of Mineral & Energy Affairs* 1985 (3) SA 626 (T). At p 631E-G McCREATH J said:

> "I turn then to the principles of the rule *delegatus delegare non potest*. These principles are well-established. In *Shidiack v Union Government* 1912 AD 642 at 648 INNES ACJ stated:
>
> > '...where the Legislature places upon any official the responsibility of exercising a discretion which the nature of the subject-matter and the language of the section show can only be properly exercised in a judicial spirit, then that responsibility cannot be vicariously discharged.'

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> And in *Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 (A) at 639 BOTHA JA states the following:
>
> > 'The maxim *delegatus delegare non potest* is based upon the assumption that, where the Legislature has delegated powers and functions to the subordinate authority, it intended that authority itself to exercise those powers and to perform those functions and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate. It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers.'"

It is clear that the maxim applies in relation to powers and functions delegated by the Legislature to a particular official or subordinate authority. In *Minister of Trade & Industry & Anor v Nieuwoudt & Ors* 1985 (2) SA 1 (C) the scope and application of the maxim was discussed. It is clear from the judgment of BAKER J that the maxim applies where powers have been delegated by the Legislature. At p 15 the learned judge quotes from Professor SA de Smith's

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Judicial Review of Administrative Action 4 ed and cites the following extract from p 308 of that work:

> "The maxim *delegatus non potest delegare* does not enunciate a rule that knows no exception; it is a rule of construction to the effect that 'a discretion conferred by statute is *prima facie* intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this intention may be negatived by any contrary indications found in the language, scope or object of the statute'. But the courts have sometimes assumed that the maxim does lay down a rule of rigid application, so that devolution of power cannot (in the absence of express statutory authority) be held to be valid unless it is held to fall short of delegation. In this way an unreasonably restricted meaning has often been given to the concept of delegation."

In my view Parliament is an "original" legislator and not a subordinate body exercising "delegated" powers. The Constitution of Zimbabwe has not delegated authority to Parliament to make laws. The distinction between an "original" legislator and a "delegated" legislator is explained in Baxter's *Administrative Law* at p 491 as follows:

> "The description of provincial councils as 'original' legislators is a

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> hangover from the days before Union. Originally the adjective was adopted by British judges in order to show respect for colonial legislatures which, though subordinate to the British Parliament, had plenary powers similar to those of the Mother Parliament herself within their respective colonies. The epithet was applied to the parliaments of the four colonies which joined at Union. After Union the ghosts of the old parliaments lived on in the form of the newly created provincial councils whose existence and powers were prescribed by the South Africa Act, itself enacted by the British Parliament. Although South Africa had become a unitary state and provincial councils were subordinate to the new South African Parliament, the courts continued to label the councils as 'original' legislatures. One effect of this was (and still is) that the merits, reasonableness and certainty of the ordinances would not be reviewed. The courts' reasons for refusing to do so were threefold. First, the provincial councils had been created by the British Act and they derived their powers from the same sources as the South African Parliament. Secondly, the powers conferred on the councils were 'plenary' or very wide. And thirdly, the councils were composed of elected members and they functioned as 'deliberative' bodies. For these reasons it has been assumed that provincial councils are somehow inherently different from other, 'delegated', legislators."

In *Johannesburg Consolidated Investment v Marshalls Township Syndicate Ltd* 1917 AD 662 at 666 INNES CJ said:

> "The legislative authority conferred by the South African Act upon Provincial Councils is an original and not a delegated authority, so that within the limits imposed they may make laws as freely and effectively as the Parliament of the Union. And jurisdiction given in respect of a general subject matter must be taken to include all powers reasonably required for the purpose of dealing fully with the subject assigned in accordance with the conditions and requirements prevailing at the time."

In the case of In re *The Initiative and Referendum Act* [1919] AC 935 the Privy Council held that an Act of the Legislative Assembly of Manitoba was invalid, not on the basis of *delegatus non potest delegare* but because it would abrogate any power which the Crown possessed through the Lieutenant-Governor. At p 945 VISCOUNT HALDANE said:

> "Section 92 of the Act of 1967 entrusts the legislative power in a Province to its Legislature, and to that Legislature only. No doubt a body, with a

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> powers of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in *Hodge v The Queen*, the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence."

Thus, in my opinion, Parliament cannot, without amending the Constitution, create a new legislative body to take over its legislative functions because that would be inconsistent with the Constitution. It may, however, delegate its legislative functions as it thinks fit.

For the reasons set out above I consider that the maxim has no application in relation to the power or authority of Parliament to make laws for the peace, order and good government of Zimbabwe. Therefore the Act is not *ultra vires*.

The next issue is the failure to lay the August 1991 Regulations before Parliament as required by s 4(1) of the Act. The August 1991 Regulations were promulgated on 19 August. They came into operation on the date of promulgation: s 18 of the Interpretation Act [*Chapter 1*]. There can be no argument about that. It is common cause that Parliament sat on 20, 21, 22, 23, 27, 28 and 29 September and 3 September and that the August 1991 Regulations were not tabled on any of those days. Section 4(1) of the Act requires that copies of all regulations made in terms of s 2 shall be laid before Parliament no later than the eighth day on which Parliament next sits after the regulations were made. In order to determine the effect of the failure to comply with the requirements of s 4(1) I consider that the other provisions of the Act must be analysed in order to try to ascertain the intention of the Legislature.

Where a statute requires that something be done without stating the consequence of non-compliance with the provision, the normal course followed in order to determine the consequence is to ascertain whether the provision concerned is peremptory or merely directory. If it is peremptory, then the act is a nullity; if it is directory, then the act has legal effect despite the non-observance of the provisions of the statute. In *Lion Match Co v Wessels* 1946 OPD 376 VAN DEN HEEVER J (as he then was) pointed out that the expressions "peremptory" and "directory", as applied to statutory

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provisions, are unfortunate ones, as the court is concerned not with the quality of the command but with unexpressed consequences following from it, as presumed to have been intended by the Legislature. However, in *Nkisimane & Ors v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H TROLLIP JA said:

> "Preliminarily, I should say that statutory requirements are often categorized as 'peremptory' or 'directory'. They are well-known, concise, and convenient labels to use for the purpose of differentiating between the two categories."

Whatever terminology is used, however, and whatever label is given to the test, it does not

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affect the nature of the inquiry which the court is called on to make in order to attempt to ascertain the intention of the Legislature.

In *Leibbrandt v South African Railways* 1941 AD 9 the learned CHIEF JUSTICE referred to the necessity to consider the whole scope of the statute. At p 12, DE WET CJ said:

> "The cases on the subject show that it is impossible to lay down any conclusive test as to when a legislative provision is directory and when it is peremptory. In the case of *Liverpool Bank v Turner* 30 LJ Ch 379, LORD CAMPBELL summed up his conclusion as follows:
>
> > 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for obedience. 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.'"

Then at p 13 he continued:

> "Voet (3.1.16) discusses the subject and, after stating that, as there are laws forbidding that certain things shall be done and yet not nullifying what is done contrary thereto nor fixing a penalty, the maxim 'that many things are prohibited in law which yet hold good' came into vogue, gives various instances and states:
>
> > 'The reason of all this I take to be that in these and the like cases greater inconveniences and greater impropriety would result from the rescission of what was done than would follow the act itself which has been done against the law.'"

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In *Metal & Allied Workers Union v State President* 1986 (4) SA 358 (A) DIDCOTT J held that regulations which were required to be tabled but which had not been tabled were valid, despite the failure to comply with the statutory requirement. He found that the purpose of tabling was to inform Members of Parliament and therefore conceived for the benefit of, and enforceable by, no one but the Members of Parliament. In *Bloem & Anor v State President of the Republic of South Africa & Ors* 1986 (4) SA 1064 (O), where the court was faced with the same question in relation to emergency regulations which had not been tabled as required by statute, the court also found that the statutory provision was not peremptory but merely directory, aimed at expediting their laying before Parliament but not intended to annul or invalidate them for non-compliance.

When INNES CJ formulated the "golden rule" of interpretation in *R v Venter* 1907 TS 913, he drew attention to the necessity for taking the language of the instrument, or of the relevant portion of the instrument, as a whole. This acknowledged the rule that in the interpretation of a particular provision of a statute, the statute as a whole must be looked at. It is beyond dispute that the court is entitled, and indeed bound, when construing the terms or effect of any provisions of a statute, to consider any other parts of the statute which throw light on the intention of the Legislature. A particular provision of the statute must not be construed on its own, apart from the rest of the statute.

Section 2 of the Act sets out the circumstances in which the President can make regulations under the Act and provides that he may make such regulations as he considers will deal with the situation, subject to certain limitations. Section 3 provides that the President shall give

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notice of his intention to make regulations unless he considers it inexpedient to do so because of the urgency of the situation. However, subs (3) thereof provides that a failure to publish notice of such intention shall not invalidate regulations "subsequently" made. Section 4(1) provides that the regulations shall be laid before Parliament within eight sitting days. In terms of subs (2) thereof, if Parliament resolves that any regulations laid before it should be amended or revoked, the President shall forthwith amend or revoke the regulations. Where regulations have been so amended or revoked, subs (3) prohibits the President from making regulations substantially identical to the regulations before they were so amended or revoked. Section 6 of the Act deals with the expiry of the regulations. In terms of subs (1) thereof, unless earlier repealed, the regulations expire and cease to have effect six months after their date of commencement. Subsection (2) provides that where regulations are

deemed to have been made on the same date as the earlier. Then, in terms of subs (3), where regulations have expired after six months the President cannot make regulations which are substantially identical within six months of the expiry. The terms of this section are clearly designed to ensure that regulations made to deal with a particular situation cannot have force and effect, or be extended to have effect, for a period of more than six months. Section 7 of the Act provides that any law or order that has been suspended, amended or modified by regulations is revived with effect from the expiry or repeal of the regulations.

Since subs (3) of s 3 of the Act specifically provides that the failure to publish a notice of intention to make regulations shall not invalidate any such regulations, it could be argued that the absence of a similar provision in s 4 of the Act implies that the failure to table to the regulations would invalidate them. However, I consider that ss 6 and 7 of the Act afford a better indication as to the intention of the Legislature. Section 6 deals with the expiry of the regulations. Had it been intended that the regulations would expire if they were not tabled within the eight sitting days, then that would have been stated in s 6. If I were to hold that the August 1991 Regulations expired on 3 September 1991 because of the failure to table them, the provisions of s 6 would not be applicable and therefore the President could make regulations in substantially identical terms (which he did - the September 1991 Regulations) and such regulations could have effect for six months from the date of their promulgation, not from the date of promulgation of the August 1991 Regulations. Therefore, the intention of the Legislature that regulations shall not have effect for more than six months could easily be circumvented. Furthermore s 7 does not provide for the revival of orders and laws in cases other than the repeal or expiry of the regulations.

In *R v Daniels & Anor* 1936 CPD 331 the court had to determine whether regulations which had not been tabled in the Provincial Council within fourteen days after publication were valid or invalid. The facts in that case are similar to those in this case, in that the Administrator had made regulations and published them in the *Gazette* but they were not laid upon the table of the Provincial Council in accordance with the requirements of the ordinance in question. With reference to the regulations in question and the failure to table them. WATERMEYER J, at p 335, said:

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"If they were invalid for that reason the consequences would be remarkable. If regulations were made in a recess, for instance, they would come into force when they were published in the *Gazette* and then, on some

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uncertain future date, when he whose duty it was to place them on the table of the Provincial Council, failed to comply with that duty, from that uncertain future date they would cease to be the law. This would leave the law in a complete state of uncertainty because nobody would know on what date such regulation ceased to have validity. The laying of the regulations upon the table of the Provincial Council is not a public act like promulgation in the *Gazette* and probably very few people know if it is done or if it is not done or when it is done. To allow legislation to cease to be in force in that haphazard way is against the fundamental principles of legislation which are that laws must be certain and they must be properly promulgated. However, I do not think we are driven to give a decision which would lead to such an unsatisfactory result because in my opinion the direction that the regulations be laid on the table of the Provincial Council is directory and not imperative. The validity of the regulations does not depend upon their being laid upon the table of the Provincial Council. It will be noted there is no provision in the statute which says that the regulations are of no force unless laid upon the table of the Provincial Council and there is no penalty imposed or suggested in the Statute which is to follow in case the regulations are not laid upon the table of the Provincial Council. Besides that, it will be noticed that the direction to lay them upon the table of the Provincial Council is couched in positive language and not negative language and there is no sanction added to it."

After referring to the rules set out in *Sutter v Scheepers* 1932 AD 105, the learned judge continued at p 336:

"Now these rules afford very valuable guides to us in deciding whether a provision is directory or imperative and if we apply the second and third ones then we are led to the conclusion that this provision that the regulations should be laid upon the table of the Provincial Council is directory because, as I pointed out, the direction is couched in positive language and there is no sanction and further there is no explicit statement that the regulations are to be void if the provisions are not complied with."

If it were to be held that the requirement in s 4 of the Act for tabling regulations is mandatory, then it seems to me that failure to comply with the requirement must mean that the regulations become null and void. In *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A) at 683D VAN DEN HEEVER JA said:

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"If a statutory command is couched in such peremptory terms it is a strong indication, in the absence of considerations pointing to another conclusion, that the issuer of the command intended disobedience to be visited with nullity."

Likewise, in *Nkisimane's* case *supra* at 434B TROLLIP JA said:

"Thus, on the one hand, a statutory requirement construed as peremptory usually still needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity."

I fail to see how it can be held that the August 1991 Regulations are valid and effective until the eighth sitting day of Parliament and then expire or cease to have effect. Surely, if tabling within eight sitting days is essential to the continued validity of the regulations, then the failure to table means that the regulations become null and void. That means they have no force and effect

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retroactively to the date of promulgation. I can think of no principle that would justify holding the regulations valid and enforceable until the eighth sitting day and then visiting nullity upon them after the eighth sitting day. If there were such a principle, when would the regulations concerned become null and void? Would it be at midnight on the eighth sitting day or would it be when Parliament rose on the day? If the principle was based on the grounds that the regulations cease to be effective at the end of the period when the regulations could have been tabled in order to comply with the statutory requirement, then t must follow that the regulations become unenforceable when Parliament actually adjourns on the eighth sitting day. Such a result could not have been contemplated by the Legislature. There is, in my opinion, a further reason why such an argument cannot be sustained. If regulations are promulgated and Parliament does not meet during the six months after their promulgation or does not sit on eight days during that period, any subsequent failure to table the regulations would have no effect. Surely the validity of the regulations for the full six months could not be dependent on mere chance - whether or not there happens to be eight sitting days within that period.

It seems to me that if the Legislature intended the failure to table regulations to have the effect of nullifying them, it would have specifically so provided. The Act confers on the President power to make regulations when a situation has arisen which needs to be dealt with urgently in the interest of defence, public safety, etc and, because of the urgency, it is inexpedient to await the passage through Parliament of an Act dealing with the situation. Wide

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powers are conferred upon him in making such regulations. The regulations prevail over any other law to the contrary. Thus they can override, for a short period, Acts of Parliament. The Legislature has conferred these very wide powers on the President to deal with matters on an urgent basis in the national interest. I agree with the views expressed in *Bloem*'s case *supra* by STEYN J at p 1091B where he said:

> "If, in addition to all that, the countrywide serious consequences of the regulations lapsing due merely to a non-compliance with the provisions as to the time within which to table them is taken into consideration in conjunction with the aforementioned circumstances under which the state of emergency was declared and the emergency regulations promulgated the indications that the said provisions are directory only become greatly strengthened."

There are other factors which, to my mind, indicate that the provisions of s 4 are not "peremptory" and that the Legislature did not intend that failure to table any regulations would have the effect of annulling or invalidating the regulations. In providing for the tabling of the regulations, s 4 does not impose a duty on a Minister or other person to table the regulations. It merely provides that copies of the regulations shall be tabled. If it was considered that tabling was essential, surely a duty would have been imposed on a specific person. The section does not require that Parliament must approve, ratify or even give consideration to the regulations. There is no provision that Parliament must be summoned within a specified period to consider the regulations. It is not provided that the regulations must be tabled as soon as Parliament next meets. It could be that Parliament does not sit within the six months that the regulations have effect or that there are not eight sitting days in that period. There are the regulations would expire before being tabled. Furthermore, as stated by WATERMEYER J in *Daniel*'s case *supra*,

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the tabling of regulations in Parliament is not a public act like promulgating regulations in the *Gazette*. To hold that they lapse or became null and void on the failure to table them would lead to uncertainty in the law, not only amongst the public but even with those required to enforce the law.

For the reasons set out above, I consider that the failure to table the August 1991 Regulations did not invalidate them. Consequently the said regulations remained in full force and effect until they expired in accordance with the provisions of s 6 of the Act. Therefore I would confirm the convictions of, and the sentence imposed on, the accused, namely Rufaro Buses and Enos Gatsi.

Sandura JP: I agree with ADAM J

ZIMUNYA v ZIMBABWE NEWSPAPERS 1994 (1) ZLR 35 (HC)

Court **High Court, Harare**

Annotations Link to Case Annotations

Mubako J

Civil action

18 November 1993 & 12 January 1994

Flynote

Damages - damages under the actio injuriarum - how damages to be assessed for defamation of public official and causing him humiliation by publication of embarrassing photograph of him - criteria to be applied

Delict - defamation - by newspaper - defamatory allegation against public official contained in letter to editor - whether defences of justification and fair comment applied - whether subjective intention to defame is a requirement for liability

Delict - invasion of privacy - publication in newspaper of photograph which seemed to depict plaintiff urinating in a public place - photograph causing embarrassment and humiliation - whether actionable under actio injuriarum

Headnote

A newspaper published a letter to the editor in which certain allegations were made about the plaintiff. The newspaper also published a photograph of the plaintiff which gave the impression that the plaintiff was urinating in a public place. The plaintiff sued the newspaper for damages for defamation in respect of the contents of the letter and for *injuria* in respect of the humiliation and indignity he had suffered as a result of the publication of the photograph.

Held, that originally in Roman-Dutch law subjective *animus injuriandi* was an essential requirement for liability under the *actio injuriarum*. However the law had developed new concepts and had adapted to new situations in order to continue to serve its proper function of

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providing protection

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to the individual citizen. Although the court declined to rule finally on whether there is strict liability for the press for *injuria* in Zimbabwean law, it laid down that only liability of a level higher than subjective *animus injuriandi* can equitably protect plaintiffs from injurious publications by newspaper publishers in their rush to go to press and maximise their profits. There is a duty of care on the editors and publishers of the media to be acquainted with the contents of their publications and not to injure the good name, dignity and self esteem of Zimbabwean citizens. It is not enough for the defendants to say that they were mistaken in thinking that what they published was innocuous whereas, in fact, it was highly offensive. In certain circumstances a *bona fide* mistake may operate to negative the *animus injuriandi* but that is so only when the mistake is not attributable to the negligence or recklessness of the defendant.

Held, regarding the claim for defamation in respect of the letter:

(i) The published letter contained defamatory and false factual allegations and the defences of justification and fair comment did not avail in respect of these allegations.

(ii) The defendant ought to have known, and in all probability knew, that these statements were untrue.

(iii) Although public figures should not be overprotected or over-sensitive, nonetheless they must not be targets of ill-considered garbled reports which contain a mixture of truth and falsehood.

(iv) In deciding upon the appropriate level of damages relevant factors were the rank of the public figure concerned, the extent of publication, the seriousness of the defamatory statements and whether or not the newspaper had apologised for the defamatory statements

Held, regarding the claim for *injuria* in respect of the photograph:

(i) The published photograph created the impression that the plaintiff was urinating in a public place.

(ii) The publication of this photograph subjected the plaintiff to indignity and public ridicule and caused him humiliation and embarrassment.

(iii) The invasion of the plaintiff's privacy and the resultant indignity were matters which were actionable under the *actio injuriarum.*

(iv) It is immaterial whether the photograph had been deliberately tampered with to create this impression or the photograph simply created this impression because of the effects of light and shadow in the picture. The newspaper should have spotted the offensive nature of this picture and refrained from publishing it. The absence of any intention to

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injure the plaintiff was no excuse.

(v) The publication of this picture had done grave harm to the plaintiff's

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name and personal feeling and he was thus entitled to substantial damages.

Cases cited:

Tekere v Zimbabwe Newspapers 1986 (1) ZLR 275 (H)

Zvobgo v Kingstons 1986 (2) ZLR 310 (H)

Chinengundu v Modus Publications HH-135-92

Bikwa v Ndlovu HB-18-92

Tabanie v Chimanzi HB-75-90

Buthelezi v Poorter & Ors 1975 (4) SA 608 (W)

Mhlongo v Bailey 1958 (1) SA 370 (W)

Rhodesian P & P Co Ltd v Duggan 1974 (2) RLR 207 (A); 1975 (1) SA 590 (RA)

La Grange v Schoeman 1980 (1) SA 885 (E)

Reid-Daly v Hickman & Ors (2) 1980 ZLR 540 (A); 1981 (2) SA 315 (ZA)

Monckton v BSA Company 1920 AD 332

Maisel v Van Naeren 1960 (4) SA 836 (C)

Whittaker v Roos & Bateman 1912 AD 92

Thompson v Min of Police 1971 (1) SA 371 (E)

Ingram v Min of Justice 1962 (3) SA 225 (W)

Tromp v McDonald 1920 AD 1

Assd Newspapers of Ceylon Ltd v Gunasekere [1952] 53 New IR 483

SAUK v O'Malley 1977 (3) SA 394 (A)

Smith & Anor NO v Wonesayi 1972 (1) RLR 262 (A)

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Dunning v Thomson & Co Ltd 1905 TH 313

Carbonel v Robinson & Co 1965 (1) SA 134 (D)

Hassen v Post Newspapers Ltd 1965 (3) SA 562 (W)

J B Colegrave for the plaintiff

E Chatikobo for the defendant

Judgment

Mubako J: The plaintiff, who is the Chief Executive Officer of Norton-Selous Rural Council, brought two claims for damages against Zimbabwe Newspapers (1980) Ltd because of a picture and an article which were published respectively in the issues of 13 May 1992 and 19 May 1992. For the first claim (about the photograph) he demanded $30 000 as damages and for the second claim he asked for $15 000 (the plaintiff's declaration was amended upwards from the original $10 000).

On 13 May 1992 *The Herald* published a feature article entitled "Norton A

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Rising Star For Business Development". Next to the article was a photograph captioned "The Chief Executive of the Norton-Selous Rural Council, C de Ferris Zimunya". The photograph gave the impression that the plaintiff was in the act of urinating or otherwise indecently exposing himself outside Council offices. He claimed that he was humiliated and suffered loss of dignity and reputation - "*injuria*", for which he claimed damages.

The claim arising from the publication of the letter is a straightforward defamation case and for that reason it is expedient to examine this first. The letter, published in the "Letters to Editor" page of the said newspaper, was entitled "Distorted Facts". The letter sought to correct statements, figures and impressions given by Mr Zimunya in the featured article of 13 May. It goes on to state that the plaintiff had employed-

> "a large group of administrative personnel who now find themselves twisting their fingers on their desks for seven hours a day, selling at give-away [prices] the entire fleet bought by the previous administration. No wonder the council can now not even manage to collect refuse and is thinking of firing a contractor.
>
> These days it is not unusual to see council cars parked at lay-byes at midnight, obviously supplementing as bedrooms, and it should not be forgotten that the secretary himself takes his wife to Harare International Airport in the morning and picks her up in the evening daily."

The plaintiff contended that this passage in particular is false and defamatory of him in that it imputes, and was understood by persons who read the newspaper to impute, that the plaintiff was-

1. an incompetent administrator who employes too many staff with insufficient work and

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squanders council properties by selling its vehicles for prices below market value;

2. an immoral person or one who condones the use of council vehicles for immoral or unauthorised purposes;

3. a corrupt officer who abuses council vehicles by driving his wife daily to and from Harare International Airport.

It is clear that the words complained of referred to the plaintiff and that unless there was a valid defence they were defamatory of him. All the imputations complained of were in fact present, and ordinary right-thinking readers of the newspaper would understand them to lower the image or reputation of the plaintiff. Indeed even the defendant's plea admits that the "plaintiff may have

been damaged in his reputation", though it somehow denies that the damage is actionable.

In its defence the defendant averred that the statements were justified because they were true or substantially true. The legal position is that the defence of justification, if it is factually proved to be available, may be a complete shield against a claim for defamation. In the instant case it was contended that some vehicles were indeed sold below reserve price and that the plaintiff did drive his wife to Harare Airport in a council vehicle.

However, from the evidence adduced in court, I am satisfied that the council had a system of disposing of property in accordance with its resolutions and that vehicles were not generally sold below reserve price. In the few cases when vehicles were sold below reserve price the decision was made by the Treasurer who later sought ratification by the Finance Committee of the Council. I also accept Mr Zimunya's explanation that his wife drives to and from the airport in his personal car and that on the one day his car broke down she did ride in a council vehicle which was going to Harare in any case. I therefore find that the allegations made against Mr Zimunya in the passage quoted above are false in their entirety. The claim for the defence of justification is not sustainable. There was no evidence whatsoever that vehicles were used at midnight for immoral purposes.

The defendant also pleaded that the statements complained of were fair comment on a matter of public interest. The management of the affairs of Norton-Selous Rural Council is clearly a matter of public interest. The letter to the editor purports to be a comment and correction to the feature article which had been published six days earlier. The letter is basically a criticism of the plaintiff and his administration of the rural council and a vigorous rebuttal of the information and impressions given in the feature article. By the defence of fair comment the law seeks to protect a citizen's freedom to express genuine opinions or comment on public affairs balanced against the need to protect private reputations. The defence of fair comment moves through fairly restricted channels. The primary requirement is that what the defendant said must be opinion or comment and not simply a statement of new facts. Secondly, the facts commented on must be true or substantially true and of public concern. Thirdly, the comment must be "fair", in

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the sense that the defendant must have honestly held that view to be the correct one.

In the case at hand most of the letter has to be passed as fair comment in spite of the rather extravagant language and barbed remarks. However, the

statements quoted above hardly qualify as such. The statements complained of are no longer simply opinions but statement of new "facts" about the plaintiff which are untrue and which the defendant ought to have known, and in all probability knew, to be untrue. Those statements are neither "comment" nor "fair". That defence is also not available to the defendant as regards these particular statements.

In an action for defamation the plaintiff must show that the defendant published a wrongful attack on his reputation with the intention to injure him (*animo injuriandi*). The defamatory nature of the statements is measured against the understanding and standard of the average ordinary, normal, level-headed person - the reasonable man. Such a person will be neither hypercritical nor over-sensitive. I am satisfied that the reasonable Zimbabwean person who reads *The Herald* would conclude that the passages quoted above have the effect of lowering the plaintiff in the estimation of society generally or damaging him in his profession or official position. Furthermore, there being no valid defence, the statements are wrongful and unjustifiable in the eyes of the law. As for the element of *animus injuriandi*, there was no argument that it might be in issue. Suffice it to state that where the words are defamatory a presumption of *animus injuriandi* arises. In the case of defamation by the press or radio that presumption is well-nigh irrebuttable (see *infra*). In the case before me the presumption was not rebutted.

In the result I shall enter judgment for the plaintiff and proceed to assess the quantum of damages he is entitled to. On that there is no dearth of guiding authority in a case like this one.

The first point stressed in the claim for damages was that there was no correction, retraction or apology about the defamatory statement. Moreover, contrary to normal practice, the plaintiff was not asked for his comments before publication.

Secondly, the plaintiff is a public officer and as such had a lot of reputation to lose by such defamation. *Tekere v Zimbabwe Newspapers* 1986 (1) ZLR 275 (H); *Zvobgo v Kingstons* 1986 (2) ZLR 310 (H) and *Chinengundu v Modus Publications* HH-135-92 are similar cases in principle although they involved people of much higher rank in Government than the present plaintiff. In terms of rank, this case is more in line with the situations in *Bikwa v Ndlovu* HB-18-92 and *Tabanie v Chimanzi* HB-75-90 in which lower awards than in the first three cases were made.

Thirdly, the defamatory material was published in *The Herald* which has a

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large countrywide circulation, but it was pointed out also that it was placed in the letter section of the paper which has a comparatively smaller readership.

Fourthly, I shall make the award following the criteria which were laid down in *Buthelezi v Poorter & Ors* 1975 (4) SA 608 (W). The criteria to be regarded as guide-lines only are the gravity of the defamation, the extent of the publication, the position of the plaintiff in society and the conduct of the defendant.

Finally, I take on board the submission by Mr *Chatikobo* that even if the defendant is held liable the criticisms made in the letter are not wholly out of place. The plaintiff being a public figure should not be overprotected or over-sensitive. Nonetheless public figures must not be targets of ill-considered garbled reports which contain a mixture of truth and falsehood.

I note that the plaintiff has amended his claim for damages upwards from $10 000 to $15 000. This brings the claim closer to the awards in the *Zvobgo* and *Chinengundu* cases. I have however already stated that there are basic differences between these two cases and the present one in the ranks of the plaintiffs and I should add in the gravity of the defamatory attacks.

The plaintiff is awarded damages in the sum of $6 500 with costs.

The plaintiff's claim in respect of the photograph is based on an *actio injuriarum*. It is the plaintiff's case that by publishing the photograph which depicts him in the act of urinating or otherwise exposing himself the defendant inflicted an injury on the plaintiff, wrongfully impairing his person and dignity. He suffered humiliation, indignity and loss of reputation. In his evidence in court the plaintiff stated that he is a married man with a wife and teenage children; he is the Chief Executive of Norton-Selous and as such a celebrity in the district; that the photograph was widely seen in the area and commented upon in beerhalls and "pubs". He said he was once asked "Sir, what were you really trying to display about Norton-Selous?" In short the plaintiff believes that he became a laughing stock in the district.

The defendant newspaper admitted that they published the said photograph which was taken outside Norton-Selous Council offices, but they denied that it depicted the plaintiff in the alleged positions or that it was injurious to him. It was common cause that a reporter and photographer of the defendant newspaper interviewed the plaintiff in the Norton-Selous Council offices and then proceeded to take photographs of him outside, before they went together

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for lunch. When the photographs were taken the plaintiff neither urinated nor in any way exposed himself.

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The defendant maintained that whatever impressions were created, the published photograph was no more than an optical illusion and a trick of sunlight on the trousers of the plaintiff. One witness for the defendant went so far as to deny that any indecent impression was at all created by the published picture. However, the other witness for the defendant, the photographer who took the pictures, admitted that he could see the indecent picture as alleged. To everyone else in the court-room the indecency of the published photograph was what hit one in the face as one glances at it. I am satisfied that the ordinary reader of *The Herald* who saw that photograph would have formed the impression which the plaintiff complained of. Mr White's evidence that the picture is completely innocuous cannot be taken as truthful testimony. One does not have to be an expert in abstract art to appreciate that a man's genitalia was being exposed in that photograph. The only questions for argument were how the impression was created and what the legal implications might be.

It is contended that the impressions created by the photograph do not represent what happened. How then was such a devastating image created? One theory was that the image could have been created by a mischievous person in the studios of *The Herald* and passed by the proof readers. To be able to achieve this the negatives would have been tampered with and the court was told that this is a difficult process. It appears that the negatives were not in fact tampered with. The second explanation was that the shapes and forms were developed accidentally and spontaneously from the light and shadows that fell on the film at that time of the day; that the photograph found its way into print, and the newspaper was distributed without anybody spotting the offensive image. Whatever the truth of the matter may be, how did the page escape the scrutiny of all the proof readers and sub-editor at about six stages which it should have passed before appearing on the street? Mr *Colegrave* said he did not believe Mr White's testimony, that the picture was not "doctored" but that even if that was true the publication of such a picture of the plaintiff remained a wrongful *injuria*.

The question may be asked whether the mere publication of an admittedly distasteful and embarrassing photograph of the plaintiff constitutes a delict recognised by the law and enforceable by an *actio injuriarum*. It has been suggested that the plaintiff may have to accept that he suffered a loss without a legal remedy. It is important to appreciate that the term *injuria* covers a very

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wide and open ended category of wrongs. Any person who intentionally and unjustly invades another person's dignity, reputation or personality commits an *injuria* and is answerable in damages. The *actio injuriarum* is a general rule of creating liability and is not limited to any nominate or particular delicts. It is uniquely suited for creating delicts of first impression which fall within the generic definition of *injuria*.

As a matter of fact the instant case may be peculiar, but the case is by no means *sui generis*. The facts disclose an *injuria* now known as the violation of the **right of privacy**. Man is a social animal but prior to that man is a private animal as well. The law protects a person's right to live

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and communicate with others. It also protects a person's right, if he so chooses, to be left alone, the right to lead one own life protected against publicity of facts of one's private life - protection from intrusions, illicit disclosures, false light, and appropriation. Many developed legal systems recognise the "right to privacy", however defined. The concept is most advanced in the United States of America since the *Restatement of Torts* First (1939).

In Roman-Dutch law, the right to privacy has developed under the *actio injuriarum* which as we have seen affords a general remedy for wrongs to interests of personality. There was no need for our law to discover a new delict or to write a new article of the constitution. It has been recognised that an invasion of one's private life such as by unauthorised publication of private facts (or as in this case alleged facts) constitutes degradation, insult or *contumelia* and an impairment of one's dignity or reputation, and that it is actionable. In *Mhlongo v Bailey* 1958 (1) SA 370 (W) the plaintiff was awarded damages for the invasion of his privacy by *Drum* magazine for publishing against his will two old photographs of him and a girl called Dolly Rathebe. One of the pictures was captioned "Dolly and her Man". The court held that he had suffered an invasion of his *dignitas*.

In our own courts the right to privacy was upheld by the Appellate Division in *Rhodesian Printing & Publishing Co Ltd v Duggan* 1974(2) RLR 207 (A); 1975 (1) SA 590 (RA). It was decided that minor children who had been abducted and brought to this country had a right to live without publicity of their history on the basis of their right to privacy. BEADLE CJ followed a number of South African cases in affirming the view that an invasion of privacy constitutes an impairment of a person's *dignitas*.

In other cases taking photographs of the subjects without their consent was held to be an invasion of privacy - *La Grange v Schoeman* 1980 (1) SA 885

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(E) - and telephone tapping was similarly held to be wrongful: *Reid-Daly* v *Hickman & Ors* 1980 ZLR 540 (A); 1981 (2) SA 315 (ZA). All these cases were actioned under the *actio injuriarum* which is the proper remedy for that species of *injuria*. In the case at hand the plaintiff complains of an invasion of his privacy in its most basic and intimate aspect. A picture is published of him in the act of urinating outside Council offices or in some way exposing himself. Whether it was a real picture, or as is alleged, a fake, the publication of it without his consent is without doubt the subject matter for an *actio injuriarum*. There is no basis for alleging that such a fundamental invasion of one's personality rights can be *damnum obseque injuria*.

We have already seen that the *actio injuriarum* only requires three things to be fulfilled: proof that injury was caused; secondly, that the commission of the injury was unlawful; and thirdly, the presence of the intention to cause the injury. The first two requirements are closely interlinked. Once it is shown that an injury was caused to the plaintiff, the presumption is that it was unlawful unless the defendant proves that it was lawfully inflicted. In the case at hand, the publication of an indecent picture, which purports to show the plaintiff urinating or exposing

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himself in the open outside Council offices, would injure the plaintiff's dignity and good name, whether or not what is shown was true. Such a publication is an invasion of a man's right to privacy, right to a good name and right to self respect and dignity. As such, it is an actionable delict, unless the defendant can show that it was lawful and provided, of course, the required mental element also exists.

The defendant's last fall back position was the denial of any *animus injuriandi* in the whole process. Mr *Chatikobo* put the argument most forcefully stating that assuming injury has been done to the plaintiff, it is not actionable under the *actio injuriarum* unless an "intention to injure" has been shown. There is a long line of authorities for that proposition. Melius De Villiers stated it as follows in *Roman and Roman-Dutch Law of Injuries* (1899) at pp 23-24:

> "Where there has been a merely culpable act (*culpa*), however gross, without intention, direct or indirect, an ingredient requisite to the being of an injury is wanting, and no obligation to make reparation for an injury arises."

There is no doubt that *animus injuriandi* (an intention to injure) is essential for liability in actions for injuria such as defamation. In *Monckton v BSA Company* 1920 AD 332, a Rhodesian school teacher was dismissed from the service and the defendant sent a telegram and letter to South African which

were challenged as defamatory. INNES CJ stated that *animus injuriandi* is essential to an action on defamation. It may be established by proving actual ill will towards the plaintiff or by showing improper motive or recklessness on whether the statements was true or false.

In Roman and Roman-Dutch law *animus injuriandi* or intention to injure, was the gist of the action for *injuria*. With the possible exception of Hugo Grotius, all the Roman-Dutch jurists adopted the position of Justianian's *Digest and Institutes* of regarding the concept of *animus injuriandi* as an essential element to an *actio injuriarum*. VAN DER LINDEN, one of the Dutch jurists, stated that unless there was statute law which applied to an area of law then the Netherlands accepted "Roman law as a model of wisdom and equity". That was the basic assumption about the law applicable to Dutch colonies as well. In South Africa the Roman law concept of subjective "intention to injure" reigned unchallenged until early in the 20th century. It has been said the until 1915 courts in South Africa generally applied without question the Roman-Dutch concept of *animus injuriandi*.

In *Maisel v Van Naeren* 1960 (4) SA 836 (C) it was stated that under the influence of English law the courts in South Africa and Sri Lanka increasingly preferred the English approach of a closed list of defences (justification, privilege and fair comment) to negative wrongfulness at the expense of defences to rebut *animus injuriandi*. It had begun to dawn on the courts that a slavish adherence to the doctrine of *animus injuriandi* did not always enable the courts to provide justice to the wronged plaintiff. The intention of a defendant's mind, particularly if approached subjectively, cannot always be discovered from his conduct. It was realised that too

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many defendants would go scot free by simply denying that they intended to do any harm.

The first stratagem of the courts was to qualify the doctrine of intention to injure by saying if the intention to injure cannot always be proved we may allow it to be presumed. Presumption rather than proof positive was stressed in *Whittaker v Roos & Bateman* 1912 AD 92 where it was stated that when an unlawful aggression is proved "the law presumes that the aggressor had in his view the necessary consequences of his act; that is that he had the intention in injure, the *animus injuriandi*": *per* SOLOMON JA at 141. Even Melius de Villiers, the apostle of the doctrine of *animus injuriandi*, has acknowledged that the intention is often presumed rather than proved. To do so is in fact to qualify the doctrine.

In cases relating to false imprisonment and wrongful arrests as injuries *animus injuriarum* is always presumed to be present: *Thompson v Minister*

of Police 1971 (1) SA 371 (E); *Ingram v Minister of Justice* 1962 (3) SA 225 (W). In such cases the court starts with a presumption of unlawfulness or wrongfulness of the act complained of. If that is established or not rebutted the court weighs in with another presumption that the defendant acted with *animus injuriandi*.

In defamation cases the courts have made the presumption of *animus injuriandi* virtually automatic. In *Maisel v Van Naeran supra* at p 841 De VILLIERS AJ laid down a general rule as follows:

> "Where words in their proper signification convey an insult, *animus injuriandi* is presumed to exist, and the burden of proving its absence lies on the person who used the expression."

Similar statements were made in *Tromp v McDonald* 1920 AD 1 and the Sri Lanka case *Associated Newspapers of Ceylon Ltd v Gunasekere* [1952] 53 New IR 483.

In cases of liability of the printed and electronic media for defamation a new class of strict liability may already have been borne in place of the doctrine of *animus injuriandi*. It is said that where the press is involved it is no longer necessary to allege *animus injuriandi*: Lee & Honoré *The South African Law of Obligations* 2 ed (1978) at p 317; DJ McQuoid-Mason *The Law of Privacy in South Africa* (1978); *SAUK v O'Malley* 1977 (3) SA 394 (A).

Zimbabwean courts have qualified the classical doctrine of *animus injuriandi* by applying the objective approach. See *Smith & Anor NOv Wonesayi* 1972 (1) RLR 262 (A). What matters now is not what went on in the defendant's mind, but what the fictional level-headed reasonable man would have thought.

On account of all these developments it is clear that the doctrine of *animus injuriandi* has not remained fossilised while the rest of history was marching from the days of Justianian. Yet there can be few subjects of law which have seen so much controversy between those who hold that the old doctrine subsists and those who recognise that change has taken place and continues

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to do so. It has been suggested that in defamation cases *animus injuriandi* has become a "hollow fiction": R G Mckerron "Fact and Fiction in the Law of Defamation" (1931) 48 *SALJ* 154. Cf M de Villiers "*Animus Injuriandi*: An essential in the Law of Defamation" (1931) 48 SALJ 308; PQR Boberg "The Mental Element in Defamation" (1961) 78 SALJ 181; "*Animus Injuriandi* without Tears" (1965) 82 SALJ 547; "*Animus Injuriandi* and Mistake"

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(1971) 88 *SALJ* 57; CF Amerasinghe *Defamation and Other Aspects of the* Actio Injuriarum *in Roman Dutch Law*. The correct position which emerges from these views seems to be that while *animus injuriandi* remains the historical foundation of *injuria* that part of the law has changed and continues to evolve. In the interest of legal and social policy modern Roman-Dutch law has tended to expand the doctrine recognisably beyond the narrow confines of its meaning in classical Roman-Dutch law. In today's world the position of the press, radio and remote-controlled photographic devices has become so powerful that the law has to develop new concepts and adapt to new situations if it is to continue to provide protection to the individual citizen as is its proper function.

That, as I see it, is a summary of the law which is relevant to this enquiry, and what remains is to apply the law to the facts of the present case. The publication of the photograph constitutes a naked aggression on the plaintiff's *dignitas* and right to privacy. Such an act is wrongful and I can find nothing to justify it. That fact immediately raises the presumption that the defendant acted with *animus injuriandi*. The question that remains is "has the defendant succeeded in rebutting the presumption that he intended the natural consequences of his act, ie that he had the intention to injure?" I think not. The defendant did not show that its agents could not possibly have seen or known that highly defamatory photograph of the plaintiff was being disseminated. On the contrary they ought to have known and the probabilities are that they did know. If they did not know then it was only because they were guilty of gross negligence bordering on recklessness.

Moreover, this is a case of *injuria* by the press which is virtually indistinguishable from defamation by the press. We have seen that liability of the press for defamation has almost ignored the fault element. Although I will not say that strict liability for *injuria* by the press exists in our law, I do say that only liability of a level higher than subjective *animus injuriandi* can equitably protect plaintiffs from injurious publications by newspaper publishers in their rush to go to press and maximise their profits. There is a duty of care on the editors and publishers of the media to be acquainted with the contents of their publications. For that proposition I feel fortified by the following authorities: *Dunning v Thomson & Co Ltd* 1905 TH 313; *Carbonel v Robinson & Co* 1965 (1) SA 134 (D); *Hassen v Post Newspapers Ltd* 1965 (3) SA 562 (W) at 576; *SAUK v O'Malley supra*.

There is a duty of care on their part not to injure the good names, *dignitas* and self-esteem of Zimbabwe citizens. That duty was not discharged in the

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present case. It is not enough for the defendant to say that he was mistaken in thinking that the picture he published was innocuous whereas it was highly offensive. In certain circumstances a *bona fide* mistake may operate to negative the *animus injuriandi* but that is so only when the mistake is not attributable to the negligence or recklessness of the defendant: *Hassen v Post Newspapers Ltd. supra*.

Moreover for us the highest binding authority on the question of mistake and intention is still *Smith & Anor NO v Wonesayi op cit* in which BEADLE CJ categorically rejected those South African cases which followed the subjective test to *animus injuriandi* in favour of an objective approach. That decision is the law of the land which I am bound to follow. A *bona fide* but mistaken belief in the defendant's mind about a state of affairs is irrelevant in deciding whether or not the act was done *animo injuriandi*. What is decisive is whether in the circumstances a reasonable man would have done the deed without intention to injure. In the case before me I do not believe that a reasonable publisher (who in addition to his other virtues is neither negligent nor reckless) would publish such a photograph unless he was actuated by an intention to injure.

In the result I find that the plaintiff is entitled to succeed. I shall proceed to deal with the question of quantum of damages to award him.

The principles on which to award damages in the plaintiff's second claim are basically the same as in the defamation claim which we have discussed above. It is the dignity and reputation of the same man that is at stake in both cases; the publication was done by the same newspaper, and in both cases there was no retraction and no apology to the very end. As regards the question of damages the main difference is in the gravity of the injury done to the plaintiff's name and standing in society and to his personal feelings. From the level of damages he seeks, it is clear that he judges that his injury is much greater in the second case. It is not difficult to see why that should be so.

Judgment will be entered in favour of the plaintiff in the sum of $16 000 with costs.

The final order will be that the defendant shall pay the plaintiff

(i) for the first claim $6 500;

(ii) for the second claim $16 000;

(iii) costs of suit.

Coghlan Welsh & Guest, plaintiff's practitioners

Honey & Blanckenberg, defendant's legal practitioners

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IN RE MUNHUMESO & ORS 1994 (1) ZLR 49 (SC)

Court **Supreme Court of Zimbabwe**

Annotations Link to Case Annotations

Gubbay CJ, McNally JA, Korsah JA, Ebrahim JA & Muchechetere JA

Application for an order declaring legislative provision to be unconstitutional

28 June, 2 November 1993 & 13 January 1994

Flynote

Constitutional law - whether s 6 of Law and Order (Maintenance) Act [Chapter 65] is ultra vires ss 20 and 21 of the Constitution - principles for dealing with such a matter - effect of s 20(6) and s 21(4) of Constitution - whether restrictions imposed by provision on fundamental rights are reasonably justifiable in democratic society in the interests of public safety or public order

Constitutional law - s 11 of the Constitution - whether creates substantive rights or is merely a preamble to the Declaration of Rights provisions

Human rights - nature and scope of the rights of freedom of expression and of assembly and extent of derogations from those rights

Interpretation of statutes - construction of constitutional provisions protecting freedoms and of derogations from those rights - how legislation challenged as unconstitutional is to be construed

Headnote

The six applicants were jointly charged in a magistrates court with contravening s 6(6) of the Law and Order (Maintenance) Act [*Chapter 65*]. The basis of the charge was that they had taken part in a public procession without obtaining the permit required under s 6(2) of the Act. The applicants pleaded not guilty. Counsel for applicants argued that s 6 was *ultra vires* ss 20 and 21 of the Constitution and that, therefore, the charge was bad in law. The presiding magistrate referred the question to the Supreme Court in terms of s 24(2) of the Constitution.

Held, that a litigant who challenges the constitutionality of legislation must show that it is unconstitutional. The court hearing the matter must interpret the pertinent constitutional provisions and the challenged legislation, determine the meaning of each and then decide whether the legislation violates the constitutional provisions. Where the legislation is capable of more than one meaning, and one meaning would offend against the constitution but others would not, the court will presume that the law makers intended to act constitutionally and uphold the challenged legislation. The test in determining whether an enactment infringes a fundamental freedom is to examine its effect and not its object or subject matter. If the effect of the impugned law is to abridge a fundamental freedom, its object or subject matter will be

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irrelevant.

Held, further, that all provisions bearing upon a particular subject are to be construed together and as a whole in order to effect the true objective.

Held, further, s 11 of the Constitution is a substantive provision which confers rights on the individual and is not merely a preamble to the rights provided for in the Declaration of Rights section. The purpose of this section is to strike a necessary accommodation between the enjoyment of the freedoms and the potential prejudice resulting from their exercise both to others and to the public.

Held, further, that derogations from rights and freedoms which have been conferred should be given a strict and narrow, rather than a wide, construction. Rights and freedoms are not to be diluted or diminished unless necessity or intractability of language dictates otherwise.

Held, further, that freedom of expression and of assembly are vitally important rights. These rights lie at the foundation of a democratic society and are basic conditions for the progress of society and the development of persons. Freedom of expression serves four broad purposes, namely: it helps an individual to obtain self-fulfilment; it assists in the discovery of truth; it strengthens the capacity of an individual to participate in decision making; and it provides a mechanism for establishing a reasonable balance between stability and social change.

Held, further, the right of freedom of assembly is often exercised by persons taking part in public processions and protects. A procession is an assembly in motion and is a highly effective means of drawing public attention to an issue and involving them in discussion on the issue. Public places such a streets and parks have traditionally been used for processions.

Held, further, that the right to freedom of assembly is not absolute and must be balanced against the responsibility of government to maintain public order and protect public safety.

Held, further, that as s 20(6) and ss 21(4) of the Constitution interfere with

fundamental rights and as there is an area of ambiguity in the meaning of these provisions, these provisions should be interpreted in favour of the liberty of the individual. They should not be interpreted as totally prohibiting freedom of assembly and expression on public roads and pavements, but only to mean that these rights should not be exercised so as to obstruct traffic in thoroughfares. Such an interpretation is in accordance with s 11 of the Constitution and it also avoids the withdrawal of protection from the most visible, effective and immediate means by which grievances can be brought to the knowledge of those in authority, by holding of public processions, provided those processions will not prevent or hinder free passage of persons or vehicles in places set aside for such traffic.

Held, further, that ss 20(2)(a) and 21(3)(a) of the Constitution permit the enactment of laws which derogate from freedom and assembly in the interests of public safety and public order to an extent which is reasonably justifiable in a democratic society. In terms of s 2(5) of the Constitution, the applicants had to show the court that s 6 of the Law and Order (Maintenance)

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Act was not reasonably justifiable in a democratic society.

Held, further, that what is reasonably justifiable in a democratic society is a concept which cannot be precisely defined by the courts and there is no legal yardstick to measure this except that the quality of reasonableness of the provision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right.

Held, further, that s 6 of the Law and Order (Maintenance) Act contains features which, taken cumulatively, show that it is a provision not reasonably justifiable in a democratic society in the interests of public safety or public order. These are:

(i) the discretionary power of a regulating authority is uncontrolled;

(ii) before imposing a ban on a public procession the regulating authority is not obliged to take into account whether the likelihood of a breach of peace or public order could be averted by attaching conditions upon the conduct of the procession;

(iii) the effect of the provision is to deny these primary rights unless it can be shown that the procession is unlikely to cause or lead to a breach of the public peace or public disorder;

(iv) the holding of a public procession with a permit is criminalised irrespective of the likelihood or occurrence of any threat to public safety or public order, or even of any inconvenience to persons not participating.

Held, further, that although it must be accepted that the power to prohibit or control a public procession is necessary in the interests of public safety or public order, the ensuing infringement or limitation of the freedoms of expression and assembly could be adequately achieved by less restrictive and authoritarian provisions.

Held, further, that a decree *nisi* should be issued calling on the Minister of Home Affairs to show cause why s 6 of the Law and Order (Maintenance) Act should not be declared *ultra vires* ss 20 and 21 of the Constitution.

Cases cited:

Dow v A-G [1992] LRC (Const) 623

Handyside v UK (1976) 1 EHRR 737

Whitney v California 274 US 357 (1926) at 375

Cox v Louisiana (2) 379 US 559 (1965)

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S v Turrell & Ors 1973 (1) SA 248 (C)

Indian Express Newspapers (Bombay) v Union of India (1985) 2 SCR 287

Ezelin v France (1991) 14 EHRR 362

Christians Against Racism and Fascism v UK App No. 8440/78

H v Austria, App No. 15225/89; 15 EHRR CD 70

Hague v Cttee for Industrial Organisation 307 US 496 (1938)

Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd 1983 (2) ZLR 376 (S); 1984 (2) SA 778 (ZS)

Min of Home Affairs v Bickle & Ors 1983 (2) ZLR 400 (S); 1984 (2) SA 439 (ZS)

S v A Juvenile 1989 (2) ZLR 61 (S); 1990 (4) SA 151 (ZS); 1990 (4) SA 151 (ZS)

Min of Home Affairs & Ors v Dabengwa & Anor 1982 (1) ZLR 236 (S); 1982 (4) SA 301 (ZS)

S v Ncube & Ors 1987 (2) ZLR 246 (S); 1988 (2) SA 702 (ZS)

African National Congress (Border Branch) v Chrmn, Council of State of Ciskei 1992 (4) SA 434 (CkG)

Dadoo Ltd & Ors v Krugersdorp Municipal Council 1920 AD 530

Sigaba v Min of Defence and Police & Anor 1980 (3) SA 535 (Tk)

Klass & Ors v Federal Republic of Germany 2 EHRR 214

Maluleke v Min of Law and Order & Anor 1963 R & N 554 (SR); 1963 (4) SA 206 (SR)

CoT v CW (Pvt) Ltd 1989 (3) ZLR 361 (S); 1990 (2) SA 245 (ZS)

Shuttlesworth v Birmingham 394 US 147 (1969)

Collin v Smith 447 F Supp 676 (1978)

M J Gillespie for the applicants

J R Muganhu for the Attorney-General

Judgment

Gubbay CJ:

INTRODUCTION

The six applicants were jointly charged in a magistrates court with a contravention of s 6(6) of

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the Law and Order (Maintenance) Act [*Chapter 65*], it being alleged that they had taken part in a public procession for which a permit under s 6(2) of the Act had not been obtained. After pleas of not guilty had been tendered, counsel for the applicants sought to argue that s 6 was *ultra vires* ss 20 and 21 of the Constitution of Zimbabwe and that, in consequence, the charge was bad in law. The presiding magistrate, as he was entitled to do in terms of s 24(2) of the Constitution, referred the question to this court for determination.

THE FACTUAL BACKGROUND

On 1 June 1992, the Zimbabwe Congress of Trade Unions applied, pursuant to s 6(2) of the Law and (Maintenance) Act, as read with s 4 of the Law and Order (Maintenance) (Holding of Public Processions and Public Gatherings) Directions 1981 (SI 727 of 1981), to a regulating authority, being the police officer in command for Harare Central District, for permission to stage a peaceful public procession on the morning of Saturday, 13 June 1992. The application met with the cryptic response:

> "We must advise you that taking other factors into consideration the application was not successful."

No factors were disclosed.

Notwithstanding the denial of permission, from about 0900 hours on the aforementioned day a procession of worker-members commenced to move along Robert Mugabe Road towards the city centre of Harare. When the procession reached the intersection with Kaguvi Street, it was halted by officers of the Zimbabwe Republic Police. They advised that the procession was illegal and called upon everyone to disperse. Most did so. Only a small group of about thirty persons carried on with the procession. When informed that they were to be arrested all but six, who were carrying banners, fled. The six, the present applicants, were apprehended. Their banners proclaimed four of the demands of the Zimbabwe Congress of Trade Unions. These were the withdrawal of the Labour Relations Amendment Bill, the re-introduction of subsidies on basic commodities, the shelving of the Economic Structural Adjustment Programme and the ending of transport queues.

GUBBAY CJ

THE STRUCTURE OF THE CONSTITUTIONAL PROVISIONS

Since the right to demonstrate in the form of a procession touches directly upon the freedom of expression and the freedom of assembly, it is necessary at the outset to refer to the relevant provisions of the Declaration of Rights, being Chapter III of the Constitution, under which these fundamental freedoms are afforded protection. They are ss 11, 20 and 21.

Section 11 reads:

> "Whereas every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, tribe, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -
>
> (a) life, liberty, security of the person and the protection of the law;

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(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from the compulsory acquisition of property without compensation:

and whereas it is the duty of every person to respect and abide by the Constitution and the laws of Zimbabwe, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest."

Similar wording, but in the form of a preamble to the Declaration of Rights, was contained in the Constitution of Southern Rhodesia 1961, the Constitution of Rhodesia 1965, the Constitution of Rhodesia 1969, and the Constitution of Zimbabwe-Rhodesia 1979. The up-graded status of s 11 in the present Constitution signifies that it is to be regarded as a substantive provision conferring rights on the individual. Although commencing with the word "Whereas", it underscores that "every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual", and stipulates in positive terminology that the provisions of Chapter III shall have effect for the purpose of affording protection to those rights and freedoms itemised as (a) (b) and (c), subject to such limitations as are contained in the whole of Chapter III being designed "to ensure that the enjoyment of the said rights and

freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

In *Dow v Attorney-General* [1992] LRC (Const) 623, a decision of the Appeal Court of Botswana, AMISSAH JP, at 636e-637b, considered the identically worded s 3 of the Constitution of Botswana. He viewed it, most aptly, as "the key or umbrella provision" in the Declaration of Rights under which all rights and freedoms must be subsumed; and went on to point out that it encapsulates the sum total of the individual's rights and freedoms in general terms, which may be expanded upon in the expository, elaborating and limiting sections ensuing in the Declaration of Rights.

This analysis of the scope and impact of s 3 is particularly apposite to that of s 11 in the Constitution of Zimbabwe, and I respectfully associate myself with it. Pertinently put, s 11 guarantees to the individual in para (b) freedom of conscience, of expression and of assembly and association, subject to their enjoyment and exercise not prejudicing the rights and freedoms of others or the public interest.

Section 20, in relevant part, reads:

"(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

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

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(a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;

...

except so far as that provision or, as the case may be, the things done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

...

(6) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of expression in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles."

GUBBAY CJ

And s 21:

"(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.

...

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

(a) in the interests of defence, public safety, public order, public morality or public health;

...

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(4) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of assembly or association in or on any road, street, lane, path, pavement, sidewalk, thoroughfare or similar place which exists for the free passage of persons or vehicles."

An equivalent limitation to that present in ss 20(6) and 21(4) was contained in the short-lived Zimbabwe-Rhodesia Constitution of 1979, ss 128(7) and 129(6), but not in any of the Constitutions which preceded it. Perhaps this was because under the 1961 and 1965 Constitutions the Law and Order (Maintenance) Act was saved from challenge as a law in force immediately before the appointed day and continued in force at all times thereafter (see ss 70(1)(b) and 79(1)(b) respectively); and under the 1969 Constitution the Declaration of Rights was not justiciable (see s 84).

The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be under-estimated. They lie at the foundation of a democratic society and are "one of the basic conditions for its progress and for the development of every man", *per* European Court of Human Rights in *Handyside v United Kingdom* (1976) 1 EHRR 737 at para 49. See also *Whitney v California* 274 US 357 (1926) at 375; *Cox v Louisiana* (2) 379 US 559

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(1965) at 574; *S v Turrell & Ors* 1973 (1) SA 248 (C) at 256G-H.

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Freedom of expression, one of the most precious of all the guaranteed freedoms, has four broad special purposes to serve: (i) it helps an individual to obtain self fulfilment; (ii) it assists in the discovery of truth; (iii) it strengthens the capacity of an individual to participate in decision making; and (iv), it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. See Pandey *Constitutional Law of India* 24 ed at p 118. In sum, what is at stake is the basic principle of the "people's right to know". See *Indian Express Newspapers (Bombay) v Union of India* (1985) 2 SCR 287.

The right to freedom of assembly is often exercised by persons taking part in public processions. See *Ezelin v France* (1991) 14 EHRR 362 at para 32; and freedom of assembly covers not only static meetings but public processions as well. See the judgments of the European Commission of Human Rights in *Christians Against Racism and Fascism v United Kingdom* App No. 8440/78, at p 148, para 4, and *H v Austria*, App No. 15225/89, 15 EHRR CD 70. A procession, which is but an assembly in motion, is by its very nature a highly effective means of communication, and one not provided by other media. It stimulates public attention and discussion of the opinion addressed. The public is brought into direct contact with those expressing the opinion. In an as yet unpublished article entitled "Order, The Daughter not the Mother of Liberty - Processions and the Constitution", D Matyszak expounds:

> "Public assemblies do not only impact upon those who personally see the demonstration, but influence the broader community. Where the message is an unpopular one, or one that mainstream thought would prefer to ignore, the constant presence on the streets of processions promoting a contrary view has an unsettling effect which forces the opinion to be debated. The underlying problems giving rise to the procession are thus brought into the open and a redress of grievances may result. The very physical presence of the demonstrators is indicative of the possibility of violent consequences if the issues are not attended to.
>
> Historically, the use of the public assembly and procession has proved itself indispensable as a technique for the propagation of unpopular minority views, from the demonstrations of the suffragettes in the United Kingdom to the Civil Rights movement in the United States. Important issues were brought to the public attention through these movements in a manner which could not be ignored and mass violence on the part of the demonstrators averted."

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In *Hague v Committee for Industrial Organisation* 307 US 496 (1938) Justice Jackson was at pains to spell out the importance attaching to the right to freedom of expression in public places. He said at 515-516:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative and must be exercised in subordination to the general comfort and convenience,

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and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

The need to reconcile the rights of freedom of expression and assembly - being freedoms that shape a democratic regime - with governmental responsibility to ensure the sound maintenance of public order, was also graphically alluded to by LORD SCARMAN in the following passage in *The Red Lion Square Disorders,* Report of Enquiry (Cmnd 5919 of 1975):

"Amongst our fundamental human rights there are, without doubt, the rights of peaceful assembly and public protest, and the right to public order and tranquillity. Civilized living collapses - it is obvious - if public protest becomes violent protest or public order degenerates into the quietism imposed by successful oppression. But the problem is more complex than the choice between two extremes - one a right to protest whenever and where ever you will and the other, a right to continuous calm upon our streets unruffled by the noise and obstructive pressure of the protesting procession. A balance has to be struck, a compromise found that will accommodate the exercise of the right to protest within a framework of public order which enables ordinary citizens, who are not protesting, to go about their business and pleasure without obstruction or inconvenience. The fact that those who at any one time are concerned to secure the tranquillity of the streets are likely to be the majority must not lead us to deny the protesters their opportunity to march: the fact that the protesters are desperately sincere and are exercising a fundamental human right must not lead us to overlook the rights of the majority.'"

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See also *Cox v Louisiana* (1) 379 US 536 (1965) at 554-555.

It is, then, with regard to this "framework of circumstances" that the true meaning of ss 20 and 21 is to be arrived at.

Two general interpretational principles are to be applied. The first was lucidly expressed by GEORGES CJ in *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S) at 382B-D;1984 (2) SA 778 (ZS) at 783A-D, to this effect:

"Clearly a litigant who asserts that an Act of Parliament or a Regulation is unconstitutional must show that it is. In such a case the judicial body charged with deciding that issue must interpret the Constitution and determine its meaning and thereafter interpret the challenged piece of legislation to arrive at a conclusion as to whether it falls within that meaning or it does not. The challenged piece of legislation may, however, be capable of more than one meaning. If that is the position then if one possible interpretation falls within the meaning of the Constitution and others do not, then the judicial body will presume that the law makers intended to act constitutionally and uphold the piece of legislation so interpreted. This is one of the senses in which a presumption of constitutionality can be said to arise. One does not interpret the Constitution in a restricted manner in order to accommodate the challenged legislation. The Constitution must be properly interpreted, adopting the approach accepted above. Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit into the framework of the Constitution."

See also *Minister of Home Affairs v Bickle & Ors* 1983 (2) ZLR 400 (S) at 441E-H, 1984 (2) SA 439 (ZS) at 448F-G; *S v A Juvenile* 1989 (2) ZLR 61 (S) at 89C, 1990 (4) SA 151 (ZS) at 167G-H.

The second principle relates to the adoption of a broad approach. All provisions bearing upon a particular subject are to be considered together and construed as a whole in order to effect the true objective. Derogations from rights and freedoms which have been conferred should be given a strict and narrow, rather than a wide construction. Rights and freedoms are not to be diluted or diminished unless necessity or intractability of language dictates otherwise. See

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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*

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National Congress (Border Branch) v Chairman, Council of State of Ciskei 1992 (4) SA 434 (CkG) at 447G-I.

The thrust of the argument advanced by Mr *Muganhu*, who appeared for the Attorney-General, was that subss 20(6) and 21(4) were to be accorded a wide and not a restricted meaning; that they provide a definite restraint upon the enjoyment of the rights to freedom of expression and assembly; that in clear and unambiguous language they totally prohibit such freedoms in or on any place which exists for the free passage of persons or vehicles, and that it matters not that their exercise will cause no interference therewith. Accordingly, where legislation proscribes the enjoyment of these freedoms in roads, streets, pavements and other similar places, it must be taken to be *intra vires* the Constitution. And s 6 of the Law and Order (Maintenance) Act is just such a provision.

Per contra, Mr *Gillespie*, for the applicants, submitted that viewed in their contextual setting ss 20(6) and 21(4) are plainly susceptible of a restricted meaning which, he said, is to this effect: The exercise of the freedoms of expression and assembly is limited in public thoroughfares only to the extent that it prevents, or interferes with, the free passage of persons or vehicles in places existing for such traffic; that what is excluded from the asserted freedoms, is the consequent right to impede traffic in public ways, in the course of a public gathering or procession; but not the freedom of a person to express himself, or to foregather with others, without creating a public nuisance or obstruction. Stated otherwise, the purport of ss 20(6) and 21(4) is to preserve the freedoms of expression and assembly in the places specified, provided the right of access is reserved for traffic both pedestrian and vehicular. What has been removed is nothing more than a right to impede traffic in thoroughfares by forming a public gathering or procession.

The force of the opposing contentions demonstrate, to my mind, the existence of an area of ambiguity in the meaning to be assigned to ss 20(6) and 21(4). This being so, since the provisions in question interfere with fundamental rights, an interpretation which favours the liberty of the individual is to be given. See *Dadoo Ltd & Ors v Krugersdorp Municipal Council* 1920 AD 530 at 532; *Sigaba v Minister of Defence and Police & Anor* 1980 (3) SA 535 (Tk) at 541A. *Klass & Ors v Federal Republic of Germany* 2 EHRR 214 at para 48.

The adoption of a restricted meaning is, moreover, in accordance with the purpose of s 11- the key or umbrella provision in the Declaration of Rights - which is to strike a necessary accommodation between the enjoyment of

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the freedoms and the potential prejudice resulting from their exercise both to others and to the public interest. It also avoids the withdrawal of protection from the most visible, effective and immediate means by which grievances can be brought to the knowledge of those in authority, by the holding of a public procession, where such an exercise would not prevent or hinder free passage of persons or vehicles in places set aside for such traffic.

Finally, it is logical to suppose that if the intention of the framers of the Constitution had been to emasculate the freedoms protected in ss 20(1) and 21(1) in the manner suggested by Mr *Muganhu*, the limitations would have been contained in those subsections; for it is there that the freedom of expression, and that of assembly and association, are defined.

It seems to me that the object of ss 20(6) and 21(4) is simply to underscore what is implicit in s 11; that whereas the freedoms exist and may be enjoyed, their exercise does not involve licence to interfere with or obstruct the free passage of persons or vehicles.

THE IMPUGNED LEGISLATION

The relevant provisions of s 6 of the Law and Order (Maintenance) Act are as follows:

> "(1) A regulating authority may issue directions for the purpose of controlling the conduct of public processions within his area and the route by which and the times at which a public procession may pass.
>
> (2) Any person who wishes to form a procession shall first make application in that behalf to the regulating authority of the area in which such procession is to be formed and if such authority is satisfied that such procession is unlikely to cause or lead to a breach of the peace or public disorder, he shall, subject to the provisions of section ten, issue a permit in writing authorizing such procession and specifying the name of the person to whom it is issued and such conditions attaching to the holding of such procession as the regulating authority may deem necessary to impose for the preservation of public order.
>
> (3) Without prejudice to the generality of the provisions of subsection (2), the conditions which may be imposed under the provisions of that subsection may relate to -

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> (a) the date upon which and the place and time at which the procession is authorised to take place;
>
> (b) the maximum duration of the procession;
>
> and to any other matter designed to preserve public order.
>
> ...
>
> (6) Any person who convenes, directs or takes part in a public procession for which a permit under subsection (2) has not been obtained shall be guilty of an offence and may be arrested without warrant, and shall be liable to a fine not exceeding two hundred dollars or to imprisonment for a period not exceeding one year."

The omitted subsections deal with publication of the direction issued by the regulating authority; the penalties for contravening subss (1) and (2); and the power of a police officer to order persons taking part in a public procession, if any direction issued under subsection (1) or any condition of a permit issued under subsection (2), has been violated, and the penalty to which such persons are liable.

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Counsel for the Attorney-General did not seek to argue that if, on a proper construction of ss 20 (6) and 21(4) of the Constitution, there remains to the person a freedom of expression and assembly in the places designated, the provisions of s 6 of the Act are, nonetheless, non-violative thereof. His opposition was based solely on the premise that a wide interpretation was to be assigned which denied absolutely the enjoyment of those freedoms in all such places. In my view the concession was properly made.

The test in determining whether an enactment infringes a fundamental freedom is to examine its **effect** and not its object or subject matter. If the **effect** of the impugned law is to abridge a fundamental freedom, its object or subject matter will be irrelevant.

Section 6 is plainly at variance with the enjoyment of the freedoms of expression and assembly protected under s 20 and 21 of the Constitution. It imposes a prohibition on the right to take out a public procession unless permission is first applied for and obtained from a regulating authority. It empowers a regulating authority, to whom such an application has been made, to issue directions which may amount to an absolute ban, irrespective of any consideration of the procession causing an obstruction to the free flow of traffic; and by virtue of the definition of "public procession" and "public place" in s 2, the prohibition may be applied to places other than those

mentioned in ss 20(6) and 21(4), such as a recreation ground, a park, or an open space to which the public are permitted access. Permission will only be granted if the regulating authority is of the opinion that the procession is unlikely to cause or lead to a breach of the peace or public disorder and then on such restrictive conditions as he decides to set.

This is not the end of the matter however. Sections 20(2)(a) and 21(3)(a) of the Constitution permit the enactment of laws, or anything done under the authority thereof, which derogate respectively, from the right to freedom of expression and the right to freedom of assembly and association, in the interests of public safety and public order to an extent which is reasonably justifiable in a democratic society.

It was not part of the argument addressed by Mr *Muganhu* that the existence of s 6 of the Law and Order (Maintenance) Act is reasonably justifiable in a democratic society. Notwithstanding, I must deal with this aspect by virtue of the applicability of s 24(5) of the Constitution. It reads:

> "If in any proceedings it is alleged that anything contained in or done under the authority of any law is in contravention of section 16, 17, 19, 20, 21 or 22 and the court decides, as a result of hearing the parties, that the complainant has shown that the court should not accept that the provision of the law concerned is reasonably justifiable in a democratic society on such of the grounds mentioned in section 16(7), 17(2), 19(5), 20(2) and (4), 21(3) or 22(3) (a) to (e), as the case may be, as are relied upon by the other party without proof to its satisfaction, it shall issue a rule nisi calling upon the responsible Minister to show cause why that provision should not be declared to be in contravention of the section concerned."

Thus, the applicants have to show that this court should not accept that s 6 is reasonably justifiable in a democratic society on the grounds of public safety or public order. If they succeed in doing so, the court must then give the responsible Minister the opportunity of producing proof

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to its satisfaction that the provision is reasonably justifiable in a democratic society. As observed by BEADLE CJ in *Maluleke v Minister of Law and Order and Attorney-General of Southern Rhodesia* 1963 R & N 554 (SR) at 562H-I, 1963 (4) SA 206 (SR) at 215D-E:

> "...the court may not deprive the Minister of his right to put proof before the court, simply because the court may think that it may not be possible

> for the Minister in the particular circumstances of the case to place any proof before it which might satisfy it. The Minister is entitled, as of right, to be heard on this issue ..."

What is reasonably justifiable in a democratic society is an illusive concept - one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the provision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right. See, generally, *Commissioner of Taxes v CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 370F-372C, 1990 (2) SA 245 (ZS) at 265B-266D.

At this stage of the proceedings, I would agree with Mr *Gillespie* that s 6 contains features which, taken cumulatively, show that it is a provision not reasonably justifiable in a democratic society in the interests of public safety or public order. The term "public safety" means the safety of the community from external and internal dangers. Public order is synonymous with public peace, safety and tranquillity. See Pandey *op cit* at pp 125-126. The adverse features are these:

First, the discretionary power of a regulating authority is uncontrolled. He may, under s 6(1), issue a direction prohibiting the right to form a public procession upon a ground not related in any way to conditions of public safety or public order. There is no definition of the criteria to be used by the regulating authority in the exercise of his discretion. It may be gravely misplaced and made the instrument for the arbitrary suppression of the free expression of views. See *Shuttlesworth v Birmingham* 394 US 147 (1969) at 153; *Collin v Smith* 447 F Supp 676 (1978) at 685 *in fine*.

Second, before imposing a ban on a public procession the regulating authority is not obliged to take into account whether the likelihood of a breach of the peace or public disorder could be averted by attaching conditions upon the conduct of the procession in the issuance of a permit relating, for instance, to time, duration and route. If the potential disorder could be prevented by the imposition of suitable conditions, then it is only reasonable that such a less stringent course of action be adopted than an outright ban.

Third, although the rights to freedom of expression and assembly are primary and the limitations thereon secondary, s 6(2) reverses the order. Its effect is to deny such rights unless a certain condition is satisfied, namely, that the public procession it is sought to form is "unlikely to cause or lead to a breach

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of the peace or public disorder". If there is the slightest possibility of it doing so, permission is refused.

Fourth, the holding of a public procession without a permit is criminalised irrespective of the likelihood or occurrence of any threat to public safety or public order, or even of any inconvenience to persons not participating (see ss 6(5), (6) and (7)).

Accepting, as one must, that the power to prohibit or control a public procession is necessary in the interests of public safety or public order, the ensuing infringement or limitation of the freedoms of expression and assembly, could be adequately achieved, so it would seem, by less restrictive and authoritarian provisions than are contained in s 6. Compare, for instance, s 3 of the English Public Order Act 1936 (repealed) and s 12 of the English Public Order Act of 1986.

THE ORDER

In the result:

1. A rule *nisi* will issue calling upon the Minister of Home Affairs to show cause before this Court, at 0930 hours on 25 February 1994, why s 6 of the Law and Order (Maintenance) Act [*Chapter 65*] should not be declared to be *ultra vires* ss 20 and 21 of the Constitution of Zimbabwe and, accordingly, invalid.

2. The costs of the application are to stand over for determination on the return day.

McNally JA: I agree

Korsah JA: I agree

Ebrahim JA: I agree

Muchechetere JA: I agree

Honey & Blanckenberg, applicants' legal practitioners

NATIONAL FOODS Ltd v MASUKUSA 1994 (1) ZLR 66 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Civil appeal

16 November 1993 & 13 January 1994

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Flynote

Employment - termination - summary dismissal - grounds justifying summary dismissal

Headnote

The common law right of an employer to summarily dismiss an employee still exists despite the passing of s 4(1) of the Employment (Conditions of Service) Regulations 1981.

The summary dismissal of an employee may be justified where he has wilfully disobeyed the lawful order of the employer, or has engaged in misconduct inconsistent with the due and faithful discharge of his duty to the employer, or conduct which is incompatible with the faithful discharge of his duty to the employer or prejudicial to the business of the employer. Summary dismissal on the grounds of disobedience to a lawful order is only justified where the employee has deliberately and intentionally disobeyed an order and not done this merely mistakenly or inadvertently. The disobedience must also be disobedience in a serious degree. It must be such disobedience as to be likely to undermine the relationship between the employer and employee going to the very root of the contract of employment. An employer cannot dismiss an employee on the sole ground that the employee turns out to be a rather awkward person or the employer finds him rather exasperating to work with.

Wilful disobedience to lawful and reasonable orders and other forms of misconduct such as serious insubordination can threaten the smooth running of the enterprise and an employer is not obliged to wait until his business is adversely affected by the conduct of an employee before he moves to dismiss him.

1994 (1) ZLR p67

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Cumulatively, the various forms of misconduct of the respondent were so grave that they went to the very root of the contract of employment and his summary dismissal was amply justified.

Cases cited:

S v Jovner 1982 (2) ZLR 252 (S)

Matereke v C T Bowring & Asscs (Pvt) Ltd 1987 (1) ZLR 206 (S)

Tobacco Sales Floor Ltd v Chimwala 1987 (2) ZLR 210 (S); 1988 (3) SA 427 (ZS)

Zieve v National Meat Suppliers Ltd 1937 AD 177

Acklam v Sentinel Ins Co Ltd [1959] 2 Lloyd's Rep 683

Pepper v Webb [1969] 2 All ER 216

A P de Bourbon SC for the appellant

E Chatikobo for the respondent

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Judgment

Korsah JA: This is an appeal by an employer against a judgment of the High Court, handed down on 1 June 1989, awarding damages for the wrongful dismissal of the respondent in the sum of $25 875, with interest a *tempore morae* thereon, together with costs of suit. The appellant contends that the respondent's conduct justified his summary dismissal.

The findings of fact by the trial court were not in dispute and were in fact relied on by both parties. They are:

1. The respondent, in the presence of a number of employees of National Foods Limited, made statements which were derogatory of National Foods Limited and the status and position of its black African managers. The findings of an internal committee (the Roebuck Committee) were not communicated to the respondent. The Minister of Labour and Social Services on 7 July 1982 refused his approval for the dismissal of the respondent on those grounds. Thereafter the respondent was given a temporary assignment at Natpak, a subsidiary of National Foods Limited. He was given a specific project to carry out and was instructed to have nothing to do with those employees of National Foods Limited with whom he had previously worked. Either immediately before or at the time of his transfer to Natpak the respondent received a substantial increase in salary from $650 to $1 100 per month. By a letter dated 13 August 1982, the respondent was informed that the refusal of the Minister's approval for his dismissal did not mean that he ha been exonerated and he was issued with a warning to mend his ways.

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2. On 24 September 1982, the respondent informed Mr Smith, the general manager of Natpak, that he wanted to collect his diplomas which he had left behind at his former office at National Foods Limited. Mr Smith offered to collect them for him, but the respondent insisted that there were also some books that he wanted to collect. Mr Smith asked him to list the books he wanted so he could collect them for him. The respondent then complained about being kept in captivity. Eventually Mr Smith took the respondent to his former office. Both on the way there and on the return journey, the respondent gave vent to an unwarranted outburst and accused Mr Smith of being a racist like all the other managers of the appellant company.

3. On 10 November 1982, the messenger of court, Mr J Koti, attempted to serve on the respondent a garnishee order and two summonses for civil arrest for default payments. In a scathing outburst, the respondent accused the messenger of court of being a "colonialist and imperialist" and threatened to kill him if he attempted service of such documents on him. When Mr Koti informed the respondent that he was going to report him to Mr Shonhiwa, the personnel manager, the respondent dubbed Mr Shonhiwa as "a white man in a black skin". The respondent also made derogatory remarks about a key member of

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> Government and poured contempt on the policy of reconciliation introduced by Government. Mr Koti left and returned thirty minutes later in the company of two Zimbabwe Republic Police officers to assist him in effecting service of the orders on the respondent. In the interest of avoiding a scene being witnessed by factory workers, Mr Shonhiwa sent a message to the respondent to come to his office. The respondent flatly refued to honour the invitation and made it quite clear that he would not take orders from either Mr Shonhiwa or Mr Garah, but only from Mr Harris, whom he considered as his friend.

Although the appellant sought and obtained the permission of the Minister of Labour and Social Services, contained in a letter dated 30 November 1982, to summarily dismiss the respondent, it was rightly conceded by the parties that s 4(1) of the Employment (Conditions of Service) Regulations 1981, did not inhibit the common law right of an employer to summarily dismiss an employee on the grounds of misconduct: *S v Jovner* 1982 (2) ZLR 252 (S).

The issue for determination resolves itself into the comparatively simple one of whether on the facts as found the summary dismissal of the respondent by the appellant was justified.

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The learned trial judge held that the summary dismissal of the respondent was not justified because: (i) the effect of his conduct had been exaggerated; (ii) his conduct did not affect the standard of his work or his relations with other employees; and (iii) his conduct did not render him unfit to carry out any of his duties and did not affect the appellant's business in any way.

While there is no fixed rule as to what will justify summary dismissal, it is generally accepted that wilful disobedience to the lawful and reasonable order of the employer, or misconduct inconsistent with the due and faithful discharge of his duty to the employer, or conduct which is incompatible with the faithful discharge of his duty to the employer or prejudicial to the business of the employer, may justify summary dismissal. In each case, the conduct complained of must be such as to show that the employee disregarded the essential conditions of his contract of service, express or implied, to such an extent that the substratum of employer-employee relations was destroyed. As stated by GUBBAY JA (as he then was) in *Matereke v C T Bowring & Associates (Pvt) Ltd* 1987 (1) ZLR 206 (S) at pp 211G-212A:

> "...having regard to the purpose of this piece of legislation, as well as to the common law grounds for summary dismissal for wilful disobedience or wilful misconduct, the words in my view connote a deliberate and serious refusal to obey. Knowledge and deliberateness must be present. Disobedience must be intentional and not the result of mistake or inadvertence. It must be disobedience in a serious degree, and not trivial - not simply an unconsidered reaction in a moment of excitement. **It must be such disobedience as to be likely to undermine the relationship between the employer and the employee, going to the very root of the contract of employment"** (my emphasis).

See also *Tobacco Sales Floor Limited v Chimwala* 1987 (2) ZLR 210 (S) at 218-219; 1988 (3) SA 427 (ZS) at 433.

Mr de Bourbon drew our attention to the conduct of the appellant in *Zieve* v *National Meat Suppliers Ltd* 1937 AD 177 at 192, to which the conduct of the respondent in the present case

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bears a striking similarity, and of which DE VILLIERS JA had

> "...no doubt whatever that such conduct amounted to a repudiation of the contract and also to a breach of an essential term in the contract of service between Zieve and the Company."

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Of Zieve, the following findings were made by the trial court and accepted by the Appellate Division:

> "[that] He was quarrelsome and insubordinate in his dealings with officials and officers of the Company; that he failed to work harmoniously with these persons; that he on a number of occasions was guilty of rude and insulting conduct towards Isaac Albow, the Chairman of the Retail Committee; and that he wilfully disobeyed the orders of his superiors .... His temperament was such that he would brook no opposition or other opinion than his own and thought he was right and others wrong. He could not take instructions. He was incapable of working amicably with the officers and officials of the Company. His mistaken impression, for which there was no justification, that his position was that of a partner and not a servant in the Company in the ordinary sense, and his acting upon that view, perhaps accounts for some of his conduct but cannot excuse it. If the conduct of the plaintiff be taken not separately but as a whole, then in my opinion the case made by the defendant in justification of his dismissal is wellnigh overwhelming."

The respondent herein made disparaging remarks about the black African managers of National Foods Limited. He insisted on visiting his former office at National Foods Limited in spite of an injunction by senior officials of National Foods Limited not to do so. On 24 September 1982, he berated the general manager, Mr Smith, under whom he worked, and who had offered him a lift to the offices of National Foods Limited and back to Natpak, and accused him, for no apparent reason, of racialism. On 10 November 1982, at the offices of Natpak, he made derogatory remarks not only about an officer of court but also about a key member of Government and the Government's policy of reconciliation. While he was certainly entitled to his views and to pronounce them, he was not entitled to use his workplace as a platform to advocate a revolution. He deliberately disobeyed the orders of the personnel manager, whom he epithetized as "a white man in a black skin". Surely, taking the respondent's conduct as a whole, the evidence was wellnigh overwhelming that the respondent was self-opinionated to such an extent that he could not work harmoniously with the officers and officials of the appellant and that his conduct amounted to a repudiation of his contract.

Insofar as the learned trial judge took the view that to justify summary dismissal it was necessary for the conduct complained of to be such as would affect the standard of the respondent's work, or his relations with other

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employees and for it to adversely affect the appellant's business, his view of conduct that would justify wrongful dismissal was too restrictive.

It is true, as expressed by SALMON J in *Acklam v Sentinel Insurance Co Ltd* [1959] 2 Lloyd's Rep 683 at 689, that -

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> "Misconduct is a very serious matter: you cannot get rid of a man under a contract ...because he turns out to be rather awkward or you find it exasperating to work with him. One can well understand that a position may arise where the employer will come to the conclusion that he cannot continue with the man any longer. It may be the man's fault, it may be the employer's fault, it may be the fault of both of them or neither of them, but that situation can arise. **Unless, however, the employer can prove misconduct or negligence, he has to pay the man damages if he gets rid of him."**

An employer, however, is not obliged to wait until his business is adversely affected by the conduct of an employee before he takes remedial action. In my view, if wilful disobedience to lawful and reasonable orders of an employer threatens the smooth running of the fabric of the enterprise, or the conduct of the employee has been such that it would be injurious to the employer's business to retain him, the employer does not have to remain supine until such mischief is achieved before summarily terminating the contract of employment. Provided the employee's conduct is insulting and exhibits insubordination to such a degree as to be incompatible with the continuance of the relationship of employer and employee, such conduct, if persisted in, may amount to conduct repudiatory of the contract of service and thus justify summary dismissal: *Pepper v Webb* [1969] 2 All ER 216 at 218 B, D and H

In considering whether the conduct complained of was sufficient to justify summary dismissal, it is permissible to have regard to prior warnings and conduct on the part of the respondent which had a material bearing on the conduct complained of; for a minor act of insubordination may be "the last straw" justifying dismissal - McGlyne *Unfair Dismissal Cases* 2 ed at para 126; *Pepper's* case *supra*.

I favour *Mr de Bourbon's* submission that, whilst the respondent may have generally performed his duties well, his behaviour, which was erratic and temperamental, must have undermined his relations with the employees against whom it was directed, and who were senior to him, and that it

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demonstrated a lack of loyalty to and respect for the appellant which clearly must have undermined his relationship with the appellant.

The allegations that the appellant and its senior employees practised racism against senior black employees could only have embarrassed and upset the black employees, who were told by the respondent that they lacked status and authority and thus respectability. The white officers and employees against whom these accusations were levelled could not have been less embarrassed. Nor could the appellant itself as a public company, particularly in the context of the socio-political changes taking place in Zimbabwe at the time - some ten-and-a-half years ago - have been unperturbed and remained indifferent to these utterances which the respondent persisted in despite warning. It cannot be gainsaid that the serious nature of these allegations were inconsistent with the loyalty and commitment owed by the respondent to the appellant.

To the respondent, anyone who did not share his point of view was, if white, "a racist", if black, "a white man in a black skin". You could not disagree with him without earning one or other

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accolade. In the fragile socio-political atmosphere of the early eighties, he was anathema to any organisation. While this by itself may not have made his conduct, insufferable though it was, incompatible with the discharge of his duty to the appellant, insofar as it was persisted in to the extent that it led to disobedience of lawful orders and amounted to misconduct so grave that it went to the very root of the contract of employment, his summary dismissal was amply justified.

As regards the conduct of the respondent towards the Deputy Sheriff, Mr Koti, leading to his subsequent arrest, whilst such conduct did not affect the appellant's business directly, it nevertheless constituted conduct unbecoming of an employee of the respondent's status in the appellant's employ and was related to the other outbursts of racism made by him against other employees of the appellant. The respondent was only acquainted with Mr Koti as an officer of court and a process server. As an officer of court, Mr Koti had been tasked to serve on the respondent a garnishee order and two summonses for civil arrest. He had no choice in serving, or forbearing to serve, them on the respondent. How, I ask myself, does Mr Koti become a racist in the execution of a process which he did not initiate and was merely doing so in compliance with his duties as a messenger of court?

The accusation of racism levelled against Mr Koti, whom the respondent hardly knew, probably underscores the hollowness of similar accusations made by him against Mr Smith and other white employees of the appellant.

KORSAH JA

The respondent was under a duty to behave in a manner commensurate with his position, particularly whilst at the appellant's premises. Obstructing a process server in the execution of his duty by threatening him with violence may amount to contempt of court. Tolerance of such conduct on the appellant's part would adversely affect its own credibility as to the type of persons it was prepared to employ and reflect badly on the appellant and its employees.

In my view, if the conduct of the respondent is taken, not separately, but as a whole, then the case made by the appellant in justification of his dismissal is wellnigh overwhelming.

In the result, the appeal is allowed with costs. The orders of the High Court granting judgment in favour of the respondent and awarding him damages and costs are hereby set aside. In place thereof is substituted the following:

> "The plaintiff's claim is dismissed with costs."

Korsah JA: I agree.

Ebrahim JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

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SIBANDA v THE CHURCH OF CHRIST 1994 (1) ZLR 74 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

30 November 1993 & 18 January 1994

Flynote

Trust deed - church property - whether authorisation of court required for alienation of church property - express provision in trust deed for alienation by trustees - only small part of original organisation still existing and all those with any interest in the property approving alienation - whether court should authorise alienation

Headnote

In terms of a trust deed the trustees of a religious organisation were empowered to alienate Church property if they were authorised to do so by a meeting of the male members of congregation. At least three trustees had to sign the document alienating the property. Most of the congregation had moved away and there were now fewer than three trustees left. All of the remaining members in the organisation wished to dissolve the organisation and to alienate certain Church property.

Held, that even if the prior sanction of the court is necessary for the alienation of Church property, if the court can grant relief where there is express provision restricting alienation, then it ought more readily to do so where the trustees are vested with express authority to alienate Church property, and all the more so where all remaining members of the congregation had consented to this action and no-one had any status to object to such alienation because it would not derogate from the rights of any other person or the public.

Held, further, that the court should give effect to the undisputed will of the only interested members left at the time of the dissolution of the Church.

Cases cited:

Banbury v Bank of Montreal[1918] AC 626

KORSAH JA

Klerksdorp & District Muslim Merchants Assn v Mahomed & Anor 1948 (4) SA 731 (T)

Ex p *die Kerkraad van die Nederduitse Gereformeerde Kerk van Ploysber*g 1938 CPD 392

Ex p *Moodley NO & Anor* 1969 (3) SA 734 (C)

Ex p *van Vryheid* 1930 NPD 193

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Sewmurgal & Anor NOv Regent Cinema 1976 (3) SA 91 (N); 1977 (1) SA 814 (N)

Chetty v Naidoo 1974 (3) SA 13 (A)

Re James, Grenfell v Hamilton [1932] 2 Ch 25

Ex p *Hart* 1947 (4) SA 464 (W)

M J Gillespie for the appellant

S Nkiwane for the respondent

Judgment

Korsah JA: This is an appeal from the judgment of the High Court, Bulawayo, handed down on 24 July 1992, wherein the court declared null and void the sale to the appellant of house No. 105 Churchill Road, Bellevue, ordered the eviction of the appellant and all those claiming through him therefrom, and awarded costs of suit to the respondent.

In 1974 a group of people who belonged to the Church of Christ in the Bellevue area of Bulawayo called a meeting at which they adopted a Constitution which was to govern the affairs of their Church. The Church was to be known as the Church of Christ, Bellevue. It was to be an autonomous body and was to adhere to the principles and teachings as found in the New Testament of the Holy Bible.

The Constitution provided for the appointment of trustees, who shall number no more than five nor less than three, from the male members "in good standing of the Church", by a duly constituted meeting of male members, called by the Eldership of the Church on not less than prior notice of seven days. "Should there be no Eldership in office, the meeting may be called in the same manner by not less than three male members in good standing of the Church".

The Constitution reposed power in the trustees:

> "(a) To accept and grant leases of immovable property in favour of or on behalf of the Church, to settle the terms of such leases and to execute all documents relating thereto;

> (b) To acquire by way of donation, movable or immovable property and to accept such donations on behalf of the Church;
>
> (c) To purchase, alienate, subdivide, consolidate, mortgage or otherwise encumber the immovable property of the Church; ..."

The authorisation by a resolution following a meeting of the male members of the Church, as above prescribed, was made a condition precedent to the exercise by the trustees of their

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powers to deal with the movable and immovable property of the Church. And it was stipulated that the signatures of any three trustees shall be sufficient for the purpose of the signature of any document.

By a deed of transfer dated 23 May 1976, the trustees of the Church of Christ, Hillside, donated to the trustees of the Church of Christ, Bellevue, Stand No. 31 Bellevue Township, for the erection of a Church and/or Church Hall, which "shall be used for ecclesiastical purposes and for other purposes connected with the running of a Church".

By another deed of transfer dated 9 October 1981, the trustees of the Church of Christ, Hillside, with accustomed benevolence, donated to the trustees of the Church of Christ, Bellevue, Stand No. 32 Bellevue Township, to be used for residential purposes only.

There was overwhelming evidence from the witnesses who testified for both parties, and the trial court rightly found, that the trustees of the Church of Christ, Bellevue, entered into some loose arrangement, whereby they allowed the local Ndebele speaking people, most of whom were domestic workers before Independence, to conduct their own services and worship in the same Church building in the afternoons when the English speaking congregation was not using the building.

As a result, the English speaking people constituted the morning congregation and the Ndebele speaking people constituted the afternoon congregation. Each congregation was independent of the other and members of one congregation attended the services of the other only as visitors.

I pause here to mention that it was not clear from the evidence whether the afternoon congregation had also embraced the principal tenet of the Constitution under which the morning congregation operated, which was to adhere to only those principles and teachings to be found in the New Testament of the Holy Bible. Maybe that enquiry was not considered

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KORSAH JA

necessary because the two congregations were accepted as separate entities whose aims and aspirations did not have to be coincidental. But if such an investigation had been undertaken, and it had been established that the afternoon congregation embraced the teachings to be found in both the Old and the New Testaments, it may well have been the end of the matter, since the afternoon congregation's claim to be the successor of the morning congregation would not have been tenable.

Be that as it may, Gasela, the respondent's representative, admitted that the two congregations existed independently of each other and were run separately. The morning congregation owned all the assets and had a bank account, while the afternoon congregation had no assets and no bank account. While Gasela later asserted that the Church of Christ belonged to everybody, that conclusion is not supported by his own testimony that all the assets belonged to the morning congregation. The conclusion is inescapable that the afternoon congregation was using the property of the morning congregation on sufferance. They contributed nothing to the upkeep of the property nor shared any of the obligations which fall to be borne by an owner of property.

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In 1978 the appellant was engaged by the trustees of the Church as a caretaker. In that capacity, he was granted occupancy of Stand No. 32, also known as No. 105 Churchill Road, Bellevue. He also preached to the afternoon congregation.

From 1983 to 1984 most members of the morning congregation had either emigrated or moved away from Bellevue and so joined other congregations of the Church of Christ in other suburbs of Bulawayo. The last remaining enfranchised members of the organisation which owned the property of the Church decided to alienate it by sale of the house to the appellant and by donation of the Church to the "afternoon congregation".

The house was sold to the appellant for $6 000 in recognition of his services as caretaker. It was a condition of sale that he be permitted to deduct from the purchase price any Church building maintenance expenses such as lights, water and rates paid by him on behalf of the "afternoon congregation". At the time of action only $2 785,01 of the purchase price remained outstanding.

The remaining members of the organisation that owned the property of the Church and who took this decision were three in number: Allen Bent, Eric Rushton and Martin Mienie. Their noble intentions were carried to fruition without documentation of either sale or donation. But Gasela attested to the

KORSAH JA

decision of the remaining members of the organisation which owned the Church property being common knowledge within the remaining "afternoon congregation". In fact, at a heated meeting of the "afternoon congregation", Gasela was reported in the Minutes as telling members present that "the main problem was that the Church house was sold to Brother Cain Sibanda in 1984".

A further fact, not specifically adverted to by the learned trial judge, but equally undisputable, is that the "afternoon congregation" has never formally been constituted.

On 12 February 1989, almost six years after the said alienation by the remaining enfranchised members of the organisation which owned the Church property, the "afternoon congregation" held a meeting at which it was resolved to appoint trustees in terms of para 5 of the Constitution of the "morning congregation". If, as the evidence clearly indicates, the "morning congregation" and the "afternoon congregation" were entirely separate entities, co-existing each on its own, how could the "afternoon congregation" purport to act under a Constitution alien to it and which did not contemplate its existence or acknowledge its members as part of the enfranchised members of the Church of Christ, Bellevue? This usurpation of the Constitution of what was previously the Bellevue Church of Christ and its purported election of trustees to that body achieved nothing.

The learned trial judge reasoned that of the three remaining enfranchised members left who alienated the property of the organisation, only Rushton was a trustee. He said:

> "They considered that since they were the only male members left they could take any decision concerning the property of the Church.

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This was wrong. Once a group of people draw up a document in the form of a Constitution and agree that their affairs, or the affairs of the Institution they create, should be governed by that Constitution, they must comply with the requirements of that Constitution.

According to their Constitution only the trustees had power to do what they did.

No three members could simply give themselves the powers of trustees without being elected trustees.

KORSAH JA

Whilst it is appreciated that they were the only three left, it would have been much better for the three to apply for a court order authorising them to alienate the Church's property in the absence of elected trustees. They cannot be allowed to do what was against their own Constitution. What they did was therefore null and void.

Accordingly the sale of the Church house by them to Cain is null and void."

If the above reasoning is conclusive of the inability of the three remaining members of the enfranchised members to sell the house to the appellant, then equally so is it of their inability to make a donation of the Hall to the respondent, and the respondent acquired nothing. There is an adage that people who reside in glass houses should not resort to stones as projectiles for the resolution of their differences. What then was the *locus standi* of the respondent in seeking the eviction of the appellant?

It was submitted by Mr *Nkiwane*, for the respondent, that this court cannot properly at this stage entertain a challenge to the respondent's *locus standi* because such a point should be raised in the court of first instance at the commencement of the trial, and not for the first time on appeal.

I most respectfully disagree with learned counsel on this issue.

To begin with, that point was raised in the pleadings and at the commencement of the trial. Though it was never abandoned, it was not persisted in and it appears not to have been raised as a ground of appeal. But the issue was not one to which the respondent's attention was not drawn at the inception of the proceedings, and it cannot be said that it had been taken unawares or would be prejudiced by that issue being considered now. As LORD PARKER OF WADDINGTON explained in *Banbury v Bank of Montreal*[1918] AC 626 at 705:

"There are no doubt cases in which the Court of Appeal have refused to allow points of law not taken in the court of first instance to be raised on appeal. But these cases do not go to jurisdiction but to discretion. It may be that if a point of law had been taken below further evidence would have been adduced, or a further or different question left to the jury. In such cases it would be manifestly unfair and unjust to allow the point to be raised for the first time in the Court of Appeal. In the present case there is no such element of unfairness or injustice. It is not suggested that had

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the point been taken below any further evidence could have been adduced, or any further or different question left to the jury. Why, then, should not the Court of Appeal have felt itself at liberty to do complete justice between the parties on the evidence before them? I can see no reason at all."

It seems to me that *locus standi* is always an issue in a claim of this nature, and no unfairness

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or injustice to the respondent results from a consideration of it.

In my view, the conclusion that the sale of the house to the appellant was null and void was founded on a misdirection.

Consideration of whether the alienation was null and void must, as submitted by Mr *Gillespie*, commence with an examination of the Constitution.

There is no doubt that the Church of Christ, Bellevue, was a voluntary association, and all questions pertaining to it must turn ultimately on the terms of its Constitution: for that is the charter of the organisation which not only expresses, but also regulates, the rights and obligations of the members *inter se*, inclusive of any powers bestowed on its officers and the manner of exercise of such powers. It is the document which informs all persons dealing with the organisation what the organisation is formed to do and how it is proposed to achieve those aims.

It was contended by Mr *Gillespie* that there is nothing unequivocal in the Constitution of the Church which helps one to determine whether the Church is an *universitas* or an unincorporated association. He contended that the use of the word "autonomous" has reference to its relationship with other congregations of the same sect and not to its own corporate personality; that the association appears to have perpetual succession is implicit from the nature of a Church rather than from any provision to that effect in the Constitution; that property is held by trustees for the Church may mean either that the trustees hold it for the members or that they hold it for the corporation - see *Klerksdorp & District Muslim Merchants Association v Mahomed & Anor* 1948 (4) SA 731 (T) at 738; and submitted that on a balance the Church was a body corporate. I did not hear him go so far as to say that the organisation under consideration was not an *universitas*.

The organisation was labelled a Church by its Constitution and its aims as expressed were those of Christian worship, according to the tenets of the New

KORSAH JA

Testament. There was no provision in the Constitution for the termination of its existence upon any future occurrence or the attainment of some objective. It continued as an entity, notwithstanding changes of membership within it. It therefore had perpetual succession distinct from the accolade "Church". It held property and appointed trustees to act on its behalf in respect of such property - a factor which favours a strong inference that the creation of an *universitas* was intended. Finally, the absence from its Constitution as its object the acquisition for gain by the association or by the individual members thereof confirms me in the view that the Church of Christ, Bellevue, was an *universitas*.

The question then arises as to the powers of the Church to alienate property. The learned trial judge remarked that it would have been much better for the three remaining members to have applied to the court for an order authorising the alienation of the property of the Church. Support for this view is gathered from the judgment of SOLOMON J in Ex parte *die Kerkraad van die*

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Nederduitse Gereformeerde Kerk van Ploysberg 1938 CPD 392 at 394, where he says:

> "Voet (27.19.17) tells us that Church property, like the property of minors, can only be sold by order of Court, and that the principles upon which the Court will act are the same in both cases. He refers with approval to Menochius *De Arbitrar. Judic.* Lib 2, *Casus* 172. That author deals with the matter at some length. ...He says that immovable Church property must never be sold save for just cause and that what is such a just cause in any particular case is left to the decision of the judge."

Further on in the judgment the learned judge said:

> "I have not overlooked the fact that in this case the Deed contains the express prohibition to which I have referred. But, as it seems to me, that takes the matter no farther, for the prohibition contained in the Deed merely confirms what was already the law even without it, namely that Church property is inalienable.
>
> In the case both of the property of minors and of Church property the Court has on a number of occasions granted its authority to sell whether the original prohibition arose by operation of law alone or came from the express directions of the donor or testator as well."

He drew specific attention to the fact that all the cases which he had referred

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KORSAH JA

to above were of the latter character. But it appears from Ex parte *Moodley NO & Anor* 1969 (3) SA 734 (C) at 735-8, that even where there is no express prohibition against alienation the authority of the court is necessary for the alienation of Church property.

What then is the position, as is in the instant case, where, not only is there no restriction on alienation, but the Constitution expressly empowers the trustees to alienate property subject only to their acting in accordance with the resolution of all the members? Can it be said that in the absence of any restriction on the powers of the members or any *modus* attaching to the property and in the face of this specific power to alienate, the intervention of the court is not required? Bamford *The Law of Partnership and Voluntary Association in South Africa* 3 ed at 188 expresses the view that -

> "It seems that whatever the powers granted in the Constitution and even where all the members consent, the property of a Church may be sold only by order of the Court."

In Ex parte *van Vryheid* 1930 NPD 193 the court removed conditions imposed on the use of the Church's property and stated at 196, as to the prayer for leave to alienate the property:

> "If the conditions are deleted, the body in whom the lands are vested will hold them free from the conditions which it is said hinder their alienation. It follows that if the Constitution of the Church or the Vestry permits the alienation of its lands, it will be free to alienate these particular lands."

But as the learned author Bamford *supra* rightly comments in the footnote at p 188: "The contrary Roman Dutch authorities were not considered".

It seems to me, however, that an important consideration for the decision in that case was that no persons other than the Crown and the congregation of the Church were concerned, or had any status to object to the proposed order to delete the conditions, as it would not derogate from

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the rights of any other persons or of the public.

Even if prior sanction by a court is necessary for the alienation of Church property, if the court can grant relief where there is express provision restricting alienation, then, in my view, it ought more readily to do so where the trustees are vested with express authority to alienate Church property, and all the more so where all remaining members of the congregation consent and

KORSAH JA

no-one has any status to object to such alienation because it would not derogate from the rights of any other persons or of the public.

There are factors, crucial to this case, which render a resolution of the conflict between the parties exceedingly difficult. It was common cause that the two properties with which we are here concerned were donated by the Church of Christ, Hillside. None of the parties in the instant action considered whether alienation of the properties by the Church of Christ, Hillside, was sanctioned by a court. If the original donation to the Church of Christ, Bellevue, was invalid then the Church of Christ, Bellevue, received nothing and had nothing to bestow on the present contestants. Since that issue was not raised, and there is no evidence either way on the record, I will assume that the donations by the Church of Christ, Hillside, were in accordance with the principles of the common law and, therefore, regular and valid.

Turning now to the factual situation: The congregation, which formed the entire Church, was dissolving. The alienation, which was approved by the entire remaining voting body of the Church, and the entirety of members with any interest in the Church property, was accomplished in order to facilitate the dissolution of the Church and the continuation, in due course, of that which was perceived to be the legitimate interest of the Church through an aspirant successor. In such circumstances, any suggestion of responsibility to a larger body of faithful, or to a governing Church body or synod is removed because such a body no longer exists and cannot be created. But the sacred nature of the property is retained and the intervention of the court is necessary because sacred things cannot be diverted to profane uses: Voet 1.8.6.

I am at variance with the finding of the learned trial judge that it was wrong of the remaining male members of the Church to consider that they could take any decision concerning the property of the Church. The decision they took brought about a result which could be accomplished by the trustees with the approval of the majority of members. The Constitution does not provide for a quorum of trustees to exercise the powers of trustees. Even the full complement of trustees acting with unanimity could not exercise those powers without the confirmatory resolution of the members at a duly constituted meeting. I agree with Mr *Gillespie* that the lack of an independent discretion in the trustees only goes to emphasise what is in any event the law, that the real power and authority vests in the membership of the association: *Sewmurgal & Anor NOv Regent Cinema* 1976 (3) SA 91 (N) at 94B-D, 1977 (1) SA 814 (N). What the trustees may accomplish with the approval

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of the majority of members may be done by the unanimous vote of all the members and all the remaining trustees in the instant case if the authority of the court is obtained.

I return once more to the issue of *locus standi.* The respondent's cause of action for ejectment of the appellant was based on the *rei vindicatio*. In such an action the plaintiff must allege and prove that he is the owner of the property and that the defendant was in possession of it at the time of the institution of the action: *Chetty v Naidoo* 1974 (3) SA 13 (A). Suppose it were true, as alleged by the respondent and found by the trial court, that the remnant of the Church could not dispose of the house, it would follow that it could certainly not dispose of the house to the afternoon congregation, nor could it likewise dispose of the Church building. The basis of the claim, and of the judgment itself, as submitted by Mr *Gillespie*, thus operates to deny the plaintiff (the respondent) *locus standi* and also to deny it any rights to the Church building. Its right, such as it is, to the Church building would rest on its occupation thereof, just as the appellant's right to the house. This is no ground at all and would result in the property escheating to the State as *bona vacantia*.

There is no doubt about what the remaining enfranchised members wanted to do. And what they wanted to accomplish could have been done with the sanction of the court. There can be no question of an application *cyprés* until it is clearly established that the mode specified by the donor cannot be carried into effect and that the donor had a general charitable intention: *Re James, Grenfell v Hamilton* [1932] 2 Ch 25. Here the intentions of the remaining members of the Church were known. The only legitimate claimants were the parties before the court. See Ex parte *Hart* 1947 (4) SA 464 (W) at 474.

With the intention of the remaining enfranchised members clearly spelt out and known to the parties as far back as 1984, and with only a court order necessary to perfect that intention, the only proper course open to the court was to give effect to the undisputed will of the only interested parties at the time of the dissolution of the Church of Christ, Bellevue. That will had been expressed in a concluded sale and donation, both of which transactions remain unperformed, in the sense that delivery has not yet been effected.

Since the organisation no longer exists, and no trustees remain vested with property, the delivery of the various properties can only be effected by the Deputy Sheriff.

KORSAH JA

I would accordingly make the following orders:

(a) The appeal is allowed with costs.

(b) The orders of the High Court granting judgment in favour of the respondent and granting eviction of the appellant are set aside and in place thereof is substituted the following -

(i) The plaintiff's claim is dismissed with costs.

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(ii) The Deputy Sheriff is authorised to do all things and to sign all documents necessary to effect transfer to the defendant of certain piece of land, namely Stand No. 32 Bellevue Township of Subdivision A of Bellevue, known as 105 Churchill Road, as against payment to the plaintiff of the sum of $2 785,01.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Coghlan & Welsh, appellant's legal practitioners

Ben Baron & Partners, respondent's legal practitioners

McGOWN v HEALTH PROFESSIONS COUNCIL 1994 (1) ZLR 86 (HC)

Court **High Court, Harare**

Smith J

Application for interdict

7 & 19 January 1994

Flynote

Administrative law - condition imposed upon doctor when renewing practice certificate by body responsible for regulation of medical profession - condition imposed without first giving doctor opportunity to make representations - whether breach of audi alteram partem rule - application pending in High Court for review of decision to impose condition - disciplinary committee intending to hold inquiry into breach of condition by doctor - whether interdict should be granted to prevent holding of disciplinary inquiry until High Court had heard the review case and determined the validity of decision to impose condition - whether condition imposed should be suspended until the High Court review case had been decided

Headnote

The applicant, an anaesthetist, was facing criminal charges arising out of the deaths of patients. He had been released on bail, the conditions of which included a restriction prohibiting him from using certain drugs when he was carrying out his professional duties. When the applicant had sought to renew his practising certificate, the Practice Control Committee of the Health Professions Council had renewed his certificate subject to a restrictive condition that the application refrain from performing any form of spinal anaesthesia. That committee had imposed this condition without first giving the applicant an opportunity of making representations relating to this matter. The applicant had breached the condition imposed upon him and the Health Professions Council was intending to hold a disciplinary inquiry pertaining to this breach. The applicant had, in the meantime, filed an application to the High Court for a review of the

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decision by the Practice Control Committee to impose the restrictive condition.

In the present action the applicant applied to the High Court for an interim interdict to restrain the Health Professions Council from holding a disciplinary hearing into the breach of the conditions imposed upon the applicant until the High Court had reviewed the original decision to impose the condition.

The court granted an interim interdict to prevent the disciplinary hearing from taking place until the High Court had decided the review case. It held that all the essential requisites for the interdict were present. A clear right of the applicant was involved, he had no other remedy available to protect his rights, he would suffer substantial prejudice if the disciplinary hearing took place before the High Court had determined the validity of the restrictive condition imposed and the balance of convenience was in his favour.

The court also suspended the condition imposed on the applicant by the Practice Control Committee pending the review case in the High Court. The court pointed out that the courts normally will not interfere with decisions assigned by the lawmaker to specialist bodies with technical expertise in the areas concerned. However, in the present case such interference was justified. The applicant himself was an expert in the field in question and the allegations against him to be dealt with in the criminal courts related solely to the type of drugs used by him, whereas the condition imposed related to the nature of the procedures he was to use. In imposing the restrictive condition on the applicant, the respondent had not exercised its powers regularly and in accordance with principles of natural justice. Although the effect of this suspension of the condition would be that the applicant's practising certificate would become unrestricted, the bail conditions imposed on him in connection with a pending criminal case oud still apply.

Cases cited:

Flame Lily Invtm Co (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd & Anor 1980 ZLR 378 (H)

Gideon v Nguma 1973 (2) RLR 197 (G)

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

Metsola v Chrmn, PSC & Anor 1989 (3) ZLR 147 (S)

Gemi v Min of Justice, Transkei 1993 (2) SA 276 (TkG)

Dir of Civil Aviation v Hall 1990 (2) ZLR 354 (S)

Admin, Transvaal & Ors v Zenzile & Ors 1991 (1) SA 21 (A)

Admin, Natal & Anor v Sibiyi & Anor 1992 (4) SA 532 (A)

SMITH J

JC Andersen SC & A Dyke for the applicant

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RY Phillips for the respondent.

Judgment

Smith J: The applicant, who is a registered medical practitioner and practises as an anaesthetist, has made an urgent chamber application seeking an interdict restraining the respondent from convening a meeting of its Disciplinary Committee to adjudicate upon an allegation that he contravened the conditions of his practising certificate, pending the determination of his application in case HC 9158/93. The circumstances of this case are as follows. Last year the applicant applied for the renewal of his practising certificate. In terms of s 39B of the Medical, Dental and Allied Professions Act [*Chapter 224*] (hereinafter referred to as "Chapter 224") a registered medical practitioner cannot practise as such unless he is the holder of a valid practising certificate. By letter dated 27 September 1993 he was advised that at its meeting on 21 September, the Practice Control Committee of the respondent ("PCC") had renewed his practising certificate and that, in the public interest, it had imposed a condition which was that the applicant was restricted from performing any form of spinal anaesthesia, including epidurals and caudals. On 10 November, the applicant performed a spinal anaesthetic. On the same day he wrote to the respondent saying that he objected to the restriction imposed on him in the practising certificate and that he intended to challenge the decision. His legal practitioner also wrote to the respondent on that date pointing out that the PCC had imposed the condition without giving the applicant the opportunity to make representations and asking that the PCC set aside the condition. The legal practitioner said that the applicant had given instructions "some weeks ago" to make representations in relation to the condition placed on his practising certificate but due to pressure of work the instructions had not been attended to earlier. The respondent, by letter dated 23 November, informed the applicant's legal practitioner that the PCC, at its meeting on 16 November, had considered the applicant's appeal for he removal of the condition and had decided that the condition should not be varied.

On 16 December the applicant filed an application, case no. HC 9158/93, seeking an order setting aside the condition imposed on his practising certificate. The respondent opposed the application.

Mr *Andersen* submitted that although the applicant had applied in case no. HC 9158/93 for the review of the decision of the PCC in imposing the restriction in question, he now believed that he had a right of appeal in terms of s 39(1) of Chapter 224. It was common cause that the applicant had not

been invited to make representations before the condition in question was imposed. The applicant had filed affidavits from a number of medical practitioners to the effect that he had performed many spinal anaesthetics skilfully and efficiently without adverse effects and that he was regarded by some as a recognised authority on certain types of spinal anaesthesia. The bail conditions fixed in relation to the applicant did not prohibit him from performing spinal anaesthesia but merely prohibited him from using opiods as an anaesthetic. Mr *Andersen* further submitted that the Disciplinary Committee of the respondent could not rule on the

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allegations against the applicant until the validity of the restriction imposed by the PCC had been determined by the High Court. With regard to the interdict, the balance of convenience favoured the applicant. He would suffer grave prejudice if the Disciplinary Committee held its inquiry before the validity of the restriction was determined, whereas the respondent would suffer no prejudice if the inquiry were postponed. Mr *Andersen* submitted that if the inquiry by the Disciplinary Committee was not to be postponed then the president of the Health Professions Council, Mr Harid, should recuse himself from sitting as chairman of the Disciplinary Committee as he had been a member of the PCC which had imposed the condition which was in issue. He also submitted that Mr Danso, who was a member of the Disciplinary Committee, should also recuse himself as he too had been a member of the PCC. Finally, Mr *Andersen* said that the applicant wanted an order which confirmed that his application in case no. HC 9158/93 was in fact an appeal and had the effect of suspending the condition fixed by the PCC.

Mr *Phillips* said that the applicant had not yet noted an appeal against the decision of the PCC and so the condition imposed by the PCC could not be regarded as being suspended by the application for review. Chapter 244 did not provide for an appeal from a condition imposed by PCC in renewing a practising certificate; the only remedy open to the applicant was by way of review. With regard to the recusal of Messrs Harid and Danso from the Disciplinary Committee, the application should be made at the hearing of the Disciplinary Committee when the members concerned could decide for themselves whether or not they should recuse themselves. With regard to the interdict against the Disciplinary Committee, he conceded that he could not argue that the balance of convenience favoured the applicant. The respondent would suffer no real prejudice if the inquiry were delayed.

In considering an application for an interim interdict the tests to be applied are settled. They have been stated in many cases. In *Flame Lily Investment Co (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378 (H)

SMITH J

at 382H Waddington J set out the three essentials for the issue of an interdict. They are (i) a clear right in the part of the applicant, (ii) actual or reasonably apprehended injury and (iii) no other ordinary remedy by which the applicant can be protected with the same result. The learned judge also referred with approval to the approach followed in *Gideon v Nguma* 1973 (2) RLR 197 (G) and *Eriksen Motors (Welkom) Ltd v Protea Motors & Anor* 1973 (3) SA 685 (A). In the latter case HOLMES JA stated that an interim interdict *pendente lite* is an extraordinary remedy within the discretion of the court and that in exercising its discretion the court -

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

In the present case, there is no doubt that the three basic essential requisites are present. There is no other ordinary remedy by which the applicant can be protected. As far as the balance of convenience is concerned, Mr *Phillips* has very fairly conceded that there would be substantial prejudice to the applicant, as submitted by Mr *Andersen*, if the interdict is withheld.

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The validity of the restriction imposed by the PCC is fundamental to the allegation of improper conduct on the part of the applicant. It is doubtful that the Disciplinary Committee would be able to determine that issue. Even if it attempted to do so, its decision would be subject to the determination of the court on the matter in case no. HC 9158/93. It would, in my view, be unreasonable to subject the applicant to the expense and stress of a disciplinary inquiry knowing that the proceedings would be rendered nugatory if the court were to hold that the restriction was invalid. Accordingly, I am satisfied that it would be proper for an interim interdict to be granted.

That being the case, it is not necessary to decide the question of recusal.

The remaining issue is whether the restriction imposed by the PCC should remain in force and effect or be suspended pending the determination of case no. 9158/93.

It will be for the court which hears that case to decide whether the application is for a review or an appeal. My *prima facie* view, however, is that the applicant does not have a right of appeal against the condition imposed by the PCC. Part III A of Chapter 224, which deals with practising certificates, does not provide for an appeal against a decision of the PCC made in terms of that Part. Section 39(1) of Chapter 224 provides for an appeal to the High Court where the respondent refuses to register a person or any qualification or

particular which he wishes to be registered or the erasure from a register of a person's name or of any qualification or particulars. A right of appeal is also conferred by s 45 in relation to disciplinary proceedings. As the details of a practising certificate are not apparently entered in a register, s 39(1) does not overtly apply and s 45 applies only to findings or penalties imposed under Part IV of Chapter 224. However, it is common cause that in imposing the restriction on the applicant's practising certificate the PCC did not give the applicant an opportunity to make representations before it imposed the restriction. In terms of s 39D(2) the PCC is empowered to impose any condition restricting a practitioner which it considers desirable in the public interest. Part IIIA of Chapter 224 requires the PCC, if it proposes to refuse to issue or renew a practising certificate or to withdraw a certificate, to advise the person concerned of its proposal, stating the reasons, and affording him a reasonable opportunity to make representations - s 39D(4) and s 39E. The PCC is required, in addition, to obtain a report from the Executive Committee on its proposal and must give consideration to the representations made and the report from the Executive Committee. Although the provisions of s 39D(4) do not apply when the PCC issues or renews a practising certificate subject to conditions, it seems to me that it cannot be implied that the Legislature intended to exclude the *audi alteram partem* rule in such circumstances. After all, the PCC could, instead of refusing a practising certificate, impose a condition which had the effect of preventing a practitioner from practising his profession.

In *Metsola v Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S) at 155C-D GUBBAY JA, as he then was, said:

> "Recently the South African Appellate Division has once again expressed preference for the 'substantive right' approach, which holds that when a statute empowers a public official to give a decision which prejudicially affects

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> the property or liberty of an individual, that individual has a right to be heard before any action is taken against him, unless the statute expressly or by necessary implication indicates the contrary. See *Attorney-General, Eastern Cape v Blom & Ors* 1988 (4) SA 645 (A) at 662H; *Moodley & Ors v Minister of Education and Culture, House and Delegates & Anor* 1989 (3) SA 221 (A) at 235. I respectfully agree with this formulation of the audi principle as logically preferable to that which inquires whether the enactment concerned impliedly incorporates the maxim."

The learned JUDGE OF APPEAL then went on to discuss the "legitimate

expectation" test and said that that catch-phrase was no more than a manifestation of the duty to act fairly and was clearly connected with the "right to be heard". In *Gemi v Minister of Justice, Transkei* 1993 (2) SA 276 (TkG) at 288D-E PICKERING AJ expressed himself as follows:

> "Officials entrusted with public power must exercise such power rationally and fairly. In order to act rationally and fairly the decision-maker would of necessity have to apply his mind properly to all relevant aspects and circumstances pertaining to a decision and in order to do this he would in most instances be obliged to afford the person affected by the decision a hearing prior to coming to his decision. Officials are not relieved of this duty except to the extent that a departure from the rules of natural justice is expressly or impliedly sanctioned by the relevant enabling legislation. In the absence of such statutory authorization a departure from the rules of natural justice can only be justified in circumstances where it is necessary to promote some value or end of equal or greater significance than natural justice or, to put it differently, 'where circumstances are so exceptional as to justify such a departure'."

In his application in case HC 9158/93, the applicant alleges that the decision of the respondent in imposing the restriction on his practising certificate is irrational and improper. The chairman of the respondent denies that the decision is irrational and states that the PCC exercised its discretion properly. The practising certificate with the restriction in question was issued on 27 September 1993. The respondent was asked to reconsider the decision by letter dated 11 November and at its meeting the PCC decided that there was no reason to vary the conditions imposed on the practice of the applicant. As stated by PICKERING AJ in *Gemi's* case *supra*, in order to act rationally and fairly the decision-maker must apply his mind properly to all relevant aspects and circumstances and in order to do this he would in most circumstances be obliged to afford the person affected by the decision a hearing **prior to** coming to his decision. That was not done in this case. The PCC reached its decision without affording the applicant an opportunity to make representations.

I accept that a court will not normally interfere in the sphere of practical administration. This principle was affirmed by GUBBAY CJ in *Director of Civil Aviation v Hall* 1990 (2) ZLR 354 (S) at 361E. That case concerned an appeal from an order granted by CHIDYAUSIKU J that the Director of Civil Aviation renew the pilot's licence of Mr Hall. The CHIEF JUSTICE Justice held that that was not the type of case which justified the judge in substituting his own

decision for that of an administrative and specialist body vested by the law-maker with a

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discretion. The CHIEF JUSTICE pointed out that the determination whether Mr Hall met the minimum requirements for a pilot's licence and whether it was necessary to impose further conditions involved specialist and technical knowledge and expertise. That was why it was left to the Director, who is a professional in the field of aviation, to make such a determination. GUBBAY CJ pointed out that the paramount consideration in the grant or renewal of a pilot's licence is to ensure, as far as it is possible to do so, the safety of the pilot and those who accompany him in the aircraft, as well as of persons who happen to be in other aircraft or on the ground.

Ordinarily, I would be very hesitant to interfere in the sphere of jurisdiction of the PCC. However in this case the papers show, and it is not disputed by the respondent, that the applicant is an expert in his field. The allegations against the applicant are based, not on the method used by him to administer anaesthetics or his ability to administer anaesthetics, but on the drugs used by him as an anaesthetist. Thus in the conditions fixed in granting him bail, there is no restriction on him administering anaesthetics. The restrictions relate to the drugs used - he may not use morphine in any case and he may not use lignocaine as an anaesthetic for children.

In *Administrator, Transvaal & Ors v Zenzile & Ors* 1991 (1) SA 21 (A), where the appellants had summarily dismissed the respondents, the court held the dismissals were improper because the *audi alteram partem* principle had not been observed. At p 39A HOEXTER JA said that COETZEE J, the judge in the court *a quo* -

> "was right in holding that the failure of the appellants to apply the *audi* principle constituted a procedural irregularity vitiating the decision summarily dismissing the respondents for alleged misconduct."

The *audi alteram partem* principle was again considered in *Administrator, Natal & Anor v Sibiyi & Anor* 1992 (4) SA 532 (A). At p 536H HOEXTER JA referred to the *Zenile's* case *supra*, where he had held that the procedural impropriety vitiated the decision. Then at p 539C he said:

> "As in the *Zenzile* case, here too, the employer was a public authority whose decision to dismiss involved the exercise of a public power. Such a power has to be exercised regularly and in accordance with the principles of natural justice."

SMITH J

In imposing the restriction in question the PCC, in my opinion, did not exercise its powers regularly and in accordance with the principles of natural justice. The procedural impropriety must therefore vitiate their decision to impose the restriction on the applicant's practising certificate. Accordingly, I consider that it would be only right to suspend the restriction until the application in case no. HC 9158/93 is determined. Although that would mean that the applicant's practising certificate would be unrestricted, the bail conditions are still in force and those conditions impose restriction relating to epidural narcotics - they preclude the applicant from using morphine for any patient or lignocaine for the anaesthesia of children. The consequences to the applicant should he breach any condition of his bail would be likely to be far more serious than any penalty that would be imposed for a breach of the conditions of his practising certificate.

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For the above reasons on 10 January 1994 I issued the following order:

1. Respondent be and is hereby restrained from convening a meeting of its Disciplinary Committee to deal with or adjudicate upon the allegation of improper conduct made against the applicant concerning the contravention of restrictions endorsed on his practising certificate pending the determination of this Honourable Court in case no. HC 9158/93.

2. The restrictions endorsed on the applicant's practising certificate be and are hereby suspended until the proceedings in case no. HC 9158/93 are concluded.

3. The respondent pays the costs of this application.

Winterton, Holmes and Hill, applicant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

JOHNSEN v AGRICULTURAL FINANCE CORPORATION 1994 (1) ZLR 95 (HC)

Editor's Note:(2)

Court **High Court, Harare**

Chidyausiku J

Application for a declaratory order

16 July, 7 December 1993 & 26 January 1994

Flynote

Practice and procedure declaratory order - s 14 of High Court Act 29 of 1981 - circumstances in which not proper to grant declaratory order

Headnote

The High Court's power to grant a declaratory order is contained in s 14 of the High Court Act. Although that provision allows the court to make a declaratory order even where there has been no infringement of existing rights, the courts will exercise the power to grant such an order where there has been no infringement of rights. The courts are there to settle concrete controversies and actual infringement of rights and should only pronounce upon abstract questions or to advise upon differing contentions very sparingly. It is not the function of a court to act as legal adviser to litigants or to act as a consultative body.

In the present case the court decided that a declaratory order should not be granted. The reasons for this decision were that -

(i) the applicant was essentially seeking a legal opinion about a dispute between the

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parties concerning the interpretation of a contract between them;

(ii) the granting of a declaratory order would not bring litigation between the parties to finality; and

(iii) the applicant had an alternative remedy available to him in the form of an interdict to prevent respondent from resorting to extra-judicial methods against the applicant.

CHIDYAUSIKU J

Cases cited:

RK Footwear Mfrs (Pvt) Ltd v Boka Booksales (Pvt) Ltd 1986 (2) ZLR 209 (H)

Bulawayo Bottlers (Pvt) Ltd v Min of Labour & Ors 1988 (2) ZLR 129 (H)

Geldenhuys & Anor v Beathin 1918 AD 426

Ex p Ginsberg 1936 TPD 154

M J Gillespie for the applicants

E Chatikobo for the respondents

Judgment

Chidyausiku J: The applicants in this case are seeking a declaratory order. The relief sought is set out in the draft order which reads as follows:

"1. it is declared that the respondent is not entitled under the agreement of loan of July 1981 with the applicant and similar agreements of loan with other interested parties to recover any amount claimed to be due in respect of an escalation in expense, however caused, of the equipment for the purchase of which the loans were granted.

2. it is declared that the respondent is not entitled to use the threat of withholding of other finance in order to cause the applicant or other interested parties to acknowledge indebtedness to the respondent in any amount claimed by the latter in respect of an escalation in price, howsoever caused, of equipment for the purchase of which the loans as aforesaid were granted."

The facts of the case are these. The applicant is a farmer and makes this application on his own behalf and on behalf of other farmers in similar position to himself. Some of these have filed affidavits in support of this application. He seeks to do this in terms of order 13 of the rules of this court.

In March 1990 the applicant and other farmers were advised through the Karoi Farmers Association that the respondent had received a loan from the World Bank for the benefit of farms wanting to purchase capital equipment and that those farmers who wised to avail themselves of this facility should individually apply to the AFC.

The applicant advised the respondent through its local agent and employee that he wished to purchase a 7-ton truck. He completed an application form and was advised by the respondent

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that the truck he wanted to purchase would be something in excess of $176 000 and this was acceptable to the applicant. The applicant was also advised that two methods of payment were available

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to him. He could either pay 25% of the purchase price in cash and borrow the remaining 75% from the respondent or pay the full purchase price in cash. Should he wish to pay the full purchase price in cash the goods would cost 10% more. This was so because the respondent made its money out of the interest it received on the loans it made. The respondent therefore preferred to make loans and charged 10% extra for cash purchases.

The applicant signed the agreement of loan on 3 July 1991 and paid $44 382, which was 25% of the purchase price. The loan agreement between the two parties shows that the loan was for $133 145. In March 1992 the applicant duly collected the truck.

Subsequent to the delivery of the truck to the applicant the applicant received from the respondent a letter which in part reads as follows:

> "We wish to advise you that we are now in receipt of the final invoicing of the (item) Nissan CPB12 provided to you under the above mentioned loan agreement.
>
> The depreciation of the Zimbabwe dollar against the major currencies increased the CIF value of your item. This resulted in increased customs, duty, rates, tax and local charges payable on your item. Consequently the original cost of your item have escalated resulting in an additional cost of $76 380."

The applicant contends that he is not liable to pay the extra charge and the respondent contends otherwise. The respondent has done nothing to enforce its claim for the excess except to debit the account of the applicant with the respondent. The applicant avers that he is apprehensive that the respondent might refuse to grant him further loans because of his refusal to accept liability for the extra charge. The applicant also avers that he is apprehensive that the respondent might seek in terms of the powers it has in Part 5 of the Agricultural Finance Corporation Act to enter upon his farm and take possession of the truck in question. He now seeks a declaratory order the terms of which are set out above.

Two issues arise. The first issue is whether or not this is a proper case for a declaratory order. The second issue is, if this is a proper case for a declaratory order, whether the applicant and fellow farmers are entitled to the declaratory order sought. The second issue involves what meaning or interpretation is to be placed on the agreement between the parties. I shall

CHIDYAUSIKU J

first deal with the question of whether or not this is a proper case for the granting of a declaratory order.

This court derives its power to grant or make a declaratory order from s 14 of the High Court Act

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29 of 1981. The section reads as follows:

> "The High Court may, in its discretion, at the instance of an interested person inquire into and determine any existing, future or contingent right or obligation notwithstanding that such person cannot claim relief consequential upon such a determination."

The above section confers on this court a discretion to make a declaratory order in an appropriate case. That discretion like any other discretion conferred on this court has to be exercised judicially. Certain principles and guidelines have emerged from certain decided cases which might assist the court in deciding whether to exercise the discretion or not.

The question of whether or not a declaratory order should be made in terms of the above named provision should be examined in two stages. Firstly the applicant must satisfy the court that he is a person interested in an existing, future or contingent right or obligation. If satisfied on that point, the court then decides a further question of whether the case is a proper one for the exercise of the discretion conferred on itself *RK Footwear Manufacturers (Pvt) Ltd v Boka Booksales (Pvt) Ltd* 1986 (2) ZLR 209 (H) and *Bulawayo Bottlers (Pvt) Ltd v Minister of Labour, Manpower Planning and Social Welfare & Ors* 1988 (2) ZLR 129 (H). In the present case I did not understand Mr *Chatikobo* to dispute that the applicant is an interested party. He merely argued that this is not an appropriate case for the exercise of the discretion. On that basis I accept that the first stage of the inquiry has to be answered in favour of the applicant. I now turn to consider the question of whether this is an appropriate case for the court to exercise its discretion and assume jurisdiction to make to decline to make the declaratory order sought.

In my view, this is not a proper case for the court to assume jurisdiction to consider the question of a declaratory order as requested by the applicant for a number of reasons. The fact of the matter in this case is that the parties entered into an agreement. They now differ on what interpretation to place on that agreement. The one party contends that the agreement allows it to add escalation costs to the original price while the other party contends that the agreement does not permit such extra charge. The court is now being asked to advise which of the differing contentions is correct. It is not the function

of this court to act as legal adviser to litigants or to act as a consultative body. In the case of *Geldenhuys & Anor v Beathin* 1918 AD 426 at 441 the role and function of the court was discussed. INNES CJ had this to say in this regard:

> "No doubt there is something to be said in favour of sanctioning the issue of declaratory orders even where there has been no infringement of rights. But on the other hand it would be very difficult to define the limits within which that jurisdiction should be confined, and its unregulated exercise would lead to great uncertainty of practice. **After all, courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions or to advise upon differing contentions however important**" (emphasis added).

Although the learned CHIEF JUSTICE'S remarks were made in the context of common law requirements for a declaratory order his remarks regarding the essential function of the court are valid despite the provisions of s 14 of the High Court Act. The Act alters the common law

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position by merely spelling it out categorically that it is permissible for a court to make a declaratory order even where there has been no infringement of rights, an area where there had been hitherto conflicting decisions under the common law. In my view the courts should very sparingly exercise their jurisdiction to make declaratory orders where there has been no infringement of a right for the reasons referred to by INNES CJ in *Geldenhuys supra*.

In the case of Ex parte *Ginsberg* 1936 TPD 154 the Transvaal Provincial Division had occasion to consider s 102 of the South African Act 46 of 1935, a provision almost identical to s 14 of the Zimbabwean High Court Act. GREENBERG J delivered the unanimous judgment and had the following to say in the course of his judgment at p 156:

> "The common law in South Africa as to declaratory orders was discussed in *Geldenhuys and Neethling v Beathin* 1918 AD 426 by INNES CJ, who said in the course of his judgment, that
>
> > 'Courts of law exist for the settlement of concrete controversies and actual infringements of rights, and not to pronounce upon abstract questions or to advise upon differing contentions, however important.'
>
> This limitations of functions of a court of law continues in force except to the extent to which it has been altered by section 102. In interpreting

CHIDYAUSIKU J

> the section, this limitation, which has been fundamental to our conception of the functions of the court must be borne in mind and must not be held to be altered by the section unless its wording points clearly to such a conclusion. I find nothing in the section which entitled the Court 'to pronounce upon abstract questions or to advise upon differing contentions'. In my opinion the words 'inquire into and determine' in section 102 do not confer separate powers to be exercised independently of each other, but confer the power of inquiring into for the purpose of determining and thereafter determining. The legislature must have been aware of the fact that there is no dearth of advocates and attorneys competent to advise upon legal problems and there is no reason to think that it intended to set up the Courts as consultative or advisory bodies, in competition with he members of these respected professions."

As I said s 102 referred to above is almost identical to s 14 of the High Court Act so the remarks of GREENBERG J apply to our s 14 with equal force.

Another reason why I do not think a declaratory order is an appropriate remedy in this case is that such an order will not bring finality to litigation between the parties over these transactions. Mr *Gillespie* conceded this much. In Ex parte *Ginsberg , supra*, the view was expressed that the court's jurisdiction under s 102 of the South African Act 46 of 1935 was limited to those cases where it can give a binding decision on the parties concerned and the matter becomes *res judicata*. This is not the case here. It is conceded as I said that a declaratory order will not finally dispose litigation rising from this transaction. The respondent may sue the applicant on some other basis despite the existence of a declaratory order in terms of the draft order. This is a factor that I have taken into account in declining to grant a declaratory order.

It was also argued for the appellant that because the respondent has indicated that it might resort to extra-judicial execution against the asset in question in terms of the Agricultural Financial Corporation Act this was a proper case to grant declaratory order in order to prevent the respondent form resorting to this extreme measure. In this regard I am inclined to agree with Mr *Chatikobo's* submission that this is an attempt to get an interdict through the back door.

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If indeed the threat is unlawful, real and imminent then applicant's remedy is to seek an interdict. The existence of this alternative remedy is another factor I have taken into account in deciding that this is not a proper case for a declaratory order.

CHIDYAUSIKU J

In brief I have come to the conclusion that this is not a proper case for assuming jurisdiction to consider whether or not a declaratory order should be granted for the following three reasons:

(a) essentially the applicant is seeking the legal opinion of this court as to which interpretation of the contract between the parties is correct, the applicant's or the respondent's;

(b) the granting of the declaratory order will not bring litigation between the parties to finality;

(c) the existence of an alternative remedy, namely, the applicant can apply for an interdict.

The court having declined to assume jurisdiction to consider the question of the declaratory order, the question of whether the applicant is entitled to such an order on the merits falls away.

In the result the application is dismissed with costs.

Atherstone & Cook, applicant's legal practitioners

Chinamasa, Mudimu & Chinogwenya, respondent's legal practitioners

MAKETO & ANOR v WOOD & ORS 1994 (1) ZLR 102 (HC)

Court **High Court, Harare**

Adam J

Civil trial

19 & 20 July 1993, 26 January 1994

Flynote

Delict - negligence - liability - duty of care - duty owed by professional person to person other than his client - legal practitioner for judgment creditor failing to ensure that Deputy Sheriff informed that judgment debt had been paid and debtor's goods being sold at sale in execution - whether liable to judgment debtor

Damages - delict - plaintiff's goods at Sheriff's sale in execution sold because of defendant's negligence - assessment of value of goods - price realised at auction prima facie the value of the goods, in absence of

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contrary evidence

Legal practitioner - duties - whether duty of care owed to party other than practitioner's own client - requirement to use proper care in carrying out client's instructions and to ensure that third parties not harmed by his actions

Headnote

The plaintiffs, who were husband and wife, were judgment debtors in an action brought against them by the third defendant, Medical Investment (Pvt) Ltd The first defendant, a partner in Atherstone and Cook, the firm cited as the second defendant, acted on behalf of the third defendant. The fourth defendant was the Deputy Sheriff.

As a result of the plaintiffs' failure to pay the judgment debt of $2 162.83, a writ of execution was issued on 12 November 1988. On 16 November 1988 the Deputy Sheriff attached certain household goods belonging to the plaintiffs. The plaintiffs, in consequence, paid $700 on 23 December.

On 12 January 1989 the attached goods were removed by a firm of auctioneers. On 23 and 24 January, $620 was paid and on 26 January $842.18 was paid. These payments virtually extinguished the debt. The plaintiff went to the first defendant on the morning of 27 January, the date on which the auction was to take place, to get from him a letter addressed to the Deputy Sheriff, authorising the release of the goods, subject to payment of the auctioneer's fees. Until the plaintiff went to ask for a letter of release, no notification had been given by any of the first three defendants to the Deputy Sheriff that any payment at all had been made by the plaintiffs. The letter of release was not issued in time to prevent the sale by auction of the attached goods. The goods realised $2 015, from which the auctioneer and Deputy Sheriff deducted their fees; the balance of $1 623.79 was sent by the second defendant to the second plaintiff's legal practitioners.

The plaintiffs claimed damages, on the grounds that -

(1) the first and second defendants negligently failed to notify the Deputy Sheriff of the payment of the debt by the plaintiffs;

(2) the Deputy Sheriff had acted contrary to rule 339 of the High Court of Zimbabwe Rules, in that the goods had been sold less than 12 days after being seized;

(3) the first and second defendants were agents of the third defendant.

The sum claimed was $60 950, the alleged cost of replacing the furniture sold.

The first and second defendants denied liability, arguing that they owed the plaintiffs no duty of care. Legal practitioners for creditors would be put in a most invidious position if they were to become personally liable when a debtor, at the last minute, pays in order to avoid a sale in execution and the debtor takes no steps to advise the auctioneer of the payment or the legal practitioner of the date and time of the sale, so that it can be prevented. Legal practitioners owe a duty of care to their clients, not to persons who are not their clients. The legal practitioner for a

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judgment creditor is not the guardian of the judgment debtor's interests; what he does for his client may even be hostile or injurious to the judgment debtor's interests. Even if they were liable, however, no damages had been suffered or proved. The value of the goods was what was realised at the sale, not what it would have cost the plaintiffs to replace the items with new items. The maximum amount of any loss would have been the auctioneer's commission of $201,50.

The Deputy Sheriff pleaded prescription in terms of rule 456, the summons having been served on him well over six months after the cause of action arose.

Held, that there is no longer any rule that a legal practitioner who is negligent

in his professional work can be liable only to his client. He may be liable to his client and to others, as long as all the elements of Aquilian liability are satisfied. The rules of court required that the Deputy Sheriff attach only so much property as he may deem sufficient to satisfy the judgment debt and that a sale in execution must be stopped when sufficient money to satisfy the judgment debt has been paid. This imposes a duty on the creditor or his legal practitioner, as his agent, to inform the Deputy Sheriff if payment is made to satisfy the debt, so that the sale can be stopped. Provided there is sufficient time to do this, no intolerable burden is imposed on legal practitioners. In this case, payments were made on various occasions before the sale in execution and it could not be claimed that the defendants had no time to communicate with the Deputy Sheriff.

Held, further, that the third defendant (the judgment creditor) was liable on the grounds that there was sufficient relationship of proximity that, in the reasonable contemplation of the third defendant, carelessness on its own part or on the part of its agents might be likely to cause damage to the plaintiffs. The legal practitioner who is instructed to carry out a transaction that will affect a third party owes a duty of care to that third party, as being a person who is likely to be injured by his acts or omissions.

Held, further, that the price realised at the auction was *prima facie* evidence of the value of the goods. There was little reliable evidence to suggest that the true value was higher and accordingly the loss to the plaintiffs had to be assessed on the basis of the sale price. Since the plaintiffs received $1 623,79 out of the sale price of $2 015, they were entitled to judgment for the balance.

Held, further, that the claim against the Deputy Sheriff was prescribed and had to be dismissed.

Cases cited:

Ross v Caunters (a firm) [1979] 3 All ER 580 (Ch)

Philip Robinson Motors (Pty) Ltd v N M Dada (Pty) Ltd 1975 (2) SA 420 (A)

Cape Town Municipality v Paine 1923 AD 207

Halliwell v Johannesburg Municipality 1912 AD 659

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Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd 1972 (1) RLR 56 (G)

Joffe & Co Ltd v Hoskins & Anor 1941 AD 431

Herschel v Mrupe 1954 (3) SA 464 (A)

Union Govt v Ocean Accident & Guarantee Corp Ltd 1956 (1) SA 577 (A)

ADAM J

Peri-Urban Areas Health Bd v Munarin 1965 (3) SA 367 (A)

Anns & Ors v London Borough of Merton [1977] 2 All ER 492 (HL)

Junior Book Ltd v Veitchi Co Ltd [1982] 3 All ER 201 (HL)

Ultramares Corp v George A Touche (1931) 74 ALR 1139

Lillicrap, Wassenaar & Partners v Pilkington Bros (SA) (Pty) Ltd 1985 (1) SA 475 (A)

Mouton v Die Mynwerkersunie 1977 (1) SA 119 (A)

Potchefstroom Dairies & Industries Co Ltd v Standard Milk Supply Co 1913 TPD 506

Colonial Mutual Life Assurance Soc Ltd v Macdonald 1931 AD 412

JEB Fasteners Ltd v Marks, Bloom & Co (a firm) [1981] 3 All ER 289 (QBD)

Morris v Salberg (1889) 22 QBD 614 (CA)

Steenkamp v Kyd (1898) 15 SC 221

McKenzie v van der Merwe 1917 AD 41

Erasmus v Davis 1969 (2) SA 1 (A)

Todd v Admin, Tvl 1972 (2) SA 874 (A)

Schulz v Throw 1929 EDL 94

In re *Est Late Margaret Young* 1942 NPD 276

Esso Standard SA (Pty) Ltd v Katz 1981 (1) SA 964 (A)

Sandler v Wholesale Coal Supplies Ltd 1941 AD 194

Plaintiffs in person

AP de Bourbon SC for the defendants

Judgment

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Adam J: The plaintiffs in their declaration filed on 20 January 1992 allege that the first and second defendants as agents for the third defendant negligently, and maliciously with intent, caused to be sold, plaintiffs' household property listed in the Schedule to their declaration. They allege that as a result of negligence the first and second defendants failed to instruct the fourth defendant to issue stay of execution on the plaintiff's household goods and as a result the household goods were sold by Bill Hyland Auctioneers (Pvt) Ltd They also allege that the first and second defendants were negligent, in that one or any one of them, with full knowledge of the fact that the plaintiffs had paid the full amount of the judgment in favour of the third defendant, "deliberately, negligently, maliciously, with full intent, failed to advise" the fourth defendant to stop the sale by Bill Hyland Auctioneers (Pvt) Ltd They further allege that the fourth defendant acted against rule 339 of the High Court of Zimbabwe Rules 1971 in that the goods seized on January 16 1989 were auctioned on January 27 1989, less than 12 days after seizure. They plaintiffs aver that -

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(i) they paid to the third defendant the sum of $2 162,83 plus costs of $18,12

(ii) the plaintiffs also lost their household property sold by the auctioneers to satisfy the same debt; and

(iii) despite their demand, all the defendants have refused to return the household goods or to pay the amount of compensation.

The plaintiffs' amended their declaration and pray for judgment against all the defendants jointly, the one paying and the others being absolved, as follows : "(1) return of all property listed on an attached Schedule failing which payment of $60 950, (2) costs of suit".

In the defendants' plea, they deny that the second defendant is a *persona* in law and on that basis deny that the plaintiffs are entitled to judgment against the second defendant. Save for admitting that on 29 January 1989 household goods were sold in execution by the fourth defendant through the agency of Bill Hyland Auctioneers (Pvt) Ltd, each and every other allegation in the plaintiffs' declaration is denied. The defendants also aver that -

(i) the plaintiffs made the final payment outstanding upon the judgment on 27 January 1989 after the sale in execution had taken place;

(ii) the plaintiffs had at no stage advised the first and second defendants that the sale in execution had been scheduled for 27 January 1989;

(iii) immediately after receipt of the final payment, the first and second defendants advised the fourth defendant that payment had been made and authorised the release of the goods, but such letter reached the fourth defendant after the sale had taken place.

Otherwise each and every allegation of the plaintiffs' declaration is denied. They aver that all the payments received from the sale were paid to the plaintiffs on or about 7 February 1989, which

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payment was accepted by the plaintiffs. They aver that the goods were attached on 12 November 1988 and accordingly deny that the goods were auctioned less than 12 days after seizure. They aver that the sale was lawful and deny that the plaintiffs are entitled to an order for the return of the property listed in the Schedule to their declaration, as the plaintiffs well knew that such goods were sold in a judicial sale. They aver that such sale cannot be rescinded at this stage. The defendants put the plaintiffs to proof of joint ownership of the listed property and dispute the values ascribed in the schedule. In the premises, the defendants deny the plaintiffs' claim set out in their declaration. Further, in any event, they aver that the sole, alternatively the proximate, cause of any loss suffered by the plaintiffs ws the failure of the second plaintiff to pay the judgment debt to the third defendant on due date, and such loss was not caused by or contributed to by any act or omission on the part of any of the defendants. The fourth defendant avers that, in any event, any claim against

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him has prescribed. In terms of rule 456 of the High Court of Zimbabwe Rules 1971 any claim against him has to be brought within 6 months of the cause of action arising. The fourth defendant avers that the cause of action arose on 27 January 1989. The defendants pray that the plaintiffs' claim be dismissed with costs.

[The learned judge then set out the gist of the plaintiffs' replication.]

At the trial the first plaintiff in his evidence agreed that they were to pay $2 162,83 as a result of the taxed costs in case no. HC 4059/87. He accepted that the writ of execution was effected on 12 November 1989. He testified that he phoned in the morning of 27 January 1989 and was told by the first defendant that he could come and collect the letter. He went to the offices of the second defendant after 10 a.m. on that date. He was given a letter addressed to the Deputy Sheriff stating that the debt had been paid in full so Bill Hyland Auctioneers (Pvt) Ltd could release the goods. He took the letter to the Deputy Sheriff, who sent him to Bill Hyland Auctioneers (Pvt) Ltd, where he found out that the household goods had already been sold. From the auctioneers' premises he telephoned the first defendant and inquired from him what he should do. The first defendant said he did not know, but told him to leave it till Monday as this was already Friday. The first plaintiff went from the auctioneers to his legal practitioners. His legal practitioners wrote to the second defendant on 3 February 1989; the first defendant replied on 7 February 1989. He testified that by 23 January 1989 they had about $600 left to pay. This meant they had paid close to two-thirds, so they expected the first defendant would tell the fourth defendant not to carry out the sale. By 26 January 1989 he had paid to his legal practitioners $842,18, making a total of $2 162,18. He was aware that by 27 January 1989 a further $18,77 had been paid to the second defendants. In cross-examination, he admitted that he had been a judge's clerk for 12 years and was familiar with the procedure in a civil case. He agreed that the writ of execution against movable property, which is at p 2 of the defendants' bundle of documents, was issued on 16 September 1988 and showed the sum to be realised from the attached movable property was $2 162,83 excluding all other costs and charges of the defendants hereafter to be taxed and all the costs incurred by the Sheriff He agreed that on 31 October 1988 their legal practitioners were informed by the second defendant, in the letter on p

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5 in the defendants' bundle of documents, that unless $2 162,83 was paid a writ of execution would be issued. This was done on 16 September 1988 but the writ was not served on the second plaintiff. The plaintiffs' legal practitioners were advised that if that amount was not paid by the end of the week the Deputy Sheriff would be instructed to proceed with

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the attachment of their property. He accepted that on 5 January 1989 their legal practitioners were advised that on 23 December 1988 the second defendants had received payment of $700, but as this was less than a third of the total amount due they had not requested the Sheriff to refrain from removing the furniture. He was shown a letter of 23 January 1989 from their legal practitioners to the second defendant which stated that $620 was being paid and that the second plaintiff was working flat out to raise the balance within the course of the week. The letter requested the second defendant to kindly consider releasing the attached goods. He testified that he gave their legal practitioners $842,18 on 26 January 1989 in the morning. This was paid to the second defendant on the same date. He testified that he first saw the advertisement of 20 January 1989 in *The Herald* during that week. He was asked whether, during the period of January 1989 until January 1992, the plaintiffs bought replacement furniture. He replied that they had not but that they were given furniture by friends.

The plaintiffs next called Mr B Sibanda, employed at Radio Ltd He said that he had been in the furniture business for fourteen and half years. He said that the prices for furniture were not the same now as they were 2 or 3 years ago. He indicated that on the average that in 1989 the prices for the same new items were about 35% less than presently. He gave the following prices presently for new items : 3 piece Barcelona lounge suite - $16 112; 8 piece Aristocrat dining-room suite - $7 360; Capri fridge - $3 349; TRTCS Hi Fi - $1 521; Huntington coffee table- $1 330; 2 flame carpets - $7 400; paraffin heater $2 300. The total was $39 372.

The second plaintiff testified that when the furniture was removed by the auctioneers it was ripped. She said that they did not want new furniture but their own old furniture. She said the furniture was bought in South Africa and they brought it when they came here in 1983.

In his evidence the first defendant stated that he started legal practice in 1961. He handled the claim in case no. HC 4059/87, where the taxed costs were $2 162,83. On failure of payment by the second defendant on the 16 September 1988 the writ of execution against movable property was issued. The writ was not sent to the Deputy Sheriff, as a result of a letter dated 16 September 1988 from the second plaintiff's legal practitioners. On 25 November 1988 he wrote to the second plaintiff's legal practitioners, referring to a message which said that payment would be made by 23 November 1988. He advised that unless they received $2 162,83 (plus $18,12) by 28 November 1988, they would instruct the Sheriff to uplift the attached property and sell the same. On

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7 December 1988 he gave the second plaintiff until the following Monday to make the payment,

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otherwise the Sheriff would be instructed to sell. On 23 December 1988 he received $700. On 5 January 1989 he wrote to the second plaintiff's legal practitioners, informing them that -

(i) property had been attached;

(ii) not having received payment by the end of November 1988 the Deputy Sheriff was instructed to remove that property after the Christmas break;

(iii) they had on 23 December 1988 received $700, but as this was less than a third of the amount required they had not requested the Sheriff to refrain from removing the furniture.

He said that he did not peruse the newspapers to ascertain when sales in execution were held. Legal practitioners found this out from the judgment debtor and the Deputy Sheriff. Payment to the firm was handled by the cashier. He would know about these payments when his secretary brought it to his attention. He referred to the 23 January 1989 letter from the second plaintiff's legal practitioners (which enclosed $620 and requested the release of the attached goods as payment so far was in excess of a third). He said that $600 was received on 23 January 1988 and $20 on 24 January 1988 and that he did not accede to the request. He testified that the normal practice was that a sale in execution was conducted 30 days after the attached property was removed. He agreed that the first plaintiff came to see him after 10 a.m. on 27 January 1989 and that he was given the letter of that date to the Deputy Sheriff. He stated that the Deputy Sheriff's note of 1 February 1989, which informed him that the sale in execution had already taken place, was received by him on 3 February 1989. The sum of $1 623,79 was accounted to him by the Deputy Sheriff as the net proceeds. The Deputy Sheriff advised that "the attached furniture was poorish - hence low price". He referred to the credit note of 27 January 1989 from Bill Hyland Auctioneers (Pvt) Ltd to the Deputy Sheriff. He said that he had no difficulty in the plaintiffs being compensated in the amount shown there. He agreed that the expenses for advertising for $42,50 and cartage of $102,50 were legitimate. It was put to him that the plaintiffs had alleged in the pleadings that he had deliberately sold their attached property and he replied that this distressed him and that he was saddened by the note of 1 February 1989 from the Deputy Sheriff. He expected that the plaintiffs' legal practitioners would let him know about the auction sale. When the first plaintiff came to see him on 27 January 1989, the first plaintiff was given the letter to the Deputy Sheriff. He said that he was not in a position to recover the attached property that was sold. In cross-examination, he stated that he expected the plaintiffs to tell him of the sale in execution. He agreed that he knew that the furniture had been collected at

his instructions. He was asked whether the plaintiffs' legal practitioners had written to them on 3 February 1989 about the attached goods and whether he had tried to locate them. He replied that he had not done so, as persons who buy at a sale in execution get good title. He was asked if it was his fault that he had left it rather late with their letter of 27 January 1989 to the Deputy Sheriff. He replied that it was not. Asked why he had not contacted the Deputy Sheriff and the auctioneers, he replied that had he been informed about the auction sale he would have done

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so. He had not spoken to the auctioneers on 27 January 1989 and did not recollect the first plaintiff's telephone call from the auctioneers' place on that date. He testified that immediately after receipt of the final payment he wrote the letter on 27 January 1989 to the Deputy Sheriff. He agreed that he had informed the plaintiffs' legal practitioners that it was a lawful sale at the time the attached goods were sold but if he had known about the date of the sale he would have stopped it. Asked if the attached goods were sold by mistake, he replied that it was sold because he was not advised of the date of the auction sale. Had he been told he would have stopped it in spite of the fact that all the amount had not been paid. He did not know that the plaintiffs were making late payments. He accepted the Deputy Sheriff's description that the furniture was in poor condition. He had not seen the attached furniture. In answer to a question by the second plaintiff as to why the attached goods were sold, he replied that it was because the Deputy Sheriff was not advised in time that most of the amount was paid.

In his address, the first plaintiff, on behalf of the plaintiffs, argued that in terms of rule 327 of the High Court of Zimbabwe Rules 1971 the writ of execution had to be withdrawn once payment was made and that in terms of rule 340, once sufficient money was paid to extinguish the debt, they were entitled to stop the sale. He said that the goods were removed on 16 January 1989 and sold on 27 January 1989. In terms of rule 339 eight days were required. He argued that since the Deputy Sheriff was instructed in terms of rule 337(b) to remove the goods, the first defendant could not state that he knew nothing about the goods being in the custody of the auctioneers. He submitted that as the defendants admit that the plaintiffs had on 26 January 1989 paid the full amount which was owed to the third defendant, they logically expected the writ of execution and the instructions to sell to be withdrawn. He argued that, as far as the collection of the debt was concerned, the first and second defendants were agents of he third defendant and that the plaintiffs fulfilled their obligations by making payment on 26 January 1989 to the third defendant's legal practitioners. He submitted that the first and second defendants, as agents of the third defendant, were negligent in

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that each or one of them caused attached goods belonging to the plaintiffs to be sold by the auctioneers and that either or each of them failed to inform the fourth defendant that payment had been made to satisfy the debt in the writ of execution. He argued that the sale in execution was illegal and unlawful, as it was conducted without the plaintiffs' instructions as there was no basis for the fourth defendant to hold on to the attached property, let alone sell the same.

In his address, Mr *de Bourbon* accepted that the first and second defendants were acting as agents for the third defendant but submitted that the first and second defendants did not owe any form of duty of care to the plaintiffs: *Ross* v *Caunters (a firm)* [1979] 3 All ER 580 (Ch) at 599. He emphasised that there was no haste in the process of execution, as 152 days passed from the letter of demand of payment on 29 August 1988 until the sale and 141 days passed from the letter of demand until the removal of the attached goods. He argued that legal practitioners would be put in a most invidious position if they are to become personally liable when a debtor at the last moment pays the debt in order to prevent the sale of execution and the debtor does not take any positive steps to advise the auctioneer of the payment or the legal

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practitioners of the date and times of the sale in execution so the legal practitioners can prevent it. He submitted that as a matter of policy no duty can be owed by such legal practitioners to a debtor. The greater the burden on such legal practitioners, and the greater the risk of personal liability, the less effective becomes the process of execution to enforce court orders. He argued that it was unrealistic to require legal practitioners who have directed the Deputy Sheriff to remove goods to immediately advise the Deputy Sheriff of a payment (like the $700 on 23 December 1988) as in all probability, the Deputy Sheriff would still remove the exact same amount of property in order to satisfy the balance of the debt. Thus no breach of any duty occurred, or put differently, no breach was proved by the plaintiffs on account of the first and second defendants failing to advise the Deputy Sheriff of the payment on 23 December 1988. He submitted that the removal of the goods on 16 January 1989 was lawful and the defendants did not cause any loss to the plaintiffs by not advising the Deputy Sheriff of the payment of $700 before the removal. He argued that the law, as a matter of policy, will non-composer a duty on a creditor's legal practitioners -

(a) to acquaint themselves with the date of the sale of execution;

(b) to ensure that the Deputy Sheriff is advised of each payment, no matter how small; and

(c) to take steps to ensure that arrangements are made to cancel the sale once payment in full has been made.

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Any of these duties would impose an intolerable interference not only in the process of execution but upon the practice of legal practitioners. He accepted that the auction sale could have been stopped by the first and second defendants advising the Deputy Sheriff of the fact of full payment, although they were ignorant of the fact that the sale had been scheduled for 10 a.m. on 27 January 1989. In these circumstances, he submitted that the plaintiffs have not proved any breach of duty by the first and second defendants towards the plaintiffs. Sight cannot be lost of the fact that the plaintiffs were at that time being legally represented. The question can be asked whether the plaintiffs' legal practitioners had any obligation towards them to ensure no auction sale took place, as their legal practitioners were making the payments and knew when the auction sale was taking place. He stated that surely the duty existed as between the plaintiffs and their own legal practitioners, not between the plaintiffs and the third defendant's legal practitioners. As to damages, he submits that the approach in *Philip Robinson Motors (Pty) Ltd v NM Dada (Pty) Ltd* 1975 (2) SA 420 (A) at 428-429 should be applied. As the auction sale, the attachment and the removal of the goods were lawful, the plaintiffs would have been obliged in any event to have paid commissions and charges incurred by the auctioneers in removing the goods, as well as those incurred by the Deputy Sheriff including his commission in terms of the Fourth Schedule of the High Court of Zimbabwe Rules 1971. He submitted that, even if there was any form of liability, no damages have been suffered and certainly none have been proved. In the alternative, he argues the maximum loss suffered by the plaintiffs is $201,50 as auctioneer's commission. He also submits that the first plaintiff's claim must be

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dismissed, since the first plaintiff has led no evidence of joint ownership.

It is not disputed that, in terms of rule 335 of the High Court of Zimbabwe Rules 1971, the Sheriff or Deputy Sheriff, upon receipt of a writ of execution against movable property, must go and demand from the judgment debtor satisfaction of the writ or else require that so much movable property be pointed out as the Sheriff or Deputy Sheriff may deem sufficient to satisfy the writ and the Sheriff or Deputy Sheriff shall make an inventory and valuation of such movable property. The writ of attachment has to be served and the goods so inventoried shall become and be judicially attached and the Sheriff or the Deputy Sheriffs shall deliver or leave at the premises a copy of the inventory and notice of attachment for the judgment debtor. In terms of rule 337, where the Sheriff or Deputy Sheriff is instructed by the judgment creditor to remove attached goods, he must do so within 48 hours after attachment. In the meantime he must leave the attached goods in the charge and custody of some person for him. In terms ovule 338, unless the parties

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agree to the contrary, attached movable property must be sold publicly and for ready money by the Sheriff or Deputy Sheriff to the highest bidder. The Sheriff or Deputy Sheriff must publish the sale in a newspaper. Rule 339 requires that the appointed day for the sale must not be less than 12 days after seizure or attachment, unless perishable items are involved. Rule 340 provides that an execution sale must be stopped as soon as sufficient money has been raised to satisfy the writ of execution and the costs of the sale. Rule 456 requires that any action against the Sheriff or Deputy Sheriff for anything done or omitted to be done in the execution of his office must be commenced within 6 months after the cause of action has arisen. Rule 457 lays down the charges to be paid for the execution of process of this court by the Deputy Sheriff in terms of the Fourth Schedule.

It is clear that, because of rule 340, the Deputy Sheriff and the auctioneer can only sell so much of the attached goods as will satisfy the writ of execution and the costs of the sale. It therefore follows that, for the sale in execution to be stopped, the execution debtor is obliged, once payment towards the debt is made, to give the execution creditor enough time to communicate with the Deputy Sheriff (or the auctioneer). What constitutes sufficient time must depend upon the circumstances of each case. However, if the execution creditor has been given adequate time either intentionally (*dolus*) or negligently (*culpa*) fails to communicate with the Deputy Sheriff (or the auctioneer) that the debt has been paid and the execution sale goes ahead, the execution creditor will be liable in delict. Similarly, if the execution debtor makes part payment towards the debt and if the execution creditor has been given adequate time and either due to *dolus* or *culpa* fails to instruct the Deputy Sheriff and the auctioneer tat only sufficient quantity of the execution debtor's attached goods must be sold to satisfy the outstanding amount of the debt, he will also be liable under the extended *lex Aquilia: Cape Town Municipality v Paine* 1935 AD 207.

In *Halliwell v Johannesburg Municipality* 1912 AD 659 at 672 INNES CJ indicated that -

> "...where in consequence of some positive act, a duty is created to do some other act or exercise some special

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care so as to avoid injuries to others, then the person concerned is, under Roman-Dutch law liable for damages caused to those whom he owes such duty by an omission to discharge it."

In *Cape Town Municipality v Paine supra* (followed in *Rhostar* (Pvt) *Ltd* v

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Netherlands Bank of Rhodesia Ltd 1972 (1) RLR 56 (G) at 74) the Municipality leased a sports ground with a groundstand to the YMCA. A spectator at an event was injured when he stepped on the grandstand. There was no contractual privity between the municipality and the spectator. INNES CJ said at 216-217:

"It has repeatedly been laid down in this court that accountability for unintentional injury depends upon *culpa* - the failure to observe that degree of care which a reasonable man would have observed. I use the term reasonable man to denote the *diligens paterfamilias* of Roman law - the average prudent person. Every man has a right not to be injured in his person or property by the negligence of another, and that involves a duty on each to exercise due and reasonable care. The question whether, in any given situation, a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon the consideration of all the circumstances. Once it ...would have been foreseen and guarded against by the *diligens paterfamilias*, the duty to take care is established...But as pointed out in *Transvaal & Rhodesian Estates Ltd v Golding and Farmer v Robinson GM Co Ltd* 1917 AD 18 and 501, there is an advantage at adhering to the general principle of the Aquilian law and in determining the existence or non-existence of *culpa* by applying the test of a reasonable man's judgment to the facts of each case."

Later CENTLIVRES JA (as he then was), when referring to *Paine's* case, in *Joffe & Co v Hoskins & Anor* 1941 AD 431 at 451 pointed out:

"The word 'likelihood' which is used ...is, it seems to me, not used in the ordinary dictionary sense of a possibility of harm to another against the happening of which a reasonable man would take precautions."

Also, SCHREINER JA in *Herschel v Mrupe* 1954 (3) SA 464 (A) at 477 remarked:

"The general principle stated in *Paine's* case will always be an authoritative guide to the proper decision of cases in the fields to which it was intended to apply. It may be of great assistance also in other fields. But it must not be used, merely because verbally it is wide enough, to provide a universal major premise from which results, possibly unsatisfactory ones, may be deduced which were not in the contemplation of those who stated the principle."

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In explaining the requisite of duty of care SCHREINER JA in *Union Government v Ocean Accident & Guarantee Corporation Ltd* 1956 (1) SA 577 (A) at 584-585 said:

"Although it is true that our law recognizes that in applying the *Lex Aquilia* elasticity is a valuable factor, it is equally true that growth must be controlled, not only in the interests of the systematic development of the law but also in the interests of practical convenience...it is usual to say that, to say that, to succeed in an action for damages for negligence, the plaintiff must show that the defendant owed him a duty of care and that the damage suffered was not too remote. Without venturing unnecessarily near to the problem of whether remoteness rests upon foreseeability or upon directness, one must recognize some relation between remoteness and the duty of care. According to ordinary usage, the former deals with the extent of the defendants liability to the plaintiff, whoever he may be, the latter with the persons who are entitled to sue the defendant. The expression 'duty of care' has sometimes been criticized as introducing an unnecessary complication into the law of negligence, but

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apart from the fact that it is endorsed by considerable authority in this court, it is so convenient a way of saying that it is the plaintiff himself and no other, whose right must have been invaded by the careless defendant, that the complication seems rather to be introduced by the effort to avoid its use. The duty of care is in our case law rested upon foreseeability, and this gives rise to a measure of artificiality. But this is really unavoidable, for, if there is to be control over the range of persons who may sue, the test must be that of the reasonable man; what he would have foreseen and what action he would have taken...

The enquiry whether in any particular case there is a duty of care commonly involves no difficulty at all; the answer is usually covered by authority or is obvious...Once one goes beyond physical proximity and considers the possibilities that may arise out of the relationships, contractual or other, between the physically injured person and other persons who may suffer indirectly, though materially, through his incapacitation, one is immediately met with the prospects of an unmanageable situation."

HOLMES JA in *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) at 373 said:

"Negligence is the breach of a duty of care. In general, the law allows me

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to mind my own business. Thus if I happen to see someone else's child about to drown in a pool, ordinarily I do not owe a legal duty to anyone to try and save it. But sometimes the law requires me to be my brother's keeper...I owe him such a duty if a *diligens paterfamilias*, that notional epitome of reasonable prudence, in the position in which I am in, would

(a) foresee the possibility of harm occurring to him; and

(b) take steps to guard against its occurrence.

Foreseeability of harm to a person, whether he be a specific individual or one of a category, is usually not a difficult question, but when ought I to guard against it? It depends upon the circumstances in each particular case."

In further elaboration on the concept of duty of care LORD WILBERFORCE in *Anns & Ors v London Borough of Merton* [1977] 2 All ER 492 (HL) at 498 observed:

"Throughout the trilogy of cases in this House, *Donoghue v Stevenson* [1932] All ER Rep 1, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 and *Home Office v Dorset Yatch Co Ltd* [1970] 2 All 294, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. Firstly, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damages there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative or reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise."

Later, in *Junior Book Ltd v Veitchi Co Ltd* [1982] 3 All ER 201 (HL), the sub-contractors laid a floor for a factory that was being built for the plaintiffs by a building company. There was no privity between the sub-contractors and the plaintiffs. The House of Lords, after applying the two tests of LORD WILBERFORCE in *Anns*' case, held that where the relationship between the parties was sufficiently close, the scope of the duty of care in tort or delict owed by a person doing work was not limited to a duty to avoid causing

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foreseeable harm to persons or property other than the subject-matter of the work by negligent acts or omissions, but extended to a duty to avoid causing pure economic loss consequential on defects in the work and to avoid defects in the work itself. On the plaintiffs' averments being correct, they disclosed a sufficient degree of proximity to give rise to a duty of care and disclosed nothing to restrict that duty. The plaintiffs were therefore entitled to recover their financial loss for repairing the floor but they could only recover for the less profitable operation of their business due to heavy cost of maintenance of the floor. If they relaid the floor in order to mitigate their loss, the cost of such work would be the measure of the sub-contractor's liability. LORD ROSKILL, referring to judicial limitation on liability founded upon the "floodgates" argument, responded that the history of the development of law in the last 50 years showed the fears aroused by such argument had been unfounded. This "floodgates" argument was described by CARDOZO J in the New York Court of Appeals in *Ultramares Corporation v George A Touche* (1931) 74 ALR 1139 at 1145, when considering the liability of accountants to third parties, as follows:

> "If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences."

When considering the issue whether the breach of a contractual duty to perform professional work with due diligence was *per se* a wrongful act for purposes of Aquilian liability (with the corollary that, if the breach were accompanied by *culpa* damages could be claimed *ex delicto*), it was held, in *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A), on policy grounds that it was not desirable to extend the Aquilian action to cover such a situation. GROSSKOPF AJA said at 496:

> "...our law also acknowledges that the same facts may give rise to a claim for damages *ex delicto* as well as *ex contractu*, and allows the plaintiff to choose which he wishes to pursue ...
>
> It is trite law that, to succeed in such a claim, a plaintiff must allege and prove that the defendant has been guilty of conduct which is both wrongful and culpable, and which caused patrimonial damage to the plaintiff...

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> The element of wrongfulness in the requirements for delictual liability is sometimes overlooked, because most delictual actions arise from acts which are, *prima facie*, clearly wrongful, such as causing of damage to property or injury to the person...
>
> It is clear that in our law Aquilian liability has long outgrown its earlier limitation to damages arising from physical or personal injury. Thus in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) this court held that Aquilian liability could in principle arise from negligent misstatements which caused pure financial loss, i.e. loss which was caused without the interposition of a physical lesion or injury to a person or corporeal property...
>
> And at 835 the court found that, in the circumstances of that case, the defendant was not under a legal duty to exercise care in making the statement which it did. In so doing, this court applied what JANSEN JA (in *Marais v*

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Richard 1981 (1) SA 1157 (A) at 1168C-E) called the 'algemene redelikheidsmaatstat' (general criteria of reasonableness) in determining whether an act or omission is to be regarded as wrongful for purposes of delictual liability...This criterion of reasonableness involves policy consideration, and *in Administrateur, Natal v Trust Bank van Afrika Bpk* (*, supra*, at 833-4) RUMPFF CJ quoted the following passage from Fleming *Law of Torts* as being relevant to our law:

> 'In short, recognition of a duty of care is the outcome of a value judgment that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in in the light of the constant shifts and changes in community attitudes.'

In applying the test of reasonableness to the facts of the present case... is that the respondent does not contend that the appellant would have been under a duty to the respondent to exercise diligence if no contract had been concluded requiring it to perform professional services. In this respect the present case differs from *van Wyk v Lewis* 1924 AD 438...Although there was a contract between the parties in that case, Dr Lewis would have been liable to his patient for professional negligence even in

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the absence of a contract between the parties, eg if he had operated on a person found unconscious in the streets or if he had contracted with a third person to perform an operation on the patient. The wrongfulness of his conduct would have arisen (at least *prima facie*) from his infringement of the patient's bodily integrity; and if then other elements of the *actio legis Aquilia* had been present (more particularly *culpa* and resultant damage) an action by the patient would have been competent. The only infringement f which the respondent complains is the infringement of the appellant's contractual duty to perform specific professional work with due diligence; and the damages which the respondent claims, are those which would place it in the position it would have occupied if the contract had been properly performed. In determining the present appeal we accordingly have to decide whether the infringement of this duty is a wrongful act for purposes of Aquilian liability...

> 'The same conduct may constitute both a breach of contract and a delict. This is the case where the conduct of the defendant constitutes an infringement of the plaintiff's rights *ex contractu* and a right which he had independently of the contract.'

...

Moreover, the Aquilian action does not fit comfortably in a contractual setting like the present...This does not of course mean that the law may not impose additional obligations by way of *naturalia* arising by implication of law, or, as I have indicated above, those arising *ex delicto* independently of the contract...If the Aquilian action were generally available for defective performance of contractual obligations, a party's performance would presumably have to be tested not only against the definition of his duties in the contract but also by applying the standard of *bonus paterfamilias*. How is the latter standard to be determined? Could it conceivably be higher or lower than the contractual one? ... If, on the other hand, it were to be argued that the *bonus paterfamilias* would always comply with the standard laid down by a contract to which he is a party, one would in effect be saying that the law of delict can be invoked to reinforce the law of contract. I can think of no policy consideration to justify such a conclusion...

The respondent, in arguing the contrary, relied heavily on *van Wyk v Lewis* 1924 AD 438...At 443 INNES CJ said the following:

> 'There was some discussion during the argument as to whether the action had been framed in contract or in tort. One of the appellant's

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> contentions indeed assumed that the basis of her claim was contractual. Now the line of division where negligence is alleged is not always easy to draw for negligence underlies the field both of contract and tort. Cases are conceivable where it may be important to decide on which side of the line the cause of action lies. But the present is not such a case; no mere omission is relied on, nor is the basis upon which damages should be calculated in dispute. But as the point has been raised I must say that, in my opinion, the claim is based on tort. The compensation demanded is in respect of injury alleged to have been sustained by reason of the respondent's negligence and lack of skill. No doubt the duty to take care arose from the contractual relationship between the parties, but it was a duty the breach of which was actionable under the Aquilian procedure.'

...

In the present case the words which present difficulty are:

> 'No doubt the duty to take care arose from the contractual relationship between the parties...'

Taken literally, these words would seem, in my respectful opinion, to justify the criticism expressed as follows ...

> 'The view expressed in *van Wyk's* case ... that delictual duty arose from the contract between the parties, leads to a confusion of delictual liability and liability flowing from a breach of contract. The delictual liability is imposed by law, not by the contract."

...

INNES CJ may have regarded the contractual relationship merely as a fact which brought the plaintiff within the class of persons towards whom the defendant was under a duty to perform his professional duties with due skill.

...

The main point of difference relates to the court's approach to the question of wrongfulness, which involves the extension of delictual liability in the present case to circumstances not covered by existing authority. In this regard the court a quo adopted the...pronouncement of LORD WILBERFORCE in *Anns v Merton London Borough Council* [1989] AC 728 at 751...

This pronouncement is authoritative in Britain... However, the approach of English law seems to be different from ours ... English law adopts a

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liberal approach to the extension of a duty of care. If there is a sufficient relationship of proximity between the parties such that, in the reasonable contemplation of the alleged wrongdoer, carelessness on his part may be likely to cause damage to the plaintiff, there is a *prima facie* duty of care, which is excluded only if the court considers that there are considerations which ought to negative, reduce or limit the scope of the duty. South African law approaches the matter in a more cautious way, as I have indicated, and does not extend the scope of the Aquilian action to new situations unless there are positive policy considerations which favour such an extension.

...

The essential difference between computing damages for, respectively, breach of contract and delict was succinctly stated as follows by VAN DEN HEEVER JA in *Trotman and Another v Edwick* 1951 (1) SA 443 (A) at 449B-C:

> 'A litigant who sues on contract sues to have his bargain or its equivalent in money or in money kind. The

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> litigant who sues on delict sues to recover the loss he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.'
>
> Although this principle has not always been easy to apply...its authority remains unimpaired and unquestioned in the field of Aquilian liability."

Turning to the situation of a legal practitioner and his client, WESSELS JA in *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A) at 142 (translations) said that a legal practitioner

> "would be liable on the ground of negligence if he lacked the necessary knowledge or skill or failed to exercise in the execution of his mandates that degree of care which could reasonably be expected of an average attorney...It was contended on behalf of the appellant that it was 'clear' that an error of judgment...will not easily result in liability on the attorney's part...In my opinion, however, this does not exclude the possibility of liability where the error of judgment is due to the lack on the part of the attorney of the required degree of knowledge, skill or care."

As for the position of a partnership, DE VILLIERS JP in *Potchefstroom Dairies*

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& Industries Co Ltd v Standard Fresh Milk Supply Co 1913 TPD 506 at 511 stated:

> "Now there is no doubt that partners are very often styled agents of each other...For although partners may have the powers of agents, they are much more than agents. The character sustained by a partner is more complex than merely that of an agent...And not only is a partner an agent, but he sustains the double character of agent and principal in one and the same transaction."

While BRISTOWE J at 513-514 said:

> "...the agency of a partner for his co-partner is not expressly created but arises by implication of law as soon as the partnership relation is constituted...By the partnership contract a relation is established between the parties which persists during the continuance of the partnership and for all partnership purposes by virtue of which each partner becomes *prima facie* capable of signing the firm's name. The name so signed is really the signature of the firm, though written by one partner, just as the seal of a company is the signature of the company though affixed by an agent.
>
> To state the position this way may seem to be conceding to a firm an individuality of its own. I do not think it makes much difference whether we regard a partnership as a *persona* or whether we regard it as a contractual compound of several *personae.* In the one case the firm name if properly signed is the signature of the *persona,* in the other case it is the signature of the contractual compound. And the distinction between the two seems more academic than substantial. I am however prepared to go to the extent of holding that a partnership though not a corporate individual is so analogous to a persona that it may be called a a quasi - *persona*. This indeed seems to be an accurate statement of the law as deducible from recent cases.
>
> For many purposes it has or is treated as having a *persona* of its own, and particularly in relation to commercial transactions is this a convenient and succinct way of regarding its position. A partner is often said to be the agent of the firm."

It is obvious that an agent in his capacity as agent and acting within the scope of his authority, when conducting relations with others on behalf of his

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principal, renders the principal liable (a) for the agent's delict, if the principal has authorised the doing of the delictual act or of an act the natural and probable consequence is the delict; and (b) for the agent's delict committed by him in obtaining the results which the principal authorised him to obtain: *Colonial Mutual Life Assurance Society Ltd v Macdonald* 1931 AD 412 at 427 and 429.

Mr *de Bourbon* referred to *Ross v Caunters supra*,. In that case the solicitors prepared a will for a testator under which the plaintiff was a beneficiary, but when sending the will for execution the solicitors failed to advise the testator that it should not be witnessed by the beneficiary's husband. They also failed to notice, when the will was executed and returned, that one of the attesting witnesses was the beneficiary's husband. SIR ROBERT MEGARRY V-C said at 599:

> "In broad terms, a solicitor's duty to his client is to do for him all that he properly can, with, of course, proper care and attention. Subject to giving due weight to the adverb 'properly', that duty is a paramount duty. The solicitor owes no such duty to those who are not his clients. He is not guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater the injuries the better he will have served his client. The duty owed by a solicitor to a third party is entirely different. There is no trace of a wide and general duty to do all that properly can be done for him. Instead, in a case such as the present, there is merely a duty, owed to him as well as the client, to use proper care in carrying out the client's instructions for conferring the benefit on the third party. If it is to be held that there is a duty that is wider than that, that will have to be determined in some other case...A solicitor who is instructed by his client to carry out a transaction that will confer a benefit on an identified third party owes a duty of care towards that third party in carrying out that transaction, in that the third party is a person within his direct contemplation as someone who is likely to be so closely and directly affected by his acts or omissions that he can reasonably foresee that the third party is likely to be injured by those acts or omissions."

On determining on what basis that duty of care rested in the case before him the learned VICE-CHANCELLOR found that three features stood out. Firstly, the close degree of proximity between the parties: there was no question of whether the solicitors could fairly have been expected to contemplate the beneficiary as one likely to be affected by any lack of care on their part, and

the *nexus* between them was that the beneficiary was named and identified in the will which they had drafted and so their contemplation of the beneficiary was actual, nominate and direct. It was contemplation by contract which was with the testator client. Secondly, this proximity was the product of the duty of care owed by them to their testator client, which was in no way casual or accidental or unforeseen. The solicitors accepted a duty towards the testator to take reasonable care concerning the will and in all they did or failed to do about the will, the solicitors were bound by this duty and that duty included a duty to confer a benefit on the beneficiary, which duty may readily be extended to him. Thirdly, to hold that the solicitors were under such duty towards the beneficiary raised no spectre of imposing an uncertain and unlimited liability on the solicitors. He maintains that the standard generally applied in negligence cases was to impose liability on the general *Donoghue v Stevenson* basis of foreseeability and that the true basis of liability in the matter before him flowed directly from

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Donoghue v Stevenson.

Subsequently, WOOLF J in *JEB Fasteners Ltd v Marks, Bloom & Co (a firm)* [1981] 3 All ER 289 (QB) at 296 stated that, without trying to lay down a general principle, the appropriate test in the case before him was whether the accountants knew or ought reasonably to have foreseen, at the time they audited the company's accounts, that a person might rely on those accounts for purposes of deciding whether or not to take over the company and might suffer loss if the accounts were inaccurate. He said that this approach placed a limitation on the person seeking redress, since it must be shown that such a person must have relied on the accounts and he must have done so in circumstances where the accountants knew that such a person would or the accountants ought to have known that he might. WOOLF J, in reaching his decision, applied *Anns v London Borough of Morton and Ross v Caunters* and held that foreseeability of risk of causing injury plays a part in establishing liability. It can be seen that in English law a professional person may be held liable in tort or delict to a third party where there is no privity of contract between them.

Mr *de Bourbon's* argument, based on *Ross v Caunters*, is that the legal practitioners do not owe any form of duty of care to the execution debtor, as they owe a duty of care to their client (the execution creditor) to do for him all that they properly can with proper care and attention and that such a duty is not owed to persons who are not their clients. Legal practitioners for a judgment creditor are not guardians of the judgment debtor's interests and what they do for their client might be hostile or injurious to the judgment debtor's interests. But in *Ross v Caunters*, the learned VICE-CHANCELLOR'S

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conclusions were that there is no longer any rule that a legal practitioner who is negligent in his professional work can be liable only to his client in contract. He may be liable both to his client and to others, since the tort of negligence and the basis of such liability is a direct application of the principle in *Donoghue v Stevenson.*

In *Lillicrap, Wassenaar's* case, GROSSKOPF AJA emphasized that contractual terms may bring a plaintiff within the class of persons towards whom a duty of care was owed by a professional to do his work with due diligence and skill and from which delictual liability may arise and that there could be liability in delict apart from contract.

To summarise, there can be no reason in principle why a professional should not be held liable under the extended *Lex Aquilia* for negligence to a third party as long as all the elements of Aquilian liability are satisfied.

In *Morris v Salberg* (1889) 22 QBD 614 (CA) the solicitor of the judgment creditor directed the Sheriff to seize goods under a writ by endorsing on it an address which was not that of the judgment debtor. The plaintiff's goods were seized by the Sheriff. It was held that the direction endorsed by the solicitor on the writ was within the scope of his authority which constituted the Sheriff as the bailiff of the execution creditor. As the solicitor's endorsed direction was a statement it bound the execution creditor. If a person makes a statement that may well mislead

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and does in fact mislead the Sheriff into thinking he was directed to seize the goods, such a statement renders the maker liable if he intended to give such a direction. The execution creditor was held liable in respect of the wrongful seizure of the goods and was awarded damages.

In *Steenkamp v Kyd* (1898) 15 SC 221 the defendants were insurgents who had elected La Fleur as their leader and on his orders the plaintiff was arrested at his farm by some of the defendants and suffered personal injuries and damage to his property. DE VILLIERS CJ held that all the defendants had appointed La Fleur as their agent to do all that was reasonably necessary to carry out the objects of the insurgency and that the attack on the plaintiff might have been reasonably anticipated as a consequence of that order, even by those defendants who did not go to his farm. All the defendants were liable to the plaintiff as they did nothing to prevent it. But in *McKenzie v van der Merwe* 1917 AD 41 the defendant was the assistant head of one band of insurgents, Cremer commanded another band. Both bands were operating in the neighbourhood of the plaintiff's farm. There was nothing to implicate the defendant in the damage caused to the plaintiff's property. The plaintiff's

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contention was that every person who took part as an insurgent must be taken to constitute every other insurgent as his agent to do all that was necessary in order to carry out their common purpose and relied on *Steenkamp v Kyd supra*. But the court held that the mere fact of being an insurgent did not render the defendant liable for the acts of every other insurgent since he had not expressly or by implication authorised them. SOLOMON JA said at 51-52:

> "By our law, however, a person is liable for a delict committed by his agent acting on his instructions...'*qui facit per alium, facit per se*'...reliance was placed upon the case of *Steenkamp v Kyd* 15 SC 221. That case is an entirely different one from the present...the defendant had appointed Le Fleur as his agent to do all that was reasonably necessary to carry out their objects of the insurgency, and that the attack upon the plaintiff might fairly be regarded as falling within that authority conferred. In the present case, however, there is nothing to show that the damage was done by the orders of anyone whom the defendant had chosen as his leader."

Turning to this case, it was common cause that:

(i) on 16 November 1988 the goods were attached;

(ii) on 25 November 1988 judgment debt of $2 162,83, plus costs of $18,12, had to be paid;

(iii) on 23 December 1988 the second plaintiff paid $700;

(iv) on 16 January 1989 the goods attached were removed by the auctioneers;

(v) on 23 and 24 January 1989 a further $620 had been paid by the second plaintiff;

(vi) on 26 January 1989 a further $842,18 was paid by the second plaintiff, making a total of $2 162,18 towards the debt of $2 162,83 plus $18,12 costs;

(vii) on 27 January 1989, after the first plaintiff telephoned, he collected after 10am a

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letter (addressed to the Deputy Sheriff) from the second defendants, which stated that the debtor had paid the amount due and the letter authorised the release of the goods subject to the payment of auctioneer's costs incurred;

(vii) on 27 January 1989 the goods were sold by the auctioneer for $2 015, from which was deducted $346,50 by him, leaving $1 668,50, out of which $44,71 were deducted by the Deputy Sheriff;

(ix) on 7 February 1989, $1 623,79 was sent by the second defendants to the second plaintiff's legal practitioners.

It is not disputed that the first, second and third defendants did not, after

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receipt of $700 on 23 December 1988 or after receipt of $620 on 23 and 24 January 1988, contact the fourth defendant. The first defendant accepted that the first plaintiff came after 10 am on 27 January 1989 and he was given the letter addressed to the fourth defendant.

Mr *de Bourbon*, although he accepted that the first and second defendants were acting as agents for the third defendant, submitted that the onus was on the plaintiffs, that they jointly owned the property, that there was a breach of duty imposed by law on the defendants and that loss was sustained as a consequence of that breach. He argues that the removal of the goods on 16 January 1989 was lawful and that the defendants did not cause any loss to the plaintiffs by not advising the fourth defendant of payments. He submits that the law as a matter of policy will not impose on the execution creditor or his legal practitioner agent any duty of care whereby they become liable as this would impose an intolerable interference in the process of execution and upon the practice of lawyers. But, as previously pointed out, the Rules of this Court requires that the Deputy Sheriff attach so much movable property that he may deem sufficient to satisfy the judgment debt and that a sale in execution must be stopped when money sufficient to satisfy the debt has been paid. This surely means that the execution creditor or his legal practitioner agent has to inform the Deputy Sheriff that monies towards the judgment debt have been paid before he can either sell sufficient attached property to satisfy the judgment or stop the sale in execution when money has been paid to satisfy the judgment debt. If payment is made and the execution creditor or his legal practitioner is given enough time to communicate with the Deputy Sheriff (or the auctioneer), he has to contact the Deputy Sheriff (or the auctioneer). This can hardly be described as imposing an intolerable interference in the process of execution and upon the practice of lawyers. In my view, once payment is made and adequate time is given to the execution creditor (or his legal practitioner as his agent) he owes a duty of care to the execution debtor that he does not suffer any injury by the disposition of the attached goods. By 23 December 1988, close to a third of the debt had bee paid, by 23 and 24 January 1989 sixty percent of it had been paid. Despite the fourth defendant's letter of 4 January 1989 drawing the second defendant's attention to the question of the cancellation of sale, as well as the second plaintiff's legal practitioner's letter of 23 January 1989 requesting the attached goods be released, the third defendant (or its agents) did nothing about communicating with the fourth defendant. On 27 January 1989 (after the second defendant had on 26 January 1989 received

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$842,18) the letter addressed to the Deputy Sheriff was, at his request, given to the first plaintiff. The third defendant (or its agents) had ample opportunity after 23 December

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1988 and 24 January 1989 to inform the fourth defendant that by 23 December 1988 close to a third and by 24 January 1989 sixty per cent of the debt had been paid and so the fourth defendant should govern himself accordingly.

The first defendant testified that had he been informed in time by the plaintiffs that the auction was at 10 am on 27 January 1989, he would have communicated with the fourth defendant. But on 26 January 1989 a total of $2 162,18 had been paid. As the second defendants agreed that the amount due in terms of the writ of execution had been paid, surely it was for the third defendant (or its agents) to communicate with the fourth defendant, irrespective of being advised of the time and date of the auction. The first defendant accepted that it was only after the first plaintiff came to his office after 10 am on 27 January 1989 that the letter to the fourth defendant was made available. The first defendant testified that monies are received by the cashier and he is only made aware of this by his secretary. Be that as it may, once the execution creditor (or his agent) is paid, it follows that he is required to communicate that fact to the Deputy Sheriff. It appears from the evidence given by the plaintiffs - and the first defendant did not testify to the contrary - that the second defendant's letter of 27 January 1989 to the fourth defendant was prompted by the first plaintiff's request to him. This means that the third defendant (or its agents) did not on their own make any effort to contact the fourth defendant. From the foregoing, particularly with the case with which persons like the fourth defendant can be contacted by modern means of telecommunications, it cannot be maintained by the third defendant (or its agents) that, after the payment on 26 January 1989, it did not have time to communicate with the fourth defendant to inform him that the judgment debt due had been paid. It follows that, as a result of the third defendant or its agents' failure, the plaintiffs' attached goods were sold. This could have been prevented and as a consequence liability ensued. As between the third defendant and the plaintiffs, there is a sufficient relationship of proximity, such that, in the reasonable contemplation of the third defendant, carelessness on its part or on its agents' part may be likely to cause damage to the plaintiffs. In my view, there are no considerations which ought to negative or limit the scope of the duty or the person to whom it is owed or the damages to which a breach of it may give rise.

Further, a legal practitioner's duty to his client is a paramount duty. The duty, when owed by a legal practitioner to a third party, is not a wide and general duty to do all that properly can be done for the third party. But there is a duty owed to his client, as well as to a third party, to use proper care in carrying

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out the client's instructions. A legal practitioner who is instructed by his client to carry out a transaction that will affect an identified third party owes a duty of care towards that third party in

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carrying out the transaction, since such a third party is a person within the legal practitioner's direct contemplation as someone who is likely to be so closely and directly hurt by his acts or omissions. The legal practitioner can reasonably foresee that the third party is likely to be injured by those acts or omissions. In this matter, there is no question of whether the legal practitioners could fairly have been expected to contemplate the third party as someone likely to be affected by any lack of care on their part: The nexus between them was that the third party was named and identified in the proceedings instituted by those legal practitioners. The proximity arose from the duty of care owed to their client, which was in no way casual or accidental or unforeseen. To hold that the legal practitioners were under such duty towards the third party did not mean the imposition of an uncertain and unlimited liability on the legal practitioners. In my view there are no considerations which ought to negative or limit the scope of duty or the person to whom it is owed or the damages to which a breach of it may give rise.

The fourth defendant pleaded prescription. The cause of action, it is not disputed, arose on 27 January 1989, when the attached property was sold by auction. These proceedings were commenced on 20 January 1992, with service on the fourth defendant on 21 January 1992, more than 6 months after the cause of action arose. Therefore, it is clear in terms of rule 456 that the plaintiffs' claim against the fourth defendant has been prescribed.

In her evidence the second plaintiff testified that they purchased the furniture in South Africa and that it was brought by them when they came to this country in 1983. She said that it was not in good condition but fair condition. Her evidence was not challenged. The plaintiffs are husband and wife. I am satisfied on the evidence that the goods attached were jointly owned by the plaintiffs. In matrimonial proceedings before it, this court would certainly hold that the furniture was jointly owned by them.

It was argued by Mr *de Bourbon* that no damages have been suffered by the plaintiffs, that none were proved and that the approach in determining damages is that laid down in *Philip Robinson Motors (Pty) Ltd v N M Dade (Pty) Ltd , supra*,. In that case, the plaintiff had sold a new car in January 1970 to their client on hire-purchase, who then sold the car to the defendant in July 1970 before all the instalments and balance owing had been paid. The plaintiffs' lawyers wrote on 8 June 1971 to the defendant's lawyers, asking

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for confirmation that the defendant still had possession of the car. On 17 June 1971 the defendant sold the car. The plaintiff brought an action against the defendant for delictual damages. The court held that the time at which to measure the delictual damages was the date of the delict, ie when the car was unlawfully sold.

In *Erasmus v Davis* 1969 (2) SA 1 (A) at 9 POTGIETER JA stated:

> "The principle of assessment of damages in delict is that a plaintiff must by monetary compensation be placed in as a good position financially as he would be in if the delict had not been committed."

The plaintiffs did not indicate when the furniture was purchased in South Africa and what they paid for it. Mr Sibanda testified about the price presently for the new items mentioned by him

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and that in 1989 the prices were about 35% less. This would mean that the value would have been about $25 600 for them in 1989. The first defendant said he accepted the Deputy Sheriff's description that the furniture was in poorish condition and hence low priced at the auction. The second plaintiff described that the furniture was not in good condition but fair condition.

Mr *de Bourbon* suggests that the value of attached goods can be ascertained from what was received for it at the auction sale. He referred to *Todd v Administrator, Transvaal* 1972 (2) SA 874 (A) at 884 and *Schultz v Throw* 1929 EDL 94. In the latter case the price obtained for a cow at an auction sale in August 1927 was £4 but the court instead accepted that the market value was £6 which had been paid by the plaintiff in June 1926 when she purchased the cow.

In In re *Estate Late Margaret Young* 1942 NPD 276 at 281, immovable property was sold by private treaty for £27 500. This was regarded by the beneficiary as inadequate. The administrator produced the current municipal valuation for that immovable property as being £24 630. Three sworn appraisements were £27 000, £27 500 and £27 500. An auction sale produced no offer better than £26 000. The beneficiary produced two sworn appraisements of £32 500 and £34 000. BROOME J was prepared to accept that municipal valuations do not usually err on the high side. As he was not in a position to choose between expert appraisers who disagreed, to his mind the auction sale represented the safest guide. He therefore held that the price at which the administrator sold was a fair price.

In *Todd v Administrator, Transvaal supra*, RABIE JA (as he then was)

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referred to In re *Estate late Margaret Young supra*. It seemed to him to indicate no more than that a price obtained at a properly attended auction sale is *prima facie* evidence of the market value of the property sold, but circumstances may show it not to be so.

Mr *de Bourbon* also cited *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) where DIEMONT JA at 969 said:

> "...it is necessary to make some reference to the principles applicable to the assessment of damages in this type of a case. These principles have been conveniently summarized by DE VILLIERS J in *Lazarus v Steam Laundries (1946) (Pty) Ltd* 1952 (3) SA 49 (T). It has long been accepted that in some type of cases damages are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty. Among the authorities cited in *Lazarus'* case is *Hall v Ross* 111 ER 672 which was decided as long ago as 1813. Not only is the principle not a novel one but the English precedents which have given some guidance on the problem have gone so far as to hold that the court doing the best it can with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess. See, for example, *Chaplin v Hicks* [1911] 2 KB 786 (A) at 792. In the case of *Arendse v Maher* 1936 TPD 162 GREENBERG J .went on to say at 165: 'It remains, therefore, for the court, with the very scanty material at hand, to try and assess the damage. We are asked to make bricks without straw, and if the result is inadequate then it is a disadvantage which the person who should have put proper material before the court should suffer.'...in *Hersman v Shapiro & Co* 1926 TPD 367 at 379 STRATFORD J is reported as stating: 'Monetary damages having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is very little more than estimate, but even so, if it is certain that pecuniary damages have been suffered, the court is bound to award damages.'"

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In *Sandler v Wholesale Coal Supplies Ltd* 1941 AD 194 the negligence of the defendant's servant in a collision caused injury to the plaintiff, a proprietor of a garage. He produced extracts from his books to show that his gross receipts had fallen, that he had a smaller rate of profit and there were no sales of cars during his absence in hospital. The court held that this constituted reasonably sufficient proof of some loss caused to the plaintiff's business and

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even though an accurate assessment of such loss was not possible, the court nevertheless made an estimate of the loss suffered.

In the present matter before me, the plaintiffs have established that injury was suffered by the auction sale of the attached goods. In its amended form, the plaintiffs' claim is payment in the amount or value of the attached goods of $69 500. But their witness, Mr Sibanda, provided the prices of such new furniture as about $25 600, while the plaintiffs brought their furniture from South Africa in 1983. Even if it can be said to have been purchased as new in 1983 it was at least 6 years old in January 1989 and it was not in good condition but fair condition. It is, undoubtedly, most difficult to put a value to the attached goods. The amounts mentioned by Mr Sibanda for new furniture are not of much assistance and so it becomes necessary for me to assess the amount and in so doing make the best use I can of the material before me. With the very scanty material before me I am asked to try and calculate the damages suffered by the plaintiffs. Although, it is true, a price obtained at an advertised auction sale s no more than *prima facie* evidence of the market value, nevertheless it does represent some guide to this court. The attached goods fetched $2 015 at the auction in January 1989. It is common cause that $1 623,79 was received on 7 February 1989 by the second plaintiff's legal practitioners. Since $1 623,79 was paid, the amount of $391,21 is outstanding.

In all the circumstances, there will be judgment for the plaintiffs in the amount of $391,21 against the first, second and third defendants jointly and severally, the one paying the others to be absolved, together with costs of suit. The plaintiffs' claim as against the fourth defendant, which is prescribed, is dismissed with costs.

Atherstone & Cook, defendant's legal practitioners

CHINAMASA v JONGWE PRINTING & PUBLISHING CO (PVT) LTD & ANOR 1994 (1) ZLR 133 (HC)

Court **High Court, Harare**

Annotations Link to Case Annotations

Bartlett J

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Civil trial

10, 11, 12, 13 & 27 January 1994

Flynote

Delict - actio injuriarum - defamation - what is - allegations that serving Attorney-General had been subject of criminal investigation, involving fraud committed on client while a private practitioner - defamatory nature of such allegations - basically true story but seriously corrupted - no serious investigation made by reporter - meaning to be given to words - ordinary readership of newspaper - meaning given by such readers to words used

Delict - defamation - defences - justification - no attempt by defendants to establish truth of allegations made - fair comment - requirements for defence to succeed - qualified privilege - requirements - not applicable to newspapers disclosing information to readers - malice or improper motive disqualifying defences of fair comment or qualified privilege - requirements - failure by newspaper to conduct serious investigation - failure to seek comment from subject of article

Delict - defamation - damages - quantum - serious allegations made against professional lawyer and person of unimpeached character - person also holding high office and prominent in public life - no apology or retraction - declining value of money - effect in assessing amount of damages - no evidence of conspiracy to blacken plaintiff's name

Headnote

The plaintiff, the Attorney-General of Zimbabwe, claimed damages for defamation in respect of an article published in *The People's Voice,* a

newspaper published by the first defendant and edited by the second defendant. The article alleged that criminal investigations were being made into frauds alleged to have been committed by the plaintiff when he was a partner in a firm of legal practitioners. It claimed that the police had seriously incriminating evidence in their possession. The alleged fraud was said to have been of a client, in an amount over $5 000. The article further alleged that the case "mysteriously ended in 1985 and is only now resurfacing after the client...sought audience with 'very high officials of the Government'". It also said that the charges were of "such a sensitive nature that the Zimbabwe Republic Police have elected not to give any detailed statement to the Press". The plaintiff claimed that -

(a) most of these statements were defamatory on their plain meaning;

(b) the allegation that the case ended mysteriously implied that the plaintiff was a party to a disgraceful suppression of the truth; and

(c) the article as a whole carried the additional sting that the plaintiff, as a lawyer in private practice, had committed a fraud on a client and was unfit to remain in office as Attorney-General, either pending investigation or at all.

The plaintiff argued that the defendants acted out of malice or from improper motives.

The defendants admitted making most of the statements, but said that the article stated no more than that a police docket into allegations of fraud had been re-opened. They said that the words

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of the article meant no more than that the police were investigating a serious offence allegedly committed by the plaintiff and that it was inappropriate for the plaintiff to remain in office while the investigation was pending. Alternatively, they claimed that the words were substantially true, that their publication was in the public interest, that insofar as the statements were expressions of opinion they constituted fair comment on a matter of public interest, and that they had a right and duty to publish the contents of the article.

In his replication, the plaintiff alleged that the publication was actuated by malice or improper motive.

After hearing evidence, the court found that the reporter who wrote the article was not told by the Commissioner of Police that the police had in their possession seriously incriminating material evidence relating to the alleged fraud committed by the plaintiff, nor that the case had improperly ended in 1985 and that it was only resurfacing after the complainant had sought audience with high officials of the Government. On the various statements made by the defendant and the defences raised:

Held, that the following statements were defamatory within the ordinary meaning of

the words used:

(1) the allegation that the Attorney-General might be charged with a criminal offence. The defamatory nature of this allegation was aggravated by the statement that the charges were sensitive;

(2) the statement that the plaintiff was alleged to have committed a fraud, it being defamatory to impute a crime or suspicion of a crime to another;

(3) the statement that the police had seriously incriminating evidence in their possession, the defamatory nature of the statement being aggravated by the fact that the statement was made after two statements that the police had refused to comment;

(4) the statement that the plaintiff had defrauded a client of over $5 000;

(5) the statement questioning the plaintiff's continued incumbency.

Held, further, that the ordinary meaning of the words used is the meaning that a reasonable or ordinary reader of *The People's Voice* would attribute to the words. In examining what meaning such a reader would give, one must accept that the readership of *The People's Voice* was at the grass roots level and that the ordinary reader is inclined to loose thinking and to reading in implications more freely than a lawyer would. Further, a newspaper reader would not read an article with cautious and analytical care, but, in the case of a newspaper like *The People's Voice*, for entertainment.

Held, further, that the ordinary reader of *The People's Voice* would form the impression that the Attorney-General was facing serious allegations of fraud, that the evidence was strong, and that he was likely to be convicted. This view would be strengthened by the alleged comments of

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other legal practitioners, that he should stand down.

Held, further, that the statement that the case ended mysteriously and only resurfaced after representations had been made to high officials in the Government would not necessarily be regarded by the ordinary reader as an allegation that there had been a disgraceful suppression of the truth to which the plaintiff was a party.

Held, further, that the article as a whole carried the additional sting that the plaintiff, as a lawyer in private practice, had committed a fraud on a client and was unfit to remain in office as Attorney-General, either pending investigation or at all.

Held, further, that the defamatory meaning of the words were to be judged by the "right thinking" test. On the various defences put forward by the defendants:

Held, that if the defence of justification were to succeed, it would not be necessary for the publication to be absolutely accurate in every detail. What must be shown, though, is that the defamatory matter is truthful.

It was not enough for the defendants to show that they were told the statements complained of. In any event, the evidence did not show that the defendants were actually told what they said they were told. What they were told was considerably less than what was reported. No evidence was led by the defendants to establish the truth of the allegations they made, while the plaintiff, on whom there was no onus in this respect, had proved the falsity of the statements.

Held, further, that the defence of fair comment could not succeed either. For the defence to succeed, the comment must constitute a comment on facts which are notorious or set out in the publication complained of. It must be genuinely held and fairly stated and its utterance must be in the public interest. The only part of the article which could constitute a comment was the alleged sentiment of lawyers; and this was not a fair comment, no response having been sought from the plaintiff and there being no good grounds for the facts alleged.

Held, further, that the defence of qualified privilege would not avail the defendants. There is no special privilege attaching to the media and there is no duty-interest relationship between a newspaper and its readers sufficient to support qualified privilege. While it is in the interests of society that the conduct of public figures should be criticised, this does not sanction baseless attacks on them which destroy their honour and character. The defendants had not established any basis for their attack; indeed, what they said was substantially false. They published and sensationalised a baseless scandal.

Held, further, that malice or improper motive on the defendants' part had been shown. It was untrue that the defendants had undertaken their own investigation. They did not even approach the plaintiff for comment, nor did they interview the police investigating officer. It was quite improper for them to attribute remarks to lawyers in the absence of genuine comment from lawyers. It was clear that the journalist's primary concern was to meet deadlines, not to write an honest and balanced article.

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On the quantum of damages:

Held, that the plaintiff was a person of unimpeached character and had proved the charges to be unfounded and unwarranted. He was also an experienced and respected lawyer who held the office of Attorney-General. The slur was as serious as anyone could make against a professional lawyer and almost as serious as the worst that could be said about a serving Attorney-General. The defamation had struck at his professional reputation. He had also attained a high position in public life. The nature and extent of the publication was particularly aggravating. The plaintiff had been attacked by a newspaper which was the mouthpiece

of the political party of which the plaintiff was a central committee member. The newspaper was widely circulated, particularly to party members. The article was one of a series which gave the appearance of a concerted press campaign. There had been no apology or retraction.

Held, further, that the declining value of money was a factor that should be taken into account in terms of purchasing power, but not with such mathematical precision as to lead to an unreasonable result.

Held, further, that it should not be overlooked that the defamatory statement started off with a basic truth, but that basic truth had been seriously corrupted. This distinguished the case from one where the defamation was wholly false. Had the article adhered to the basic truth, defamation proceedings would probably not have commenced.

Held, further, that if the plaintiff's allegations of a conspiracy had been proved, the damages would have been much greater, but *The People's Voice* could not be regarded as being part of the alleged conspiracy.

Held, further, that although it was critical to the future of Zimbabwe that corruption be exposed and the highest in the land be held accountable for their actions and although the press had an important role to play in this regard, this did not mean that the press could act with the serious irresponsibility it had shown in this case.

Held, further, that accordingly a higher award of damages should be made than any that had been granted previously, but the award should not be substantially higher. Damages in the sum of $30 000 would be awarded.

Cases cited:

Lewis v Daily Telegraph Ltd [1963] 1 QB 340; [1962] 2 All ER 698

Lilford v Rhodesian P & P Co Ltd & Anor 1967 (2) RLR 274 (G)

Demmers v Wyllie & Ors 1980 (1) SA 835 (A)

Morgan v Odhams Press Ltd & Anor [1971] 2 All ER 1156 (HL)

Dorfman v Afrikaanse Pers Publikasies (Edms) Bpk en Andere 1966 (1) PH J9 (A)

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Ngcobo v Shembe & Ors 1983 (4) SA 66 (N)

Velimpini v Eng Svcs Dept Workers' Cttee for the Eng Svcs of the City of Bulawayo & Ors 1988 (2) ZLR 173 (H)

Neethling v du Preez & Ors; Neethling v The Weekly Mail & Ors 1994 (1) SA 708 (A)

Johnson v Rand Daily Mails 1928 AD 190

Crawford v Albu 1917 AD 102

Marais v Richard & Anor 1981 (1) SA 1157 (A)

Tekere v Zimbabwe Newspapers (1980) Ltd & Anor 1986 (1) ZLR 275 (H)

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Financial Mail (Pty) Ltd & Ors v Sage Hldgs & Anor 1993 (2) SA 451 (A)

Campbell v Spottiswoode (1863) 3 B & S 768

Borgin v de Villiers & Anor 1980 (3) SA 556 (A)

May v Udwin 1981 (1) SA 1 (A)

Zvobgo v Kingstons Ltd 1986 (2) ZLR 310 (H)

Chinengundu v Modus Publications HH-135-92

De Flamingh v Pakendorf en 'n Ander 1979 (3) SA 676 (T)

SA Assoc Newspapers Ltd & Anor v Yutar en 'n Ander 1969 (2) SA 442 (A)

SA Eagle Ins Co v Hartley 1990 (4) SA 833 (A)

Min of Defence & Anor v Jackson 1990 (2) ZLR 1 (S)

M J Gillespie for the plaintiff

D P Carter for the defendants

Judgment

Bartlett J: The plaintiff in this matter claims $150 000 damage for defamation in respect of an article published in *The People's Voice* newspaper. The claim is against the first and second defendants jointly and severally. The first defendant is the publisher of *The People's Voice* and the second defendant is the editor.

The *People's Voice* is a weekly newspaper and in its edition of 12-18 January 1992 published an article under the headline "POLICE MUM ON A G.'S CASE". In paras 8 and 9 of its amended

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declaration, the following assertions are made by the plaintiff concerning the article:

"8. The article states the following of and concerning the plaintiff:

(a) 'Criminal charges that could be laid against the Attorney-General Cde Patrick Chinamasa are of such a "sensitive nature" that the Zimbabwe Republic Police have elected not to give any detailed statement to the Press'; and

(b) 'The People's Voice's independent investigations have, however, revealed that the ZRP has reopened the docket pertaining to the alleged fraud, which is said to have been committed in 1985 when Cde Chinamasa was employed by a firm of lawyers'; and

(c) 'The police are believed to have in their possession seriously incriminating material evidence pertaining to the alleged fraud'; and

(d) 'Cde Chinamasa is alleged to have defrauded a client's account of an amount in excess of $5 000';

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(e) 'The sources revealed that the case mysteriously ended in 1985, and is only resurfacing now after the client allegedly sought audience with very high officials of the government of Zimbabwe'; and

(f) 'Meanwhile a number of legal practitioners interviewed by The People's Voice have voiced concern over the continued incumbency of Cde Chinamasa in the A-G's Office. "How can he continued to preside over the execution of justice when he himself is the subject of criminal proceedings?" they asked.'

9. The said words and statements are defamatory of the plaintiff in the manner set out below:

(a) The statements in para 8(1), (b), (c), (d) and (f) are defamatory on their plain meaning in the primary sense; and

(b) The statement in para 8(e) bears the meaning and in the context of the article would be reasonably understood to mean that the dropping of charges in 1985 was part of a disgraceful suppression of the truth to which the plaintiff must have been a party.

(c) The article as a whole carries the additional sting that the plaintiff, as a lawyer in private practice, has committed a fraud on a client and that he is unfit to remain in office as the Attorney-General of Zimbabwe pending investigations or at all."

The first and second defendants in a joint plea pleaded to paras 8 and 9 of the plaintiff's declaration as follows:

"Ad Paragraph 8:

Paragraphs 8(a), (b), (c), (e) and (f) are admitted. Paragraph 8(d) is denied, and the defendants aver that the article stated no more of the plaintiff than that a police docket into investigations of an alleged fraud by the plaintiff involving an excess of $5 000 had been re-opened.

Ad paragraph 9:

This is denied, and defendants aver that the words in the context of the article were intended and were understood by readers to mean no more than that the police were investigating a serious criminal offence allegedly committed

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by the plaintiff, and that while such investigation was pending it was inappropriate for him to hold office.

Alternatively, and in any event, if the words were in the context of the article defamatory of the plaintiff, defendants aver:

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(i) That insofar as the words are statement of fact they are substantially true in every material part and are for the public benefit, and insofar as they are expressions of opinion they constitute fair comment on a matter of public interest;

(ii) That the contents of the article were in the public interest and the defendants had a duty and a right to publish it to the public and the public had a right to receive it."

The plaintiff subsequently filed a replication to the defendant's plea alleging that the publication was actuated by malice or improper motive.

The plaintiff's case: Tonde's evidence

The plaintiff called Assistant Commissioner Tonde of the ZRP and gave evidence himself. The evidence of Assistant Commissioner Tonde (who was a Chief Superintendent at the time) was to the following effect. In January 1992 he was given instructions relating to an investigation of the Attorney-General and asked to look into monies which had gone into a trust account of the plaintiff and belonging to a Mr Frost. Tonde stated he was given these instructions by the then Acting Commissioner of the ZRP, Mr Chihuri. The matter had already been investigated before and there had been a docket in existence, which had been closed. Tonde stated that, after receiving his instructions, he went with several other police officers to interview the plaintiff, who is the Attorney-General and who was the subject of the investigation. Tonde stated that he was given a lengthy affidavit by the plaintiff, in which the plaintiff responded in very considerable detail to the allegations made against him.

This document had been made by the plaintiff in September 1986 when the complaint had originally been made against him and had been handed to the police then, but had apparently been mislaid by them. This affidavit by the plaintiff (which with annexures consisted of 115 pages) was produced as an exhibit. Mr Tonde also produced as an exhibit a memorandum made by himself in early January 1992, which summarised the nature of the complaint against the plaintiff by Mr Frost, and the state of the investigation at the time of the preparation of the memorandum. This document was also produced as an exhibit. It indicated that Mr Frost had made an initial report of fraud on 15 September 1986 to the ZRP and had made a statement at the time. The substance of Mr Frost's complaint was that the plaintiff, as his legal practitioner, had defrauded him of some $5 400,00. Mr Frost listed a number of payments made by the plaintiff which he described as unauthorised

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payments. The allegation was that a large number of the unauthorised payments were made by cheques on which Frost's signature had been forged. It was also alleged by Frost that the cheques were made and paid out while Frost was outside Zimbabwe. The memorandum indicated that the docket was closed in 1989 with the police recording that they had been unable to locate Frost for further investigations.

The memorandum also indicated that the police had conducted a questioned document examiner's report on the alleged forged signatures with the assistance of the Forensic Science Laboratory at the time the complaint was made in 1986. This examination had confirmed that the signatures which Frost had alleged were forged were in fact his own signatures - but that the police had been unable to locate Frost at the time to confront him with this evidence. When Frost was located in January 1992 he accepted that the signatures which he had said were forged were in fact his own signatures. This resolved most of the complaints made by Frost against the plaintiff, but there were a number of other queries regarding payments made on his behalf with which Frost was still not satisfied.

Tonde also referred in his memorandum to a lengthy record of previous convictions for dishonesty relating to Mr Frost and produced the police record of those previous convictions. These previous convictions indicated that Mr Frost was convicted on a total of 12 separate occasions between 1954 and 1976 of a total of 39 counts of dishonesty involving theft, theft by conversion, theft from a motor vehicle, theft of a motor vehicle and fraud. Mr Frost's previous convictions concluded in 1982 with a conviction under the Exchange Control Regulations.

Tonde's evidence was further to the effect that when the docket had been completed in approximately January 1993 he had forwarded it to Deputy Commissioner Mhika. He explained that he was unable to obey the subpoena requiring him to bring the docket and various documents contained in it, as the docket was now apparently with the Ministry of Home Affairs. I should point out that a letter was filed with the Registrar of the High Court from the Senior Staff Officer (Crime) of the ZRP at the commencement of the trial, indicating that the docket was with the Ministry of Home Affairs, and that Tonde would accordingly be unable to produce it. Tonde did not recall any recommendations made by himself as to the completion of the docket. He, however, stated that the allegations against the plaintiff were based on him having forged Frost's signature, and that with a question document examiner having confirmed that the signatures in fact belonged to Frost, the evidence

against the complainant was not highly incriminating - but still warranting further investigation. Tonde also stated that a subpoena had to be issued against the plaintiff for him to produce certain documents relating to the docket - but accepted that these documents had previously been provided by the plaintiff to the police.

Chinamasa's evidence

The plaintiff gave evidence and described his background. He had qualified as a legal practitioner at the then University of Rhodesia. He had then entered private practice and

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become a partner in a firm of legal practitioners. He had next set up his own practice and had in 1985 been elected to the Senate of Zimbabwe and been made Chairman of the Senate Legal Committee. He had carried on his dual role as a senator and running his own legal firm until 1989 when he was appointed Attorney-General.

The plaintiff described in detail his dealing with Mr Frost, the author of the complaints against him. These dealings related, in the main, to the sale of a business on behalf of Mr Frost and to the sale of a residential property owned by Mr Frost. The plaintiff described an amicable relationship between himself and Mr Frost. He indicated that in carrying out Mr Frost's mandate and making payments to Mr Frost, that Mr Frost was always required to endorse with his signature cheques which were paid to him and which he came to collect. The plaintiff explained that the transactions in question took place between March and August 1985 and that in August 1985 Mr Frost appeared, and seemed to think that there were monies still due to him from one of the transactions in question. The plaintiff described explaining to Mr Frost exactly how all payments were made.

He stated that Mr Frost then disappeared for a year but re-surfaced in September 1986 stating that he had only received three of the cheques which were due to him. The plaintiff described making arrangements to have copies of all the cheques paid to Mr Frost obtained. He described showing these cheques to Mr Frost who apparently indicated satisfaction with the way the plaintiff had accounted to him. The plaintiff stated that Frost however returned later that day making the allegations of fraud. The subsequent day Frost appeared with the police. The plaintiff explained that he had in the meantime, in view of the serious nature of the complaints made by Mr Frost, commenced a detailed examination of Mr Frost's files. This led him to discover that he had documents indicating that Frost was in Zimbabwe during the period May-July 1985 - though Frost had stated that he could not

have received or signed the cheques in question because he was out of Zimbabwe during that period. The documents which the plaintiff found included a power of attorney signed by Mr Frost during the relevant period and a consent paper relating to a divorce, also signed by Mr Frost during the relevant period. Both these documents were signed in Harare. The plaintiff described showing this information to the police, whereupon Frost indicated that he needed to go to the toilet and then disappeared. The plaintiff stated that he had not seen Frost since Frost left to go to the toilet on that day in September 1986.

The plaintiff stated that despite Frost's disappearance he prepared a detailed document refuting the various allegations made by Mr Frost, and provided that document to the police on 25 September 1986 - some 10 days after the visit by the police to his office. This document which had been produced by Assistant Commissioner Tonde consists, as I have indicated, of an affidavit with annexures totalling 115 pages. It deals in exhaustive detail with every aspect of the plaintiff's business relationship with Mr Frost. It provides a very detailed analysis of the work done for Mr Frost, the payments made to Mr Frost in respect of that work, and the fees levied by the plaintiff in respect of his professional services. The plaintiff stated that he also provided all of the books of account and returned cheques which the police required and that these were taken

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and examined by the police and subsequently returned to him. He was told, at the time that his books of account were returned, that handwriting specimens examine by the ZRP's Questioned Document Examiner had established that signatures on the cheques were in fact Frost's and not forgeries as Frost had alleged. He was also left with a copy of the statement originally made by Frost to the police in September 1986 - which statement was also produced as an exhibit.

The plaintiff's evidence was to the effect that he assumed - not surprisingly - that the matter had been completed. It, however, resurfaced early in 1992. The plaintiff described receiving a number of nuisance telephone calls and queries from various news media asking whether he had been sent on forced leave. A newspaper report then appeared in the *Sunday Times* on 5 January 1992, referring to the allegations made against him by Mr Frost, and also referring to the fact that he had recently announced the impending prosecution of the Acting Police Commissioner. The article in the *Sunday Times* was the first of a number of articles published by various newspapers in respect of the allegations made against the plaintiff by Mr Frost and the consequent police investigation. The *Sunday Times* article is not the subject of the present proceedings, but is I understand, the subject of other defamation proceedings.

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The article, the subject of these proceedings, was published just over a week later by *The People's Voice*. Th plaintiff described not having been contacted by *The People's Voice* prior to the publication of the article in question - though both the reporter who wrote the article and the editor of the newspaper were known to him. The plaintiff outlined the defamatory allegations he was making in regard to the article in question as outlined in the declaration. He also produced copies of various other articles published in regard to the matter - some of which are also subject of defamation proceedings.

The plaintiff described being visited by Assistant Commissioner Tonde and providing him with the 115 page explanation of his conduct - which document he had previously provided to the ZRP but which they had apparently mislaid. The plaintiff described a further interview with Tonde in early March 1992 (the initial interview was in January 1992). He described Tonde as indicating that there was nothing against him but that he was acting on instructions continuing the investigation. The plaintiff said that he then became concerned at the integrity of the investigation. He accordingly asked for copies of Frost's affidavit retracting his allegation of forgery and the Questioned Document Examiner's report proving the allegation of forgery to be incorrect. The plaintiff stated that in view of his concerns, when the police asked for further documents from himself, he became stubborn and refused to provide them. He indicated that he subsequently relented and provided the documents in question which had at any rate been previously in the possession of the police at the time of the original investigation.

The plaintiff described the effect on him of the article published by the defendants. He stated that the article (and the other articles) had a devastating effect on him. He was generally shunned - even by people he had thought were his friends. He described himself as becoming withdrawn and uncommunicative. He stated that he attempted to get the media to publish his response to the allegations against him but that nobody was prepared to listen to him. He finally managed to provide ZIANA with a copy of his rebutting affidavit and a report was subsequently

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published by *The Herald*. He described this report as disappointing, as it did not deal with the aspects raised in the affidavit he had provided. He produced a letter which he had written to Chief Superintendent Tonde immediately after his initial interview with Tonde in January, detailing the substance of that interview. In particular, the letter referred to the retraction by Mr Frost of his allegations. It also referred to Frost's disappearance, on the pretext of going to the toilet, on being confronted with evidence that the signatures on the cheques were his and that he had been in Zimbabwe at the time the cheques were signed.

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The plaintiff stated that the article published by the defendant was particularly painful, in that the newspaper in question was the newspaper of ZANU(Pf), of which the plaintiff is a member of the Central Committee. It was accordingly the plaintiff's evidence that the publication by the party newspaper of the allegations against him gave them added credibility in view of the plaintiff's own status within ZANU(PF).

The plaintiff was subjected to a fairly lengthy cross-examination - though no questions were put to the plaintiff concerning his affidavit relating to his dealings with Frost or his descriptions of Frost's complaints and the police investigations of them.

The defendants' case : the news editor's evidence

The defendants' case consisted of the evidence of the news editor of *The People's Voice*, of the reporter who wrote the article in question, of the editor of *The People's Voice* and of the Commissioner of the ZRP.

I propose to deal only briefly with the evidence of the news editor. This is because he played only a very limited role in the matter. The substance of his evidence was that at an editorial meeting reference was made to an article on the allegations against the Attorney General which had been published in the *Sunday Times*. A decision was then made to endeavour to follow up the story by using the angle of raising the question as to whether the Attorney-General should remain in office while an investigation was being conducted against him. The news editor's evidence was to the effect that he was shown the article which had been written by Mr Munyati, but that he made only one small suggestion as to changing the article. He indicated that he did not ask who the source was for the article and that once the article had been written a short meeting took place at which the publication of the article was agreed.

Munyati's evidence

The evidence of the next witness called by the defendants was critical to the defendants' case. This witness was Mr Munyati, the reporter who actually sourced and wrote the article in question.

Munyati's evidence was to the effect that, having read the article concerning the Attorney-General which appeared in the *Sunday Times* on 5 January 1992 it was decided at *The People's Voice* to see whether they could find an angle to follow up that article. He

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accordingly approached the press liaison office

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of the ZRP for information but was told that the police had no comment. Munyati stated that he considered the question of misappropriation of trust fund money as a matter of public interest and also that it was in the public interest to find out whether there was a police investigation of the Attorney-General in respect of a matter of that nature. He stated that he accordingly phoned the Police Commissioner's office and spoke to an officer who told him that there was indeed such a docket and that it had been re-opened after it had been closed after there had been no action for quite some time on it. He stated that the source told him that the police had started acting on it again because the complainant had made contact with senior Government officials who had instructed the office of the Police Commissioner to recommence investigations.

Munyati stated that he then tried through his secretary to contact the Attorney-General over the telephone but was unable to get through. As a deadline was approaching, and as he considered it important to come up with a story before any competing newspapers, he decided to write the story which appeared. He was of the view that the source in the Police Commissioner's office was sufficiently reliable to justify the story written. The only other sources Munyati relied upon for the story were four legal practitioners whom he contacted for comment as to whether they felt the Attorney-General should remain in office while an investigation was carrying on. Munyati indicated that if it was critical to the defendants' case he would be prepared to name the source in the Police Commissioner's Office. He was not, however, prepared to name the four legal practitioners he spoke to as he felt this would harm their relationship with the Attorney-General whose peers they were.

Munyati also emphasized that, with changing circumstances in Zimbabwe, there was a new transparency in journalism. The press was becoming more independent, persons who were previously unassailable were now assailable, and persons who were previously unaccountable were now becoming accountable for their actions. He accordingly considered the article he wrote appropriate against that background of a new dawn in the freedom of the press.

Munyati asked to be allowed a few minutes to consider whether he wished to disclose his source in the Police Commissioner's office. When the court recommenced, he stated that he had decided to reveal the identity of his source. He stated that it was the then Acting Police Commissioner, Mr Chihuri, who had provided him the details in respect of the story published in *The People's Voice*. He stated that he had phoned Chihuri after he had

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received no comment from the ZRP press liaison office and that he had badgered Chihuri to make a comment on the matter. He emphasised that he kept at it until Chihuri told him it was improper for the police to give a running commentary but that he would go so far as to say that the docket had been re-opened. Munyati stated that he asked Chihuri why the docket had been re-opened. Chihuri, he said, informed him that the manner in which it had been closed in 1986

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appeared to be improper and that he could not understand why it had been closed. He stated that it had been re-opened as the complainant had approached someone much higher than the Police Commissioner who instructed the Police Commissioner to find out what was happening. Under cross examination, Munyati accepted that there was no independent investigation carried out by *The People's Voice* as indicated in the article. He accepted that the article was written purely from the information provided by Mr Chihuri and by the four legal practitioners who he had contacted but would not name. Munyati's reason for referring to an independent investigation was to protect the police source who had asked for his name not to be disclosed.

Munyati also stated under cross-examination that it was Chihuri who provided the information that the police had seriously incriminating evidence implicating the plaintiff in the commission of fraud. He stated that he had introduced the word "mysteriously" in regard to the original closing of the docket in view of Chihuri's statement that he could not understand why the case had been closed. Munyati accepted that he had read the article published in the *Sunday Times* before speaking to Chihuri and before writing the article in question. He accepted that the *Sunday Times* article referred to the plaintiff having recently announced that the Acting Police Commissioner would be the subject of an impending prosecution. He also accepted that the *Sunday Times* had wondered whether there was a connection between the re-opened police investigation of the plaintiff and the announcement of the impending prosecution of the Acting Police Commissioner. Munyati stated, however, that it never occurred to him because of this background that he should doubt the reliability of any comments made by Chihuri in respect of the plaintiff. Munyati stated that he could do nothing other than rely on the word of such a high official within the Police Force. He would only concede that with the benefit of hindsight he might make the connection suggested by the article in the *Sunday Times*.

The editor's evidence

Charles Ndlovu, the second defendant and editor of *The People's Voice*, also

gave evidence. He played a very limited role in the matter. His evidence was simply to the effect that the article was written by Munyati and that he had approved its publication in *The People's Voice*. He stated that Munyati informed him that the source was Acting Commissioner Chihuri. He also stated that he agreed to the publication when it was not possible to contact the plaintiff as the newspaper was facing a deadline. The substance of Ndlovu's evidence was that he relied largely on Munyati and accepted Munyati's comments in regard to the sourcing of the article. He did not require any further or any independent investigation to be made by Munyati.

Chihuri's evidence

The final witness called by the defendants was Augustine Chihuri, the Commissioner of the ZRP. His evidence was to the effect that he received a phone call from the ZRP's Staff Officer in charge of press liaison, who told him that Munyati was on the line asking about the investigation in respect of the plaintiff. He stated that, as Munyati was not accepting the refusal to comment by the Press Liaison Office, he suggested that the call be put through to him. He stated that he

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spoke to Munyati who asked him whether there were any police investigations concerning the plaintiff. He stated that his reply was straightforward and that he said yes there was a docket and that the police are investigating. He added that Munyati wanted to probe more and that he replied saying that it was a serious and sensitive matter which he should not talk about and he accordingly refused to comment further. He stated that he was even now unaware of the contents of the docket as he had never seen it. He requested not to be asked to comment any further on the docket as it was with the Ministry of Home Affairs and accordingly still *sub judice*.

He stated that he disagreed that the investigation had been re-opened because the complainant had gone to senior Government officials. He insisted that that was not the police version and had never been the police version. He added that investigations had recommenced because the complainant Frost had become available.

[The learned Judge then assessed the credibility of the witnesses, finding Tonde and the plaintiff to be reliable witnesses, and concluded:]

Accordingly, overall Munyati's evidence was not credible or reliable. It also clearly contradicts the evidence of Chihuri who, for the reasons I have already stated, must be accepted as having been a credible and reliable

witness. My view of the effect of the respective findings of credibility in respect of Munyati and Chihuri is that Munyati was not told by Chihuri that the police had in their possession seriously incriminating material evidence pertaining to the alleged fraud committed by Chinamasa. Nor was he told that the case had improperly ended in 1985 and was only resurfacing after the complainant had sought audience with very high officials of the Government of Zimbabwe. This means that Munyati was not telling the court the truth in regard to these aspects and that the defendants accordingly have led no credible evidence as to how those important aspects came to be included in the article.

Approach in deciding whether the article is defamatory

Having assessed the evidence and made findings on the credibility of the witnesses, I must now turn to decide whether the article is defamatory on the basis as alleged by the plaintiff, and if so whether any of the defences put forward by the defendants have been established. The findings I have made on credibility will, of course, be relevant where appropriate in making the necessary findings on these further aspects.

I accordingly proceed to decide whether the article is defamatory in the various aspects as pleaded by the plaintiff. The defendants have, of course, pleaded that the article is not defamatory of the plaintiff.

Mr *Gillespie*, for the plaintiff, has argued that I must first consider whether the words as specified in the declaration are capable of bearing the meaning attributed to them - that is, whether the defamatory meaning alleged is within the ordinary meaning of the words. He has argued that I must, secondly, assess whether that is the meaning according to which the words

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would probably be reasonably understood and that, thirdly, I must decide whether the meaning identified is defamatory. Mr *Carter* did not break down the matter in the same detail as Mr *Gillespie*. Mr *Carter* did not, however, disagree with the approach suggested by Mr *Gillespie* in analysing the matter.

Paragraph 8(a)

I turn now to consider whether the words specified in para 8(a) of the declaration are capable of the meaning attributed to them - that is, whether the defamatory meaning alleged is within the ordinary meaning of the words. The statement quoted in para 8(a) of the declaration states that - "Criminal

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charges that could be laid against the Attorney-General Comrade Patrick Chinamasa are of such a 'sensitive' nature that the Zimbabwe Republic Police have elected not to give any detailed statement to the press".

As Mr *Gillespie* points out, this paragraph contains three statements: (1) that criminal charges could be laid against the plaintiff; (2) that they are of a sensitive nature; and (3) that they are so sensitive that the police will not comment on them.

I accept Mr *Gillespie's* contention that it is defamatory to publish a statement that a person could be charged with a criminal offence. In this regard see *Lewis v Daily Telegraph Ltd* [1963] 1 QB 340 at 374 where HOLROYD PEARCE LJ said:

> "To say that the Fraud Squad are making inquiries into a person's affairs is plainly a serious defamation, but it is less than an allegation that he has been fraudulent or convicted of fraud. The making of inquiries by the police may be the initial stage in criminal proceedings. But also it may be found at that stage that there is no offence and no case for a prosecution. A further and a different stage is reached when the person concerned is charged or tried. Again it may be found that he is innocent. The third and final stage is reached when guilt is established and there is a conviction. Those three stages in procedure are quite distinct and known to all."

I accordingly accept that the words specified in para 8(a) are capable of bearing the meaning attributed to them by the plaintiff - that is, the defamatory meaning alleged is within the ordinary meaning of the words. I also accept Mr *Gillespie's* argument that the statement that the charges are sensitive and will not be discussed by the police aggravates the defamation to the extent that it under-scores the alleged gravity of the charges that could be laid. I consider that the use of the word such in relation to "sensitive" is of particular significance in this regard. I do not, however, think there is substance in his argument about the word charges being phrased in the plural.

Paragraph 8(b)

I turn now to consider the position in regard to para 8(b) of the declaration. The words complained of in this paragraph are - "*The People's Voice* independent investigations have however revealed that the ZRP has reopened the docket pertaining to the alleged fraud, which was said to be committed

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in 1985 when Comrade Chinamasa was employed by a firm of lawyers".

It is Mr *Gillespie's* argument that the plain meaning of the words is unambiguous, but, in addition, gains from the context in which the words appear. He argues that in isolation, even though the words relate only to the reopening of investigations in respect of an accusation of fraud, and certainly in the context, which relates unequivocally to the cogency of the allegations, the imputation is defamatory.

I am satisfied that Mr *Gillespie's* submission in this regard is correct. In *Lilford v Rhodesian Printing and Publishing Co Ltd & Anor* 1967 (2) RLR 274 (H) the following is stated at 280 C-G by FIELDSEND J (as he then was):

> "There can be no doubt that a statement which imputes a crime to another is defamatory: Gatley *op cit* s 73 *et seq* and Halsbury 3 ed vol 24 p 30-31 and indeed Mr *May,* who appeared for the excipient, did not contest this proposition. It is also clear that to impute suspicion that a person has committed a crime is defamatory: *Hassen v Post Newspapers (Pty) Ltd* 1965 (3) SA 562 (W), and *Lewis v Daily Telegraph Ltd* [1963] 2 All ER 151 (HL). Although a number of other cases were cited I do not find it necessary to refer to them, for they were all to the same effect, and supported what was really a proposition which was common cause. That the defendant may have merely repeated what the complainant has said does not affect the question: the words may still be defamatory (Gatley s 166) and this would be so even if the defendants had expressed doubt or disbelief as to the truth of the words."

On this basis, I am accordingly satisfied that Mr *Gillespie* is correct when he states that the words in para 8(b) are capable of bearing the meaning attributed to them by the plaintiff - that is, that the defamatory meaning alleged is within the ordinary meaning of the words.

Paragraph 8(c)

I turn now to para 8(c) of the declaration. In this paragraph the words complained of are: "the police are believed to have in their possession seriously incriminating material evidence pertaining to the alleged fraud."

I agree with Mr *Gillespie's* submissions that the plain meaning of these words is quite inescapable. The claim that there is in existence evidence which seriously incriminates the Attorney-General of a country of fraud perpetrated

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by himself on a client whilst practising as a legal practitioner is undoubtedly highly defamatory. Mr *Gillespie* also argues that this aspect of the defamatory meaning is aggravated by the fact that the revelation is made in the context of the previous two statements that police have refused to comment but the newspaper, by its own independent investigative skills, has uncovered the truth of the matter. I agree that this affirmation of the reliability of the report aggravates the defamatory aspect. I am accordingly satisfied that in respect of para 8(c) of the

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declaration the defamatory meaning alleged is clearly within the ordinary meaning of the words.

Paragraph 8(d)

I turn now to para 8(d) of the declaration. The words complained of in para 8(d) are:

> "Comrade Chinamasa is alleged to have defrauded a client's account of an amount in excess of Z$5 000,00".

I accept Mr *Gillespie's* submissions that, for the reasons I have specified in regard to para 8(a) and 8(b) of the declaration, the statement in para 8(d) has the defamatory meaning alleged.

Paragraph 8(e)

I now turn to para 8(e). The words complained of are: "the sources revealed that the case mysteriously ended in 1985, and it is only resurfacing now after the client allegedly sought audience with very high officials of the Government of Zimbabwe".

The allegation in regard to this paragraph is that the statement bears the meaning and, in the context of the article, would be reasonably understood to mean that the dropping of charges in 1985 was part of a disgraceful suppression of the truth to which the plaintiff must have been a party. I will consider this argument at a later stage, when considering how the article and the paragraphs specified would be understood by the ordinary reasonable reader.

Paragraph 8(f)

I turn now to para 8(f) of the declaration. The words complained of in this paragraph are: "Meanwhile a number of legal practitioners interviewed by *The People's Voice* have voiced concern over the continued incumbency of Comrade Chinamasa in the AG's office - How can he continue to preside

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over the execution of justice when he himself is the subject of criminal proceedings, they asked".

It is Mr *Gillespie's* contention that the clear meaning of these words is threefold: (1) that the plaintiff is the subject of criminal proceedings; (2) that he is unsuited to remain the Attorney-General for Zimbabwe; and (3) that his continued incumbency of the office is a matter of concern to the legal profession. It is not clear whether the words are referring to a suggestion of a temporary or permanent removal from office. I, however, agree with Mr *Gillespie* that the defamatory meaning alleged is within the ordinary meaning of the words.

The ordinary reader test

I now turn to the second question raised by Mr *Gillespie* in argument, namely, whether the defamatory meaning is the meaning according to which the words alleged would probably be reasonably understood by the ordinary reasonable reader. In considering this question I will give overall consideration to the words referred to in para 8(e) of the declaration with which I

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have not dealt.

I would point out at this stage that the ordinary meaning of the words is the meaning which an ordinary or reasonable reader or hearer would attribute to the words - in this case the ordinary or reasonable reader of *The People's Voice*. I am told by the defendant's counsel that the ordinary readership of *The People's Voice* (or a large section thereof) should not be identified as being highly educated or sophisticated. I am told that The People's Voice is aimed at the generality of ZANU(PF)'s grass roots and that the newspaper is distributed through commercial outlets and the party's district offices throughout the country.

It is, of course, very difficult to decide what meaning an ordinary or reasonable reader would attribute to the words. In this regard I would refer to the observations by DIEMONT JA in *Demmers v Wyllie & Ors* 1980 (1) SA 835 (A) at 848 G to H:

> "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."

DIEMONT JA then approved the following comments of LORD DEVLIN in *Lewis v Daily Telegraph Ltd supra*, at 169:

> "My Lords, the natural and ordinary meaning of words ought in theory to be the same for the lawyer as for the layman, because the lawyer's first rule of construction is that words are to be given their natural and ordinary meaning as popularly understood. The proposition that ordinary words are the same for the lawyer as for the layman is as a matter of pure construction undoubtedly true. But it is very difficult to draw the line between pure construction and implication, and the layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely; and unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory."

DIEMONT JA also referred to the following instructive comments in regard to the ordinary reader made in *Morgan v Odhams Press Ltd & Anor* [1971] 2 All ER 1156 at 1162j-1163b, when LORD REID stated:

> "If we are to follow *Lewis's* case and take the ordinary man as our guide then we must accept a certain amount of loose thinking. The ordinary reader does not formulate reasons in his own mind; he gets a general impression and one can expect him to look again before coming to a conclusion and acting on it. But formulated reasons are very often an afterthought. The publishers of newspapers must know the habits of mind of their readers and I see no injustice in holding them liable if readers, behaving as they normally do, honestly reach conclusions which they might be expected to reach."

Further relevant observations from *Morgan v Odhams Press* (referred to in *Demmer v Wyllie supra*,) are as follows:

> "Further, it was said that what must be contemplated is that a person would read an article with care. With respect,

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I do not agree. What must be contemplated is a reading of a newspaper in what a jury would consider to be the ordinary way in which a newspaper article would be read. The

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average reader does not read a sensational article with cautious and critical analytical care." (LORD MORRIS at 1170f-g.)

At 1181g-h, by LORD PEARSON:

"The article was written so as to be sensational rather than informative and allusive rather than specific. The sequence of events and the connections between them are far from clear, especially on a first reading, which is the only reading which an article of this character is likely to receive."

And at 1184d-f, also by LORD PEARSON:

"Regard should be had to the character of the article; it is vague, sensational and allusive; it is evidently designed for entertainment rather than instruction or accurate information. The ordinary, sensible man, if he read the article at all, would be likely to skim through it casually and not to give it concentrated attention or a second reading. It is no part of his work to read this article, nor does he have to base any practical decision on what he reads there. The relevant impression is that which would be conveyed to an ordinary sensible man (in this case having knowledge of the relevant circumstances) reading the article casually and not expecting a high degree of accuracy."

Having made these comments about the ordinary reasonable reader, I find it difficult to analyse each of the paragraphs alleged in the declaration and decide what impression the ordinary reader would gain. This is because the ordinary reader would not break down and analyse the article in the manner it has been broken down in the declaration. In this regard, I agree with the comments of HOLMES JA in *Dorfman v Afrikaanse Pers Publikasies (Edms) Bpk en andere* 1966 (1) PH J9 (A) at 45, where the learned JUDGE OF APPEAL stated:

"A court deciding whether a newspaper report is defamatory must ask itself what impression the ordinary reader would be likely to gain from it. In such an inquiry the court must eschew any intellectual analysis of the contents of the report and of its implications, and must also be careful not to attribute to the ordinary reader a tendency towards such analysis or an ability to recall more than an outline or overall impression of what he or she has just read. Furthermore, in view of the mass of material in a newspaper it is in general unlikely that the ordinary reader would peruse and ponder a single report in isolation."

I am satisfied that the article in *The People's Voice* very squarely fits within

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the quoted description by LORD PEARSON *supra*:

"The article was written so as to be sensational rather than informative and allusive rather than specific. The sequence of events and the connection between events are far from clear, especially on a first reading, which is the only reading which an article of this character is likely to receive."

I am satisfied that, apart from the fact that *The People's Voice* is not a Sunday paper, I must read the article in the manner as described by DIEMONT JA in *Demmers v Wyllie & Ors supra*,

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at 851 G to H:

> "I must picture the Sunday afternoon reader of this newspaper who relaxes with his feet up and a glass by his side. He is in no mood to subject the article to close scrutiny and analysis. He is reading for his pleasure; sensational matter is provided for his entertainment. He will browse through the article, probably once only ..."

In approaching this question I also take (I hope) careful note of the comments by LEON J in *Ngcobo v Shembe & Ors* 1983 (4) SA 66 (N) at 71B-G:

> "The technique of interpretation which is required is a matter of great importance; it is a hangover from the jury system and is by no means free from difficulty. For a court must attempt the difficult task of striving to read the article through the eyes of an 'ordinary reader'. Frequently the court attempting this task (as here) does not qualify as an 'ordinary reader' at all, *inter alia*, because those articles in a newspaper which are read are read with close attention and critically at that. In those circumstances the subconscious temptation to substitute one's own views for those of the 'ordinary reader' may be strong and, in some cases, I suspect, has proved fatally irresistible. Within the limits of my ability I have endeavoured to guard against this danger."

Applying the ordinary reader test

My view is that an ordinary reasonable reader on reading through the article in question in *The People's Voice* would form the impression that the Attorney-General was facing a very serious allegation of fraud, that the evidence against him was very strong, and that he would be very likely to be convicted. I would also understand the ordinary reader as deciding from the article that even other legal practitioners were of the view that in the circumstances described the Attorney-General should not be in office. I

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would think that the ordinary reader having glanced through the article would think that the closing paragraph underlined the strength of the allegations against the Attorney-General by suggesting that even fellow legal practitioners were of the view that he should stand down. I am quite satisfied that the ordinary reasonable reader would gain a clear impression that the allegations against the Attorney-General were both very serious and that the evidence against the Attorney-General was very incriminating - leaving the ordinary reasonable reader to the conclusion that the conviction of the Attorney-General would be very likely indeed. I do not consider that the ordinary reader would make the conclusions suggested in the defendants' plea. I am of the view that the content of the article goes much further than limiting the ordinary reader to the conclusion suggested in the defendants' plea.

I should, perhaps, specify that it is my view that each of the aspects referred to in para 8(a), 8(b), 8(c), 8(d) and 8(f) of the declaration results in the ordinary reader arriving at the overall impression to which I have referred.

Paragraph 8(e) revisited

I will now deal specifically with the arguments in regard to para 8(e) of the declaration.

Paragraph 8(e) states that "the sources revealed that the case mysteriously ended in 1985 and is only resurfacing now after the client allegedly sought audience with very high officials of the

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Government of Zimbabwe". It is Mr *Gillespie's* contention that the statement in para 8(e) bears the meaning and in the context of the article will be reasonably understood to mean that the dropping of charges in 1985 was part of a disgraceful suppression of the truth to which the plaintiff must have been a party.

Mr *Gillespie* argued in particular that ordinary readers would be moved by the context of the imputation, namely that charges in the plural could be laid and that only one has thus far been identified in the article. He also argues that a fraud, although very serious, is by no means necessarily so "sensitive" as to lead the police to decline to name it. I have considered these points raised by Mr *Gillespie*, but I do not consider that the ordinary reasonable reader would read the article in the degree of detail necessary to make those observations. Mr *Gillespie* frankly conceded in his argument that the inference he was seeking to make in regard to para 8(e) is an available inference, though not the only possible inference.

I have given the matter careful consideration and the decision in regard to this

aspect is not an easy one, but my view is that the reasonable reader reading the article in the manner in which I have described would not probably conclude that the dropping of the charges in 1985 was part of a disgraceful suppression of the truth to which the plaintiff must have been a party. My view is that the reasonable reader would much more probably read the paragraph in question as further enhancing his belief from the article that the allegations against the Attorney-General were very serious and the evidence very incriminating. I make this finding having given careful consideration to of the capacity of the ordinary reader to jump to conclusions and have in this regard considered the judgments in *Demmers* v *Wyllie supra*.

I am accordingly not able to find on the probabilities that the ordinary reader would draw the conclusion as suggested by Mr *Gillespie* from para 8(e) of the article. I reiterate that my view is that that paragraph, as read with the various other paragraphs in the declaration, would collectively add to the ordinary reader's belief that there was a very strong allegation of very serious fraud.

Paragraph 9(c)

Having dealt specifically with para 8(e) I now turn to the allegation in para 9(c) of the amended declaration. This paragraph alleges that the article as a whole carries the additional sting that the plaintiff, as a lawyer in private practice, has committed a fraud on a client and he is unfit to remain in office as the Attorney-General of Zimbabwe pending investigations or at all. It should be clear from the comments I have made as to how I consider the ordinary reader would read the article, that I am of the firm view that the article does carry the additional sting as detailed in para 9(c) of the plaintiff's declaration. I accordingly make that finding.

Identification of defamatory meaning

I turn now to the third consideration referred to by Mr *Gillespie* in his argument. This is whether the meaning identified is defamatory, and is generally judged by the "right thinking test". In this

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regard I would simply refer to the comments made by MUCHECHETERE J (as he then was) in *Velempini v Engineering Services Department Worker's Committee for the Engineering Services of the City of Bulawayo & Ors* 1988 (2) ZLR 173 (H) at 178G-H where he stated that the approach is whether the offending statement "is calculated to bring another person into contempt, or undue ridicule, or which is calculated to diminish the willingness of others to associate with the plaintiff, or which is calculated to lower him in the

estimation of right thinking or reasonable members of society generally". I am quite satisfied that the right thinking test is clearly met in this matter.

The defences

(1) JUSTIFICATION

Having dealt with the basic three requirements outlined by Mr *Gillespie* in argument, I must now proceed to decide, having made the findings I have, whether any of the defences which the defendant has put forward can be sustained. It is, of course, clear that the *onus* of establishing the defences rests squarely on the defendants on a balance of probabilities. In this regard I refer to the very recent decision of the South African Appellate Division in *Neethling v Du Preez & Ors and Neethling v The Weekly Mail & Ors*, a decision handed down by the South African Appellate Division on 2 December 1993, and which has not yet been reported. I am grateful to Counsel for having provided me with a copy of the judgment. *(3)

It is accordingly necessary to consider each of the defences raised by the defendants in regard to the matter. The first defence raised is that of justification. I am in agreement with Mr *Gillespie's* submission that for this defence to succeed it is generally said to be the rule that it is not necessary for the publication to be absolutely accurate in every detail. It suffices if it is substantially true, though in certain serious allegations, such as fraud, strict proof may be required. The authority for this contention is *Johnson v Rand Daily Mails* 1928 AD 190.

It is also Mr *Gillespie's* submission that the truth to be proven, moreover, is the defamatory content of the matter. Mr *Gillespie* argues that thus where it is said, for instance, that the "police are believed to have incriminating material"; or "Chinamasa is alleged to have defrauded his client"; or "lawyers believe that Chinamasa is unsuited for office"; what is to be proven in each case is not the existence of the belief or the making of the allegation, but the possession of the incriminating material; the occurrence of the fraud; and the disqualification from office. I am satisfied that Mr *Gillespie* is correct and in this regard refer to the statement in Burchell *The Law of Defamation in South Africa* at p 211-212 where the learned author states as follows :

> "Thus De Villiers correctly indicates that when A says of B 'I hear he is

a thief', the inquiry as to the truth of the statement relates to the question, not whether it is true that A actually heard

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what he did, but whether B is a thief."

Accordingly, I do not accept the argument put forward by Mr *Carter* that the defendants just need to prove that they were told the statements which have been complained of. But even if Mr *Carter* were correct, the defendants, because of the adverse finding I have made in respect of the credibility of Munyati have not proved that they were told that: (1) the police are believed to have in their possession seriously incriminating evidence pertaining to the alleged fraud; or (2) that the case mysteriously ended in 1985, and is only resurfacing now after the client allegedly sought audience with very high officials of the government of Zimbabwe. The defendants would, on Mr *Carter's* submissions as to the requirements of the defence of justification, have at the very least been required to prove that Munyati was told these aspects to have any chance of establishing the defence. They clearly have not done that.

The defendants would also, on Mr *Carter's* submissions, have had to prove that they were told that the charges were of such a sensitive nature that the ZRP had elected not to give any detailed statement to the press. All they actually proved was that Chihuri, speaking on condition of anonymity, said that it was a serious and sensitive matter which he should not talk about. So they could, applying Mr *Carter's* criteria, have reported that an anonymous source within the ZRP had said that the matter was a serious and sensitive one which he should not talk about. That is considerably less than what was printed. The use of the word "such" in relation to "sensitive" was not used by Chihuri and makes a substantial difference to the impact and meaning. Chihuri also did not state that the ZRP had elected not to give any detailed statement to the press. He just said (quite correctly) that he should not be talking about it. The use of the word "such" in relation to "sensitive", together with the suggestion that the ZRP on an official basis because of that declined to comment, to my mind puts what was printed in a different dimension to what Munyati was told.

Accordingly, in respect of paras 8(a), 8(c) and 8(e) of the declaration, applying Mr *Carter's* criteria for the defence of justification, the defendants have not even established that they printed what they were told.

I now turn to assess the defence of justification against the law as summarised in Burchell *op cit*. I must confess that I find the matter unusual in that

normally one would have expected the defendants to be endeavouring to prove the truth of the defamatory allegations made. In fact, in this case, the defendants have made no effort to prove that the basis of the allegations contain any truth at all. Instead, the plaintiff, who does not have the onus, has specifically proved that the allegations are of no substance whatsoever. This has been established, not only from the plaintiff, who I have found to be an entirely credible witness, but also from the police investigating officer Assistant Commissioner Tonde. His evidence, which I have accepted, established that when the docket was originally closed there was a complete explanation from the plaintiff. In addition, as Mr *Gillespie* has pointed out, there was also substantial rebutting evidence of the complaint which would have rendered any prosecution malicious. There is nothing to indicate that the reinvestigation of the docket has

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changed that situation.

It is also clear from the plaintiff's evidence, read with Tonde's, that Tonde was of the view that there was no case against the plaintiff. As regards the allegation that the police possessed seriously incriminating material evidence implicating the plaintiff in the commission of the fraud, absolutely nothing has been led to establish that this is so. In fact, the converse is clearly the truth. Furthermore, nothing has been led to show that the alleged charges were of such a sensitive nature as to preclude comment or that the docket was mysteriously closed and only reopened after high level intervention. Accordingly, I am entirely satisfied that on the aspect of justification the defendants have gone nowhere near discharging the onus which falls upon them. Indeed, the exact opposite is true: the plaintiff has very clearly proved that the allegations are untrue. I should point out that if the defendants had established justification, then I would have no doubt, as Mr *Gillespie* concedes, that the publication wold have been in the public benefit.

Accordingly, I am satisfied that the defence of justification and public benefit has not been established by the defendants and I turn now to the defence of fair comment.

(2) FAIR COMMENT

It is correct that the defence of fair comment has as its essence that the offensive matter be an expression of opinion rather than statement of fact and that this opinion must constitute a comment on facts which are notorious or are set out in the publication complained of. The comment as identified must, as Mr *Gillespie* has argued, be genuinely held and fairly stated and its utterance in the public interest. The authorities in this regard are *Crawford*

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v *Albu* 1917 AD 102; *Marais v Richard & Anor* 1981 (1) SA 1157 (A) and *Tekere v Zimbabwe Newspapers* (1980) *Ltd & Anor* 1986 (1) ZLR 275 (H) at p 286-7.

I am in agreement with Mr *Gillespie's* submission that the only part of the offensive publication which conceivably constitutes an expression of opinion is that part which reports the alleged sentiment of the lawyers claimed to have been interviewed. I am also in agreement with Mr *Gillespie's* assertion that fatal for the defendants is the consideration that the comment is based on the supposed fact of the commission of a fraud and a genuine investigation being conducted into the matter. That has not been established as a fact. If the defendants had obtained the plaintiff's response to the allegations, and then put both sides to the legal practitioners, the defendants might well have then been in the sphere of establishing fair comment. I am, however, satisfied that on the basis of the matter before me they have not done so.

I also agree with Mr *Gillespie's* argument that the defendants faced difficulties in the requirements that the comment must be fair, that it must be honest, relevant, free from malice and a reasonable inference on the facts.

I am satisfied that even if it is no requirement that the comment be a reasonable inference on the facts, but merely one which an honest though prejudiced man might hold, that the

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defendants have not shown that they honestly held the opinion nor that any persons interviewed did so. I agree with Mr *Gillespie's* submissions in that regard. I am in particular agreement with his submission that in addition any relevance which the comment has to the matter is related entirely to that portion of the context which constitutes an affirmation of the reliability and substance of the accusations. It is to be noted that this is the aspect which I have referred to in regard to that part of the article in analysing the matter earlier. There can be no relevance to any comment concerning the resignation of a high public official in the face of, and solely because of, ungrounded accusations. This portion of the article to my mind, as I have indicated, adds to the impression that the allegations are very well founded when in fat they are baseless. That further distances it from the realm of fair comment.

I am accordingly satisfied, that for the reasons suggested in Mr *Gillespie's* argument, the defence of fair comment has also not been established by the defendants. I now turn to assess whether the defence of qualified privilege has been established.

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(3) QUALIFIED PRIVILEGE

The existence of qualified privilege outside the special categories of privilege is only held to exist where a statement is published in the exercise of a duty or right or the furtherance of a legitimate interest where the publishee had a legitimate interest in receiving the publication. In this regard I would refer to the comments by CORBETT CJ in *Financial Mail (Pty) Ltd & Ors v Sage Holdings & Anor* 1993 (2) SA 451 (A) at p 464 C-D where the learned CHIEF JUSTICE stated:

> "1. There is a wide difference between what is interesting to the public and what it is in the public's interest to make known.
>
> 2. The media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners; and they are peculiarly vulnerable to the error of confusing the public interest with their own interest."

The position in regard to the defence of qualified privilege has been very authoritatively decided in a case to which I have already referred, namely, that of *Neethling v Du Preez & Ors* and *Neethling v The Weekly Mail & Ors supra*.

In that case, in a landmark decision, the entire basis of the defence of qualified privilege was reviewed. I propose to quote at length from the summation of the law made by HOEXTER JA at p 229-232 of the cyclostyled judgment which I have been kindly provided with *(4). After reviewing the authorities HOEXTER JA summarises the law as follows:

> "(a) At common law there is no general 'media privilege'; and there is no defence of 'fair information on a matter of public interest'. A journalist who obtains information reflecting on a public figure has no greater right than any other private citizen to publish his assertions to the world.
>
> (b) The common law does not recognise a duty-interest relationship between a newspaper and its readers sufficient to support qualified privilege. Publication in the media is publication to the world; not

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everyone can be regarded as having a sufficient interest in the subject-matter. To this rule there are limited exceptions, such as replies to public attacks, and publication in 'crisis' cases, where speedy national warnings are necessary to avert possible disaster.

(c) Although all privilege is based on the publication in question being 'in the public interest', there is a palpable difference between that which is interesting to the public and what is in the public interest to be known.

(d) A newspaper publication is not the subject of qualified privilege merely because it gives the public information concerning a matter in which the public is interested. Qualified privilege requires publication pursuant to a duty, whether legal, moral or social, and the existence on the part of its readers of a corresponding interest or right to receive the defamatory communication. This reciprocity is essential. It connotes a common legitimate interest which is more than idle curiosity in the affairs of others.

(e) The test of the existence of a duty to publish is an objective one, based on the standards of the community concerned: Would the great mass of right-minded persons in the position of the defamer have considered, in all the circumstances, that it was their duty to make the communication? The test is the common convenience and welfare of society.

(f) One function of a newspaper is to provide its readers with fair and accurate reports of proceedings, parliamentary, judicial and otherwise. Another function of a newspaper is to provide its readers with news of current events and gossip.

(g) The commercial incentive to increase circulation figures renders newspapers prone to the error of confusing what is in the public interest with the newspaper's private economic interest.

(h) In deciding whether a defamatory publication attracts qualified privilege the status of the matter communicated (ie its source and intrinsic quality) is of critical importance. In this connection obvious questions which suggest themselves (the examples given are not intended to be exhaustive) are: Does the matter emanate from an official and identified source or does it spring from a source which is informal and anonymous? Does the matter involve a formal finding based on reasoned conclusions, after the weighing and sifting of evidence, or is it no more than an *ex parte* statement or mere hearsay?"

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I also note the citing by HOEXTER JA with approval, at p 241 of the cyclostyled report in the *Neethling* matter *(5), the words of COCKBURN CJ in *Campbell v Spottiswoode* (1863) 3 B&S 769 at 777. The wisdom of these words, I feel, has stood the test of time.

"It is said that it is for the interests of society that the public conduct of men should be criticized without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men, and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them,

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destructive of their honour and character, and made without any foundation."

I turn now to apply the principles in regard to qualified privilege as laid down in the authorities to which I have referred to the facts of this case. In this regard, Mr *Gillespie* argues that objectively judged the defendants can have had no possible duty to publish the information and imputations without any attempt at verification, particularly in that they have in substance been shown to be false. I am in full agreement with that submission.

Mr *Gillespie* also argued that the defendants have failed to show the source of their information was so reliable and unimpeachable as to justify publication of the matter that, if false, would be quite scurrilous and seriously detrimental to the administration of justice. I also associate myself with those arguments of Mr *Gillespie's*. I would add that the defendants have not proved that there was any source at all for some of the statements-and the statements for which they have proved no source are those which are particularly defamatory.

Mr *Gillespie's* third argument in respect of this aspect of the matter was that the defendants gave no heed to the harmful consequences of error in the report, or falsity of the facts, or ulterior motive or unreliability on the part of the source. They published and sensationalised a baseless scandal and utterly failed to show the required journalistic ethic. I am also in agreement with that argument put forward by Mr *Gillespie*. I need only refer to my comments on Munyati's credibility to indicate why I express that agreement.

I think it is also appropriate to analyse the position in this case against the tests specifically referred to in the *Neethling* case to which I have referred. The

first question asked by HOEXTER JA is: does the matter emanate from an official and identified source or does it spring from a source which is informal and anonymous? In this case the matter sprang from a source which was anonymous, became identified, and then resulted in a marked discrepancy between the source and the reporter. That hardly gives one confidence in the veracity of the matter.

The next question asked by HOEXTER JA is: does the matter involve a formal finding based on reasons and conclusions after the weighing and sifting of evidence, or is it no more than an *ex parte* statement or mere hearsay? Quite clearly, the report in this matter did not involve a formal finding based on reasoned conclusions after the weighing and sifting of evidence. It was anything but; in fact, it was entirely the opposite. It was at best no more than an *ex parte* statement or mere hearsay.

A further comment also raised by Mr *Gillespie* in regard to the defence of qualified privilege is that *The People's Voice* could hardly have failed in any duty it felt it had to the public if it had delayed the matter for a week to speak to Mr Chinamasa. That is undoubtedly true. If it had done so, it would hopefully have succeeded in publishing a fair and balanced article.

Taking all those factors into consideration, I am satisfied that the defendants have gone nowhere near meeting the *onus* of establishing the defence of qualified privilege. Accordingly, I

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am satisfied that each of the defences put forward by the defendants have failed to be established.

Malice or improper motive

I now turn to the question of malice or improper motive.

Malice or improper motive will, as Mr *Gillespie* argued, disqualify a defence of fair comment or qualified privilege - not that they have been established anyway. In this regard see *Burchell on Defamation* at p 230 and p 258.

It is Mr *Gillespie*'s argument, based on the authority of *Borgin v de Villiers & Anor* 1980 (3) SA 556 (A) 578H-579A and *May v Udwin* 1981 (1) SA 1 (A) at 18G-19H, that improper motive is disclosed where the publisher has any intent other than the honest and legitimate exercise of his right to comment or to give information, and particularly where he acts in order to expose the subject of his report to odium, or without an honest belief in the truth of what is being said. It is also his argument that improper motive is

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disclosed where the defamatory matter is not germane to the lawful exercise of the right or is published where there is no reasonable cause to do so.

It is Mr *Gillespie*'s argument in regard to the question of malice or improper motive in this matter that it was a deliberate untruth to suggest that the defendants had undertaken their own investigation and that there was seriously incriminating evidence against the plaintiff. This, he argues, was done to persuade a readership to believe in the truth of the defamatory slur. I am satisfied that that submission by Mr *Gillespie* is entirely correct. Mr *Gillespie* also argued that it was equally objectionable, particularly in the context of a claim to have made independent investigations, to have reported falsely Frost's alleged importunate demands for justice which eventually led to action at high level to pierce [*sic*] a cover up. Mr *Gillespie*'s argument is that this was done solely to sensationalise a suggestion of official oppression of an individual and to raise further opprobrium against the plaintiff. I am also in agreement with that argument. I would add that my overall view is that the article was carefully constructed to sensationalise the allegation, to make it appear a very serious matter where there was very incriminating evidence. The first paragraph of the article (para 8(a) of the declaration) sets the sensationalist tone which, to my mind, then continues undiminished. That approach, when considered against the baseless nature of the allegations and my findings on the credibility of the reporter, becomes very relevant in considering the existence of improper motive.

Mr *Gillespie*'s further argument in regard to malice or improper motive was that in the absence of genuine comment from lawyers it was quite improper to attribute such remarks or to adopt such comments. He argued that this was nothing other than a calculated attack upon the plaintiff's position and not at all germane to any duty to publish fairly the existence and true state of investigations on a complaint against him.

I have already indicated that my specific view of that part of the article is that it serves to

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enhance the impression of a very strong case against the plaintiff, and I am satisfied that there is substance in Mr *Gillespie*'s arguments in regard to this aspect of the matter.

There are also various other aspects which are relevant in regard to malice or improper motive and which have been referred to by Mr *Gillespie*.

The first of these is the failure by the defendants to approach the plaintiff Chinamasa at all. I am satisfied that it would have been very easy to make that

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approach. The fact that the defendants decided to publish without seeking the comments of the plaintiff is a further relevant factor in regard to existence of improper motive. A further factor also referred to by Mr *Gillespie* was the failure to interview or attempt to interview the investigating officer. I am quite satisfied that if the defendants had been acting properly an obvious step would have been to contact the investigating officer. They could easily have obtained the name of the investigating officer from the Press Liaison Office or from the Police Commissioner to whom Mr Munyati spoke. I am satisfied that this failure is also relevant in regard to the assessment of the existence of malice or improper motive.

Mr *Gillespie* also referred to the evidence of Munyati and noted that his primary concern was to keep the press moving and to meet his deadlines, not to ensure that he was writing a reasonable and balanced article. It is quite clear from Munyati's evidence that Mr *Gillespie*'s criticism is valid and I am satisfied that this aspect is also relevant in regard to the assessment of improper motive.

The factor which I think is of particular relevance in regard to the question of whether malice or improper motive exists is the fact that the reporter who wrote the article has been found by this court to have given untruthful evidence in regard to the inclusion of the paragraphs relating to the strength of the incriminating evidence, and the reasons for closing and re-opening the investigation - all aspects which, in my view, very substantially add to the sting of the defamatory imputations. I also note Mr *Gillespie*'s argument that it cannot pass unremarked there has been never any attempt to show nor to uphold any belief in the veracity of the complaint. For all the reasons which I have outlined, I am quite satisfied that it is appropriate for this court to make a finding that there was malice or improper motive in regard to the publication.

Quantum of damages

I now, having analysed the evidence, the credibility of the witnesses, the law in regard to defamation, and having made findings in regard to the allegations of defamation and rejected each of the defences raised by the defendant, turn to assess the question of damages.

Mr *Gillespie*'s argument in regard to damages started by conceding that damages in this jurisdiction have remained relatively modest. He referred to the three relevant leading cases - *Tekere v Zimbabwe Newspapers supra*; *Zvobgo v Kingstons* 1986 (2) ZLR 310 (H); and

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Publications Ltd HH-135-92. I have considered the principles laid down in these cases in regard to the assessment of quantum of damages. I have paid particular regard to the approach laid down in *Zvobgo v Kingstons, supra*, at 325-329.

Mr *Gillespie* then referred to a number of aspects which he argued would make this case appropriate for a particularly high award of damages. I propose to look at each of the arguments raised in this regard by Mr *Gillespie*.

The first argument raised was that the plaintiff is a gentleman of unimpeached character and that he has assumed and discharged the burden of upholding his character and proving the defamatory slurs totally unfounded and totally unwarranted. This argument is entirely valid and is a relevant factor in assessing an appropriate amount of damages.

The second point raised was that the plaintiff is an experienced and respected lawyer and Attorney-General of the country. He has had a legal career and reputation of success, achievement and honour and the defamation struck directly at that professional reputation. This submission is undoubtedly correct and undoubtedly relevant in assessing the amount of damages. See *de Flamingh v Pakendorf en 'n Ander* 1979 (3) SA 676 9 (T) 686 and *South African Associated Newspapers & Anor v Yutar* 1969 (2) SA 442 (A).

The third argument raised is that the plaintiff has in addition a public and political life and reputation among the foremost in the nation. That position and fame was calumnized by the report and the plaintiff's ability to discharge his high official duties came under severe pressure. Apart from noting that the plaintiff, nevertheless, managed to continue carrying out those official duties I think this argument is also one of substance which needs to be taken into account.

The fourth submission put forward was that the nature and extent of the publication was particularly aggravating. The plaintiff was attacked by the magazine which is the mouthpiece of the party of which he is a central committee member. It was argued that this gave a considerable imprimatur of reliability and weight to the attack. The article was moreover extensively published throughout the country to all sectors of the population and in particular to the party masses. I should point out that there was evidence that *The People's Voice* had an average weekly circulation at the time of some 19 000. Once again, this submission is correct and needs to be taken into account in assessing damages.

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The fifth point made is that the attack was moreover one of a series of articles in what had the appearance of a concerted press campaign. The defendants, by adding their voice to the publicity, enhanced and aggravated it. This argument, though not as cogent as some of the

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previous arguments, is basically valid.

The sixth point raised in regard to damages was that the nature and gravity of the defamatory slur is as serious as anyone could make against a practising lawyer and almost as serious as the worst that could be said about an Attorney-General in office. The comments made in *SA Newspapers v Yutar* 1969 (2) SA 442 (A) underline this submission.

The seventh submission made by Mr *Gillespie* is that to date there has been no apology or retraction in respect of any portion of the article and that there has been no attempt to publish the other side of the story. This is correct and of course also relevant in assessing the amount of damages.

Mr *Gillespie* argued that all these features put the matter in a class of its own thereby warranting a substantially higher award of damages than any previously granted.

Mr *Gillespie* also argued that account must be taken of the declining value of money when comparing with awards in earlier cases. In this regard he referred to *SA Eagle Insurance Company v Hartley* 1990 (4) SA 833 (A) at 841, and I think take note of the comments made in that matter. I think, however, that the comments in *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 (S) at 8 are also apposite. In particular I refer to the observation (at 8C-D) that the fall in the value of money is a fact which should be taken into account in terms of purchasing power, but not with such an adherence to mathematics which may lead to an unreasonable result. I also take note of the comment at 8 E-F that awards should reflect the state of economic development and general economic conditions of the country and tend towards conservatism. I am aware that *Jackson v Minister of Defence* does not relate to defamation but to personal injuries. I am, however, of the view that those comments which I have quoted from GUBBAY JA (as he then was) are relevant in deciding the approach to damages in defamation matters as well.

As against the aspects referred to by Mr *Gillespie*, a factor which I think is also of substantial relevance in regard to damages, is that the defamatory material in this matter started with what was a basic truth. This was that there was an allegation and a docket had been opened - which docket had been

closed and then re-opened. What the defendants did was to seriously corrupt that basic truth and the seriousness of the defamation derives from that corruption of the truth.

The corruption of the truth derives from: the suggestion that the allegations were of such a sensitive nature that the ZRP would not comment; that an independent investigation had taken place; that the police had in their possession seriously incriminating evidence pertaining to the alleged fraud; that the docket was mysteriously closed and only re-opened after high level intervention; and that other legal practitioners doubted the continued incumbency of the Attorney-General in office. These aspects collectively, as I have indicated, give the entirely false impression of a very strong case, with very strong evidence, and with conviction being very likely. It is this wholly false impression from which the seriousness of the defamation derives,

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but it must not be forgotten that it is a corruption of a basic truth and not an outright lie. The matter is different, for example, from the position in *Chinengundu v Modus Publications , supra*, where the defamation of the late Mr Justice Chinengundu, who was then a Deputy Minister of Justice, was entirely untrue. I accordingly make the distinction between the normal run of defamation matters where quite often the statement is totally untrue and where, as in this case, the defendants have corrupted a basic truth.

I do not in any way understimate the extent of the corruption but I think that the point I have made is a relevant factor. In this regard I would point to the observation made by Mr *Gillespie*, that if the article had stuck to the basic truth that a docket was opened against the plaintiff in 1985 and later closed, then re-opened, and that the complaint was a fraud against a client involving an alleged amount of $5 000, that it is very likely that the defamation proceedings would not have commenced. I note that Mr *Gillespie* would also have required the paper to have consulted the plaintiff and provided a balanced article. I am, however, of the view that if the defendants had limited themselves to the basic truths, and not seriously corrupted those truths, then it is very likely that the defence of qualified privilege may have been upheld. This observation needs to be taken into account against the various valid observations made by Mr *Gillespie*.

I am also of the view that it is important to keep in touch with reality. It must be realised that what the plaintiff has been clearly alleging in evidence is a conspiracy to blacken his name. If the plaintiff were to proceed against the authors of that conspiracy, which he alleges existed, and prove that conspiracy, then the damages to which he is entitled would be very much greater than

those which this court will award. It is important to appreciate that *The People's Voice*, despite its very serious shortcomings, cannot be regarded as being part of the alleged conspiracy to which the plaintiff averted in evidence.

I am accordingly satisfied that all the aspects to which I have referred need to be taken into account in assessing the matter. My view is that the defamation is for all the arguments which Mr *Gillespie* has put forward a serious defamation, indeed a very serious defamation, but that it is not in the circumstances I have described as serious as it might otherwise have been.

Before proceeding to make the award of damages in this case there are two observations I would like to make which I think are pertinent.

The first observation is that I would not like this judgment to be regarded as affecting the new transparency of the press to which Mr Munyati referred. It is of critical importance to Zimbabwe's future that corruption in high places be exposed and that the highest persons in the land be held accountable for their actions. The press has an important role to play in this regard. But that does not mean that the press can act with the irresponsibility, and the serious irresponsibility, revealed in this case. I would hope that any journalist reading the judgment in this matter would realise the serious failings of *The People's Voice* in regard to the publication of the article

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complained of and be guided accordingly.

The second observation I would like to make is that on the papers which have been put in front of me I am able to comment very specifically on the strength of the allegation against Mr Chinamasa. I have in front of me not only Mr Frost's original statement to the police but also a police memorandum summarising Mr Frost's later position. I also have the detailed refutation of the allegations made by the plaintiff. Although, for reasons which I cannot readily comprehend, the docket has not been provided as requested, I am nevertheless in a position to make a reasoned comment on the nature of the allegations made against Mr Chinamasa. I can say with complete assurance that it should take anyone with any legal acumen not more than a few minutes to realise that the fraud allegations are completely without foundation. Mr Chinamasa's actions in regard to Mr Frost, on the evidence before me, were entirely proper. I share Mr Chinamasa's surprise that the police have not instituted investigations against Frost on an allegation of making a false report to the police. I emphasise that on clear evidence before this court Mr Frost made a false allegation that his signature on cheques had been forged and that unauthorised payments had been made by the plaintiff, when in fact he had signed the cheques himself.

BARTLETT J

Against the background I have detailed in this judgment, I find it mystifying that the docket that was reopened in early 1992 has still not been closed.

Having made these observations, which I believe to be pertinent, I now turn to make the award of damages in this matter. I am satisfied that in all the circumstances a higher award than any that has been granted previously is appropriate. But for the various reasons I have given I am not satisfied that the award should be very substantially higher.

Accordingly, balancing all the factors to which I have referred, the following order is made:

(1) The plaintiff is awarded damages in the sum of $30 000,00 against the defendants jointly and severally, the one paying the other to be absolved;

(2) Interest is awarded on the damages at the prescribed rate from the date of judgment to the date of payment;

(3) The plaintiff is awarded costs of suit.

Honey & Blanckenberg, plaintiff's legal practitioners

Kantor & Immerman, defendant's legal practitioners

CHITSAKA & ORS v THE PUBLIC SERVICE ASSOCIATION 1994 (1) ZLR 174 (SC)

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Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

17 January & 7 February 1994

Flynote

Public service - Public Service Association - whether Executive Committee properly constituted - legality of action taken by Executive Commission

Headnote

There had been a leadership dispute within the Public Service Association. The dispute related to which persons were properly members of the Executive Committee (Exco). When this matter came on appeal the Appeal Court found that in terms of the constitution of the Public Service Association the purported suspension of certain members of Exco was invalid and that, after this purported expulsion of these members, the Exco was neither properly constituted in terms of the constitution nor was it quorate. Additionally, the President of the Association was not validly a member of the sub-association which he had purported to join.

Case cited:

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

Mrs J B Wood for the appellants

A P de Bourbon SC for the respondent

Judgment

McNally JA: This appeal concerns a leadership dispute within the Public Services Association ("the PSA"). On 14 September 1992 the PSA instituted proceedings by notice of motion in the High Court. It sought a declaration that certain persons were properly members of the Executive Committee ("Exco"), and that the eight respondents (the present appellants) were not. It further sought an order interdicting those eight persons from holding themselves out

as members of Exco, from interfering with the operations of Exco, and from dealing with the property of the PSA. They were required to return to the PSA such of its property as was in their possession.

The application succeeded. The learned judge *a quo* handed down a judgment in their favour on 17 March 1993. The eight respondents appealed.

The appeal almost collapsed before it started, as a reference to S-179-93, not reported, will reveal. It survived by the narrowest of margins, and was heard on 17 January 1994. Our order

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made it clear that the application would be heard then, and its success would depend on the strength of the merits of the appeal.

Before going into the merits of the appeal, I will briefly set out the structure and organisation of the PSA. It is a very large organisation representing all public servants. However, they are not represented directly. Each public servant is permitted to join one of the four sub-associations of the PSA, and it is these sub-associations which are the members of the PSA. The four sub-associations are as follows:

1. The Professional and Technical Officers Association - PROTEC;
2. The Administrative and Executive Officers Association - ADEX;
3. The Civil Service Employees Association - CSEA; and
4. The Government Workers Association - GWA.

The constitution of the PSA was produced in the court *a quo*. The membership provisions include the following:

> "Membership shall be open to all groups of workers employed in the Civil Service, provided that:-
>
> a. The group's interests are not covered by an existing recognised sub-association;
>
> b. ...;
>
> c. ...;
>
> d. The applicant's constitution is not inconsistent with the constitution of the PSA;
>
> e. ...;
>
> f. Individuals wishing to join the Association shall be referred to the affiliate Association corresponding to their posts: Where a dispute arises as to which Association is appropriate the final decision shall be that of the Executive Council."

McNALLY JA

It is important to bear in mind the structure of the PSA, and the thinking behind that structure. It seems to me that the following statements can be made about the structure of the PSA, following from the provisions I have cited:

1. Its members are not individual public servants but groups of public servants;
2. Public servants are to be grouped according to their particular interests. Thus professional and technical employees belong to PROTEC; administrative and executive officers belong to ADEX; employees in Group I and II of the Public Service belong to CSEA; and general workers belong to GWA.
3. Where the constitution of one of the sub-associations is ambiguous or capable of more

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than one interpretation or inconsistent with that of the PSA, it must be interpreted so as to be consistent with the constitution of the PSA.

4. Individual public servants may belong to only one of the sub-associations.

Against that background, I turn to consider the issues in the present case. A brief history of the dispute is necessary in order to understand these issues.

Mr Nelson Bushu was the President of the PSA. At the stage when this dispute arose, it was in issue whether he was still President. The argument was that he had ceased to qualify for CSEA membership by reason of his promotion to a grade which qualified him for membership of ADEX. But he had not joined ADEX. He had joined GWA. Thus, it was contended, he was not qualified to hold office in GWA and, through GWA, in the PSA.

Mr Bushu was elected President of the PSA in 1990. In November 1991 a group of public servants was unhappy about the way the PSA was being run. They convened a special meeting of the PSA for 20 December 1991. They wanted to propose constitutional amendments, but did not circulate the details of the amendments proposed. They were advised, probably correctly, that such a meeting would be unconstitutional. They went ahead anyway.

The December meeting was attended by representatives of PROTEC, ADEX and CSEA, but not by GWA. This meeting was followed by another in Kadoma. The contention of the PSA is that both those meetings were unconstitutional and that their decisions must be ignored.

Meanwhile in January 1992 the PSA Executive Committee, consisting now

McNALLY JA

entirely of GWA members, suspended the membership of PROTEC, ADEX and CSEA, on the grounds of failure to pay affiliation fees. This was done presumably in pursuance of the provisions of s 6.3 of the PSA constitution, which provides:

> "Failure to pay affiliation fees for two consecutive months shall result in the sub-association concerned automatically losing all benefits and services enjoyed by affiliates. The matter shall then be referred to the disciplinary committee which shall proceed to deal with it in the manner provided for disciplinary measures in terms of this constitution."

I should say that I have found no provision for disciplinary measures in the constitution of the PSA. There is a provision that the General Conference may decide on the affiliation and expulsion of sub-associations.

Thus, from January 1992, the PSA was effectively being run by GWA, which is both the largest in number of members, and the lowest ranked in terms of the Public Service hierarchy of all the four sub-associations. The Executive Council consisted of the President (Mr Bushu, claiming to be a member of GWA), the Vice President from GWA, and three GWA members. The other three Vice Presidents, representing PROTEC, ADEX and CSEA, were excluded, as were the additional members from those three bodies.

These three excluded sub-associations meanwhile were seeking to claim that they were the

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true representatives of the PSA, and they purported to act on behalf of the PSA.

This, then, was the background to the application by the PSA before the High Court, in which it sought the relief set out in the first paragraph of this judgment. The appellants contend that the various orders should not have been made. They raise the following arguments:

1. Mr Bushu should not have been held to be eligible for membership of GWA.
2. GWA was not proved to have over 18 000 members, therefore it was entitled only to two additional members on the Executive Committee. Therefore, even if the Exco quorum was five, there were only four members present and eligible and thus Exco could not function legally.
3. In any event the Exco quorum was six, not five.
4. Exco had no authority to suspend members from Exco simply because of non-payment of affiliation fees.

McNALLY JA

I will deal with these arguments in turn:

1. MR BUSHU'S MEMBERSHIP OF GWA

Mr Bushu was a member of CSEA. He was promoted to a rank which made him ineligible for membership of CSEA, but eligible for ADEX. He chose instead to join GWA.

Two documents were produced which were claimed to be the constitution of GWA. The one provides that "membership shall be voluntary and open to Group III employees in the Public Service". The other provides that "membership shall be voluntary and open to all Civil Servants".

The learned judge decided that because the first document clearly had "draft" written on it, whereas the other had the rubber stamp of GWA authenticating it, the latter was to be preferred. Thus any civil servant could be a member of GWA. Therefore Mr Bushu was entitled to be a member of GWA.

This decision, with respect, ignores the warning I gave in *Public Service Commission & Anor v Tsomondo* 1988 (1) ZLR 427 (S) at 441E about the dangers of relying in motion proceedings on the relative credibility of pieces of paper. In my view, both these alleged constitutions were so flawed that their production should not have been sanctioned.

The overriding consideration on which the learned judge should have relied was the need for concordance between the constitution of GWA and the constitution of the PSA.

I have already drawn attention to the constitution of the PSA (which, apart from its appendix, was an agreed document). That constitution makes it clear that members of the Public Service

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may join "the affiliate Association corresponding to their posts". In Mr Bushu's case, that was ADEX. If indeed the GWA constitution allows any civil servant to join it, that provision is *ultra vires*. The provision must be read to mean "any civil servant **who is not eligible for membership of one of the other sub-associations**". If any civil servant could join GWA it would make nonsense of the whole structure of the PSA and its sub-associations. The GWA constitution would be inconsistent with the PSA constitution.

This first point should not therefore have been decided in favour of the respondent.

McNALLY JA

2. THE MEMBERSHIP OF GWA

This question is important because of the composition of Exco. Exco consists of:

One President;

Four Vice-Presidents, one from each of the four sub-associations;

One extra delegate per 6 000 members to a maximum of three extra.

This last provision is not very clearly worded but has been interpreted, I think correctly, to mean that each sub-association may have an extra representative if it has 6 000 or more members, two extra representatives if it has 12 000 or more members, and three extra representatives if it has 18 000 or more members.

On the facts, it is argued, GWA has not proved it has 18 000 members. Indeed Annexure MMM, provided by the PSA through Mr Bushu, shows that at no time did GWA membership reach 17 000. The learned judge seems to have accepted the figure of 18 000, for which there is no justification.

If GWA had between 12 000 and 17 000 members at the relevant time, it was entitled to nominate to Exco one Vice-President plus two other members, a total of three. Together with the President that made a total of four which was inadequate for a quorum, whether that quorum was five or six. The appellants' objection on this score seems to me to be valid.

3. THE QUORUM

The provisions relating to the quorum for the PSA Exco are contained in an annexure or appendix. Again, we had two versions. One says: "A quorum will be six committee members". The other says: "A quorum will be five committee members". The latter document had the "five" typed in. The former had it inked in. The learned judge favoured the "five".

In my view, neither document was properly proved to be the correct one, and neither should have been relied on.

But there is a more fundamental question. The provision as to a quorum is, in my view, woefully inadequate. With an organisation like the PSA, which has only four members (PROTEC, ADEX,

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CSEA and GWA), the quorum provisions should relate not only to individuals but to groups. In other words, the quorum provisions should read something like the following:

McNALLY JA

> "A quorum will be five (or six) committee members, provided that there will be at least one representative (excluding the President) from each of at least three of the four sub-associations."

Otherwise, we have the ridiculous situation of "the tail wagging the dog". It is not appropriate that one sub-association should be able to make fundamental decisions in the absence of the other three. It must be noted, however, that this is no more than a comment. It is not a judicial ruling.

4. EXCO'S AUTHORITY TO SUSPEND FOR NON-PAYMENT

Because PROTEC, ADEX and CSEA refused to pay their affiliation fees, they were not allowed to send representatives to Exco.

As I indicated earlier, the basis for this exclusion is alleged to be s 6.3 of the PSA constitution. It does not seem to me that s 6.3 allows the president to suspend the non-paying sub-associations from their right to representation on Exco.

Only the general conference may expel sub-associations. Only the disciplinary committee can deal with matters of discipline. The only thing that happens automatically is that the offending sub-associations "lose all benefits and services enjoyed by affiliates". Membership of Exco is not a benefit or a service. What is envisaged here is an automatic loss of financial and material benefits for the affiliated sub-associations and their members.

Accordingly, in my view it was wrong for Mr Bushu to deny PROTEC, ADEX and CSEA their right to representation on Exco.

For any one of these four reasons the application by the PSA should have failed in the court *a quo*.

Bearing in mind that we are faced with an application for the reinstatement of the appeal, the following considerations are relevant:

1. The appeal is justified because the decision of the court *a quo* was clearly wrong;
2. The issue with which we are concerned is one of major importance to a very large number of people. It affects virtually everyone in the Public Service;
3. The blame for the procedural problems which have dogged the appellants'

McNALLY JA

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case is entirely attributable to the mishandling of the case by their legal representative - and I am not referring to Mrs *Wood*, who has conducted an excellent salvage operation; and

4. An appropriate special order as to costs can be made, as foreshadowed in S-179-93.

Accordingly, the application for reinstatement of the appeal succeeds. The appeal is reinstated, and is allowed. The order of the court *a quo* is altered to read:

"The application is dismissed with costs."

The costs of and relating to the hearing of 17 January 1994, including the costs of preparing the record and other appeal related costs, are to be borne by the respondent. The costs of both parties of and relating to the hearings on 18 October 1993 and on 2 November 1993, excluding those costs in respect of which the CHIEF JUSTICE made orders on 13 and 25 August 1993, are to be borne personally by Mr Samukange of Byron Venturas & Travlos.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Byron, Venturas & Travlos, appellants' legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

BINDURA TOWN COUNCIL v CHAKAMA & ANOR 1994 (1) ZLR 182 (HC)

Court **High Court, Harare**

Robinson J

Application for garnishee order

9 February 1994

Flynote

Practice and procedure - attachment - garnishee order - against whom garnishee order may be made - money in hands of judgment creditor - judgment debtor employed by judgment creditor - judgment creditor a local authority and precluded by regulations from deducting from wages except when compelled to do so by legal process - not competent to obtain garnishee order against itself

Headnote

The applicant, a local authority, was judgment creditor in an action brought against one of its own employees. In terms of s 9 of the Undertaking of Town Councils Regulations 1984, it was precluded from making deductions from its employees' salaries except, *inter alia*, for amounts

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which the council was compelled by legal process to pay on behalf of an employee. It sought to evade this restriction by obtaining a garnishee order against itself. Its reasoning was that money deducted in terms of such an order would constitute amounts which it was compelled by legal process to pay on behalf of the employee.

Held, that the application could not succeed. Apart from the fact that it is not competent for a party to institute legal proceedings for an order against itself, rule 388 of the High Court Rules clearly envisages that the garnishee must be a third party. In addition, if a garnishee fails to make deductions in terms of a garnishee order, execution may be levied against it. There can be no question of a creditor levying execution against itself.

Per curiam: although s 34 of the Magistrates Court Act [*Chapter 18*] permits a magistrates court to order execution against a garnishee, there is no corresponding provision in the High Court Rules.

ROBINSON J

Case cited:

African Distillers Ltd & Ors v John Plagis Bottle Store (Pvt) Ltd & Anor 1972 (1) RLR 171 (G); 1972 (3) SA 135 (R)

A B C Chinake for the applicant

Judgment

Robinson J: This is an unopposed application for a garnishee order, which raises the question whether a judgment creditor may garnishee monies in its own hands.

The salient facts are these:

(a) The application seeks to enforce a judgment granted by this court on 12 May 1993 against the judgment debtor for costs which were taxed and allowed in the sum of $2 764,65 ("the judgment debt").

(b) The judgment debtor is employed by the applicant.

(c) A writ of execution issued by the applicant against the judgment debtor for the recovery of the judgment debt resulted in a *nulla bona* return.

(d) The applicant is prohibited from deducting the judgment debt from, or setting it off against the judgment debtor's wages by s 9 of the Undertaking of Town Councils Employment Regulations 1984 (SI 403 of 1984), which provides in peremptory terms as follows:

"9. No deduction or set off of any description shall be made or allowed from any remuneration, other than a bonus, due to any employee, except -

(a) where an employee is absent from work, on days other than paid holidays or vacation leave, a *pro*

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rata amount of his wage only, for the period of such absence; or

(b) by a written stop-order for contributions to insurance, medical aid or pension funds; or

(c) any amount which a council is compelled by law or legal process to pay on behalf of an employee; or

(d) the rent of accommodation provided by the council; or

(e) costs in terms of section 19; or

(f) with the written consent of the employee, a deduction, not exceeding fifty *per centum* of the wage of the employee, in respect of an advance on wages."

(I would point out that para (e) *supra*, refers to the costs of a security identity card and items of clothing and equipment supplied to an employee.)

(e) In the circumstances the applicant decided to launch these proceedings

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ROBINSON J

to enable it to have the judgment debt deducted by instalments from the judgment debtor's wages on the ground that this would constitute an "amount which a council is compelled by law or legal process to pay on behalf of an employee", a deduction allowed by s 9(c) of SI 403 of 1984.

(f) The applicant therefore prays for an order that of the monies becoming due by it to the judgment debtor by way of wages there be attached each month the sum of $30 to satisfy the judgment debt and that the judgment debtor pay the costs of the proceedings.

It will be seen immediately that what in effect the applicant asks for is an order against itself to make deductions from the judgment debtor's wages. May this be done?

The relevant provisions of the Rules of Court are rules 377 and 385, which provide as follows:

"377. A judgment creditor who has obtained a judgment or order for the recovery or payment of money, which judgment or order is unsatisfied, may make a court application for an order that any money at present due or becoming due in the future to the judgment debtor **by a third party** within the jurisdiction (hereinafter called the garnishee) shall be attached. (my emphasis)

385. Where the attachment relates to the salary or wages of the judgment debtor and he shows that the attachment will not leave him and those dependent upon him a sufficient amount for their maintenance, the court may make an order for payment by instalments of such sum periodically as it decides will leave sufficient for the judgment debtor to maintain himself and those dependant upon him, and in awarding the costs of the proceedings the court may take into consideration the reasonableness or otherwise of any offer made by the judgment debtor to pay by instalments out of his salary or wages."

Apart from it not being competent for a party to institute legal proceedings for an order against

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itself, rule 377 clearly envisages that the garnishee be "a third party". Accordingly, insofar as the applicant and the garnishee in this case are "one and the same entity", to quote the words used in para 5 of the supporting affidavit filed by the applicant's legal practitioner, the short answer to the question raised is that rule 377 precludes the court from granting the garnishee order sought by the applicant against itself.

Furthermore and in any event, there can be no question of a creditor's levying

ROBINSON J

execution against itself. I highlight this point because, although unlikely to happen in this matter, if a garnishee fails to make deductions from a judgment debtor's wages in terms of a garnishee order, the court can, under the common law, upon a special application made by the judgment creditor, order execution to levy against the garnishee. See *African Distillers Ltd & Ors v John Plagis Bottle Store (Pvt) Ltd & Anor* 1972 (1) RLR 171 (G) at 174A-G; 1972 (3) SA 135 (R) at 137A-F (*per* GOLDIN J).

In the premises the application is dismissed and the applicant is left either to institute civil imprisonment proceedings against the judgment debtor or to recover the judgment debt from Felix Chinoro as provided for in the judgment of this court granted on 12 May 1993.

In conclusion, I would re-direct attention to an anomaly mentioned by GOLDIN J in the *African Distillers Ltd case supra* at 174A-E (135A-D), which still exists in our law governing garnishee proceedings.

Whereas s 34 of the Magistrates Court Act [*Chapter 18*] permits a magistrates court to "order execution to issue against the garnishee", there is no corresponding provision in the High Court Rules. Accordingly, I would urge that the Rules be amended to close this gap.

Kantor & Immerman, applicant's legal practitioners

STANDARD CHARTERED BANK ZIMBABWE LTD v MATIZA 1994 (1) ZLR 186 (HC)

Court **High Court, Harare**

Robinson J

Application for summary judgment

9 February 1994

Flynote

Practice and procedure - summary judgment - application - may be made at any time before trial - High Court of Zimbabwe Rules 1971- rules 64, 71, 164 and 212(a)

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Headnote

An application for summary judgment may be made at any time before a trial begins, even after the pleadings have been filed by both sides and the pre-trial conference between the parties has been held. This was not always the case, as an application at one time had to be made within ten days of notice of entry of appearance to defend had been served on the plaintiff. When rule 64 of the High Court Rules was replaced in 1992, no reference to time limit was included, making it clear that the legislature intended to do away with any time limit. To hold otherwise would be to frustrate the plaintiff in its legitimate quest for judgment and allow the defendant unfairly to hold the plaintiff at bay for an inordinate period. Even under the former rules which prescribed a time limit, the court could entertain an application for summary judgment after closure of the pleadings. Further, if after the discovery of documents and the holding of the pre-trial conference, a document revealed that the defendant's defence was a sham, there is every reason why the plaintiff should be allowed to make application for summary judgment at that stage.

Quaere, whether it is permissible for a plaintiff to adduce evidence on the quantum of his damages in his founding affidavit in terms of rule 64(2) or by a separate affidavit attached to his founding affidavit in terms of rule 64(3).

1994 (1) ZLR p187

ROBINSON J

Cases cited:

IMF Mgmt Svcs (Pvt) Ltd v Sicom Spa (Zim) Ltd 1991 (1) ZLR 309 (S) *Venetian Blind Entprs (Pvt) Ltd v Venture Cruises Boatel (Pvt) Ltd* 1973 (1) RLR 229 (G); 1973 (3) SA 575 (R)

Scotfin Ltd v Afri-trade Supplies (Pvt) Ltd 1993 (2) ZLR 170 (H)

Jena v Nechipote 1986 (1) ZLR 29 (S)

B D Brighton for the plaintiff/applicant

Judgment

Robinson J: This is an unopposed application for summary judgment which came before CHIDYAUSIKU J on 2 February 1994. However, the learned judge postponed the matter for one week for argument on whether the plaintiff could apply for summary judgment after a plea and replication had been filed. Accordingly, it falls to me to give a decision on this issue.

In answering this question, it is appropriate to start by looking at the former rule 65 of the High Court Rules as it stood before that rule and the former rule 64 were both repealed and replaced by the present rule 64 with effect from 7 February 1992, in terms of s 11(a) of SI 43 of 1992.

The former s 65 provided that notice of an application for (summary) judgment under (former) rule 64 was to be served on the defendant not more than ten days after notice of entry of appearance to defend had been served on the plaintiff.

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When former rules 64 and 65 were repealed and replaced by the present rule 64, the former time limit of ten days was conspicuous by its absence.

Rule 64 now provides as follows:

> "*Application for summary judgment*.
>
> (1) Where the defendant has entered appearance to a summons, the plaintiff may make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.
>
> (2) A court application in terms of subrule (1) shall be supported by an affidavit made by the plaintiff or by any other person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no *bona fide* defence to the action.
>
> (3) A deponent may attach to his affidavit filed in terms of subrule (2)

ROBINSON J

documents which verify the plaintiff's cause of action on his belief that there is no *bona fide* defence to the action.

> (4) Order 32 shall apply to the form and service of an application in terms of this rule and to any opposition thereto."

By omitting reference to any time limit in the present rule 64, the Legislature clearly intended to do away with any time restriction with regard to the filing and service of a summary judgment application. However, was it intended that a plaintiff could apply for summary judgment, as the plaintiff has done in this case, after the defendant had filed his plea and the plaintiff had replicated; or, for that matter, at any time before the trial commences, even after the holding of the pre-trial conference between the parties?

In this connection, I quote below the heads of argument filed by the applicant's legal practitioners.

> "1 BACKGROUND
>
> 1.1 This is an unopposed summary judgment application.
>
> 1.2 The matter was postponed from 2 February 1994 for argument as to whether summary judgment procedure was permissible once a plea and replication have been filed.
>
> 2 SUBMISSIONS IN DETAIL
>
> 2.1 The 14-day [*sic*] period after entry of appearance within which to file [*sic*] a summary judgment application was removed from rule 64 by SI 43/92.
>
> 2.2 The clear and obvious intention was that summary judgment could be raised at *any* stage of the proceedings right up to the trial if the "bogus defence" situation could be raised by the applicant.
>
> 2.3 The old case of *Roscoe v Stewart* 1937 CPD 138 is cited by Herbstein & Van Winsen *Civil Practice of the Superior Courts in South Africa* 2 ed at p 295 as indicating that the procedure was intended to eliminate bogus defences and defences which are obviously bad in law.
>
> 2.4 Since the circumstances in which summary judgment may be sought might arrive after the 14-day [*sic*] time limit had expired, for example, by way of discovery of new evidence or as a result of disclosures or

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admissions made in pleadings, it was illogical and unnecessarily restrictive to prevent the relief of summary judgment at any time, particularly in view of the delays in finalising trial actions.

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2.5 This intent of the Rules Committee is made clear in the amendments enacted by SI 43/92.

2.6 This trend towards opening up the use of summary judgment procedure is made even clearer by the amendments to rule 67 brought about by SI 25/93 which permits the filing of a replying affidavit in certain circumstances, which was previously generally not permissible at all (*Venetian Blind Enterprises (Pvt) Ltd v Venture Cruises Boatel (Pvt) Ltd* 1973 (3) SA 27 [*sic* - it should be 575] (R), although the opposite conclusion was reached in *Dube v Ncube* HB-67-87 and (partly) *Chinaire v Ednewgnam* (Pvt) Ltd HH-493-87.

2.7 In any event rule 71 clearly contemplates that summary judgment may be applied for even after a defendant has pleaded.

2.8 In the present case the applicant's belief that the respondent had no *bona fide* defence was confirmed by the defence set out in the defendant's plea in which he largely admits the plaintiff's claim.

2.9 In all the circumstances the court is clearly entitled to hear a summary judgment application, particularly as the merits are good and to deny summary judgment on a technicality will only postpone the inevitable and unfairly prejudice the applicant.

2.10 Regarding the merits, it is quite plain from the defendant's own plea that he has no real defence and he has in any event failed to provide security or an opposing affidavit.

2.11 Accordingly summary judgment is prayed in terms of the draft order."

Turning to the issue before me, that is to say, whether the plaintiff may apply for summary judgment after the filing of the defendant's plea and the plaintiff's replication, let me say immediately that there is no doubt in my mind that he may do so.

I say this because even when the former rule 75 carried a time limit for the service of an application for summary judgment on the defendant, rule 71 envisages that a defendant may have pleaded before the application is heard. Consequently, if a defendant had filed his plea, without a claim in reconvention, before the time limit for serving a summary judgment application had expired and the plaintiff had replicated before the application was heard, obviously there could and would have been no objection to the court's hearing the application, despite the pleadings being deemed to be closed in terms of rule 212(a). *A fortiori*, if, under the present Rules, there is no longer any time limit within which a summary judgment application is to be served,

ROBINSON J

it was clearly permissible for the plaintiff in this matter to make its application for summary

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judgment when it did on 17 December 1993, being over two months from the date on which it filed its replication to the defendant's plea. The defendant's plea was filed on 2 September 1993, just over one month after the defendant had entered an appearance to defend the plaintiff's action.

I agree entirely with Mr *Brighton* that to hold otherwise would be to frustrate the plaintiff in its legitimate quest for judgment and to allow the defendant unfairly to hold the plaintiff at bay for an inordinate period while the plaintiff awaited, with concern, the advent of the trial of his action.

Accordingly, since, on the papers, I am satisfied that the plaintiff is entitled to the relief which it claims, I order that summary judgment, with costs, including collection commission at the rates prescribed by the Law Society of Zimbabwe, be entered for the plaintiff in the sum of $415 628,06 together with interest thereon at the rate of 43% *per annum*, compounded monthly, calculated from 1 August 1993 to the date of payment.

Although it is not necessary for me to decide the point, I would add that, in my view, there is nothing to stop a plaintiff from applying for summary judgment at any time before the trial commences, even after the holding of the pre-trial conference between the parties. I say this for two main reasons.

First, as already observed, even under the former rules, which prescribed a time limit for serving a summary judgment application, it was possible and permissible for the court to entertain an application for summary judgment after the closure of pleadings. Furthermore, when considering an application for summary judgment, there is nothing to prevent a court from taking into account the pleadings filed of record as well as any particulars furnished which, when filed, become part of and additional to the pleading to which they relate without, however, existing as a pleading in their own right. See *IMF Management Services (Pvt) Ltd v Sicom Spa (Zimbabwe) Ltd* 1991 (1) ZLR 309 (S) at 314 B (*per* GUBBAY CJ). See also *Venetian Blind Enterprises (Pvt) Ltd v Venture Cruises Boatel (Pvt) Ltd* 1973 (1) RLR 229 (G) at 233H & 234A (*per* GOLDIN, J as he then was) 1973 (3) SA 575 (R) at 577 & 578.

Second, if, after discovery of documents, a plaintiff were to inspect a document made available to him by the defendant in terms of rule 164 which revealed that the defendant's defence was a sham, then there is every reason why the plaintiff should be allowed to make an application for summary judgment at that stage.

ROBINSON J

Before concluding, I would like to make a couple of observations which I trust will have the ear of Mr *Brighton* as a member of the High Court Rules Committee.

In *Scotfin Ltd v African Trade Supplies (Pvt) Ltd* 1993 (2) ZLR 170 at p 177E I commented as follows:

> "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

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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 made this recommendation in the knowledge that it is not difficult for a defendant to defeat an application for summary judgment because, as pointed out by GUBBAY JA (as he then was) in *Jena v Nechipote* 1986 (1) ZLR 29 (S) at 30D, all the defendant has to establish "is that 'there is a mere possibility of his success'; 'he has a plausible case'; 'there is a triable issue'; or, 'there is a reasonable possibility that an injustice may be done if summary judgment is granted'".

Accordingly, since under the rules now governing the position, a plaintiff seeking summary judgment is permitted to attach to his founding affidavit documents which verify his cause of action on his belief that there is no *bona fide* defence to the action and may in certain circumstances supplement his founding affidavit with a further affidavit, I feel one might as well go the full distance by allowing the plaintiff to file an answering affidavit to the defendant's opposing affidavit, if the plaintiff elects to do so in a last ditch attempt to satisfy the court that the defendant has no *bona fide* defence, so as to avoid the lengthy delay entailed if the case has to go to trial.

My second observation is that, now that rule 64 no longer makes an application for summary judgment conditional upon the plaintiff's claim being for a debt or liquidated demand, there can be no objection to a plaintiff's seeking summary judgment in respect of damages which are easily and readily ascertainable such as, for example, for holding over damages which are readily assessable having regard to the rental payable before the termination of the lease in question.

ROBINSON J

However, where a judgment in default is sought under Order 9, rule 60 requires evidence as to *quantum* to be adduced if the claim is one for damages. A *fortiori* it follows that the court should not grant summary judgment against a defendant in respect of a claim for damages unless the *quantum* of the damages has first been proved to its satisfaction.

That being so, it is not clear to me whether, as the rules on summary judgment presently stand, it is permissible for a plaintiff to adduce evidence on the *quantum* of his damages in his founding affidavit filed in terms of rule 64(2) or by a separate affidavit attached to his founding affidavit in terms of rule 64(3). Consequently, I feel that this is a matter which should be clarified and dealt with in the appropriate rules.

Honey & Blanckenberg, plaintiff/applicant's legal practitioners

NICOLS v PEARL GENERAL INSURANCE COMPANY & ANOR 1994 (1) ZLR 193 (HC)

Editor's Note:(6)

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Court **High Court, Harare**

Annotations Link to Case Annotations

Bartlett J

18, 19 & 20 January & 11 February 1994

Civil action

Flynote

Delict-apportionment of damages

Damages - delictual damages for loss of support - discount factor - taxation - period of dependency - accelerated benefits of inheritance - pension entitlement

Evidence - onus in civil cases - proof on balance of probabilities - link between credibility of witnesses and probabilities of case

Headnote

A British diplomat, who was crossing a road on foot during daytime, was struck and killed by a young man in a motor vehicle. The young man was going too fast, failed to keep a proper lookout and did not hoot or take any evasive action.

In finding that the driver of the vehicle did not sound his hooter, the court decided that the issue of credibility was inextricably bound up with the issue of the probabilities of the case.

The court found that the contributory negligence of the driver was 85% and that of the pedestrian was 15%.

In respect of damages, the court applied a discount factor of 8% and made a contingency deduction of 10%. It also took into account the benefit to the children of the accelerated inheritance of deceased's property in England. It did not, however, take into account the inheritance by the widow of property in Cyprus as she was living on this inheritance and was unlikely to sell the property. The court also did not take into account the pension that the widow received as a result of her husband's death. It held that s 3

BARTLETT J

of the Assessment of Damages Act [*Chapter 40*] laid down that such a pension was not to be taken into account in assessing damages. Finally, the court awarded damages in British sterling currency.

Cases cited:

National Employers' General Ins (Pvt) Ltd v Jagers 1984 (4) SA 437

Koster Ko-op Landboumaatskappy Bpk v SA Spoorwee en Hawens 1974 (4) SA 420 (W)

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African Eagle Assurance Co Ltd v Cainer 1980 (2) SA 234 (W)

McKenzie v SA Taxi Cab Co 1910 WLD 232

Senator Versekeringmaatskappy v Laurence 1982 (3) SA 136 (A)

BP & Shell Mktg (Pvt) Ltd & Anor v Baptista S-203-91

Jackson v Motor Ins Pool 1976 (1) SA 562 (R)

Hulley v Cox 1923 AD 234

Legal Ins Co Ltd v Botes 1963 (1) SA 608 (A)

Min of Defence & Anor v Jackson 1990 (2) ZLR 1 (S)

CIR v African Oxygen Ltd 1963 (1) SA 681 (A)

British Transport v Gourley [1956] AC 185 (HL)

Pitt v Economic Ins Co Ltd 1957 (3) SA 284 (D)

Gilbanks v Sigournay 1959 (2) SA 11 (N)

Van der Platts v SA Mutual Fire & General Ins Co Ltd 1980 (3) SA 105 (A)

Goodall v President Ins Co Ltd 1978 (1) SA 389 (W)

Laney v Walhem 1931 CPD 360

Roberts v London Ass Co Ltd 1948 (2) SA 841 (W)

Maasberg v Hunt, Leuchars & Hepburn Ltd 1944 WLD 2

Snyders v Groenewald 1966 (3) SA 785 (C)

A P de Bourbon SC for plaintiff

M J Gillespie for defendants

Judgment

Bartlett J: In this matter the plaintiff claims £ 172 700 as damages in respect of the loss of support suffered by herself and three children as the result of the death of her husband in a motor accident in Zimbabwe on 26 November 1988.

The first defendant is the insurer of the motor vehicle which collided with the plaintiff's late husband. The second defendant (Beattie) is the driver of that vehicle. In her declaration the plaintiff makes the allegation that the accident which resulted in the death of her husband was due to the negligence of the second defendant. In their pleas the defendants deny that there was any

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BARTLETT J

negligence on the part of the second defendant and accordingly put the entire basis of the plaintiff's claim in dispute.

I would refer to the approach laid down in *National Employers' General Insurance (Pvt) Ltd v Jagers* 1984 (4) SA 437 at 440-441 where EKSTEEN AJP, stated:

> "It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but, nevertheless, where the *onus* rests on the plaintiff as in the present case, and there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. **The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of the probabilities favours the plaintiff, then the Court will accept his version as being probably true.** If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

This view seems to me to be in general accordance with the views expressed by COETZEE J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens* 1974 (4) SA 420 (W) and *African Eagle Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W). **I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him**

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> **on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore accepted. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities"** (my emphasis).

I have endeavoured to adopt the approach laid down by EKSTEEN AJP in assessing the credibility of the witnesses in this matter. I agree that the estimate of the credibility of a witness is inextricably bound up with a consideration of the probabilities. On that basis I have no doubt that I can unreservedly accept the evidence of the plaintiff's witnesses as to how the accident occurred and reject the evidence of Beattie and the witnesses called by him. The plaintiff has very definitely discharged the onus falling on her shoulders.

The significance of this finding is that there was no hooting by Beattie. I am also satisfied that in accepting the evidence of the plaintiff's witnesses and rejecting the evidence of the defendants witnesses that Beattie was keeping no look out at all. He was driving at a speed which was undoubtedly excessive in the circumstances and because he was not keeping a proper look out I am satisfied that he only saw the deceased at the very last moment. I reiterate that I am quite

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satisfied that the court can unreservedly reject as unworthy of belief the carefully tailored evidence of the defendant describing the hooting and carefully watching the deceased as he approached.

It is not possible to make a specific finding as to the speed of Beattie's vehicle. It was certainly travelling at a speed in excess of the speed limit - even Beattie accepts that. Lowe, the most impressive of the plaintiff's witnesses, was of the view that it was travelling considerably faster than the 60 km/h speed limit, but was unable to assess an approximate speed. I have no doubt that it is appropriate to find that it was travelling at a speed which was markedly excessive in the circumstances, and that Beattie in all probability engaged in friendly conversation with his four young friends in the car, was not keeping any proper look out at all and only saw the deceased at the very last moment.

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ASSESSMENT OF THE RESPECTIVE DEGREES OF NEGLIGENCE

Having assessed the evidence and made findings of fact I must now turn to assess the respective degrees of fault in regard to the accident.

It is clear from the evidence that the deceased was himself not keeping a proper look out. It would seem that he was walking across the road, having bought the soapstone carvings, and that he was not paying any proper attention to the traffic on the road. From Mr Lowe's evidence and the evidence of the other witnesses called by the plaintiff there was very little traffic on the Enterprise Road that Saturday afternoon. But it would clearly appear that the deceased was not looking - as he would otherwise would have seen the approaching car driven by Beattie, and have either stood in the centre of the road until it had gone past, or waited between the lanes on the carriageway towards town before crossing. Accordingly I am satisfied, as Mr *de Bourbon* fairly concedes, that there was a degree of contributory negligence on the part of the deceased. The decision this court must make is to decide what the respective degrees of fault in respect of the accident were.

In this regard Mr *de Bourbon* referred to *McKenzie v SA Taxi Cab Co* 1910 WLD 232 at 233 where BRISTOWE J stated:

> "It has been urged in this case that as the driver of the car sounded his hooter, he did all that it was his duty to do. That was only part of his duty. It was also his duty to avert an accident if reasonably possible . . . it is the duty of a person in control of an instrument, if an accident is imminent, to prevent it where that is possible by the exercise of ordinary care and diligence."

I am satisfied that this general principle still applies today - though of course taking proper account of the vastly different traffic conditions pertaining in the last decade of the century as opposed to the first. I would also refer to the observation in *Senator Versekeringmaatskappy v Lawrence* 1982 (3) SA 136 (A) where it was pointed out that a motorist will be negligent if he proceeds on his way when he sees a pedestrian approaching his vehicle and that pedestrian appears to be unaware of his approaching vehicle.

Mr *de Bourbon* also referred to *BP & Shell Marketing (Pvt) Ltd & Anor v Baptista* S-203-91.

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Ironically that case occurred outside the first defendant's building in Harare and the key witness was the commissionaire of the first defendant. In that case a pedestrian crossing Samora Machel Avenue had

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been hit and killed by a vehicle driven by an employee of BP & Shell Marketing. By accepting the evidence of the witness to whom I have referred, however, the High Court as supported by the Supreme Court, found that the deceased had been crossing the road when there was a pedestrian green signal and the appellant's driver had apparently proceeded against a red light. There was no suggestion of contributory negligence on the facts of that matter and it is accordingly of no particular assistance. A further case referred to by Mr *de Bourbon* was *Jackson v Motor Insurance Pool* 1976 (1) SA 562 (R). In that case the driver was held 75% responsible and the pedestrian 25% responsible, on facts which were broadly similar to those in this matter. Two pedestrians crossed Angwa Street in Harare without looking and the driver, also without looking, crashed into them.

Mr *de Bourbon* while accepting the existence of contributory negligence argued that on the particular facts of this matter the degree of negligence of the driver should be found to be close to 100%. Mr *Gillespie* for his part was particularly helpful in respect of this aspect of the matter. He very fairly conceded that he was of the view that if the court accepted that there was hooting then there should be a finding of two-thirds to one-third against Beattie and that if the court accepted that there was no hooting then the finding should be 75% to 25% against Beattie. I have of course found that there was no hooting.

Each case, however, depends entirely on its own particular circumstances and I am of the view that the negligence of Beattie in this matter was to a greater degree than 75%. It is quite apparent from the findings I have made that he was keeping no lookout whatsoever, while driving at a speed well in excess of the speed limit and markedly excessive in the circumstances, and that he only saw the deceased at the very last moment. I am of the view that *Jackson v Motor Insurance Pool , supra*, although similar, is distinguishable. The reported judgment is brief and the detailed facts are not included. It is, however, apparent that the accident occurred in Angwa Street which is in the city centre and that excessive speed on the part of the driver was not referred to as a factor. This provides two distinguishing aspects from the present matter.

The presence of an abundance of pedestrians crossing the road at odd points apparently with some degree of carelessness is commonplace within the relatively small amount of blocks making up the City Centre - and much more difficult for drivers to anticipate or guard against. The accident in this matter occurred on an open carriageway several kilometres from the city

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centre and I am satisfied that in these circumstances the degree of negligence of Beattie in failing to observe the deceased at all was of a higher degree than that revealed in *Jackson*'s

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case. The second distinguishing factor is that Beattie was very definitely travelling at an excessive speed whereas there is no indication of speed being a factor in *Jackson*'s case.

My view is that considering the circumstances of this case, and in particular the fact that it was a quiet Saturday afternoon with very little traffic, that the degree of negligence of Beattie was substantially higher than that revealed in *Jackson*'s case *supra*. My view is that the breakdown of the degree of fault in this matter is one of 85% on the part of the driver and 15% on the part of the deceased pedestrian.

I accordingly make the finding that Beattie's degree of negligence was 85% responsible for the accident in this matter.

ASSESSMENT OF DAMAGES: THE PRINCIPLES TO APPLY

Having made that finding in regard to the causes of the accident I must now turn to assess the quantum of damages. In this regard Mr *Gillespie* and Mr *de Bourbon* were unable to reach an agreement. I accordingly have before me two competing documents in relation to the quantum of damages suffered by the plaintiff and her children.

Mr *de Bourbon*'s document consists of six pages of calculations detailing three possible alternatives as regards the assessment damages - though in view of the concessions made by Mr *Gillespie* in argument only the first two pages are relevant. Mr *Gillespie*'s document is somewhat longer, providing nine pages of calculations as to the appropriate quantum of damages.

Before proceeding to look at the two documents, to look at the differences between them, and to make my decision as to those differences, I think it appropriate to refer to the basic principles which should be applied in dealing with a matter of this nature. These principles were laid down a number of years ago in *Hulley v Cox* 1923 AD 234 at 243 to 244 by INNES CJ where he stated:

> "Some authorities consider that the calculation should be based on the principle of an annuity. *Voet* on the other hand favours a more general estimate. Such damages, he thinks, should be awarded as the sense of equity of the Judge may determine, account being taken of the maintenance

> which the deceased would have been able to afford and had usually afforded to his wife and children. That would seem the preferable view as giving a greater latitude to deal with varying circumstances. It is at any rate desirable to test the result of an actuarial calculation by a consideration of the general equities of the case."

A further relevant case in regard to the overall principles to be applied is *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 614E-F where HOLMES JA stated:

> "The remedy has continued its evolution in South Africa - particularly during the course of this century - through judicial pronouncements, including judgments of this Court, and it has kept abreast of the times in regard to such matters as benefits from insurance policies. The remedy relates to material loss 'caused to the dependants of the deceased man by his death'. It aims at placing them in as good a position, as regards maintenance, as they would have been in if the deceased had not been killed. To this end, material losses as well as benefits and prospects must be considered. The remedy has been described as anomalous, peculiar, and *sui generis* - but it is effective.

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> In assessing the compensation the trial Judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations. In its present form, robust and practical, the remedy illustrates the growth and flexibility of the system of law, basically Roman-Dutch..."

These comments I think are relevant as providing the basis on which I should deal with the respective arguments in relation to the quantum of damages. There are a number of aspects in Mr *Gillespie*'s and Mr *de Bourbon*'s submissions which are common cause and I will refer to those initially.

THE POINTS OF COMMON CAUSE

The first of these is that it is common cause that the second eldest daughter, Maria, should be included in the calculation and that the amount of £ 2 700 calculated for her is the correct amount. It is also common cause, and indeed obvious from what I have said in respect of Maria, that it is appropriate to take into account the support of the minor children beyond the age of 18. It is also accepted by Mr *Gillespie* and therefore common cause that the prospects of the plaintiff remarrying are sufficiently unlikely to be disregarded. It is further agreed that the prospects of the plaintiff obtaining employment are

sufficiently unlikely to be disregarded in the calculations. It is also common cause that the amount of the award should be discounted at 8% which is the amount referred to in *Minister of Defence v Jackson* 1990 (2) ZLR 1 (S). Also common cause was the breakdown of the shares between the plaintiff and the children in accordance with accepted practice. It was also agreed that the award would be made in pounds sterling. Those accordingly are the agreed aspects. I now turn to deal with the aspects which were the subject of argument or disagreement.

THE POINTS OF DISAGREEMENT: TAXATION

The first of these is the question of taxation. Mr *Gillespie* in the documents he produced worked out his figures on the basis of a nett figure after tax. Mr *de Bourbon*'s calculations were based on a figure nett of tax for the deceased's salary but on a gross figure in respect of his pension. It is common cause that in regard to the pension the gross figure was £5 433 per annum and that the plaintiff's share of the nett figure after tax was £2 380. It was similarly agreed that in respect of the deceased's salary the nett figure was an amount of £9 452. I think it is necessary to deal with this point although Mr *de Bourbon* did not specifically deal with the question. He did, however, state that he maintained his submissions after hearing Mr *Gillespie*'s argument - apart from one minor concession in regard to boarding school fees. So I think it necessary to deal with the question of taxation.

In regard to the appropriate approach to taxation, I refer to the recent text Visser and Potgieter *The Law of Damages* at p 201. The starting point is that an amount of damages is usually not taxable as income since it is of a capital nature (*CIR v African Oxygen Ltd* 1963 (1) SA 681 (A)). The learned authors then state as follows:

> " In the leading English case of *British Transport v Gourley*[1956] AC 185 (HL), it was held that in assessing

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damages for loss of income in the past or future caused by bodily injuries, tax savings have to be taken into account when the damages themselves are not taxable but the lost income would be subject to taxation. A South African court quickly adopted this view in *Pitt v Economic Ins Co Ltd* 1957 (3) SA 284 at 287 and 289."

The learned authors add that in *Gilbanks v Sigournay* 1959 (2) SA 11 (N) at 19 the court followed the decisions in the above two quoted cases. They conclude by pointing out that from a remark in *Van der Platts v South African*

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Mutual Fire & General Ins Co Ltd 1980 (3) SA 105 (A) at 114, it seems that actuaries make a practise of deducting tax from estimates of future income, trial courts usually accept this, and the point is seldom raised on appeal. Reference should also be made as Visser & Potgieter do to the Zimbabwean case of *Minister of Defence v Jackson* 1990 (2) ZLR 1 (S) where taxation was taken into account in regard to lost income in the past as well as the future. Koch *Damages for Lost Income* at p 99 underlines the position when he states that the proper approach to taxation is to use a discount rate of interest gross of taxation but to reduce the notional lost flow of earnings or support to allow for the tax to which this income might be liable had the injury or death not occurred.

It accordingly seems to me on the basis of the authorities to which I have referred that Mr *Gillespie* was entirely correct in using the nett figure as opposed to the gross figure in working out his calculations. So I accordingly adopt Mr *Gillespie*'s approach in regard to this aspect of the matter.

THE PERIOD OF DEPENDANCY

The next aspect on which there was disagreement was the period of the dependancy. Mr *Gillespie* placed the period at 20 years while Mr *de Bourbon* placed it at 25 years. Mr *Gillespie*'s approach was based on the mortality tables contained in the November 1986 edition of *De Rebus* which tables were prepared by Koch, the author of *Damages for Lost Income.*

It seems to me that Mr *Gillespie*'s approach is preferable. Mr *de Bourbon* did not produce any mortality tables or documents dealing with the period of dependancy in relation to the plaintiff's case; he simply criticised Mr *Gillespie* for relying on South African mortality tables. If Mr *de Bourbon* had produced tables relating to the position in England and argued on those then the court might have been in a better position to accept his argument. As it is, I am satisfied that the 20-year period suggested by Mr *Gillespie*, taking the matter up to the age of 75, is a reasonable and fair approach. It might indeed have been difficult to categorise the deceased as he was a person who was in many countries for short periods of time - some of which would have been decidedly less safe than others. Accordingly in making the calculations I will use the 20-year period suggested by Mr *Gillespie*, as opposed to the 25-year period suggested by Mr *de Bourbon*.

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DEDUCTION FOR CONTINGENCIES

The next point of dispute was the deduction for contingencies. Mr *Gillespie* made a deduction of 15% and Mr *de Bourbon* a deduction of 10%. The basis of Mr *de Bourbon*'s deduction of 10% was by reference to *Goodall v President Insurance* 1978 (1) SA 389 (W). Assessing this authority and taking into account the overall equities of the matter I am of the view that a 10% deduction for contingencies would be appropriate. I accordingly propose to adopt Mr *de Bourbon*'s approach as regards the contingency deduction as opposed to Mr *Gillespie's*.

ACCELERATED BENEFIT OF INHERITANCE

A substantial remaining difficulty is the question of the accelerated benefit of the inheritance which resulted from the death of the deceased. Visser & Potgieter point out (at p 195) that -

> "The dependants of a deceased breadwinner may derive financial benefit from his death where they receive an inheritance earlier than would have been the case had he died in accordance with his normal life expectancy. Since *Hulley v Cox* 1923 AD 234 it is clear that the accelerated receipt of a benefit from the estate of a breadwinner has to be deducted from the claim by a dependant for loss of support sustained on account of his death.
>
> An important question is exactly how such benefits should be taken into account. According to one view, the full value of the benefit is to be deducted from the plaintiff's damages (see for example *Laney v Walhem* 1931 CPD 360 at 362). The alternative, and probably correct approach, is that it is merely the accelerated receipt of an inheritance which constitutes the benefit to be taken into account (see for example *Roberts v London Ass Co Ltd* 1948 (2) SA 841 at 851). Exactly how the accelerated value has to be assessed has not been finalized."

It is accordingly not surprising that there are very strongly competing positions put forward by Mr *de Bourbon* and Mr *Gillespie.* In regard to the relevant calculations Mr *de Bourbon* has utilised only the movable property referred to on p 4 of the Administrator's Account in respect of the deceased's estate which was produced as an exhibit by the plaintiff. On this basis in respect of the two boys, Jason Nichols and Corin Nichols, the amount which Mr *de Bourbon* utilised in his calculations of the accelerated benefit was an amount of £1 248,78.

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Mr *Gillespie* for his part included that £ 1 248,78 shared equally between the two boys together with an equal share of the immovable property in England which had a total value of £110 000. This immovable property had been transferred into the names of the two boys as a result of an agreement subsequent to the death of the deceased between the plaintiff and the surviving children. The two daughters renounced their rights to a share in that immovable property in favour of their two brothers having initially renounced those rights in favour of the plaintiff.

Mr *Gillespie* accordingly produced a vastly different calculation in regard to the accelerated benefit taking full account of the benefit the two boys obtained from each inheriting a half share of the house. His starting figure for the calculation was £ 55 624,00 as opposed to Mr *de Bourbon*'s much more modest £ 1 248,78.

The difference in regard to the plaintiff herself though substantial was not as marked. In respect of the plaintiff Mr *de Bourbon* included a total amount of £ 5 093 made up of the balance in a

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Barclays Bank account, some unit trusts and the refund of an insurance premium. He left out an amount of £20 000 relating to a plot in Cyprus. Mr *Gillespie* for his part included the plot in Cyprus in his calculations of the accelerated benefit of the inheritance. Accordingly Mr *de Bourbon* worked from a figure of £5 093 whereas Mr *Gillespie*'s starting figure was one of £25 093.

The significance of these figures is that if Mr *Gillespie*'s calculations are accepted then the accelerated benefit from the inheritance would completely wipe out the calculations of the amounts due for loss of support in respect of the two boys, Jason and Corin - leaving them due nothing at all. In regard to the plaintiff the amount due to her would be substantially reduced.

Mr *de Bourbon*, while accepting that the principle of accelerated benefit needed to be taken into account, was of the view that the benefit of the immovable properties should be excluded because of the particular circumstances of this case. His argument was to the effect that arrangements had been made within the estate after the death of the deceased to make the position as tenable as possible for the plaintiff and her children. He pointed out that it was accordingly unfair to lump the two boys with the full value of the house in England - when in fact the two sisters, who would have had a claim to an equal share in the house, had renounced their claim simply in order to come up with a beneficial arrangement for the family as a whole. Mr *de Bourbon* also put forward the argument that in view of the fact that, as the

plaintiff described, the house was being utilised for the benefit of the children as they went through their University careers that it should be excluded from the calculations. Mr *de Bourbon*'s final position was that if the court accepted Mr *Gillespie*'s argument that the property should be included then the share of the two boys should be reduced by half. This was because in reality that was the share to which they were entitled - that is a quarter share each as opposed to a half share each.

I have given careful consideration to the arguments of both counsel as to whether the property in England should be included in the accelerated benefit formula. I am satisfied that on balance there is no reason for excluding it. The value of that inheritance is a very real benefit in the hands of the two boys. It is a property which could be realised in England for a substantial amount of money and indeed is likely to be realised at some future stage. The plaintiff's evidence was that it is likely to be sold after the youngest boy, Corin, completes his university education. The reason for that is that until then it would be a place for the boys to stay as they followed their tertiary education in England. I am satisfied that that is not a sufficient reason for excluding it from the calculations in respect of the accelerated benefit of the inheritance.

I am accordingly satisfied that in respect of the property in England the value of that property should be taken into account in assessing the accelerated benefit value. I am in agreement with Mr *de Bourbon*'s submission, however, that the figure which should be the starting point in respect of those calculations should be a quarter share as opposed to a half share. I think there is validity in his comment that looking at the equity of the matter, and looking at the reality of the matter, it would be unfair to lump the two boys with half shares when in fact the two daughters

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were also entitled to quarter shares and only renounced their shares as part of an overall financial arrangement to assist the plaintiff.

Mr *de Bourbon* conceded that the formula in regard to the calculation of the benefit of the accelerated inheritance referred to by Mr *Gillespie* was correct. This avoids the need to have to consider which approach as to the calculation should be adopted (see Visser and Potgieter at p 195). The complicated arithmetical formula put forward by Mr *Gillespie* is as laid down in the table contained in Koch *Damages for Lost Income* at p 289. Mr *Gillespie* utilized this table in his document relating to calculations and Mr *de Bourbon* accepts that Mr *Gillespie*'s calculations correctly apply the formula - subject to their disagreement as to the starting figure which is the basis of the

calculation. Accordingly in view of the ruling I have made in respect of the shares in the house, the starting figure on Mr *Gillespie*'s table (in respect of the boys) is halved to £27 812 as opposed to £55 624. The value of the *spes* then becomes £9 925 and the value of the accelerated benefit for the two boys £17 887. These alterations in fact will make no difference to the final position in view of the overall calculations that I will ultimately be making. But I think that in principle the alteration, nevertheless, needs to be made.

I now turn to the question of whether the plot in Cyprus should be included in the accelerated benefit formula in respect of the plaintiff herself. Once again I have given careful consideration to the argument of counsel in regard to this aspect of the matter. My view of the matter is taking into account all the factors, and in particular taking into account the need to be fair and equitable, that the Cyprus plot should not be included in the calculation of the accelerated benefit. The reason for this is that the plaintiff has moved back to Cyprus, she is living in Cyprus, and the Cyprus plot is of considerable importance to her future and not something which is likely to be realised in monetary terms.

The same criteria does not apply to the house in England. There seems to be a decreasing detachment of the plaintiff's family to England and an increasing attachment to Cyprus. In this regard I have also taken into account the respective approaches in regard to the treatment of the family home outlined in Koch at p 194-5. I prefer the approach adopted in *Maasberg v Hunt Leuchars & Hepburn Ltd* 1944 WLD 2 as opposed to that adopted in *Snyders v Groenewald* 1966 (3) SA 785 (C) - as do Visser and Potgieter (at p 196). Accordingly I am of the view that assessing the matter overall that it would be fair and equitable to exclude the Cyprus property just as it is fair and equitable to include the property in England.

The effect of this is to make a substantial difference to the calculation of the value of the accelerated benefit due to the plaintiff. The starting figure on the accelerated inheritance table in respect of the plaintiff produced as part of Mr *Gillespie*'s calculations becomes £5 093 instead of £25 093. I have not done a precise adjustment of the various figures in the detailed table provided by Mr *Gillespie*. I am satisfied that to divide the final figure by 5 will provide a sufficiently accurate figure. I have done the first few revised calculations on Mr *Gillespie*'s chart and am satisfied that this supposition is correct - any slight differences will be of no overall

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significance. On this basis the value of the *spes* becomes £1 777 and the value of the accelerated benefit £3 316. I

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will transpose these figures into the overall calculations when I proceed to give judgment on the overall calculations.

THE BOARDING SCHOOL BENEFIT

The next point of disagreement which needs to be considered is the basis on which the loss of the benefit of boarding schools should be assessed. Mr *de Bourbon* on the one hand has relied on the £10 000 per annum described by the plaintiff in her evidence and the figures he has produced are based on that figure - that is £5 000 per child. Mr *Gillespie* on the other hand, having asked if documentary evidence was going to be produced, has relied squarely on the documentary evidence produced. His figures are therefore based on the amount of £1 120 per term shown in the receipt for the autumn term of 1991.

Accordingly Mr *Gillespie*'s calculations are somewhat less than Mr *de Bourbon*'s. Mr *de Bourbon* suggested in argument that a compromise figure should be relied upon at 50% between the figure used by Mr *Gillespie* of £3 360 per child and that of the plaintiff's of £5 000 per child. This compromise figure would be £4 180, being halfway between the respective positions.

The difficulty I have in regard to assessing this aspect of the matter is that on the one hand the plaintiff was undoubtedly a credible and reliable witness. But on the other hand this is an aspect of the matter which does require clear documentary proof - and which should be easily capable of clear documentary proof. It would have been abundantly clear to the plaintiff right from the early days after her husband's death that factors like proving school fees would in the fullness of time be important. It is accordingly somewhat surprising that only one receipt relating to one term in 1991 has been produced. So I need to balance the credible impression made by the plaintiff as a witness as against the lack of clear documentary proof of the position she described. I would add that she described the amount as being approximately £10 000 and she did not indicate what "approximately" meant.

It seems to me that I must exercise my discretion in this matter in a fair and equitable fashion. The figures in relation to the documents produced relate to 1991. It would to be unfair to postulate those figures through to 1994 and 1997 since it is unlikely that the school fees would not be increased. On the other hand, it would also be unfair without some recent substantial documentary proof to use a figure of £5 000 per year per child. Accordingly exercising my discretion to deal with the matter fairly and equitably I consider that it would

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be appropriate to use the figure of £1 120 per term to 1991 and to use the compromise figure suggested by Mr *de Bourbon* from after September 1991. That new figure will be one of £ 1 393

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per term from after September 1991. This solution is by no means perfect but I believe it to be fair considering the limited amount of precise information at my disposal. The calculation for Corin will be discounted as suggested by Mr *Gillespie* and agreed by Mr *de Bourbon*.

The next aspect which I need to consider is whether the boarding school figures should be attached to the calculations in respect of the two boys or to those in respect of the plaintiff. Mr *de Bourbon* in his submissions included them in the calculations in relation to the two boys, whereas Mr *Gillespie* was of the view that it would be more appropriate to include them as a loss suffered by the plaintiff. If they are included as a loss suffered by the plaintiff, as Mr *Gillespie* pointed out, that would in view of the calculations he had made benefit the plaintiff. I am grateful to Mr *Gillespie* for his fair comments in this regard. I am in agreement with Mr *Gillespie* that the boarding school fees should be included under the head relating to the plaintiff as opposed to that relating to the two boys. It seems to me quite clear that the expenditure is one which has been incurred by the plaintiff.

SECTION 3(1) THE ASSESSMENT OF DAMAGES ACT [*CHAPTER 40*]

The final aspect I need to consider before turning to making my calculations is the argument put forward by Mr *Gillespie* in regard to the interpretation of s 3(1) of the Assessment of Damages Act [*Chapter 40*]. If Mr *Gillespie*'s arguments in this regard were accepted it would have a substantial effect on the matter. Section 3(1) of the Assessment of Damages Act states as follows:

> "In assessing damages for loss of support as a result of the death of a person no insurance money, pension or benefit which has been or will or may be paid as a result of the death shall be taken into account."

It was Mr *Gillespie*'s submission that from the expected date of the deceased's retirement in July 1994 he would have been paid a pension in accordance with the documents produced in court, and to the extent that the plaintiff receives a pension thereafter, she receives it not as a result of the death, but as her portion of the deceased's entitlement to a pension. Mr *Gillespie*'s alternative argument was that if the wording of the statute was such as to exclude from consideration such a pension then this would lead to a manifest absurdity, such that the legislature could not have intended to have enacted, and that the

Statute ought to be interpreted so as to eliminate the absurdity. It was Mr *Gillespie*'s argument that the provision was intended to remove doubt as to whether any particular benefit received by a surviving dependant should be excluded as *res inter alios acta* or taken into account. It was Mr *Gillespie*'s argument referring to Visser and Potgieter at p 184-192 that the section achieves that in respect of benefits covered by it to the extent that it may be argued that these ought to be deducted from lost salary. He argued that where, however, a loss is claimed on the basis of a loss of a pension or a portion of that pension, and that pension or a portion thereof has been or will be paid to the survivor, then it is wholly fictitious to ignore the pension received. He suggested that that leads to a situation which cannot have been intended - so divergent is it from the principle of reasonable compensation for patrimonial loss.

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Mr *Gillespie*'s argument was advanced with less assurance verbally than it was in writing and I have no doubt that there is no substance in his argument. The relevant statutory provision has been in existence for 20 years in Zimbabwe and for even longer in South Africa. The argument which Mr *Gillespie* makes is one which would make a substantial erosion from the protection the section offers and if such an interpretation of the section was to be the acceptable interpretation I would have expected Mr *Gillespie* to be able to refer to specific authority supporting his interpretation. He has not done so and I have been unable to find any such authority.

It seems to me that the provision has been for the last 20 years interpreted as Mr *de Bourbon* has asked the court to interpret it and it is Mr *de Bourbon*'s argument that quite clearly the pension received is a result of the death. I am satisfied that that argument is correct. To reach that conclusion one only needs to apply the literal rule of interpretation and give the words their ordinary, literal meaning. Mr *de Bourbon* referred to Koch *op cit* p 213 and it is clear that the learned author is also of the view that pensions are excluded completely. He quotes an example referring to a widow's pension and states that such amount is excluded in terms of the legislation. He doesn't go on to add that it would only be excluded until the date the pension was actually being earned. I consider that Visser and Potgieter deal with the matter quite appropriately (at p 197) where they say, referring to the equivalent of s 3(1) of the Assessment of Damages Act:

> "Before the section came into operation such benefits were taken into account but the Legislature apparently felt this to be unfair. The criticism directed against this provision is unconvincing as the breadwinner

> during his lifetime bargained, worked or paid for such benefits and it is not clear why the wrongdoer, or his insurer should be enriched by that."

See Boberg 1965 SALJ at 107, 1969 SALJ at 342; McKerron 1951 SALJ at 373.

To interpret the provision as Mr *Gillespie* would have the court interpret it would substantially erode the rights which the Legislature was clearly trying to protect. One could perhaps take the example of a person already in receipt of a pension being struck and killed. On Mr *Gillespie*'s argument one would be able to say that that person was already in receipt of a pension and therefore the widow would receive the pension despite the death - and that accordingly the pension was not being paid as a result of the death. When one takes into account that persons might retire at the age of 55 and have another 20 years of useful life, on Mr *Gillespie*'s interpretation, the provision would enable insurers and persons such as the second defendant substantially to escape liability if the person that happens to be injured or killed is a pensioner. It seems to me that it is Mr *Gillespie*'s interpretation which would lead to the absurd result that concerns him.

For the reasons I have referred to and those advanced by Mr *de Bourbon* I am satisfied that the interpretation s 3(1) of the Assessment of Damages Act [*Chapter 40*] has had untroubled for 20 years is appropriate. I am accordingly satisfied that Mr *Gillespie*'s argument can be rejected.

I would finally point out that if I were incorrect in rejecting Mr *Gillespie*'s argument, he conceded

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that even if his argument were accepted there would be on his calculations an amount just in excess of £40 000 owing to the plaintiff. On my figures, incorporating the alterations made to Mr *Gillespie*'s figures, that amount would be close to £60 000.

OVERALL AWARD

Accordingly the overall figures are £2 700 in respect of Maria, £28 948 in respect of the plaintiff, and boarding school fees incurred by the plaintiff for Jason and Corin of £19 257 and £29 491. This gives an overall award of £80 396. This figure must be reduced in accordance with the findings I have made in regard to the respective degrees of negligence. 85% of the amount awarded totals £68 337.

Accordingly judgment is entered for the plaintiff with costs against the defendants jointly and severally, the one paying the other to be absolved in

BARTLETT J

the sum of £68 337. As to the question of interest from the date of judgment, my *prima facie* view is that this should run from the date of judgment at the rate of interest currently prevailing at any particular time at the Bank of England. This point was not, however, argued and accordingly I will allow that aspect of the matter to be held over for argument if the parties are unable to agree the matter between themselves.

Atherstone & Cook, plaintiff's legal practitioners

Scanlen & Holderness, first defendant's legal practitioners

Coghlan, Welsh & Guest, second defendant's legal practitioners

S v MAGUNDA 1994 (1) ZLR 212 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Criminal appeal

1 & 14 February 1994

Flynote

Criminal law (statutory offences) - Prevention of Corruption Act 1985 - s 3(1)(c)(i) - requirements for this offence

Interpretation of statutes Prevention of Corruption Act 1985 - how word "use" in s 3(1)(c)(i) should be interpreted

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Headnote

The word "use" in s 3(1)(c)(i) of the Prevention of Corruption Act 1985 means the taking of some positive action in respect of the document in question.

Cases cited:

British Motor Synd Ltd v Taylor & Sons Ltd [1900] 1 Ch 577

Shell-Mex & BP Ltd v Clayden (Valuation Officer) & Anor [1955] 3 All ER 102 (CA)

Arbuckle Smith & Co Ltd v Greenock Corp [1960] 1 All ER 568 (HL)

R v Tru Products (Pty) Ltd & Ors 1954 (4) SA 356 (C)

R v Harris [1965] 3 All ER 206 (CA)

A J Dyke for the appellant

Miss T Searl for the respondent

Judgment

Gubbay CJ: The appellant, who is the district administrator for Chivhu, pleaded not guilty in a magistrate's court to a contravention of s 3(1)(c)(i) of the Prevention of Corruption Act, 1985, on a charge reading as follows -

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GUBBAY CJ

> "...in that during the period extending from 24 to 29 September 1992, the accused, being an agent, that is to say, a person employed by the Ministry of Local Government, Rural and Urban Development, unlawfully, corruptly, and with intent to deceive his principal, used a receipt, account or other record, in respect of which the principal was interested, and which contained a statement that was false or erroneous or defective in a material particular, and by means thereof he:
>
> (a) withdrew blasting material from the stores on issue voucher number 353644;
>
> (b) engaged District Development Fund casual workers and drivers during working hours and at Government expense;
>
> (c) utilised a jack hammer and compressors, the property of the Government;
>
> (d) transported the above-mentioned personnel and equipment in two Government lorries;
>
> on the pretext that the blasting materials, equipment, personnel and transport, were required to sink wells at Masvaire for the benefit of the community, when he well knew that such were to be utilised for the purpose of blasting stone and sinking a well at is private residence in Chivhu Town."

The factual defence raised by the appellant was rejected. He was convicted and sentenced to a fine of $600 or, in default of payment, four months' imprisonment with labour, and an additional four months' imprisonment with labour the whole of which was conditionally suspended.

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The essential elements of the offence created by s 3(1)(c)(i) of the Act are that -

(1) the accused must be an agent;

(2) with intent to deceive his principal he must have used -

(3) any receipt, account or other record in respect of which his principal is interested;

(4) and which contains a statement that is false or erroneous or defective in a material particular.

It was not in dispute either that the appellant was an agent or that voucher

GUBBAY CJ

number 353644 was a record in which the appellant's principal, the Government, had an interest.

The attack upon the conviction by the appellant's counsel was advanced on two fronts: first, that the prosecution fell short of proving that voucher number 353644 had been used by the appellant, within the proper meaning to be given to the word "uses", to withdraw the blasting material in question from the stores. And that, in any event, the appellant's use of District Development Fund casual labourers and drivers, and of Government equipment and motor vehicles, was outside the ambit of s 3(1)(c)(i) as the voucher did not relate to the use of such persons and items. This latter contention was properly conceded to be correct by Miss *Searl*, who appeared for the respondent. Second, that the evidence adduced failed to establish that the voucher contained a statement that was, in any way, false, erroneous or defective, let alone so in a material particular.

Although the testimony of the Government auditor, Martin Munjanja, could have been more detailed, I think it implicit from the enquiries he made of the appellant that it was he who was responsible for compiling voucher number 353644. Yet neither Munjanja nor any other witness went so far as to assert that the appellant had made use of the voucher in the sense of uttering it to the stores supervisor, one Kombora, thereby securing a withdrawal of the blasting equipment.

The word "use" is - as STIRLING J put it in *British Motor Syndicate Ltd* v *Taylor & Son Ltd* [1900] 1 Ch 577 at 583 - "one of wide signification". It may have the widest connotation. See *Shell-Mex & BP Ltd v Clayton (Valuation Officer) & Anor* [1955] 3 All ER 102 (CA) at 117 C-D; *Arbuckle Smith & Co Ltd v Greenock Corporation* [1960] 1 All ER 568 (HL) at 574E. Illustrations of the diverse meanings of the word, as determined by the courts in different contexts, are to be found in Stroud's Judicial Dictionary 5 ed, vol 5, at pp 2757-2758, and Claassen *Dictionary of Legal Words and Phrases*, vol 4, at p 241.

The task, of course, remains essentially one of ascertaining the proper meaning of the word in its particular legislative setting.

An examination of s 3(1)(c)(i) of the Prevention of Corruption Act persuades me that there

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should be assigned to the word "uses" its ordinary grammatical and linguistic meaning. I do not consider that a deviation therefrom is warranted. The *Oxford English Dictionary*, vol XI, at p 468, defines "use" as being:

GUBBAY CJ

> "The act of using a thing for any (especially a profitable) purpose; the fact, state or condition of being so used; utilization or employment for or with some aim or purpose; application or conversion to some (especially good or useful) end."

This meaning is not at variance with that given in other leading dictionaries such as *Chambers 20th Century Dictionary* at p 1432, Funk & Wagnall's *Standard Dictionary*, Vol 2, at p 1382, and *Black's Law Dictionary* 5 ed at p 1381.

There are two cases which provide helpful guidance where the prohibited use relates to a document.

In *R v Tru Products (Pty) Ltd & Ors* 1954 (4) SA 356 (C) the court was concerned with the question of whether the retention of false invoices and their mere production at the request of an officer of the Department of Customs constituted "making use", for the purposes of s 120 of the Customs Act, of a document containing a false statement. In deciding that it did not, OGILVIE THOMPSON J (as he then was) said at 366 B-C:

> " . . . the words 'make use . . . of a document' connote some positive action in relation to that document. The presentation of an invoice containing false entries for the express purpose of obtaining a lower assessment of duty than is rightly payable would clearly be to 'make use . . . of a document' containing a false statement. It is, I think, equally clear that as a matter of language the mere retention of such a document in one's possession is not to 'make use' of it" (my emphasis).

On the other side of the line, it was held in *R v Harris* [1965] 3 All ER 206 (CA) that making a photostat copy of a forged document and sending it with a view to deceiving the recipient is "using" it within the meaning of the Forgery Act. It would have been different "if the photostat having been made had simply been put in a drawer and no further action had been taken in the shape of sending it" (see at 208C).

These authorities and the dictionary meaning I have referred to confirm, to my mind, that there must be some element of positive utilisation - some positive action in respect of the document - in order to found a contravention of s 3(1)(c)(i) of the Act.

Thus, contrary to the submission advanced on the appellant's behalf, I do not

GUBBAY CJ

consider that the word "use" is to be construed as denoting that the agent must have physically dealt with the "receipt, account or other record", in the sense of having forged and/or uttered it. The State is not obliged to go to that length. It will suffice if, for instance, having merely obtained sight of the document and being aware that it contains a false statement, the agent proceeds to

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recount such content to another with intent to deceive his principal.

Be this as it may, all that was proved was that it was the appellant who had compiled or issued voucher number 353644. Even assuming at highest in favour of the State that that in itself amounted to sufficient "positive action" to meet the element of use, the further prerequisite of a material falsity, error or defect, appearing *ex facie* the voucher, remained unsatisfied. It would seem, rather, that the representation contained in the voucher, that blasting materials were needed for the purpose of sinking wells at Masvaire, was, in fact, true.

For the foregoing reasons, the appeal succeeds and the conviction and sentence are set aside.

Korsah JA: I agree.

Muchechetere JA: I agree.

Chirunda, Chihambakwe & Jumo, appellant's legal practitioners

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MUZUVA v UNITED BOTTLERS (PVT) LTD 1994 (1) ZLR 217 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

21 & 28 February 1994

Flynote

Appeal - grounds - point of law - meaning

Employment - appeals under Labour Relations Act and Regulations - appeal from Labour Relations Tribunal - lies on point of law only

Headnote

An appeal from the Labour Relations Tribunal now lies to the Supreme Court on points of law only. The court has no jurisdiction to entertain an appeal on factual grounds. This also applies to any appeal which was "pending" before the Labour Relations Tribunal on the date on which s 108(2) of the Labour Relations Act was amended by Act 12 of 1992. Any appeal to the Tribunal could be said to be pending if, immediately before the amendment came into effect on 1 January 1993, the appeal had been noted yet awaited the Tribunal's determination. If, on the other hand, the Tribunal had decided the matter before 1 January 1993 and an appeal had after that date been noted to the Supreme Court, the appellant would not be restricted to raising questions of law.

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The phrase "question of law" has three distinct, though related, meanings:

(a) a question which the law itself has authoritatively answered to the exclusion of the right of the court to answer the question as it thinks fit, in accordance with what is considered to be the truth and justice of the matter;

(b) a question as to what the law is. An appeal on a question of law means one in which the question for argument and determination is what the true rule of law is on a certain matter;

(c) a question which is within the province of the judge instead of the jury.

GUBBAY CJ

Cases cited:

King v King 1971 (2) SA 630 (O)

Noah v Union National South British Ins Co Ltd 1979 (1) SA 330 (T)

National Bank of New Zealand Ltd v Chapman [1975] 1 NZLR 480

Media Workers' Assn of SA & Ors v Press Corp of SA Ltd ("Perskor") 1992 (4) SA 791 (A)

Appellant in person

R Y Phillips for the respondent

Judgment

Gubbay CJ: On 25 June 1992, the Labour Relations Tribunal ("the Tribunal") heard an appeal against the determination of the Labour Relations Board ("the Board") which had ordered the reinstatement of the appellant ("the employee") to the employment of the respondent ("the employer"), with immediate effect, his salary and benefits to be paid from 20 January 1989.

In an undated judgment, reflected in correspondence as having been delivered either in late February or early March 1993, the Tribunal allowed the appeal and set aside the determination of the Board.

The Tribunal considered two related issues. The first was whether grounds existed for the termination of the employee's contract of employment. The second was whether the employee had agreed in writing to such termination or had been coerced by the employer to submit his resignation. It held against the employee on both issues, finding, on the evidence, that he had confessed to converting to his own use monies for which he was responsible and that, in consequence of such misconduct, the employer had offered him the choice of resigning from employment or having the allegation of theft reported to the police. The employee had opted to resign and, on 20 January 1989, duly signed a letter to the effect that he was resigning for

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personal reasons. In the words of the chairman:

> "We are satisfied that, having failed to give a satisfactory explanation about the missing cheque and about the shortfall of cash and being faced with the prospect of going to prison, the (employee) decided to take advantage of the offer to resign. In the circumstances, we are of the opinion that the employee's assertion of having been forced to resign and attempt to withdraw his resignation are futile afterthoughts amounting to bolting the stable after the horse has already gone out."

GUBBAY CJ

Aggrieved by the outcome of the proceedings, the employee, on 26 March 1993, noted an appeal to this court. The grounds of appeal, in substance, challenged the correctness of the findings that the employee had confessed to misappropriating the monies and that he had not been coerced into tendering his resignation in writing.

Mr *Phillips*, who appeared for the employer, took the point *in limine* that an appeal to this court from a determination of the Tribunal only lies on a question of law and that, as the present appeal was brought on pure issues of fact, it should be struck out.

The Labour Relations Amendment Act 12 of 1992, which took effect on 1 January 1993, amended s 108(2) of the Labour Relations Act 1985, by the insertion of the words "on a question of law" after the word "appeal", the section now reading:

> "An appeal **on a question of law** from any decision of the Tribunal shall lie to the Supreme Court" (emphasis added).

Section 30 of the amending Act contains transitional provisions that mainly concern the Board. Subsection (5), however, refers to the Tribunal and is in the following terms:

> "The provisions of the principal Act as amended by this Act shall apply to any appeal pending before the Labour Relations Tribunal immediately before the date of commencement of this Act."

Plainly, a right of appeal to the Supreme Court will be confined to a question of law if immediately before 1 January 1993 an appeal was pending before the Tribunal.

Black's *Law Dictionary* (1983) Abridged 5 ed at p 390 defines the word "pending" as -

> "Begun, but not yet completed; before the conclusion of; prior to the completion of; unsettled; undetermined; . . . an action or suit is 'pending' from its inception until the rendition of final judgment."

Stroud's Judicial Dictionary 5 ed, vol 4, at p 1890 sv (1) is to the same effect.

This is certainly the ordinary meaning of the word when used with reference to legal proceedings. Thus in *King v King* 1971 (2) SA 630 (O) it was held

GUBBAY CJ

that the phrase "pending action" in rule 33(4) of the South African Rules of Court means any action in which the issues between the parties have not yet been finally decided or disposed of

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(at 634 G-H). See also, *Noah v Union National South British Insurance Co Ltd* 1979 (1) SA 330 (T) at 333 C-D; *A v B* [1969] NZLR 534 at 535 and *National Bank of New Zealand Ltd v Chapman* [1975] 1 NZLR 480 at 482, both cited in *Words and Phrases Legally Defined*, Supp, sv "pending".

In the context of s 30(5), I am unable to perceive of any reason why the words "any appeal pending" should bear a meaning different from that alluded to. In my view, an appeal is pending before the Tribunal if, immediately before 1 January 1993, it had been noted yet awaited the Tribunal's determination. But if the Tribunal had given judgment upon an appeal heard by it prior to 1 January 1993 and a further appeal to the Supreme Court had been noted after such date, I do not think that the appellant would be caught by s 30(5) and restricted, as the present employee is, to raising questions of law.

The twin concepts, questions of law and questions of fact, were considered in depth by E M GROSSKOPF JA in *Media Workers' Association of South Africa & Ors v Press Corporation of South Africa Ltd ("Perskor")* 1992 (4) SA 791 (A). Approving the discussion of the topic in Salmond on Jurisprudence 12 ed at 65-75, the learned Judge of appeal pointed out at 795 D-G that the term "question of law" is used in three distinct though related senses. First, it means "a question which the law itself has authoritatively answered to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter". Second, it means "a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter". And third, any question which is within the province of the judge instead of the jury is called a question of law. This division of judicial function arises in this country in a criminal trial presided over by a judge and assessors.

I respectfully adopt this classification, although the third sense is of no relevance to a matter such as this.

The determination by the Tribunal that the employee had voluntarily submitted a letter of resignation which the employer had acceded to, was based upon its factual findings. It accepted the employer's version that the employee had admitted to having misappropriated the monies and that he had been given the option to resign without recourse to prosecution. It rejected the employee's

claim that he had made no such confession and had been subjected to duress in signing the letter of resignation. In the premises, the Tribunal found as a fact that the employee's contract of employment had been terminated by mutual agreement in compliance with s 2(1)(b) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985.

In my opinion, no question of law arises from the determination of the appeal by the Tribunal in either the first or second sense referred to above.

It follows that this court has no jurisdiction to entertain this appeal and it is to be struck off the

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roll. In accordance with Mr *Phillips'* indication as to the attitude of the employer, there will be no order as to costs.

McNally JA: I agree.

Muchechetere JA: I agree.

Scanlen & Holderness, respondent's legal practitioners

CHIGUMBA v KATSVAMUTIMA 1994 (1) ZLR 223 (SC)

Court **Supreme Court, Harare**

Gubbay CJ (in chambers)

Review of taxation

3 March 1994

Flynote

Costs - taxation - review - right of - waiver - failure to appear before taxing master, preceded by notification that taxation would not be opposed - whether party can be said to have waived right to have taxation reviewed

Headnote

A party who is, of his own volition, absent from a taxation is not necessarily debarred from taking the taxing master's decision on review. Mere absence from taxation or a consent to taxation in the absence of the party is not a waiver of the right of review. For the party to be said to have waived the right of review, there must be something more than a consent to taxation *in absentia*. This would be the case where what is conveyed is an acceptance in advance of the taxing master's ruling on all items on the bill.

Cases cited:

Rogoff v Law Soc, Cape 1982 (1) SA 563 (C)

Sterling Products Intl Ltd v Zulu 1988 (2) ZLR 293 (S)

Judgment

Gubbay CJ (in chambers): This is a review of taxation brought under the provisions of rule 58 of the Supreme Court Rules, as read with rule 314 of the High Court Rules.

The bill of costs was taxed before the Taxing Master on 24 January 1994, and on that date the *allocatur* was completed. The bill was that of the appellant, Katsvamutima, who had successfully appealed to this court against a judgment

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GUBBAY CJ

given in favour of the respondent, Chigumba. At the taxation Katsvamutima was represented by a legal practitioner but Chigumba was *in absentia.*

Notwithstanding his deliberate non-appearance before the Taxing Master and consequent failure to object to any of the items in the bill of costs, Chigumba is dissatisfied with the taxation. On 14 February 1994, his legal practitioner delivered a notice requesting a review of item numbers 55 and 60 to 116, on the ground that the costs allowed, which amount to $630,25, relate to consultations, correspondence, telephone communications and disbursements undertaken or expended in an abortive attempt by the parties to settle their dispute prior to the hearing of the appeal.

It is conceded by Katsvamutima's legal practitioner that the costs allowed in respect of item numbers 122 to 125, 153, 161, 175, 176 and 221 to 226, totalling $134, should be deducted from the bill, and that item number 133 should be reduced by $21 to $63. The taxation must be amended accordingly.

The Taxing Master has reported in writing that an hour or so before the taxation was due to be heard he received a telephone call from the secretary employed by the legal practitioner acting for Chigumba, advising that the bill of costs was not opposed and that the legal practitioner would not be attending. Accordingly, at the appointed time the taxation proceeded as though no objection to any single item in the bill had been raised.

The point is taken on behalf of Katsvamutima that, with regard to item numbers 55 and 60 to 116, by reason of both the decision not to be present at the taxation and the indication given to the Taxing Master that the bill of costs was not opposed, Chigumba should be found to have waived his right to have reviewed those aspects of the bill with which he does not now agree.

In *Rogoff v Law Society, Cape* 1982 (1) SA 563 (C), BAKER J considered whether a party who is absent from a taxation of his own volition, is debarred from taking on review the decision of a taxing master. In reaching a negative conclusion he said at 568 F-G:

> " . . . if the voluntary absence is alleged to be a waiver of the right to review, the answer is that mere absence (or rather consent to taxation in the absence of the party) is not a waiver. A waiver must be clearly shown and is never lightly inferred. . . . A mere consent to allow taxation in my absence does not mean that I will abide the ruling of the taxing master, no matter what it might be. If I am to be held to have waived my right to

GUBBAY CJ

review there must be something more than a mere consent to taxation *in absentia*."

In that case it would seem that the voluntary absence was not preceded by an advisement that the bill of costs was not opposed. Here, that intimation was given. To my mind, there is a distinction to be drawn between a party who consents to allow taxation to take place in his absence and one who expressly states that he will not be attending the taxation **and adds** that

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he does not wish to oppose any item in the bill of his adversary. Put differently, what is then conveyed is an acceptance in advance of the ruling of the Taxing Master on all the items in the bill.

If the person who spoke to the Taxing Master on the morning of 24 January 1994, had been Chigumba's legal practitioner, I would have been persuaded that a waiver of the right to review was established. See *Sterling Products International Ltd v Zulu* 1988 (2) ZLR 293 (S) at 303G-304C. But as it was the secretary who telephoned, I am not able to hold with sufficient certainty that what she said to the Taxing Master was what the legal practitioner had authorised her to say, thereby in turn binding the client, Chigumba. Upon the information before me, an inference of ostensible authority on behalf of Chigumba is too nebulous. Such a positive finding could only be made by virtue of an admission, or upon the reception of evidence by way of affidavit or *viva voce*.

For these reasons the point *in limine* fails.

Without sight of the correspondence and other relevant documents, it is not possible for me to determine whether the Taxing Master was wrong in allowing the costs pertaining to items numbers 55 and 60 to 116. It necessarily follows that the only course to adopt is to set aside the decision concerning these items and to order that there be another taxation in respect of them.

As the application for review and the need to hold a further taxation of the bill of costs are the result of the omission of Chigumba to attend the taxation on 24 January 1994, I consider it fitting that he pay all costs arising therefrom. It is so ordered.

KATIYO v STANDARD CHARTERED ZIMBABWE PENSION FUND 1995 (1) ZLR 225 (HC)

Court **High Court, Harare**

Garwe J

11 January & 9 March 1994

Civil action

Flynote

Customary law - unregistered customary union - husband a member of pension scheme operated by his employer - wife claiming spouse's annuity in terms of the rules of the pension fund - extent to which the law recognises such unions

Headnote

The deceased was married to the plaintiff in an unregistered customary law union. The deceased had been a member of a pension scheme operated by his employer. When he died,

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the plaintiff was advised by the defendant that she would not be paid a spouse's annuity from the pension fund unless she produced a marriage certificate. She was unable to do so. The trustees of the fund decided that she was not a spouse as envisaged in the rules of the pension fund and that she was, therefore, not entitled to a spouse's annuity. The plaintiff applied to court for an order directing the defendant to register her as a spouse and to pay her a spouse's annuity.

Held, that the refusal by the trustees of the fund to treat the plaintiff as a spouse for the purposes of the fund did not violate s 23 of the Constitution. Section 3 of the African Marriages Act [*Chapter 238*] lays down that unregistered customary law unions are not valid, except for the purposes of status, guardianship and rights of succession of children. These statutory provisions do not offend against s 23 of the Constitution as s 23(3) allows for differential treatment of persons by law in matters of marriage and other matters of personal law. The ruling by the trustees not to accept the unregistered customary law union as a valid marriage under the pension scheme was largely influenced by s 3 of the African Marriages Act and, therefore did not violate s 23 of the Constitution.

GARWE J

Held, further, that in the absence of unreasonable conduct or *mala fides* on the part of the trustees of the pension fund, the court is not entitled to interfere with the discretionary decision reached by the defendant that the plaintiff was not a spouse for the purposes of the pension fund. The trustees' decision had not been taken on an unreasonable or *mala fide* basis.

Held, further, that the trustees of the pension fund had correctly concluded that the plaintiff was not a "spouse" as envisaged in the rules of the fund. In terms of s 3 of the African Marriages Act an unregistered customary law union is not a valid marriage, except for certain limited purposes. These exceptions relate only to the children of such a union. There is no provision in that Act, or any other statute, laying down that such a union is to be recognised as valid for the purpose of payment of pension funds and that the customary law wife must be treated as a spouse for the purposes of payment of an annuity under the pension scheme. Although the present position is unfair, the position could only be changed by the Legislature and the court could not usurp the law-making function of the Legislature.

Cases cited:

Van Rensburg v Bd of Trustees, Mining Industry Pension Fund 1979 RLR 131 (G)

Zonke v Chairman, PSC HH-33-92

Ex p *Seti* 1963 R & N 681 (H)

Choto v Matiyi 1974 (1) ZLR 302 (A)

Zimnat Ins Ltd v Chawanda 1990 (2) ZLR 143 (S)

T D Muskwe for the plaintiff

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A P de Bourbon SC for the defendant

Judgment

Garwe J: The facts giving rise to this action are largely common cause or at least not seriously in dispute.

The plaintiff resides at 73 Mutsonzowa Street, Mufakose Township, Harare. On 12 October 1983, she married one Passion Katiyo according to customary law. Lobola was paid in full. The two stayed together as husband and wife until 13 January 1991 when Passion Katiyo was involved in a fatal accident on his way from Mutoko. The plaintiff has always regarded herself as the deceased's wife. The deceased was not married to any other woman nor did he have children by any other woman.

GARWE J

Passion Katiyo was, during his lifetime, employed by the Standard Chartered Bank. He was a member of the Standard Chartered Bank Zimbabwe Pension Fund (hereinafter referred to as the defendant).

There are three surviving children, namely Simbarashe Paul, Violet Ruvimbo and Munashe Peter.

Following the death of Passion Katiyo, the plaintiff was advised by the defendant that she would not be paid a spouse's annuity unless she produced a marriage certificate. The defendant indicated, however, that the death benefits would be paid to the deceased's three children. Copies of the children's birth certificates had previously been lodged with the defendant.

The plaintiff maintains that the deceased had a duty to maintain and support her as his wife and that, therefore, she is entitled to the spouse's annuity. Consequently she has brought this action in which she claims the following:

(a) an order directing the defendant to register her as the spouse of the late Passion Katiyo and therefore the beneficiary of the annuity payable to the spouse in terms of s 27 of the defendant's rules;

(b) an order directing the defendant to disburse the amounts due and payable to the plaintiff in terms of the defendant's rules within 48 hours of the judgment;

(c) interest a *tempore morae* on the amounts due with effect from 31 January 1991 to date of payment; and

(d) costs of suit.

The defendant called a Mrs Joyce Pinnar as its only witness. The witness told the court that she worked for the Standard Chartered Bank from 1960 until April 1990, when she retired from the bank. Thereafter she was appointed one of the trustees of the pension fund, a position she

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holds to this day.

Mrs Pinnar told the Court that the pension fund came into existence in 1975. The pension scheme remained non-contributory until July 1990, when it became a contributory scheme.

It was her evidence that for one to be accepted as a spouse for the purposes of the pension scheme it is necessary that a marriage certificate be produced. The same also applies to the children. Any person who does not produce a marriage certificate is regarded as single. Any child in respect of whom a birth certificate has not been produced cannot be regarded as a child for the purposes of the pension scheme.

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The defendant operates under a board of trustees. The trustees make decisions on behalf of the fund in terms of the defendant's rules.

On 20 March 1991, the trustees held a meeting at which a decision was made that the death benefits in question be awarded to the three surviving children and that no annuity was to be awarded as there was no marriage certificate in existence. During that meeting it was noted that the deceased Passion Katiyo had always been taxed as a single parent. The decision to award the benefits to the children was reached because birth certificates had been produced in respect of all three children and these birth certificates reflected the deceased as the father. It was also decided that an accident benefit be paid to the Master of the High Court for the benefit of the three children. That accident benefit, payable under the bank's group insurance policy, does not form part of the plaintiff's claim.

The witness told the court that following receipt of a letter written by the plaintiff's legal practitioners, this matter was further discussed at a meeting of the trustees held on 17 July 1991. At that meeting, the trustees again reached the decision that since the deceased had never had a marriage certificate and as he had always been taxed as a single parent, no annuity was payable to the plaintiff. At that stage, the matter was then referred to the defendant's legal practitioners.

The witness produced a copy of a letter written by the defendant's legal practitioners to the plaintiff's legal practitioners. Amongst other things, the letter states that the trustees interpreted the word "spouse" and "wife" according to the general law of the land and that in terms of the defendant's rules, the interpretation is binding on all parties concerned. The letter reiterates that as the plaintiff was married to the deceased under an unregistered customary union, she could not be regarded as the deceased's wife for pension purposes and therefore was not entitled to a spouse's benefit.

The witness explained that the death benefit giving rise to this action is payable either to a surviving spouse or to the children but not to both. In this case the trustees decided that the benefit be paid to the deceased's children. However, if the court finds that the plaintiff is a "spouse" for the purposes of the defendant's rules, then the lump sum payment would be made to the plaintiff and no payment would be made to the children.

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Mr *Muskwe*, who appeared for the plaintiff, submitted that there are two issues for the court to decide. These are, firstly, whether the plaintiff is a

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"spouse" and, secondly, whether in terms of s 23 of the Constitution, the decision by the trustees is constitutional. He submitted that the plaintiff, being a spouse to an unregistered customary union, is being disadvantaged because she is of a race which recognizes such unions. He submitted that the decision by the trustees is therefore unconstitutional. He also contended that the decision by the trustees is not final and that this is a proper case for the court to interfere with the trustee's decision.

Mr *de Bourbon*, who appeared for the defendant, submitted that it was for the plaintiff to satisfy the court that she is entitled to an annuity, in terms of the defendant's rules and not for the defendant to show that she is not. He submitted further that the court cannot, in the absence of an irregularity, take upon itself the role of the trustees and interfere with their decision unless it is shown that the existing trustees should no longer exercise that function. He argued further that the fact that customary unions have been recognized as valid for certain specific purposes does not give such marriages validity under the general law. He cited other unions such as "living-in" which are not recognized by the law and the parties to such a union have no rights flowing from such a relationship.

He submitted further that the matter starts and ends with s 3 of the African Marriages Act [*Chapter 238*] and that the word "spouse" in the defendant's rules is decisive and cannot be interpreted to mean a partner in a union not recognized by the law.

Regarding the constitutionality or otherwise of the decision by the trustees, he submitted that the plaintiff has been treated differently simply because she has no marriage certificate and not because of her race. He contended that other women of her race have produced marriage certificates in similar circumstances and have benefitted from the Fund.

There are three issues to be decided by this court.

These are, firstly, whether the decision of the trustees that the plaintiff is not a spouse offends s 23 of the Constitution; secondly, whether this court is empowered to interfere with the decision of the trustees; and, thirdly, whether the plaintiff is a "spouse" for the purposes of the defendant's rules.

Regarding the constitutionality or otherwise of the defendant's decision, there is need to look at the relevant constitutional provisions.

GARWE J

Section 3 of the Constitution of Zimbabwe states:

> "This Constitution is the Supreme Law of Zimbabwe and if any other law is inconsistent with this Constitution that

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other law shall, to the extent of the inconsistency, be void."

The language in the above section is clear and allows of no ambiguity. Any law that offends the Constitution is, to the extent to which it offends the Constitution, void.

The question is whether s 23 of the Constitution has been offended. That section reads:

"23 (1) Subject to the provisions of this section -

(a) no law shall make any provision that is discriminatory either of itself or in its effect; and

(b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinion, colour or creed are prejudiced -

(a) by being subjected to a condition, restriction or disability to which persons of another such description are not made subject; or

(b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description;

and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour or creed of the persons concerned.

(3) Nothing contained in any law shall be held to be in contravention

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of subsection (1)(a) to the extent that the law in question relates to any of the following matters -

(a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law in that case..."

There can be no argument therefore that s 23(3) of the Constitution allows for differential treatment of persons by the law in matters of adoption, marriage, divorce, burial, inheritance and other matters of personal law. Neither the provisions of the African Marriages Act [*Chapter 238*] nor the Marriages Act [*Chapter 37*] could therefore be said to be unconstitutional as the Constitution clearly recognizes the need to apply different laws to marriages contracted according to African law and customs on the one hand and those contracted under the general law on the other. By requiring a party to a customary union to solemnise such a union, s 3 of the African Marriages Act cannot therefore be said to offend the Constitution.

A provision would be regarded as being discriminatory and therefore unconstitutional if, for example, it provided for the recognition of some but not all unregistered customary unions.

It may well be that the parties to an unregistered customary union are disadvantaged in the

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sense that whilst custom may regard such a union as a valid one, statute has made it clear that such a union is not valid, except for certain purposes.

In requiring the plaintiff to produce a marriage certificate, it appears the trustees were largely influenced by the provisions of s 3 of the African Marriages Act [*Chapter 37*].

I conclude therefore that by holding that a marriage certificate must be produced before any benefit could be processed under the defendant's rules, the trustees cannot be said to have contravened the Constitution.

I now turn to deal with the second issue before this court, namely, whether this court is in any event empowered to interfere with the decision of the

GARWE J

trustees. It is necessary to look at the relevant provisions in both the Pension and Provident Funds Act 1976 and the defendant's rules.

Section 4 of the Act provides as follows:

> "No person shall establish or carry on the business of a fund unless that fund is registered or provisionally registered."

Section 5(1)(b) of the same Act provides that if the application is for registration, two copies of printed, duplicated or typed rules must be submitted to the Registrar of Pension and Provident Funds, providing for the matters referred to in s 7 of the Act.

Section 7 of the Act provides:

> "(1) The rules of a fund -
>
> (a) shall state the name of the fund; and
>
> (b) shall comply with such requirements as may be prescribed.
>
> (2) Requirements prescribed for the purposes of paragraph (b) of subsection (1) may relate to -
>
> (a) the membership of the fund;
>
> (b) the contributions to be paid to the fund, whether compulsorily or otherwise;
>
> (c) the benefits to be payable...;
>
> (3) Subject to the provisions of this Act, the rules of a registered fund shall be binding on -
>
> (a) the fund; and
>
> (b) any participating employer and the members and officers of the fund;
>
> and
>
> (c) **any person who claims under the rules or whose claim is**

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derived from a person claiming under the rules of the fund" (the emphasis is my own).

It is clear, therefore, that the rules of a registered fund are binding not only on the member but also on any claimant or beneficiary. In this regard, paras 41 and 42 of the Standard Chartered Bank Zimbabwe Pension Fund Rules also provide:

"41. DISPUTES REGARDING ENTITLEMENT.

In the event that any dispute, or difference of opinion, shall arise at any time regarding either the entitlement of any person to any benefit from the Fund or the amount of any such benefit, then the decision of the trustees, after full consideration of any representations made by any interested party, shall be final and binding on all parties concerned.

42. INTERPRETATION.

The decision of the Trustees on any question of doubt or difference as to meaning, interpretation, effect or operation of the Rules, or on any dispute arising under the Rules, shall be binding on all interested parties."

Clearly therefore the rules are binding on the plaintiff.

Is this court empowered to interfere with the discretionary powers entrusted upon the trustees by the Act and the defendant's rules?

In *van Rensburg v Bd of Trustees, Mining Industry Pension Fund* 1979 RLR 131 (G), the appellant sought a review of the respondent's decision that the innocent party to a bigamous marriage who had been entirely supported by the guilty party was a dependant of the guilty party for the purpose of the rules of the Mining Industry Pension Fund. The applicant contended that the word "dependant" in the rules implied a legal duty of support and that the respondent had given a wrong interpretation of the word "dependant" in the Pension Fund Rules.

In dismissing the application for review, SMITH J stated at p 133:

"Assuming that the respondent misinterpreted the provision as alleged by the applicant, that would be no ground for review...Nor in my view can

it be said that the respondent's conclusion was a grossly unreasonable one. There is no suggestion that the respondent was not *bona fide* in arriving at its decision ...

In terms of the Pension Fund Rules it was the duty of the respondent to determine whether or not they were any dependants and I am satisfied that no recognized ground has been advanced upon which this Court can interfere by way of review."

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In *Zonke v Chairman, Public Service Commission* H-33-92, the applicant sought a review of the determination made by the respondent withholding half the applicant's salary for a period of over four years.

In dismissing the application, CHAMBAKARE J remarked:

> "In cases such as this, the court's power to set aside a determination of an authority is limited where the discretion is *bona fide* expressed. The court cannot interfere with the result in the sense of substituting its own conclusion for the authority, even if it considers the decision inequitable and wrong ...it is only if it is exercised in a manner which no reasonable man could consider justifiable that the court is entitled to interfere... The mere fact that a decision arrived at by an official in the exercise of his discretion is unwise or is one at which the court itself probably would not have arrived does not entitle the court to review that decision...In Kruse's case (*supra*) LORD RUSSELL OF KILLOWEN CJ explained 'reasonable'. He posed the question 'Reasonable in what sense?' It may be partial and unequal in its operation as between different classes, it may be manifestly unjust, it may disclose bad faith, it may involve oppressive or gratuitous interference with the rights of 'those subjects to them as could find no justification in the minds of reasonable men'. In that case, the court might well say Parliament never intended to give authority to make such rules and they were unreasonable and *ultra vires.*"

I conclude therefore that in the absence of unreasonable conduct or *mala fides* on the part of the defendant, this court is not entitled to interfere with the trustees' decision.

I now turn to consider whether the applicant is a "spouse" for the purposes of the defendant's rules.

Neither the Pension and Provident Funds Act 1976 nor the defendant's rules define what is meant by spouse.

GARWE J

A "spouse" is defined by Burke *Jowitt's Dictionary of English Law* 2 ed as "a husband or wife".

The *Shorter Oxford English Dictionary defines* "spouse" as "a married woman in relation to her husband; a wife; a bride. A married man in relation to his wife; a husband; a bridegroom".

Is a party to an unregistered customary union a "spouse" for the purposes of the defendant's rules?

To answer this question, it is necessary to go back to the African Marriages Act [*Chapter 238*]. Section 3 of that Act provides:

> "(1)Subject to the provisions of this section, no marriage contracted according to African Law and Custom including the case where a man takes to wife the widow or widows of a deceased relative, shall be regarded as a valid marriage unless -
>
> (a) such marriage is solemnized in terms of this Act; or...;
>
> (b) ...;
>
> (2) A marriage contracted according to African law and custom which is not a valid marriage in terms of this section shall, for the purposes of African law and custom relating to status, guardianship, custody and rights of succession of the children of such marriage, be regarded as a valid marriage."

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In Ex p *Seti* 1963 R & N 681, the Rhodesian High Court considered the implication of s 3 of the African Marriages Act. The court remarked:

> "It follows from these provisions that Seti's marriage is not a valid marriage and her status is not that of a wife for the purposes of the general law of the country. As the first petitioner was not therefore a wife for the purposes of the general law, she had no legal right of support from the deceased on the basis advanced. As no other basis for her claim has been put forward, I must hold that she has no claim in law to be compensated."

The issue was also considered by the Rhodesian Appellate Division in *Choto v Matiyi* 1974 (1) ZLR 302 (A). The court held that -

> "in s 3(3) of the African Marriages Act, the Legislature went out of its way to make clear the limited extent to which the Court would be able to

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GARWE J

recognize the incidents of an invalid marriage in terms of the Act and those incidents are confined to the status, guardianship and rights of succession of the children. All other incidents of the marriage...are not to be recognized as valid and enforceable."

The Customary Law and Primary Courts Act 1981 was promulgated in 1981. This Act set up what came to be known as community courts and village courts. The jurisdiction of these courts was limited to adjudicating over cases involving customary law. That Act was amended by the Customary Law and Primary Courts Amendment 1982. By s 12(3) of the new Act, community courts were empowered, for the first time, to entertain applications for maintenance in customary law cases. The Act specifically provided that a person, who according to customary law is the husband, would be regarded as primarily responsible for the maintenance of the wife and the children of that union. That amendment significantly altered the legal position regarding the right to maintenance of customary law wives.

Professor W Ncube in his book F*amily Law in Zimbabwe* says of s 3 of the African Marriages Act:

> "Accordingly a customary law union is treated as a valid customary law marriage for the purposes of the status, guardianship, custody and rights of succession of children so that the children of such a union enjoy the same rights as those enjoyed by children born in valid customary law marriages. For the purposes of customary law, such children are legitimate or at least presumed to be so, fall under the guardianship of their father, have the usual customary law rights of succession to the property of their parents and their custody is governed by the customary law that govern the custody of legitimate children.

A customary law union is also regarded as a valid marriage for the purposes of maintenance of the 'wife'. Thus the wife in a customary law union is entitled to be maintained by her husband as if their 'marriage' was fully valid.

For all other purposes except those stated above, a customary law union is legally invalid. The husband cannot recover adultery damages from his wife's seducer because he is in law not regarded as married to her, likewise he cannot divorce her because they are legally not married to each other, the 'wife's' father cannot sue the husband for the payment of agreed lobola" (at pp 134, 135).

GARWE J

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> Whilst the above remarks by Professor Ncube correctly reflect the law, there have been further developments following the Supreme Court's decision in *Zimnat Insurance Co Ltd v Chawanda* 1990 (2) ZLR 143 (S). In that case the court held that s 12 of the Customary Law and Primary Courts Act 1981 imposes "upon a husband of a customary law union the legal obligation to provide support and they create for the wife of such a union a legal right to receive it..."

In the above case, the appellant insured a Glen's Corporation heavy vehicle for purposes of Part III of the Road Traffic Act. An employee of the defendant negligently collided with a Peugeot pick-up in which the deceased was a passenger. The deceased died as a result of the collision. The plaintiff to whom the deceased had been married according to customary law and who lived with and was supported by the deceased instituted proceedings for loss of support.

The issue before the court was (a) whether a widow of a customary union can claim damages against the wrongful killer of her husband at common law; (b) if she has no such right of action at common law, whether she has been accorded such a right to support by statute and consequently the right to sue for loss of that support and; (c) if statute has not accorded her the right to support and consequently the right to sue for loss of support, whether it is desirable to extend to her that right by way of the general remedy provided by an Aquilian action and/or extend to her that right by the exercise of the judicial law making function of the court.

After reviewing a number of authorities and after considering the provisions of ss 4(a), 6(1) and 12(3) of the Customary Law and Primary Courts Act 1981, the court held that the Act gives a wife in a customary union a legal right to support from her husband, and creates a legal obligation for the husband to provide such support. In consequence, the wife can sue for both maintenance and loss of support.

The court further held that the modern Aquilian action should be extended to include persons in the category of the plaintiff and that even if the Aquilian action were not applicable, the present case would be a proper case for the exercise of a court's judicial law-making function.

Unlike *Zimnat Insurance Company v Chawanda* (*, supra*,), there is no statutory provision in the present case extending a spouse's benefit to a customary law wife or empowering such a wife to sue for a spouse's benefit in terms of s 27 of the defendant's rules.

GARWE J

In view of the provisions of s 3 of the African Marriages Act [*Chapter 238*], and in the absence of any other statutory provision extending a spouse's annuity to a customary law wife, the plaintiff cannot be regarded as a spouse for the purposes of the defendant's rules. It is however clear that the plaintiff can sue the party who was responsible for the death of her husband for loss of support.

The above position is of course unfair. In this regard, the remarks of the Supreme Court in the *Zimnat Insurance Co v Chawanda* case *supra*, are pertinent. At p 153G, it is stated:

> "What is offensive to one's sense of justice is that upon the wrongful killing of a breadwinner the position of a widow, who had married according to customary law, should differ adversely from that of another, who had married according to civil rites, albeit both suffer the same kind of loss. As our law accepts customary unions, it should endeavour to secure equality to the parties thereto and discard the intolerable affectation of superior virtue

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> (to borrow a phrase) inherited from the colonial past. To continue to exhibit a vestige of condescension and conservatism towards customary law unions ill befits, and is repugnant to, the current and unyielding movement by the State to remove the legal disabilities suffered by African women."

The problem, in my view, is the continued existence of s 3 of the African Marriages Act [*Chapter 238*], on our statute books. I am aware that the Ministry of Justice, Legal & Parliamentary Affairs has gazetted a White Paper on marriage and inheritance. The White Paper recognizes the problems that have arisen as a result of the application of different marriage and inheritance laws and the urgent need for these laws to be harmonized. A new Bill proposing new marriage and inheritance laws will be presented to Parliament once the White Paper has been fully considered.

Until such time as Parliament changes the law, some legal disabilities will continue to be suffered by African women.

That courts have a law-making function is settled law. The Supreme Court in *Zimnat Insurance Co v Chawanda , supra*, stated at p 154:

> "Today the expectations amongst people all over the world and particularly in developing countries, are rising, and the judicial process has a vital role to play in moulding and developing the process of social change.

GARWE J

> The judiciary can and must operate the law so as to fulfil the necessary role of effecting such development.
>
> It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the Judiciary than by the Legislature. This is because judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that judges do not just discover the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of the judicial process.
>
> The opportunity to play a meaningful and constructive role in developing and moulding the law to make it accord with the interests of the country may present itself where a judge is concerned with the application of the common law, even though there is a spate of judicial precedents which obstructs the taking of such a course. If judges hold to their precedents too closely, they may well sacrifice the fundamental principles of justice and fairness for which they stand...The law must be responsive as well as, at times, enunciatory, and good doctrine can seldom be divorced from sound practice."

In the light of the clear language of s 3 of the African Marriages Act [*Chapter 238*] and also considering the trustees' discretionary powers under the rules which form the basis of the agreement between the fund and its beneficiaries, I reach the conclusion that the plaintiff is not a spouse for the purposes of the defendant's rules. To hold otherwise would be to do violence to the clear language of s 3 of the Act and would amount to usurping the legislature's function. I also find that in the absence of *mala fides* or unreasonableness on the part of the trustees, this court would not be entitled to set aside the decision by the trustees and substitute its own.

Since the plaintiff is not a "spouse" for the purposes of the defendant's rules, the defendant is under no obligation to pay any annuity to her.

The plaintiff's claim must therefore be dismissed with costs.

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Muskwe & Associates, plaintiff's legal practitioners

Coghlan, Welsh & Guest, legal practitioners for the defendant

S v BUTAU 1994 (1) ZLR 240 (HC)

Court **High Court, Harare**

Garwe J

Criminal review

9 March 1994

Flynote

Criminal procedure (sentence) - juvenile - corporal punishment - when maximum number of cuts should be imposed - wording of order

Headnote

The accused juvenile was convicted on his plea of guilty to theft of $1400 - worth of goods, stolen from a motor vehicle. He was sentenced to "a moderate correction of 6 cuts with a light cane to be administered in private by a prison officer at Harare Remand Prison", as well as to a wholly suspended term of imprisonment. The maximum number of cuts which may be imposed in terms of s 329(1) of the Criminal Procedure and Evidence Act [*Chapter 59*] is six. The magistrate justified his imposition of the maximum number of cuts on the grounds that the offence was serious and prevalent and that the number of juveniles appearing before the courts on such charges had reached alarming proportions.

Held, that the magistrate should not have imposed the maximum number of cuts, which should be reserved for the most serious offences or persistent offenders. Six cuts would be appropriate in very serious cases such as rape or theft of a motor vehicle. The present offence did not warrant the imposition of the maximum number of cuts permitted by the law. Four cuts would have been sufficient.

Held, further, that the wording of the sentence was also incorrect. Section 329(2) of the Act provides that the manner in which and the place at which corporal punishment shall be inflicted and the person who shall inflict it shall be as prescribed. The Criminal Procedure (Corporal Punishment) Regulations 1993 (SI 308/1993) prescribe various matters

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in connection with corporal punishment, other than the place at which such punishment should

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be inflicted. In order to ensure that the wording of the sentence follows as far as possible the wording of the Act and Regulations, the sentence should have read:

> "To receive moderate corporal punishment of 4 strokes with a rattan cane to be administered in private at Harare Remand Prison by a designated Prison Officer."

Cases cited:

S v A Juvenile 1989 (2) ZLR 61 (S)

S v Mutusva HH-156-86

S v Mathe HB-104-83

S v Bote HH-340-87

S v Maposa & Ors HH-395-85

S v Ziyadhuram & Ors HH-139-86

Judgment

Garwe J: The accused in this case, aged 17, was convicted on his plea of guilty of the theft of two car batteries, one Bosal hydraulic jack, one jumper, one spanner and two 50 kg packets of white sugar from a motor vehicle. He admitted that on 20 January 1992 at about 7.30 pm in the company of two others he approached a lorry which was parked at a house in Mabvuku Township, Harare. From the vehicle, the three stole the property in question. The value of the property is $1 434. Following police investigations, $1 270 - worth was recovered.

The accused was sentenced to receive a moderate correction of 6 cuts with a light cane to be administered in private by a prison officer at Harare Remand Prison. In addition, he was sentenced to 4 months' imprisonment with labour, wholly suspended for 5 years on certain conditions.

I enquired from the trial magistrate whether the sentence of 6 cuts was not excessive, given the facts of this matter.

In his response, the trial magistrate justified the sentence he imposed on the basis that "the offence normally attracts custodial sentences because it is a very serious and disturbingly prevalent one" and that "the number of similar cases involving juveniles that the court is dealing with has reached alarming proportions...Young offenders who commit serious offences like adults cannot expect lesser penalties."

The trial magistrate has misdirected himself in this regard. True, theft from

motor vehicle is a very serious and prevalent offence. It may also be true that the number of juveniles appearing before the courts on similar allegations has increased. But this is no

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justification for imposing the maximum number of cuts permitted by the law. It is also not correct that juveniles "cannot expect lesser penalties than adults". A number of review judgments of this court have stressed that youthfulness is an important factor to be taken into account in assessing an appropriate penalty and that as far as is possible juveniles should be kept out of prison.

Prior to the 1989 Amendment, s 330 of the Criminal Procedure and Evidence Act empowered courts to impose, on juveniles, a moderate correction not exceeding ten (10) strokes. Following the Supreme Court decision in *S v A Juvenile* 1989 (2) ZLR 61 (S), s 330 of the Criminal Code was repealed. Juvenile cuts were, however, reintroduced following the promulgation of the Criminal Procedure and Evidence Amendment Act 1992 and the Criminal Procedure (Corporal Punishment) Regulations SI 308/93.

Section 329 (1) of the Criminal Procedure and Evidence Act now provides:

> "Where a male person under the age of eighteen years is convicted of any offence, the Court which imposes sentence upon him may -
>
> (a) in lieu of any other punishment; or
>
> (b) in addition to a wholly suspended sentence of a fine or imprisonment; or
>
> (c) ...sentence him to receive moderate corporal punishment, **not exceeding six strokes**" (the emphasis is my own).

The maximum number of strokes that a court can impose on a juvenile cannot therefore exceed six.

Judging by the cases being submitted on review, it appears that a number of magistrates are not aware that six strokes is the limit. It has been noted that, even in relatively minor cases, magistrates are imposing six strokes. Perhaps this is because when the Act previously permitted a moderate correction of up to 10 cuts, 6 cuts with a light cane was generally regarded as reasonable punishment. Such an approach is no longer acceptable in view of the maximum number of strokes permitted by the Act.

The principle is now established that the maximum penalty should be reserved for the most serious offences or persistent offenders.

1994 (1) ZLR p243

GARWE J

In *S v Mutusva* HH-156-86, the accused was charged with wrongfully and unlawfully carrying on the business of an ivory dealer without being in possession of the necessary licence, contrary to the provisions of the Parks and Wild Life Regulations 1981. On conviction, he was sentenced to pay the maximum possible fine.

In reducing the sentence, REYNOLDS J remarked that -

> "...the maximum sentences prescribed should be reserved for the worst or most persistent of offenders...Once again...the magistrate attempts to justify the most severe sentence allowed by the Legislature on the basis of prevalence. I can only repeat that this approach is improper. It is to be hoped that the magistrate will now bear this

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well-recognized principle in mind in future cases."

In *S v Mathe* HB-104-83 the accused, who was 18 and a first offender, killed a heifer on a commercial farm and took away the meat. He was subsequently convicted, on his plea of guilty, of theft of stock and sentenced to receive 10 cuts with a light cane and in addition to a wholly suspended prison term of 18 months' imprisonment with labour. Having considered that ten strokes was the maximum number of strokes imposable under the Criminal Procedure and Evidence Act, GUBBAY J (as he then was) remarked:

"I do not question the propriety of ordering the accused to receive a moderate correction co-joined with a period of conditional imprisonment. After all he committed a serious offence and one which is particularly prevalent in the Gwanda area. But the number of cuts inflicted was grossly excessive. Ten cuts is the maximum that may be imposed on a juvenile in terms of s 330 (1) of the Criminal Procedure & Evidence Act [*Chapter 59*]. I venture to think that very few crimes would demand a juvenile being visited with such a degree of judicial barbarism. Perhaps offences of unprovoked and extreme violence or of bestial or wanton cruelty to the person of another might qualify. The present offence certainly does not."

The same sentiments were expressed by REYNOLDS J in *S v Bote* HH-340-87 and by SANSOLE J in *S v Maposa & Ors* HH-395-85.

In the latter case, eight accused persons, all juveniles, were convicted and sentenced to receive a moderate correction of 6 cuts with a light cane. Although the learned judge confirmed the proceedings in that case, he

GARWE J

stressed the need for magistrates to take heed of the attitude of the High Court on the issue of juvenile whipping. He remarked:

"These courts have many a time emphasized the need for moderation when meting out punishment by whipping, for excessive whipping is apt to benumb the victim. As BECK J (as he then was) put it in *S v Chattlier* 1973 (2) RLR 339 at 344C:

'With whatever cane the whipping is imposed, six strokes represents a severe whipping.'

Excessive whipping tends to degenerate into 'senseless brutality'. As far as I am concerned, the younger the offender is, the less desirable is the need for excessive whipping. Four cuts represents a severe to moderate whipping. Therefore I would consider that cuts in excess of this number are a severe whipping."

The learned judge repeated the same remarks in *S v Ziyadhuram & Ors* HH-139-86.

In the present case, the offence committed by the accused, though serious, cannot be described as "most serious". In my view, six cuts would be appropriate in very serious cases such as rape, theft of motor vehicle etc, but should not be imposed in relatively less serious offences. The present offence certainly did not warrant the imposition of the maximum number of cuts permitted by the law. Four cuts would have met the justice of this case.

In view of the fact that the cuts may have already been carried out, no useful purpose would be achieved by altering the sentence at this stage. In the result, I confirm the conviction but am unable to certify the sentence as being in accordance with real and substantial justice.

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One other matter concerns me and that is the wording of the order.

In terms of s 329 (1) of the Criminal Procedure and Evidence Act, a court can sentence a juvenile to receive "moderate, corporal punishment, not exceeding six strokes". By subs (2) of that section, such corporal punishment "shall be inflicted in private". Subsection 6 provides that "**the manner in which and the place at which corporal punishment shall be inflicted and the person who shall inflict it, shall be as prescribed**" (the emphasis is my own).

Section 3 of the Criminal Procedure (Corporal Punishment) Regulations

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GARWE J

SI 308/93 provides that a sentence of corporal punishment shall be administered by an officer designated in writing for that purpose by the Director of Prisons.

It is to be hoped that by now the Director of Prisons has designated the officers who may carry out corporal punishment in terms of the Regulations.

Section 4 of the Regulations provides that corporal punishment shall be administered with a rattan cane whose measurements are given.

Section 10 of the same Regulations provides that corporal punishment administered in terms of these regulations shall be moderate.

Although s 8 of the Regulations provides that the officer-in-charge of the prison shall be present together with a doctor or a nurse when corporal punishment is administered, the Regulations do not specify the place at which corporal punishment shall be inflicted. Until such time as this aspect is clarified, corporal punishment should be administered at the nearest prison.

Considering the above, sentences of corporal punishment should, as far as is possible, follow the wording of the Act and the Regulations. In this case, the order should have read:

> "To receive moderate corporal punishment of 4 strokes with a rattan cane to be administered in private at Harare Remand Prison by a designated Prison Officer."

Bartlett J: agrees.

TECHNIQUIP (PVT) LTD v ALLAN CAMERON ENGINEERING (PVT) LTD 1994 (1) ZLR 246 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

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28 February & 10 March 1994

Flynote

Costs - de bonis propriis - principles - requirement to observe audi alteram partem rule

Legal practitioner - conduct and ethics - acquiescence in ruling by court - not to be construed from counsel observing traditional courtesies

Headnote

The appeal in this case was brought by Mr D W Aitken, legal practitioner for the cited appellant. Mr Aitken had been ordered by the judge *a quo* to pay *de bonis propriis* the wasted costs occasioned by the postponement of an application for summary judgment brought by the appellant against the respondent. The application had had to be postponed because essential documents, including an affidavit from the appellant were missing from the papers. They had been mislaid or misfiled in the Registry at the High Court. The judge requested his clerk to obtain a copy from Mr Aitken, who responded that the clerk should obtain a copy from counsel who had been briefed to argue the matter. The clerk could not do this because counsel was out of Harare until the afternoon of the day before the application was due to be heard. Mr Aitken was contacted again, at the request of the judge, and asked to arrange for a copy of the affidavit to be provided that day. His response was that the missing affidavit had been properly filed an must have been mislaid by the Registry and that a copy should be sought from counsel. The judge regarded Mr Aitken's attitude as "completely unacceptable" and decided not to hear the matter on the date on which it had been set down and to order that Mr Aitken should pay the wasted costs.

On the morning of the date of set down, the judge found a copy of the affidavit had been pushed under his door, having been sent by counsel at Mr Aitken's request. The affidavit had been sent the previous afternoon before the judge left the court building but for some unexplained reason was not delivered to him.

When counsel appeared for the hearing, the judge informed him of the postponement of the matter and his reasons therefor and of his intention of ordering that Mr Aitken should pay the wasted costs. Counsel did not protest the ruling and resumed his seat after voicing the traditional courtesy "as your Lordship pleases".

Held, that an order that a legal practitioner pay costs *de bonis propriis* is only granted against legal practitioners in reasonably grave circumstances. Dishonesty, *mala fides*, wilfulness or professional negligence of a high degree fall into this category. The critical factor to be determined before making such an order is whether justice demands that it be made. It is, after all, an order which has penal qualities.

Held, further, that Mr Aitken's conduct was not sufficiently morally indefensible or reprehensible as to attract the disapproval with which it was visited. It was not unreasonable for him not to search counsel's chambers in his absence for a copy of the affidavit. A copy could have been obtained from the practitioners for the respondent. Further, a postponement could have been

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avoided without too much inconvenience. The parties were ready to argue the matter. The judge had the papers before the application was due to be heard and although he was not as well prepared as he would have liked to be, he was not obliged to deliver an *ex tempore* judgment. The judge was determined to punish Mr Aitken, though the primary cause for the non-timeous inclusion of the affidavit in the papers was the fault of the Registry. He should have exercised his authority with more caution and objectivity.

Held, further, that the judge was in breach of the *audi alteram partem* rule, in failing to give Mr Aitken an opportunity to tender an explanation. He even failed to ask counsel for the other side if he wished to be heard.

Held, further, that counsel's failure to protest and his use of the traditional courtesy did not amount to an acquiescence in the procedural irregularity which took place. Counsel had been taken completely by surprise by the judge's announcement and was in no position to argue the matter. Appeal allowed and order that Mr Aitken pay the costs *de bonis propriis* set aside.

Cases cited:

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

GUBBAY CJ

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

Benmac Mfg (Pvt) Ltd v Angelique Entprs (Pvt) Ltd 1988 (2) ZLR 52 (H)

Muhaka v van der Linden 1988 (2) ZLR 338 (S)

Washaya v Washaya 1989 (2) ZLR 195 (H)

Masama v Borehole Drilling (Pvt) Ltd S-27-93

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

Khunou & Ors v M Fihrer & Son (Pty) Ltd & Ors 1982 (3) SA 353 (W)

Gondwe v Bangajena 1988 (1) ZLR 1 (H)

Khan v Mzovuyo Invtms (Pty) Ltd 1991 (3) SA 47 (Tk)

Claude Neon Lights (SA) Ltd v Peroglou 1977 (1) SA 575 (C)

Merber v Merber 1948 (1) SA 446 (A)

Ward v Sulzer 1973 (3) SA 701 (A)

Min of Prisons & Anor v Jongilanga 1985 (3) SA 117 (A)

Mhlanga v Mtenengari & Anor 1992 (2) ZLR 431 (S)

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A J Dyke for the appellant

S M Mafusire for the respondent

Judgment

Gubbay CJ: On 11 May 1993, Bartlett J refused the grant of an unopposed application for leave to appeal to the Supreme Court against an order he made on 1 April 1993, that a legal practitioner, David William Aitken ("Aitken"), pay *de bonis propriis* the wasted costs occasioned by the postponement of an application for summary judgment brought by his client, Techniquip (Pvt) Ltd ("Techniquip") against Allan Cameron Engineering (Pvt) Ltd ("Allan Cameron").

Aggrieved at such refusal, Aitken, albeit in the name of Techniquip, applied in terms of rule 31(2) of the Rules of the Supreme Court for leave to appeal. Again the application was unopposed. It was allowed by me in Chambers on 27 May 1993. Hence the present appeal, which incorrectly cites Techniquip as the appellant and not Aitken, who is the true party seeking relief. It is of no concern or consequence to Techniquip whether this appeal should succeed, for if it were to fail the real appellant, and not it, would have to bear the costs.

At the outset it is important to recognise that courts tend to award costs *de bonis propriis* against erring legal practitioners only in reasonably grave instances. Generally speaking, dishonesty, *mala fides*, wilfulness or professional negligence of a high degree, fall into this category. See *Waar v Louw* 1977 (3) SA 297 (O) at 304F. Thus, in *Machumela v Santam Insurance Co Ltd* 1977 (1) SA 660 (A) at 664B-C, *Benmac Manufacturing (Pvt) Ltd* v

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GUBBAY CJ

Angelique Enterprises (Pvt) Ltd 1988 (2) ZLR 52 (H) at 60A, *Muhaka v van der Linden* 1988 (2) ZLR 338 (S) at 342 F-G, *Washaya v Washaya* 1989 (2) ZLR 195 (H) at 201G, and *Masama v Borehill Drilling (Pvt) Ltd* 1993 (1) ZLR 116 (S) at 118D, where there was serious negligence on the part of the legal practitioner concerned, the special order was invoked; as it was in *Webb & Ors v Botha* 1980 (3) SA 666 (N) at 673B-D, *Khunou & Ors v Fihrer & Son (Pty) Ltd & Ors* 1982 (3) SA 353 (W) at 353G and *Gondwe v Bangajena* 1988 (1) ZLR 1 (H) at 6A-B, where the conduct in question amounted to an abuse of the process of the court; and, more recently, in *Khan v Mzovuyo Investments (Pty) Ltd* 1991 (3) SA 47 (Tk) at 48G, where the proceedings had been handled in an unconcerned and slack manner.

The rationale to be gathered from these authorities is, I think, that the critical factor to be considered before making such an order against a legal practitioner is whether justice demands that it be made. After all, it is an order which, like an award of attorney and client costs, has penal qualities. See *Claude Neon Lights (SA) Ltd v Peroglou* 1977 (1) SA 575 (C) at 578H.

In my opinion, even if there were to be attributed to Aitken's conduct the extent of blame attached to it by the learned judge (which I venture to say was not warranted), it was not deserving of the severity of the order imposed.

The pertinent scenario leading up to this appeal may be summarised as follows.

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The learned judge had been assigned to preside over the opposed applications set down for hearing on Thursday, 1 April 1993. During the previous weekend he noticed that an application by Techniquip for condonation of the late filing of an answering affidavit and the affidavit deposed to by its managing director, both of which were referred to in the consolidated index, had not been included in his papers.

On Monday morning, 29 March, after the learned judge had instructed his clerk to fetch the missing documents from the Registry, he learned that they could not be located, having been either mislaid or misfiled. As the answering affidavit (which from the pagination in the index comprised, with annexures, some fourteen pages) appeared to be essential to a proper consideration of the matter, he requested his clerk to obtain a copy from Aitken. The latter's response, as later conveyed to the learned judge, was that the clerk should contact Mr Colegrave, who had been briefed to argue the application and who would be able to furnish a copy. Although somewhat perturbed by what he

took to be a lack of co-operation on the part of Aitken, but anxious to avoid the necessity of postponement, the learned judge told his clerk to act as suggested. However, this proved of no avail, for it was ascertained that counsel was in Shurugwi and would only be returning to Chambers late on the afternoon of Wednesday, 31 March.

Early the following morning, at the behest of the learned judge, Aitken was again telephoned by the clerk and informed of Mr Colegrave's situation. He was asked to arrange for a copy of the affidavit to be provided that day. His response, again as recounted to the learned judge, was that the answering affidavit, which had been properly filed, must have been mislaid by the Registry and that a copy should be sought from Mr Colegrave. The reaction of the learned judge to this is best set out in his reasons for refusing leave to appeal:

> "I felt that I had gone as far as I could reasonably be expected to go in informing the legal practitioner of the problems in regard to the file and in asking him to assist in resolving them. I could not understand the approach of the legal practitioner. It could not but have been abundantly clear to him that I did not have the answering affidavit and was asking him to provide it. It should also have been abundantly clear that as the hearing date was now less than two days away it was important that the answering affidavit be provided without delay if the application was to proceed. It should have been simple for the legal practitioner to send an assistant to Advocates' Chambers and to arrange to obtain a copy of the answering affidavit and deliver it to my clerk. The effect of the legal practitioner's answer to my clerk was - if the judge wants a copy of the answering affidavit before Advocate Colegrave gets back on the afternoon of 31 March (when the hearing was on 1 April) he should get it himself. I did no consider that appropriate - especially since all my other approaches through my clerk were intended to promote efficiency, assist the legal practitioner and overcome the deficiencies within the Registry which might otherwise prevent the matter being heard timeously. I considered that the reasonable response of the legal practitioner would have been to arrange to obtain a copy of the answering affidavit from Advocates' Chambers and to have forwarded it to my clerk by 30 March as requested. I considered that in all the circumstances the response of the legal practitioner was decidedly unreasonable.

Accordingly, in view of the fact that my clerk had already made two approaches to the legal practitioner on 29 and 30 March and these did not

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result in the affidavit being provided, I decided any further approach on my part was not called for."

Incensed by Aitken's attitude, which he regarded as "completely unacceptable", the learned judge had decided by the late afternoon of 30 March that "it would be appropriate to refuse to hear the matter on 1 April and to order that (Aitken) pay the wasted costs".

At 08.00 hours on Thursday, 1 April, the learned judge found that an envelope containing a copy of the answering affidavit had been pushed under the door of his Chambers. It had been sent by Mr Colegrave. Enquiries revealed that the envelope had been delivered to the High Court shortly before 16.00 hours the previous day but, though marked for the attention of the learned judge, had not been referred to him by the Registry or his clerk prior to his departure at 16.30 hours. Obviously, on his return from Shurugwi Mr Colegrave had been contacted by Aitken and requested to dispatch the affidavit.

No sooner had the matter been called before him than the learned judge informed Mr Colegrave, who announced that he appeared on behalf of Techniquip, that he would not be hearing it and that he proposed to order that the applicant's instructing legal practitioner pay the costs for the day's hearing. He then proceeded to give his reasons for the order, detailing the preceding events and the inferences he drew therefrom.

It has frequently been stated that in an appeal against an order for costs the issue to be addressed is whether there was an improper exercise of judicial discretion, that is, whether the award is vitiated by irregularity, misdirection or is disquietingly inappropriate. An appeal court will not interfere merely because it might have reached a different decision. See *Merber v Merber* 1948 (1) SA 446 (A) at 452; *Ward v Sulzer* 1973 (3) SA 701 (A) at 707A; *Minister of Prisons and Anor v Jongilanga* 1985 (3) SA 117 (A) at 124B.

In casu, I have no hesitation in expressing the view that this court is justified in interfering with the order made and allowing the appeal.

In the first place, the conduct of Aitken was not sufficiently morally indefensible or reprehensible as to attract the disapproval with which it was visited. To my mind, the learned judge failed to appreciate that Aitken's reluctance to enter Mr Colegrave's chambers and, in his absence, search for the brief and remove therefrom the required affidavit for copying, was not unreasonable. Mr Colegrave could well have been displeased if such an

unauthorised intrusion had occurred. What Aitken did was to contact counsel on his return and ask that he comply with the request of the learned judge. This was done and the answering affidavit was received at the High Court before the departure that afternoon of the learned judge.

Accepting the commendable concern of the learned judge to deal with the application on 1 April, I find it difficult to understand why, upon being advised that the answering affidavit was in the

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possession of Mr Colegrave who was away from Harare, an approach was not made to obtain a copy from the legal practitioners representing Allan Cameron. If this had been done, the affidavit would doubtlessly have been in the learned judge's hands by 30 March.

Furthermore, having received the answering affidavit and annexures two hours before the application was due to be heard, I think a postponement could have been avoided without too much inconvenience to the learned judge. The parties were ready to argue the merits and although he was not as well prepared as he would have preferred to be, the learned judge was not obliged to deliver an *ex tempore* judgment; he could have taken time to consider his decision.

With due respect, it seems to me that if the learned judge had not been smarting at what he considered Aitken's discourtesy, he would have inevitably proceeded to hear the application. In short, he did not do so because he was determined to punish Aitken, even though the primary cause for the non-timeous inclusion of the answering affidavit in his papers was the fault of the Registry officials in permitting it to go astray. Since he was personally involved, he ought to have exercised his authority with more caution and objectivity.

There is, in addition, yet another ground upon which the judicial discretion to order Aitken to pay the costs of the postponement *de bonis propriis* is vitiated.

Without affording Mr Colegrave an opportunity to address him on whether it was fitting to penalise Aitken, thereby depriving the latter of the ability to tender an explanation, the learned judge, in accordance with his pre-determined resolve, informed the parties that he intended to postpone the application and that the wasted costs were to be borne by Aitken. In adopting that approach, he was in breach of the *audi alteram partem* rule - an elementary rule based on natural justice and fairness. He even omitted to

enquire from Mr *Mafusire*, who was appearing for the other party, if he wished to be heard. Certainly, before this court, Mr *Mafusire* did not feel constrained to support the order.

The learned judge has sought to reason *ex post facto* that Mr Colegrave's failure to protest the ruling and "his whole tone and deportment" in resuming his seat after voicing the traditional courtesy: "As Your Lordship pleases" signified acquiescence in and approval of the order made. This is disputed by Mr Colegrave in the heads of argument prepared by him. This is what is stated:

> "Having been told of his decision, counsel was, at that point in time, entitled to assume that the matter was a *fait accompli*.
>
> In spite of this, counsel is then criticised for not protesting or otherwise showing dissent. The simple answer to this is, with great respect, that it is not counsel's place to do so. Counsel may not seek to emulate the sportsman on the playing field who questions the referee's or umpire's decision. As far as decisions of the court are concerned, counsel should strive to take the rough with the smooth.
>
> The reality of the matter is, therefore, that counsel should have been afforded the opportunity of addressing the court before the order was made. No doubt, counsel would have had to have sought an adjournment in order to obtain

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full instructions as to what had happened over the previous few days. The court was in no position to assume that he was fully aware of what had happened."

I have to agree that the endeavour to overcome the procedural irregularity by seeking to place reliance upon Mr Colegrave's silence is wholly unpersuasive.

The situation which pertained was fundamentally different from that considered by this court in *Mhlanga v Mtenengari & Anor* 1992 (2) ZLR 431 (S) at 436G-437C. In that case, both counsel had been made aware of the presiding judge's intention to resume a trial that had been part-heard before another judge, yet neither communicated an objection in advance to the Registrar or to the learned judge before he announced his official ruling. In this, Mr Colegrave was taken completely by surprise. A warning of what the learned judge intended to do was not given him. He had been briefed to apply for summary judgment and had no instructions from Aitken, who was not present in court, on how to deal with the punitive order for costs.

GUBBAY CJ

Finally, there is the question of costs. No order was sought by Mr *Dyke*, who appeared for Aitken, and correctly so, either in respect of the wasted costs incurred on 1 April or the two unopposed applications for leave to appeal to this court. What was in contention was whether the costs of the appeal, if it were to succeed, should follow the event.

Mr *Mafusire* submitted that Allan Cameron was obliged to oppose the appeal because an order for costs was prayed against *it*. As previously observed, the citing of the parties in the applications for leave to appeal and in the notice of appeal, was incorrect and misleading. The complaint had nothing to do with either litigant. If Aitken had been named as the appellant in the notice, and no order for costs of the appeal sought (to which at that stage he was not entitled), the strong probability is that Allan Cameron would have realised that the prudent course was to stand aside and take no part in the appeal proceedings. I consider, therefore, that fault attaches to both in more or less equal degree. Accordingly, I am not prepared to make an order for costs. Costs must lie with the parties.

In the result:

1. The appeal is allowed.

2. The judgment of the court *a quo* ordering Mr D W Aitken to pay the costs *de bonis propriis* of the postponement on 1 April 1993, is set aside.

3. There is to be no order as to costs.

Korsah JA: I agree.

Ebrahim JA: I agree.

D W Aitken & Co, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

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LEOPARD ROCK HOTEL CO (PVT) LTD & ANOR v WALENN CONSTRUCTION (PVT) LTD 1994 (1) ZLR 255 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

2 December 1993 & 14 March 1994

Civil appeal

Flynote

Arbitration - arbitrator - duties - must be independent and impartial

Costs- - arbitrator becoming involved in dispute over whether or not he should be removed - whether costs awardable against him

Appeal - evidence on appeal - adducing fresh evidence on appeal - application by successful party in court below when court will allow

Headnote

The first appellant and the respondent had been involved in a dispute which had been referred for arbitration. An arbitrator was appointed. The arbitrator wanted to appoint a technical adviser who would sit with him throughout the proceedings. After the arbitrator had been appointed, the respondent became aware that the arbitrator had certain financial interests which the respondent believed would be likely to bias him in favour of the first appellant. The respondent raised objections to the appointing of the technical adviser to act in a capacity which would be virtually that of an assessor. It also later emerged that the technical adviser had certain financial interests which led the respondent to believe that he too would not be impartial.

The respondent applied successfully to the High Court for the removal of the arbitrator and the setting aside of the appointment of the technical adviser.

When the matter was taken on appeal, the respondent applied to adduce new evidence which had not been available at the time of the High Court proceedings.

Held, dismissing the application to lead new evidence, that the practice of the courts has been to confine the admission of fresh evidence on appeal to evidence relating to an issue in the case, or at any rate to an issue which could or might be raised on a new trial of the action, and to evidence which, if believed, either would be conclusive or would lead to the reasonable probability that the verdict would have been different. If that were not the case, it would be an exercise in futility to allow the introduction of such evidence. A successful litigant should not be allowed to lead fresh evidence where he is not seeking to persuade the appeal court to alter the

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verdict but is simply trying to bolster the original judgment in his favour.

Held, regarding the issue of bias, that an arbitrator must be impartial and disinterested. A party to arbitration proceedings who has originally agreed to the appointment of the arbitrator is still entitled to ask for the removal of that arbitrator if subsequently he discovers facts about the arbitrator which cast doubt on his impartiality. In a case where it is alleged that the arbitrator should be disqualified from sitting on the grounds that he has some financial interest, the test is objective. The question to be asked is whether the reasonable litigant, knowing of the financial interest, would have believed that there was a real likelihood or danger that he would not receive a fair hearing. The fact that the adjudicator emphatically believes that he would deal with the matter impartially despite his financial interest is irrelevant. In the present case a reasonable litigant would have believed that the financial interest would create a real risk of bias. Such a belief would have been accentuated by the fact that not only did the arbitrator refuse to recuse himself, but he descended into the arena of battle by actively participating in the proceedings for his removal and making common cause with the party maintaining that he should not recuse himself.

Held, further regarding the issue of bias, that it is most undesirable that an arbiter of a dispute should appear to be siding with a contestant who is opposing a court application for the recusal of the arbiter. If the arbiter joins with that contestant in opposing the application for refusal, the other contestant is likely to gain the impression that the arbiter is biased against him and this would reinforce his feeling that the arbiter is indeed biased against him. The arbiter in such a situation should adopt one of two courses: he should file an affidavit setting out colourlessly the facts which he considers to be of assistance to the court or take no part in the proceedings and abide by the court's decision.

Held, regarding the contention that the arbitrator had been guilty of legal misconduct in the proceedings, the discretion which the arbitrator has in

KORSAH JA

relation to the conduct of proceedings must be exercised judicially. The respondent is entitled to object to the appointment of the technical adviser. The arbitrator did not have the power to appoint a person as technical adviser to whom one of the parties had objected and this appointment amounted to legal misconduct in the circumstances.

Held, regarding the issue of costs, as the arbitrator had seen fit to join with the first appellant in opposing the application for his recusal in the trial court, he was liable to pay costs of the trial case.

Cases cited:

Farmers' Coop Ltd v Borden Synd (Pvt) Ltd 1961 R & N 28 (FS)

Colman v Dunbar 1933 AD 141 EH

Lewis & Son, Ltd v Morelli & Anor [1948] 2 All ER 1021 (CA)

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Murphy v Stone Wallwork (Charlton) Ltd [1969] 2 All ER 949 (HL)

Braddock v Tillotsons Newspapers Ltd [1949] 2 All ER 306 (CA)

FE Hookway & Co Ltd v Alfred Isaacs & Sons & Ors [1954] 1 Lloyd's Rep 491

Graaff-Reinet Municipality v Jensen 1907 CPD 604

Leing Township Co (Pty) Ltd v Admin, Tvl & Ors 1960 (2) SA 22 (W)

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

Barnard v Jockey Club of S A 1984 (2) SA 35 (W)

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

Dimes v Grand Junction Canal (1852) 3 HL Cas 759

Bailey v Health Professions Council of Zimbabwe 1993 (2) ZLR 17 (S)

Appel v Leo 1947 (4) SA 766 (W)

Frame United Breweries Co v Bath JJ [1926] AC 586

R (Donoghue) v County Cork JJ [1910] 2 IR 271

Port Sudan v Chettiar [1977] 1 Lloyds Rep 166

Blue Ribbons Foods Limited v Dube NO & Anor 1993 (2) ZLR 146 (S)

Smith v Martin [1925] 1 KB 745

Dickenson & Brown v Fisher's Exors 1915 AD 166

Benjamin v Sobae SA Bldg & Construction 1989 (4) SA 940 (C)

Mediterranean & Eastern Export Co Ltd v Fortress Fabrics (Manchester) Ltd [1948] 2 All ER 196 (KBD)

J C Andersen SC for the first appellant

A P de Bourbon SC for the second appellant

M J Gillespie for the respondent

Judgment

Korsah JA: On 16 June 1993, in a judgment handed down in the High Court, Harare, CHINENGUNDU J ordered that -

KORSAH JA

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(a) the second appellant be removed from his position as arbitrator;

(b) the appointment of Mr J O'Donovan as a technical adviser to the second appellant be set aside;

(c) clause 7 of the deed of submission be deleted;

(d) either party may, subject to the provisions of s 8 of the Arbitration Act [*Chapter 12*] make application to the High Court for the appointment of an arbitrator if, within two months from the date of the judgment, the parties have been unable to agree upon any arbitrator; and

(e) the costs of the application (which was initiated by the respondent), excluding the costs of the respondent's supplementary replying affidavit and/or regarding allegations of misconduct of proceedings, be borne by the first and second respondents jointly and severally.

The first appellant ("Leopard Rock"), with the condonation of this court, lodged an appeal against the whole of the judgment of the High Court granting these orders.

The second appellant ("Mr Whaley"), likewise with the condonation of this court, appealed only against the order of costs by the trial court, that he should bear any part of that burden.

Pursuant to leave being granted by the trial court, the respondent ("Walenn Construction") noted a cross-appeal against that part of the order for costs which denial it costs in relation to the supplementary replying affidavit and the allegations of misconduct therein contained.

Mr *de Bourbon*, who appeared for Mr Whaley, explained, at the inception of the proceedings before us, that although Leopard Rock was pursuing its appeal against the judgment, the outcome of which may have a material bearing on the award of costs against Mr Whaley, unless there is before this court in the name of Mr Whaley an appeal against the order of costs, this court would not be empowered to interfere with the order of costs against him. While Mr Whaley does not acquiesce in the merits of the appeal, but pursues the appeal against costs, he nevertheless would be happy to abide the judgment of this court and, therefore, wishes to take no further part in the matter. Mr *de Bourbon* craved, and was accorded, the indulgence of this court for him and his client to be excused any further participation in this appeal.

KORSAH JA

I shall consider the issue of costs at an appropriate stage in this judgment, whereat I shall comment on the withdrawal of Mr Whaley.

Mr *Gillespie* applied on behalf of Walenn Construction, by way of motion of which Leopard Rock and Mr Whaley had notice, to lead further evidence at the hearing of this appeal. The basis for the application was the usual one, that since the hearing in the High Court Walenn Construction had come into possession of certain documents relevant to the issues in the pending appeal, and it now seeks leave to adduce these documents in evidence before this

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court.

The documents sought to be adduced were not only enumerated in para 7 of the supporting affidavit, but copies thereof were attached to the application in compliance with rule 39(4) of the Supreme Court Rules (RGN 380/64). Walenn Construction sought condonation in its supporting affidavit for non-compliance with the mandatory provision to append a copy of the judgment appealed to the application, as such was already part of the record before this court.

Paragraphs 8 and 9 of Mr Thomson's affidavit in support of the application to adduce further evidence read:

> "8. The applicant (Walenn Construction) did not adduce these documents in evidence in the court *a quo* because they were not in its possession at the time of the proceedings in that court, nor was the applicant then aware of their existence. All of the documents concerned, save one, are internal documents of the first respondent (Leopard Rock) and each one has come into the applicant's possession during the course of various inspections of documents made available by the first respondent as part of the preliminary procedures in the pending arbitration proceedings.
>
> 9. It is my respectful submission that the information which can be culled from these documents is likely to affect the result of this case in that it establishes clearly the interest of the second respondent (Mr Whaley) and of his appointed adviser, Mr J O'Donovan, in the arbitration proceedings and strengthens the applicant's case on the issue of its fears of lack of impartiality."

The application was strenuously opposed by Mr *Andersen* on behalf of Leopard Rock. He contended that the omission to append a copy of the

judgment appealed to the application to lead fresh evidence amounted to non- compliance with the mandatory provisions of rule 39(4) of the Supreme Court Rules.

Mr *Andersen* is undoubtedly right in his submission, but it seems to me that the purpose of the provision to place before this court the judgment appealed is to enable the court to determine whether such evidence, if adduced, would advance the case of the applicant and be relevant to a resolution of the matters alleged to be in dispute from the judgment. If, therefore, there is already a copy of the judgment appealed before this court, it obviates the necessity to attach another copy to the application. This is an example of where the strictest application of the law may result in injustice being done to a party.

Although the principles governing applications to adduce fresh evidence on appeal are well documented, the decision whether or not to allow the introduction of such evidence is never an easy one. As CLAYDEN FJ observed in *Farmers' Co-op Ltd v Borden Syndicate (Pvt) Ltd* 1961 R & N 28 at 31 B-C:

> "An application of this nature is never lightly granted. In *Brown v Dean,*[1910] AC 373 at 374 LORD LOREBURN LC stressed 'the extreme value of the old doctrine "*Interest reipublicae ut sit finis litium*", remembering as we should that people who have means at their command are easily able to exhaust the resources of a poor antagonist.' And in *Colman* v *Dunbar*, 1933 AD 141 at 161 WESSELS CJ said: 'It is essential that there should be finality to a trial, and therefore if a suitor elects to stand by the evidence which he adduces he should not be

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allowed to adduce further evidence except in exceptional circumstances.'"

The learned JUDGE OF APPEAL then proceeded to set out at 31D the principles by which a court will be guided in exercising its discretion as follows:

"The first is that the evidence tendered could not have been obtained with reasonable diligence for use at the trial - see *Ladd v Marshall* [1954] 3 All ER 745 at 748A-C; *Colman v Dunbar*, *supra*, 161. The second is that the evidence must be such as is 'presumably to be believed' or 'apparently credible', see *Ladd v Marshall* at 748; *Colman v Dunbar* at 162. The third relates to the effect which it would have on this case...The last is that conditions since the trial must not have so changed that the fresh evidence will prejudice the opposite party - see *Colman v Dunbar* at 162."

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The existence of the documents sought to be adduced in evidence is admitted by Leopard Rock. It is, however, noted that the first of the documents enumerated in para 7 of the supporting affidavit is a public document and was available to Walenn Construction before it received it as a part of the discovery procedure in the arbitration. Even assuming that this document, if admitted, would be conclusive in favour of Walenn Construction, it was evidence which could easily have been obtained at the time of the hearing in the court of first instance, and for that reason ought not to be admitted in evidence on appeal: *E H Lewis & Son, Ltd v Morelli & Anor* [1948] 2 All ER 1021 (CA) at 1024 A-B.

As regards the remainder of the documents sought to be introduced, it was contended on behalf of Leopard Rock that Walenn Construction was given possession of these documents on or about 10 September 1993; and it had sought to have these documents adduced in evidence approximately one week before the hearing of the appeal on 2 December 1993, and after heads of arguments had already been filed. Mr *Andersen* submitted that if it was important for these documents to be adduced in evidence before this court at the hearing of the appeal, one would have expected Walenn Construction to have acted with greater dispatch and to have expeditiously applied for leave to do so within a reasonable time of receiving the documents and, in any event, before heads of argument were filed.

It does not seem to me, without deciding the issue, that this time factor is one which should unduly worry a court if such evidence satisfies the prerequisites for its introduction; for this court has a discretion to re-open a matter on fresh evidence even after the time for appeal has expired if the particular exigencies of justice clearly outweigh the general undesirability of so doing. In such circumstances, however, the onus on the party applying of satisfying this court that the case is a proper one to re-open is higher than when he makes application to admit fresh evidence within time. See *Murphy v Stone Wallwork (Charlton) Ltd* [1969] 2 All ER 949 (HL) at 953F and 956C.

Of far greater concern to me is the application of the third principle which CLAYDEN FJ stated in the *Farmers' Co-op* case *supra*, that is: the effect which the fresh evidence would have on this case. He said at 32C of the judgment:

"The principle should be that it would probably have an important influence on the result of the case, although it need not be decisive."

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I understand this to mean that a different result may be arrived at on consideration of the fresh evidence.

Put another way, the practice of the courts has been to confine the admission of fresh evidence on appeal to evidence relating to an issue in the case, or at any rate to an issue which could or might be raised on a new trial of the action, and to evidence which, if believed, either would be conclusive or would lead to the reasonable probability that the verdict would have been different. If that were not the case, it would be an exercise in futility to allow the introduction of such evidence.

In the present case, the party seeking to adduce fresh evidence was the successful party in the court below. Whichever way the third principle is expressed, I cannot perceive of the evidence sought to be adduced having an important influence on the result of the case, save that it would shore up Walenn Construction's allegations of interest against the arbitrator. It is not alleged that such fresh evidence sought to be adduced would probably have led to a different result in the court below. In fact the party applying to lead such evidence does not desire a different conclusion from that arrived at by the court of first instance.

I can conceive of a situation where an unsuccessful party may apply for leave to adduce fresh evidence on appeal and the successful party seeks leave to adduce evidence in rebuttal. Though, in principle, there is no bar to a successful party seeking leave to adduce fresh evidence on appeal, provided such evidence falls within the parameters for introducing it, I am unaware of any case in which the successful party, who is not disputing the validity of the verdict in his favour, has successfully sought leave to adduce fresh evidence merely to bolster the judgment in his favour, and not because there is a probability, or merely a reasonable probability, that such evidence may result in a different verdict. Even assuming that the evidence, if admitted, would be conclusive in favour of Walenn Construction, the sole purpose for which it is sought to be adduced is to lend weight to the allegation of interest by the arbitrator. As TUCKER LJ explained in *Braddock v Tillotsons Newspapers Ltd* [1949] 2 All ER 306 (CA) a 311A:

> "There are two conflicting principles always operating in these matters. One is that everything should be done to ascertain the truth; the other is that there should be some finality in litigation, and, so far as possible, a reasonable limitation of costs. It is to achieve the latter result that it is necessary for the court to impose some limit to the re-opening of decided

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issues, even at the risk that injustice may result or that there is a possibility of injustice resulting."

The documentary evidence placed before us and which is sought to be adduced as fresh evidence, only embellishes what was already known or had been disclosed:

> "That the arbitrator had been a non-executive director of the company John Sisk & Sons (Private) Limited for

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some twenty-three years, which was well known to his firm and accordingly to the legal practitioner acting on behalf of the respondent at the time the appointment was made. The arbitrator and two other persons were members of a private company which owned 8 000 shares in Tabex Limited. In addition the arbitrator is a director in another company in which his widowed sister-in-law is the shareholder and which owned an undisclosed number of shares in Tabex Limited. [The] respondent had not requested disclosure of the precise number involved.

Tabex Limited is a public quoted company in which 190 227 000 shares have been issued. Mr O'Donovan's shareholding of 360 000 shares amounts to 0,19% of the total shares so issued. 92,75% of [the] first appellant's shares are held by Blair Holdings (Private) Limited and the remainder by a private company. The majority of the shares in Blair Holdings (Private) Limited are owned by Mr A C Taberer, who is the Chairman of that company and of Tabex. Blair Holdings is the owner of 60% of the shares in Tabex."

The evidence sought to be adduced is intended to establish that Tabex Holdings Ltd has invested an amount of $47 million in Leopard Rock. And because of the close inter-relationship between the companies concerned, this indebtedness threatens the stability and even the very existence of all the companies in the Tabex Group. Therefore, the less money Leopard Rock has to pay to Walenn Construction, the better the chances of the companies in the Tabex Group surviving and the prices of their shares being maintained or strengthened, and that this underscores the possibility of bias on the part of the arbitrator and his adviser.

But we are not here concerned with the interest of either Tabex Holdings Ltd or Blair Holdings (Pvt) Ltd in this matter. The issue in this case relates to any interest that the arbitrator may have in the subject matter of the arbitration or the parties. The evidence sought to be adduced is, in my view, irrelevant to

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such a determination. It is intended to invite an inference, which goes to the weight of the likelihood, that the greater the investment of Tabex Holdings Ltd in Leopard Rock, the greater the interest of the arbitrator in the subject matter of the arbitration. This evidence is only a make-weight and in no way affects the legal principles applicable to a resolution of the dispute.

In my judgment, there is no probability that the fresh evidence sought to be adduced in the present case would have increased the arbitrator's disclosed interest in the subject matter of the arbitration so as to have an important influence on the result of this case, and this court would not be justified in setting what might be a dangerous precedent.

Accordingly, I would disallow the application to lead fresh evidence.

I now turn to the merits of the appeal. In this regard, I can perceive of no better way than to consider the orders made by the learned trial judge in the sequence in which they were made.

As submitted by Mr *Gillespie*, the fundamental qualification of an arbitrator is that he must be and continue to be disinterested with reference to the matters before him and the parties thereto. This qualification in an arbitrator may be expressed in a positive or negative form. See Mustil & Boyd *Commercial Arbitration* at p 213-214.

The qualification under our law has been given statutory expression in s 11 of the Arbitration

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Act [*Chapter 12*] ("the Act"), which provides that

> "Every arbitrator and umpire must be and continue throughout the reference to be disinterested with reference to the matters referred and the parties to the reference, and any party to a reference may require any arbitrator or umpire to make a sworn declaration **before beginning** or continuing his duties as such arbitrator or umpire, that he has no interest, **direct or indirect**, in the matter referred or parties to the reference, and knows of nothing disqualifying him from being impartial and disinterested in the discharge of such duties:
>
> Provided that any party may expressly waive any right to object to any arbitrator or umpire on the ground of **interest or the like**" (emphasis added).

It appears from the above provision that the existence of an interest may

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render an appointment void unless written waiver is given by a party; for, while any sane person of full age may be appointed as an arbitrator, a person is not qualified to act as an arbitrator if he has an interest, "direct or indirect", in the matter referred or the parties, unless a party expressly waives any right to object to him on the ground of interest or the like. In my judgment, the disqualification of an arbitrator under our law is expressed in a negative form; and s 11 of the Act should be treated as disqualifying any persons who fall within it, but not as containing any implied permission that anyone who does not fall within it should be allowed to sit, no matter what his interest may be. See *FE Hookway & Co, Ltd v Alfred Isaacs & Sons & Ors* [1954] 1 Lloyd's Rep 491 at 507-508.

Undoubtedly, whether or not any interest renders an appointment void, is another matter. Under s 11 of the Act, the very existence of an interest disqualifies the arbitrator, unless a written waiver is executed by the relevant party in compliance with the proviso. It follows, therefore, that the section entitles the relevant party to object to the appointment before the appointment is made. Since the relevant party can only exercise his right of waiver upon knowledge of an interest or the like by an arbitrator, where consent was given in ignorance of the existing interest, whether that interest arose prior to the appointment or afterwards, the absence of knowledge of such an interest before consent entitles the relevant party to claim the removal of the arbitrator even after consent. That is to say, that in such a situation, the appointment is voidable at the instance of the relevant party if he consented to the appointment prior to knowledge of the interest or the like by the arbitrator. The extent of the arbitrator's interest, direct or indirect, is irrelevant.

Mr *Gillespie* submitted that an arbitrator, whether appointed in terms of a mechanism in an arbitration clause, as under s 8 of the Act, or appointed by consent of the parties, must, in compliance with s 11 of the said Act, be in a position to be able to swear an oath that he has no interest in the matter referred or in the parties to the reference. I, however, take issue with the submission that if he is not in a position to do so, then the appointment fails. It seems to me, from the provisions of s 11, that what is required of an arbitrator is for him to make a declaration intimating that he has no interest or, if he has, to disclose it. Were it not so, the proviso to s 11, that the relevant party may expressly waive any right to object to the appointment on the ground of interest, would be rendered meaningless.

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In the instant case, after the dispute between the parties arose, agreement was reached first as to the release of a builder's lien which Walenn Construction

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had hitherto enforced, and thereafter as to the terms of a deed of submission to arbitration. Both agreements are in writing and are dated 15 July 1992.

As regards the appointment of an arbitrator, Walenn Construction was informed by its former legal practitioners that Mr Whaley's name had been put forward by Leopard Rock. Walenn Construction was advised by its former legal practitioners that Mr Whaley had been a senior partner in the firm and enjoyed a distinguished legal and public career. Since Leopard Rock had proposed the arbitrator and Mr Whaley had been recommended by Walenn Construction's own legal practitioners, and it was apparent to both parties that, having regard to the complexities of the legal issues to be resolved, it was desirable that the arbitrator should be a lawyer, Walenn Construction consented to the appointment without further ado.

On 24 July 1992, Mr Whaley formally accepted his appointment and commenced preparations for the arbitral proceedings. On 4 August 1992, an informal meeting between the parties and the arbitrator took place at the arbitrator's residence. Having withdrawn its instructions, Walenn Construction was not represented by a legal practitioner. It was at this meeting that the question of the interpretation of clause 7 of the deed of submission was raised for the first time. Clause 7 recites:

> "THAT the arbitrator shall be entitled to engage the assistance of technically and/or legally qualified persons shall he so require and the costs thereof shall be costs in the arbitration."

Mr Whaley informed them that it was at his instigation that clause 7 was inserted in the deed of submission, but did not indicate the extent to which such an adviser would be involved in the arbitral proceedings.

Walenn Construction meanwhile re-engaged the services of legal practitioners who, on 4 September 1992, in a letter to the legal practitioners for Leopard Rock, requested to be enlightened as to how the arbitrator "proposes to utilise the assistance of any persons co-opted by him". In response to this query, the legal practitioners of Leopard Rock informed their counterparts for Walenn Construction, in a letter dated 11 September 1992, that Mr Whaley intended to engage the services of Mr O'Donovan, the managing director of John Sisk & Sons (Pvt) Ltd, as his technical adviser, without espousing on the extent of the role that Mr O'Donovan was to play in the proceedings. Shortly thereafter, Leopard Rock's legal practitioners, in a letter dated 14 September 1992, informed the legal practitioners of Walenn Construction that:

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> "With regard to the Arbitrator and Mr O'Donovan, our attention has been drawn by Mr Whaley to the fact that both

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he and Mr O'Donovan are involved in companies which are shareholders in Tabex Holdings Limited."

In the circumstances, consent was given to the appointment of the arbitrator in ignorance of the existence of any interest, direct or indirect, which he had in the matter the subject of the reference. Thus, there neither was, nor could there have been, any waiver or objection at the time consent was given.

When these interests were brought to the attention of Walenn Construction, written correspondence relating to them passed between the legal practitioners of the parties. In a letter of 18 September 1992, the representatives for Walenn Construction intimated that, with regard to the interests that Mr Whaley and Mr O'Donovan had in the companies which are shareholders in Tabex Holdings Ltd, they would be taking instructions from their client. Walenn Construction's representatives confirmed, in a letter of 15 October 1992, that Mr Whaley had disclosed to them in a telephone conversation that he was "a shareholder in some three small private investment companies which each hold Tabex shares and that Mr O'Donovan also had shares in Tabex through a similar company", and that they awaited the instructions of their client as to whether these disclosed interests gave it cause for concern to object to the appointment of Mr Whaley and his technical adviser.

The rôle that Mr O'Donovan was to play as a technical adviser remained a thorny issue up to 28 October 1992, on which date there was held a pre-trial conference. If he was to sit full time with the arbitrator the costs of arbitration would be considerably increased, whereas if his expertise was resorted to as and when required the costs would be considerably reduced. No decision had been reached by Walenn Construction on the question of the newly disclosed interests of the arbitrator and his technical adviser at this stage; but Walenn Construction averred in its founding affidavit that were full disclosure of interest by the arbitrator to reveal no more than that mentioned in the correspondence, it would not have objected to the appointment.

However, at the pre-trial conference on 28 October 1992, at which the chairman of Walenn Construction, Mr Thomson, was absent, the arbitrator disclosed interest of a holding of some 8 000 shares in Tabex Holdings Ltd through a company in which he, his brother and Mr D Lewis are shareholders, and a directorship of another company owned by his widowed sister-in-law which holds shares in Tabex Holdings Ltd The precise number of shares was

not disclosed. Mr O'Donovan also disclosed that in addition to his known chairmanship of John Sisk & Sons (Pvt) Ltd, he had a personal shareholding in Tabex Holdings Ltd in an amount which he promised to disclose later to the legal practitioners of Walenn Construction. The arbitrator also disclosed that he held a directorship with John Sisk & Sons (Pvt) Ltd - a fact previously unknown to Walenn Construction. Despite objection on behalf of Walenn Construction, the arbitrator ruled at the pre-trial conference that the technical adviser would sit full time as assessor throughout he proceedings.

When these happenings were communicated to Mr Thomson by the lawyers representing Walenn Construction, he on behalf of Walenn Construction formed the view that there existed in the arbitrator and Mr O'Donovan an interest in the matter and became apprehensive that

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Walenn Construction might be disadvantaged in the proceedings because of the disclosed interests of the arbitrator and Mr O'Donovan. The fears of Walenn Construction were expressed thus in its founding affidavit deposed to by its chairman, Mr Thomson:

> "17. Had the arbitrator's interest - that is the 8 000 shares specified in Tabex Limited - been his only connection with the matter, I would probably not have objected. This is a real interest, even if indirect. It arises thus: The employer is a private company which has as its majority shareholder Blair Holdings (Private) Limited. This latter company is effectively owned by a Mr A C B Taberer, its chairman. Mr Taberer in effect therefore owns the employer. He is in fact the chairman of the employer too. A letter of assurance concerning payment of the applicant was issued by Blair Holdings, signed by Mr Taberer, and all cheques paid to us were drawn by Blair Holdings. The applicant's managing director, Mr A J Traicos, holds position in the Tabex Holdings Limited Group Executive as chairman of subsidiary companies, Tabex (Private) Limited. There has in addition recently been an attempt to have Blair Holdings transfer its shares in the employer to Tabex. This move is currently being opposed by a minority of Tabex shareholders, but it shows, and should it proceed it strengthens, the interest in Tabex in the arbitration and the interest of Tabex shareholders therein. There is, however, more than the 8 000 shares. There is the further interest mentioned in paragraph 15.1 and also Mr O'Donovan's interest. This, to my increasing alarm, was subsequently disclosed to be in a total amount of 360 000 shares, but I will say more of this in the appropriate place below.
>
> 18. The connection with John Sisk & Sons (Private) Limited also

> amounts to an interest in the matter. Whilst my fears (which I explain more fully elsewhere) might have been eased had the assessor's rôle been properly circumscribed, the combined effect of his free rein, his position with John Sisk & Sons (Private) Limited and the arbitrator's own position with that company is most alarming. Sisk, as I shall call it, is a major contractor and a competitor with the applicant; a much larger concern than the applicant. Tabex is a major developer, and plays a significant rôle in the Zimbabwean construction industry. The architects presently involved on this project, SBT Harvey Williams Juul Partnership, are involved in major development projects and recently claimed to have successfully increased their share of commissions in Zimbabwe. The conduct of the architects, in particular of Mr Harvey, now of the partnership I have named, comes under criticism in this arbitration. Any decision for the applicant and adverse to the employer will therefore be a decision adverse to the interests of Tabex and the architects. Such an adverse decision, coming from persons with a responsibility towards Sisk, may be perceived as adverse to the prospects of Sisk successfully competing for contracts in which Tabex or the architects have influence in selecting contractors. The converse is also true and, to my mind, and in my appreciation of the way Sisk do business, which relies heavily on fostering goodwill and personal relationships socially-the 'old boy network' - there is a very real and reasonable apprehension that the arbitrator and assessor, persons responsible to Sisk, would or might experience difficulty giving a decision tending to alienate such important sources of work as Tabex and the architects. This is particularly so in the present shrinking market. I repeat that I personally entertain this apprehension and believe that the applicant might be disadvantaged in the arbitration."

There can be no doubt that the disclosures revealed an interest in terms of s 11 of the Act. Indeed, had the parties making these disclosures not comprehended them to be interests in the cause they would not have made them. Mr Whaley enjoys "a distinguished legal and public career" and is conversant with interests that are material for disclosure.

The question of lack of interest in the matter referred or the parties is entirely factual. It is not confined to anything, pecuniary or otherwise. It refers to a basic qualification to sit in judgment as an arbitrator and has nothing to do with any possibility or likelihood of perverse conduct, which is a separate ground for removal. Voet 4.8.9. states that -

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> "...no-one is a competent arbitrator in his own case, so as to order himself to do or not to do a thing; indeed no-one can lay a command or prohibition upon himself."

Jacobs *The Law of Arbitration in South Africa* lists, among the four requirements for the valid appointment of an arbitrator at pp 59 to 60 of his work, the need for the arbitrator to be independent and impartial. So also says Russell on Arbitration 12 ed at p 110:

> "There is universal agreement amongst jurists of all countries that it is of the first importance that judicial tribunals should be honest, impartial and disinterested...As a practical matter, interest is the important case, and as interest is always a question of fact, usually determined on a sound basis of common sense, precedents are not of great assistance..."

Suffice it to say that the two cases of *Graaff-Reinet Municipality v Jensen* 1907 CPD 604 at 606-7, and *Leing Township Co (Pty) Ltd v Administrator, Transvaal & Ors* 1960 (2) SA 22 (W) at 25 G-H, illustrate the factual basis for the determination of what may fall to be regarded as interest.

As already observed, it was rightly perceived as necessary by the arbitrator to make disclosure of the interest so disclosed. It is of no consequence whether or not he maintains the perception that the interest so disclosed would not cloud his judgment or affect his impartiality. The fact remains that an interest has been disclosed. And Jacobs *op cit* states at p 72 that:

> "...any personal interest which will tend to bias an arbitrator's mind, which was unknown to either of the parties at the time when the dispute concerned was agreed to be referred, will unfit a person to act as arbitrator."

It does not matter how remote or indirect the interest may be. If it is "so connected with his duties as administrator as to render it inequitable that the parties should be held bound by the agreement to accept his decision", he is disqualified from acting as arbitrator - see *Russell on Arbitration*, at pp 143-4. All the more so would such interest disqualify a person from acting as arbitrator, if the party complaining of it, had it known of the interest before the appointment, would have declined consent thereto.

In *Rose v Johannesburg Local Road Transport Board* 1947 (4) SA 272 (W), cited with approval in *Barnard v Jockey Club of South Africa* 1984 (2) SA 35 (W) at 46B-D, the headnote reads:

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

See also *Barnard v Jockey Club of South Africa , supra*, at 47A to 48B.

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In the case of an arbitrator, the relevant section of the Act has advisedly not confined the interest in question to a "direct pecuniary interest", but, by extending it to "indirect pecuniary interest", requires that an arbitrator be and remain free of all interest. See *R v Gough* [1993] 2 All ER 724 (HL) at 730 a-g.

It seems to me what is to be gathered from the authorities is that it is not necessary that actual bias be proved. In the interest of the fair and proper administration of justice, tribunals must be careful, not only that in the exercise of their functions they are not influenced by their personal interests, but also to avoid the appearance of labouring under such an influence.

To my mind, in deciding whether a person is disqualified from the performance of his duties as an arbitrator, the test to be applied is that suggested by Jacobs *op cit* at p 71:

> "Could the applicant show a reasonable fear that the trial before the chosen arbitrator would not be impartial?"

If the applicant can establish such a degree of possibility of bias on the part of the arbitrator, that there is the appearance that justice would not be seen as manifestly and undoubtedly done, then the arbitrator should not be allowed to continue.

The fact cannot be ignored that neither the arbitrator nor his appointed assessor could have deposed to affidavits that they had no interest in the matter referred. Mr *Whaley* contended in the trial court, and in this he is

supported by Leopard Rock, that his interest, such as it is, would not cloud his legal vision in the conduct of the arbitral proceedings and in arriving at a fair and just conclusion. But that is of no consequence, and recalls to mind the oft - quoted words of LORD CAMPBELL in *Dimes v Grand Junction Canal* (1852) 3 HL Cas 759:

> "No-one can suppose that LORD COTTENHAM could be, in the remotest degree, influenced by the interest that he had in this concern: but, My Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause be held sacred. And that is not to be confined to a cause in which he is a party but applies to a cause in which he has an interest ...This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest but to avoid the appearance of labouring under such an influence."

Mr Whaley disclosed, both in himself and his nominated assessor, an interest in respect of which a right to object had not been waived in terms of the proviso to s 11 of the Act, but had rather been vigorously asserted.

In my judgment, both Mr Whaley and his assessor are disqualified in terms of the Act and were properly removed in the teeth of their refusal to stand down. It follows from the foregoing that the second of the orders made by the trial court, that the appointment of Mr O'Donovan as a technical adviser to Mr Whaley be set aside, is upheld.

It was contended by Mr *Andersen*, on behalf of Leopard Rock, that Mr Whaley had no direct interest in the subject matter or the parties to the arbitration and stood to gain no direct benefit as a result thereof. However, having regard to his directorship in John Sisk & Sons (Pvt) Ltd and

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his shareholding with two others in a private company which owned shares in Tabex Holdings Ltd, and with Tabex Holdings Ltd having invested a sizeable amount in Leopard Rock, it is not unlikely that the result of this matter may have some effect on the dividends payable by Tabex Holdings Ltd on its shares. Even if any dividend payable would be paid to the company in which the arbitrator has shares, he would, it was conceded, receive a benefit of one third of it. The value of the shareholding of the company in Tabex Holdings Ltd being only $2 400, it was submitted that the net amount of any dividend would be infinitesimal.

It was further contended that the fears harboured by Walenn Construction, on the basis that the arbitrator, being an executive director of the Sisk Group of

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companies, would not wish to find against Leopard Rock because of its involvement with Tabex Holdings Ltd and because the allegation that Tabex Holdings Ltd might not award contracts to the Sisk Group as a result of such an adverse finding against Leopard Rock in what are difficult times, are groundless and unreasonable. Support for this argument is said to derive from the fact that neither his fees nor his standing as an executive director of the Sisk Group would be even remotely affected by the result of the arbitration.

It was submitted by Mr *Andersen* that the position of the arbitrator, in the instant case, is even more removed than that of persons in other professions, occupations or undertakings, who might be called upon to act in arbitrations because of their expertise, or in disciplinary or other domestic proceedings such as the Disciplinary Committee of the Health Professions Council or the Legal Practitioners Disciplinary Tribunal.

Mr *Andersen* submitted that, save in the case of a direct pecuniary interest, the test as to when a person performing a judicial function should be disqualified to act on the grounds of interest or bias is "whether there is a real danger of bias in the sense of a real probability of bias". In support of this proposition, he referred to *Bailey v Health Professions Council of Zimbabwe* 1993 (2) ZLR 17 (S); *R v Gough supra*, at 737-8; and *Barnard v Jockey Club of South Africa , supra*, at 46-47.

Mr *Andersen* further submitted that the test applied by the learned judge in the court of first instance was the less stringent test set out in *Appel v Leo* 1947 (4) SA 766 (W). And that that test was in conflict with the test applied in *R v Gough , supra*, and in *Bailey v Health Professions Council of Zimbabwe , supra*,.

This criticism of the judgment appealed cannot be dismissed out of hand. There is indeed some difficulty in reconciling the tests applied in the above cases to the issue of bias. But, as submitted by Mr *Gillespie*, LORD GOFF, aware of semantic differences and misunderstandings that had arisen in the past concerning the issue, took pains to explain himself. At 730e-g of his judgment in *R v Gough , supra*, he said:

> "I turn next to the broader question of bias on the part of a member of the relevant tribunal. Here it is necessary to put on one side the very rare case where actual bias is shown to exist. Of course, if factual bias is proved, that is an end of the case: the person concerned must be disqualified. But it is not necessary that actual bias be proved;

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and in practice the enquiry

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is directed to the question whether t**here was such a degree of possibility of bias on the part of the tribunal that the court will not allow the decision to stand.** Such a question may arise in a wide variety of circumstances. These include, but are by no means limited to, cases in which a member of the tribunal has an interest in the outcome of the proceedings which falls short of direct pecuniary interest. Such interests may vary widely in their nature, in their effect and in their relevance to the subject matter of the proceedings; and there is no rule, as there is in the case of a pecuniary interest, that the possession of such an interest automatically disqualifies the member of the tribunal from sitting. Each case falls to be considered on its own facts" (emphasis added).

As the court always adopts the standard of the reasonable man in resolving factual issues, I understand the words: "the court will not allow the decision to stand" to imply that: "nothing is to be done which will create a suspicion **in the mind of the reasonable man** that there has been an improper interference with the course of justice".

The view the individual takes of his own ability to be impartial, or the fact that others may consider his standing in society to lend him an air of impartiality, has nothing to do with the determination of the issue of bias. As LORD WOOLF also remarked at 740a of the report in *Gough's* case *supra*:

"...except in the rare case where actual bias is alleged, the court is not concerned to investigate whether or not bias has been established. Whether it is a judge, a member of the jury, justices or their clerk who is alleged to be biased, the courts do not regard it as being desirable or useful to inquire into the individual's state of mind. It is not desirable because of the confidential nature of the judicial decision-making process. It is not useful because the courts have long recognised that bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect."

In *Appel's* case *supra*, CLAYDEN J (as he then was) too expressed himself thus at 774:

"When the problem is whether a Judge ought to sit to hear a case the enquiry relates to what is to happen and not what has happened, and in such a case the possibility of prejudice should I consider be tested by whether it could reasonably be contemplated."

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A common theme which runs through the authorities is, therefore, that the test to be applied is an objective one. One does not enquire into the mind of the person challenged to determine whether or not he was or would be actually biased. Thus the character, professionalism, experience or ability as to make it unlikely, despite the existence of circumstances suggesting a possibility of bias arising out of some conflict of interest, that he would yield to infamy, do not fall for consideration.

Again, the authorities are agreed that a mere suspicion of bias is not enough. In *Frame United Breweries Co v Bath JJ*[1926] AC 586 at 590 VISCOUNT CAVE LC said:

"My Lords, if there is one principle which forms an integral part of the English law, it is that every member of a

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> body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal. ...This being so, the justices who are members of the authority are bound to act judicially and not to sit if they are subject to that which in *R v Rand* (1866) LR 1 QB 230 was referred to by BLACKBURN J as a 'real likelihood of bias'..."

In *R* (*Donoghue*) v *County Cork JJ* [1910] 2 IR 271 at 275 LORD O'BRIEN CJ said:

> "By 'bias' I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must, in my opinion, be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that the mere vague suspicions of whimsical, capricious, and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds - was reasonably generated - but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision."

CLAYDEN J (as he then was) in the *Appel* case *supra*, at 744, after a careful perusal of relevant cases, concluded that "the test to be applied is the objective test, the possibility in fact of bias", and not actual bias.

LORD GOFF at 735j of the report in the *Gough* case *supra* puts it more succinctly thus:

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> "In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that in its original form, the real likelihood test required that any more rigorous criterion should be applied."

Both CLAYDEN J (as he then was) at 771-2 of the judgment in the *Appel* case *supra*, and LORD GOFF at 733 h-j, 735j and 737j, are *ad idem* that a probability of perverse conduct is not required to be proved. A mere possibility being sufficient. I quote specifically from 737j of the *Gough* case *supra*, where the learned LAW LORD stated as follows:

> "Finally for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, there was a real danger 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 ..."

I am of the view, submitted by Mr *Gillespie*, that a careful examination of the reasoning of the judgments shows that the only divergence in approach is whether, in determining the possibility of bias, one does so from the point of view of the court seized of the challenge or in the eyes of the reasonable litigant. See *Appel , supra*, at 774 and 776, and LORD GOFF'S observations at 735 f-h regarding the different approaches adopted by LORDS DEVLIN LJ and DENNING MR, where it was said:

> "...both considered that it was not necessary that actual bias should be proved, the court having therefore to proceed upon an impression derived from the circumstances, and that the question is whether such an impression reveals a likelihood of bias. The only difference between them seems to have been that, whereas DEVLIN LJ spoke of the impression which the court gets from the circumstances, LORD DENNING MR looked at the circumstances from the point of view of a reasonable man, stating that there must be circumstances from which a

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reasonable man would think it likely or probable that the justice, or chairman, was biased."

This difference, however, as LORD GOFF himself points out immediately after, should not be productive of incongruity:

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"Since, however, the court investigates the actual circumstances, knowledge of such circumstances as are found by the court must be imputed to the reasonable man; and in the result it is difficult to see what difference there is between the impression derived by a reasonable man to whom such knowledge has been imputed and the impression derived by the court, here personifying the reasonable man."

The circumstances from which the court is invited to draw the conclusion that there is a real danger of bias are as follows. The arbitrator is a member of an investment company which holds 8 000 shares in Tabex Holdings Ltd He is also the director of an investment company, owned by a trust in favour of the children of his widowed sister-in-law, which owns an undisclosed number of shares in Tabex Holdings Ltd The assessor is also a member of an investment company which holds 160 000 shares in Tabex Holdings Ltd He also holds personally 200 000 shares in Tabex Holdings Ltd.

Tabex Holdings Ltd is alleged to be closely connected with Leopard Rock thus: Mr A C B Taberer is the chairman respectively of Blair Holdings (Pvt) Ltd, Tabex Holdings Ltd and of Leopard Rock. Blair Holdings (Pvt) Ltd holds 60% of the shares in Tabex Holdings Limited and 92,75% of the shares in Leopard Rock. Mr A J Traicos is the managing director of Leopard Rock and a director of Tabex Holdings Ltd Blair Holdings (Pvt) Ltd has guaranteed payment of Walenn Construction's fees in respect of the contract the subject of arbitral proceedings and thus its award in the arbitration.

There were also attempts to have Tabex Holdings Ltd acquire from Blair Holdings (Pvt) Ltd the shares in Leopard Rock which the latter holds, but this was resisted by a minority of shareholders in Tabex Holdings Ltd on the ground of uncertainty as to the profitability or otherwise of Leopard Rock, which must include its liability to Walenn Construction. This move has not been proceeded with.

Given this scenario, Mr *Gillespie* submitted that it is reasonably possible that a shareholder in Tabex Holdings Ltd, being in a position to influence the possible indebtedness and viability of Leopard Rock and to enhance its attractiveness to Tabex Holdings Ltd (if he supports the majority shareholders) or to minimise its potential risk (if he shares the concerns of the minority shareholders) might, given the insidious nature of partiality, act unfairly towards or view unfavourably the claim by Walenn Construction.

Applying the test that is good on the authority of both *Appel supra* and *Gough*

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supra, I am of the view that, although I am personally not apprehensive of any possibility of an

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unfair adjudication by a person of Mr Whaley's calibre, there exist circumstances which may engender a belief in the mind of a reasonable litigant that in the arbitral proceedings he would be at a disadvantage.

Such belief in the mind of a reasonable litigant is bound to be heightened by the fact that not only has the arbitrator refused to recuse himself, but he has descended into the arena of battle by actively participating in the proceedings for his removal and making common cause with the party maintaining that he should not recuse himself.

In *Port Sudan v Chettiar* [1977] 1 Lloyds Rep 166 at 178, DONALDSON J expressed the view that:

> "The modern practice (in England) is for a notice of motion alleging misconduct, whether technical or actual, to be served upon the arbitrator or anyone concerned. He then has a choice whether to (a) take a full part in the proceedings as an active party; or (b) to file an affidavit setting out any facts which he considers may be of assistance to the court; or (c) to take no action, in which case it will be assumed that he has no wish to do more than accept the decision of the court. This practice is based upon the consideration of natural justice that no-one should have his conduct criticised without being given an opportunity for replying or explaining."

I think it of some import to observe that it has always been the practice in this jurisdiction to have the notice of motion in all matters, where the removal of any adjudicator is sought, or his conduct is being impugned, served on such adjudicator. It is the first option which, in the passage cited above from the judgment of DONALDSON J, is said to be open to an arbitrator or umpire that causes me some concern.

I do appreciate that, in the *Port Sudan* case *supra* DONALDSON J was dealing with a matter in which the umpire had already pronounced his award and the application was to have that award set aside on the ground of misconduct. In the instant case, the application was to have the arbitrator removed before the real commencement of the arbitral proceedings, on the grounds of (a) a real likelihood of bias, and (b) misconduct at the pre-trial conference.

While it may be contended that an arbitrator or umpire who has made an award is *functus officio* and can no longer exhibit bias and so may take full part as a party in proceedings to set his award aside for misconduct (Mr

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Andersen did not so contend and I certainly do not subscribe to that view), the same cannot be said of an arbitrator whose removal as such is sought during the pendency of the proceedings, for whatever reason. This is because if the application to remove him fails, having thrown his weight on one side in the proceedings for his removal, he can hardly be considered as being disinterested in the matter or the parties before him - a prerequisite for his appointment, and continuance, as an arbitrator in the matter submitted to him.

In my view, in circumstances such as these, an arbitrator, umpire, judge or other adjudicating body has one of two choices.

The first is that he could file an affidavit setting out facts which he considers may be of

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assistance to the court. So long as such facts are stated colourlessly, no-one could object, but if the affidavit should err plainly in support of one of the parties it might expose the adjudicator to the odium of the court.

It is most undesirable that any arbiter or other adjudicator of a dispute should appear to be pitching camp with, or rendering assistance to, one of the contestants to the dispute before him. For the other party is likely to gain the impression that the arbiter and his adversary are conspiring against him. And such an impression would reinforce his belief that the arbiter is biased against him. See the remarks of McNALLY JA in *Blue Ribbon Foods Ltd v Dube NO & Anor* 1993 (2) ZLR 146 (S) at 148. When the arbiter makes common cause with one of the parties in such proceedings, any facade of justice is shattered; the arbiter is seen to have descended into the arena with the possible consequential blurring of his vision by the dust of battle. Unconsciously, he deprives himself of the advantage of calm and dispassionate observation.

The second choice of the arbitrator or umpire when served with notice of motion for his removal, or to set aside his award, is to take no action and abide by the court's decision.

The learned trial judge was undoubtedly right when he said:

> "Mr Whaley certainly has tried his best in the circumstances to clear his character which he considered had been attacked by the applicant because of his involvement in Tabex Holdings Ltd and John Sisk & Sons (Pvt) Ltd As stated in the authorities which I have already cited, it is not what the arbitrator believes to be the position. It is not his *bona fides* that matter in an application of this nature. It is what an ordinary reasonable litigant might feel."

KORSAH JA

I have no doubt that Mr Whaley is an honourable man, but so was LORD COTTENHAM with regard to the *Dimes v Grand Junction Canal* case *supra*.

In arriving at the decision that the arbitrator be removed and the appointment of his adviser set aside, the learned trial judge drew attention to the highly relevant fact that both the adviser and the company of which the arbitrator is a director have threatened to institute legal proceedings against Walenn Construction for damages for defamation, said to arise out of statements contained in the founding affidavit filed on behalf of Walenn Construction. He gave expression to the anxiety that Walenn Construction might entertain in the circumstances thus:

> "The applicant might be inhibited in presenting its case to arbitration proceedings in which Mr O'Donovan in particular would be taking part. Again it is highly unlikely that the arbitration proceedings would be conducted in a free atmosphere when certain statements uttered on both sides are taken into account. No amount of goodwill can suffice to change the animosity amongst the parties concerned that can clearly be found in the papers before me. One cannot pretend that the parties can generously forget and forgive. In my view the justice of the matter can only be met by the removal of the arbitrator and consequently the consultant."

Now, clause 7 of the deed of submission was not part of the submission as originally agreed by the parties. It was inserted at the insistence of the arbitrator as a pre-condition for his acceptance of appointment. It is possible that a new arbitrator, agreed upon by the parties, or appointed by the court, may find the clause wholly unnecessary or vague. As Mr *Gillespie*

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quaintly puts it:

> "...as a creature of the arbitrator's and relevant solely to his acceptance of office, it should become *pro non scripto* when that gentleman leaves office. It may indeed become otiose depending upon the identity of any replacement appointed, who might in any event himself wish to request quite a different approach to be taken."

Clause 7, quoted *supra*, does not oblige the arbitrator to appoint an assessor- it invests him with authority to engage the assistance of technical and/or legally qualified persons, should he so require. The parties were already at variance as to the jurisdiction conferred by this clause upon the arbitrator. The arbitrator decided the issue in his own favour and exercised his

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jurisdiction to appoint Mr O'Donovan as a full time assessor. It seems to be well-settled law that an arbitrator cannot confer jurisdiction upon himself by deciding in his own favour some preliminary point upon which his jurisdiction rests: *Smith v Martin* [1925] 1 KB 745 at 749. In any event, since the interpretation of clause 7 has been the genesis of such grave controversy, its retention, in the absence of Mr Whaley, is not likely to eliminate the dispute that it has engendered. The dispute being whether or not, having regard to clause 7, the agreement submitted to the arbitrator was not the agreement of the parties.

The question of the arbitrator's jurisdiction as to how to utilise technical or legal assistance ultimately depends on the wording of clause 7. As a rule the court will not make a contract for the parties. As a rule the arbitrator cannot clothe himself with jurisdiction. Should clause 7 stand as it is, it will be productive of much controversy because of its imprecision, and delay the final determination of this matter. No doubt the parties can agree to some formula, other than clause 7, which will give effect to their intentions. It seems to me that, having regard to the vagueness of clause 7, it would be improvident to permit its retention as part of the deed of submission, especially as it was the brain-child of the arbitrator, foisted on the parties without adequate explanation as to the extent of its use. Indeed, it was the manner in which the power it bestowed was exercised in the appointment of a technical adviser, who also had an interest, direct or indirect, in Leopard Rock, that aggravated the suspicion which Walenn Construction entertained. I can only surmise that the parties were not *ad idem* as to the purport of the clause. It does not represent their common intention and must, therefore, be stricken from the deed of submission.

Regarding the allegations of legal misconduct, the first task of the court is to construe the arbitration agreement. The presumption is that, in confiding their disputes, not to the courts of law, but to an arbitral tribunal of their own choice, the parties intended to confer on that tribunal a discretion as to the procedure it should adopt to arrive at a just decision; and the court will not lightly assume a limitation on that discretion unless the mode of exercising it tends, or appears to tend, to an unjust result: *Russell on Arbitration* at p 408. While failure to comply fully with the terms of the deed of submission amounts to misconduct, not every irregularity of procedure amounts to misconduct: *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 175; *Benjamin v Sobae South African Building & Construction* 1989 (4) SA 940 (C) at 970. I have already observed that clause 7 of the deed of submission has provoked unwarranted

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controversy. It was in exercise of his powers

KORSAH JA

under this clause to appoint an assessor that the arbitrator is said to have misconducted himself by appointing a person known to him to have an interest in the subject matter of the submission.

It seems to me that since any party may **expressly** waive any right to object to any arbitrator or umpire on the ground of interest or the like, a party may similarly object to an assessor appointed by an arbitrator. Thus, the appointment of an assessor who has an interest in the subject matter of the submission does not *per se* constitute misconduct; for the parties may expressly waive their right to object to his appointment. But, whatever the meaning of clause 7 of the deed of submission, it does not give the arbitrator the power to appoint a person, to whom a party objects, to the position of assessor.

It is true that the arbitrator has in general a discretion as to the manner in which the reference is to be conducted, but, like any other tribunal, the arbitrator's discretion must be exercised judicially. Thus LORD GODDARD CJ said in *Mediterranean & Eastern Export Co Ltd v Fortress Fabrics (Manchester) Ltd* [1948] 2 All ER 186 (KB) at 189A:

> "If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the courts should be slow indeed to set aside his award."

It seems to me that the rules of natural justice dictate that if the arbitrator is to appoint a technical adviser to sit with him right through the proceedings, so that such an adviser virtually occupies the position of an assessor, then it is only fair that the parties be given an opportunity to object or assent to his appointment. To persist in the appointment of Mr O'Donovan as a technical adviser in the teeth of opposition from one of the parties, in my view, offends the rules of natural justice and constitutes legal misconduct. It follows from the above that all matters in which Mr O'Donovan participated in relation to the arbitral proceedings are tainted with legal misconduct. Accordingly, the cross-appeal is allowed with costs.

On the question of costs, s 32 of the Act provides that -

> "Any order made under this Act may be made on such terms as to costs or otherwise as the authority making the order thinks just."

In the absence of any exception, I take the above statutory mandate to include costs against an arbitrator or umpire as the court considers just.

KORSAH JA

The general principle is that a successful litigant is entitled to his costs against those who unsuccessfully opposed him. In the trial court both the arbitrator and Leopard Rock failed in their opposition to the application by Walenn Construction, and were rightly mulcted in costs.

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Had the arbitrator taken a back seat and left the fight to the two protagonists, no order as to costs may properly have been made against him. Having joined in the battle, he cannot pray to be spared "the slings and arrows of outrageous fortune". In the event, I make the following orders:

1. The respondent's application to lead fresh evidence on appeal is dismissed with costs.
2. The cross-appeal is allowed with costs.
3. The judgment and orders of the learned judge are confirmed, save paragraph (e) which is altered to read:

"The costs of this application, inclusive of the costs of the applicant's supplementary replying affidavit and allegations of misconduct of proceedings, shall be borne by the first and second respondents jointly and severally."

4. The appeal is dismissed with costs. Such costs are to be paid by the first appellant alone.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

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

Coghlan, Welsh & Guest, second appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

SIBINDI v AGRICULTURAL AND RURAL DEVELOPMENT AUTHORITY 1994 (1) ZLR 284 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

1 & 14 March 1994

Flynote

Practice and procedure - dismissal of action - court's right to order - defendant in default and had not made application for dismissal

Headnote

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It is well established that a superior court has an inherent jurisdiction to dismiss an action. Invariably, though, the exercise of this power has followed on the making of an application by the defendant. There is no precedent for the exercise of the power by the court *mero motu* and in favour of a defendant who is in default. The Rules of the High Court do not provide for the dismissal of an action solely at the instance of the court. If the power does exist at all, it is one which should be very sparingly used and only in very exceptional cases.

Cases cited:

Meyer v Meyer 1948 (1) SA 484 (T)

Broughton v Manicaland Air Svcs (Pvt) Ltd 1972 (1) ZLR 350 (G)

Schoeman en Andere v van Tonder 1979 (1) SA 301 (O)

Kuiper & Ors v Benson 1984 (1) SA 474 (W)

Bulford v Bob White's Svc Station (Pvt) Ltd 1972 (2) RLR 224 (A)

Western Assurance Co v Caldwell's Trustee 1918 AD 262

Ravden v Beeten 1935 CPD 269

L F Boshoff Invtms (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C)

Cohen v Sherman & Co 1941 TPD 134

Mahomed v Nagdee 1952 (1) SA 410 (A)

GUBBAY CJ

Appellant in person

G T Mutendadzamera for the respondent

Judgment

Gubbay CJ: On 29 June 1988 Justmart (Pvt) Ltd, to which I shall refer as "Justmart", issued summons out of the High Court against the respondent, in which was claimed payment of the sum of $22 500 in respect of goods sold and delivered, together with interest thereon at the rate of ten *per centum per annum* from 31 December 1987, and costs of suit. Appearance to defend was entered on 12 July 1988. After a request for further particulars to the summons had been answered, the respondent filed a plea on 15 November 1988, in which it raised two defences to the claim. First, the sale of the goods (which comprised two photographic copiers with accessories) was subject to the condition precedent that the approval of the Government Tender Board was obtained, which approval had been denied. Second, and in the alternative, pursuant to clause 11 of the conditions of purchase attached to the signed purchase order, it had unilaterally cancelled the sale as it was entitled to do. No replication was filed by Justmart.

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The action was set down for trial for 8 July 1991. On that day the appellant appeared, as the legal practitioners for Justmart had renounced agency a few months before. The respondent was represented by counsel. Apparently at the inception of the hearing the appellant indicated to GIBSON J, who presided, that Justmart had been incorporated as a limited liability company after the agreement of sale had been entered into on 21 December 1987. In consequence Her Ladyship ordered that:

1. The application by the plaintiff to amend the pleadings in order to strike out the plaintiff's claim on the basis that the plaintiff was not a party to the agreement, as the agreement was between Mr Sibindi, trading as Justmart, be and is hereby granted.

2. The application to amend the pleadings to establish that he was acting as a representative of a company about to be incorporated be and is hereby granted.

3. The notice of amendment be filed within fourteen days and the defendant file its notice to amend its plea within seven days of the receipt of the plaintiff's application.

4. The matter be and is hereby postponed *sine die*.

5. Costs be costs in the cause.

GUBBAY CJ

Although para 1 of the order is to the effect that an amendment to the pleadings is required so as to reflect "Mr Sibindi trading as Justmart" as the party suing, that is, the appellant in his personal capacity, para 2 records that what is granted is an amendment to the pleadings to enable the allegation to be made that Mr Sibindi "was acting as a representative of a company about to be incorporated", that is, as a trustee.

Notwithstanding the ambiguity, the notice of amendment filed in compliance with the order on 17 July 1991 (in place of that filed six days before) was worded as follows:

> "...the plaintiff hereby amends its claim by the deletion in the pleadings, wherever it occurs, of 'JUSTMART (PRIVATE) LIMITED', and by the substitution thereof with 'MARTIN SIBINDI in his capacity as Trustee or representative for a company in the course of incorporation to be called 'JUSTMART (PRIVATE) LIMITED'."

The respondent duly gave notice that **at the hearing of the matter** it intended to apply to amend its plea by the addition thereto of what was a further defence. This was to the effect that it was impermissible for Martin Sibindi to sue it in his capacity as a trustee of a company not yet formed, incorporated or registered, since the requirements of s 32 of the Companies Act [*Chapter 190*] had not been met.

The trial was set down for hearing on the continuous roll commencing on Monday, 8 March 1993. On that morning the respondent was in default of appearance, its legal practitioner having also renounced agency. The appellant moved for default judgment. It seems that the learned judge raised with him that, in the absence of a declaration, the summons ought to have been

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endorsed with the wording: "Issued in terms of Order 3 Rule 13", even though it had been pleaded to without objection by the respondent.

The matter having been adjourned to the following morning, the respondent was again found to be in default. The appellant renewed his application for judgment. Being in doubt as to whether he ought to grant it, the learned judge reserved his decision.

In a judgment handed down on 2 June 1993, the learned judge ordered that the action be dismissed with no order as to costs. His reason for adopting such a drastic course was that he considered the pleadings an "absolute shambles", being too vague and embarrassing on the issue of the identity of the party who had entered into the sale with the respondent.

GUBBAY CJ

It appears to me that the learned judge's criticism that the appellant was confused as to the capacity in which he should sue the respondent was founded, to some extent at least, upon the allegation of the appellant's non-compliance with s 32 of the Companies Act, contained in the respondent's notice of amendment to the plea. No regard, however, should have been paid to the content of that notice. Until such time as the amendment had been moved and allowed, which had not occurred, it was not properly before the court as part of the pleadings. Furthermore, in the absence of a replication by the appellant the allegation was deemed to be denied.

Be this as it may, before this court the appellant maintained that, in spite of the wording of the notice of amendment of 17 July 1991, his intention was to sue in his personal capacity and not as a trustee or representative of Justmart. This he claimed to have conveyed to the learned judge. Whether he did or not, it is now obvious that he is desirous of suing in his personal capacity.

In the circumstances, it seems to me that, as on the amended pleadings he was suing in a capacity as trustee, it is just as well that the learned judge, exercising his discretion under rule 59A(1) of the High Court Rules, refused to grant a default judgment. For, had he not done so, the judgment would have been in favour of a party who, on the present information, was not entitled to be granted it.

It necessarily follows that the appellant's contention that the learned judge ought not to have withheld judgment by default cannot prevail.

I am satisfied, however, that the learned judge erred in dismissing the action. Indeed, Mr *Mutendadzamera*, who appeared for the respondent, very fairly conceded that he was unable to support that aspect of the judgment.

The respondent was in default of appearance at the trial. It had not sought the dismissal of the action brought against it. There was, therefore, no application before the learned judge for the grant of such an order.

It is well established that a superior court has an inherent jurisdiction to dismiss an action. See

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Meyer v Meyer 1948 (1) SA 484 (T) at 487; *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 (1) RLR 350 (G) at 352 B-C, 1972 (4) SA 458 (R) at 460 A-B; *Schoeman en Andere v van Tonder* 1979 (1) SA 301 (O) at 304 G-H; *Kuiper & Ors v Benson* 1984 (1) SA 474 (W) at 476H-477B. But I am unaware of any decision in which that power has been

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exercised by the court *mero motu* and in favour of a defendant who is in default. Invariably its exercise has followed upon the making of an application and, I believe, correctly so.

An examination of the Rules of the High Court appears to me to support the view I take. They reveal that an action may be dismissed on application by the defendant where the plaintiff has been barred from declaring or making a claim (rule 61); or on the ground that the action is frivolous or vexatious (rule 75); or for non-compliance with an order compelling production of a document (rules 168 and 169(4)) or requiring answers to an interrogatory (rule 196). No provision is made for dismissal of an action solely at the instance of the court or judge.

If I am wrong in holding that the inherent jurisdiction is exercisable only when sought by a litigant, I would express my disagreement that the pleadings were in such poor shape that "the best course to follow is to dismiss the action and give leave to the plaintiff to start afresh if he so wishes". The grant of such leave was, of course, unnecessary, since dismissal is tantamount to absolution from the instance. See *Bulford v Bob White's Service Station (Pvt) Ltd* 1972 (2) RLR 224 (A) at 232H; 1973 (1) SA 188 (RA) at 193G-H.

Both the nature of the claim and the defences set up were clearly defined. The only issue that was ambiguous was the capacity of the appellant in entering into the agreement of sale. Once Justmart fell out of the picture, the appellant could only sue as a trustee or personally. He has now resolved to sue in his personal capacity, and a further amendment in substitution for that of 17 July 1991 will suffice to put the action upon a proper footing and allow the substantive factual disputes to be determined.

Especially as the appellant was and remains a self-actor, leniency should have been accorded him. In my opinion, the power of the court to dismiss an action at its own behest, on the ground of poor pleadings or any other, if at all available, is one which ought to be sparingly used and only in very exceptional cases. Compare, *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 273 in fine; *Ravden v Beeten* 1935 CPD 269 at 277; L F *Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 275 B-C.

It remains to deal with the question of costs.

The appellant has achieved partial success. In such a situation, an appropriate

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costs order may range from awarding all the costs of the appeal to the appellant (see *Cohen v*

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Sherman & Co 1941 TPD 134 at 139-140) to depriving him entirely of his costs (see *Mahomed v Nagdee* 1952 (1) SA 410 (A) at 420F-421A). Between the two extremes there are a variety of possible forms of order.

The factors which are apposite in the exercise of this court's discretion are: (i) the measure of the appellant's overall success; and (ii) the extent to which the appellant has unsuccessfully added to the costs on a time basis.

Of the two issues that fell for determination by this court, the appellant has failed on the first yet succeeded on the second. They hardly differed in importance or complexity, and I would say that argument thereon occupied an equal amount of the court's time.

Taking these factors into account, it would, in my view, be fair and just to the parties if no order for costs were made, both in respect of the appeal and the proceedings below.

In the result:

1. The appeal is allowed with no order as to costs.

2. The order of the court *a quo* dismissing the action is set aside and is amended to read:

"The application for default judgment is dismissed with no order as to costs."

Korsah JA: I agree.

Ebrahim JA: I agree.

Sawyer & Mkushi, respondent's legal practitioners

S v NDLOVU 1994 (1) ZLR 290 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

Korsah JA, Ebrahim JA & Muchechetere JA

14 February & 21 March 1994

Flynote

Criminal procedure (sentence) - suspended sentence - conditions of suspension - community service - when should be made condition of suspension

Headnote

Community service orders are especially appropriate for offenders aged 16 years or over who have been convicted of an offence punishable with a short term of imprisonment, but not where a fine is an appropriate punishment. Such an order is considered a fine on leisure time and is

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particularly appropriate for persons who exhibit anti-social behaviour. It gives the opportunity for constructive activity as well as a possible change of outlook on the part of the offender. The essentials of an order for community service, all of which must co-exist to render it meaningful, are to punish the culprit, make him pay reparation by way of his service to the community and to reintegrate him into society.

A community service order has the advantage of relieving the over-crowdedness in the prisons in Zimbabwe, avoiding the destructive effect of a short term of imprisonment, avoiding a burden on the taxpayer and allowing the culprit to continue in his employment.

Cases cited:

S v Kearns 1992 (2) ZLR 116 (S)

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

S S Mlaudzi for the appellant

Mrs J Zindi for the respondent

Judgment

Korsah JA: The appellant was, on 27 September 1993, in the court of the

KORSAH JA

Provincial Magistrate at Beitbridge, convicted of two contraventions of s 39(b) of the Firearms Act [*Chapter 308*] as amended by Act 37 of 1981 and on a count charging him of common assault. On the contraventions of the Firearms Act, he was sentenced to five months' imprisonment with labour, three months of which were suspended on conditions, and a fine of $80 or, in default thereof, six days' imprisonment with labour, was imposed for the charge of common assault. He appealed against both conviction and sentence.

On 7 January 1993, acting upon a report received, the appellant went to his home in the Chapfuche area of Beitbridge. Suspecting that his neighbours, the complainants, had stolen his herd of thirty-seven goats, he armed himself with a loaded 12-bore shotgun and proceeded, accompanied by his father and Kenias Sithole, to the homestead of Samson Manda Ndou (Samson).

Upon his arrival at the homestead of Samson at about midnight, he banged on the door and ordered Samson to come out of the hut. Samson was awakened by his wife and came out to inquire of the appellant the reason for his behaviour. Before Samson could utter a word the appellant branded him a thief, pointed the gun at Samson and threatened to shoot him unless Samson apprised him of the whereabouts of his goats. When Samson informed the appellant that he had not seen his goats the appellant then ordered Samson to lead him and his party to the homestead of Tsitsi Tsumela. Samson, afraid that the appellant would carry out his threat to shoot him, complied with the appellant's order. There could not have been a more compelling reason for Samson to leave the comfort of his bed and the charms of his wife to lead the

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appellant and his party to Tsitsi's homestead after midnight.

When the appellant's party arrived at Tsitsi's homestead, Tsitsi's dogs started barking. The appellant ordered Samson to walk ahead of them to face the aggressive dogs while he walked behind Samson with his gun. The barking of the dogs aroused Tsitsi, who was asleep outside her hut, from her slumber. The barking of the dogs awakened also Tsitsi's uncle, Wurayayi, and her children: Gladys, Vonai, Shorai and Rhoda, who were all sleeping outside their huts in the same homestead. The appellant ordered Samson to speak, but Samson remained silent and sat down. He then ordered Samson to lie down. When Samson refused to lie down he struck him on the back with a switch.

Tsitsi sat up, saw the appellant come to lean on part of her enclosure and address her saying: "Shakes' mother, I want my goats". When Tsitsi asked him whether his goats had strayed, the appellant responded that he wanted his

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KORSAH JA

37 goats. Tsitsi told the appellant to conduct a search of her goat pen to find out whether any of his goats were there. For reasons that I cannot fathom, this evoked the anger of the appellant who informed Tsitsi that he had not journeyed to her homestead for a chit-chat and, pointing his gun at Tsitsi's chest, threatened to shoot her there and then. This pointing of the gun at Tsitsi was witnessed and attested to by Samson, Wurayayi, Gladys and Tsitsi herself. Indeed, so threatening was the appellant's behaviour that his father who had accompanied him in the search for his beasts intervened and struggled with the appellant to dispossess him of the firearm. Tsitsi's natural reaction to the threat was to take refuge in flight. But her uncle called her back and told her it was better to de on one's own soil.

The appellant does not deny the visits to the homesteads of the complainants in the dead of night, though he fixes the time of his visit before midnight. He does not deny the purpose of his visits or that he was armed with the shotgun produced in court as an exhibit. He does not deny that at Tsitsi's homestead his father took the gun away from him. What he denies is the pointing of the gun at the complainants.

The learned trial magistrate, after a careful consideration of the testimonies of all the parties and with due regard to their demeanour as witnesses, believed the complainants and rightly rejected the testimony of the appellant.

Why would anyone carry a gun in the middle of the night to the homes of persons whom he believes have stolen his beasts, except to threaten them with it? Why would Samson leave the comfort of his homestead at night, enter Tsitsi's compound despite confrontation by aggressive dogs, unless there was a greater threat to his life? Why, indeed, would Tsitsi attempt to flee from her own homestead in the middle of the night if the appellant had not pointed a gun at her and threatened to shoot her? Had the appellant not pointed the gun at Tsitsi why would his father struggle with him and dispossess him of the firearm? This was not some pantomime being staged by the appellant and his father for the entertainment of Tsitsi's family. Samson and Tsitsi were certainly unwilling members of the cast and had not consented to the appellant

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pointing his gun at them.

The provisions of s 39(b) of the Act, as MANYARARA JA observed in *S v Kearns* 1992 (2) ZLR 116 (S) at 121F "prohibit the improper use of firearms, one of which is the unlawful pointing of a firearm at any other person". The evidence against the appellant is overwhelming that he pointed his firearm at the two complainants and did assault Samson with a switch.

KORSAH JA

As regards sentence both the appellant and the State fall back on the sentiments expressed by GEORGES JA (as he then was), and echoed by MANYARARA JA in the *Kearns* case *supra*, in *S v de Lange* 1983 (2) ZLR 9 (S). It is all a matter of moral blameworthiness. As MANYARARA JA pointed out in the *Kearns* case *supra*,:

> "A gun may be pointed in circumstances in which it is evident that no harm is meant. In this case there was an intention to intimidate. That type of aggressive conduct is properly punished by a short sharp period of imprisonment."

As already stated, in the instant case, the appellant's gun was loaded. He pointed it, not at one, but two, persons, and threatened to shoot them. This he did in the middle of the night. There is no doubt that his moral blameworthiness is high.

At first blush, I was inclined to follow precedent and to dismiss the appeal against sentence as the custodial punishment imposed was not out of the ordinary. But it seems to me that this would be taking an easy course out of the problem.

That the offence is serious and normally merits a custodial sentence cannot be gainsaid. I am, however, motivated by the complaints about the prisons virtually bursting at the seams to give serious consideration to the appropriateness of the imposition of a very short custodial term for an offence which may never be repeated if the culprit is put to community service and a suspended term of imprisonment is imposed as a deterrent.

Theft of stock and rustling have become rampant. The appellant was, no doubt, incensed by the loss of his goats. But taking the law into his own hands and threatening people with a gun was not the solution to his problem. Such conduct must be severely deprecated. Were it not for the need to reduce the over-crowdedness in the prisons and the fact that a short term of imprisonment could be so destructive I would not have departed from the sentences imposed in *de Lange supra*, and *Kearns supra*, in spite of the mitigatory factors which I am about to recite.

The appellant is a first offender aged 43 years. He is married and has six children by his wife. He is employed as a salesman at a salary of $1 000 a month. There is every possibility that he will lose his job if he is incarcerated for the effective term of two months. On the other hand, if the appellant is

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ordered to do community service he would not be a burden on the taxpayer, he would not lose his job and his wife and children would not be deprived of a breadwinner.

It has been said that community service orders are especially appropriate for offenders aged 16 years or over, convicted of an offence punishable with a short term of imprisonment, but not where a fine is an appropriate punishment. Community service is considered as a fine on leisure time and is particularly appropriate for persons who exhibit anti-social behaviour. It gives the opportunity for constructive activity as well as a possible change of outlook on the part of the offender. The essentials of an order for community service, all of which must co-exist to render it meaningful, are to punish the culprit, to make him pay reparation by way of his service to the community and to reintegrate him into society.

It seems to me the anti-social behaviour of the appellant, having regard to his antecedents, suggests that the ends of justice might best be served by making an order for community service.

The appeal against sentence is allowed.

The sentence imposed is altered to read:

"Five months' imprisonment with labour of which:

(a) three months' imprisonment with labour is suspended for five years on condition the accused is not convicted of any offence involving the use of firearms in contravention of the Firearms Act committed within that period for which he is sentenced to imprisonment without the option of a fine.

(b) a further period of two months' imprisonment with labour is suspended on condition the accused completes sixty hours of community service at the Beitbridge Hospital on the following terms:

(i) the community service starts on 10 April 1994 (ie the first weekend fourteen days after the date of this order) and must be completed within six weeks of that date;

(ii) the community service must be performed between the hours of 8 am and 1 pm each Saturday and Sunday under the supervision, and to the satisfaction, of the Administrator of the said Hospital or his representative, who may, for good cause grant the accused leave to be absent on a particular day or days or during certain

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hours. Any such leave of absence shall not count as part of the community service to be completed."

Ebrahim JA: I agree

Muchechetere JA: I agree

Mlaudzi, Samp & Partners, appellant's legal practitioners

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S v MUSHONGA 1994 (1) ZLR 296 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

1 & 21 March 1994

Criminal appeal

Flynote

Criminal law - contempt of court - disobeying order of court - whether disobedience can constitute contempt if order invalid - intention - circumstances in which failure by legal practitioner to appear in court will amount to contempt of court

Legal practitioner - contempt of court - when matter should be referred to Council of Law Society for disciplinary action and when it should be dealt with as criminal contempt

Headnote

The appellant, a legal practitioner, had been ordered by a judge to appear as *pro Deo* counsel in a criminal matter. He notified the registry in advance that his professional assistant would appear in this case and not himself. He had asked that the judge be made aware of this and any comments on this matter be transmitted to him. The appellant received no communication from the registry indicating that the substitution of the professional assistant was unacceptable. In the subsequent documents received from the registry the name of the professional assistant was entered as the *pro Deo* counsel in this case. When the trial of this case commenced, the judge refused to commence the trial until the appellant was present. He postponed the case until the next day and informed the professional assistant that the appellant had to be present when the case resumed. The appellant was absent the next day. The judge then issued a warrant for his arrest. The appellant was brought before the court. After being allowed to explain his disobedience to the court order, he was found guilty of contempt of court.

On appeal, the conviction and sentence were set aside.

Held, that in a *pro Deo* case a legal practitioner can only be requested to represent an accused and cannot be compelled to do so. Therefore the order by the judge obliging the appellant to appear in this case was invalid.

Held, further, that disobedience to an invalid order can still constitute contempt of court. In order to ensure the proper administration of justice, a person must normally obey a supposedly invalid order and thereafter seek redress by way of appeal or review. However, in exceptional circumstances a person can disobey an invalid order without committing contempt of court. This would be so where, for example, blind compliance with an obviously invalid order would itself tend to weaken respect for the administration of justice.

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Held, further, that the crime of contempt is only committed if the accused had actual or legal intention to bring the administration of justice into contempt. Intention is absent if the seemingly insulting behaviour is the result of forgetfulness, ignorance or inadvertence. It may also be absent where the accused disobeys an order under a genuine belief that the order is invalid. (In the present case, however, the appellant had been under the impression that the order had been validly made.)

Held, further, that non-appearance of a lawyer in a case may go beyond mere discourtesy and amount to a criminal contempt of court, provided that there was intention to interfere with the process of the court and the administration of justice.

Held, on the facts of the present case, the appellant had genuinely believed that the presence in his stead of his professional assistant would be acceptable and had thus had no intention to violate the dignity or authority of the court.

Held, further, that in most cases of alleged contempts by legal practitioners the matter should simply be referred to the Law Society for investigation and possible disciplinary action. Only in an exceptional case, such as where the legal practitioner has used scurrilous language *in facie curiae*, should the court invoke its criminal jurisdiction to deal with the matter.

Held, further, that in a case of criminal contempt the court did not have jurisdiction to order the offender to provide security for wasted costs.

Cases cited:

S v Mkize 1962 (2) SA 457 (N)

S v Ngcemu 1964 (3) SA 665 (N)

R v Masitshane 1946 (2) PH H185 (E)

R v Arnold 1953 (1) PH L3

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R v Pitje 1960 (4) SA 709 (A)

S v Zungo 1966 (1) SA 268 (N)

In re *Honeyborne* (1876) Buch Vol 6 145

R v Vass 1945 GWLD 34

R v Tobias 1966 (1) SA 656 (N)

Culverwell v Beira 1992 (4) SA 656 (W)

Makapan v Khope 1923 AD 551

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

S v Gibson NO & Ors 1979 (4) SA 115 (D)

S v Benatar 1984 (1) ZLR 296 (S)

S v Harber & Anor 1988 (3) SA 396 (A)

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

R v Izuora [1953] 1 All ER 827 (PC)

Weston v Court Administration of the Central Criminal Court [1976] 2 All ER 875 (CA)

R v Hill (1977) 73 DLR (3d) 621

R v Magerman & Ors 1960 (1) SA 184 (O)

R v Butelezi 1960 (1) SA 284 (N)

Bull v A-G & Anor 1987 (1) ZLR 36 (S)

H Simpson for the appellant

Mrs *J Zindi* for the respondent

Headnote

Gubbay CJ: In late November 1992, the Assistant Registrar of the High Court, at Bulawayo, certified that two accused persons, Alexander Mukundwa and Obert Chiweshe, who were due to be jointly indicted on three counts of theft of motor vehicles, should have legal assistance in the preparation and conduct of their respective defences. Two local legal practitioners were assigned to them for that purpose. The trial before the High Court at Bulawayo was set down to commence on 11 January 1993.

Mukundwa, a resident of Gweru, was incarcerated in a remand prison in Bulawayo. He was a former client of the appellant, a legal practitioner of some seven years standing and the senior partner of the Harare - based firm, Mushonga and Associates.

On the morning of 4 January 1993, the appellant informed State counsel that he would be representing Mukundwa on a fee - paying brief and requested that all papers to which the defence was entitled be sent to him immediately. After confirming telephonically with the appellant that he was to defend Mukundwa privately, the Assistant Registrar advised the legal practitioner, who had been

appointed to act *pro Deo*, that his services were no longer required. And as soon as the latter had returned the defence papers they were dispatched by courier to the appellant's offices in

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Harare.

On 6 January 1993, the Assistant Registrar telephoned the appellant to tell him that Mukundwa was being held in the cells at the High Court, Bulawayo, awaiting to be interviewed. It was arranged for the appellant to speak to his client on the telephone. Having done so, the appellant informed the Assistant Registrar that Mukundwa was without sufficient funds to meet his fee and that, accordingly, he was not in a position to act for him. It was suggested that he do so on a *pro Deo* basis. To this the appellant was agreeable, provided that the cost of his return airfare and hotel accommodation was paid by the State. His precondition was not acceptable.

Two days later, the appellant addressed a letter to the Assistant Registrar in these terms:

> "Further to previous telephone conversations with both your office and the Attorney-General's Office in both Bulawayo and Harare we herewith return the papers.
>
> In the absence of any assistance in meeting our air fares and hotel accommodation there is no other source where we can get the money.
>
> The indictment was late as it was done on 4th January, 1993 for trial on 11th January, 1993. Our client though he wishes us to represent him failed to raise the requisite deposit of $4 000 for travelling and subsistence.
>
> Any inconveniences are regretted."

In the event, the trial was postponed on 11 January 1993. Three working days were lost and the witnesses who had been subpoenaed to testify were released. The Assistant Registrar was obliged to pay their wasted travel expenses.

I interpose this recitation of events to intimate that it cannot be fairly inferred that the appellant had unethically offered his services upon learning that Mukundwa was facing trial. The probability is that he was approached by someone on Mukundwa's behalf to undertake the defence. This he agreed to do, upon the not unreasonable assumption that his services were affordable. He expected to be placed in funds; he was not. It was only on 6 January 1993,

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when he spoke personally to Mukundwa, that he was made aware that Mukundwa was indigent. In short, it was not the appellant who was deserving of blame for the necessity to postpone the trial. The responsibility was Mukundwa's. He ought to have realised that, notwithstanding his constitutional right to counsel of his choice, the appellant would not defend him without being adequately remunerated. He should have retained the services of the *pro Deo* counsel initially assigned to him.

On 11 February 1993, the Assistant Registrar wrote to the appellant, advising that the presiding judge, to whom the letter of 8 January 1993 had been shown, had commented that the appellant's attitude in relation to the past events was "unacceptable" and that:

> "While I make no order regarding the costs in this case, it should be noted that if this happens in future the legal practitioner may be ordered to pay the costs."

Attached to the letter was an order of the same date that the learned judge had issued. It

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provided:

> The registrar is to set the matter down for trial and Mr Mushonga is ordered to represent the accused on a *pro Deo* basis but will be allowed to recover only the costs that a Bulawayo practitioner would have recovered."

The trial of Mukundwa and Chiweshe was then set down to be heard from 5 to 8 April 1993.

On 25 February 1993, the appellant wrote to the Assistant Registrar, in part, as follows:

> "Since the court insists that we handle the matter, our colleague Mr Tawanda Chiwuta (a professional assistant in the appellant's employ) will be in Bulawayo on the 5th April to 8th April 1993 to continue with the matter.
>
> Let us have the State papers back for preparation of our client's defence outline, etcetera.
>
> We request that our client be temporarily remanded to appear in Harare so that we have access to him to take full instructions before the hearing date...

GUBBAY CJ

> Let the judge be given a copy of this letter and (State counsel) has been copied one for their information **and possible comments if same is warranted**" (emphasis added).

There was no response to this letter, but on 11 March 1993, the Assistant Registrar forwarded the relevant papers to the appellant. The accompanying *pro forma* instructed that: "the slip below be signed as acknowledgement of receipt". It was duly completed so as to reflect:

"Name of *pro Deo* counsel	Mr Tawanda Chiwuta
Name of company	Mushonga & Associates
Date	15 March 1993
Signature	(illegible)
Name of accused	A. Mukundwa",

and was returned to the Assistant Registrar. The only reaction it evoked was the receipt from the registry of a brief sheet bearing the name of Mr Chiwuta as *pro Deo* counsel in the trial of *State v Mukundwa*.

As soon as the court convened on 5 April 1993, and Mr Chiwuta announced that he was appearing on behalf of Mukundwa (apparently with no objection from the latter) the learned judge refused to commence the trial in the absence of the appellant. He ordered it to be postponed to the following morning after informing Mr Chiwuta that his principal, the appellant, had to be present.

The next morning, as the appellant was again *in absentia* (though he had been in contact with Mr Chiwuta and had approached the Assistant Registrar to amend the order), the learned judge issued a warrant for his arrest. Notwithstanding that Mr Chiwuta remained available to defend

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Mukundwa and had filed a defence outline the previous day, the trial was postponed *sine die* and the attendance of the witnesses excused.

On 8 April 1993, the appellant appeared before the learned judge, having been brought to Bulawayo under police escort. After being afforded an opportunity to explain his disobedience of the order of 11 February 1993, the appellant was found guilty of contempt of court. He was sentenced to a fine of $500 or, in default of payment, six days' imprisonment with labour, together with a further seven days' imprisonment with labour conditionally suspended for three years. In addition, in the implementation of his warning, the learned judge ordered the appellant to provide security in an amount of $5 000 in respect of the wasted costs incurred by the State.

GUBBAY CJ

At the outset of this judgment, it is necessary to consider whether the order made by the learned judge on 11 February 1993, was valid. Put differently, whether he was empowered to compel the appellant to undertake a *pro Deo* defence on behalf of Mukundwa. The situation was not one in which the appellant had consented to render his services *pro Deo.* He had made it abundantly clear to the Assistant Registrar that he was only willing to represent Mukundwa at the trial provided his travel and accommodation expenses were paid over and above the prescribed daily fee. His conditions were rejected. In issuing the order, it would seem that the learned judge believed that the appellant was attempting to renege on an undertaking given to defend Mukundwa *pro Deo*. In that he was mistaken.

Section 3 of the Legal Assistance and Representation Act [*Chapter 66*] stipulates, in substance, that if it appears to a judge, a registrar or a magistrate, that it is desirable in the interests of justice that a person should have legal representation in a criminal proceeding, whose means are insufficient to enable him to attain it, he may certify that legal assistance be given. The Attorney-General is vested with a similar authority under s 4. Section 5 reads as follows:

> "A person in respect of whom a certificate has been issued in terms of section three or four shall, **if it is practicable to procure the services of a legal practitioner,** be entitled to have a legal practitioner assigned to him in accordance with the rules of court"(emphasis added).

See also, rule 4 of the Legal Assistance and Representation Act (Supreme Court and High Court) Rules 1984 (SI 146/84), which is to similar effect.

This provision, to my mind, makes it plain beyond doubt that once a certificate has been issued, it is not permissible to assign a legal practitioner to the person unless the legal practitioner's consent has been obtained. If this were not so, the law-maker would have omitted the caveat concerning the practicability of procuring the services of a legal practitioner. Wholly consistent with this construction is s 6(1) of the Act. It states that whether assigned in terms of s 5 or where he appears before the Supreme Court or the High Court "**at the request of the Court**", the legal practitioner shall be entitled to such remuneration and expenses as may be provided for in the rules of court. In contra-distinction to "order", the word "request" envisages an ability to refuse. It could not have been intended that the services of a legal practitioner could be assigned without his consent; yet where not assigned his appearance before a superior court

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could only be obtained upon request.

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Moreover, it has always been my understanding that the practice in this country is to permit a legal practitioner to decline to represent an accused person *pro Deo*. But as a matter of moral obligation to assist the criminal court by co-operating with its administrators, a legal practitioner, when requested, rarely refuses to act. Usually, however, the approach is made to those who are known to be in a position to undertake such a task without causing too much of a disruption to their other pressing commitments.

Since the order of 11 February 1993 was invalid, the question that necessarily arises is whether it was competent to find the appellant guilty of contempt in disobeying it.

In favour of the view that it is not unlawful to refuse to obey an invalid order of court, are, principally, the decisions of the Natal Provincial Division in *S v Mkize* 1962 (2) SA 457 (N) and *S v Ngcemu* 1964 (3) SA 665 (N).

In the first, it was adjudged on review that the failure of the second accused to obey the magistrate's order to have his thumbprints taken in open court, then and there, after he had admitted certain previous convictions, did not constitute contempt *in facie curiae.* For as it was not a competent and valid order, there was no wilful defiance, disobedience or insult, on the part of the second accused (see at 460H, *per* HENOCHSBERG J).

The second cited case held that the appellant was entitled, in the exercise of his right to remain silent and make no answer to the evidence of the State, to refuse to comply with the magistrate's order to proceed with his defence. In the words of FANNIN J at 668G:

> "(The magistrate) had no right to require the appellant to speak or to call witnesses if the latter did not wish to do so. In these circumstances it seems to me that the appellant's words, indicating that he refused to put his defence, cannot be regarded as misbehaviour and still less as wilful misbehaviour."

See also *R v Masitshane* 1946 (2) PH H185 (E); *R v Arnold* 1953 (1) PH L3 (O); *R v Pitje* 1960 (4) SA 709 (A) at 710A, where disobedience of an invalid order was assumed, for the purposes of the appeal, to be a good defence.

But quite apart from any right there may be to disobey, if in so doing the person were to act with insolence he would render himself guilty of contempt. See *S v Zungo* 1966 (1) SA 268 (N) at 270H.

GUBBAY CJ

The opposing view is that generally a person may not refuse to obey an order of court merely because it has been wrongly made, for to do so would be seriously detrimental, if not completely fatal, to the authority of the court. This proposition was forcibly advanced by DE VILLIERS CJ in In re *Honeyborne* (1876) Buch Vol 6 145 at 150, in these terms:

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> "It would be utterly subversive of the authority of magistrates and of the dignity and decorum which ought to prevail in all courts of law if [an invalid order could be disobeyed with impunity]. If the agent were to be allowed to defy the authority of the court on the ground of an error of judgment on the part of the court, the question would in every case be whether the magistrate is right in his reading of the law or whether the agent is correct in his, but there would be no tribunal on the spot to decide between them. Undoubtedly it is the duty of the agent to bow to the decision of the court and to seek his remedy elsewhere; and it is equally the duty of the court to uphold its own dignity and see that its authority is respected by the practitioners before the court."

On this approach, the person must first obey the supposed invalid order and thereafter seek redress, if any, by way of appeal or review. He is not to determine for himself whether the order ought not to have been made, but should come to the court for relief if advised that it is invalid. Otherwise, as observed by CANEY J in *S v Zungo supra*, at 271E:

> "...the conduct of legal proceedings would become chaotic."

See also *R v Vass* 1945 GWLD 34 at 39; *S v Tobias* 1966 (1) SA 656 (N) at 665 E-F; *Culverwell v Beira* 1992 (4) SA 490 (W) at 494A-C.

It is this view, and not the other, that derives direct support from English law. See Miller *Contempt of Court* 2 ed at pp 438-440; Arlidge and Eady *The Law of Contempt* para 5-44 at p 280.

The exception to the general proposition is where blind compliance with an obviously invalid order would itself tend to weaken respect for the administration of justice. Suppose, for instance, that a judicial officer had ordered a person to do something quite absurd and blatantly in violation of his legal rights; his disobedience could not be regarded as contemptuous. See *Makapan v Khope* 1923 AD 551 at 556 in fine - 557; *R v Vass , supra*, at 37; Melius de Villiers *The Roman and Roman-Dutch Law of Injuries* at pp 172-173; Snyman *Criminal Law* 2 ed at p 343.

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Accepting the limitation, which is essentially a matter of common sense, it is the second view that I find the more persuasive. Its adherence ensures that the authority, dignity and respect of the court - the maintenance of which is so fundamental to the proper administration of justice - is not demeaned or prejudiced.

It does not follow inevitably, however, that disobedience of an order of court constitutes the crime of contempt. It must be committed intentionally and in relation to the administration of justice in the courts. See *S v van Niekerk* 1970 (3) SA 655 (T) at 657F-G; *S v Gibson NO & Ors* 1979 (4) SA 115 (D) at 120A-121B; *S v Benatar* 1984 (1) ZLR 296 (S) at 304D-E; 1984 (3) SA 588 (ZS) at 593I; *S v Harber & Anor* 1988 (3) SA 396 (A) at 413G-414E. *Dolus eventualis* is sufficient. Indeed, it is this form of intent that is usually present when contempt is committed. See *R v Silber* 1952 (2) SA 475 (A) at 484D-E; *S v van Niekerk supra* at 657 G-H. Intention is absent if the seemingly insulting behaviour is the result of forgetfulness, ignorance, absent mindedness, inadvertence or excitement. See Snyman *op cit* at p 344. And where an order of court has been disobeyed because of a genuine belief that it was invalidly made, *mens rea* **may** be found to be lacking. This feature does not operate in casu, as the appellant was under the

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impression that the order concerning him was valid.

The failure of a legal practitioner to appear in court, thereby causing a delay to or a postponement of a hearing, has occasioned some difficulty.

In *R v Izuora* [1953] 1 All ER 827 (PC) a barrister practising in Nigeria, who was appearing in a murder trial, was absent from court on the day on which judgment was to be given, permission to absent himself which had been previously granted by the judge having been withdrawn. He was summoned to attend the Supreme Court of Nigeria, which fined him £10 for contempt of court. In allowing the appeal, LORD TUCKER, delivering the opinion of the Judicial Committee, said at 830G-H:

> "It is not every act of discourtesy to the court by counsel that amounts to contempt, nor is conduct which involves a breach by counsel of his duty to his client necessarily in this category. In the present case, the appellant's conduct was clearly discourteous, it may have been in breach of r. 11 of Ord. 16, and it may, perhaps, have been in dereliction of his duty to his client, but, in Their Lordships' opinion, it cannot properly be placed over the line that divides mere discourtesy from contempt."

The issue of non-attendance was again considered, this time by the Court of

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GUBBAY CJ

Appeal, in *Weston v Courts Administration of the Central Criminal Court* [1976] 2 All ER 875 (CA). LORD DENNING MR at 881h-j remarked:

> "I have no doubt that if a solicitor deliberately fails to attend - with intent to hinder or delay the hearing and doing so - he would be guilty of a contempt of court. He would be interfering with the course of justice. But in this case the conduct of the solicitor was not done with intent to hinder or delay the hearing. He took the view that, in fairness to the accused, the case could not be forced on for trial at such short notice before he was ready and that, as it was bound to be adjourned, he did not propose to attend. That was, I think, a serious discourtesy and even a breach of duty. But it did not affect the trial of the street trader. His trial was, in fact, adjourned; and it was, in fact, heard in the following week at the earliest moment that it could have been."

Both these decisions recognise that non-appearance by a lawyer may go beyond mere discourtesy and amount to a criminal contempt of court; provided always that the intention, whether actual or constructive, was to interfere with the process of the court and the administration of justice. That is the issue to which I shall now turn.

The critical events to be taken into account in determining whether the appellant was shown to have entertained the requisite *mens rea* to bring the administration of justice into contempt - and which, with respect, the learned judge either overlooked or accorded insufficient weight to - were these:

(1) The letter of 25 February 1993, indicated that Mr Chiwuta, a member of the appellant's firm, would be representing Mukundwa at the trial and asked that the learned judge be made aware thereof in case he wished to comment. None was forthcoming.

(2) On 15 March 1993, the *pro forma* sent to the appellant was returned to the Assistant Registrar duly completed. Written in against the typed words "Name of *pro Deo*

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counsel" was "Mr Tawanda Chiwuta"

(3) Thereafter, the brief issued out of the registry bore the name of Mr Chiwuta as the counsel to represent Mukundwa at the trial. The significance of this was stressed by the appellant in his explanation to the learned judge. He said:

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> "The brief which was sent to us for the hearing on 5 April 1993 was addressed to Mr Chiwuta who is in our office. And that brief addressed to Mr Chiwuta, I took it that everything was going to be in order...The brief for the hearing was not in my name but in my colleague's name... The background comes from that brief, I believed in all honesty that there would be no prejudice to the interests of justice if (that) lawyer came..."

Even though the order of 11 February 1993, explicitly named the appellant as the legal practitioner to represent Mukundwa, it seems to me entirely feasible that the subsequent factors to which I have referred led the appellant to believe, as he asserted, that Mr Chiwuta's presence in his stead would be acceptable; and that his absence would not result in any violation of the dignity or authority of the court.

The situation considered by the British Columbia Court of Appeal in *R v Hill* (1977) 73 DLR (3d) 621, though bearing some factual similarity, is distinguishable. In that case the appellant, a lawyer, represented two persons charged with criminal offences. On the day set for trial in both matters he failed to appear but sent in his place an associate, one Grimmett, with instructions to represent the two persons if they so desired. The appellant at the time was in another city. Neither person would have Grimmett as his counsel. The judge accordingly instructed Grimmett to contact the appellant and convey his order that he was to appear that afternoon. The appellant told Grimmett that he was unable to appear. The judge ordered him to appear the next day to explain his earlier non-appearance but the appellant did not appear on that day or the next. The reason he gave was that he was in poor health. In consequence of the appellant's non-appearance the two cases were not able to proceed. The trial judge, before whom the contempt proceedings were taken, found as a fact that the appellant was not too ill to appear on the dates in question, and that he had not communicated or attempted to communicate with any official of the court his intention not to appear. In dismissing an appeal brought against a conviction of contempt, it was observed at 629 that:

> "As a result of this behaviour the course of justice was hampered, witnesses ready to give evidence were sent away to be called another day, expense no doubt incurred at the trial delay."

At the very least, Hill was plainly reckless as to whether or not his absence would disrupt the administration of justice. He did not even bother to ascertain in advance of the date of the trials if representation by his employee

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was acceptable to the two clients. Since it was not, the presiding judge had no option but to

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postpone the proceedings.

In the present matter, the appellant, by virtue of the objective factors outlined, genuinely believed that appearance by Mr Chiwuta as *pro Deo* counsel had been impliedly sanctioned. And there is no suggestion that Mukundwa objected to being defended by him. To the contrary, the preparation by Mr Chiwuta of the defence outline, which could only have followed upon a consultation, is indicative of Mukundwa's consent. The postponement of the trial was solely at the instance of the learned judge, who was insistent that no-one other than the appellant was to defend Mukundwa.

It is for the reasons mentioned that I find myself in respectful disagreement with the conclusion of the learned judge that the appellant's disobedience of the order of court manifested an actual disrespect for the court in such a way as to bring the administration of justice into contempt.

There are other aspects of this case relating to the procedure adopted by the learned judge upon which I feel constrained to comment.

A legal practitioner is an officer of the court. In terms of the Legal Practitioners Act 1981, a Disciplinary Tribunal is vested with the jurisdiction to deal with any unprofessional, dishonourable or unworthy conduct on the part of a legal practitioner. In the exercise of its wide powers, it may direct that the name of the errant legal practitioner be deleted from the Register, or order a suspension from practising for a specified period, or impose a penalty not exceeding $1 000.

Taking the view of the appellant's conduct that he did, it would have been more prudent for the learned judge to have referred the matter to the Council of the Law Society in terms of s 26(1) of the Act.

It seems to me that the existence of the Disciplinary Tribunal's powers over legal practitioners justify the court in exercising its contempt jurisdiction only in exceptional circumstances, such as, for example, where the legal practitioner has used scurrilous language in *facie curiae*.

I am also disturbed by the learned judge's recourse to the issue of a warrant for the arrest of the appellant. The behaviour objected to occurred *ex facie* curiae. See *R v Magerman & Ors* 1960 (1) SA 184 (O) at 189D-E; *R v Butelezi* 1960 (1) SA 284 (N) at 285H; *S v Nene* 1963 (3) SA 58 (N) at 60A-

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B. Obviously, as the learned judge was disposed to deal with the absent appellant himself, some degree of formality was required to bring him before the court. But, at most, a citation in writing from the learned judge calling upon the appellant to attend at a designated time and place to show cause why he should not be punished for contempt was all that was necessary.

Finally, I would point out that having convicted the appellant of criminal contempt, the learned judge had no jurisdiction to order him to provide security for the wasted costs. A contempt is not punishable by payment of costs. See *Weston v Courts Administration of the Central Criminal*

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Court , supra, at 883i; *Bull v Attorney-General & Anor* 1987 (1) ZLR 36 (S) at 41E.

The appeal is allowed and the conviction and sentence are set aside.

Judgment

Korsah JA: I agree.

Ebrahim JA: I agree.

Mushonga & Associates, appellant's legal practitioners

CHIMUTANDA MOTOR SPARES (PVT) LTD v MUSARE & ANOR 1994 (1) ZLR 310 (HC)

Court **High Court, Harare**

Mtambanengwe J

Civil trial

17 January & 23 March 1994

Flynote

Contract - enforceability - pactum commissorium - agreement to surrender immovable property if debt not paid - agreement not enforceable

Practice and procedure - admissions - withdrawal of - made in pleadings or at pre-trial conference - whether and when can be withdrawn

Headnote

The plaintiff sought an order to compel the defendants to effect transfer to itself of a residential property in Harare. The action was based on an acknowledgment of debt, arising from a loan of $7 713 made to the defendants by the plaintiff. The defendants required this sum to pay off a loan made to them by a building society in respect of the property. In the acknowledgment of debt, it was provided that in the event of the defendants defaulting in any repayment, the plaintiff would have the right to take over the defendants' rights in the property. The plaintiff claimed that the debt owing was in fact $10 000, on the basis that the defendants had made an admission to that effect at the pre-trial conference.

In a later affidavit, the defendants averred that the original loan was for $7 713, but that they agreed to pay the sum of $10 000 in two and a half months. They argued that the agreement was unenforceable for two reasons: it was contrary to the Money Lending and Rates of Interest Act [*Chapter 299*] and it constituted a *pactum commissorium*. The plaintiff argued that the defendants were bound by the admission made at the pre-trial conference and that all that was

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in issue was the defendants' liability to surrender the immovable property.

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Held, that the agreement was a *pactum commissorium*, as the consequence of defaulting was the surrender of the property. That aspect of the agreement was thus unenforceable.

Held, further, that when admissions are made in pleadings or at a pre-trial conference, no proof of the fact admitted need be given by the other party. However, the court has a discretion to allow an admission to be withdrawn; for example, where the admission is clearly contrary to the facts. This was the situation here and injustice would result from adherence to the admission.

Held, further, that the plaintiff was not entitled to recover interest in excess of that allowed by law. It would be inequitable to order that the mora interest be at the current prescribed rate and a staggered rate would be ordered.

Cases cited:

van Rensburg v Weiblen 1916 OPD 247

Mapenduka v Ashington 1919 AD 343

Abbott v Cawood 1982 (2) SA 153 (NC)

York Ests Ltd v Wareham 1949 SR 197; 1950 (1) SA 125 (SR)

Madziwadondo v Matikiti S-166-87

Hanan v Turner 1967 RLR 293 (G); 1967 (4) SA 368 (R)

Liq M & C Hldgs (Pvt) Ltd v Guard Alert (Pvt) Ltd HH-7-94

E Chatikobo for the plaintiff

Defendants in person

Judgment

Mtambanengwe J: This matter started as an opposed application in which the applicant, now the plaintiff, sought an order to compel respondents (now the defendants) to effect transfer to itself of Lot 1 of Stand 67 Midlands Township of Midlands situate in the District of Salisbury, failing which after 30 days from the date of the order, the Deputy Sheriff was to be empowered to effect such transfer on behalf of the respondents. I shall henceforth refer to the parties as plaintiff and defendants.

The action is based on an acknowledgement of debt (the agreement) entered into between the parties on 14 June 1988, which records that plaintiff on that date lent to defendants the sum of $10 000, repayable on 31 August 1988.

In terms of clause 4 of that agreement the plaintiff was to "have the right without notice to take

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over the debtors' rights and interests to and in the immovable property described (as above) held under Deed of Transfer No.

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1638/86 together with any Mortgage Bond registered over the property without any further payment to the debtors by the creditor".

In their opposing affidavits, the defendants denied that they borrowed $10 000. They alleged that they only borrowed $7 713, being the total amount they then owed the Central African Building Society (Cabs) in respect of bond repayment arrears, including costs, in terms of a mortgage bond passed over the property by them in favour of Cabs. They say the $10 000 reflected on the agreement includes interest of over $2 200. The agreement itself stipulates no interest as payable on the loan.

The evidence led in this matter reveals that the plaintiff's managing director, one Douglas Chimutanda, gave the defendants a cheque for $7 713 on the date the agreement was signed. This was taken to Scanlen & Holderness, Cabs' legal practitioners, who had arranged a sale in execution of the property for 15 June 1988. Scanlen & Holderness said they would only accept a bank certified cheque. The defendants went back and obtained a bank certified cheque from Mr Chimutanda and duly paid Scanlen & Holderness on that day, though the receipt bears 15 June as the date of payment. The defendants explained that this was so because payment was made at a very late hour on 14 June when Scanlen and Holderness had closed their books for that day. The receipt was produced as exhibit 3. I accept their explanation.

A Mr Chiremba of Sawyer and Mkushi, who drew up the agreement (produced as exhibit 1), said that he got his instructions from Mr Chimutanda in the presence of the defendants and drew up the agreement by using a standard typed form, making necessary alterations and additions. He had the final draft typed while the parties waited, after which he indicated where the parties should sign and the alterations and additions that had to be initialed. He said that the signing was to be done after the handing over of the money, which event did not take place at the offices of Sawyer and Mkushi.

Mr Chimutanda's evidence was that the signing and handing over of the money was done at the offices of Sawyer and Mkushi in the presence of Mr Chiremba. The defendants, on the other hand, deny this and say that the signing took place at the plaintiff's offices. Their version of events is supported by Mr Chiremba, the plaintiff's witness, who gave his evidence in a very credible manner. Mr Chimutanda said he gave the defendants the money borrowed in the form of a cheque for $7 713 and the rest in cash. He could not give a credible explanation why he gave them the extra amount, when he had seen their papers from Scanlen & Holderness showing that the

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amount they owed was $7 713. He does not say that the defendants asked for the extra

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amount. Nor could he explain satisfactorily how he expected the defendants to be able to repay the whole amount borrowed in two and a half months. The parties went to Sawyer and Mkushi to have an agreement that they had already reached reduced to writing. Chimutanda was contradicted by Chiremba on a very material point. He said the agreement was signed in the presence of Chiremba at the offices of Sawyer and Mukushi and that the money was counted there too and in Chiremba's presence. Chiremba said after the agreement was typed he handed three copies to Chimutanda and indicated where the parties would sign and the alterations that had to be initialled and told them once the money was given to the defendants then the parties would sign the agreement. Chimutanda did not have the $10 000 with him that day. The signed agreement was returned to him by the parties the following day. He then checked the signatures and retained a copy, giving a copy each to each of the parties. I accept Chiremba's evidence because, in addition to finding that he gave his evidence well and that he was a very credible witness, his version agrees with that of the defendants. Mr Chimutanda did not give his evidence in a credible manner. He was in fact fabricating some of his evidence and was evasive in his answers to questions under cross examination.

Clause 4 of the agreement provides as follows:

> "Should the debtor default in the payment of any one instalment or more instalments timeously in full or should the Debtor commit any act of insolvency or compromise or attempt to compromise with creditors, or convene a meeting (or) creditors or surrender as an insolvent or apply for assignment or should the judgment of any court be entered against the debtor or should the debtor do any act, matter or thing which has the effect of jeopardising or prejudicing the creditors position in any way whatsoever, then in any such events the Creditor shall have the right without notice to **take over the debtor's rights from and interests to and in the immovable property described as Lot 1 of Stand 67 Midlands Township of Midlands situated in the District of Salisbury and held under Deed of Transfer No. 1638/86 together with any Mortgage Bond registered over the property without payment of any further money to the debtors by the creditor**" (my emphasis).

The emphasised part of this clause is what was typed in, in place of a provision which would normally stipulate that in any such event all outstanding balance of the money lent would immediately become due and payable.

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The defendants said that although this alteration (ie the crossing out) was there when they signed the agreement, the words inserted were not, whereas Mr Chimutanda and Mr Chiremba said both were there. It is not, however, necessary to resolve this conflict because Mr *Chatikobo* for the plaintiff properly accepted that there was room for finding that clause 4 of this agreement amounts to a *pactum commissorium* which would not be enforceable.

A *pactum commissorium* is defined as "a pact by which the parties agree that if the debtor does not within a certain time release the thing given in pledge by paying the entire debt, after the lapse of the time fixed, the full property in the thing will irrevocably pass to the creditor in payment of the debt". See *Van Rensberg v Weiblen* 1916 OPD 247 at 252.

A full discussion of why the law reprobates a *pactum commissorium* is to be found in the judgment of DE VILLIERS AJA in *Mapenduka v Ashington* 1919 AD 343 at 351 where, quoting Voet 20.1.25, he says such a pact has been reprobated by the law since the time of Emperor

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Constantine as being unduly oppressive to debtors:

> "Inasmuch as if it might be agreed that when a debt is not paid within a certain time the creditor is to retain (as his own) the thing pledged for the debt, things of the greatest importance and value would often be ceded in payment of a very trifling debt; the debtor, needy and pressed by the straitened condition of his pecuniary circumstances, readily submitting to the insertion of hard and inhuman conditions (in the bond) and holding out to himself the promise of better times and fortune before the arrival of day fixed by the *pactum commissorium*, and hoping that the asperity of the pact will be averted from him by payment, a slippery and fallacious hope, however, to which the event not rarely fails to respond" (Gane's translation of Voet 20.1.25).

See also *Abbott v Cawood* 1982 (2) SA (NC) 153 at 155H-156A .

The facts of the present case present an ample demonstration of the type of situation described by Voet in the passage quoted by DE VILLIERS AJA in *Mapenduka*'s case *supra*. Here, the defendants were in real pressing need and stood to lose the property the very next day, if, on the day the loan was sought and obtained, payment was not made to CABS' legal practitioners of the $7 713 they owed. Nor have they been able to avert the asperity of the pact by payment before the date fixed.

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It is quite understandable, in those circumstances, that the defendants, their minds pre-occupied with avoiding the imminent disaster facing them, did submit to the onerous conditions exacted by their plaintiff in the forlorn hope that they would avert the rigours of the agreement before the day of reckoning came.

I find the agreement as to the consequences of defaulting on defendant's part is a *pactum commissorium* and as such unenforceable.

It was submitted that at the pre-trial conference the defendants admitted that they owed plaintiff $10 000. Mr *Chatikobo*, for the plaintiff, stated the point to the following effect. It is not necessary to determine liability of defendants for the $10 000 because they have always accepted liability for the $10 000, and the admission was carried through to the pre-trial conference.

The pre-trial conference minute records:

> "2. ADMISSIONS MADE
>
> 1st and 2nd Defendants admitted that they owe Plaintiff the sum of $10 000,00 together with interest at the rate of 10% per annum with effect from 31st August, 1988. The defendants stated that they would soon be making an offer of settlement of the amount owed ..."

The minute also records the only issue as "whether the agreement dated 14th August 1988 entitled the Plaintiff to take transfer of the property." But, at the start of the plaintiff's case, Mr *Chatikobo* said that the "Issues should include plaintiff's entitlement to payment of $10 000 so that if no transfer is ordered then payment of $10 000 should be ordered". Mr *Samukange* for the defendants did not oppose this addition to the issues.

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The opposing affidavit filed by first defendant states:

> "I deny that we entered into the agreement annexed to the notice of motion on the 14th June 1988. What in fact happened is that we borrowed the sum of $7 713 which was the amount owed by us to the Building Society. As we needed the money desperately, we agreed to refund the amount of ten thousand dollars to applicant on the 31st August 1988. We understand that the interest claimed by applicant of over $2 200 within two months is usurious in terms of the Usury Act and that the agreement is illegal."

Section 9 of the Usury Act [*Chapter 299*](now the Moneylending and Rates of Interest Act) provides:

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> "(1) No lender shall stipulate for or receive from the borrower interest at a rate greater than the prescribed rate of interest."

Subsection (2) makes it an offence to contravene subs (1). Such a contravention punishable by a fine of $2 000 or three times the capital amount lent in contravention thereof, whichever is the greater, or by a period of imprisonment not exceeding one year or both such fine and such imprisonment.

A money lender is described as:

> "Any person who carries on a business of moneylending or who advertises or announces himself or holds himself out in any way as carrying on such business but does not include -
>
> (a) any person engaged in any transaction exempted by section *twenty* or by regulations made in terms of section *twenty-two*;
>
> (b) any person exempted by section *twenty* or by regulations made in terms of section *twenty-two*, to the extent of that he has been so exempted."

Section 20 provides:

> "(1) The provisions of this Act shall apply to every transaction which, whatever its form may be, is substantially one of money lending and includes any arrangement under which goods are purchased under a condition of repurchase at a higher price."

On the evidence, I find as a proven fact that the plaintiff lent the defendants $7 713, to be repaid in two and half months as $10 000. This meant that, in effect, defendants were being charged interest at a usurious rate. Clearly the agreement is struck down by s 9 of the Moneylending and Rate of Interest Act.

In *York Estate Ltd v Wareham* 1949 SR 197 at 198, LEWIS ACJ (as he then was) said:

> "As a general rule a contract or agreement which is expressly prohibited by statute is illegal and null and void" (see the authorities cited therein).

He went on to say at p 199-200:

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> "The Court has no equitable jurisdiction to grant relief to a plaintiff seeking to enforce a contract prohibited by law. See *Matthew v Rabinowitz* 1948 (2) SA 876. In fact the Court is bound to refuse to enforce a contract which is illegal even though no objection to the legality of the contract is raised by the parties. See *Cape Dairy and General Livestock Auctioneers* v *Sim supra*. Furthermore, the court will not enforce such a contract even though the plaintiff is innocent and the defendant is setting up his own illegality."

In light of the above, one must ask what, in terms of the loan agreement between the parties in this case, is the illegality. It is clear that what is prohibited by the Act is the stipulation for or demand or receipt of interest greater than the prescribed rate of interest.

As was pointed out by KORSAH JA in *Madziwadondo v Matikiti* S-166-87, s 10 of the Usury Act disallows recovery by the lender of any interest in excess of that allowed by law. It does not render the whole of the debt and legitimate interest irrecoverable. The position at common law is the same. See *Hanan v Turner* 1967 RLR 293 (G) 1967 (4) SA 368 (R).

In argument Mr *Chatikobo* submitted that the liability for $10 000 was admitted by the defendants and that anything in the evidence tending to deny liability is irrelevant. He said that all that defendants put in issue was their liability to surrender the house.

It is true that in the pre-trial conference minute the defendants made the admission that Mr *Chatikobo* relies on to support the alternative relief that he says plaintiff is entitled to, that is, payment of $10 000 with interest at the rate of 10% per annum with effect from 31 August 1988.

When admissions are made in pleadings or at a pre-trial conference, the effect is that no proof of the fact admitted need be given by the other party. Order 27 of the High Court Rules makes this clear. The Order, in rule 189, also gives the court a discretion whether at any time to allow a party to withdraw any such admission given at a pre-trial minute, or in a pleading.

The points that emerge from an examination of the Civil Evidence Act 1992, the Rules of this Court and the case authorities in point were listed by ROBINSON J, correctly in my view, in *Liq of M & C Holdings (Pvt) Ltd* v *Guard Alert (Pvt) Ltd* HH-7-94 (unreported) at pp 15-16 as:

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> "(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 (4) of the Civil Evidence Act.
>
> (c) An admission in a plea, once made, can be withdrawn only with leave of this court, see the proviso to s 35 (4) of the Civil Evidence Act, rule 189 of the High Court Rules and *Beck's Theory and Principles of Pleadings 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

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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 Shervil's Garage* 1932 TPD 196 at 199 (*per* GREENBERG J) and *Van Deventer*'s case *supra*, at 76A."

In the present case, the issue whether the amount that plaintiff lent to the defendants was $10 000 or $7 713 was fully canvassed in the evidence adduced and in the pleadings. It seems clear to me that at the stage that the admissions were made by the defendants - the pre-trial conference - the defendants were merely confirming the illegal agreement that they entered into, namely, that they would repay the $7 713 borrowed as $10 000 which was inclusive of the usurious interest, the 10% interest being *mora* interest. The admission is clearly contrary to the facts and I am of the firm view that in the circumstances of this case injustice would result from an adherence to that admission.

Mr *Chatikobo* argued further that if transfer is not ordered and the defendants are ordered to repay the amount borrowed with *mora* interest the rate of *mora* interest should be the current, prescribed rate of interest. He cited no authority for that proposition. While the plaintiff is, in my view, entitled to *mora* interest from 31 August 1988; it seems to me it is in principle wrong to order payment of interest at the current rate of interest from 31 August 1988. It would mean imposing a burden on the defendants retrospectively. I

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would therefore order interest payment on a staggered basis ie at 10% *per annum* from 1 September 1988, to 5 September 1991, 12 1/2% per annum from 6 September 1991 to 9 September 1993 and 25% per annum from 10 September 1993 to date of payment.

The defendants did not pay into court the amount that they admitted owing to plaintiff. Had they done so, in the circumstances of this case, I would have been minded to deprive the plaintiff of his costs.

In the result I order that the defendants pay the plaintiff the sum of $7 713, with interest at the rate as specified in this judgment, and costs of suit.

Sawyer & Mkushi, applicant's legal practitioners

George Seirlis & Associates, respondents' legal practitioners

MARISA & ANOR v CHIKUHWA & ANOR 1994 (1) ZLR 320 (HC)

Court **High Court, Harare**

Chidyausiku J

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24 March 1993 & 23 March 1994

Application to set aside taxation

Flynote

Costs - taxation - witness - party to action - payment of travel expenses to - whether competent for taxing officer to award costs to party where party claiming costs has not been declared a necessary witness - Rules of High Court, 1971 - rule 307

Headnote

A first respondent had instituted legal proceedings against the applicant. He had purchased an air ticket to travel to Zimbabwe from overseas in order to appear at the trial of this case. The first respondent had succeeded in the action and had been awarded costs against the applicant. A taxing officer had then awarded the cost of his air ticket to the first respondent.

The applicant applied to the High Court to have this award of the cost of the air fare set aside. His main ground was that the taxing officer had wrongly made this award as the first respondent had not been declared a necessary witness.

Held, that in terms of rule 307 of the Rules of the High Court the taxing officer has a discretion to award a party travelling expenses even if such party has not been declared a necessary witness and thus the award was a competent one.

Cases cited:

Geldenhuys v Kuilder (1896) 13 SC 366

Krull v Bursey 1966 (4) SA 448 (E)

Mouton & Anor v Martine 1968 (4) SA 738 (T)

Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467

Rhys-Maitland v Taxing Officer HH-233-92

1994 (1) ZLR p321

CHIDYAUSIKU J

van Diggelen v Triggs (1) 1911 SR 78

Bernstein & Co v Enslin 1912 SR 189

T Biti for the applicants

J Dondo for the first respondent

No appearance for the second respondent

Judgment

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Chidyausiku J: The applicant in this case is seeking to have set aside an award of about $8 113,45 made by second respondent, the taxing officer, in favour of the first respondent (who was plaintiff in this action). The $8 113,45 represents the cost of an air ticket the first respondent purchased in order to enable him to travel to Zimbabwe from overseas to attend a trial he had instituted against the applicant. In that trial the first respondent was successful. Judgment was in his favour plus costs. No application was made for the first respondent to be declared a necessary witness and he was not declared a necessary witness. Upon the taxation of the bill of costs the taxing officer acting in terms of rule 307 allowed the first respondent the cost of the air ticket.

The applicant now seeks a review of the taxing officer's ruling in terms of rule 314. The applicant wishes to have the ruling awarding the first respondent the cost of the air ticket set aside on two grounds. Firstly, the applicant contends it was not given due notice of 3 days before the bill of costs was taxed as is required in terms of rule 310. Secondly, the applicant contends that the first respondent was not declared a necessary witness. Because the first respondent was not declared a necessary witness, the second respondent had no competence to award him the cost of the air ticket. It would appear from the papers that it was through an oversight that no application to have the plaintiff declared a necessary witness was made. Had the application been made the plaintiff in all probability would have been declared a necessary witness.

I will turn now to deal with the first ground of objection. The applicants' legal practitioners admit receiving the notice of taxation Annexure C to these proceedings. They deny however that it was accompanied by the actual bill of costs. The first respondent contended that the notice was accompanied by the bill of costs. There is therefore to some extent a conflict of fact. I have decided to take a robust view and resolve the conflict of fact in favour of the first respondent for the following reasons. The notice that the applicant's legal practitioners admit receiving clearly refers to the attached bill of costs. If the attached bill was not there one would have expected the applicant's legal practitioners to phone and enquire about the alleged attached document.

CHIDYAUSIKU J

That did not happen. I am not impressed by the applicant's explanation that he thought the bill referred to was another bill of costs in respect of the same case. In any event what would the respondent achieve by referring to the attached bill of costs then deliberately refrain from attaching the bill? It has not been suggested that a mistake was made but rather that the first respondent's legal practitioners deliberately withheld the bill until the last minute. Regrettably no affidavit from the taxing officer, the second respondent, has been filed. Such an affidavit might have been useful in this regard.

I now turn to deal with the second ground of appeal. The main thrust of the applicant's case rested on this ground. It was strenuously argued for the applicant that a successful party to an action is entitled to his travelling expenses such as an air ticket only when he has been declared a necessary witness. If for some reason or other the successful party is not declared a necessary witness he cannot recover his travelling expenses. Put differently, it was argued that it was not competent for the taxing officer to award a party the cost of an air ticket when that

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party was not declared a necessary witness. It was submitted that a long line of cases establish or support this proposition. I was also referred to a number of authors who support the above proposition. A number of South African and Zimbabwean cases were cited to me in support of the above proposition. I shall deal with the South African cases first. The earliest of the cases cited was the case of *Geldenhuys v Kuilder* (1896) 13 SC 366. In that case magistrate acting in terms of s 8 of Act 4 of 1861 declared a party to an action a necessary witness. Section 8 of Act 4 of 1861 provided as follows:

> "No person being a party to any suit, action or proceeding, and who shall be adduced as a witness therein in his own belief, shall (except as hereinafter excepted) be entitled in the taxation of any costs which may be awarded against the opposite party, to any expenses as a witness : Provided that it shall be competent for the Court upon the application of any such party so adduced as a witness to direct, at its discretion, that such party shall be allowed his expenses in case the said Court shall be of the opinion that such party was a necessary witness."

In *Geldenhuys*' case *supra* the issue was whether a party who in fact did not give evidence could be declared a necessary witness. The magistrate held that such a party in the circumstances of that case was such a witness. He was upheld on appeal. In my view the *Geldenhuys* case *supra* states no more than that in terms of s 8 of Act 4 of 1861 a party to an action is not entitled to a witness's expenses unless he is declared a necessary witness. *Geldenhuys*'

CHIDYAUSIKU J

case *supra* was followed with approval in the case of *Krull v Bursey* 1966 (4) SA 448 (E). At p 451H JENNETT JP had this to say:

> "It has long been the rule that a party to a suit is not entitled to any expenses as a witness unless the Court declares him a necessary witness. See *Geldenhuys v Kuilder* 13 SC 366. Rule 49(14) is quite clear and provides that: -
>
> > 'Witness fees and expenses shall be allowed in respect of attendance of a party to an action or proceedings only if such party has been declared by the Court to be a necessary witness.'"

The case of *Mouton & Anor v Martine* 1968 (4) SA 738 (T), although the main issue was what expenses are recoverable once a witness has been declared a necessary witness, also supports the proposition that for a party to be entitled to witnesses' expenses he has to be declared a necessary witness first. The case of *Texas Company (SA) Ltd v Cape Town Municipality* 1926 AD 467 supports the above proposition. At p 489 INNES CJ had this to say:

> "And a party to a suit is entitled to claim his own expenses, provided he is duly declared to have been a necessary witness. Whether the qualifying expenses of a suitor - witness would be covered by the same rule need not now be discussed. It does not arise in this case."

The court was also referred to the works of the authors, Jacobs & Ehlers *Law of Attorney's Costs and Taxation Thereof* p 197 and A C Cilliers *Law of Costs* 2 ed para 13.29. The authors of both books support the proposition that a suitor is entitled to special expenses upon being declared a necessary witness and they cite as their authorities for the proposition the cases that I have dealt with above, namely the cases of *Texas Co (SA) Ltd supra; Krull's* case *supra; Geldenhuys's* case *supra* and *Mouton & Anor supra*.

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It emerges from the above South African authorities that in South Africa a witness had to be declared a necessary witness before he can recover special expenses like travelling expenses and that this practice is based on the provisions of s 8 of Act 4 of 1861 and the South African Court Rules. The South African Court Rules certainly have no application in Zimbabwe but the provisions of s 8 of Act 4 of 1861 do apply by reason of the provisions of s 89 of the Zimbabwe Constitution. I shall

revert to this issue later.

I now wish to turn to some of the Zimbabwean authorities cited to the court.

CHIDYAUSIKU J

In *Rhys-Maitland v Taxing Officer* HH-233-92 the court discussed the extent and nature of a party's expenses once such a party has been declared a necessary witness. The crisp issue of whether a suitor can recover certain expenses without being declared a necessary witness never arose. The successful party had been declared a necessary witness. Similarly in the case of van *Diggelen v Triggs* (1) 1911 SR 178 and *Bernstein & Co v Enslin* 1912 SR 189 the courts discussed the issue whether a party that inadvertently omits to apply to be declared a necessary witness in a trial can subsequently approach to the same court and apply to be declared a necessary witness. The court in the above cases came to different conclusions over the issue. It was clear however in the later case, from the respondent counsel's submissions, that in seeking to have the respondent declared a necessary witness reliance was placed on the provisions of s 8 of Act 4 of 1861.

It would appear to me that the provisions of Act 4 of 1861 have application to Zimbabwe to the extent that those provisions may not have been affected by subsequent legislation having the force of law in Zimbabwe. This is so by reason of the provision of s 89 of the Zimbabwe Constitution, 1979, which reads as follows:

> "Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African Customary Law, the law to be administered by the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the colony of the Cape of Good Hope on 10th June 1891, **as modified by subsequent legislation having in Zimbabwe the force of law"** (the emphasis is mine).

Act 4 of 1861 is therefore part of our law by virtue of the above constitutional provision. It is clear from the above cases that in terms of s 8 of Act 4 of 1861 a suitor is entitled to expenses such as the air ticket only if he is declared a necessary witness. Indeed the provision is very clear in this regard and allows no room for ambiguity. In the light of that does the taxing officer have the competence to award a successful suitor, as happened in this case, the cost of an air ticket without such party having been declared a necessary witness? The taxing officer is a statutory creature and derives his power from Order 38 rule 307 of the High Court Rules 1971. This rule confers on the taxing officer a very wide discretion in the exercise of his duty as a taxing officer. Indeed the rule reads as follows:

> "307. With a view to affording the party who has been awarded an order

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CHIDYAUSIKU J

for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded, the taxing officer shall on every taxation allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to another legal practitioner, or special charges and expenses to witnesses or other persons or by other unusual expenses."

The above rule, in my view, gives the taxing officer the discretion to award a party travelling expenses, such as an air ticket, even if such party has not been declared a necessary witness by the court. There is no reference in the above rule to the need for a party to be declared a necessary witness before he can be awarded certain expenses. I hold the view that rule 307 being legislation having the force of law in Zimbabwe supersedes the provisions of Act 4 of 1861. The only limitations on the taxing officer's discretion in awarding is to be found in the exceptions in that rule itself ie unnecessary expenses, unusual expenses etc. It has not been argued that costs of the air ticket which was allowed falls into one of these exceptions. In brief I have come to the conclusion that it is competent for a taxing officer to award any costs allowed under rule 307 irrespective of whether the party claiming such costs has been declared a necessary witness or not.

In the result the application is dismissed with costs.

Honey & Blanckenberg, applicants' legal practitioners

Chinamasa, Mudimu & Chinogwenya, first respondent's legal practitioners

S v MARAMBA 1994 (1) ZLR 326 (HC)

Court **High Court, Harare**

Garwe J

30 March 1994

Criminal review

Flynote

Criminal law - statutory offences - concealment of birth - Concealment of Birth Act [Chapter 57] - woman having spontaneous abortion and discarding foetus - no evidence as to age of foetus - no evidence that foetus a "child" for the purposes of the Act

Headnote

The accused was convicted by a magistrates court of contravening s 3 of the Concealment of

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Birth Act [*Chapter 57*]. She admitted giving birth to a dead foetus and throwing it into a pool of water. The cause of death could not be established and there was no evidence as to the age of the foetus.

Held, that unless it was established that the foetus was a child for the purposes of s 2 of the Act, a conviction for concealment of birth would not be competent. A child, for this purpose, is one which has, irrespective of its age, reached such a stage of development that it is capable of being born alive. There being no evidence on the age of the foetus or on whether it could have existed independently of its mother, the foetus could not be said to have been a child for the purposes of the Act.

Conviction set aside.

Cases cited:

S v Mazengero HH-68-85

S v Jasi 1993 (2) ZLR 451 (H)

Judgment

Garwe J: The accused in this matter was found guilty of contravening s 2 of the Concealment of Birth Act [*Chapter 57*].

GARWE J

She admitted that on 7 April 1993 she gave birth to a dead foetus and that thereafter she threw the foetus into a pool of water. The foetus was found floating in the pool about a week later and the accused was subsequently arrested. The dead foetus was thereafter taken to Harare Central Hospital where a pathologist carried out a post-mortem examination. The doctor was unable to determine the cause of death due to advanced putrefaction.

On being arraigned, the accused pleaded guilty and admitted the essential elements of the offence. She was found guilty as charged.

For some unknown reason, a copy of the post mortem report was not produced. The accused was not asked to indicate how advanced her pregnancy had been. Consequently, the age of the foetus is not known.

I asked the trial magistrate to explain whether in the circumstances the accused had been correctly convicted of contravening s 2 of the Act.

In his response, the trial magistrate has remarked that:

> "The facts refer to a 'child' not foetus. It was on this basis that I believed that it was not in dispute that what the accused gave birth to was nothing other than a child...I am still of the view that the accused was correctly convicted..."

The first point to stress is that not every concealment of birth is a criminal offence. The word

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"child" in s 2 of the Act has been legally defined. Unless a court is satisfied that the foetus was a "child" for the purposes of s 2 of the Act, then a conviction for concealment of birth would not be competent.

In *S v Mazengero* HH-68-85 a temporary teacher discharged a three-month-old foetus into a shallow toilet. On her arrest, she was examined by a doctor who confirmed spontaneous abortion at 12 weeks' gestation. The accused was convicted, on her plea, of contravening s 2 of the Act and was sentenced to pay a fine of $180 or in default of payment 2 months' imprisonment with labour and in addition to a suspended sentence of 4 months' imprisonment with labour.

In quashing the conviction, SCOTT J remarked:

> "It would appear therefore that a still-born foetus of less than twenty-eight weeks old cannot be regarded as a child within the Births and Deaths

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GARWE J

> Registration Act and consequently cannot be regarded as a "child" within the Concealment of Birth Act.
>
> ...The record contains no *post mortem* examination to ascertain the age of the foetus. But the accused said she was three months pregnant and her evidence tallies with the medical examination carried out on her which indicates that she spontaneously aborted at 12 weeks' gestation ...That being the case, she cannot be said to have concealed the birth of her 'child' that child having been a foetus of less than 28 weeks old."

The issue was recently considered by ADAM J in *S v Jasi* 1993 (2) ZLR 451 (H). In that case, the accused took some unknown herbal concoction to procure an abortion. As a result, an intra-uterine still-birth occurred. She gave birth to a dead foetus which she threw into a pit toilet. A medical affidavit produced during the proceedings confirmed that there had been a criminal abortion during the sixteenth week of gestation. No evidence was placed before the court to suggest that the foetus was capable of an independent existence.

After reviewing a number of English authorities, the learned judge quashed the conviction and remarked:

> "It is a truism that there have been rapid, extensive and most remarkable developments, in the medical field including obstetrics and gynaecology ...I cannot, therefore, accept that Whitaker J was correct when he held that a foetus 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."

I agree entirely with the above remarks. Times have changed and in my view it is time to discard the notion that only a foetus of more than 28 weeks is a child for the purposes of the Act.

In the present case, however, no medical evidence was produced. It is unknown how old the foetus was or whether it could have existed independently of its mother. It is unknown how advanced the pregnancy was at the time the accused aborted and gave birth to the still-born foetus. The foetus cannot therefore be said to have been a "child" for the purposes of s 2 of the

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Act.

GARWE J

Accordingly, both the conviction and sentence must be quashed. The accused is entitled to her immediate release from prison. A warrant of liberation has been issued and forwarded to the prison authorities.

Mtambanengwe J: agrees

S v MASEKO & ANOR 1994 (1) ZLR 330 (SC)

Court **Supreme Court, Bulawayo**

McNally JA, Korsah JA & Ebrahim JA

5 April 1994

Criminal appeal

Flynote

Evidence - extra - curial statement - confession - confirmation in material respect - murder case - no evidence that deceased was murdered - accused's admitted rôle peripheral - no evidence to confirm other portions of confessions

Headnote

It is competent for a court to convict a person by reason of a confession of that offence proved to have been made by him, even though the confession is not confirmed by other evidence, provided that the offence is proved to have been actually committed. Where there is no evidence *aliunde* that the offence has been committed, the court must, in addition, go outside the confession and be satisfied that the confession is confirmed by other evidence. The confirming evidence need not directly implicate the accused in the offence, as long as it corroborates the confession in a material respect.

In casu, there was no proof that the deceased, who was found in a lift shaft with injuries consistent with a fall from a great height, was murdered. The evidence about his death was consistent with a number of hypotheses other than foul play. The two appellants' rôles in the events before the death of the deceased were outlined in statements made by them to the police. Apart from the fact that the statements were unclear as to what the appellants had done, they were not confirmed in any material respect by other evidence and the convictions had to be set aside.

Cases cited:

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R v Taputsa & Ors 1966 RLR 662 (A)

McNALLY JA

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

S v Dube 1992 (1) ZLR 234 (S)

C S Kambefu for the appellants

K Hodzi for the respondent

Judgment

McNally JA: The two appellants were convicted of murder and sentenced to death in the High Court in Bulawayo on 26 February 1991. The alleged murder was committed some time between 4 and 6 October 1987; and the trial, which was long and frequently interrupted, began on 10 July 1989.

At the appeal hearing in Bulawayo on 5 April 1994 the members of the court were unanimous in their view that the appeal should be allowed and the convictions and sentences set aside. Accordingly, warrants of liberation were signed there and then, and it was announced that our reasons would be handed down later. These are they.

The record is some 950 pages long, and of that the judgment occupies 137 pages. Yet for all that the facts are remarkably scanty.

The events surrounding the death of the deceased, one Cyril Pullen, took place in a building called Southampton House in Bulawayo. In a basement thereof there was a bar and disco known as the Zambezi Bar. The people concerned were all involved in one way or another with the Zambezi Bar. The deceased had been the disc jockey at the Bar, although some time before these events he had been dismissed as disc jockey and forbidden to enter the Bar. Despite this, he did frequent the Bar.

The first appellant, Maseko, was the assistant disc jockey. The second appellant, Muredela (sometimes called "Sam" or "Khumalo"), was the *de facto* manager of the Bar. A third person, who was charged with the murder but acquitted at the end of the State case, was the owner of the Bar.

The known facts are these. The building has a lift which runs from the thirteenth floor to the basement where the Bar is. The deceased was in the Bar on the night of 4 October 1987. He was not seen alive again. On 6 October 1987 one Simon Dube wanted to put some empty crates into the lift which was at the basement. It was used by the Bar as a service lift. He found the lift jammed. Eventually it was discovered that the body of the deceased, Cyril Pullen, was lying on top of the lift. His shoe had fallen off and his foot was in some unspecified way preventing the lift from moving.

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McNALLY JA

Further investigation revealed the following. The body had injuries consistent with a fall from a considerable height. The doctor who examined the body was not called, but his report reveals:

> "There is a compound fracture right leg bones being nearly all exposed through midway of the leg with laceration nearly all round. There is fracture in left upper arm (humerus). There is a very large abrasion over right thigh and the pelvis is fractured. The left wrist joint is dislocated, with superficial abrasions. There is forehead horizontal wound 4 cm above the right eyebrow."

In his comment the doctor said:

> "There seem to be no injuries suggesting use of knife or blows. This however would not rule out what appears to be the strong possibility of the deceased having been assaulted or involved in some fight."

Two other pieces of evidence complete the State case, apart from the statements by the appellants, to which I will refer later.

The first is that there were "bloodstains" on the "steps leading to the third floor", according to the investigating officer. Samples of these stains were sent for forensic examination but the results were apparently inconclusive and the forensic report was not produced. So we do not know whether the blood was animal or human. Indeed we do not know if it was blood at all. The significance of these stains is therefore speculative in the extreme.

The second item of evidence relates to a piece of wire found next to the lift-shaft on the thirteenth floor. It was shown that this piece of wire could have been used to open the lift door at a time when the lift was not there. So the conclusion is almost inescapable that that door was opened while the lift was at the basement, and that the deceased fell from there onto the roof of the lift.

It seems to me that the so-called "bloodstains" on the third floor steps may be ignored. So we are left with a number of possible hypotheses:

1. The deceased was assaulted and either killed or knocked unconscious and then thrown into the lift-shaft.

2. The deceased was pushed into the lift-shaft while still conscious and was killed by the fall.

McNALLY JA

3. The deceased committed suicide by throwing himself down the lift-shaft.

It is argued, against the third hypothesis, that when the lift door on the thirteenth floor was examined on 7 October 1987 it was closed. But it seems to me that that fact is not conclusive against the possibility of suicide. The deceased might have closed the door before jumping, or someone else, passing by on the fifth or sixth, might have noticed the open door and closed it.

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Equally, one might speculate that a murderer would have been likely to take away the piece of wire after using it to open the door. But again this is mere speculation.

These therefore are the facts. And at once, it seems to me, they raise the question - has there been compliance with the proviso to s 255B of the Criminal Procedure and Evidence Act [*Chapter 59*]?

The section reads:

> "Any court which is trying any person on a charge of any offence may convict him of any offence with which he is charged by reason of the confession of that offence proved to have been made by him, although the confession is not confirmed by other evidence:
>
> Provided that the offence has, by competent evidence other than such confession, been proved to have been actually committed."

Is there proof that Cyril Pullen was murdered? The evidence suggests strongly that he died as a result of a fall onto the roof of the lift from the thirteenth floor. But we are not concerned with evidence but with proof. Do the facts **prove** that he was murdered? It seems to me that the facts are consistent with murder, or with suicide, or, less probably, accidental fall.

I assume that when the Act speaks of "proof" it means "proof beyond a reasonable doubt"; but even if I am wrong in that, I am satisfied that, even on a balance of probabilities, it has not been proved that the deceased was murdered. Compare *R v Taputsa & Ors* 1966 RLR 662 (A) at 667E; *S v Dehwe* 1987 (2) ZLR 231 at 237D-F; *S v Dube* 1992 (1) ZLR (S) 234 at 236C.

That, however, is not the end of the matter. The law is clearly set out in *Taputsa supra*:

> "Where there is no evidence *aliunde* proving that the offence itself has

> been committed, the court must, in addition, go outside the confession and be satisfied that it is confirmed by other evidence."

The confirming evidence "need not directly implicate the accused in the offence" as long as it "corroborates the confession in a material respect".

I proceed to undertake that enquiry. I begin by setting out the statements of the two appellants. It may be noted in passing that, although they were confirmed, they were alleged by the appellants to be both untrue and made under physical compulsion. There was, moreover, some evidence to support these allegations.

The statement by the first appellant reads as follows:

> "I, Martin Maseko, do recall that on the 27th of September, 1987 I went to Zambezi Bar on the morning and I went to the office of which there was Theo and Tom, Sam, Timothy and me. At first they talked about the pay of the staff at Zambezi then after that Timothy went out and after he left Theo and Tom stated to me that there is plot to kill Cyril.
>
> They arranged that I, Martin, will go to Sam's house and Sam will give me a hammer and I, Martin, will take the

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hammer to a guy with the name of Agrippa, a coloured guy, and this Agrippa will kill Cyril on the Sunday night of the 4th of October. After being told that, I left the office and went back home. On the night of Saturday the 3rd October Sam told me to come to his house on the morning of the 4th October at about 9.00 am. Well, I didn't go there in the morning, I had to go there in the evening. When I got there Sam Khumalo gave me a hammer and $40 as for my help in this killing. After that I went back to Zambezi Bar and then I went inside and stood by the corner at the counter. I then saw three guys approaching me and one of them identified himself as Agrippa and this Agrippa asked me for a hammer I collected from Sam and I gave it to him as I was told to do so. He, Agrippa, was accompanied by two guys, a coloured and a black guy. After taking the hammer he put it inside his shirt and went outside. By that time Cyril came in and I saw him but (he) didn't talk to me. He went to the disco deck and came back and went outside the same moment. Whatever happened outside I can't recall 'cause I was inside Zambezi Bar playing disco until 11.00 pm.

By the time I was at Sam's house, Sam had told me that if this case gets discovered we tell the police that we know nothing about it. As for Agrippa

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McNALLY JA

he came back at about 10.00 pm that night when Cyril got killed and waved me goodbye and left."

The statement by the second appellant reads as follows:

"The start of the story of killing PULLEN, Tom CAHILL called me to the office and we sat down being myself, Martin and him, CAHILL. We built a story (formed the idea) that PULLEN should die. We started the story (idea) in September on a Thursday morning. Thomas CAHILL said to me PULLEN should die. I said yes, what is the problem. He said PULLEN is worrying, he is arguing with me about the disco and other things just different (and other various matters) and he said to me on a Sunday morning, Simon let us look for a person who shall kill PULLEN. I said, yes I have understood. CAHILL said to me, I have my person who is the one I trust. I said, yes. CAHILL said to me he was going to Botswana, it was on a Sunday morning at about 11.00 in the morning, and I (we) should not forget to do the job that PULLEN should die. I left and went home and I spent the day at home. At about 5.30 I went back to work. I gave the Bar cigarettes (tobacco) and hot (hard) stuff and other things just different (various things). I went back home (to my house). At about 7 pm Martin arrived at my house (and) at about 8 pm I gave him a hammer and $40. The hammer was to kill PULLEN. Martin went back to work. The hammer was given to BESAL who was the one supposed to do the job with a person who agreed with the European (to see to it that PULLEN dies).

Q. Did you see BESAL being given the hammer by Martin? Martin came to my house and I gave him a hammer and he went with it at work. I do not know who he gave. BESAL is a friend of CAHILL. I am used to seeing them playing together, that is why I think it was him who was given the hammer."

It should be explained that the person referred to as "Tom" or "Cahill" is Thomas Cahill, the third accused, who was acquitted.

There is something very odd about the statements. First, the idea of forming an *ad hoc* committee to discuss a murder is unusual. Second, it seems strangely careless to involve two people (the two appellants) in so peripheral a manner. Why not ask Agrippa (or Besal as he is sometimes called) to provide his own hammer? Two extra people are brought into a murder plot simply so that one of them can get a hammer from the other and hand it over to a third person!

McNALLY JA

But quite apart from that, the statements are not confirmed in a material respect. In fact, rather

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the reverse. Thus:

a. No hammer was ever found;

b. No attempt was made to show that the skull fracture was caused by a hammer;

c. Despite diligent efforts, Agrippa was never found; nor was Besal; nor was the "other coloured guy"; nor the "black guy"; and

d. Thomas Cahill, the alleged mastermind, was acquitted.

We do not even know that the hammer was used to kill the deceased (if he was killed as opposed to committing suicide or falling accidentally). If the hammer was not used, where does that leave the appellants?

Our conclusion was therefore that the statements (if one assumes they amount to confessions) were not confirmed in any material respect by other evidence. Nor was the crime of murder proved to have been actually committed by evidence other than the "confessions".

For these reasons we set aside the convictions and sentences and ordered the liberation of the appellants.

Korsah JA: I agree.

Ebrahim JA: I agree.

Pro Deo

MUNN PUBLISHING (PVT) LTD v ZIMBABWE BROADCASTING CORPORATION 1994 (1) ZLR 337 (S)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Civil appeal

24 March & 8 April 1994

Flynote

Contract - divisibility - test of - sale of by broadcasting corporation magazines containing details of radio and television programmes, together with obligation to supply programme information to new publisher - termination of one part of contract - when permissible

Contract - cancellation - notification - no provision allowing for termination on notice - when such termination permissible

Practice and procedure - declaratory order - when may be sought - principles - not necessary that actual

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dispute should exist nor that there should be no other remedy available

Headnote

In 1978, the respondent (the ZBC) sold the appellant two magazines published by it, *Look and Listen* and *Radio Post*. One of the terms of the contract of sale was that the ZBC would supply information about the programmes to be broadcast by it for inclusion in the magazines. The appellant would pay royalties to the ZBC on the number of copies sold. The only provision relating to the termination of the contract on notice was one which allowed the purchaser to give two months' notice of any decision to discontinue publication.

The ZBC was of the opinion that the agreement was terminable by either party upon reasonable notice and that the requisite mutual confidence and amicable association between the parties had broken down. It applied to the High Court for an order declaring that it was entitled to

cancel the agreement and that six months' notice would be reasonable.

The application was opposed on three grounds:

(a) relief by way of a declaratory order was not appropriate as no actual notice had been given by the ZBC to terminate the agreement;

(b) the agreement was one in perpetuity and was incapable of cancellation on notice;

(c) if the agreement was capable of cancellation on notice, 24 months was a reasonable period.

The judge *a quo* held that there was a real dispute between the parties which made it unnecessary for the ZBC to give notice before seeking a declaration of rights. He held that the agreement was one terminable on notice and that twelve months' notice was reasonable. On appeal, the appellant persisted in the submission that the ZBC was really seeking advice as to the consequences of giving notice and that the application for a declaratory order should have been dismissed. It was also argued for the appellant that the contract was not terminable on notice. The ZBC argued that the entire agreement was terminable on notice and that consequent on termination it was entitled to publish the magazines, together with the cessation of its obligation to provide information. Alternatively, it argued that the agreement contained two separate and divisible components and that it was permissible to cancel one part and leave the other intact.

Held, that the condition precedent to the granting of a declaratory order is that the applicant must be an interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must relate to an existing, future or contingent right; the court will not decide abstract, academic or hypothetical questions unrelated to such interest. But the existence of an actual dispute between persons interested is not a statutory requirement to the exercise by the court of jurisdiction, nor does the availability of another remedy render the grant of a declaratory order incompetent.

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Held, further, that it is then incumbent on the court to decide whether or not the case is a proper one for the exercise of its discretion. A proper case is one where some tangible and justifiable advantage in relation to the person's position with reference to an existing, future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought. The decision of the judge *a quo*, that the question was not hypothetical or abstract but formed a real and tangible dispute between the parties, could not be faulted.

Held, further, that an agreement silent as to its duration may still be terminable on notice. Whether it is or not depends on the true construction of the agreement. The intention of the parties is determined in the light of all the admissible evidence and in the light of what the parties have said or omitted to say in their agreement. There is no presumption either way, and the onus is on the party who asserts that the parties intended something which they omitted to state expressly to show that this was so.

Held, further, that a contract cannot be said to be indefinite in its duration when all the parties contracted for was a temporary arrangement or where the agreement required the parties to work closely together and to have mutual trust and confidence. Where an agreement is silent as to its duration, it is terminable on reasonable notice in the absence of a conclusion that it was intended to continue indefinitely. The inclusion of specific grounds for termination does not in itself exclude termination on notice. The intention of the parties is paramount.

Held, further, that the judge *a quo* had erred in declaring that the ZBC was entitled to terminate the entire agreement on reasonable notice, because of the substantial difficulty of the parties being able to restore the *status quo ante*.

Held, further, that the test to be applied to determine the divisibility of the agreement was whether each portion of the agreement stood separate and apart from the other and whether the termination of one would affect the very nature, substance or viable existence of the other. In this case, the sale of the magazines could not be severed from the obligation to provide the details of the ZBC's programmes. In the absence of that information, the substratum of the sale of the magazines would be virtually, if not entirely, destroyed. Other aspects of the agreement also pointed to its indivisibility, such as the provisions which specified when either party might be entitled to cancel the agreement.

Held, further, that the inference that the contract was terminable on reasonable notice because it was dependant on mutual confidence was negated by the existence of express provisions for the termination of the agreement in defined circumstances. One such provision made it clear that only the purchaser could by notice end the agreement.

Cases cited:

United Watch & Diamond Co (Pty) Ltd & Ors v Disa Hotels Ltd & Anor 1972 (4) SA 409 (C)

Milani & Anor v SA Medical & Dental Council & Anor 1990 (1) SA 899 (T)

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Anglo-Tvl Collieries Ltd v SA Mutual Life Assurance Soc 1977 (3) SA 631 (T)

Ex p *Nell* 1963 (1) SA 754 (A)

Gelcon Invtms (Pvt) Ltd v Adair Properties (Pvt) Ltd 1969 (2) RLR 120 (G); 1969 (3) SA 142 (R)

Adbro Invtm Co Ltd v Min of the Interior & Ors 1961 (3) SA 283 (T)

Reinecke v Inc Gen Insurances Ltd 1974 (2) SA 84 (A)

Lawson & Kirk (Pty) Ltd v Phil Morkel Ltd 1953 (3) SA 324 (A)

Ex p *Ginsberg* 1936 TPD 154

Levin's Exor v Seliger 1941 WLD 49

Crediton Gas Co v Crediton UDC [1928] Ch 447 (CA)

Staffordshire Area Health Authority v South Staffordshire Waterworks Co [1978] 3 All ER 769 (CA)

Re Spenborough UDC's Agreement [1967] 1 All ER 959 (ChD)

Winter Garden Theatre (London) Ltd v Millenium Productions Ltd [1947] 2 All ER 331 (HL)

Richardson & Anor v Koefod [1969] 3 All ER 1264 (CA)

Martin-Baker Aircraft Co Ltd & Anor v Canadian Flight Eqpt Ltd [1955] 2 All ER 722 (QB)

JH Milner & Son v Percy Bilton Ltd [1966] 2 All ER 894 (QB)

Re *Berker Sportcraft Ltd's Agreements* (1947) 177 LT 420 (KB)

Sasficor Ltd v Datsun Motor Vehicle Distributors (Pty) Ltd (TP, unreported, 27 February 1973)

Trident Sales (Pty) Ltd v AH Pillman & Son (Pty) Ltd 1984 (1) SA 433 (W)

Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd & Other related Cases 1985 (4) SA 809 (A)

Outeniqua Produce Agency v Machanick 1924 CPD 315

Salzwedel v Raath 1956 (2) SA 160 (E)

Brown v Hayden 1931 CPD 70

Decro-Wall Intl SA v Practitioners in Mktg Ltd [1971] 2 All ER 216 (CA)

Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd 1984 (1) SA 443 (T)

A P de Bourbon SC for the appellant

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J C Andersen SC for the respondent

Judgment

Gubbay CJ: Pursuant to a written agreement entered into on 21 December 1978, the respondent sold to the appellant its two magazines entitled "Look and Listen" and "Radio Post", and undertook in terms of clause 11 thereof, to provide:

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> "...freely, timeously, fully and without further restriction all information available regarding both the titles, timings and content of all programmes, features and other productions to be broadcast on television and radio in Rhodesia (*sic*) and all the other topics and areas of information such as have been of assistance or use in the compilation and publication of the magazines prior to the effective date" (namely, midnight on 13 January 1979).

The purchase price payable by the appellant (which I shall henceforth refer to as "the purchaser") was $12 500 on the date of signing of the agreement and a further $12 500 on 1 July 1979, less the amount to be determined as at 13 January 1979, as equivalent to the total subscriptions received by the respondent ("the seller"), in advance of issues of the magazines to be supplied subsequent to such date (see clause 4). Additionally, under clause 5, the purchaser was obliged, within twenty days of the last day of each month with effect from 31 January 1979, to pay the following royalties on issues sold of "Look and Listen" or its successor in title:

(i) ten cents per one hundred copies up to monthly sales of 30 000 copies; and

(ii) twelve cents per one hundred copies in respect of monthly sales exceeding 30 000 copies.

It was further provided that the seller undertook to ensure that:

(a) all its obligations under the agreement would be performed by any successor (see clause 9);

(b) the purchaser retains the exclusive right to the information detailed in clause 11 (see clause 13); and

(c) for the first twelve months following the effective date, it would continue to advertise, free of charge, each magazine on both radio and television with the same volume, frequency and type of advertising, as it had during the preceding twelve months (see clause 17).

The purchaser, on the other hand, undertook to ensure that:

(a) all its obligations under the agreement in regard to either or both magazines would be performed by any successor (see clause 10);

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(b) it would only publish in either magazine reasonable criticism, not of a political or substantially unbalanced nature, relating to the content or type of programmes, features or other productions broadcast by the seller (see clause 14);

(c) in the event of it deciding to remodel or amalgamate the magazines or amalgamate either magazine with any other publication, it would publish substantially the same information with the same frequency as before (see clause 18); and

(d) "Look and Listen" or its successor will continue to be published on a weekly basis, unless to the reasonable satisfaction of the seller, it is not economically viable to continue weekly publication, in which event alternative arrangements in regard to the frequency of publication may be made (see clause 20).

Clause 19 deserves to be quoted in full. It reads:

> "Notwithstanding the provisions of clause eighteen above, the purchaser may in its discretion decide to discontinue the publication of the information of either or both the magazines and/or their successors, provided that two calendar months' notice in writing of such decision is given to the seller not earlier than the 2nd day of July, 1979, in which event:
>
> (a) if the discontinuance relates to Look and Listen or its successor, the royalties payable in terms of clause five hereof shall cease on the date of expiry of such notice; but
>
> (b) if the discontinuance relates only to Radio Post or its successor, the said royalties shall continue to be paid in full; and
>
> (c) the seller shall be entitled to publish or arrange the publication of a magazine in replacement of the discontinued magazine and the provisions of this agreement relating to such discontinued magazine, shall no longer be applicable."

Being of the opinion that the agreement is one terminable by either party upon the giving of a reasonable period of notice, and that the requisite mutual confidence and amicable association between them has broken down, the seller applied to the High Court for an order declaring (i) that it is entitled to

cancel the agreement; and (ii) that a period of six months would constitute reasonable notice.

The application was opposed on three grounds. First, relief by way of a declarator was not appropriate as no actual notice had been given by the seller to terminate the agreement. Second, the agreement is one in perpetuity incapable of cancellation on notice. Third, if the agreement is susceptible of cancellation on notice, a period of twenty-four months is reasonable in the circumstances.

The learned judge presiding held that there was a real dispute between the parties, making it unnecessary for the seller to give notice of an intention to terminate the agreement before seeking a declaration of rights from the court. He interpreted the agreement as one terminable on notice and issued a declarator to that effect, to which he added that a period of twelve months would constitute reasonable notice. The purchaser was ordered to pay the costs of the

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application.

In the appeal brought before this court, Mr *de Bourbon*, who appeared for the purchaser, persisted with the submission that in reality the seller was seeking advice as to the consequence of it giving notice of cancellation; and for that reason the court *a quo* ought to have dismissed the application.

Section 14 of the High Court of Zimbabwe Act 29 of 1981 (the wording of which conforms with s 19(1)(a)(iii) of the South African Supreme Court Act, 1959) provides that:

> "The High Court may, in its discretion at the instance of an interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

The condition precedent to the grant of a declaratory order is that the applicant must be an interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. See *United Watch & Diamond Co (Pty) Ltd &Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C) at 415 *in fine; Milani & Anor v South African Medical & Dental Council & Anor* 1990 (1) SA 899 (T) at 902G-H. The interest must relate to an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest. See *Anglo-Transvaal Collieries Ltd v S A Mutual*

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Life Assurance Soc 1977 (3) SA 631 (T) at 635G-H. But the existence of an actual dispute between persons interested is not a statutory requirement to an exercise by the court of jurisdiction. See Ex p *Nell* 1963 (1) SA 754 (A) at 759H-760A. Nor does the availability of another remedy render the grant of a declaratory order incompetent. See *Gelcon Investments (Pvt) Ltd v Adair Properties (Pvt) Ltd* 1969 (2) RLR 120 (G) at 128A-B; 1969 (3) SA 142 (R) at 144D-F.

This, then, is the first stage in the determination by the court.

At the second stage of the enquiry, it is incumbent upon the court to decide whether or not the case in question is a proper one for the exercise of its discretion under s 14. What constitutes a proper case was considered by WILLIAMSON J in *Adbro Investment Co Ltd v Minister of the Interior &Ors* 1961 (3) SA 283 (T) at 285B-C, to be one which, generally speaking, showed that -

> "...despite the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet nevertheless justice or convenience demands that a declaration be made, for instance as to the existence of or as to the nature of a legal right claimed by the applicant or of a legal obligation said to be due by a respondent. I think that a proper case for a purely declaratory order is not made out if the result is merely a decision on a matter which is really of mere academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant's position with reference to an existing future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought."

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See also *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 93D-H.

In casu, the learned judge applied his mind to whether, in the exercise of the discretion vested in him, he should deal with the issue or not.

I understood Mr *de Bourbon* to accept that it was not permissible for this court to interfere with the power to grant or refuse to grant a declaratory order which vested in the court a quo unless there had been a failure to exercise a judicial discretion. This is plainly so. See *Lawson & Kirk (Pty) Ltd v Phil Morkel Ltd* 1953 (3) SA 324 (A) at 332A; *Reinecke v Incorporated General Insurances Ltd supra* at 93H-94A.

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I am unable to fault the approach of the learned judge that the question as to whether the agreement is terminable upon reasonable notice was not hypothetical, abstract or academic but formed a real and tangible dispute between the parties, and that a declarator thereon in favour of either would be binding upon both and have the effect of reaching finality. See Ex p *Ginsberg* 1936 TPD 154 at 158; *Levin's Executor v Seliger* 1941 WLD 49 at 53.

In the result, I find the first submission advanced on behalf of the purchaser to be devoid of merit.

I turn now to the substantive issue of whether, having decided that "the dispute" was susceptible of resolution by way of a declarator, the learned judge was correct in holding as he did that the agreement, though of unspecified duration, is determinable on reasonable notice being given by one or other of the parties.

It cannot be doubted that an agreement silent as to its duration may yet be terminated upon reasonable notice. The *onus* is on the party who asserts the right to so terminate. There is no presumption either in favour or against perpetuity or terminability. The answer is dependent on the true construction of the agreement, which will require careful scrutiny.

There are several examples of agreements of indefinite duration being held determinable by either party on reasonable notice. An agreement to supply gas to a public authority in such quantities as it should require, or to discharge effluents into a public sewer, is one. See *Crediton Gas Co v Crediton Urban District Council*[1928] Ch 447 (CA); *Staffordshire Area Health Authority* v *South Staffordshire Waterworks Co* [1978] 3 All ER 769 (CA); Re *Spenborough Urban District Council's Agreement* [1967] 1 All ER 959 (ChD). A licence to occupy a theatre and to produce there stage plays, which gave to the licensee an option to extend the licence at stated intervals but which contained no provisions for determination by the licensor, was another. See *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd* [1947] 2 All ER 331 (HL). Similar constructions were adopted in the cases of agreements between employee and employer - see *Richardson & Anor v Koefod* [1969] 3 All ER 1264 (CA); between principal and agent - see *Martin-Baker Aircraft Co Ltd & Anor v Canadian Flight Equipment Ltd* [1955] 2 All ER 722 (QB); and between solicitor and client in respect of an indefinite retainer 1 see *JH Milner & Son v Percy Bilton Ltd* [1966] 2 All ER 894 (QB).

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On the other hand, notice to terminate was held inoperative in Re *Berker Sportcraft Ltd's Agreements* (1947) 177 LT 420 (KB), even though the nature of the agreement implied a high degree of mutual confidence and satisfaction in the relationship between the parties, who were, respectively, a dress designer and a manufacturer of ladies' clothing. Similarly, in *Sasficor Ltd v Datsun Motor Vehicle Distributors (Pty) Ltd* (an unreported decision of the Transvaal Provincial Division delivered on 27 February 1973), where the agreement was expressed to be of an unlimited period and could be cancelled only in certain specified circumstances, DE KOK J had little difficulty in concluding that it could not be terminated by notice.

In *Trident Sales (Pty) Ltd v AH Pillman & Son (Pty) Ltd* 1984 (1) SA 433 (W), the agreement was expressed to be one that would continue indefinitely, and it contained express provisions for determination in certain circumstances but was silent on whether, outside those circumstances, it was truly perpetual or terminable by reasonable notice. COETZEE J, after an examination of the relevant English decisions, which he found to be of much persuasive force and in accordance with the principles of South African law, summed up their effect at 441D-G as follows:

> "(1) It is a question of construction of the agreement according to the ordinary principles of construction.
>
> (2) Since, however, such agreement, *ex hypothesi*, contains no express provision dealing with determination by the party who asserts that it should be inferred, it is a question of construction in the wider sense of ascertaining what the intention of the parties was when they entered into the agreement.
>
> (3) This intention is determined in the light of all the admissible evidence and in the light of what the parties have said or omitted to say in their agreement.
>
> (4) There is no presumption one way or the other.
>
> (5) The *onus* is on the party who asserts that the parties intended something which they omitted to state expressly to demonstrate that this was so."

Applying the aforegoing principles, the learned judge continued at 442C-E:

> "...it seems to me, applying the aforegoing principles, that the common

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> intention of the parties was most probably that the respondent was not entitled to determine the contract otherwise than in terms of clause 8.3 which is the applicable subclause. Under the heading 'duration' the parties evolved explicitly detailed machinery for determination of their contract by either of them. Unilateral determination by one of them was clearly considered and dealt with by providing that the applicant has this right upon three months' notice and omitting to give a similar right to the respondent. Instead, in the very next subparagraph, its right to terminate is tied to specifically described situations. The existence of these express provisions for its determination *prima facie* excludes any such implied power on the part of the respondent."

However, as the debate before him concentrated upon whether the notice was unreasonably short, COETZEE J refrained from finally determining the fundamental question of

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determinability. He was also of the view that as the agreement had to be construed in accordance with the principles he had catalogued "evidence will be admissible of surrounding circumstances to place the Court in thought in the same factual matrix as the parties were"; and that such evidence, were it available, "might throw a different light on their aim or object or commercial purpose when they entered into the contract" (see at 442F-G).

Further principles may be gathered from *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd & Other Related Cases* 1985 (4) SA 809 (A), in which SMALBERGER AJA (as he then was) said at 827H-828B:

> "They cannot be held permanently bound when all they contracted for was a temporary arrangement. Furthermore, when parties bind themselves to an agreement which requires them to work closely together and to have mutual trust and confidence in each other, of which the agreement under consideration is an example, it is reasonable to infer that they did not intend to bind themselves indefinitely, but rather contemplated termination by either party on reasonable notice. Where an agreement is silent as to its duration, it is terminable on reasonable notice in the absence of a conclusion that it was intended to continue indefinitely. The inclusion in the agreement of three specific grounds for termination does not exclude termination by reasonable notice. The logical consequence of an argument that only three specific grounds for cancellation of the agreement exist would be that, provided those grounds for cancellation do not arise, the agreement would continue indefinitely. This would not be a proper construction to place on the agreement as it ignores the intention of the

> parties when entering into the agreement, and such intention is paramount."

As pertinently observed in Christie *The Law of Contract in South Africa* 2 ed at p 522, it is unlikely that, in the quoted sentence relating to an agreement which is silent as to its duration, the learned JUDGE OF APPEAL intended to accept the presumption in American law in favour of determinability and against perpetuity, which COETZEE J showed in the *Trident Sales* case at 441G-442C does not have cogent arguments in its favour.

It is apparent from the founding and answering affidavits deposed to on behalf of the seller, as well as from the form of the draft order filed, that what was contended for was a declarator that the **entire** agreement, properly construed, was determinable upon reasonable notice; that consequent upon termination the seller was entitled to obtain the right to publish the two magazines, together with the cessation of its obligation to provide information. Put differently, the application drew no distinction between these two facets of the agreement. After professing some difficulty, the learned judge upheld the contention. He did so mainly, if not entirely, on the basis that the agreement contained no provision for a variation of the amount of royalties payable by the purchaser.

Mr *de Bourbon* argued that the agreement between the parties was one of sale *simpliciter*. He pointed to features which supported the proposition, namely: (i) the description of the parties as "the seller" and "the purchaser"; (ii) the reference to the two magazines as the subject matter; (iii) the purchase price of $25 000, being in essence the consideration payable for the right to publish; (iv) the obligation of the seller to provide information regarding its programming and the exclusive right (save for a few limitations) of the purchaser to publish such information in return for the payment of what is termed "royalties"; and (v) the passing of the risk and profit in the

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magazines to the purchaser, with the liabilities incurred prior to the effective date remaining the responsibility of the seller. In addition, counsel adverted to the breaches by either party which permit cancellation and, in particular, to clause 19. This allows the purchaser to discontinue the publication of either or both magazines on two months' notice, that is, to unilaterally terminate the agreement in part or in whole, in which instance the seller becomes entitled to publish the magazine/s in replacement of the discontinued magazine/s. Such a provision, so it was urged, was unnecessary if the agreement, on its true construction, is determinable by either party, or even just the seller, on reasonable notice.

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It was further submitted that whereas a court may shrink from holding a contract to supply goods or services continuously over an unlimited period of time for a fixed monthly or yearly payment to be one in perpetuity (see the *Staffordshire AHA* case *supra* at 775d-e, *per* LORD DENNING MR), the concept of royalties payable for the use of what is in the nature of copyright material is distinguishable. Moreover, the amount of the royalties in the present agreement is variable depending upon the number of copies of "Look and Listen" sold. The greater the circulation of that magazine, the greater the monetary return to the seller. Payment is for the use of the seller's copyright material, and not for any goods or services to be supplied.

Finally, on this aspect, reference was made to the self-evident observation of Professor Kerr in his work *The Principles of the Law of Contract* 4 ed at p 398 that:

> "Some contracts are, by their nature, not subject to termination by notice, eg sale."

It was not disputed by Mr *Andersen* that the learned judge *a quo* had erred in declaring the seller entitled to terminate the **entire** agreement between the parties by giving reasonable notice to the purchaser. Plainly inherent in such a declarator is the substantial difficulty of the parties being able to restore the *status quo ante*.

The argument advanced, with much ingenuity, was that the agreement contains two separate and divisible components: the sale of the two magazines being the one, and the continuous supply of programme information as set out in clauses 11 and 13, the other, with only the latter being determinable upon reasonable notice. Counsel placed reliance on those authorities which lay down that it may be permissible to cancel an independent part of a contract leaving the remaining part or parts intact and enforceable. See *Outeniqua Produce Agency v Machanick* 1924 CPD 315 at 319-320; *Salzwedel v Raath* 1956 (2) SA 160 (E) at 163F; Christie *op cit* at p 638.

I entertain doubt as to whether it is competent for the seller at this late stage of the proceedings to claim a different declarator from that specifically sought in its application and granted by the court *a quo*. Nevertheless, for the purposes of the appeal, I shall assume the propriety of such a course in its favour, especially as no objection was taken thereto by Mr *de Bourbon*.

It seems to me that the test to be applied is to determine whether the portions

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of the agreement are clearly and fairly divisible. Does each stand separate and apart from the other? Will the termination of the one affect the very nature, substance or viable existence of the other? If it does, then legal severability is not competent (see *Brown v Hayden* 1931 CPD 70 at 74) and, *prima facie*, could not have been envisaged by the parties when entering into the agreement. In Cheshire et al *Law of Contract* 11 ed at p 406, this concept is stated thus:

> "The parties themselves must have sown the seeds of severability in the sense that it is possible to construe the promise drafted by them as divisible into a number of separate and independent parts. If this is the correct construction, then one or more of the parts may be struck out and yet leave a promise that is substantially the same in character as that framed by the parties, though it will be diminished in extent by the reduction of its sphere of operation."

Both counsel submitted that the issue of severability was capable of resolution upon an interpretation of the agreement by linguistic treatment only; yet each urged that if the court were of the opinion that it was necessary to have regard to admissible evidence of surrounding circumstances, such circumstances would favour his contention.

In my view, the structure of the agreement and the language used are wholly inconsistent with an intention that the sale of the two magazines could be severed from the seller's undertaking, as set out in clauses 11 and 13, to provide the purchaser almost exclusively with all available information relating to the programmes to be broadcast on television and radio. In the absence of that information, the substratum of the sale of the two magazines is virtually, if not entirely, destroyed. What was sold was not merely the names of the two magazines, but the indivisible entity comprising the two magazines together with the right and ability to publish the seller's programmes therein. The purchase price was not only $25 000 but the royalties arising out of the sale of "Look and Listen".

Another important indication that the parties did not contemplate that the agreement would be divisible is to be found in clause 21, which reads:

> "In the event that either party commits a breach of its obligations in regard to clauses four, five, nine, ten, eleven, thirteen, fourteen, seventeen or eighteen, the other party shall be entitled to require suitable rectification of the breach within seven days of written notice of such requirement.

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> Failing such rectification, the other party shall be entitled either to cancel the sale of the magazines, without prejudice to any claim for damages which may exist, or to institute proceedings for such relief as it may deem fit."

The effect of this provision is that breaches by the purchaser of clauses 11 and 13 are stipulated to entitle the seller to cancel the sale of the magazines. This can only mean the entire agreement, because it is only in "Look and Listen" and "Radio Post", or their respective successors, that the purchaser is permitted to publish the seller's television and radio programmes. Without these two magazines the receipt of the information would be pointless. Furthermore, a breach by the purchaser of its undertaking to pay the second instalment of the

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purchase price under clause 4, or the royalties due in terms of clause 5, cannot be intelligently construed so as to restrict the seller's relief to a cancellation of "the sale" independently of a cessation of its obligation to continue to provide programme information.

Mr *Andersen* stressed that the nature of the agreement is one dependent upon mutual confidence, which suggests that the parties intended it to be determinable upon reasonable notice. Such an inference, however, may be negated by the existence of express provisions for the termination of the agreement in defined circumstances. This was recognised by JENKINS J in the *Berker Sportcraft* case *supra* at 428 where he said:

> "Under the agreements as they actually stand, the parties, no doubt for reasons which they deemed sufficient, did insert powers of determination, but powers exercisable only in certain particular events. It seems to me that the presence of those express powers excludes the implication...of any other power of determination. There is no reason in law why an agreement of this kind should not be made to continue so long as its results are mutually satisfactory to the parties from a financial point of view. That is what the parties here seem to me to have done, and I do not think that the fact that in the ultimate event one party or the other might find that they had been ill advised in binding themselves in this way by any means justifies the Court in reading into the agreement something which is not there, namely a general power to determine on notice, merely because the party in question might have been better advised to require its insertion."

This agreement also contains explicit machinery relating to termination. Clause 23 confers upon each party the right to cancel, failing rectification by

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the other of a defined breach. And, most importantly, clause 19 grants to the purchaser the unilateral power, at its discretion, to discontinue the publication of both magazines, provided two months' written notice is given to the seller. In short, only the purchaser may, by notice, end the agreement.

It is for the reasons mentioned that I find myself in respectful disagreement with the conclusion reached by the learned judge that the agreement is determinable upon notice. This makes it unnecessary for me to deal with the last argument as to whether, in the absence of actual notice being given by the seller, the court ought to have declined to assess what period was reasonable. See *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216 (CA) at 229h-j; *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1984 (1) SA 443 (T) at 453A.

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

> "The application is dismissed with costs".

McNally JA: I agree.

Ebrahim JA: I agree.

Surgey, Pittman & Kerswell, appellant's legal practitioners

Gollop & Blank, respondent's legal practitioners

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BHEKA v DISABLEMENT BENEFITS BOARD 1994 (1) ZLR 353 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

28 March & 8 April 1994

Civil appeal

Flynote

Appeal - right of - decision of Disablement Benefits Appeal Board - when appeal may be made to Supreme Court - State Service (Disability Benefits, Act [Chapter 274] - s 13(4) - limited to stated case on question of law

Court jurisdiction - Supreme Court - inherent jurisdiction limited to procedural field

Headnote

The appellant was injured while driving an army lorry. In terms of the State Service (Disability Benefits) Act he applied for disability compensation. The Disablement Benefits Board refused his application on the grounds that his injury had been caused by serious negligence or serious misconduct on his part. His appeal to the Disablement Benefits Appeal Board was unsuccessful. The appellant then appealed to the Supreme Court.

Held, that under the State Service (Disability Benefits) Act there was no right of appeal to the Supreme Court. The only right was to apply to the Appeal Board in terms of the s 13(4) of the Act for the Board to refer a point of law for determination by the Supreme Court. This latter application had not been made in the present case.

Held, further, that the Supreme Court's inherent jurisdiction extended only to procedural matters and, the court could not, therefore, set aside the Appeal Board's determination and remit the case to the Appeal Board to enable the appellant to present an application under s 13(4) of the Act.

Held, further, that even if the Supreme Court's inherent jurisdiction did allow it to remit the case to the Appeal Board, the exercise of this inherent

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jurisdiction is entirely discretionary and the court is not obliged to exercise it. In the present case there were a number of reasons why this discretion should not be exercised.

Cases cited:

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McTaggart v Disabled Benefits Bd 1975 (1) RLR 53 (A)

Chunguete v Min of Home Affairs & Ors 1990 (2) SA 836 (W)

A M T Mutsonziwa for the appellant

Miss A M Gowora for the respondent

Judgment

Gubbay CJ: On 12 January 1992, Lance-Corporal Bheka (who, somewhat inappropriately, I shall refer to as "the appellant"), a motor vehicle driver in the Zimbabwe National Army stationed at Masvingo, was assigned the duty of collecting a quantity of asbestos pipes from an industrial site in Harare. A military troop-carrier type of vehicle was made available for that purpose and he departed, accompanied by L/Cpe Madzikatire.

On the outward journey the appellant had the brakes of the vehicle attended to at a private garage in Chivhu before proceeding to Harare, where he and his colleague spent the night.

The following day, after loading the piping onto the vehicle, the appellant and L/Cpe Madzikatire commenced their return journey. At 1400 hours, when about sixty kilometres from Masvingo and while traversing a straight stretch of road at a speed of between 45 and 55 km/h, the appellant encountered a motor vehicle ahead of him proceeding in the same direction. It was travelling at a slightly slower speed than he was. In the course of attempting to overtake, the appellant was confronted by an oncoming vehicle. He swung the troop-carrier to the left hand side of the road, overtaking the vehicle in front of him on its left hand side. Almost immediately the appellant's vehicle struck a bump in or near a water drain, as a result of which the unsecured load of pipes at the rear of the troop-carrier was propelled forward. One of the pipes struck the appellant, severing his left arm above the elbow. The vehicle then overturned further along the road.

Although it was accepted that the appellant's injury and consequent disablement arose out of and in the course of his official duties, the Disablement Benefits Board ("the Board"), acting in terms of s 4(3)(a) of the State Service (Disability Benefits) Act [*Chapter 274*], refused his application for an award of compensation. In its opinion the injury had been caused by "serious negligence or serious misconduct" on the appellant's part.

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The appellant was aggrieved by the decision. Pursuant to s 12(1) of the Act, he noted an appeal to the Disablement Benefits Appeal Board ("the Appeal Board"). At that hearing, the legal practitioner representing the appellant only challenged the finding of serious negligence or serious misconduct. A contention was not advanced, in the alternative, that s 4(3)(a) of the Act permitted the Board, in the exercise of its discretion, to award compensation purely on compassionate grounds.

The chairman of the Appeal Board, in a closely reasoned and well constructed judgment, delivered on 28 July 1989 and concurred in by his two members, dismissed the appeal. It was found that the appellant had set off from Masvingo knowing that the troop-carrier vehicle he was

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driving had defective brakes; that the insufficiency of the braking system had manifested itself *en route* and had failed at the critical moment at which the appellant was attempting to overtake the vehicle ahead, culminating in the accident which caused the loss of his left arm. Reliance was placed on the admissions contained in the statement made by the appellant to the Board of Enquiry on 29 January 1982. In the words of the chairman:

> "Notwithstanding it was his duty to report the defective brakes to the transport officer and not to undertake the journey in that particular vehicle until the brakes had been remedied, the appellant, for some reason best known to himself, disregarded his duty in that respect. He knew he had to undertake a lengthy journey, returning with a heavy load of pipes and he must have appreciated that if the defective brakes were not remedied, before he left Masvingo there was a real possibility that they might eventually fail or that he might find himself in a situation where it was imperative to have efficient brakes to avoid an accident. But instead he chose to take upon himself a wholly unnecessary risk. Furthermore, on the journey to Harare it was apparent that the brakes were not operating satisfactorily and it was his duty to report to the authorities in Harare and have them remedied before continuing his journey, which he obviously did not do.
>
> With respect, it seems to me that to deliberately ignore standing orders in this manner is not slight or trifling but serious misconduct to which the cause of the accident, injury and subsequent disablement is ultimately attributable."

In due course an appeal was noted to this court. At the hearing, and in compliance with the request received via the registrar, both counsel addressed

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argument on whether the State Services (Disability Benefits) Act gave a right of appeal to the Supreme Court from a decision of the Appeal Board.

It is apparent from an examination of the Act that the sole avenue to the Supreme Court from a matter coming before the Appeal Board is under s 13(4). It reads:

> "Where in the opinion of the Appeal Board any matter to be determined by it rests wholly or partly on a point of law, the Appeal Board may on application by the appellant or the Board state a case for the determination of such question of law by the Supreme Court." (c)

This provision envisages that where a matter brought before the Appeal Board concerns a point of law, the Supreme Court becomes involved in an advisory capacity if a case is stated to it. The application to state a case must be made to the Appeal Board by either the appellant or the Board. Once made, the Appeal Board is vested with a discretion whether to grant or refuse the application. Obviously it will not state a case if of the opinion that the point of law is of a trivial nature or one directly covered by judicial authority. Nor will it state a case *mero motu*. What is plain is that the application to the Appeal Board must be made during the hearing of the matter and precede its determination of the appeal. It cannot be moved once the appeal has been upheld or dismissed. Upon referral, the Supreme Court sits as a court of first instance and does not exercise appellate jurisdiction. See *McTaggart v Disabled Benefits Board* 1975 (1) RLR 53 (A). After the stated question of law has been answered, the hearing before the Appeal Board is resumed. It is that body which must then render its decision on the appeal before it.

No such application was made to the Appeal Board, either on behalf of the appellant or the

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Board. Consequently access to this court under s 13(4) was lost.

Mr *Mutsonziwa*, who appeared for the so-called appellant, correctly conceded that the decision of the Appeal Board was final and that the present appeal had been improperly enrolled. He sought to argue, however, that in the exercise of this court's inherent jurisdiction it should set aside the decision of the Appeal Board and remit the appeal to it, thereby enabling the appellant to present the requisite application under s 13(4).

The nature of the inherent jurisdiction of a superior court was recently the subject of a scholarly exposition by FLEMMING J in *Chunguete v Minister* of

Home Affairs & Ors 1990 (2) SA 836 (W). After referring to a number of English and South African authorities, the learned judge came to the conclusion that such jurisdiction is limited to the procedural field. At 848G-H he explained this as follows:

> "What is appropriately called the 'inherent jurisdiction' is related to the Court's functioning towards securing a just and respected process of coming to a decision and is not a factor which determines what order the Court may make after due process has been achieved. That is a function of the substantive law. The Court-always-is charged with holding the scales of justice. It is not within its task to add weights to the scales by detracting from a right given by the substantive law or granting a right not given by the substantive law."

See also Taitz *The Inherent Jurisdiction of the Supreme Court* at p 55, para (d).

Upon an application of that approach, which I respectfully adopt, it seems to me that due process, being a function of the substantive law, was duly achieved. The appellant had the statutory right to request the Appeal Board to state a case, but omitted to do so. For whatever reason, whether by deliberation or neglect, he forfeited that right. He allowed the Appeal Board to dispose of his appeal without endeavouring to ensure that it obtained guidance. Finality was reached under its decision. This court has now no power to intervene, for the linkage to pending proceedings which is of paramount and decisive importance, has ceased.

In any event, and in case I am wrong in this, it should be noted that a superior court is not obliged to exercise its inherent jurisdiction. To do so is entirely discretionary. Much will depend upon the particular factual situation. See, *Taitz*, op cit, at 55, para (b).

Assuming, then, that this court is empowered to exercise a discretion, I consider that it should decline to do so for several reasons. The first is that the right which the appellant is seeking to resurrect was lost by his own hand. The second is that the Appeal Board gave its decision as long ago as 28 July 1989. On the ground of public policy there must be finality to legal proceedings, whether criminal or civil. The maxim "*interest reipublicae ut sit finis litium*" pertains. Third, the former chairman of the Appeal Board has now retired, so that to remit the appeal would mean, in effect, that it would have to be heard *de novo* before a differently constituted body, with the appellant testifying

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once again. Fourthly, the decision of the Appeal Board to dismiss the appeal appears on a careful perusal of the record to have been justified. The final reason is that counsel who appeared for the Appeal Board firmly resisted the relief sought. The attitude of the other party to the proceedings is always a relevant factor in the consideration of whether to grant an indulgence.

Since this court has no jurisdiction to entertain the appeal it is struck off the roll. In accordance with Miss *Gowora's* indication as to the attitude of the respondent, there will be no order as to costs.

McNally JA: I agree.

Korsah JA: I agree.

Pro Deo

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

TUMBARE v DIRECTOR OF CUSTOMS & EXCISE & ANOR 1994 (1) ZLR 359 (SC)

Court **High Court, Harare**

Smith J

10 March & 13 April 1994

Action for vindication of property

Flynote

Customs and excise - goods sold after having been declared forfeit to State - whether owner can vindicate goods from bona fide purchaser

Property and real rights - vindicatory action - limitation on - property mistakenly declared forfeit by Customs officer and sold to bona fide purchaser - vindication not possible

Sale property mistakenly declared forfeit to the State - whether owner can vindicate property from bona fide purchaser

Headnote

Acting in accordance with his statutory powers, a customs officer had declared a motor vehicle to be forfeited to the State because of non-payment of duty and a penalty. When the official declared the vehicle to be forfeit, he was acting on a mistaken basis because he had already granted an extension of time to pay the duty and penalty.

Held, that the declaration that the vehicle be forfeited to the State could not be set aside on the

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basis of the carelessness of the official in making the declaration and the owner of the vehicle was not entitled to recover the vehicle from a person who had purchased in good faith the goods which had been declared forfeit. The remedy of the owner in such circumstances was to claim damages against the Department of Customs for the loss suffered as a result of the careless performance of his duties by the customs officer.

SMITH J

Cases cited:

Ronnies Motors (Pty) Ltd & Ors v van der Merwe & Anor 1960 (4) SA 206 (E)

Smith v Inner London Education Authority [1978] All ER 411 (CA)

Kotze v Prins (1903) 20 SC 159

Laker Airways Ltd v Dept of Trade [1977] 1 QB 643

Mining Comr of Johannesburg v Getz 1915 TPD 323

Roberts & Letts v Fynn 1920 AD 23

E Chatikobo for the applicant

J B Colegrave for the first respondent

J Devittie for the second respondent

Judgment

Smith J: The applicant instituted this action claiming an order that the sale by the first respondent to the second respondent of a motor vehicle (Ford Courier pick-up registration Nos RKT283T and ZPH570T) be declared null and void and that the second respondent restore that vehicle with keys and documents to the applicant.

The facts leading up to the sale are not in dispute. The applicant bought the vehicle in the Republic of South Africa on 19 September 1992. On 27 September he brought it into Zimbabwe on a temporary import licence or permit. Whilst in Zimbabwe it developed a mechanical fault so he left it with his brother-in-law, Kufaruwenga, to be repaired. On 12 November it was seized at a road block. Kufaruwenga was given a "Receipt for Item Held". He notified the applicant of the seizure. As the applicant was in the process of moving house from Botswana to Zambia he could not come to Harare until 2 February 1993. On that day he and Kufaruwenga visited the customs office. He produced the receipt which had been issued to Kufaruwenga when the vehicle was seized and the registration book relating to the vehicle which showed that the vehicle was in fact his. A notice of seizure was then issued stating that the vehicle had been seized from him and indicating that it replaced the receipt that had been issued on 13 November 1992 to Kufaruwenga. On 4 February 1993 the applicant wrote to the first respondent asking if the temporary import permit could be extended. The first respondent refused to do so

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and pointed out that the vehicle was liable to forfeiture. However he said that he was prepared to release the vehicle from seizure if duty amounting to $23 507,85 and a fine of $4 702 was paid by 5 August 1993. The deadline was subsequently extended to 6 September 1993. On that date, Kufaruwenga paid the amount demanded, ie $18 209,85, and was issued with a certificate authorizing the release of the vehicle and the car

keys. However, when he was going to collect the vehicle he saw it being worked on by mechanics at a garage he happened to pass. He subsequently discovered that the vehicle had been sold to the second respondent.

The first respondent states that the receipt was issued to Kufaruwenga pending the production of a temporary import permit for the vehicle within two weeks. When the permit was not produced a notice of seizure dated 25 November 1992 was issued which was sent to Kufaruwenga by post. At that time a file was opened in the name of Kufaruwenga. When a second seizure notice was issued on 5 February after the visit of the applicant, a second file was opened in the applicant's name. In relation to the first file, he was awaiting representations from Kufaruwenga for the release of the vehicle. Representations were not received within six months, so on 6 July 1993 he wrote to Kufaruwenga. No response was received and so, on 10 August 1993, he declared the vehicle forfeit in terms of s 176 (10) of the Customs and Excise Act [*Chapter 177*](hereinafter referred to as "Chapter 177") and directed that it be sold by tender. The vehicle was sold on 1 September 1993. The first respondent conceded that the applicant had made written representations concerning the release of the vehicle and that he had told the applicant that he would release the vehicle if duty and a fine were paid before 5 August. The period was later extended to 6 September when the duty and fine were in fact paid. He also conceded that a mistake had been made. It was because two files had been opened in two different names for vehicles with different registration numbers. He submitted that the second respondent had acquired the vehicle lawfully after winning the tender to purchase the vehicle. In fact the second respondent did not win the tender. Someone else did and the second respondent paid him $4 000 for the right to purchase the vehicle. The first respondent tendered $28 209,85 as a refund to the applicant and handsomely said that the applicant was at liberty to purchase the vehicle from the second respondent on any agreeable terms. The second respondent purchased the motor vehicle. A friend of his won the tender to purchase the motor vehicle from the Department of Customs and Excise but could not raise the $26 500 he had tendered. The friend agreed to let the second respondent purchase the vehicle if the Department of Customs and Excise agreed thereto. Agreement was obtained and the second respondent paid $26 500 for the vehicle. He also paid his friend $4 000 for giving him the tender. After he had taken delivery of the vehicle he was told that there had been a mix-up and was asked if he would return the vehicle. He said he would but, because substantial repairs to the vehicle had been carried out, he wanted $55 000. He received a letter dated 13 September 1993 confirming that the first respondent would refund $55 000 to him on his surrendering the vehicle.

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The following day he was told that the first respondent could not pay him $55 000 for the vehicle. Then on 20 September police came to his house and seized the vehicle. He was told that the police were investigating the activities of certain customs officials in connection with the sale of the vehicle. When e tried to recover the vehicle he was informed that a provisional order had been issued on 22 September requiring him to surrender the vehicle to the police for safe keeping.

Mr *Chatikobo* submitted that the applicant, being the owner of the vehicle, is entitled to vindicate his property from the second respondent - *Chetty v Naidoo* 1974 (3) SA 13 (A). It is common cause that the applicant was the owner of the vehicle at the time it was seized. He was asked to pay duty and the penalty by 5 August, which date was later altered to 6 September. He paid on that date and was given an authority for the release of the vehicle and the keys of the vehicle. When the first respondent declared the vehicle to be forfeit his decision was based on an erroneous appreciation of the facts because on that same date he had granted the applicant an extension of time to pay the duty and penalty. Therefore the decision is null and void: *Ronnies Motors (Pty) Ltd & Ors v van der Merwe & Anor* 1960 (4) SA 206 (E) and *Smith v Inner London Education Authority* [1978] All ER 411 (CA).

Mr *Colegrave* this argued that although there appeared to have been "an administrative muddle of quite unusual proportions", the vehicle was undoubtedly liable to forfeiture and it had been duly declared forfeit and sold to the second respondent. Whilst the applicant may have a claim for damages against the first respondent, which has not been sought in this action, there is no basis for declaring the forfeiture and sale of the vehicle to be null and void. Mr *Devittie* argued that a person who has purchased an article of another from the fiscus is not liable to an action at the suit of the owner where the article sold has devolved upon the fiscus by virtue of a confiscation: *Kotze v Prins* (1903) 20 SC 159.

It is not disputed that the vehicle was lawfully seized and that the seizure notice dated 25 November was issued in accordance with the provisions of s 176 of Chapter 177. The second seizure notice that was issued on 5 February should not have been issued as the vehicle had already been seized and a seizure notice issued. The declaration that the vehicle had been forfeited to the State in terms of s 176(10) of Chapter 177 was made in accordance with the provisions of s 176 of Chapter 177. The question to be decided is whether the fact that the first respondent told the applicant that he would release the vehicle from seizure if the duty and fine were paid before 6 September nullified his declaration of forfeiture. I do not think so.

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In *Smith v Inner London Education Authority supra* it was held that the courts were entitled to interfere with a decision of a local education authority only where it had exceeded or misused its powers, had misdirected itself in fact or in law or had exercised its discretion wrongly or for no good reason. At p 415 LORD DENNING MR expressed himself as follow:

> "As the case proceeded, it became apparent that there is an important question under discussion: to what extent are the courts of law entitled to interfere with the decisions of the executive branches of government, local or

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> national? It is clear that, if the education authority or the Secretary of State have exceeded their powers or misused them, the courts can say 'Stop'. Likewise, if they have misdirected themselves in fact or in law. I go further. If they have exercised their discretion wrongly, or for no good reason, then too the courts can interfere."

Similar views were expressed in *Laker Airways Ltd v Department of Trade* [1977] 1 QB 643. In that case, at p 706, LORD DENNING MR referred to two outstanding cases where the House of Lords had shown that when discretionary powers were entrusted to the executive by statute, the courts could examine the exercise of those powers to see that they were used properly and not improperly or mistakenly. By "mistakenly" he meant under the influence of a misdirection in fact or in law.

In the *Ronnies Motors* case *supra* the court set aside a decision of the Administrator because the material on which he reached his decision was a false statement made by another person. He was seriously misled and he was not in a position to apply his mind properly to the question he had to decide.

In this case what happened was due to a mistake made by the first respondent. When he considered the papers in the file that had been opened in the name of Kufaruwenga, he decided to declare the vehicle forfeited to the State. In doing so he acted within the powers conferred on him by s 176 (10) of Chapter 177. However, had he realised that the second file in the name of the applicant related to the same vehicle, I am sure that he would not have declared the vehicle to be forfeited because he had said that he would not do so if the duty and fine were paid by 6 September. Had it not been for the fact that the vehicle was sold, I would have had no hesitation in setting aside the forfeiture on the grounds that the first respondent had not applied his mind properly to the question of forfeiture. He did not have all the relevant facts before him when he made his decision. However, in this case a third party has purchased the vehicle and there is no allegation that the sale was *mala fide*. There were one

or two strange happenings - the vehicle was handed over to the second respondent after the sale and yet he was not given the keys because they were subsequently given to the applicant, and the vehicle disappeared quickly overnight from the garage where it was being repaired - but there is no allegation or proof that the sale was not *bona fide.* According to the second respondent, the police did investigate the matter. I consider that the order of forfeiture should not be set aside merely because of the carelessness displayed by the first respondent. In *Mining Commissioner of Johannesburg v Getz* 1915 TPD 323 the court was considering an appeal from a judgment of Wessels J (as he then was) who had refused to allow the mining commissioner to make the application in question. One of the reasons given by the learned judge for his decision was expressed as follows:

> "Apart from any special law upon this matter I do not think it is advisable to allow an officer to exercise his discretion and make a grant and then, after having done so, to come to Court and to ask that what he has done should be set aside on the ground of his own carelessness or ill - use of his discretion. It seems to me that such a practice is not advisable on the ground of public policy, for a grantee would, under such circumstances, never be sure of his title."

I concur with the views set out above. Once an official such as the first respondent has made a

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determination which is in accordance with his statutory or other powers and members of the public have acted *bona fide* on the basis of that determination and acquired rights or liabilities, the determination should not be set aside merely because of some carelessness on the part of the official. If any person suffers loss as a result of the carelessness of the official, his remedy is to sue for damages. In this case Mr *Colegrave* has conceded that the applicant may well have a good case against the first respondent for damages. However, as the applicant has not claimed damages in the alternate, it is not necessary for me to decide that issue.

There is, in my view, another reason why the sale of the vehicle to the second respondent should not be set aside. In Silberberg and Schoeman *The Law of Property* 3 ed the learned authors deal with the restrictions on the owner's power to vindicate. At p 302 they say that property sold at judicial sales cannot, after delivery in the case of movable or registration in the case of immovables, be vindicated from a *bona fide* purchaser. They go on at p 303 to say:

> "Voet is authority for the view that a person who has purchased an article

> of another from the fiscus is not liable to an action at the suit of the owner. In *Kotze v Prins* it was, however, pointed out that it is clear from the authority cited by Voet that this statement of the law is subject to the qualification that the goods must have devolved upon the fiscus by virtue of, for example, a confiscation, or as bona vacantia must have been sold by public auction."

This principle is also referred to in Wille and Millin *Mercantile Law of South Africa* 17 ed at p 162. After stating that where property is sold in execution of the judgment of a competent court, an indefeasible title is passed by delivery or transfer to a *bona fide* purchaser, the learned authors go on to say:

> "There is authority for saying that the same rule as to the conferring of an indefeasible title on a *bona fide* purchaser applies to sales under the authority of the fiscus, or public treasury of the country: see *Roberts & Letts v Fynn* 1920 AD 23 at 28."

In *Roberts & Letts v Fynn* 1920 AD 23 the Appellate Division was dealing with the question of whether the sale of an ox which had been found trespassing was valid. At p 28 INNES CJ said that counsel had argued that the ox was sold "under the authority of the Government; it was in effect a sale by the fiscus" and had quoted Voet 6.1.23 as an authority for the proposition that such a sale passed clear title to all property so disposed of. The learned CHIEF JUSTICE dismissed the submission on the basis that the sale of the ox was not a sale of the kind referred to. It was not a sale of Government or Crown property but a sale of private property, the proceeds of which went to the real owner.

There is an article by MJD Francis in (1964) 81 SALJ 252 dealing with pound sales in which reference is made to sales by the fiscus. At pp 252-3 the author says:

> "There are two possible categories of exception to an owner's right of vindication from an innocent purchaser into which pound sales may possibly fall, viz sales by the Fisc and sales at public market (*in publico emporio, vrije marktem, market overt*).

> Authorities for the first category, sales by the Fisc, are Matthaeus *de Auctionibus* 1.14.8 (also 1.16.33 and 1.18.2) and Voet *Commentarius ad Pandectas*, 6.1.23. The category is mentioned in modern textbooks, eg H G Mackeurtan,

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Sale of Goods in South Africa 3 ed (1949) p 46, Wille

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and Milling *Mercantile Law of South Africa* 15 ed (1963) p 121, and in *Roberts & Letts v Fynn* 1920 AD 23, and therefore appears to be established. However, it was decided in *Roberts & Letts v Fynn* that pound sales are not sales by the Fisc. It is not intended to dispute the correctness of this decision, but one may respectfully express regret that the Court did not deal with the point more thoroughly. The reason given by the Court was that pound sales are not sales of Government property and the proceeds of sale go to the owner, not the Fisc. The reason does not appear adequate. If the property sold by the Fisc was owned by the Government, the question of vindication by a third party would not arise. Accordingly, if the category consisted of sales by the Fisc of Government property, the category would not be an exception to an owner's right of vindication. If the Court meant that the category consists of sales by the Fisc of private persons' property by mistake at general sales of Government property (eg at sales of surplus Government stores), the category still would not include sales of unclaimed goods at the Railways, yet Mackeurtan (op cit p 46) mentions the latter as an example of the category."

In Corey Miller's *The Acquisition and Protection of Ownership* the limitations on the right of vindication are dealt with. At p 294 the learned author says:

"Voet, in his title on vindication, refers to the inavailability of the *rei vindicatio* in respect of things publicly sold 'by judge's order' and, in a subsequent section, in respect of sales by the fiscus. There could be no vindication from a *bona fide* party who had acquired in either context."

Then at p 297 he goes on to say:

"There is scant authority in modern law regarding fiscal sales and it seems that this exception to the right of vindication is of limited importance. In *Roberts and Letts v Fynn* the court was concerned with an irregular pound sale but Innes CJ defined a fiscal sale in rejecting a submission that the facts amounted to this:

> 'Mr *Phear* argued that, at any rate, this was a sale under the authority of the Government; it was in effect a sale by the Fiscus. ...But a sale under this Ordinance is not a sale of Government or Crown property ...It is in no sense a fiscal sale.'

It is submitted that the well-recognized principle of unimpeachability

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applying to sales in execution applies equally to official sales of government or state property. Provided the purchaser was in good faith - ie, did not have notice of the defect at the time of purchase - his position following delivery will be secure."

In a footnote the learned author refers to *Kotze v Prins , supra*, which he says concerned the title to a donkey bought at a Government sale. He mentions that in the judgment DE VILLIERS CJ said, "Although it is true that a person who has purchased anything from the fiscus is free from liability to third parties ...yet this is only true provided that the fiscus has sold it under a proper title and with the solemnities required by the law". He then comments that the "proper title" requirement seems open to question because it suggests that a fiscal sale is subject to the *nemo dat quod non habet* principle, but if that were so, there could be no exception to the owner's right of vindication. *Kotze's* case actually concerned a mule, not a donkey, which had been removed from a farm by some British soldiers and was subsequently sold at a public sale.

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The owner of the mule applied to court to vindicate his property. At pp 159-160 DE VILLIERS CJ said:

> "According to Voet (6.1.23), a person who has purchased the goods of another from the fiscus is not liable to an action at the suit of the owner, but the authority cited by him (Dutch Cons 4, 128, 2) does not support his view without an important qualification. Advising upon a case submitted to them, counsel there stated the law to be as follows:
>
> > 'Although it be true that a person who has purchased anything from the fiscus is free from liability to third parties, whatever remedy they might have against the fiscus, yet this is only true provided that the fiscus has sold it under a proper title and with the solemnities required by law, that is to say, when the goods have devolved on the fiscus by virtue of a confiscation, or as bona vacantia, and have been sold by public auction.'"

The learned CHIEF JUSTICE went on to hold that the owner was entitled to vindicate his mule because the acting magistrate who had purported to sell the mule did not represent the public treasury, there was no evidence that he had been authorized by the proper authorities to sell the mule and he took no steps, by obtaining a decree of confiscation or otherwise, to deprive the owner of his ownership. In the present case, all the three elements referred to by DE VILLIERS CJ did exist. The first respondent represented the fiscus, he was authorized by Chapter 177 to sell the vehicle and he declared the

vehicle to be forfeited, thus depriving the owner of his ownership. Therefore the applicant is not entitled to vindicate the vehicle.

It seems to me, with respect, that the criticisms voiced by M J D Francis and Carey Miller about the qualification by DE VILLIERS CJ in *Kotze's* case, that the fiscus must sell the property in question under a proper title, are valid. If the property is in fact owned by the State then the former owner would have no right to vindicate. I feel that the limitation upon the right of vindication which applies in the case of sales in execution must apply equally in the case of sales by the fiscus. Therefore the rights of a person who purchases property at a sale by the fiscus would be indefeasible even if there had been no order of forfeiture , as long as the sale was conducted in accordance with the statutory requirements. In this case, however, there was an order of forfeiture which was made in accordance with the statutory requirements.

The application is dismissed with costs.

V S Nyangulu & Associates, applicant's legal practitioners

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

Surgey, Pittman & Kerswell, second respondent's legal practitioners

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ZARANYIKA v COMMISSIONER FOR WAR VICTIMS & ANOR 1994 (1) ZLR 369 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

31 March & 22 April 1994

Flynote

War - compensation for injuries sustained - War Victims Compensation Act 22 of 1980 - compensation for disabled ex-combatant - s 8 - "normal occupation" - meaning

Headnote

A guerilla fighter had been badly injured in the liberation war. Before he had gone to join the guerillas, he had been a student. He had applied for compensation in terms of the War Victims Compensation Act 22 of 1980.

In terms of s 8 of the Act, the rate of compensation payable depended the nature of a person's normal occupation prior to the injury and whether or not the injured person had been compelled to change his normal occupation as a result of the injury.

Held, that in the case of a guerilla fighter, the phrase "normal occupation" must refer to that person's occupation other than his guerilla activities, as the occupation as a guerilla is an abnormal or exceptional occupation.

Held, therefore, that the Commissioner had correctly decided that the applicant's normal occupation prior to his injuries had been that of scholar or student.

Case cited:

Peake Trailer & Chassis Ltd v Jackson [1967] 1 All ER 172 (QBD)

Mrs J B Wood for the appellant

D P Carter for the respondents

Judgment

McNally JA: I will refer to the parties as "Mr Zaranyika", "the Commissioner" and "the Minister" respectively.

McNALLY JA

Mr Zaranyika was a combatant in the liberation struggle. He sustained a gun shot wound in his left hip in 1979. His use of his left leg was severely impaired and he was assessed as having an 83% disability for the purpose of calculating a pension in terms of s 8 of the War Victims Compensation Act 22 of 1980. His income for purposes of this calculation was assessed at a

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figure of $8 820 per annum.

In terms of s 28 of the Act Mr Zaranyika, being aggrieved, appealed to the Minister. He claimed that:

1. he should have been assessed at the higher rate provided in s 8(1)(b) rather than the lower rate provided in s 8(1)(a);

2. his children were entitled to allowances in terms of s 16 (1) of the Act;

3. his degree of disability should have been increased to 100% in terms of s 7(4) of the Act.

This appeal was dismissed. In terms of s 18 the Minister's decision "shall be final; provided that the Minister may at any time reconsider such decision". No such reconsideration has taken place. The Minister is not obliged to give reasons. See s 28(2).

Mr Zaranyika then took the Minister's decision on review to the High Court, alleging the decision was illegal or irrational.

Before this review hearing took place, Mr Zaranyika also made an application seeking to compel the respondents to produce certain documents and records. The two applications were heard together, by consent, and both were dismissed with costs by the Judge President on 1 September 1993.

Mr Zaranyika now appeals against the whole of that judgment. The grounds of appeal pursued in Mr Zaranyika's heads of argument were:

1. The court erred in finding that Mr Zaranyika's normal occupation was that of a student;

2. The court erred in holding that service with the ZANLA forces did not qualify as a "normal occupation" for the purposes of the War Victims Compensation Act (the Act).

It is necessary to consider the provisions of the Act in order to adjudicate upon these points. On the face of it, if Mr Zaranyika's contentions are correct, then the Minister has made an error of law and his decision was liable to be set aside on review. The appeal should, in those circumstances, succeed.

McNALLY JA

The Act was promulgated in November 1980 and was designed to provide compensation in respect of injuries to or the death of persons caused by "the war", which was defined to mean what is commonly called the liberation struggle. There is no doubt that Mr Zaranyika qualified as a "disabled person" for purposes of the Act.

The relevant sections for our purposes are as follows.

Section 8 provides, (omitting irrelevant parts), that -

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"a disabled person shall be entitled to a disablement pension calculated as follows:

(a) if the person carried on his normal occupation [a smaller sum calculated in terms of his earnings immediately prior to the date of his injury].

(b) if in the opinion of the Commissioner the person is compelled as a result of his disablement to change his normal occupation or to follow a lower standard of occupation" [a higher sum calculated in the same way but allowing a higher percentage].

Section 27 provides (again omitting irrelevant parts) that -

"...where any compensation payable in terms of this Act is to be calculated in relation to the earnings of any person, the Commissioner shall assess the earnings of that person by taking into account -

(a) in the case of a person employed by another, the income, either real or potential, including the value of free quarters, received by him in respect of such employment and any other income which the Commissioner considers to be relevant; and

(b) in the case of a person not employed by another, any income of his which the Commissioner considers to be relevant;

and where, in the opinion of the Commissioner, it is necessary to do so, the Commissioner may, for the purpose of calculating the earning of that person immediately prior to the 1st July, 1980, calculate his average income over such period, not exceeding four years, immediately prior to that date, as the Commissioner considers to be equitable in the circumstances.

(2) In assessing, in terms of subsection (1), the earnings of a person who, at the time of his injury or death, was under the age of twenty-five years or was employed under a contract of apprenticeship or learnership

GUBBAY CJ

the Commissioner shall calculate the income received by him or which would have been received by him had he been employed as being the income which, had he not been injured or died, he would, in the opinion of the Commissioner, probably have been receiving from employment -

(a) four years after the date of his injury or death; or

(b) in the case of a person who was employed under a contract of apprenticeship or learnership, had he been a journeyman or operator who had completed his apprenticeship or learnership at the date of his injury or death;

whichever calculation is more favourable to the person or any dependant to whom compensation is payable, as the case may be:

Provided that the amount so calculated shall not exceed the income which the person would, in the opinion of the Commissioner, probably have been receiving at the age of twenty-five years.

(3) In assessing, in terms of subsection (1), the earnings of a person who at the time of his death or injury was performing unpaid combatant duties, the Commissioner shall, for the purpose of calculating that person's potential earnings, have regard to the level of seniority and rank of that person in his military or guerilla service at the time of his death or injury."

The Commissioner considered that Mr Zaranyika fell under s 8(a) and assessed his earnings by reference to s 27(3).

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The main submission by Mrs *Wood*, who appeared for Mr Zaranyika, was Mr Zaranyika's normal occupation was that of soldier, and that he had, as a result of his injury, been compelled to change his normal occupation. Therefore he qualified for the higher rate of pension provided for in s 8(b).

One of the difficulties in interpreting s 8 of the Act is that it is not very clearly worded. One would expect, from the way it was framed, that it is intended to cover all eventualities. In other words, if a disabled person does not fall under (a) then he or she must fall under (b). But it is not at all clear that that is so. And the difficulty is compounded by the failure to define the critical phrase "normal occupation".

The facts are these. Mr Zaranyika was born on 25 January 1960. He is not very clear as to dates but he avers as follows:

GUBBAY CJ

> "The applicant left for the struggle after he had completed primary education and at the age of nineteen. He had been a *mujiba* for many years."

Yet he was injured when he was nineteen, in 1979, after, apparently, several years as a guerilla in Mocambique and in the field of battle. He "remained in the battle for years" to quote from his own affidavit. So he must have left school well before he was nineteen. However, this is not important. The fact is that he went from primary school to being a mujiba to being an unpaid guerilla.

He insists that it was his firm intention from an early stage to become a soldier in the regular army of Zimbabwe after the war. It is on this that he bases his contention that his "normal occupation" was "soldier" and that he was compelled, as a result of his disablement, to change his normal occupation.

Now, in the absence of any definition in the Act of "normal occupation" one must give the words their ordinary meaning in the context in which they are placed.

It has been said of the word "normally" (and the description must apply also to the word "normal"), that:

> "In my view the word 'normally' has a perfectly ordinary meaning which would be given to it by ordinary people in every day use, as a man might say - 'I normally get to the office every morning at nine-thirty but this morning I was delayed by fog and only arrived at ten o'clock.' In using the word 'normally' one is referring to something which is in contradistinction to abnormal or exceptional": *per* WIDGERY J (as he then was) in *Peake Trailer & Chassis Ltd v Jackson* [1967] 1 All ER 172 at 176.

The most relevant definition of "occupation" seems to me to be that in the *Oxford English Dictionary*:

> "The being occupied or employed with, or engaged in something; that in which one is engaged; employment; business."

I conclude that when the phrase "normal occupation" is used in a statute dealing with

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compensation for people caught up and injured in a guerilla war, it must refer to that person's occupation other than his guerilla activities. One's occupation as a guerilla is the abnormal or exceptional occupation. Otherwise there would be no point in the use of the word "normal."

McNALLY JA

I imagine that a regular soldier in the Rhodesian Forces who had joined the Army straight from school and had served for many years before becoming involved in "the war" could certainly claim that being a soldier was his "normal occupation". More rarely a professional mercenary who had fought all over the world, or a Che Guevara, might successfully claim that being a guerilla was his "normal occupation".

The fallacy in Mr Zaranyika's argument seems to me to be this. He says, in effect, "I had a fixed intention and ambition to join the regular army of Zimbabwe after the war. I was a guerilla in the liberation forces during the war. Therefore my normal occupation when I was injured was that of soldier".

If he had said "I had a fixed intention and ambition to become a nuclear physicist after the war", no one would conclude that his normal occupation at the time of his injury was that of nuclear physicist. There is a distinction between being a guerilla and being a member of the regular armed forces, just as there is a distinction between being a guerilla and being a nuclear physicist. He might never have been accepted into the Zimbabwe Armed Forces, even if he had not been injured. If he had been accepted into the Zimbabwe army he would have changed from his "abnormal occupation" as a guerilla to a normal occupation as a member of the regular army. In short, he was a guerilla. A guerilla is, by the very nature of his occupation, compelled to change his occupation when peace supervenes. What Mr Zaranyika is saying is that he hoped to join the regular army after the war. Perhaps he did. But that hope does not convert his guerilla career into a "normal occupation".

In my view, therefore, in an Act designed specifically to deal with people coming out of "the war" which is defined in s 2 of the Act as extending from 23 December 1972 to 29 February 1980, the words "normal occupation" must mean "occupation apart from involvement in the war". In considering that definition one must of course bear in mind that a person, fighting against the guerillas, who was in the Rhodesian regular army, would be defined as having the normal occupation of "member of the army" because that would be his normal occupation whether or not he was involved in the war. On the other hand a bricklayer on call-up would describe his normal occupation as "bricklayer".

I have not so far specifically addressed the word "occupation". It seems to me that, in terms of the dictionary definition to which I have referred, the word is wide enough to cover remunerative and non remunerative occupations. It

GUBBAY CJ

includes all activities in which a person is habitually engaged, whether that be student, scholar,

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bricklayer, nuclear physicist or contemplative nun. I note that in the Act the word is defined inclusively, ie it says - "occupation includes a profession, calling or trade".

In other words:

> "occupation means a number of things as well as a profession, calling or trade."

Since "profession, calling or trade" covers the spectrum of remunerative occupations, it is fair to conclude that the Act recognises the existence of non-remunerative occupations. And indeed, in the course of every day life one comes across official forms which have to be filled in and which contain the question "occupation?". It does no offence to language to write "student" or "scholar" in the space provided, if that be the fact.

Therefore I define "occupation" as used in the Act in the same way as it is defined in the *Oxford English Dictionary*.

Returning to the facts, the position is that after his injury Mr Zaranyika, unable to consider an Army career because of his disability, went back to school at Danhiko School, improved his educational qualifications, became a clerk in government employ, rose quite rapidly in the very department which deals with War Victims Compensation, and instituted these proceedings.

In the light of the interpretations I have placed upon the key words "normal occupation" it follows that I consider that Mr Zaranyika's "normal occupation" was not "guerilla" or "soldier" but "scholar" or "student". That is what he was doing when war broke out and that is what he abandoned temporarily to deal with the abnormal situation which was the liberation struggle. And indeed, he reverted to that occupation when he went back to school after the struggle.

In the circumstances he does, in fact, fit precisely into the definition in s 8(a) of the Act. He carried on his normal occupation as a student. He does not fit into the definition of s 8(b) of the Act because he was not compelled to (nor did he in fact) change his normal occupation or follow a lower standard of occupation.

He was correctly categorised as falling under s 8(a).

It follows that he was not entitled to the children's allowances under s 16(1)

McNALLY JA

because they are only payable when "a disabled person is compelled to change his normal occupation or to follow a lower standard of occupation".

His third claim was that he should have benefited under s 7(4) which gives the Commissioner a discretion to increase the degree of disablement on an equitable basis. It seems to me, however, that there is simply no basis for taking this point on review to the court. The Act provides for a procedure to be followed by anyone aggrieved by the determination of the Commissioner in this regard (s 7 (5)). He must act within six months. The matter must be referred to a Medical Board. The decision of the Medical Board "shall be final" (s 7 (7)(a)).

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None of this has happened. The court has thus no jurisdiction. It may be unfortunate, or even harsh, that the Commissioner did not exercise his discretion in favour of Mr Zaranyika. He may be willing to waive the six month time limit and allow Mr Zaranyika's case to be referred to a Medical Board. But that is not a matter on which we can adjudicate.

Finally, it must be said that there is nothing unfair or untoward in accepting that an occupation may be an unremunerative one. The reason for this is that s 27 of the Act allows the Commissioner to assess remuneration for someone whose normal occupation was, in fact, unremunerative. That is how Mr Zaranyika, who was a non-earning student, both before and after the armed struggle, was assessed to have had a notional income of $8 820 a year.

In the light of my findings above, and as held by the learned JUDGE PRESIDENT, the second application falls away. The appeals are dismissed with costs.

Gubbay CJ: I agree

Korsah JA: I agree

Scanlen & Holderness, appellant's legal practitioners

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

S v ISMAIL 1994 (1) ZLR 377 (SC)

Court **Supreme Court, Bulawayo**

McNally JA, Korsah JA & Ebrahim JA

6 & 22 April 1994

Criminal appeal

Flynote

Criminal procedure - trial - multiple accused - separation of trials - must be on application by prosecutor or accused - court has discretion whether to order separation - when separation will be ordered - Criminal Procedure and Evidence Act [Chapter 59] - s 182

Headnote

A court has a discretion in deciding whether to order that co-accused should be tried separately rather than jointly. This discretion must be exercised judicially. An appeal court will only interfere with the exercise of this discretion where the refusal to order separate trials has resulted in an improper prejudice and to a miscarriage of justice.

The trial court's exercise of this discretion should be pre-conditioned upon an application being made to the court by either the prosecutor or the accused.

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The fact that an essential part of one accused's defence will be to attack the evidence of his co-accused is a factor to take into account in deciding whether to order separate trials. However, there is no hard and fast rule that separate trials must always be ordered whenever one accused intends to attack a co-accused.

Separate trials may be ordered where the State intends to call an accused to testify against other co-accused after the first accused has been tried and sentenced.

It may also be appropriate to order separate trials where the evidence admissible against one of the accused will not be admissible against the others.

KORSAH JA

Cases cited:

R v Gibbons & Proctor (1918) 13 Cr App Rep 134

R v Grondkowski & Malinowski (1946) Cr App Rep 116

R v Payne [1950] 1 All ER 102 (CA)

R v Saleica & Wadson 1958 R & N 10 (SR)

S Ndlovu for the appellant

A Muchadehama for the respondent

Judgment

Korsah JA: The appellant was convicted at the regional magistrate's court, sitting at Bulawayo on 25 August 1993, of the theft of a motor vehicle. He was sentenced to a custodial term of six years' imprisonment with labour, whereof one year was suspended on conditions of good behaviour. He appealed against both conviction and sentence.

The appellant was originally charged jointly with two others, Robert Vickers ("Vickers") and Clayton Mohamed, with the theft of a motor vehicle.

All three accused persons pleaded not guilty to the charge preferred against them. At the close of the State's case, the State withdrew the charge against Clayton Mohamed for want of evidence in proof of his complicity in the theft of the vehicle. He was accordingly acquitted and discharged.

Subsequent to Vickers testifying in evidence as to his innocence, after some penetrating cross-examination by counsel for the State, which revealed that Vickers' defence, denying complicity in the commission of the offence, had as many holes in it as a sieve, Vickers capitulated and elected, freely and voluntarily, to alter his plea of "not guilty" to one of guilty of

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being an accomplice to the theft of the vehicle.

At that stage some doubt as to how to proceed, after the change in plea, crept in, with counsel for the appellant expressing himself thus:

> "...Your Worship, I feel there should be certainly a separation (of trials) now in the light of his (Vickers') change of plea. I am not sure about the procedure afterwards, I am in the hands of the court."

An expression of sentiment is not an application to assert a legal right. There was thus no proper application for separate trials of the appellant and Vickers at that stage. There were certainly no grounds advanced by counsel for the appellant, who was the only accused represented by counsel, to have a

KORSAH JA

separation of trials. Counsel for the appellant felt there should be a separation of trials, but did not know why this should be so and offered no argument to separate the trials of the remaining two accused persons. In short, an application was not made.

Section 182 of the Criminal Procedure and Evidence Act [*Chapter 59*] seems to me to bestow on the judicial officer before whom two or more persons are charged in the same indictment, a discretion, at any time during the course of the trial, **on the application of either the prosecutor or any of the accused** persons, to separate their trials. That section reads:

> "Where two or more persons are charged in the same indictment, summons or charge, whether with the same offence or different offences, the Court may, at any time during the trial, on the application of the prosecutor or of any of the accused, direct that the trial of the accused or any of them shall be held separately from the trial of the other or others of them, and may abstain from giving a judgment as to any of such accused (my emphasis)."

The practice approved by the English Criminal Court of Appeal is the same. Thus DARLING J, delivering the opinion of the court in *R v Gibbins & Proctor* (1918) 13 Cr App Rep 134, said at p 136:

> "The rule is, that it is a matter for the discretion of the Judge at the trial, whether two people jointly indicted should be tried together or separately. But the Judge must exercise his discretion judicially."

As with the exercise of judicial discretion in all cases, a court of criminal appeal will interfere with the discretion of a judge only where it is shown that the exercise of the discretion has resulted in a miscarriage of justice - in other words, that improper prejudice has been created either by a separate or joint trial.

A further requirement of s 182, *supra*, is that the exercise of the trial judge's discretion should be pre-conditioned upon an application being made to the court by either the prosecutor or the accused. The trial court does not fall into error if, without invocation, it did not *mero motu* separate the trials of accused persons jointly charged.

There is no rule of law that separate trials should be ordered where an essential part of one accused person's defence amounts to an attack on a co-

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KORSAH JA

accused, but the matter is one which the judge should take into account in the determination, of an application, whether to order separate trials or not. Thus in *R v Grondkowski & Malinowski* (1946) 31 Cr App Rep 116 at 120 LORD GODDARD CJ expressed the view that:

> "It is too often nowadays thought, or seems to be thought, that 'the interests of justice' means only 'the interests of the prisoners'. If once it were taken as settled that every time it appears that one prisoner as part of his defence means to attack another, a separate trial must be ordered, it is obvious there is no room for discretion and a rule of law is substituted for it. There is no case in which this has been laid down, and in the opinion of the Court it would be most unfortunate and contrary to the interests of justice if it were."

Section 182, *supra*, reposes in a judicial officer a discretion which may be invoked by an application for a separation of trials. As there was no proper application for a separation, there is no foundation for the attack that there was gross procedural irregularity in the proceedings because the court *mero motu* did not separate the trials of the appellant and Vickers. Thereafter the trial proceeded in the normal way, with Vickers testifying and being cross-examined by the appellant's counsel, and the appellant testifying and being cross-examined by Vickers.

Equally flawed is the submission that the trial court erred in procedure by not convicting and sentencing Vickers on his altered plea before proceeding with the matter against the appellant. I accept, of course, the dictum of Lord Goddard CJ in R v Payne [1950] 1 All ER 102 (CA), quoted with approval by Morton J in R v Saleica & Wadson 1958 R & N 10 (SR) at p 12, that where two or more persons jointly are indicted:

> "If one pleads guilty and the others not guilty, the proper course is to postpone sentence on the man who has pleaded guilty until the others have been tried, and then to bring up all the prisoners to be dealt with together because by that time the Court will be in possession of the facts relating to all of them and will be able to assess properly the degree of guilt of each. ...What I have said does not apply in the exceptional case where a man who pleads guilty is going to be called as a witness. In these circumstances it is right that he be sentenced there and then, so that there can be no suspicion that his evidence is coloured by the fact that he hopes to get a lighter sentence. I do not throw doubt on that very proper practice" (my emphasis).

KORSAH JA

What happened in the instant case, which undoubtedly was a little bizarre, was that, when Vickers offered to alter his plea to one of "guilty to being accomplice to theft of the vehicle", both the court and the prosecutor misapprehended the position and were of opinion that Vickers was offering a limited plea to the charge of "Theft of a motor vehicle". Consequently, the State refused to accept the "limited" plea and, therefore, harboured no intention of calling Vickers as a witness against the appellant. Had there been an intention exhibited on the part of the State to call Vickers as a witness against the appellant, then the very proper practice of convicting and sentencing him before that eventuality should have been followed. But there was not.

As has already been pointed out, it is not a rule of law that every time it appears that one prisoner as part of his defence means to attack another with whom he has been jointly charged a separate trial must be ordered. There reposes in the judicial officer a discretion to separate

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the trials of the co-accused. This discretion is sometimes exercised in favour of an applicant where evidence admissible against one of the accused would not be admissible against the others, or where the separate trial would enable the State to call an accomplice as a witness. But it remains a discretion.

Here, the State clearly demonstrated that it had no intention to call Vickers as a witness against the appellant. The real question to be addressed is: did the misapprehension by the court and the prosecutor regarding the change of plea by Vickers create any improper prejudice by their being tried jointly?

[The court then proceeded to analyse the evidence in relation to the appellant. This evidence is omitted from this report.]

The appeal is dismissed in its entirety.

McNally JA: I agree.

Ebrahim JA: I agree.

Coghlan & Welsh, appellant's legal practitioners

CHIZIKANI v LAW SOCIETY OF ZIMBABWE 1994 (1) ZLR 382 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

22 March & 16 May 1994

Flynote

Legal practitioner - discipline - misappropriation of client's trust funds - appropriate penalty

Headnote

The Legal Practitioners Disciplinary Tribunal had found the appellant guilty of unprofessional, dishonourable or unworthy conduct, in that he had misappropriated client's trust funds. The Tribunal ordered that his name be deleted from the register of legal practitioners. The appellant appealed to the Supreme Court against his striking off.

Held, dismissing the appeal, that there is no doubt that a legal practitioner who misappropriates a client's funds is not a fit and proper person to be placed in the position of trust and confidentiality to which his enrolment as a member of the Law Society elevates him.

Held, further, that the Law Society is justified in expunging the name of any member who, in the

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name of the profession, preys upon the credulity of members of the public to their detriment.

Held, further, that in all the circumstances of this case the striking off of the name of the appellant from the register was fully warranted.

Cases cited:

Jones v Owens (1870) 34 JP 759

King v R (1968) 52 Cr App R 353

R v Wessels 1933 TPD 313

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

Inc Law Soc Tvl v Visse & Ors 1958 (4) SA 115 (T)

Inc Law Soc of the Tvl v van E 1954 (4) SA 155 (T)

GUBBAY CJ

Law Soc, Cape v C 1985 (1) SA 754 (C)

Law Soc, Tvl v Matthews 1989 (4) SA 389 (T)

Inc Law Soc, Natal v Naude 1959 (1) SA 2 (N)

Die Prokureursode van die OVS v Schoeman 1977 (4) SA 588 (O)

Inc Law Soc, Tvl v K & Anor 1963 (4) SA 631 (T)

Inc Law Soc, Tvl v Horowitz 1964 (4) SA 294 (T)

Reyneke v Wetszenootskap van die Kaap van Goeie Hoop 1994 (1) SA 359 (A)

Mrs J B Wood for the appellant

B D Brighton for the respondent

Judgment

Gubbay CJ, McNally JA & Korsah JA: The Legal Practitioners Disciplinary Tribunal ("the Tribunal") decided, on 6 September 1993, that the appellant had been guilty of unprofessional, dishonourable or unworthy conduct, in that he had misappropriated clients' trust funds, and in consequence ordered that, in terms of s 28(1)(i) of the Legal Practitioners Act, 15 of 1981 ("the Act"), his name be deleted from the register of legal practitioners and that he should pay the respondent's expenses in connection with the proceedings on the High Court tariff.

The appellant challenges the findings of the Tribunal, on the ground that the Tribunal failed to

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put his position in proper perspective, and the sentence imposed, on the basis that the Tribunal gave insufficient weight to the mitigatory factors and over-emphasised the factors of aggravation.

In place of the Tribunal's decision the appellant seeks a substitution of the following:

> "The only allegation proved against (the) Respondent is that he misappropriated Sibanda's funds in the broad sense of that term. Accordingly, we direct that (the) Respondent be suspended from practising law for a period of one year and that suspension is suspended for a period of three years on condition that during the three years (the) Respondent shall, at his own expense, produce at six monthly intervals satisfactory audit reports prepared by the auditors for the time being of the Law Society of Zimbabwe."

In a judgment of conspicuous clarity the Chairman of the Tribunal set out the history of events leading to the direction to delete the appellant's name from the register of legal practitioners. To those circumstances we now turn.

GUBBAY CJ

On 26 August 1991, Mr Lovemore Sibanda, who was the purchaser in a conveyancing transaction, complained to the Law Society of Zimbabwe ("the Law Society") that he was dissatisfied with the lack of expedition with which the appellant was attending to the transfer and he suspected that the appellant had used the money deposited with him in pursuance of the transaction for his own purposes.

The appellant's initial explanation, contained in a letter dated 18 October 1991, categorically denying acting in an unethical manner or in any way likely to prejudice the parties involved in the transaction, satisfied the Law Society, but not Mr Sibanda. Consequently, Mr Sibanda wrote to the appellant on 29 January 1992, asking him to account for the use of the sum of $8 000 deposited with his practice to cover the transaction.

As Mr Sibanda was not favoured with a reply to his query by the appellant, he again raised the matter with the Law Society in a letter dated 9 March 1992, to which he attached the ledger cards of the appellant pertaining to the payment by him of the sum of $8 000 to the appellant's practice. He drew attention to cheque transactions on those ledgers which he concluded effectively wiped out his deposit.

The three pages of ledger cards indicated that the appellant's account was overdrawn on 3 October 1990, when Mr Sibanda's cheque was deposited. The pages, as was observed by the Tribunal, covered the period 3 October 1990 to 1 November 1990, and reveal that at no time during that period were there sufficient funds to meet Mr Sibanda's deposit. In fact by 11 November 1990 the account had no more than $53,81 in it to satisfy the amount of $8 000 which he was supposed to hold in trust for Mr Sibanda.

In terms of s 61 of the Law Society of Zimbabwe By-Laws ("the By-Laws"), (SI 314 of 1982), the Secretary of the Law Society, by a letter dated 1 April 1992, informed the appellant of the nature of Mr Sibanda's complaint and required him to reply thereto within fourteen days. He was also asked to explain, if the account he paid Mr Sibanda's cheque into was his trust account, why it was not designated as such in terms of the provisions of the Act; and if it was not his

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trust account, why the deposit of $8 000 was not paid into his trust account. He was further called upon, in either event, to explain why other cheques were drawn on the account which had the effect of using up the deposit made by Mr Sibanda when those withdrawals had nothing to do with the transaction for which Mr Sibanda had deposited the funds, thus effectively resulting in misappropriation of his client's trust money.

GUBBAY CJ

The appellant's reply to this request, bearing the date 6 April 1992, was, to say the least, baffling. He said due to the turnover of staff in "his establishment" efforts to trace Mr Sibanda's letter of 29 January 1992 had proved fruitless and that he desired a copy of Mr Sibanda's said letter to enable him to respond on the merits.

It admits of no doubt that the appellant knew that the basis of the allegations made by Mr Sibanda against him related to the payment of the sum of $8 000 into his business account and the use to which that money had been put. If he wanted to furnish an answer to the queries on the merits, there was sufficient information in the Secretary's letter to activate him into calling his bankers for a copy of the account covering the relevant period to enable him to make an adequate response. He did not do so; instead he tried to fob off the Secretary with the unacceptable excuse that he could not respond to the queries without sight of Mr Sibanda's letter.

The Secretary of the Law Society, exercising great restraint, courteously furnished the appellant with a copy of Mr Sibanda's letter of 29 January 1992. The appellant acknowledged receipt of a copy of the said letter on 29 April 1992 and asked, not for a copy, but the annexure of the bank record attached to Mr Sibanda's said letter. The Secretary of the Law Society, who had by then understandably reached the end of his tether, replied curtly on 18 May 1992, and to the point:

> "I refer to your letter of 29 April. You do not need any annexure to respond to the questions I have raised. I am seeking information in relation to your trust account in respect of which you are supposed to be keeping proper records. Please let me have your response to the questions raised by return."

Not dissuaded from his recalcitrance to respond meaningfully by the direct demand contained in the Secretary's letter, the appellant, on 8 June 1992, wrote to the Secretary insisting, notwithstanding his being furnished with a copy of Mr Sibanda's said letter, that unless he was informed of Mr Sibanda's full complaint, of which annexures of his trust account formed a part, he could not respond to the Secretary's request.

Having been apprised by the Secretary of his responsibility to keep proper records of his trust account, if the appellant, as a legal practitioner, was not already aware of this paramount obligation, his insistence on being accorded sight of the annexures to Mr Sibanda's complaint and accusations, of which

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he was in possession of the originals, not only beggars belief, but is a direct insult to the intelligence of any legal practitioner who has been in practice for as long as the appellant. The only logical inference is that the appellant, by his prevarication, was playing for time in the hope that the Secretary would succumb to the tedium of his dilatoriness and forget the serious allegations levelled against him.

We accept that it was not in non-compliance with s 26(1) of the Act that the appellant failed to respond to a call for information, but rather with a failure to heed the Secretary's request in terms of s 61 of the By-Laws. However, it is of little or no consequence whether the request issued from the Council of the Law Society in terms of s 26(1) of the Act or from the Secretary in terms of s 61 of the By-Laws. Failure to respond to the request is equally grave in either case. action 65 of the By-Laws provides that:

> "If a complainant, legal practitioner or legal assistant unreasonably neglects or wilfully refuses to furnish to the secretary, the disciplinary committee or council, in connection with any proceedings under this part, any statement, affidavit, particulars, book, deed, document, paper or other writing required of him -
>
> (a) ...
>
> (b) in the case of a legal practitioner or legal assistant, he shall, *ipso facto*, be guilty of unprofessional conduct, and the council shall refer the papers to the disciplinary tribunal for inquiry."

Right up to the hearing by the Tribunal on 6 September 1993 of the allegations made by Mr Sibanda, the appellant had not favoured the Secretary with a reply answering the substance of the request for an explanation contained in the letter of 1 April 1992. Even at the Tribunal he did not explain why other cheques were drawn on the account which had the effect of using up the deposit of $8 000 when these had nothing to do with Mr Sibanda's transaction and resulted effectively in the misappropriation of Mr Sibanda's trust money.

It is, of course, possible that the appellant's ledger cards were illegally obtained by Mr Sibanda. Save for a limited discretion in a court to disallow the use of documents illegally obtained, the general principle is that documents obtained as a consequence of an unlawful act are admissible in evidence; for as MELLOR J observed in *Jones* v *Owens* (1870) 34 JP 759 at 760, cited with approval in *King v R* (1968) 52 Cr App R 353 at 360:

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> "I think it would be a dangerous obstacle to the administration of justice if we were to hold, because evidence was obtained by illegal means, it could not be used against a party charged with an offence."

It is pertinent to note that this rule applies in criminal matters only and that with regard to civil cases the judge has no discretion to refuse to admit evidence which is relevant and admissible on the ground that it was unlawfully obtained: *Phipson on Evidence* 13 ed paras 22-55 p 457. This enquiry was not of a criminal nature, and the mere fact of the possible illegal obtaining of the ledgers does not change what is written in them.

The simple fact of the matter, as counsel for the respondent put it, was that the respondent was in possession of bank statements and a complaint which suggested that there had been misappropriation of trust funds. The appellant was requested to explain this. He never did so,

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and only subsequently admitted misappropriation when no route of escape was available to him.

It was suggested by counsel for the appellant that insofar as the appellant replied to the query regarding the delay in effecting transfer of the property, he complied with the request for information by the Secretary. That is an over-simplification of the issue.

The Secretary's letter of 10 October 1991, to which a copy of Mr Sibanda's complaint, dated 26 September 1991, was attached, asked the appellant for an explanation of the allegations contained in Mr Sibanda's letter. One of the accusations in Mr Sibanda's letter was that the appellant had delayed the transaction **because he had used the sum of $8 000 for his own purposes.** That allegation was not traversed by the appellant in his response of 18 October 1991. In fact, in his response the appellant misled the Secretary into believing that there had been no impropriety. By withholding information from the Secretary that he had used Mr Sibanda's money for his own purposes, the appellant not only wilfully refused to respond to the Secretary's request for an explanation, but was less than truthful with the Secretary.

The Secretary, having derived no satisfaction from the appellant's prevarications concerning the trust account, wrote to the appellant on 3 September 1992, informing him that he was referring the matter to the Disciplinary Committee of the Law Society for its consideration.

On 10 November 1992, a copy of a letter addressed to Messrs Deloitte & Touche, instructing them to carry out an audit of the appellant's trust account

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in terms of s 14(2) of the Act, was sent to the appellant. The appellant acknowledged receiving a copy of that letter. Despite letters and telephone calls from Deloitte & Touche the appellant frustrated all attempts by that firm of consultants to arrange to carry out an audit of his trust account.

In the appellant's letter of 8 February 1993 to the Secretary of the Law Society, he intimated that unless and until he had been advised of a resolution of the Council of the Law Society competently made, he would not consider having a special trust account audit carried out. His whole attitude ran counter to the spirit of the legislation which, for obvious reasons, does not require prior warning to be given before such an audit.

By reason of the appellant's refusal to permit a trust audit in terms of s 14(2) of the Act, the respondent was on 2 April 1993, forced to make an urgent Chamber application to the High Court for an order compelling the appellant to permit such an inspection and to pay the costs of the application.

At the High Court hearing the appellant challenged the respondent's *locus standi* and even the authority of the Secretary to act in the matter on the instructions of the Law Society Council, and required to be shown the actual Council resolutions relating to the matter. He did not withdraw his opposition to the order being sought, but instead challenged the jurisdiction of the court to deal with the application. His challenge to the jurisdiction of the court to hear and determine the

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application was rightly dismissed.

After the accountants had inspected the books of account of the appellant, they reported on 12 May 1993 that:

> "The $8 000 received on behalf of L Sibanda appeared as a credit to the trust account on 3 October 1990. Two cheques were drawn on the account on the same day prior to the $8 000 deposit, temporarily placing the account in overdraft. Cheques were steadily drawn on this account until the account reflected a balance of $62,81 on 2 November 1990. On 31 October 1990 the account was overdrawn by $170,26 with a subsequent non-related deposit restoring it to a credit balance of $553,81...
>
> We do not have the full trust client liability at that stage but based solely on the $8 000 there was a shortfall of $8 170,26 on 31 October 1990."

It is against this background that the appellant's conduct must be judged.

The appellant is a legal practitioner of seven years standing. He was, or ought

to have been, aware that he held his position as such under the Legal Practitioners Act and the Regulations made thereunder. As a member of the Law Society of Zimbabwe he knew, or ought to have known, that the management and control of the Society was vested in the Council. He was cognisant, or ought to have been so, of the objectives of the Society to represent the views of the legal profession and maintain its integrity and status, as well as to define and enforce correct and uniform practice and discipline among legal practitioners. He owed a duty to the honourable Society, of which he was a member, not to transgress the limits of professional decorum and hold the Society and its Secretary at defiance.

To fob off the Secretary with misleading statements and fishing questions designed to cover up, and to refuse, despite demand, to give an explanation or allow a trust account audit was a defiance of the authority of the Council. By so doing he was contemptuous, not in the legal sense but in the ordinary connotation of that term, of the authority of the Council.

It was not until his trust account had been audited that the appellant admitted, in his counter-statement dated 17 May 1993, in response to the application to have his name deleted from the register of legal practitioners, that he used the deposit paid by Mr Sibanda for purposes other than those intended without the consent of Mr Sibanda. The appellant well knew by 31 October 1990, that he had misappropriated Mr Sibanda's deposit. In criminal law a trustee who fraudulently appropriates money or other property held in trust is guilty of theft: *R v Wessels* 1933 TPD 313 at 314-315; *S v Harper & Anor* 1981 (2) SA 638 (D) at 669-671; Honoré *Law of Trusts* 3 ed at p 76.

The only reasonable inference from the facts above recounted, coupled with the fact that it took the appellant two years to respond to the simple query by the respondent as to what had happened to Mr Sibanda' deposit, is that he knew all along that he had misappropriated Mr Sibanda's trust funds and was not prepared to divulge such information to the respondent. He therefore resorted to every ruse, including outright defiance of the respondent, to cover up his

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defalcations.

It is undoubtedly an offence if trust money is withdrawn for a purpose other than that authorised by the trust creditor: *Incorporated Law Society of the Transvaal v Visse & Ors* 1958 (4) SA 115 (T) at 122E. Earlier, the learned judge had observed in his judgment at 118G that:

> "The very essence of a trust is the absence of risk ...that it is imperative

> that trust moneys in the possession of an attorney should be available to his clients the instant they become payable and they are generally payable before and not after demand."

See also *Incorporated Law Society of the Transvaal v van E* 1954 (4) SA 155 (T) at 161C; *Law Society of the Cape of Good Hope v C* 1985 (1) SA 754 (C) at 786B-D.

Here, even after demand, the moneys were not forthcoming and that was what aroused suspicion in Mr Sibanda as to the fate of the funds deposited with the appellant; which suspicion was proved to be absolutely justified.

In the first place, lawyers as a professional class live by their own high code of ethics and their own moral standards. Every legal practitioner owes a duty to his colleagues to uphold those standards of the profession to which he belongs. Secondly, if legal practitioners, as a professional group, are to earn a respected position as guardians, not only of the public, but also of private, interest, then every legal practitioner must live up to the principles of decency in the relationship of a trustee to the goods and monies entrusted to him by the person who has sought his protection. A legal practitioner who breaches this trust casts a shadow on the good name of the rest, and also remains a danger to the unsuspecting public, unless his name is expunged from the register of legal practitioners. See generally in this regard *Law Society*, *Transvaal v Matthews* 1989 (4) SA 389 (T) at 394B-396H.

It was submitted on behalf of the appellant that he was only guilty of using Mr Sibanda's money for purposes other than those intended. For the reason above given, we are unable to accept that that was all he was guilty of. On the authority of Honoré *op cit* and *S v Harper & Anor supra*, he was guilty of theft of Mr Sibanda's money. And we reject the submission that the penalty imposed was not the inevitable consequence of such conduct.

We accept, however, that the "extreme penalty" should not be lightly imposed, but as HOLMES J (as he then was) observed in *Incorporated Law Society, Natal v Naude* 1959 (1) SA 2 (N) at 3E:

> "In matters of this sort the Court ever seeks to blend a measure of mercy with the justice of punishment, and would readily agree in the present case to an adjournment, or to a suspension of the respondent instead of a striking off, if some basis for such a course could be found. But unhappily the paramount factor in this case is the large amount of the

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deficiency, and this factor overrides the element of restitution, even if made. In the result we are of the opinion that our duty, painful though it may be, is plain and we grant the order sought by the Law Society for the striking off of the respondent's name, leaving the matter of restitution, if made, to stand as a point in favour of the respondent, if and when he should apply for the reinstatement of his name on the roll."

The deficiency we are here concerned with is not insignificant. Putting aside for the moment the appellant's lack of transparency in his dealings with the respondent, as well as his intransigence and obduracy, we find no basis for the criticism that, in imposing the penalty it did, the Tribunal failed to distinguish the appellant's case from the more serious cases before it.

Counsel for the appellant urged upon us the need, when imposing punishment, to take into reckoning the circumstances attaching to the offender as an individual; the fact that the deficiency has been made good; the extent of the deficiency; deep remorse; the fact that no person or estate has suffered loss; and an undertaking on the part of the offender to conduct himself in future in accordance with the rules. All this overlooks the shadow which such behaviour casts on the good name of the rest and the need to protect the unsuspecting public from the clutches of an unscrupulous legal practitioner.

In each case the facts usually determine the punishment. Part of the headnote in *Die Prokureursode van die OVS v Schoeman* 1977 (4) SA 588 (O) at 589F reads:

"The consequences of an order of striking off are serious and far-reaching. But the facts usually determine the punishment. And even the making up of a deficiency in trust moneys, deep remorse and ignorance concerning book-keeping and basic business principles are not in themselves sufficient to avoid a striking off order in all cases. Those are, however, all factors in mitigation of punishment which should be placed in the scales."

In *Visse's* case *supra* although restitution had been made, and others had contributed to the misappropriation, both respondents were struck off the roll.

HIEMSTRA J observed in *Incorporated Law Society, Transvaal v K & Anor* 1963 (4) SA 631 (T) at 632E that:

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"Since the case of *Incorporated Law Society, Transvaal v Visse & Ors* 1958 (4) SA 115 (T) this Court has consistently followed the practice of removing attorneys from the roll who have misappropriated trust funds."

See also *Incorporated Law Society, Transvaal v Horwitz* 1964 (4) SA 294 (T) at 300H-301A.

In applications by the Law Society for disciplinary action to be taken against a member, the paramount considerations are maintaining the integrity, dignity and the respect the public must have for officers of the court, no less than the Law Society's desire to protect members of the public from unscrupulous persons operating behind the colour of their profession. The question is: is the appellant a fit and proper person to be a member of the honourable Society? Any colourable conduct sufficiently grave to attract popular dissatisfaction with the profession must be visited with sanctions befitting such conduct. Thus in *Reyneke v Wetszenootskap Van Die Kaap Die Goeie Hoop* 1994 (1) SA 359 (A) at 361I the headnote reads:

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"That, although the charges against the appellant and the findings of the Court *a quo* did not relate directly to his professional practice as such in that he had not acted to the detriment of his client **nor stolen money from his practice**, and although these factors elicited a measure of sympathy for the appellant, the fact remained that he was guilty of two serious transgressions which reflected upon his honesty and integrity and which detracted from his fitness to practise as an attorney" (emphasis supplied).

This is ominously confirmatory of the principle that a legal practitioner who is guilty of misappropriation of trust funds disentitles himself from having his name retained on the register of practitioners.

We are in no doubt that a legal practitioner who misappropriates his client's funds is not a fit and proper person to be placed in the position of trust and confidentiality to which his enrolment as a member of the Law Society elevates him. If there are any mitigatory circumstances, they will be placed in the scales and reflected in favour of the appellant, if and when he should apply for reinstatement of his name on the roll.

A few unworthy practitioners should no longer be allowed to hurt the good name of the rest. The Law Society is justified in expunging the name of any member who, in the name of the profession, preys upon the credulity of members of the public to their detriment.

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There is no merit in this appeal and it is accordingly dismissed with costs.

Jakachira & Co, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

S v SIBANDA 1994 (1) ZLR 394 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

Korsah JA, Ebrahim JA & Muchechetere JA

Criminal appeal

14 February & 16 May 1994

Flynote

Evidence - sexual offences - child complainant - corroboration - requirement for - approach towards dealing with evidence of child complainants in sexual cases

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Headnote

In our law, unlike English law, corroboration is not required. In our law the approach is that it is advisable to require corroboration of children because their youth indicates an immaturity which may cause them to give ill-considered or misleading evidence. Because our courts are not obliged to require corroboration, the courts must be cognisant of potential objections to the evidence of children which may or may not be valid according to the facts and circumstances of each case.

Detailed guidelines were given as to how to approach the testimony of children and to avoid the risks which may be involved with such testimony.

Cases cited:

R v Judson 1965 RLR 501 (A); 1966 (1) SA 88 (RA)

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

S v Santos S-138-85

S v Ponder 1989 (1) ZLR 235 (S)

R v J 1958 (3) SA 699 (SR)

R v W 1949 (3) SA 772 (A)

S v Gwanzura S-56-92

DPP v Kilbourne [1973] 1 All ER 440 (HL)

S v T 1963 (1) SA 484 (A)

EBRAHIM JA

S Mlaudzi for the appellant

Mrs *J Zindi* for the respondent

Judgment

Ebrahim JA: The appellant appeals against his conviction of rape and the sentence of nine years' imprisonment with labour, two years of which were suspended on conditions of good behaviour.

The charges against the appellant were of a serious nature. He stood accused of violating a little girl aged eleven years. The appellant was a schoolteacher and the complainant was one of his class pupils. In brief, the allegation was that on 26 July 1991, at a certain primary school in Bulawayo, the appellant caused several of his pupils, including the complainant, to remain after their normal school hours as a punishment for being noisy in class. Their punishment duty was to water the orchard. While the pupils were engaged in this task the appellant is alleged to have

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sent for the complainant and, when they were alone together in the classroom to which he had summonsed her, he committed the offence.

The complainant alleges that the rape took place in the following manner: When they were left alone she was standing in front of the appellant, who then told her to kneel. She having done so, he placed his hand on her forehead and forced her backwards onto the floor. This he did, she says, while he was still seated. He then unzipped his trousers, pulled her panties to knee level, lay on top of her and raped her. It is necessary at this juncture to relate the somewhat unusual manner of detection of the crime.

The complainant - unfortunately, in terms of conventional evidential practice - did not report the incident to the first available sympathetic witness. Indeed, she did not even tell her mother the full extent of what had taken place. She simply told her that her teacher had been "touching" her breasts, her buttocks and the front part of her body.

The evidential requirement that a rape victim should report the crime as soon as possible after its occurrence proceeds from the assumption that she is aware that a wrong has been committed against her. Now, it is abundantly clear from her evidence that the complainant was in a state of confusion over whether what had happened was wrong. That she felt a sense of shame over the incident is self-evident, but, in my view, in a child's mind the concept of a respected teacher doing something which other adults will agree was wrong is likely to cause confusion. The incident occurred during a period when the appellant was punishing the complainant among others. To an immature and

inexperienced mind what was done to her is likely to have seemed to be merely a particularised form of punishment.

The fact that the complainant was no longer a virgin emerged only several months after the event when, in accordance with custom, she was sent to a female relative for instruction in "the facts of life". In the course of the instruction, the aunt who was giving it examined her and found that her hymen had been "pierced". This fact was duly reported to the complainant's mother. The complainant was thereafter medically examined. The significant facts to emerge from this examination were:

(1) it was confirmed that the complainant had lost her virginity; and

(2) she was not currently sexually active (the examination was painful).

The complainant was questioned by her mother as to how she had lost her virginity. At first she maintained her silence and her mother had to bring pressure to bear upon her before the story of the rape was told. The pressure used was a bogus threat to report her to the police if the truth was not told. The fact that thereafter the complainant told her story tends to confirm her naivety, which in turn lends transparency to the truthfulness of her evidence.

The first ground of appeal is that the magistrate failed to observe the "cautionary rule",

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especially in regard to the evidence of children. I dismiss this ground out of hand. It is quite clear that the magistrate had foremost in mind that he had to treat with caution, and seek corroboration for, the evidence of the complainant, both on the ground of her youth and on the ground that she was the purported victim in a rape case.

Counsel for the appellant maintains that the magistrate failed to observe this evidential requirement and thus did not exclude the possibility of false incrimination. I will consider this contention in detail presently.

The second and third grounds of appeal attacked findings of fact made by the learned magistrate. It is a well established rule of procedure on appeal that an appellate tribunal will disturb findings of fact only when they are demonstrably wrong. Having read the evidence of the headmaster, I am not prepared to say that the magistrate was wrong in disregarding it. In any event, it does not seem to me that his evidence advances the case significantly. Nor is it possible to say, at this stage, whether the so-called "hatred" of the complainant for the appellant had any bearing on her allegations. The magistrate, with the benefit

of having actually seen the witnesses and heard the evidence, did not consider it had. Contrary to the allegation in the ground of appeal, he said as much in his judgment. At this distance, it seems probable to me that the word "hatred" has been used where the more moderate term "dislike" would have been more appropriate. It is not usual to express hatred, as did the complainant, for something so apparently venial - especially through the eyes of a schoolgirl - as not teaching on some days.

The fourth ground of appeal alleged that the State should have been made to prove the existence of the tradition of having young girls examined at puberty, as it was because of this "tradition" that the complainant's loss of virginity was discovered. It is urged that this has relevance to the possibility of false implication. I fail to follow this logic. The facts are simply that the complainant's aunt, who did not know the appellant, discovered that the complainant had been deflowered. She reported this fact to the complainant's mother who, with difficulty, extracted from the complainant an account of what had really occurred on the day she had reported that her teacher had molested her. Whether or not the discovery was made during a ceremony rooted in tradition has no relevance at all.

The final ground of appeal was that the evidence of the pupil whom the appellant sent to fetch the complainant immediately before the rape had not been properly corroborated. She was, it was contended, "an accomplice to the implication". This witness, Margaret Chiworira, gave evidence that she fetched the complainant to the classroom and was then dismissed. It appeared that she had been a friend of the complainant's but had moved from the school and lost touch with her. Margaret also deposed to the fact that she had no ill-feelings towards the appellant. The purpose of requiring corroboration is to guard against false implication as far as possible. The learned magistrate accepted the uncorroborated evidence of Margaret in the circumstances and she was cross-examined on it. Defence counsel did not object then to her

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evidence and I see no merit in his doing so at this stage.

Returning to the issue of the cautionary rule raised in the first ground of appeal, it is well established in cases such as *R v Judson* 1965 RLR 501, *S v Mupfudza* 1982 (1) ZLR 271 (S), *S v Santos* S-138-85 (unreported), and *S v Ponder* 1989 (1) ZLR 235 (S), that it is advisable to require corroboration of the testimony of young children because their youth indicates an immaturity of mind which may cause them to give ill-considered or misleading evidence - see the comments of YOUNG J in *R v J* 1958 (3) SA 699 (SR) at 702. However, our law, unlike English law, does not require corroboration. (See

EBRAHIM JA

WATERMEYER CJ in *R v W* 1949 (3) SA 772 (A) at 781 and McNALLY JA in *S v Santos* , *supra*, at 7-8). In W's case the learned CHIEF JUSTICE, after remarking on the absence of a requirement for corroboration, added:

> "But this is only the position where the court is fully appreciative of the risks involved and where the merits of the complainant and demerits of the accused as witnesses are beyond question."

I take this to be the source of the cautionary rule in this regard.

What precisely are the risks involved in the acceptance of the evidence of children?

The liberal rules governing the acceptance of children's evidence in our jurisdiction impose a duty on the court to be cognisant of potential objections to the evidence of children which may or may not be valid according to the facts and circumstances of each case. In their useful book *The Evidence of Children* (Blackstone Press 1990) at p 238, Spencer and Flin list six of the main objections to relying on children's evidence. These are:

(a) children's memories are unreliable;

(b) children are egocentric;

(c) children are highly suggestible;

(d) children have difficulty distinguishing fact from fantasy;

(e) children make false allegations, particularly of sexual assault; and

(f) children do not understand the duty to tell the truth.

The authors discuss each point in detail. I shall attempt to summarise these discussions insofar as they are relevant to the present case and also apply the conclusions to the evidence of the complainant. In this way, it is hoped that a more logically convincing final conclusion may be drawn regarding the reliability of her evidence than if I simply picked out various aspects of her evidence and agreed or disagreed with the conclusions of the trial magistrate.

MEMORY

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Research has shown that children generally have a good recall of central events but a poorer memory for detail and evidence of surrounding occurrences. This is certainly borne out in this case where the complainant was able to give a clear account of the circumstances of the alleged assault but was rather less

sure of her facts when asked, for instance, about the occupancy of the next door classroom at the time of the incident.

It is not without relevance that Spencer and Flin *op cit* make the point that memories tend to respond better to a sympathetic questioner, whether at the police interview stage or the trial stage. One cannot but be struck by the fact that the complainant was a little girl alone in a room full of male officials while being asked highly personal questions. While it is appreciated that staffing constraints make it impossible for at least one female official to be present at every rape case, the incidence of such cases involving children are, surely, not so high as to make it impossible for a thoughtful administration to arrange that either the prosecutor or the magistrate is female. If this was done, it might well be found that the case with which evidence was adduced and the quality thereof would improve.

EGOCENTRICITY

This is dealt with by the authors under two heads:

Firstly, is the child so much concerned with himself or herself that he or she is unable to be objective concerning the truth? The authors say this is probably true of very small (pre-school) children. The ability to make reasonable inferences about what others feel, intend or think develops at ages four to five. On this basis, there is no reason to suppose that the complainant, at age eleven, was constitutionally unable to appreciate the consequence to the appellant of her not telling the truth.

Secondly, does the child pay disproportionate attention to that evidence which concerns him or her rather than taking a balanced view of the whole? While admitting that children are probably guilty of doing this, the authors point out that all witnesses do so in differing degrees. We are all egocentric to a certain extent. It is not a problem unique to children.

SUGGESTIBILITY

In general, reliable psychological research shows that children, like adults, can certainly be suggestible. The degree of suggestibility can be minimised by questions especially designed to overcome known pitfalls. Among the most important is a child's propensity to give an answer other than the one he knows to be correct because it suits him to do so. There are numerous reasons for so doing. The child, for example, may want to be finished with

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the examination; or he may wish to please the questioner; or he may agree with the suggested answer because he assumes that the questioner, being an adult, is correct. In connection with the last two examples, it must be remembered that children are taught from an early age that adults know best, that adults should not be contradicted, and that they ought to be polite to strange adults. These are desirable social attributes, but they ill-prepare a child for the ordeal of giving evidence in court.

Scrutiny of the transcript does not reveal that any evidence was adduced in this case by way of suggesting to either the complainant or her young friend who gave evidence for the prosecution how they should answer questions, and no objections that leading questions were asked were registered by counsel in the course of questioning.

In these circumstances, it does not seem to me that either juvenile witness gave untruthful evidence because such evidence was suggested to them. On the contrary, both seemed quite sure of the events to which they testified.

There is one aspect of the complainant's evidence which on first reading is puzzling and can only be clarified when it is considered from the viewpoint of a young person. This is the reason she gave for not reporting the incident to her mother in detail. She told the court she did not report it at school because she wanted to tell her mother first. This I regard as a natural reaction of one who has been through a traumatic experience such as that deposed to. But then when she arrived home she merely told her mother that her teacher had "touched" her private parts. Out of context, this erratic behaviour might well present the prosecution with an insuperable problem, for it is a generally accepted evidential requirement that the complainant should report the offence at the earliest opportunity. I should emphasise that this requirement is not a rule of law and admits of exceptions in appropriate cases. The explanation proffered by the complainant for her erratic behaviour is not one I would accept from an adult, or even from an older juvenile, but it emerged so naturally from this eleven-year-old, and in context to the mind of an innocent child must appear so logical that I am prepared to accept it was given without intention to deceive. The little girl said that at the time she formed the intention to tell her mother about her ordeal she was bleeding from her vagina and sore, but by the time she arrived at home the bleeding had stopped. In answer to previous questions she had deposed that she was unaware that what the appellant had done was unlawful. So, when she arrived home without visible injury, she decided not to trouble her mother with a detailed report of what, one gathers, she (the complainant) regarded as a form of

punishment. I am fortified in my acceptance of this aspect of the complainant's evidence by the evidence of her mother, from which it emerges that the complainant was not infrequently detained at school for punishment. It is unlikely in these circumstances that she would wish to draw attention to a further detention by going into details about her "punishment".

I continue the analysis of the complainant's evidence in the light of the scheme suggested by

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Spencer and Flin *op cit*.

DIFFICULTY DISTINGUISHING FACT FROM FANTASY

It is suggested that children have difficulty distinguishing fact from fantasy and, by extension, are liable to tell the court of their fantasies rather than give a factual account of what happened at the scene of the crime. It is true that a child's existence is more centred around his or her imagination than is adult existence, but anyone who has watched children at play will have noticed that their play-fantasies reflect their experience, whether it be experience of real life, as when small girls play house, or experience derived from hearing stories, as when small boys play soldiers. **Children do not fantasize over things that are beyond their own direct or indirect experience**.

The complainant gave a detailed and logical account of the rape. The appellant, she said, had asked her to kneel before him. He had then placed his hand on her forehead and forced her onto her back. He then unzipped his trousers and pulled her panties to knee-level. He placed his penis in her vagina and "made some up and down movements". She felt pain. She tried to scream. He muffled the noise with his hand. When he got up, she saw blood and "some whitish stuff". She saw that the blood was coming from her vagina and assumed that the "whitish stuff" came from the same place. He said: "Mother is proud and I am proud too".

To my mind, this is simply not the type of story that could credibly emerge from the fantasy of an eleven-year-old girl. The details are too graphically realistic and precise. The fact that she was told to kneel - surely an unusual request to make of a student, especially in private - has overtones of the psychological theory that a motive for rape is to satisfy the perpetrator's desire to dominate. The "up and down movements" could possibly be the result of witnessing acts of "love-making". But is it likely that she would know of the pain experienced on the occasion of first intercourse? Is it likely that she would know that the vagina bled at this time and, if she did have such detailed knowledge of sex, is it likely that she would pretend ignorance about

semen and whence it derives? Finally, the words purportedly used by the complainant after the event are not at all the words a fantasizing child might invent. The complainant alleges that she said: "My mother is proud and I am also proud". Presumably the reference to "my mother" indicates the complainant's mother, as it was the complainant who was giving evidence of the words. It is unclear whether the words were in narrative format or a quotation. However, whatever that may be, I consider it to be unlikely that a girl of eleven years would invent such words in this context. How could the pride of her mother be associated with the cause of pain? On the other hand, the words are, perhaps, consistent with an attempted justification for the unjustified infliction of pain on a child.

FALSE ALLEGATIONS

It is commonly supposed that allegations of rape - and child rape in particular - are fundamentally suspect. It may be true that this is an almost uniquely feminine motive for

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vengeance, but it seems to me that over-emphasis of possible fantasy is not justified.

I would suggest that the incidence of false allegations is much lower than is generally believed. It is a question of credibility in each case rather than a matter of **all** complainants in sexual abuse cases being required to show any greater *quantum* of proof than in any other type of case. "Do I believe the complainant?" is the essential question in any criminal case. In a criminal case involving sexual abuse the procedural law requires that the presiding officer should specifically state the reason(s) for his certainty that the abuse took place and the evidence was not fabricated.

In this case, in my view, such corroborative evidence comes from several sources. Firstly, there is the medical evidence that this little girl of eleven is no longer a virgin. This fact is of itself sufficient to corroborate the commission of the offence of statutory rape, but does not indicate by whom or in what circumstances the crime was committed. For primary evidence of identity it is necessary to rely on the evidence of the complainant. This brings into sharp focus the necessity for corroboration. If the word of a little girl was sufficient to convict the accused of acts committed with her in seclusion the potential for injustice would be obvious. But in this case, contrary to the allegation made in the appellant's grounds of appeal, the learned magistrate did, in fact, quite validly and sufficiently, find that there was evidence which corroborated the complainant's identity of the appellant as the guilty party.

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Firstly, the complainant had reported sexual abuse by the appellant on the day it was alleged the rape took place. In the circumstances, it cannot be held against an eleven -year-old girl not to have fully reported events which she herself plainly failed to comprehend. The learned magistrate relied on what KORSAH JA said in *S v Gwanzura* S-56-92, that a youthful witness (in a rape trial) cannot necessarily be dismissed as untruthful where the effect of her lies tends to shield the person who has wronged her. It is sufficient to add a gloss to that, on similar reasoning, where a witness has told a half-truth which might, without further explanation, cast doubt on her testimony, a court is entitled to seek such explanation elsewhere. If there appears to be a valid explanation for the half-truth which negates its tendency to shield the person who has wronged her, the court may disregard the shielding tendency of the evidence and the fact that the witness has bee less than honest in this particular respect. It is in this light that it has been accepted that the evidence that the appellant "touched" or "fondled" the complainant's private parts has been accepted as corroborating the story of the rape which eventually emerged. The offence revealed by the former story was not of so heinous a nature and clearly would have shielded the appellant from culpability for the actual rape alleged in the latter story. But the complainant did offer explanations which - viewed from her perspective - were probably cogent. She said that by the time she got home the bleeding had stopped. Because her mother "went by the book" as might be said in English - her actual words were "she used to work under the law" - she thought that she would be disbelieved if she had no more evidence of what had happened than her own word. As has already been mentioned, it seems probable also that she was not aware of the unlawful nature of the appellant's actions. Although they caused her pain and, one gathers from the tenor of some of her answers, some embarrassment, it is quite likely -

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again from a child's perspective - that she would not necessarily associate such feelings with unlawfulness. School punishment evokes the self-same pain and embarrassment and that is quite socially acceptable to the adult world and her mother's world in particular. I am satisfied that this was not a case in which false allegations were made against the appellant. The evidence implicating him is clear and well corroborated.

I mention further aspects of evidence from which the magistrate sought to draw corroboration.

Firstly, the medical examination of the complainant showed that she was not a virgin but was sexually inactive (ie had not indulged in sexual intercourse often). This clearly corroborates the fact that she had experienced intercourse at least once, but it does not, on its own, directly implicate the appellant.

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However, when it is taken with other points of evidential corroboration (eg the complainant's initial report to her mother of sexual molestation on the day in question; the vindication by a classmate of her account of events, as far as was possible, on the critical day; and even the highly suspicious last minute defence erected by the appellant at a stage of the trial when it was virtually impossible to challenge it), it is indeed difficult to conceive of a valid excuse why an intelligent and reasonably well-educated teacher, advised by an experienced legal practitioner, should neglect to mention a defence so potentially vital to his case as the explanation that pupils were tidying the classroom at the time of the alleged incident. The appellant had ample time to raise this defence at a much earlier stage of the proceedings against him, when it could have been verified by the police. That he chose to raise it when he did amply justifies the magistrate's characterisation of the defence as "clearly an afterthought".

INABILITY TO UNDERSTAND THE DUTY OF TELLING THE TRUTH

The last objection to child witnesses listed by Spencer and Flin *op cit* may be dealt with shortly. It is said that children do not understand the duty of telling the truth. This is a sweeping statement which ignores differences in age, intelligence and morality between children.

In 1989 a British Home Office Committee, under the chairmanship of a High Court judge, Mr JUSTICE PIGOTT, recommended that-

> "Our courts should be willing to listen to children of all ages and lawyers should be willing to learn what other disciplines can teach them about the features of a child's evidence which suggest it is true or false, and the circumstances in which false complaints are likely to be made" (quoted in Spencer & Flin *op cit* at p 271).

I have adopted this method of analysing the evidence precisely because I think a new and more specific approach to cases involving children is called for. It is not that there is anything intrinsically wrong with the present approach of merely seeking corroboration of the evidence of a child. No-one who reflects on the matter would doubt that this in most cases is the correct approach. But, in approaching such cases with a single-minded eye towards seeking corroboration, the courts tend to lose sight of the reasons for seeking it. This danger was noted by BARON ACJ in *S v Mupfudza* , *supra* at 273E:

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> "The court looks for corroboration of the evidence of a suspect witness. But - perhaps precisely because of the search for corroboration - trial courts frequently forget that the court must decide whether the witness is credible ...If (he is) not, the matter is at an end, and the question of corroboration of, or support for, his testimony does not arise ..."

(See also LORD HAILSHAM in *DPP v Kilbourne* [1973] 1 All ER 440 (HL) at 452.)

A rational decision as to the credibility of a witness (especially a child witness) can be arrived at only in the light of a proper analysis by means of testing it against likely shortcomings in such evidence in the manner suggested by Spencer and Flin *op cit*. To reach an intelligent conclusion in such an analysis it is necessary to apply, as they do, a certain amount of psychology and to be aware of recent advances in that discipline. This will undoubtedly mean an increase in the workload of judicial officers and the machinery of justice generally, but ways must be sought of accommodating this, as it is the price to be paid for professionally administering justice in an increasingly complex society.

Regrettably, instances of lack of professionalism were evident in the conduct of this trial. My main criticism is the court personnel. All the principal officials were male. This was so, despite the fact that it must have been known well in advance that a female juvenile would be appearing in that court on that day as a complainant in a serious rape case. It surely would not have been impossible to arrange for a female prosecutor or magistrate to officiate or to have a female presence of some sort. As it happened, no criticism can be made of the conduct of either the prosecutor or the magistrate, both of whom appear to have been patient and solicitous of the well-being of the complainant and her companion who gave evidence on her behalf. But surely those responsible for physically allocating cases and courts must be aware of the embarrassment likely to be felt by a little girl when relating the detailed descriptions of the perpetration of a rape required by a court of law. Such embarrassment can only be exacerbated when the evidence must be given before an exclusively male audience because:

1. the discussion of intimate sexual matters in the presence of members of the opposite sex is normally taboo;

2. the absence of a female listener means that a female witness who has been sexually abused lacks any substantial sympathetic support. No

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male person can possibly understand the feelings of a female victim. It is thought probable that even very young complainants feel this almost instinctively; and

3. it is likely that a woman or girl who has been recently or badly abused will associate, if

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only subconsciously, all males with her assailant.

An all-male audience is, therefore, unlikely to encourage a complainant to give full and objective evidence.

Be that as it may, the appeal against conviction in this case must fail for the reasons that I have highlighted above.

I turn now to deal with the appeal against sentence.

Rape is a particularly serious offence. It is no coincidence that until recently it ranked with murder and high treason as unique among common law offences in attracting the death sentence.

The abolition of the death sentence in respect of rape does not imply any lessening of repugnance for the crime. It represents a shift in attitude to capital punishment.

The gravity with which rape is regarded, in my view, has two aspects.

Firstly, the crime itself consists of an assault of a particularly vicious nature. This is invariably the case. There may be different degrees in the viciousness, but a rape always implies vicious assault. The nature of the assault in most cases remains with the victim for life because, while whatever physical injury is incurred may heal in time, the psychological trauma may never heal. The memory will, in all probability, influence, perhaps drastically, the victim's attitude to society in general, and to men in particular, as long as she lives.

Secondly, the crime is unique, in that it is usually committed by men against women. A perpetrator of rape can never know what it is like to be raped. (If he is very unfortunate he may be sexually assaulted, but I think it may be accepted that even the worst sexual assault on a male cannot be compared to rape.)

The essence of the crime is an assault on the bodily integrity of a woman's

femininity. If it is a function of the criminal law to protect members of society from those who would employ illegal means to prey on those less able to defend themselves, then rape is rightly regarded as a crime of the utmost gravity.

If what has been said above is true of the rape of women in general, the question may pertinently be posed as to how the law should regard the rape of a juvenile and furthermore a juvenile specifically entrusted to the care of the perpetrator of the crime. Any attempt to assess the culpability of such a person needs to be approached with as much detachment as possible, for, as a human being, a judge has natural human feelings regarding those who would take advantage of the innocence and immaturity of a child - the more so a child in his care and under his authority. The natural feeling is, I think, one of utter disgust with the person concerned and

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revulsion at his deed. That an experienced teacher should contemplate assaulting a pupil in this way is utterly beyond the realms of normal comprehension, even if one supposes he must have been motivated by some pressure or difficulty of his own and was not acting on mere predatory impulse - although it has to be said that he did not in mitigation or at any other time allude to an explanation for his behaviour. Nor did he express contrition for what he had done.

Taking into account all the factors I have mentioned, and especially the age of the complainant and the fact that she was, at the time of the offence, in the appellant's care and under his authority, the sentence imposed does not induce in me any sense of shock. There is no justification, in my view, to interfere with the sentence imposed.

Accordingly the appeal is dismissed in its entirety.

Korsah JA: I agree.

Muchechetere JA: Whilst I agree with EBRAHIM JA in his exposition of the law in this matter, I, however, with respect, disagree with his conclusion on the facts.

In the first instance Mrs *Zindi*, who appeared for the State, submitted that the following matters were common cause:

"(a) that at the time of the offence alleged the complainant was eleven years old.

(b) that the appellant was her class teacher.

(c) that on the day of the alleged offence, the complainant and others had been detained at the school by the appellant."

Mrs *Zindi's* submission was not correct inasfar as (c) was concerned. The appellant strongly denied the allegation that he had on the day alleged detained the complainant and any other pupils for punishment. The following is stated in his defence outline:

"1. School runs from 7.30 am to 13.00 pm every day from Monday to Friday.

2. That he has no authority to punish pupils and punishment at the school is administered by the deputy headmaster assisted by the headboy. This was the procedure at least in 1991.

3. Further, that punishment was so administered on Fridays after 13.00 (hours), that is, after lessons.

4. He was not instructed to cause children to water the orchard on that date. Further, if it was watering of the orchard he would have supervised.

5. If the alleged rape was done after punishment where were the other children?".

In my view, one of the reasons why the State failed to prove the charge against the appellant beyond reasonable doubt was the failure to prove that the complainant was even detained for punishment by the appellant as alleged. The three State witnesses' evidence on the matter is not clear and therefore unsatisfactory.

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[The learned JUDGE OF APPEAL then examined the evidence of the complainant and other witnesses, and continued.]

From the above, I am of the view that the appellant's contention that it was not possible for him to have raped the complainant between 1.00 and 2.00 pm as alleged has credibility. In the first instance, his assertion that there would have been pupils sweeping and tidying up the classroom immediately after 1.00 pm is, as was shown above, given credence by the complainant herself. Secondly, his assertion that from 1.30 pm there would have been classes going on in room 11, which was next to his, is also supported by the

complainant. The complainant also agrees that their classrooms had large windows, implying that any slight noise in one classroom would be heard in the next classroom. Another factor is that between 1.00 and 1.30 pm pupils who attended afternoon classes would be playing in the school grounds, which were less than 40 to 60 metres from the school. It was also conceded that between 1.00 and 2.00 pm members of the feeding scheme would have been having lunch at the Home Economics Block, some six metres from the appellant's classroom. All this indicates that there was no time for the appellant to have had sexual intercourse or committed rape in the circumstances. Further, any attempt to commit the offence would have been easily heard by either the afternoon pupils or the other teachers unless, of course, the complainant is not telling the truth when she said that she "screamed".

Further, the appellant's contention, some sort of an alibi, that he, being a member of the school feeding scheme, was also at the Home Economics Block having his lunch at the time the rape is alleged to have occurred, which contention is, as shown above, supported by the headmaster, was never challenged.

The next matter which was not resolved by the State's case is whether the alleged actions of the complainant during the alleged rape show any indication that rape indeed took place.

[The learned Judge of Appeal analysed the complainant's evidence on this matter and continued.]

In my view, the actions of the complainant during and after the alleged rape do not support the allegation, more so when consideration is taken of the fact that the complainant was only eleven years of age at the time and the contention that she was having sexual intercourse for the first time on that occasion. In my view, it is improbable that she would not have screamed the place down if any sexual intercourse, let alone rape, had taken place. She would, in my view, have rushed to report the matter to the nearest official - the headmaster and other teachers whom she knew were around. Even if it could be said that she preferred to tell her mother first, what one would have expected would be that she would have rushed home in a shaken and distressed state and told her all that had happened. There was no reason why she would not have revealed everything that had happened. Her explanation that she did not know that what the appellant had done was wrong is easily discounted. In evasive and contradictory replies she admitted she knew that it was wrong. At some stage she said:

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"Q. Now, if the teacher, Mr Sibanda here, if he pulled down your pants, is that wrong? A That is wrong.

Q. What about if he put, as you told this court, his penis into your vagina, is that wrong?A. It is wrong."

She ended using the term that she did not know that it was "under the law" but could not explain what that term meant. It cannot be said that she did not tell the truth to her mother because she wanted to protect the appellant, for she clearly stated that she hated him. She also implied that the appellant hated her mother and herself because they "were proud".

The appellant's contention is also supported by the unsatisfactory nature of the complainant's evidence on the matter. As shown above, there are prevarications and contradictions throughout her evidence.

Further, the mother's evidence does not, in my view, support the allegation of rape.

[The learned Judge of Appeal considered the mother's evidence in detail, and continued.]

I should point out first that there is a contradiction between the complainant and the mother, in that the complainant stated that after she made a report to the mother she said nothing. The mother states that she advised the complainant that the next time the teacher fondled her she should report the matter to the headmaster.

The mother also contradicts herself in another matter. She also starts by saying that she did not know that it was an offence for a teacher to fondle her daughter. This in itself is a ridiculous and an unbelievable statement coming from a woman and a mother of seven children. As will be observed from the above, she later went on to admit that it must have been wrong. This came about in that she admitted that she wanted the complainant to report the matter to the headmaster if it ever happened again.

The second matter is that the mother's stated reaction to the complainant's "report" is so unnatural that it strengthens the contention that no rape or sexual intercourse ever took place. In the first instance, she does not closely observe her own child whilst she is making a very serious report to her to see whether any harm had been done to her. She does not even observe as to

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whether the complainant was in a distressed condition or not. After the child had made the report she does not ask whether she had been harmed or not and is not interested in taking the matter further. The whole scene is, in my view, unbelievable. I cannot imagine any parent reacting in that manner in such a situation. It must be borne in mind that this matter is supposed to have occurred in the city of Bulawayo and that the parents and child in question must therefore be taken to be enlightened. Viewed in this light, my view is that the evidence of

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the mother was clearly unsatisfactory on the matter.

The other unsatisfactory matter is the manner in which the complainant in the end named the appellant as the person who raped her. After she had initially declined to reveal that she had been raped and later denied on several occasions that it was the appellant who had raped her, she in the end named the appellant after being threatened with arrestn - see *S v T* 1963 (1) SA 484 (A). As stated above, there was initially no reason for the complainant to protect the appellant. On the contrary, it appears that after being threatened with arrest she decided to name the person she hated as the culprit. It also appears she named him so that she would leave the school, as was her wish. The mother, in my view, simply supported what her child said in order to save her face to her sister-in-law and family.

For the above reasons I would allow the appeal against conviction.

Mlaudzi, Samp & Partners, appellant's legal practitioners

COMMISSIONER OF TAXES v F KRISTIANSTEN (PVT) LTD 1994 (1) ZLR 412 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

31 March & 16 May 1994

Flynote

Revenue and public finance - income tax - overpayment - refused by Commissioner of Taxes - interest - no exemption under common law for fiscus - no statutory provision to require pay interest on refunds of tax

Headnote

The respondent sought interest in respect of overpaid taxes which were refunded to it. The Commissioner of Taxes contended that the fiscus was immune from the payment of interest, alternatively that the legislation in Zimbabwe made no provision for the payment of interest. The High Court held that there was no immunity for the fiscus, and that interest was payable from the date of demand. On appeal:

Held, that under the common law there is no immunity for the fiscus from the payment of interest.

Held, further, that the legislation relating to income tax in Zimbabwe imposed an obligation on a taxpayer to pay interest on unpaid tax, but imposed no obligation on the Commissioner to pay interest on refunds.

Cases cited:

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CIR v First National Industrial Bank Ltd 1990 (3) SA 641 (A)

Collector of Customs v Cape Central Rlys Ltd (1889) 6 SC 402

CIR v Steyn 1920 CPD 243

Linton v Corser 1952 (3) SA 685 (A)

Davidson v Bonafede 1981 (2) SA 501 (C)

SANLAM v Rainbow Diamonds (Edms) Bpk en Andere 1982 (4) SA 633 (C)

GUBBAY CJ

Loots v Joubert 1984 (1) SA 775 (O)

Bellairs v Hodnett & Anor 1978 (1) SA 1109 (A)

Union Government v Jackson & Ors 1956 (2) SA 398 (A)

Johannesburg Municipality v Cohen's Trustees 1909 TS 811

Seluka v Suskin & Salkow 1912 TPD 258

Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corp Ltd (in liq) 1981 (1) SA 171 (A)

Keeley v Min of Defence 1980 (4) SA 695 (T); 1981 (3) SA 904 (A)

CIR v NCR Corp of SA (Pty) Ltd 1988 (2) SA 765 (A); 50 SATC 9 (A)

Ellis NO v CoT 1994 (1) ZLR 423 (S)

M J Gillespie for the appellant

A P de Bourbon SC for the respondent

Judgment

Gubbay CJ, McNally JA & Korsah JA: On 20 September 1990, the appellant, ("the Commissioner"), issued a notice of assessment for income tax to the respondent company, ("the taxpayer"), assessing the tax payable for the year ending 31 March 1989, at $2915,50, being an amount considerably less than that already paid. The sum overpaid was $12535,70 and by letter of 17 October 1991, the taxpayer demanded repayment. It was received on 31 December 1991.

Almost fourteen months later, the taxpayer brought an application before the High Court in which it sought an order that the Commissioner pay to it interest *a tempore morae* at the prescribed rate in terms of s 6 of the Prescribed Rate of Interest Act, 1985, from the date of issue of the assessment, alternatively, from the date of demand, to the date of repayment.

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The Commissioner's opposition to the application was grounded on two contentions: first, that under the common law the fiscus is not obliged to pay interest arising *ex mora* on debts owed; second, and in any event, the taxing legislation, properly construed, excludes payment of interest *ex mora* on refunds due of the overpayments in respect of income tax.

The learned judge presiding (ADAM J) ruled against the Commissioner. He expressed the view that the exception or the privilege of the Roman Law as enunciated in Voet 49.14.2, that the fiscus is not liable to pay *mora* interest other than on its own contracts, is no longer part of the common law of this country as it has become obsolete. And further, that the payment of *mora* interest to a taxpayer in respect of an overpayment of tax is not precluded

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under existing legislation. Save for holding that the Commissioner had been placed in *mora* by the letter of demand of 17 October 1991, and not before, the learned judge granted the taxpayer the relief claimed with costs.

In the appeal before this court, the same two issues were raised by Mr *Gillespie*, who appeared for the Commissioner. Though easy to comprehend, they are difficult of resolution.

In *CIR v First National Industrial Bank Ltd* 1990 (3) SA 641 (A), NIENABER AJA (as he then was), when considering the argument that the fiscus is not liable to pay *mora* interest, said at 649C:

> "To the extent that Voet (49.14.2) suggests that the Treasury is not liable for the payment of interest he is either discussing an exception of the Roman Law or, if not, the rule has become obsolete in ours (cf Groenewegen *De Leg Abr* 22.1.17.5). The frequently quoted remarks of CENTLIVRES CJ in *Linton v Corser* 1952 (3) SA 685 (A) at 695H are not inapposite."

CORBETT CJ, BOTHA and KUBLEBEN JJA concurred, as did NICHOLAS AJA, although he dissented on other aspects of the judgment.

Mr *Gillespie* argued, as he was obliged to do, that in expressing this opinion the South African Appellate Division fell into error and ought not to be followed. He asserted that the apparent reliance on the passage in Groenewegen was misplaced and does not suggest the total vulnerability of the Treasury to interest as if it were a private individual, but on the contrary deals only with the Treasury's liability *ex suis contractibus.* He maintained that in respect of the Treasury there remains a distinction between interest *expacta* and interest *ex mora*, and that in the absence of legislation the Treasury is exempt from the payment of interest *ex mora.*

The starting point in the old authorities is *Digest* 22.1.17.5 (*The Civil Law*, translation by S P Scott), which sets out the position thus:

> "The Treasury does not pay interest on account of any contract entered into by it but collects it; as is customary in the case of keepers of public privies who are slow in paying their rent, and also in the case of those from whom taxes are due"

An opinion of *Paulus* is cited for the proposition. The reference to keepers

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of public privies who are slow in paying their rent suggests interest arising from *mora* and not interest stipulated for. The passage then proceeds:

> "But where the Treasury takes the place of a private individual, it is the custom for it to pay interest."

This refers to the situation where the Treasury succeeds to the right of a private person who is himself indebted to others in respect of interest.

Groenewegen *De Legibus Abrogatis, ad Digest* 22.1.17.5, indicates that in his day the Treasury was used by law for the public good, so much so that on the Treasury's own contracts it did not receive greater interest than it gave and similarly the other party to that contract with the Treasury did not receive greater interest than it gave. In his *Commentarius ad Pandectas*, Voet 4.4.55 explains the position relating to restitution by the Treasury thus:

> "...it seems that in the sphere of restitution the Treasury, the Church, the city and so forth are by no means to be distinguished from minors. It follows that the Treasury, the Church, the poor and cities can also receive restitution for the same causes and against the same transactions in which minors receive it

In all these cases a general principle gives support, namely that their affairs in every instance are obliged to be managed by others just like those of minors; and thus they can be just as ignorant as minors of what is being done by their managers. Nor is it just that the unwisdom of managers should do harm to those who are unable to manage their own business, since they are not properly speaking persons. Certainly written answers are found in regard to cities and states having like wards to be extraordinarily assisted.

There is no reason why the same rule should not be followed in the case of the Treasury, though the laws do not declare such a thing at all expressly. It is clear that in other regions of the law not merely do minors and the Treasury have equal privileges, but sometimes those of the latter are even greater than those of the former. Certainly they enjoy the like rights in that for them default takes place without demand (that is, *mora ex re*)."

(Translation by Percival Gane, *The Selected Voet,* Vol I, at pp 712-713).

When considering the eighteen privileges of the Treasury, Voet says, in 49.14.2:

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> "(ii) It receives interest on every contract as a result of default, **but does not pay interest except insofar as it succeeds to the right of a private person**" (emphasis added). (Translation by Percival Gane, *op cit*, Vol VII at p 644.)

This was a reference by the Roman Dutch jurist to *Digest* 22.1.17.5, which is not nearly as widely stated or as explicit as the position he enunciated. It may well be, therefore, that this particular exception or privilege was not an accurate representation of the Roman Law or, if it were, it was merely a discussion of the law in those times.

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In an article entitled "The legal position of the State in relation to payment of interest *a tempore morae*" in (1956) 73 *SALJ* at p 409-415, K Neethling argues that the exception of the Treasury as enunciated by Voet was received into the law of South Africa. (See also Manfred Nathan, *Common Law of South Africa* Vol I 2 ed (1913) at para 93.) In the first place, he points out that DE VILLIERS CJ, in *Collector of Customs v Cape Central Railways* (1889) 6 SC 402 at 407, referred with apparent approval to Voet 4.4.55, wherein the various similarities of minors and the fiscus are set out, and in particular that the fiscus is entitled to *restitutio in integrum* in the same manner as minors. Second, he adverts to the *dictum* of BENJAMIN J in *Commissioner of Inland Revenue v Steyn* 1920 CPD 243 at 244, which acknowledges the privilege of the fiscus (and minors too) of being entitled to hold its debtors liable as from the date of accrual of a debt for the payment of interest therein - *mora ex re*. Based on these two decisions it is submitted at pp 412- 413 that -

> "If this special exemption in favour of the State as regards **receipt of interest** can be upheld, then there would appear to be no logical reason why the special exemption in its favour regarding **payment of interest** should not also be upheld. They both appertain to the incapacity [*sic*] of the fiscus in relation to interest and are branches of the same principle."

With due deference, it seems that the inference drawn by the learned author does not follow as a matter of logic. Receipt of interest on the basis of *mora ex re* is a different concept from an exemption from paying interest.

If we are wrong in this and the rule as enunciated by Voet in 49.14.2 was correctly founded on the *Digest* and was received into the law of South Africa, we would respectfully adopt the opinion of that country's highest court, that it has since become obsolete. See also Gane's note *op cit*, at p 644, that it is difficult to assess to what extent some of the privileges in title 14 may

have become obsolete. We do so, notwithstanding an acceptance of Mr *Gillespie's* submission that Groenewegen *De Leg Abr* 22.1.17.5 affords no support for the obsolescence of the rule in later times.

The passage in the judgment of CENTLIVRES CJ in *Linton v Corser supra*, at 695H, which is cited by NIENABER AJA in *CIR v First National Industrial Bank Ltd supra* at 649D-E, is to this effect:

> "The old authorities regarded interest a *tempore morae* as 'poenaal ende odieus' *vide Utrechtsche Consultatien* 3, 63, p 288. Such interest is not in these modern times regarded in that light. Today interest is the life - blood of finance, and there is no reason to distinguish between interest *ex contractu* and interest *ex mora*. *Milner's* case is, as far as I have been able to ascertain, the only case which applied the old authorities and in *Johnston v Harrison* 1946 NPD 239 at p 251, the Court was not slow in distinguishing that case. The question that now arises is whether we should apply the old Roman Dutch Law to modern conditions where finance plays an entirely different rôle. I do not think we should. I think that we should take a more realistic view in a matter such as this than to have recourse to old authorities."

These sentiments, which were concurred in by two of South Africa's most long-standing and distinguished judicial scholars, GREENBERG and VAN DEN HEEVER JJA, have been reiterated regularly with approval. See, for instance, *Davidson v Bonafede* 1981 (2) SA 501 (C)

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at 508C; *SANLAM v Rainbow Diamonds (Edms) Bpk en Andere* 1982 (4) 633 (C) at 642 *in fine; Loots v Joubert* 1984 (1) SA 775 (O) at 776H. In *Bellairs v Hodnett & Anor* 1978 (1) SA 1109 (A) at 1145G, this was said:

> "...under modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive the creditor of the productive use of the money and thereby cause him loss. It is for this use that the award of *mora* interest seeks to compensate the creditor."

Furthermore, although the case of *Union Government v Jackson* 1956 (2) SA 398 (A) does not directly address the issue of whether the Treasury is bound at common law to pay interest *a tempore morae, there are dicta* in the judgments of both FAGAN JA at 416G-H and STEYN JA at 439H, which suggest that it is.

The South African authorities referred to are, of course, not binding in this

country, though of much persuasive force. What has become obsolete under the common law in South Africa may not necessarily be similarly regarded here. We have, however, been unable to find a single judicial pronouncement in this jurisdiction which is either in favour or against the reception of the fiscal exemption enunciated by Voet. The matter has never been considered. Viewed against the ever-decreasing value of our currency and the rapid inflation which besets the economy, we consider it wholly unrealistic to accept this ancient fiscal exception as operative today. To do so would be to allow the fiscus an interest-free loan, and to approve the deprivation of the use of money the taxpayer has suffered over what may be a substantial period of time.

In short, it is our view that there is no indication of this old Roman exception ever being received into the common law of this country. But if at some time in the distant past it has been, we would hold that, akin to the position which presently obtains under the common law of South Africa, over the last four decades or so it has become obsolete.

The conclusion that the fiscus is not immune from interest *ex mora,* necessitates a determination of whether it is implicit from an examination of the taxing legislation that the lawmaker's intention was to provide the fiscus with an immunity in respect of interest arising *ex mora* on a repayment of income tax due by it.

The thrust of *Mr Gillespie's* forceful submission was that the absence of any provision in the Income Tax Act [*Chapter 181*] for payment of interest to a taxpayer upon a refund of excess payment of tax, and the specific provisions for the payment of interest and penalties in the Commissioner's favour, evince an overwhelming intention on the part of the Legislature to exempt the Commissioner from the payment of interest.

Certainly, such sections as 37(1), 39(3), 58(2) and 61(5)(b), as well as a few paragraphs in Schedules 13 and 16 to 21 to the Act, deal with the refund of only excess tax by the Commissioner, while ss 60(2), 61(6) and 61(7) and other paragraphs in the aforementioned Schedules relate to the taxpayer's liability for the payment of interest to him; penalties in favour

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of the Commissioner fall under the Schedules. The Capital Gains Tax Act, 1981, also makes express reference to the taxpayer's obligation to pay interest to the Commissioner.

Counsel for the Commissioner also drew attention to the strict administration

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of the Consolidated Revenue Fund (see s102 of the Constitution of Zimbabwe); the legislative control over withdrawals therefrom (see, for instance, s 4(1) of the State Liabilities Act [*Chapter 54*]); the need for specific statutory provision in respect of interest on the raising of public funds (see s 104(3) of the Constitution) and to permit of calls on the Fund to satisfy judgments given. All this, as well as the perceived need to make the Prescribed Rate of Interest Act 1985 expressly applicable to the State (see ss 3 and 5), was urged as being solely consistent with a grundnorm of privilege of the Treasury generally and, in particular, in relation to payment by it of interest.

The learned judge *a quo* reasoned as follows. Under the common law interest is payable where there is an agreement to pay it or if there is default or *mora* on the part of the defendant; the sections of the Income Tax Act which make provision for the repayment of excess tax, and in particular s 37(1) pursuant to which the Commissioner repaid the amount of $12 535,70, are silent on interest payable to the taxpayer; and if the lawmaker had intended that the taxpayer should be deprived of the payment of interest, which constitutes an alteration of the common law, it would have done so expressly and not relied upon implication. Cited in support of the well accepted rule that a legislative intention to amend or modify the common law must not be presumed but must be obvious from the plain words used, were the cases of *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 823; *Seluka v Suskin & Salkow* 1912 TPD 258 at 263; and *Glen Anil Finance (Pty) Ltd v Joint Liquidators*, *Glen Anil Development Corporation Ltd* (*in liq*) 1981 (1) SA 171 (A) at 181 H-182D.

The difficulty with that line of reasoning lies in the existence of a clear distinction in the Income Tax Act between the provision in s 60(2), which expressly states that interest on unpaid tax **shall be payable by the taxpayer**, and the provisions in ss 37 and 39 and elsewhere in the Act, which provide for the refund to the taxpayer by the Commissioner of overpayments.

The omission of any mention of interest in the latter two sections is thus not colourless, as otherwise it might be. The fact that one of the two parties in the tax relationship, ie the taxpayer, is required to pay interest, while there is no reference to the other party, the Commissioner, having to do so, is *prima facie* a strong indication that it is not intended that the Commissioner be liable to pay interest on overdue refunds.

It may be that one cannot rely on that uncertain principle of interpretation known as *"expressio unius, exclusio alterius"* in this situation. The present

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matter is not unlike *Keeley v Minister of Defence* 1980 (4) SA 695 (T). In that case THERON J remarked at 696H-697C that *prima facie* where there is provision that "every citizen" should do something, the rule quoted would suggest that non-citizens were not under the obligation. But because elsewhere in the legislation there was provision for exceptions for various categories of persons, not including non-citizens, he held that non- citizens were included under the definition "every citizen". The reasoning of the learned judge on the facts is, with respect, questionable. It may be noted that the appeal was by consent allowed when the matter came before the Appellate Division, though no judgment was delivered - see 1981 (3) SA 904 (A). But his statement of the principle was, with respect again, correct. Where the statute provides, as here, that one party shall pay interest, but says nothing about the other party doing so, the presumption must be that the other party is not intended to pay interest.

A study of the history of the Income Tax legislation seems to us to support this view. The earliest provision for the payment of income tax and for the appointment of a Commissioner of Taxes was made in the War Taxation Ordinance 20 of 1918. No provision was made for the payment of interest, either by the taxpayer or by the Commissioner.

That position was soon altered. By Ordinance 12 of 1922 the relevant section (s 58) of the 1918 Ordinance was amended to allow the Commissioner to charge interest at eight *per centum per annum* on unpaid or overdue tax. No change was made then, or, so as far as we are aware, ever, to provide for the Commissioner to pay interest on the refund due of the overpayment of tax.

The 1938 legislation (*Chapter 134* of the 1939 Edition of the Statutes) maintained this distinction in sections 50(2) and 56. The Federal Income Tax Act, 16 of 1954 was the same. In s 65(2) the taxpayer was required to pay interest at seven *per centum per annum*, but the fiscus, in s 71, was not.

Next came the current Income Tax Act, now incorporated as *Chapter 181* of the 1974 Statutes. It was promulgated on 1 April 1967 and introduced the separate system of taxation known as PAYE. As already noted, s 60(2) provides that the tardy taxpayer shall pay interest, but ss 37 and 39 simply require the Commissioner to refund tax which has been overpaid.

Thus, for the last 72 years the income tax legislation in this country has consistently differentiated between the obligation of the taxpayer with regard to interest, and the obligation of the Commissioner in that regard.

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The differentiation was specifically introduced in 1922. If it had been assumed that by common law both the fiscus and the taxpayer were liable to pay interest, it would not have been necessary to make the amendment. It must have been considered that neither party was liable to pay interest under the 1918 Ordinance. So the amendment was introduced for the purpose of making the taxpayer liable. The failure to make any similar provision in relation to the Commissioner was thus pointed and manifestly deliberate.

Other countries have amended their taxing statutes to make the Commissioner liable for

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interest. See, for example, s 88 of the South African Act, as discussed in *CIR v NCR Corporation of SA (Pty) Ltd* 1988 (2) SA 765 (A); 50 SATC 9. Zimbabwe has not. And one can hardly say with confidence that as long ago as 1922 the old common law view as to the exemption of the fiscus from the payment of interest was regarded as obsolete. See our reference *supra* to the fact that, if it was part of the common law, it has become obsolete "over the last four decades or so".

It might have been instructive had there been evidence as to the practice of the Commissioner as to the payment of interest. But in the absence thereof, and with the *onus* on the taxpayer, we can only assume that over a period of 76 years the Commissioner has never paid, or at least never established a practice of paying, interest on overdue refunds. This is strongly suggestive of the fact that he has never considered himself liable to pay interest. Certainly he has never been challenged in the courts on this point. At any rate, no instance has been cited to us.

Our conclusion must therefore be that the income tax legislation of this country since 1922 must be interpreted as exempting the Commissioner from paying interest on overdue refunds of taxes paid.

It must be made clear that where there is a judgment sounding in money (as opposed to an order for a re-assessment, which may be a different matter) against the Commissioner, he is obliged to pay interest from the date of judgment. This is because the debt is then no longer a debt in terms of the Income Tax Act, but a judgment debt, governed by the provisions of the Prescribed Rate of Interest Act 30 of 1985.

It must equally be made clear that what we have said in this judgment about refunds of **overpaid** tax does not apply to the repayment by the Commissioner of moneys which were **exacted unlawfully** under an illegal or unconstitutional enactment. That situation is the subject of this court's concurrently delivered judgment in *Ellis NO v CoT* 1994 (1) ZLR 423 (S).

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Accordingly the appeal is allowed, with costs, and the judgment of the court *a quo* is altered to read:

> "The application is dismissed with costs."

Civil Division of the Attorney-General's Office, appellant's legal practitioners *Gill, Godlonton & Gerrans*, respondent's legal practitioners

ELLIS NO v COMMISSIONER OF TAXES 1994 (1) ZLR 423 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

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Civil appeal

31 March & 16 May 1994

Flynote

Revenue & public finance - taxation - interest - demand for tax under unlawful legislation - interest payable by Commissioner of taxes from date of receipt of payment

Headnote

The Commissioner of Taxes assessed the taxpayer for capital gains tax on expropriated shares. The tax demanded was paid, but the provision of the legislation was subsequently held to be invalid by the Supreme Court as being contrary to the Constitution. The Commissioner thereafter reimbursed the bulk of the tax paid. The estate of the taxpayer brought an application to require the Commissioner to pay interest on the tax paid from the date of payment to the date of repayment. The Commissioner argued that the fiscus was immune from a claim for interest. In the High Court it was held that the Commissioner was liable, but only from the date when the Supreme Court declared the legislation to be invalid. On appeal:

Held, where a demand for tax is made under invalid legislation, the taxpayer has a right to recover the tax paid, together with interest from the date of payment.

Held, there was no principle of Roman-Dutch law which prevented the court ordering the payment of interest in the present case.

Cases cited:

May & Ors v *Reserve Bank of Zimbabwe* 1985 (2) ZLR 358 (S); 1986 (3) SA 107 (ZS)

CW v *CoT* 1988 (2) ZLR 27 (H) ; 1990 (2) SA 245 (ZH)

CoT v *CW* (Pvt) Ltd 1989 (3) ZLR 361 (S); 1990 (2) SA 245 (ZS)

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Woolwich Bldg Soc v *IRC (No. 2)* [1992] 3 All ER 737 (HL)

Woolwich Equitable Bldg Soc v *IRC* [1991] 4 All ER 92 (HL)

Woolwich Equitable Bldg Soc v *IRC* [1987] STC 654

Woolwich Equitable Bldg Soc v *IRC* (No. 2) [1989] 1 WLR 137 (QBD); [1991] 4 All ER 577 (CA)

Glasgow Corp v *Lord Advocate* 1959 SC 203

Air Canada v *British Columbia* (1989) 59 DLR (4d) 161 (SC Canada)

Amax Potash Ltd et al v *Govt of Saskatchewan* (1976) 71 DLR (3d) 1 (SC Canada)

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Aitchison Topeka & Sante Fe Rlwy Co v *O'Connor* 223 US 280 (1912) (US SC)

Victoria Falls & Tvl Power Co Ltd v *Consol Langlaagte Mines* Ltd 1915 AD 1

West Rand Est Ltd v *New Zealand Ins Co Ltd* 1926 AD 171

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

C & T Products (Pty) Ltd v *MH Goldschmidt* (Pty) Ltd 1981 (3) SA 619 (C)

CIR v *First National Industrial Bank Ltd* 1990 (3) SA 641 (A)

Willis Faber Enthoven (Pty) Ltd v *Receiver of Revenue & Anor* 1992 (4) SA 202 (A)

David Securities (Pty) Ltd & Ors v *Commonwealth Bank of Australia* (1992) 175 CLR 353 (HC Australia)

CoT v *F Kristiansten (Pvt) Ltd* 1994 (1) ZLR 412 (S)

A P de Bourbon SC for appellant

M J Gillespie for respondent

Judgment

Gubbay CJ: Peter Temple Ellis is the executor dative in the estate of the late Evelyn Mary Brakspear ("the taxpayer"), who died on 25 November 1990. During her lifetime the taxpayer acquired shares in a number of companies which were registered outside Zimbabwe. These external shares were external securities traded on the Zimbabwe Stock Exchange as such. Upon purchase they were held on behalf of the taxpayer in the name of a locally resident nominee.

On 14 March 1984, trading on the Zimbabwe Stock Exchange in external securities was suspended. Two weeks later the Exchange Control (Amendment) Regulations 1984 (No. 3) were promulgated. Their effect was to insert a new provision, s 12A, in the Exchange Control Regulations 1977. Then, on 27 April 1984, the Reserve Bank of Zimbabwe, acting on behalf of the Minister of Finance, issued to the taxpayer in terms of the said s 12A, a

notice of its intention to acquire compulsorily the external shares. Subsequently, on 29 May 1984, and again pursuant to s 12A, the Reserve Bank of Zimbabwe directed the transfer of the external shares into its own name and thus effectively acquired them.

The taxpayer contested the compulsory acquisition of her shares and the amount of compensation paid to her, being $1 328 854, on the ground that it was inadequate, but following upon the majority decision of this court in *May & Ors* v *Reserve Bank of Zimbabwe* 1985 (2) ZLR 358 (S), 1986 (3) SA 107 (ZS), withdrew her opposition.

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With effect from 1 April 1984, s 10 of the Capital Gains Tax Act, 1981, was amended to provide in para (f) an exemption from capital gains tax on the compensation paid for the compulsorily acquired external securities. However, on 1 November 1985, a proviso to s 10(f) was added which removed the exemption from capital gains tax in respect of those persons who had contested the amount of compensation payable.

On 8 May 1987, the respondent ("the Commissioner"), in terms of the proviso to s 10(f), issued the taxpayer with a notice of assessment for capital gains tax in relation to the compensation received upon the acquisition of her external shares. The amount demanded in such assessment was $398 656,20. On 18 May 1987, the taxpayer objected to the assessment on four separate grounds, the first being that the levy of the tax was *ultra vires* the Constitution of Zimbabwe, but nonetheless paid the amount two days later.

On 12 June 1987, the Commissioner issued a credit of $4 221, 90 against the existing liability of the taxpayer. Shortly thereafter he disallowed the objection on all grounds.

The right of the Commissioner to raise capital gains tax in respect of those persons who had disputed the amount of compensation payable was tested in an appeal brought before the High Court. On 13 July 1988, the proviso to s 10(f) of the Capital Gains Tax Act was ruled by SMITH J to contravene s 16 of the Declaration of Rights, contained in the Constitution of Zimbabwe, and accordingly to be *ultra vires*. See *CW* v *CoT* 1988 (2) ZLR 27 (H), 1990 (2) SA 245 (ZH). An appeal to this court by the Commissioner was dismissed on 28 December 1989. See *CoT* v *CW (Pvt) Ltd* 1989 (3) ZLR 361 (S); 1990 (2) SA 245 (ZS) at 260ff.

About nine months later, on 3 October 1990, the Commissioner repaid the sum of $390 212,40 to the taxpayer, but this was an arithmetical error as the

amount to be refunded should have been $394 434,30 (ie $398 656,20 less $4 221,90 already credited). No payment in respect of interest on the principal amount was made by the Commissioner.

On 11 February 1992, Mr Ellis, on behalf of the estate of the taxpayer, instituted proceedings by way of a notice of motion seeking, in the main, an order that the Commissioner pay the estate:

(i) interest *a tempore morae* at the prescribed rate per annum on $398 656,20 from 20 May 1987 to 11 June 1987, on $390 212,40 from 20 May 1987 to 3 October 1990, and on $4 221,90 from 20 May 1987 to date of payment;

(ii) the sum of $4 221,90; and

(iii) the costs of suit.

The Commissioner opposed the application on several grounds. First, that under the common law the fiscus is generally immune from the payment of interest *ex mora* arising other than on its own contracts or where otherwise provided by law. Second, and in any event, that the taxing

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legislation, properly construed, excludes payment of interest *ex mora* on refunds due of the overpayments in respect of income tax or capital gains tax. Third, that if in law interest is payable, it becomes so only from the date of demand which would place the Commissioner in *mora*; no such demand having been made by the taxpayer.

In his judgment, reported under the same name in (1993) 55 SATC 260 (ZH), ADAM J expressed the view in favour of the taxpayer that the exception or privilege of the Roman Law, as enunciated by Voet 49.14.2, that the fiscus is not liable to pay *mora* interest other than on its own contracts, is no longer part of the common law of this country as it has become obsolete (at 266). And further, that the payment of *mora* interest to a taxpayer in respect of a refund of capital gains tax is not precluded under existing tax legislation (at 272). He held, however, that it was only on 29 December 1989, when the appellate judgment in *CoT* v *CW (Pvt) Ltd supra* was delivered, that the taxpayer's right to claim a refund of capital gains tax together with interest thereon, became effective (at 295). In the event he ordered the Commissioner to pay (i) interest *a tempore morae* at the prescribed rate per annum on the amounts of $390 212,40 from 29 December 1989 to 3 October 1990, and $4 221,90 from 29 December 1989 to date of payment; (ii) the sum of $4 221,90; and (iii) the costs of the application.

Mr Ellis now appeals solely against that part of the order awarding interest

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from 29 December 1989, but the Commissioner cross-appeals against the whole of the judgment on the grounds that the learned judge erred in dismissing each of the contentions advanced on his behalf.

In this court the substantive attack on the Commissioner's refusal to pay interest was founded on the illegality of the proviso to s 10(f) of the Capital Gains Tax Act, the provision pursuant to which the demand for payment was made by the Commissioner. It was submitted that as the proviso was *ultra vires* the Declaration of Rights and so null and void, the demand made was unlawful. Cited were these graphic words of JUSTICE FIELD in *Norton* v *Shelby County* 118 US 454 (1886) 425 at 442:

> "An unconstitutional Act is not a law. It confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Hence it was argued, and rightly so to my mind, that this was not a situation of an overpayment of capital gains tax **properly chargeable** under the Act, but an undue payment of capital gains tax unlawfully exacted **outside** the framework of the Act. High reliance was placed upon the recent majority decision of the House of Lords in *Woolwich Building Soc* v *Inland Revenue Comrs (No 2)* [1992] 3 All ER 737 (HL). It is, therefore, necessary to deal with the special facts, the prior judicial history and the separate speeches in this landmark case, in some considerable detail.

Between 16 June 1986 and 16 March 1987, the Woolwich Building Society made payments to the Inland Revenue totalling £56,99 million on account of corporate rate tax. Although disputing the validity of the levies it nevertheless paid in response to demands by the Inland Revenue

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under the newly introduced Income Tax (Building Societies) Regulations 1986. It did so because it feared damage to its commercial reputation if it were seen to resist a tax demand and because of the prospect of penal interest payment if its view of the invalidity of the regulations turned out to be incorrect. Immediately after the first payment the Woolwich launched judicial review proceedings to challenge the *vires* of certain parts of the regulations which, it asserted, charged composite rate tax in respect of a period prior to 6 April 1986, for which its liability had already been discharged. Ultimately the House of Lords confirmed that parts of the regulations complained of were *ultra vires* the enabling legislation. See *Woolwich Equitble Blg Soc v IRC* [1991] 4 All ER 92 (HL). It followed that the demands made by the Inland Revenue in reliance upon those parts of the regulations were equally unlawful. In

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consequence of the ruling the Inland Revenue repaid the money it had received with interest from 31 July 1987, being the date of the judgment of the High Court (NOLAN J) in the Woolwich's favour. See *Woolwich Equitable Bldg Soc* v *IRC* [1987] STC 654. The basis upon which it did so was the acceptance of a moral obligation and that any such repayment was a matter of administrative grace only and not of legal entitlement, with the result that no interest was due for the period between the original payment and the date of NOLAN J's decision.

This led to the second leg of the epic battle between the parties. The crucial issue at stake was whether the overpaid tax was recoverable from the date of the payment or only from 31 July 1987, the date of the High Court judgment. If the former view were correct, then a cause of action to recover the overpaid tax as a debt, arose immediately on payment, and interest accrued from the date of payment.

The action brought by the Woolwich for recovery of interest, which amounted to £6,73 million, as money had and received to its use, also came first before NOLAN J He held that the interest could not be recovered for two reasons. First, there was no general restitutionary principle allowing recovery of money paid in response to an unlawful demand and the case did not fall within any of the traditional grounds of restitution, particularly mistake and duress. Second, he took the view that the sums were paid under an implied agreement that they would be repaid if and when the dispute about the validity of the regulations was resolved in the Woolwich's favour. So it had no cause of action to recover the money until the date of his order on 31 July 1987. Nevertheless the learned judge was sympathetic to the Woolwich's predicament. He pointed out that if the view of the Inland Revenue was right, it had received a massive interest-free loan at a time when inflation meant that the capital sum had considerably diminished in value since it had been paid. Thus the *Woolwich* was not only deprived of interest but in effect recovered less than it had handed over. See *Woolwich Equitable Bldg Society* v *IRC (No 2)* [1989] 1 WLR 137 (QBD) at 140C-D; [1991] 4 All ER 577 (CA).

The Court of Appeal, by a majority, allowed the appeal and awarded the interest claimed. GLIDEWELL and BUTLER-SLOSS LJJ accepted the Woolwich's primary submission that where money was paid under an illegal demand for taxation by a government body, English law recognised a general principle that the payee had an immediate *prima facie* right to recover the payment, unless it had been made under a mistake of law or voluntarily to close the transaction.

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RALPH GIBSON LJ dissented. He was of the opinion that on the

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existing authorities there was no such general principle. See *Woolwich Equitable Bldg Soc* v *IRC (No 2)* [1991] *supra*.

On the appeal of the Inland Revenue, the House of Lords was faced with a fundamental issue of the law of restitution. The majority, LORD GOFF OF CHIEVELEY, LORD BROWNE-WILKINSON and LORD SLYNN OF HARDLEY, considered that the nature of a demand for tax by the Inland Revenue and the inadequacies of remedies by way of judicial review, justified the reformation of the law by reinterpreting the principles upon which the authorities were founded so as to recognise a *prima facie* right of recovery, the justice underlying such a right being that a demand for tax is implicitly backed by the coercive powers of the State and may well entail unpleasant economic and social consequences (liability to penal interest) whether or not there is duress; and in the constitutional principle that taxes should not be levied without the authority of Parliament.

The reasoning of LORD GOFF, who gave the lead speech for the majority, may be summarised as follows:

(i) At present recovery in restitution has to be founded on evidence of mistake of fact or compulsion, either in the sense of actual or implied duress of goods or person, or of "colour of office" (*colore officii*). This latter concept, although difficult to define meaningfully, embraces situations where a person charged with a public or statutory duty requires payment or excessive payment in exchange for performing his public or statutory duty (at 753c-j).

(ii) There is also some previous authority, much supported by academic writers, which suggests that recovery should be allowed as of right where payment has been made in response to an unlawful (*ultra vires*) demand. Restitution in such circumstances is founded solely on the unlawfulness of the demand (at 754g-756f).

(iii) The statutory provisions which appear in most areas of the tax code to regulate the repayment of tax by the Inland Revenue had no application, as they are concerned with overpayment of tax pursuant to *intra vires* errors, such as excessive assessment. They are not material to a case of an *ultra vires* demand, that is, where there is no legal foundation for the demand at all (at 757b-j).

(iv) There was neither a basis in law nor on the evidence for any "implied

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agreement", between the Woolwich and the Inland Revenue, so that it was necessary to face directly the question of whether the law recognises restitution as of right (at 758c-759b).

(v) Common justice required that the Woolwich be allowed to recover its money as of right. For the Inland Revenue to retain what it had unlawfully exacted was an unsustainable position, rendered worse by the fact that it would have the benefit of a massive interest free loan as the fruit of its unlawful action (at 759d-g).

(vi) To the "simple call of justice" there was a number of possible objections. The first was that English law has not developed on the basis of a general right to restitution whenever a payee is unjustly enriched. This could be answered by pointing to the constitutional principle, derived from the Bill of Rights (1688), that any such taxation as is authorised by Parliament may be levied. To allow the Inland Revenue to achieve by the back door (collecting taxes without authority) what it could not achieve by the front, was unacceptable. The circumstances in which the Woolwich paid - in response to apparently lawful demands from the State - were very similar to the existing head of recovery of compulsion. However, and rather than stretch the concept of compulsion so far, it was preferable to find a general right to restitution which covered the situation (at 759h-760h).

The second objection was that to recognise such a right as the Woolwich contended for would amount to judicial legislation. This could be countered by the following considerations:

(a) If the House of Lords had not been willing to develop the common law where appropriate, many fundamental advances of the past would never have been achieved (at 761a-c).

(b) The Woolwich's initiative in bringing the case provided a unique opportunity to recognise developments in the law by declaring the existence of a right to restitution in such circumstances (see at 763e-f).

(c) It is attractive to put the taxpayer in the same position as the Government - which can already recover sums overpaid by it as of right (at 764a-c).

Having reached the view that a general right should be recognised, LORD GOFF summed up his stance at 764d in these words:

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> "I would therefore hold that money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an *ultra vires* demand by the authority is *prima facie* recoverable by the citizen as of right."

Although LORD BROWNE-WILKINSON agreed with LORD GOFF'S reasons, the emphasis in his own speech was not so obviously dependent on the special position of governmental or public bodies. He underscored rather the fact that money paid under an *ultra vires* demand is

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paid without consideration and that the relative positions of the State and the citizen are unequal, even in the case of a major financial institution like the Woolwich. He explained at 781e:

> "...money paid on the footing that there is a legal demand is paid for a reason that does not exist if that demand is a nullity. There is in my view a close analogy to the right to recover money paid under a contract the consideration for which has wholly failed."

And continued at 782c-d:

> "The money was demanded and paid for tax, yet no tax was due; there was a payment for no consideration. The money was demanded by the state from the citizen and the inequalities of the parties' respective positions is manifest ...There are, therefore, in my judgment sound reasons by way of analogy for establishing the law in the sense which LORD GOFF proposes."

With much deference the want of consideration factor seems to me to mask somewhat the true rationale of the relief - which was the nullity of the demand that flowed from its *ultra vires* or unlawful nature.

In his speech LORD SLYNN considered that although the facts did not fit easily into the existing category of duress or of claims *colore officii* "they shade into them. There is a common element of pressure which by analogy can be said to justify a claim for repayment" (at 787c). The learned Law Lord went on to say at 787c-d:

> "If I felt compelled to hold that the taxpayer in this case could not recover I would share the no little regret expressed by my noble and learned friend LORD JAUNCEY. With great deference to him and to LORD KEITH I do not, however, feel so constrained by authority, by statute or by principle.

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> I find it quite unacceptable in principle that the common law should have no remedy for a taxpayer who has paid large sums or any sum of money to the Revenue when those sums have been demanded pursuant to an invalid regulation and retained free of interest pending a decision of the courts."

LORD KEITH OF KINKEL, who dissented, thought that it was not appropriate to make new law. He followed the approach of LORD PRESIDENT CLYDE in *Glasgow Corporation* v *Lord Advocate* 1959 SC 203 at 230, and cited the considerable number of instances where legislation had defined the circumstances in which payments of tax due might be recovered and the practical problems and uncertainty which could arise if there were a wholesale opening up of prior transactions. He held that to give effect to the Woolwich's proposition would amount "to a very far reaching exercise of judicial legislation" (at 750g). For that reason he was not prepared to find a legal right of recovery.

LORD JAUNCEY OF TULLICHETTLE agreed, though with "no little regret". Having, on his analysis, dismissed the authorities as disclosing no support for the Woolwich, he went on in similar vein to LORD KEITH, holding at 779f:

> "If I could have seen a respectable way to dismiss this appeal I should have been happy to do so. However, as I have already remarked, I do not consider that it would be appropriate for this House to make new law in this instance."

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A similar view to that exemplified in the Scottish case of *Glasgow Corporation* v *Lord Advocate supra* and approved by the learned Law Lords KEITH and JAUNCEY, was adopted by the Supreme Court of Canada in *Air Canada* v *British Columbia* (1989) 59 DLR (4d) 161. LA FORREST J, who delivered the leading judgment on behalf of the majority, accepted that a tax imposed on the purchasers of gasoline, of which Air Canada was one, under the former Gasoline Tax Act, was *ultra vires* the constitutional jurisdiction of the province of British Columbia. He went on to hold that where unconstitutional or *ultra vires* levies are in issue special considerations arose. First, if a plaintiff had passed on the relevant tax to others, the taxing authority could not be said to have been unduly enriched at his expense and the plaintiff was not therefore entitled to recover, for the "law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss" (at 193). On that basis alone he considered that Air Canada's claim failed (at 193-194). But the claim failed also on the ground that as a general rule and as a matter of policy,

there should be no recovery of taxes paid pursuant to legislation which is unconstitutional or otherwise invalid. Any other rule would at best be inefficient, and at worst could lead to financial chaos (at 194-197). The learned Judge of Appeal observed, however, that the rule against recovery should not apply where a tax is exacted, not under unconstitutional legislation, but through a misapplication of an otherwise constitutional or *intra vires* statute or regulation (at 197). He added that, in his opinion, if recovery in all cases is to be the general rule, then that was best achieved through the route of statutory reform (at 198).

In a very powerful and well-reasoned dissent, which later gained the commendation of both LORD GOFF and LORD SLYNN (*supra*, at 763c and 786a) WILSON J considered that where payments were made pursuant to an unconstitutional statute there is no legitimate basis on which they can be retained. She said at 169:

> "...payments made under unconstitutional legislation are not 'voluntary' in a sense which should prejudice the taxpayer. The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obligated to pay. Citizens are expected to be law-abiding. They are expected to pay their taxes. Pay first and object later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature. In such circumstances I consider it quite unrealistic to expect the taxpayer to make its payments 'under protest'. Any taxpayer paying taxes exigible under a statute which it has no reason to believe or suspect is other than valid should be viewed as having paid pursuant to the statutory obligation to do so.

> Based on the foregoing reasoning, I conclude that payments made under a statute subsequently found to be unconstitutional should be recoverable and I cannot, with respect, accept my colleague's proposition that the principle should be reversed for policy reasons in the case of payments made to governmental bodies. What is the policy that requires such a dramatic reversal of principle? Why should the individual taxpayer, as opposed to taxpayers as a whole, bear the burden of government's mistake? I would respectfully suggest that it is grossly unfair that X, who may not be (as in this case) a large corporate enterprise, should absorb the cost of government's unconstitutional act. If it is appropriate for the courts to adopt some kind of policy in order to protect government

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against itself (and I cannot say that the idea particularly appeals to me), it should be one which distributes the loss fairly across the public. The loss should not fall on the totally innocent taxpayer whose only fault is that it paid what the legislature improperly said was due. I find it quite ironic to describe such a person as 'asserting a right to disrupt the government by demanding a refund' or 'creating fiscal chaos' or 'requiring a new generation to pay for the expenditures of the old'. By refusing to adopt such a policy the courts are not 'visiting the sins of the fathers on the children'. The 'sin' in this case (if it can be so described) is that of government and only government and government has means available to it to protect against the consequences of it. It should not, in my opinion, be done by the courts and certainly not at the expense of individual taxpayers."

Her Ladyship's view re-echoed that of DICKSON J in *Amax Potash Ltd et al* v *Government of Saskatchewan* (1976) 71 DLR (3d) 1 at 10, where it was remarked:

"To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens."

See, too, Hogg *Constitutional Law of Canada* 2 ed (1985) at pp 349-350:

Much the same sentiment was expressed by the redoubtable Mr JUSTICE HOLMES in *Aitchison Topeka & Sante Fe Rlwy Co* v *O'Connor* 223 US 280 (1912), where he said at 285-286:

"It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that, apart from special circumstances, he cannot interfere by injunction with the state's collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course, we are speaking of those cases where the state is not put to an action if the citizen refuses to pay. In these latter he can interpose his objections by way of defense; but when, as is common, the state has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes, perhaps, have been a little too slow to recognise the implied duress under which payment is made. But even if the state is driven to an action, if, at the same time, the citizen is put at a serious

disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defense in the suit, justice may require that he should be at liberty to avoid bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms."

To my mind, the view that there is in general a right to restitution of monies paid following upon an *ultra vires* and illegal demand, and so a right to the recovery of interest thereon, is both attractive and compelling. For such principal payment would have been made either in consequence of a perceived presumption on the part of the payer of the constitutional validity of the demand and the holding out of such legality by the Legislature, or on account of the prospect of the payer being subjected to penal interest were his opinion of the illegality of the demand ultimately ruled to be incorrect. It matters not which it be, since payments made under unconstitutional legislation cannot be deemed voluntary. In short, an *ultra vires* demand alone by a government body provides a ground for restitution. It operates outside the field of mistake and focuses on the position of the government body as payee rather than on the circumstances of the payer.

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Unless, therefore, the existence of such a limited restitutionary right is offensive to the system of Roman Dutch law as applied and developed by judicial authority, it should, on the facts of this case, be accorded to the taxpayer. It is to this end that I now turn.

In his *Commentarius ad Pandectas*, Voet in 22.1.26 states:

> "Default in fact is that which arises without a demand, and thus is brought on by law without any act of a human being. Or it occurs when the very fact includes default in itself, for which reason it is also termed by Paulus *mora in re*."

He goes on in 22.1.27 to refer to seven cases where the law creates *mora in re* and where default takes place as though the law itself made a demand. One of the cases mentioned is "if a thief does not restore things which he has thievishly filched; in as much as such a person is always understood to make default" (trans Percival Gane, *The Selected Voet*, Vol 3 at pp 718 - 719).

Wessels *The Law of Contract* Vol II at para 2863, under the heading "*Mora ex lege*" writes:

> "The debtor is in *mora* not only if the contract fixes a day for the

performance and he fails to perform it, but also if the law provides at what moment performance is due."

In para 2864 the learned author refers to the example of the thief and adds:

> "Thus, the law considers that a thief is obliged to restore stolen property **at the very moment** he steals it, and therefore the thief is always in *mora* (Dig. 13.1.81)" (emphasis supplied).

Although some writers, like Wessels, recognise *mora ex lege* as a separate category, it is often treated as a sub-category of *mora ex re*. See Christie *The Law of Contract in South Africa* 2 ed at p 590.

Dealing with examples of *mora* which arise *ex re* at common law, van Zijl Steyn in his acclaimed *Mora Debitoris* at p 72 mentions:

> "A case which is connected with the foregoing is that of the thief, *fur semper in mora est*. This rule was extended to all mala fide possessors. The partner who uses *pecuniam communem* for his own benefit, the thief and the *mala fide possessores* - **all are obliged to pay interest**" (in translation) (emphasis supplied).

In a further passage on the same page it is pointed out:

> "From that and from the decision of Ulpianus in Dig 31.1.8.1 - *semper enim fur moram facere videtur* - our writers deduced that here, too, we are dealing with an instance of *mora ex re*. Nowadays, however, it is generally accepted that technically this is not an instance of *mora*. The same applies to all actions for recovery of debts *ex delicto*. The debtor is obliged to make restitution or to compensate forthwith, without demand. **His obligation arises from his unlawful act**, not from a blameworthy delay or *mora*" (in translation) (emphasis supplied).

In short, *mora ex re* arises out of the transaction itself and is not dependant upon prior demand for payment. The obligation to pay interest on the amount owing likewise arises from the moment the debtor is in *mora*. See *Victoria Falls & Tvl Power Co Ltd* v *Consol Langlaagte Mines Ltd* 1915 AD 1 at 31; *West Rand Ests Ltd* v *New Zealand Ins Co Ltd* 1926 AD 173 at 195. *Mora ex persona*, on the other hand, occurs when due demand (*interpellatio*) of the debtor has

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been made and not satisfied. See Christie *op cit* at pp 396-397.

In *Kleynhans* v *van der Westhuizen NO* 1970 (2) SA 742 (A) WESSELS JA,

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delivering the judgment of the court, gave effect to the early writings that the theft of monies at the moment of its commission gives rise to a restitutionary claim. He said at 750A-B:

> "Once the perpetration of the theft has been proved the amount of damages has equally been proved and that fixed amount may be claimed immediately after the theft. The thief is in *mora* as from the date of the theft" (in translation).

In *casu* there was, of course, no question of any intention to steal the monies of the taxpayer. Nonetheless the situation is not dissimilar from but rather analogous to the *Kleynhans* case. Each concerned the unlawful act of the recipient that placed him in possession of the monies - the one by virtue of an unlawful *contrectatio*, the other through an unlawful demand made pursuant to a constitutionally *ultra vires* and therefore invalid enactment.

A case closer to the present is that of *C & T Products (Pty) Ltd* v *MH Goldschmidt (Pty) Ltd* 1981 (3) SA 619 (C). There the court found that certain payments made by the plaintiff to the defendant were finance charges in terms of the Limitation and Disclosure of Finance Charges Act and, as such, exceeded the maximum permissible charge rate. The issue raised was from what date the plaintiff was entitled to interest a *tempore morae*. It was submitted that despite the absence of a formal demand, *mora* occurred immediately each overpayment was made and that the plaintiff was entitled to interest calculated from that date. The defendant, *per contra*, argued that *mora* interest did not become payable until a demand was made. FRIEDMAN J (as he then was) held in favour of the plaintiff. He said at 633C-H:

> "Whether this be regarded as a case of *mora* arising from the very act itself (as suggested by Voet) or as not technically a case of *mora* at all, but merely an obligation to repay arising out of an unlawful act (as suggested by Steyn *Mora Debitoris*), the provisions of the Act make it clear that, from the moment defendant received the excess charges, it incurred an obligation to repay them. Accordingly no act on plaintiff's part was required in order to render defendant liable to repay such excess charges.

This is obviously not a case of theft. It does not follow from that however, that a demand is required in order to place defendant in *mora*. As pointed out by Steyn *Mora Debitoris* at 72, the case of the thief has been extended not only to cover other *mala fide* possessors, but also to persons who

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incur delictual liability and whose obligation to pay arises immediately out of their unlawful acts, without a previous demand."

I respectfully agree with the reasoning of the learned judge.

The last and most recent decision in the apposite trilogy is *CIR* v *First National Industrial Bank Ltd* 1990 (3) SA 641 (A). The facts were that from 21 August 1984 to 20 May 1986, the Bank

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had paid stamp duty on autocard transactions to the Commissioner under protest, since it maintained that such duty was not payable. Each payment rendered, which in total amounted to R488 353,80, had been accompanied by a letter stating that it was made under protest. In an action for recovery of the duty paid with interest, SPOELSTRA J found that there had not been an overpayment of duties properly chargeable, but a payment of duties not payable and made in respect of an "instrument" which did not, in reality, attract duty at all. He ordered repayment of the capital sum, together with interest *a tempore morae* from the dates each individual payment had been made, holding that there was a right of restitution at common law apart from the remedy of *condictio indebiti*.

Acknowledging an obligation to pay the principal amount with interest from the date of the trial court's judgment, the Commissioner appealed against the award of interest prior to that date. The appeal was allowed. With regard to the argument advanced on behalf of the Bank that the *condictio indebiti* lay for the recovery of the money, NIENABER AJA (as he then was), writing for the majority, reasoned as follows. The payments had not been made involuntarily and there had not been any duress of goods; the Bank had not been forced to pay but had decided to do so to avoid the possible imposition of penalties. Moreover, there was no evidence that the Commissioner had ever threatened to impose penalties if payments were not made timeously. Nor had the Bank requested a suspension of payment, or a remission of penalties, until the dispute was adjudicated. Thus, no improper pressure had been exerted on the Bank. Its payments had been made voluntarily (at 648A-G). The words "under protest", which accompanied each payment, were used to reserve the right to seek to reverse the payment and their effect was not "to create a new cause of action but to preserve and protect an existing one - namely, that the payment was an *indebitum solutum* which is recoverable in law, eg by means of the *condictio indebiti*..." (at 649H-I).

NICHOLAS AJA dissented on this aspect of the judgment. He considered that by tendering payment under protest, the Bank had reserved its right to

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institute an action for repayment and that the *condictio indebiti* was the appropriate action in the circumstances (at 658B-C). He held that the Commissioner had been placed in *mora* only on 11 August 1986, when the Bank had formally claimed a refund of all the duties paid, since it was not implicit when the payments were made under protest that there were simultaneous demands for their repayment (at 659E and I-J).

The criticisms levelled at the majority judgment by Professor Lewis in a commentary on the case in 1990 *Annual Survey of South African Law* at p 125 seem to me, with respect, to be pertinent and weighty. The passage reads:

> "Surely it is not logical to suggest that a payment is made voluntarily simply because one is not coerced into making the payment with force, or the threat of it against one's person or property. Is it necessary for the person making payment to exhaust all avenues to discover whether it is indeed due - including taking the matter to court before he makes payment - in order for it to be involuntary? And surely the right of the commissioner to levy heavy penalties for late payment is sufficient; must he threaten to exercise the right in order for the bank to act under duress? I would think not. The pressure felt by the bank was not...the phantom of their own minds'...One

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does not take risks with the fiscus. Moreover, the equities favour the payment of interest to the bank which had been out of pocket for some considerable time, despite the fact that it had rightfully protested about the payment of the duty in question."

I would go even further. As emphasised by WILSON J in *Air Canada* v *British Columbia supra* at 169 (already quoted) and repeated by LORD GOFF in the *Woolwich case supra* at 762h-j, it is wholly unrealistic to expect a taxpayer to render payments "under protest" in a situation where they are made in the reasonable assumption that the statutory provision pursuant to which the demand for the taxes was addressed, is lawful. There is a presumption of legislative *vires* and taxpayers are obligated to abide by and not infringe the law. I strongly support the opinion of LORD GOFF *supra* at 760h that:

"In the end, logic appears to demand that the right of recovery should require neither mistake nor compulsion, and that the simple fact that the tax was exacted unlawfully should *prima facie* be enough to require its repayment."

Put differently, recovery is grounded on the unlawfulness and nullity of the demand and not on any mistaken belief of the payer.

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Secondly, it was recently held in *Willis Faber Enthoven (Pty) Ltd* v *Receiver of Revenue & Anor* 1992 (4) SA 202 (A) that:

"...there is no logic in the distinction between mistakes of fact and mistakes of law in the context of the *condictio indebiti* ...Bearing in mind that the remedy lies in respect of the payment of an *indebitum* (ie a payment without any underlying civil or natural obligation) it is clear that, where such payment is made in error, it matters not whether the error is one of fact or law: in either case it remains the payment of an *indebitum* and, if not repaid, the receiver remains enriched ...

It is equally plain that a strict application of the distinction will often, if indeed not in the majority of cases, work an injustice on the payer. Considered as a matter of simple justice between man and man, there is no conceivable reason why the receiver of money paid in error of fact should in the eyes of the law be in a better position than one who has received money paid in error of law" (per HEFER JA at 220H-221B).

The requirement, in other jurisdictions as well, is merely that the mistake be excusable in the particular circumstances. See *Air Canada* v *British Columbia supra* at 191-192; *Woolwich Bldg Soc* v IRC (No. 2) (HL) *supra* at 753c-e; *David Securities (Pty) Ltd & Ors* v *Commonwealth Bank of Australia* (1992) 175 CLR 353 at 376-a decision of the High Court of Australia. If the equal treatment of mistake of law and mistake of fact in respect of undue payments had been applied in CIR v *First National Industrial Bank Ltd,* the appeal, I venture to think, would have been dismissed. For that concept is nearer to the reasoning of NICHOLAS AJA than that of the majority.

Thirdly, the judgment of FRIEDMAN J in *C & T Products (Pty) Ltd* v *MH Goldschmidt (Pty) Ltd supra* does not appear to have been cited to the Appellate Division in CIR v *First National Industrial Bank Ltd.* Had it been, it is possible that the approach adopted would have accorded more with that of the trial court and the *Woolwich* case than it did.

Lastly, if a point of distinction is necessary, it is this: in the present matter, as in the *Woolwich* and *Air Canada cases supra* the tax was exacted under an unconstitutional and therefore null

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and void enactment; whereas the demand and consequent payments in CIR v *First National Industrial Bank Ltd* seem to have been based upon a misapplication of a valid statutory provision.

In the result, it is my view that the estate of the taxpayer ought to have been

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awarded interest *a tempore morae* from the date on which the principal payment was made, namely, 20 May 1987. The Commissioner's obligation to refund the capital gains tax so received arose from his action in making an unlawful and *ultra vires* demand under the notice of assessment. It was that which created *mora in re* and founded the restitutionary remedy.

It follows that I am unable to accept the correctness of the submissions advanced on behalf of the Commissioner.

This court has now held in the concurrently heard appeal of *CoT* v *F Kristiansen (Pvt) Ltd* 1994 (1) ZLR 412 (S) that under the common law the fiscus is not immune from the payment of interest *ex mora*. Apropos the argument that such an exemption is established upon a proper construction of the taxing legislation, I would reiterate that this case does not involve excess payment of capital gains tax properly chargeable but wrongly calculated under the Capital Gains Tax Act. It concerns a payment unlawfully exacted. The assessment to capital gains tax and the demand for payment thereof were made pursuant to an *ultra vires* provision. They were made outside the Act. Thus the Commissioner cannot seek a remedy through the statutory framework. See *Woolwich Bldg Soc* v *IRC (No. 2*) *(HL) supra* at 759g-j.

Accordingly, the appeal is to be allowed with costs and the order of the court *a quo* amended to read:

> "The application is allowed with costs, that is, the respondent is ordered to pay the estate of the late Evelyn Mary Brakspear:
>
> (a) interest a tempore morae at the prescribed rate per annum, on $398 656,20 from 20 May 1987 to 11 June 1987, on $390 212,40 from 20 May 1987 to 3 October 1990, and on $4 221,90 from 20 May 1987 to date of payment;
>
> (b) the sum of $4 221, 90."

The cross appeal is to be dismissed with costs.

McNally JA: I agree

Korsah JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

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

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S v MAGWENZI 1994 (1) ZLR 442 (HC)

Court **High Court, Harare**

Chidyausiku J

Criminal review

18 May 1994

Flynote

Criminal procedure (sentence) - common law offences - sodomy - adult male committing sodomy on juvenile relation

Headnote

Where a man forcibly sodomises another, it is no different from rape. The act is as degrading, if not more so because it is unnatural. Where the complainant is of tender years, he is likely to be traumatised and corrupted. In the present case, a 27-year-old man committed sodomy on his 8-year-old brother, who was entitled to his protection.

Held, that had the complainant been female a sentence in the range of 7 to 10 years would have been imposed and a sentence in that range should have been imposed on the accused in this case, instead of the effective 12 months imposed by the magistrate.

Cases cited:

S v *Ngwenya* HB-197-87

S v *Dube* HB-94-87

Judgment

Chidyausiku J: The accused in this case was charged with sodomy. He is alleged to have unlawfully and intentionally and against the order of nature had sexual intercourse *per anum* with another male. The accused pleaded not guilty but was found guilty. He was sentenced to 18 months' imprisonment with labour of which 6 months' imprisonment with labour was suspended on certain conditions of good behaviour. I am satisfied that the conviction is in order. It is the sentence that I find inappropriate in that it is manifestly lenient.

The facts that formed the basis of the conviction and sentence are these.

CHIDYAUSIKU J

The accused is the elder brother of the complainant and is aged 27 years. The complainant's age was estimated by the doctor who compiled the medical report to be 8 years at the time the offence was committed in July 1990. The complainant gave his age as 10 years at the trial in

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February 1994, some 3 1/2 years after the commission of the offence. I will proceed on the basis that the complainant was about 8 years at the time he was sodomised.

On the 18 July 1990 the complainant returned home from school round about mid-day. He was not feeling well and he lay on the ground outside the house. The accused, his elder brother, rebuked him for sleeping outside the house and ordered him to go and sleep inside the house. The complainant went and slept on a bed inside the house. The complainant fell asleep. He was fully clothed when he fell asleep. He woke up to find that he had been undressed to the extent that his trousers had been removed. He also discovered his elder brother, the accused, lying next to him with his penis inserted into his, the complainant's, anus. The accused removed his penis. The accused told the complainant that he would kill him if he reported the matter to their mother. The complainant did not report the matter to their mother until an incident involving an assault by the accused upon their sister. The matter was reported to the police. The complainant was examined by a medical doctor who observed anal sores on the complainant. His conclusion was that the complainant had sexual contact with an infected person.

Given the facts, it is unfortunate that a provincial magistrate considered himself sufficiently vested with jurisdiction to pass sentence and, worse still, that he did not consider this case deserving of the maximum sentence of 3 years under his jurisdiction. The Attorney-General, to whom I referred this matter, shares my view that this matter should have been properly placed before the jurisdiction of a regional magistrate or at least referred to the High Court for sentence in terms of s 52 of the Magistrates Court Act [*Chapter 18*].

The sentence imposed in this case is a travesty of justice. It trivialises a very serious offence. In my view, a 27-year-old brother who rapes an 8-year-old sister would have received a sentence in the range of 7 years to 10 years' imprisonment with labour. Raping an 8-year-old girl and sodomising an 8-year-old boy are offences of similar magnitude. In the case of the *S* v *Ngwenya* H-B-179-87 a 28 year-old pleaded guilty to forcibly sodomising a 10-year-old boy. He was sentenced to 12 months' imprisonment with labour. In reviewing the case MUCHECHETERE J (as he then was) had this to say:

> "...where an accused forcibly commits sodomy on a complainant it is no

different from rape. In a matter like this, the offence is aggravated by the fact that the complainant was a very young and therefore helpless boy. I consider the act perpetrated on the young complainant in this case is as much degrading as an act of rape on a young girl. It is in my view more so because the act is unnatural. That is why it is an offence under our law even if it is performed between two consenting adults...For offences of this nature I would consider that sentences in the region of **three** years imprisonment with labour and **upwards** would be appropriate."

The same learned judge expressed the same sentiments in the similar case of *S* v *Dube* HB-94-87. I certainly share the learned judge's view that where an accused forcibly commits sodomy on a complainant it is no different from rape. Where the complainant is of tender age, as was the case here, he is likely to be traumatised and possibly corrupted. The complainant developed anal sores as a result of being sodomised. The victim was the accused's own brother

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who expected to be protected by the accused and not sodomised.

Taking all the above factors into account, a sentence in the region of 7 years' imprisonment with labour would have been more appropriate. The sentence imposed in this case is manifestly lenient and I decline to certify the proceedings as being in accordance with real and substantial justice.

SHAMUYARIRA v ZIMBABWE NEWSPAPERS (1980) LTD & ANOR 1994 (1) ZLR 445 (HC)

Court **High Court, Harare**

Robinson J

24 & 26 May 1993 & 28 March 1994; *cur ad vult*

Postea (18 May 1994)

Flynote

Damages - defamation - factors to be taken into account in assessing damages

Delict - defamation - defences pertaining to the media - whether media has special privilege to publish material in public interest

Evidence - Civil Evidence Act 15 of 1992 - s 10 - when court will declare information to be privileged in the public interest under s 10 - journalist declining to reveal sources of information - whether court should order journalist to disclose sources

Headnote

A newspaper had published a story exposing a corruption scandal in which a number of Ministers of Government and other senior officials were implicated. The plaintiff, a Government Minister, was named as one of those involved. The plaintiff sued the journalist who had written this story and the newspaper which had published the story for defamation. The defendants raised the defences of justification and qualified privilege.

During the court hearing counsel for the plaintiff asked the journalist who had written the story to name his sources of information. He refused to do so, saying that as he had given a guarantee to his sources that their identities would not be revealed, it would be completely contrary to the ethics of journalism for him to breach his undertaking. The plaintiff's counsel applied to the court for an order compelling the journalist to supply the names of his informants.

On the question of the journalist's sources:

Held, that under common law journalists do not have any sort of special legally recognised privilege which would permit them to withhold the sources of information. If a journalist is

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ordered by the court to reveal the identity of his source, he is legally obliged to do so and will be held to be in contempt of court if he refuses to do so.

Held, further, that in a civil case where the disclosure of the identity of the source of information is sought and the journalist refuses to disclose this information, the question of protection from disclosure of a journalist's sources is a matter which now falls to be considered under s 10 of the Civil Evidence Act 15 of 1992. This section gives the court a discretion to decide whether or not to declare any evidence to be privileged in the public interest. In terms of s 10(3)(d), "public interest" includes matters that relate to "confidential sources of information which are concerned with the enforcement or administration of the law". Thus the Legislature intended that confidential sources of information should fall within the ambit of s 10.

Held, further, that s 10 of the Act provides that the court may declare evidence to be privileged in the public interest if the court is satisfied that it would be detrimental to the public interest for the evidence to be given and that such detriment would outweigh any prejudice to the parties or to the interests of justice that might be caused by non-disclosure of the evidence.

Held, further, that one factor in favour of disclosure of confidential sources of information is the public interest that the truth should emerge in litigation. Additionally, a newspaper which has knowingly broken the law cannot claim confidentiality and a newspaper may forfeit its claim to protect its sources where it has acted irresponsibly. Also a newspaper which has committed an offence with its informant may be compelled by the victim to disclose the identity of the other wrongdoer.

Held, further, on the other hand, that there are various factors in favour of not compelling the disclosure of confidential sources by newspapers, such as the public interest in the preservation of the liberty of the press and the public interest in protecting press sources where the press has exposed corruption or other wrongdoing by persons holding high office, whether in Government or elsewhere.

Held, further, that in the present case the detriment to the public interest if the journalist were to be compelled to reveal his sources would outweigh any prejudice to the interests of justice which might be caused by the non-disclosure of the sources. On the question of whether the defendants were liable in damages for defamation:

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Held, that the published statement was defamatory.

Held, further, as regards the defence of justification, that this defence could not succeed, as the statement published about the plaintiff was untrue.

Held, further, as regards the defence of qualified privilege, that at common law the media had no special privilege to publish in the public interest information about public figures which it believes to be accurate but which is actually untrue. The press certainly cannot claim a duty to publish in the public interest a statement concerning a public official which does not come from an authoritative source. The statement in the present case was not based on fact but on mere

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suspicion and no proper efforts had been made to determine the plaintiff's response to the allegation. It was not an extreme case of the sort where the urgency of communicating a warning was so great as to justify immediate publication. Although there was no malice on the part of the defendants, on the facts the defence of qualified privilege could not succeed.

Held, further, as regards damages, that taking into account the relevant factors in assessing damages (which factors are fully set out in the judgment), that an appropriate amount of damages was $15 000.

Cases cited:

S v *Pogrund* 1961 (3) SA 868 (T)

Neethling v *du Preez & Ors; Neethling* v *The Weekly Mail & Ors* 1994

(1) SA 708 (A)

Arnold v *The King-Emperor* (1914) 30 TLR 462; [1914] AC 644

R v *Parker* 1965 RLR 355 (A); 1965 (4) SA 47 (RA)

A-G v Clough [1963] 1 All ER 420

Serfontein & Anor v *Irvine* 1979 RLR 510 (A); 1980 (2) SA 63 (ZA)

British Steel Corp v *Granada Television Ltd* [1981] 1 All ER 417 (HL)

A-G v Mulholland [1963] 1 All ER 767; [1963] 2 QB 477 (CA)

McGuiness v A-G of Victoria (1940) 63 CLR 73

Argus P & P Co Ltd & Ors v *Esselen's Est* 1994 (2) SA 1 (A)

X Ltd & Anor v Morgan-Grampian (Publishers) Ltd & Ors [1990] 2 All

ER 1 (HL)

Sec for Defence & Anor v *Guardian Newspapers Ltd* [1984] 1 All ER

453 (CA)

D v *National Soc for the Prevention of Cruelty to Children* (*NSPCC*) [1977] 1 All ER 589; [1978] AC 171 (HL)

Lion Laboratories v *Evans & Ors* [1984] 2 All ER 417 (CA)

Science Research Council v *Nassé* [1979] 3 All ER 673; [1980] AC 1028 (HL)

HM Advocate v *Airs* 1975 JC 64

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Norwich Pharmacal Co v *Customs and Excise Comrs* [1973] 2 All ER 943; [1974] AC 133 (HL)

Chinamasa v *Jongwe P & P Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H)

Broadcasting Corp of New Zealand v *Alex Harvey Industries Ltd* [1980] 1 NZLR 163

Initial Services Ltd v *Putterill & Anor* [1967] 3 All ER 145; [1968] 1 QB 396 (CA)

Gartside v *Outram* (1856) 26 LJ Ch 113

Francome & Anor v *Mirror Group Newspapers Ltd & Ors* [1984] 2 All ER 408 (CA)

SA Assoc Newspapers Ltd & Anor v *Samuels* 1980 (1) SA 24 (A)

Demmers v *Wyllie* 1980 (1) SA 835 (A)

Auridiam Zimbabwe (Pvt) Ltd v *Modus Publications (Pvt) Ltd* 1993 (2) ZLR 359 (H)

Dorfman v *Afrikaanse Pers Publikasies (Edms) Bpk & Anor* 1966 (1) PH J9 (A)

Lewis & Anor v *Daily Telegraph Ltd* [1963] 2 All ER 151 (HL)

Jones v *Skelton* [1963] 3 All ER 952 (PC)

Sauls & Ors v *Hendrickse* 1992 (3) SA 912 (A)

National Union of Distributive Workers v *Cleghorn & Harris Ltd* 1946 AD 984

Tekere v *Zimbabwe Newspapers* (1980) Ltd & Anor 1986 (1) ZLR 275 (H)

Blackshaw v *Lord & Anor* [1985] 2 All ER 311 (CA); [1983] 3 WLR 283

Australian Broadcasting Corp v *Comalco Ltd* (1986) 68 ALR 259

Adam v *Ward* [1917] AC 309

Doyle v *Economist Newspaper* [1980] NILR 171

Campbell v *Spottiswoode* (1863) 3 B & S 768

Pienaar & Anor v *Argus P & P Co Ltd* 1956 (4) SA 310 (W)

Cassell & Co Ltd v *Broome & Anor* [1972] 1 All ER 801 (HL)

Argus P & P Co Ltd v *Inkatha Freedom Party* 1992 (3) SA 579 (A)

Buthelezi v *Poorter & Ors* 1975 (4) SA 608 (W)

Vengtas v *Nydoo & Ors* 1963 (4) SA 358 (D)

Moolman v *Slovo* 1964 (1) SA 760 (W)

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Muller v *SA Assoc Newspapers Ltd & Ors* 1972 (2) SA 589 (C)

Gelb v *Hawkins* 1960 (3) SA 687 (A)

Salzman v *Holmes* 1914 AD 471

Payne v *Sheffield* (1882) 2 EDC 166

SA Assoc Newspapers Ltd & Anor v *Yutar* 1969 (2) SA 442 (A)

Geyser v *Pont* 1968 (4) SA 67 (W)

Assoc Mine Workers Union & Anor v *Gwekwerere & Ors* GS-202-81

ROBINSON J

Zvobgo v *Kingstons Ltd* 1986 (2) ZLR 310 (H)

Chinengundu v *Modus Publications (Pvt) Ltd* HH-135-92

Botha v *Pretoria Printing Works Ltd & Ors* 1906 TS 710

Shield Ins Co Ltd v *Booysen* 1979 (3) SA 953 (A)

SA Eagle Ins Co v *Hartley* 1990 (4) SA 833 (A)

Min of Defence & Anor v *Jackson* 1990 (2) ZLR 1 (S)

A P de Bourbon SC for the plaintiff

D P Carter for the first and second defendants

Judgment

Robinson J *(7): The trial of this action, which was instituted in June 1989, was commenced on 24 May 1993 after it had failed to take off in February 1992 and had been removed from the court roll in January 1993. However, at the conclusion of the second day's hearing on 26 May 1993 (25 May 1993 was a public holiday), the matter had to be postponed *sine die* because the defendants' final witness, Elias Mabhena ("Mabhena") was unable to attend court due to his being incapacitated as the result of a road traffic accident.

It was agreed between counsel that on the resumption of the trial, the second defendant, Geoffrey Nyarota ("Nyarota"), would be recalled to undergo further cross-examination by Mr *de Bourbon* after the court had given its ruling on whether Nyarota would be required to disclose the identity of his sources of information, the information on which the article which was published in *The Chronicle* newspaper on 14 December 1988 ("the Chronicle article") was based and which gave rise to the present defamation suit between the parties.

The trial was eventually resumed and completed in one day, on 28 March, 1994, at the

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conclusion of which I said that I would hand down my judgment

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the following month. However, it has taken me a little longer than I anticipated to put my judgment together.

1. INTRODUCTION

The plaintiff, Nathan Shamuyarira, a Government Minister (to whom I shall refer as "the plaintiff"), is suing the first defendant, Zimbabwe Newspapers (1980) Ltd (to which I shall refer as "Zimpapers"), trading as *The Chronicle*, as the owner and publisher of *The Chronicle* newspaper (to which I shall refer as "*The Chronicle*") and the second defendant, Nyarota, as the editor of *The Chronicle* and, as such, as an employee of Zimpapers acting in the course and within the scope of his employment at all material times, jointly and severally for damages in the sum of $50 000 in respect of the alleged defamation of the plaintiff by virtue of certain words concerning him ("the objectionable words") contained in *The Chronicle* article, together with interest at the prescribed rate from the date of judgment to the date of payment and costs of suit.

2. THE RELEVANT PLEADINGS

The plaintiff's cause of action is pleaded thus in paras 7 and 8 of his declaration:

> "7.
>
> On the 14th December, 1988 and at Bulawayo, an article was published in the said newspaper in which the following was said of and concerning the plaintiff:
>
> > 'The Willowvale list also shows that a certain Lendrim TS, a Harare based company was allocated a Mazda F1300 on the instructions of Cde Mabhena in conjunction with the Minister of Foreign Affairs, Cde Nathan Shamuyarira ...'
>
> 8.
>
> The said words, in the context of the article, are wrongful and defamatory of the plaintiff in that they were intended and were understood by readers of the newspaper to mean that the plaintiff misused his position as a Minister of Government of Zimbabwe to authorise or direct the allocation of a motor vehicle to a company."

[The learned judge then analysed the evidence mentioned in the Editor's note on page 449 and continued:]

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11. THE ISSUE OF WHETHER THE COURT SHOULD ORDER NYAROTA TO DISCLOSE THE IDENTITY TO DISCLOSE THE IDENTITY OF HIS SOURCES OF INFORMATION

Counsel then addressed argument to the court on the issue of whether the Court should order,

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at the instance of the plaintiff, that Nyarota be directed to disclose the identity of his sources from whom he had obtained the information on which *The Chronicle* article was based. After hearing argument, the court said that it would give its ruling on this issue in due course.

I now incorporate in this judgment the reasons which I gave and which I have amplified for my decision at the resumption of the trial on 28 March 1994 that, in terms of the Civil Evidence Act 15 of 1992 ("the Civil Evidence Act"), the evidence sought as to the identity of Nyarota's sources was privileged in the public interest and that, consequently, the court would not direct Nyarota to reveal the identity of his sources.

The grounds on which Nyarota refused to disclose the identity of his sources were threefold, namely:

(i) that it was not relevant or necessary to the plaintiff's case for the sources to be identified;

(ii) that as the editor of *The Chronicle*, Nyarota gave his sources his very strict guarantee that their identities would never be revealed;

(iii) that it is a journalistic principle not to disclose one's sources.

A fourth ground added by Nyarota after the court had given its ruling but which I think is worthy of mention was Nyarota's concern that if he revealed the identity of his sources, retribution might be visited upon them.

On the plaintiff's side, Mr *de Bourbon* required disclosure on the following grounds:

(i) that Nyarota was a party to the proceedings and, as one of his defences, relied upon the truth of what he had published, the main fact alleged being that he had a list indicating that a motor vehicle had been allocated by Willowvale to a third party, Lendrim, on instructions given by the plaintiff;

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(ii) that no such list had been discovered by Nyarota in his affidavit giving discovery of documents for purposes of the trial;

(iii) that the evidence of Gibson did not confirm that the list allegedly in the possession of the Police was both in existence and had been passed to Nyarota's Police source prior to the publication of *The Chronicle* article on 14 December 1988 exposing the Willowvale motor scandal;

(iv) that Nyarota sought to rely on the specific wording of the list allegedly possessed by his Police source only when the defendants' plea was amended in this respect

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shortly before the trial commenced on 24 May 1993.

In my view, Mr *Carter* was correct in contending that it was s 10 of the Civil Evidence Act which had to govern my approach to this issue.

Section 10 provides as follows:

"(1) A court may declare any evidence to be privileged in the public interest if the court is satisfied -

(a) that it would be detrimental to the public interest for the evidence to be given; and

(b) that such detriment would outweigh any prejudice to the parties or to the interests of justice that might be caused by non-disclosure of the evidence.

(2) No person shall give any evidence in civil proceedings if the court has declared the evidence to be privileged in the public interest in terms of subsection (1).

(3) For the purpose of subsection (1), but without limiting it, public interest includes matters that relate to -

(a) the security or defence of the State; or

(b) the proper functioning of the Government; or

(c) international relations; or

(d) confidential sources of information which are concerned with the enforcement or administration of the law; or

(e) the prevention or detection of offences or contraventions of the law.

(4) For the purpose of determining whether or not any matter should be declared privileged in terms of subsection (1), and in weighing

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up the balance of interests referred to therein, the court shall have regard to -

(a) the likely effect on the public interest if the matter concerned is disclosed; and

(b) the importance of the matter concerned in relation to the proceedings and the need to do justice to the parties; and

(c) the nature of the cause of action and the subject matter of the proceedings; and

(d) any means available to limit the publication of the matter concerned, whether in terms of the Courts and Adjudicating Authorities (Publicity Restriction) Act, 1985 (No. 25 of 1985), or otherwise.

(5) Any evidence given in contravention of this section shall be inadmissible."

It will be noted that s 10(3)(d) provides that for the purpose of subs (1), **but without limiting it** (my emphasis), "public interest" includes matters that relate to "confidential sources of information which are concerned with the enforcement or administration of the law", thereby demonstrating that the Legislature intended that confidential sources of information should fall

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within the ambit of s 10.

In dealing with the grounds relied upon by Nyarota for his refusal to identify his sources, let me make it clear immediately that Nyarota's second and third grounds, namely, that as the editor of *The Chronicle*, he gave his sources his very strict guarantee that their identities would never be revealed and that it is a journalistic principle not to disclose one's sources, and the fourth ground which he subsequently added that if he revealed the identity of his sources, retribution might be visited upon them, are not recognised by our courts as being, in themselves, good or sufficient grounds in law to justify a journalist's refusal to divulge the identity of his or her sources. (Henceforth I shall, for the sake of convenience, use the masculine as including the feminine when referring to journalists generally.) And the first ground - that it was not relevant or necessary to the plaintiff's case for the sources to be identified - is one which a court will consider when weighing in balance the factors mentioned in subs (4) for the purpose of deciding whether the matter should be declared privileged in terms of s 10(1) of the Civil Evidence Act.

Much as he may dislike it, the truth of the matter is that a journalist, as such,

does not enjoy a privileged position under our law which permits him to withhold the sources of his information. This point was made clear by HILL J in *S v Pogrund* 1961 (3) SA 868 (T) at 871A, where the learned judge said:

> "The excuse raised on behalf of the appellant is that he was obliged by principles of professional ethics to refrain from divulging the name of the person from whom he had obtained the document. Such principles, as was conceded by Mr *Davidson* on behalf of the appellant, confer no privilege in law on any journalist."

In the recent case of *Neethling* v *Du Preez & Ors* and *Neethling* v *The Weekly Mail & Ors* 1994 (1) SA 708 (A) (to which I shall refer as "the *Neethling* case") at 777H-778A, HOEXTER JA, in delivering the judgment of the Appellate Division, had this to say on the position of a journalist:

> "At common law there is no general 'newspaper privilege'. Contrary to the view expressed by COETZEE J (at 195G) any notion that for the purposes of claiming justification in respect of defamation the press occupies 'a special position', so far from being recognised by our law, is entirely alien to it. Some 80 years ago LORD SHAW, in delivering the judgment of the Privy Council in *Arnold* v *The King-Emperor* (1914) 30 TLR 462; [1914] AC 644 (PC) remarked (at 468):
>
> > 'The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments is as wide as, and **no** wider than, that of any other subject. **No privilege attaches to his position'** (my emphasis).
>
> The above-quoted remarks, so I consider, accurately reflect the position in our modern South African Law."

In a case which arose within the jurisdiction of our courts, *R* v *Parker* 1965 RLR 355 (A); 1965 (4) SA 47 (RA), a journalist had appeared before a magistrate in answer to a summons directing him "to make a statement" in terms of s 102(1) of the Criminal Procedure and Evidence Act

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[*Chapter 31 of 1963*]. After being sworn in, the journalist answered certain questions but

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refused to answer others on the ground that it was a basic journalistic ethic not to divulge one's source of information.

As a result, the magistrate ordered that the journalist be committed to prison for two days unless he sooner consented to answer the questions put. The order was suspended pending the outcome of an appeal against it.

In the course of his judgment in the Appellate Division, which upheld the order that the journalist be committed to prison, QUENET JP, at 360E-361G (51A-G) referred to the law which then applied to journalists in England thus:

> "It was said that considerations of public policy required that the confidential relationship between journalist and informant should not be breached...In *McGuinness*' case (63 CLR 73), at p 86 Rich J said:
>
> > 'The appellant was called upon to choose between his duty under the law to answer questions relevant to the inquiry, unless he had some lawful excuse for refusal, and what he conceives to be his duty as a pressman to his informant to maintain silence.'
>
> He considered the journalist's "cause" to be "founded on a paradox" and went on to say:
>
> > 'For it is said that newspapers will not be able to discover the truth and publish it unless when the courts of justice in their turn want the truth pressmen in whom it has been confided are privileged to withhold it. It is easy to understand that editors and other journalists would find it some help in their search for news if they were able to assure those in possession of information that they could secretly impart it without fear that courts of law would be able to discover its source. But this is probably true of a great many other trades, businesses and pursuits. Privilege from disclosure in courts of justice is exceptional and depends upon only the strongest considerations of public policy. The paramount principle of public policy is that the truth should be always accessible to the established courts of the country."

In the same case, DIXON J said at p 102:

> > 'No one doubts that editors and journalists are at times made the repositories of special confidences which, from motives of interest as well as of honour, they would preserve from public disclosure, if it were possible. But the law was faced at a comparatively early stage of the growth of the rules of evidence with the question how to resolve

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> > the inevitable conflict between the necessity of discovering the truth in the interests of justice on the one hand and on the other the obligation of secrecy or confidence which an individual called upon to testify may in good faith have undertaken to a party or other person. Except in a few relations where paramount considerations of general policy appeared to require that there should be a special privilege, such as husband and wife, attorney and client, communications between jurors, the counsels of the Crown and State secrets, and, by statute, physician and patient and priest and penitent, an inflexible rule was established that no obligation of honour, no duties of on - disclosure arising from the nature of a pursuit or

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calling, could stand in the way of the imperative necessity of revealing the truth in the witness box.'

In A-G v *Clough* [1963] 1 All ER 420 (QB), LORD PARKER adopted what was said in the *McGuinness* 'case. He considered, however, that 'it would still ...remain open to this court to say in the special circumstances of any particular case that public policy did demand that the journalist should be immune...'. He found that no such special circumstances existed, and the fact that Parliament had set up the tribunal declared the public policy."

In the same case, MACDONALD AJA (as he then was) stated at 362E-363D (52D-53A):

"The appellant in explanation of his refusal to obey the magistrate's order to answer the questions put to him stated the ethics of his profession in the following words:

'My reason for refusing to answer these questions is a basic journalistic ethic. Many journalists receive confidential information from many sources. It is absolutely essential to the trust that a newspaper must have with its readers, if it is to succeed, that these sources remain confidential. There is only one type of instance, I think, in which any journalist would reveal his source of information, and that is if by not doing so he were to further violence or further the subversion of the State. I don't believe in this case that I am doing either by this refusal. In fact, I am absolutely perfectly certain that I am not. These documents may be uncomfortable to the Government, but they are by no means uncomfortable to the welfare of the State. That is all I wish to say.'

A code of conduct which encourages persons governed by it to flaunt the

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law cannot, if words are to be given their proper meaning, be described as ethical nor should the refusal to obey the order of a court of law be graced by such a term. I confess that I have difficulty in accepting that the appellant's statement correctly reflects the 'ethical' teaching of his profession. If persons in all walks of life were to assume the right to decide for themselves what the law should be and were to refuse to obey any order of a court of law which failed to conform with their ideas what, one may ask, would be the result?

Under the law any pledge of secrecy given by a journalist to an informant must necessarily be subject to the qualification that a journalist will divulge information if ordered to do so by a court of law. A failure on the part of a journalist to make clear to his informant that this limitation on any pledge of secrecy always exists can only give rise, so far as the informant is concerned, to a quite unwarranted sense of security and, so far as the journalist is concerned, to the dilemma of deciding whether to obey the law or to honour a pledge which should never have been given in unqualified terms.

If, on the other hand, the overriding limitation which the law imposes on any pledge of secrecy by a journalist is made clear to the informant, there can be no question of the journalist breaking a pledge of secrecy when he subsequently complies with a court's order to answer questions. It may well be that when this course is adopted information will not always be imparted. The loss, on occasion, of information should not, however, be regarded as too high a price to pay for compliance with the law."

However, in a sequel to this case, when it had to consider a second appeal by the journalist against the magistrate's order committing him to prison for a second time for again refusing to answer questions put to him, the Appellate Division, in *R* v *Parker* 1966 RLR 15 (A), 1966 (2) SA 56 (RA), allowed the journalist's appeal.

In that case MACDONALD JA (as he then was) stated at 171-18A (58D):

"As far as possible, the right of a person to keep information to himself is respected, and it is only when respect for privacy would or might adversely affect the interests of justice that the law intervenes to compel a person to

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speak."

At 20H-I, (60H-61A) the learned JUDGE OF APPEAL concluded with these words:

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> "When due weight is given to the above matters, it does not seem to me that it is possible to say with any conviction that the interests of justice outweigh the considerations of privacy and confidence relied upon by the appellant. In coming to this conclusion, I emphasise that I have regarded the appellant simply as an ordinary member of the public, and **have not attached importance to any special right or privilege which the appellant claims as a journalist. In my view, a journalist possesses no right in regard to silence and privacy which is not enjoyed in equal measure by any other member of the public" (**my emphasis**).**

In *Irvine* v *Serfontein and Irvine* v *de Villiers* 1979 RLR 273 (G) at 281B, BECK J (as he then was), when dealing with the ethic of their profession which requires journalists not to reveal the identity of their sources of information, stated that "the ethic in question is subject to the qualification that a journalist will divulge information if ordered to do so by a court of law and should make this clear to his informant (*R* v *Parker* 1965 RLR 355 (A) at 363; 1965 (4) SA 47 (SRA) at 52E-H)".

When giving his judgment on appeal from the interlocutory order made by BECK J in *Irvine's* case in *Serfontein & Anor* v *Irvine* 1979 RLR 510 (A), 1980 (2) SA 63 (ZA) at 519B-D (70D-F), LEWIS JP stated as follows:

> "Finally, an argument based on considerations of public policy was addressed to us. It was said that the ethics of the profession of journalism preclude the plaintiffs from disclosing the source of their information, and that it would be contrary to public policy to compel them to do so. This same argument was addressed to the learned Judge in the court *a quo* and was fully dealt with by him at pp 73E to 74A of the report (pp 280F-281E of this volume). There is no need to repeat what he there said. It is sufficient to say that I entirely agree with all that is contained in that passage, and I fully endorse his conclusion where he said:
>
> > 'To deny to a defendant access to relevant information that might materially assist him in establishing a defence to a substantial claim brought against him by a plaintiff who, having invoked the Court's assistance, then asks the the Court to refuse such access to his adversary because it would offend an ethic of the plaintiff's calling would, I think, be an unwarranted sacrifice of justice upon the altar of the public policy.'"

The common law of England likewise refuses to accord a journalist an absolute immunity from having to reveal his sources of information.

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In the case of *British Steel Corporation* v *Granada Television Ltd* 1981 1 All ER 417 at 456b-g ("the *Granada* case"), which was the precursor to the special legislative provision introduced by the Contempt of Court Act 1981 dealing with the matter of disclosure of a journalist's sources, LORD WILBERFORCE had this to say on the question of the protection of a journalist's sources of information:

> "I now come more particularly to the law relevant to this case. I start with the proposition that the media of

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information, and journalists who write or contribute for them, have no immunity based on public interest which protects them from the obligation to disclose in a court of law their sources of information, when such disclosure is necessary in the interest of justice. No such claim has ever been allowed in our courts, and such attempts as have been made to assert such an immunity have failed. A claim for immunity was made before the Parnell Commission in 1889 and flatly rejected by HANNEN P sitting with two other judges. In the two cases arising out of the Vassall inquiry, in which the usual argument was strongly put that if disclosure were ordered in such cases the sources of information would dry up, the claim was firmly repelled. In *A-G* v *Clough* [1963] 1 All ER 420 at 425 [1963] 1 QB 773 at 788 LORD PARKER CJ expressed the clear opinion that no such immunity had been recognised or existed. In *A-G* v *Mulholland* [1963] 1 All ER 767; [1963] 2 QB 477 a similar claim in respect of communications between journalists and sources of information was rejected by the Court of Appeal. LORD DENNING MR in a classic passage said ([1963] 1 All ER 767 at 770-771; [1963] 2 QB 477 at 489-490):

> 'Then it is said...that, however relevant these questions were and however proper to be answered for the purpose of the inquiry, a journalist has a privilege by law entitling him to refuse to give his sources of information...It seems to me that the journalists put the matter much too high. The only profession that I know which is given a privilege from disclosing information to a court of law is the legal profession, and then it is not the privilege of the lawyer but of his client. Take the clergyman, the banker or the medical man. None of these is entitled to refuse to answer when directed to by a judge. Let me not be mistaken. The judge will respect the confidences which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only it is relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered. A judge is the person entrusted, on behalf of the

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> community, to weigh these conflicting interests - to weigh on the one hand the respect due to confidence in the profession and on the other hand the ultimate interest of the community in justice being done or, in the case of a tribunal such as this, in a proper investigation being made into these serious allegations. If the judge determines that the journalist must answer, then no privilege will avail him to refuse.'"

The position was aptly summarised thus by VISCOUNT DILHORNE in the *Granada case supra* at 456c:

> "Save in respect of the administration of interrogatories in libel and slander actions (the so-called 'newspaper rule') newspapers have never been held to enjoy the privilege of not being compellable to disclose the sources of their information. Every time that that claim has been put forward it has been rejected. Since 1949 newspapers no longer receive any special treatment with regard to interrogatories."

In *McGuinness* v *A-G of Victoria* (1940) 63 CLR 73, the High Court of Australia held that no privilege attached to proprietors of newspapers, editors and writers which entitled them to refuse to disclose at a trial their sources of information. It is worth repeating what DIXON J stated at 102-103:

> "No one doubts that editors and journalists are at times made the repositories of special confidences which, from motives of interest as well as of honour, they would preserve from public disclosure, if it were possible. But the law was faced at a comparatively early stage of the growth of the rules of evidence with the question how to resolve the inevitable conflict between the necessity of discovering the truth in the interests of justice on the one hand and on the other the obligation of secrecy or confidence which an individual called upon to testify may in good faith have undertaken to a party or other person. Except in a few relations where paramount considerations of general policy appeared to require that there should be a special privilege, such as husband and wife, attorney and client...an inflexible rule was established that no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box. Claims have been made from time to time for the protection of confidences to trustees, agents,

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bankers, and clerks, amongst others, and they have all been rejected."

Having regard to the attitude of our law as expounded above, it will be appreciated that an investigative Zimbabwean press reporter is on the horns

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of a real dilemma. Whereas, on the one hand, if he does not give a guarantee to his source that he will not reveal the source's identity, he is unlikely to obtain the information he is after, on the other hand, if he does give his source that guarantee, he stands the risk of being imprisoned if the matter subsequently ends up in court and he refuses to disclose the identity of his source upon being ordered by the court to do so.

In Zimbabwe, the question of protection from disclosure of a journalist's sources is a matter which, in my opinion, now falls to be considered under s 10 of the Civil Evidence Act which permits a court, in the exercise of its judicial discretion, to declare any evidence to be privileged in the public interest if the court is satisfied that it would be detrimental to the public interest for the evidence to be given and that such detriment would outweigh any prejudice to the parties or to the interests of justice that might be caused by non-disclosure of the evidence.

The Constitution of Zimbabwe, unlike that of Namibia, contains no guarantee of the freedom of the press as such. However, protection of that freedom is embraced in the general provision of s 20(1) of the Constitution which provides that "no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference ...".

However, the right to freedom of expression in Zimbabwe is not an absolute right, since s 20(2) of the Constitution strives to achieve a balance by making the exercise of that right subject to the provision of any other law which provides for "the interests of defence, public safety, public order, the economic interests of the State, public morality or public health" or for the purpose of, *inter alia*, "protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings" or "preventing the disclosure of information received in confidence", except "so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society".

Academics, like Professor Feltoe of the Faculty of Law at the University of Zimbabwe, are properly concerned that the right balance should be struck between the protection of what he describes as reputational interests and the protection of freedom of speech, since, as he points out in an article on "The Press and the Law of Defamation : Achieving a Better Balance" published in *Legal Forum* (1993), Vol 5, No 2, at p 43:

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"Where the law leans too heavily in favour of protecting reputational interests, freedom of expression will be unduly curtailed. But if the law gives too much latitude to those seeking to exercise their right to freedom of

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expression, then there is the danger that reputational interests will be inadequately protected."

Professor Feltoe obviously feels that, as things presently stand in Zimbabwe, the law is weighted in favour of the protection of reputational interests, at the expense of the press's freedom of expression, as is borne out by his comments on investigative reporting in his useful little book on *A Guide to Press Law in Zimbabwe* at pp 22 & 23, which I quote below:

"9. Investigative reporting

The function of newspapers and periodical magazines is to inform the public. Access to information is of pivotal importance to the proper working of a participatory democracy.

The press in Zimbabwe is not protected by a qualified privilege if it publishes reports which seek to expose corruption or other forms of misconduct on the part of persons such as high ranking Government officials or prominent businessmen. If the story turns out to be without substance the person defamed can sue for damages. The fact that the press organ which published the statement believed that the statement was true and that it was in the public interest to publish the story, will not provide any defence to the action for defamation. It is therefore incumbent on the press to make sure that such a story does have substance before it goes ahead and publishes it. If it is sued for damages, it must be able to establish in court that the defence of justification applies, because not only was it in the public interest to publish the story, but the details of the story were substantially correct.

By seeking to expose dishonesty, corruption and nepotism the press is seeking to root out these evil practices and to promote integrity in public administration and honesty and compliance with the laws protecting the economy in the field of private business. To allow it to fulfil this role effectively it is arguable that the law of defamation should be changed so as to give the press limited protection against defamation along the lines outlined below. It has been suggested that it should be a defence in Zimbabwe for the press to establish that before it published a story in the public interest, it took all reasonable steps to check the accuracy of the

facts. If it took such steps, it would be immune from liability for defamation damages. However, if subsequently it was shown that the story was incorrect, it would have a duty to retract the story and apologise. If it failed to do this, it would again become liable for damages. It would also be under the duty to publish a reasonable statement in contradiction or rebuttal from the person at whom the story was aimed.

It has been argued that this approach would draw a better balance between the right to information and the protection of reputation. The paper would be obliged to take proper steps to check its stories and thus reputations would not be left exposed to reckless or careless reporting. But the paper would also not be left exposed to large scale damages claims if it behaved in a responsible and professional way in checking its facts.

Investigative reporting can be a very hazardous business under the present Zimbabwean law."

Certainly, Professor Feltoe's observation that investigative reporting "can be a very hazardous business under the present Zimbabwean law" was found to be true by Nyarota when he lost his position as the editor of *The Chronicle* as a result of his publication of *The Chronicle* article on 14 December 1988.

I would pause here to mention that Professor Feltoe's proposals for a change to our law to achieve a better balance in the law of defamation in relation to situations where the press publishes information in the public interest thinking that the information is true will be found in his article to which I have already referred in *Legal Forum* (1993) Vol 5, No 2 at pp 47 to 49. In this regard, it is interesting to note that since he considers it most unlikely that Government itself

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would be prepared to pass legislation to correct the imbalance, because by relaxing the restrictions on the press, it would expose itself to more bold and searching scrutiny from the press, Professor Feltoe believes that if reform is to come, it will probably have to come from the courts, as happened in the United States of America. However, as the new line of defence proposed by Professor Feltoe was not raised in this matter, there can be no question of my possibly setting the ball rolling for a test case in the Supreme Court, although I am bound to say that, for the reasons which I shall give later when I address the defence of qualified privilege, I do not consider that the defendants could have succeeded on Professor Feltoe's new line of defence even if it had been raised and accepted as a defence in this case.

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On the other hand, CORBETT CJ took a different view of the present balance of the law in seeking to protect a person's right to his reputation, on the one hand, and freedom of expression, on the other, when he had this to say when delivering the judgment of the Appellate Division in the very recent case of *Argus P & P Co Ltd & Ors* v *Esselen's Est* 1994 (2) SA 1 at 25B-D ("the *Argus Co case*"), as South Africa approached its long awaited era of democratic rule:

> "I agree, and I firmly believe, that freedom of expression and of the press are potent and indispensable instruments for the creation and maintenance of a democratic society, but it is trite that such freedom is not, and cannot be permitted to be, totally unrestrained. The law does not allow the unjustified savaging of an individual's reputation. The right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully defamed. I emphasise the word 'unlawfully' for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, the law has devised a number of defences, such as fair comment, justification (ie truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is *prima facie* defamatory (see generally the *Inkatha*, case *supra* at 588G-590F). **The resultant balance gives due recognition and protection, in my view, to freedom of expression"** (my emphasis).

In his article in *Legal Forum* (1993) Vol 5, No 2 at p 44, Professor Feltoe writes as follows under the heading, "The importance of the informational and watchdog roles of the press":

> "The function of newspapers and periodical magazines is to inform the public. Access to information is of pivotal importance to the proper working of a participatory democracy. Democratic rights can only be fully exercised if the public have access to information. Lack of access to adequate information hinders popular participation in political and developmental processes. Uninformed people cannot make informed decisions and political choices.
>
> The press also pays a vital role in making government officials fully accountable for their actions. In a democracy great emphasis is rightly placed upon open and transparent government action and accountability of government officials. Where government officials are not accountable

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> for their actions and their actions are not subject to public scrutiny, there is a pronounced danger that corruption will set in or that officials will become irresponsible and inefficient in the performance of their duties. By acting as a public watchdog over the way in which public officials perform their jobs, the press can help to promote integrity, probity and efficiency in the public service. The press can and should probe and check upon the actions of government officials, and where it finds evidence of dishonesty and ineptitude, it should publicly expose this

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evidence in order that appropriate remedial action can be taken to root out these practices."

Consequently, I agree that unless and until an independent commission against corruption, like that in Hong Kong, is appointed in Zimbabwe (see the article by J Reid Rowland, "Does Zimbabwe need an independent commission against corruption?" in *Legal Forum* (1991) Vol 3, No 4 at p 20), the press here will be called upon to play an even more prominent and vital role in investigating and exposing corruption and iniquity in high places; and, therefore, there is all the more need in this country for bold journalists like Nyarota and the late William Musarurwa.

Of course, inextricably bound up with the issues of freedom of expression, a free flow of information and a free and investigative press is the issue of protection of a journalist's sources of information from disclosure.

As I have already mentioned, in England the matter of disclosure of a journalist's sources is now covered by a special legislative provision, namely, s 10 of the Contempt of Court Act 1981, regarding which I quote below the words of LORD BRIDGE in *X Ltd & Anor* v *Morgan-Grampian (Publishers) Ltd & Ors* [1990] 2 All ER 1 (HL) at 6h:

"The courts have always recognised an important public interest in the free flow of information. How far and in what circumstances the maintenance of this public interest operated to confer on journalists any privilege from disclosure of their sources which the common law would recognise admitted of no short and simple answer on the authorities. But the matter is no longer governed by the common law and I do not think any assistance is to be gained from the authorities preceding the coming into force of s 10 of the Contempt of Court Act 1981 which is in these terms:

'No court may require a person to disclose, nor is any person guilty of

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contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.'"

In *Sec of State for Defence & Anor* v *Guardian Newspapers Ltd* [1984] 1 All ER 453 (CA) at 459g-h, GRIFFITHS LJ had this to say about s 10 of the Contempt of Court Act 1981:

"The press have always attached the greatest importance to their ability to protect their sources of information. If they are not able to do so, they believe that many of their sources would dry up and this would seriously interfere with their effectiveness. It is in the interests of us all that we should have a truly effective press, and it seems to me that Parliament by enacting s 10 has clearly recognised the importance that attaches to the ability of the press to protect their sources...I can see no harm in giving a wide construction to the opening words of the section because by the latter part of the section the court is given ample powers to order the source to be revealed where in the circumstances of a particular case the wider public interest makes it necessary to do so."

Where the correct emphasis is to be placed when construing s 10 of the Contempt of Court Act 1981 has been the subject of judicial comment in England but is not a matter which need detain me other than to note, in passing, the observation of LORD BRIDGE in the case of *X Ltd supra* at 8j that the question whether disclosure is necessary in the interests of justice gives rise to a more difficult problem of weighing one public interest against another. This is exactly what s 10 of the Civil Evidence Act enjoins me to do when weighing in the scales the importance of doing

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justice between the parties in the circumstances of the case on the one hand against the importance of protecting the source on the other hand.

As I understand it, in this balancing of interests, it is only if the court is satisfied that the detriment to the public interest in ordering the source to be identified will outweigh any prejudice to the parties and to the interests of justice which may be caused by the non-disclosure of the source's identity that the court may, in the exercise of its discretion, declare the evidence as to the disclosure of the source's identity to be privileged so that the identity of the source remains concealed.

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It was against this background that I turned to consider whether, acting in terms of s 10 of the Civil Evidence Act, I should declare the evidence as to the identification of Nyarota's sources to be privileged in the public interest for the reasons advanced by him, namely:

(i) that it was not relevant or necessary to the plaintiff's case for the sources to be identified;

(ii) that as the editor of *The Chronicle*, Nyarota gave his sources his very strict guarantee that their identities would never be revealed;

(iii) that it is a journalistic principle not to disclose one's sources.

The substance of Mr *de Bourbon*'s argument for requiring Nyarota to identify his sources was to test the truthfulness of Nyarota's claim to his having compiled a list from a list allegedly in the possession of the police which he asserted had been shown to him by a senior police officer prior to the publication of *The Chronicle* article on 14 December 1988, indicating that a motor vehicle had been allocated by Willowvale to Lendrim on instructions given by the plaintiff.

Before I engage in the balancing of interests enjoined by s 10 of the Civil Evidence Act, I find it both opportune and pertinent to refer again to the *Granada* case *supra* the facts of which I extract from the headnote and quote below:

> "In January 1980, during a national steel strike by British Steel Corporation ('BSC') employees, a television company ('Granada') decided to broadcast a programme on the strike. A few days before the programme Granada received copies of 250 secret and confidential documents from BSC's files relating to internal actions and discussions at a high level within the BSC and between BSC and the government. The documents were received unsolicited from an unofficial source, who was clearly someone inside BSC who had access to them and showed possible mismanagement within BSC. Granada used 27 of them in their programme. The informant was not revealed, in accordance with a promise by Granada to him that his identity would not be disclosed. BSC brought proceedings against Granada seeking, *inter alia*, an order that Granada disclose the identity of the informant. BSC contended that it was necessary for them to know the identity of the informant in order to prevent further misuse of BSC documents, possibly by an injunction,

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and to remove the suspicion directed at those of their staff who had access to the documents."

In the circumstances of that case, the House of Lords upheld (with LORD SALMON dissenting) the decision of the Court of Appeal which, in turn, had upheld the decision of SIR ROBERT MEGARRY VC in the Chancery Division, ordering Granada to disclose the identity of its informer.

From a reading of the judgment of SIR ROBERT MEGARRY VC in the Chancery Division, of the judgments of LORD DENNING MR, TEMPLEMAN LJ and WATKINS LJ in the Court of Appeal and of the judgments of LORD WILBERFORCE, VISCOUNT DILHORNE, LORD SALMON, LORD FRASER of TULLEYBELTON and LORD RUSSELL OF KILLOWEEN in the House of Lords, the following principles and considerations of public interest emerge which had a bearing, in one way or another and to a greater or lesser extent, on the decision which I was called upon to make in this case under s 10 of the Civil Evidence Act. I set out below those principles and considerations of public interest, first those operating in favour of disclosure of the identity of a journalist's source and then those operating against disclosure, not necessarily in any order of importance or priority.

12A. PRINCIPLES AND CONSIDERATIONS OF PUBLIC INTEREST OPERATING IN FAVOUR OF DISCLOSURE OF THE IDENTITY OF A JOURNALIST'S SOURCE OF INFORMATION.

1. There is a public interest that in the administration of justice or in the process of litigation the truth must come out or be uncovered

TEMPLEMAN LJ stated at 444b-c:

> "In *D* v *National Society for the Prevention of Cruelty to Children* (NSPCC) [1977] 1 All ER 589, [1978] AC 171, however, the NSPCC successfully resisted an order for the discovery of an informant who inaccurately alleged that the plaintiff had ill-treated a child. Discovery was refused because information regarding child cruelty would not be forthcoming if the NSPCC were obliged to reveal the names of their informants and it was in the public interest that such information should be supplied to the NSPCC. LORD DIPLOCK said (1977] 1 All ER 589 at 594; [1978] AC 171 at 218):
>
> > 'The private promise must yield to the general public interest that in the administration of justice truth will out, unless by reason of the

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> character of the information or the relationship of the recipient of the information to the informant a more important public interest is served by protecting the information or the identity of the informant from disclosure in a court of law.'"

At 429f, SIR ROBERT MEGARRY V-C stated:

> "One thing that clearly emerges from the NSPCC case is the re-affirmation of the view that a mere promise of confidentiality will not, without more, protect a communication from disclosure (see also *Science Research Council v Nassé* [1979] 3 All ER 673; [1980] AC 1028). What matters is the public interest, and something must be found to countervail the strong public interest of getting the truth out in the administration of justice."

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And at 433g-h:

> "The plaintiff's 'private interest' seems to me to be a misdescription for the paramount public interest that in litigation all relevant evidence should be available to the court. However private the interest that the plaintiff seeks to protect, the real balance is between the public interest in justice being done, and whatever public interest there is in protecting the media's sources of information. I do not think that authority for this need be cited, though if authority be required, it may be found in the NSPCC and the Nassé cases, and elsewhere."

At 456b LORD WILBERFORCE stated:

> "I now come more particularly to the law relevant to this case. I start with the proposition that the media of information, and journalists who write or contribute for them, have no immunity based on public interest which protects them from the obligation to disclose in a court of law their sources of information, when such disclosure is necessary in the interests of justice."

At 476a-d, LORD FRASER of TULLYBELTON went even further when he said:

> "Consideration of the legal position starts from the proposition that a witness is not as a general rule entitled to withhold relevant admissible evidence in court, merely on the ground that it will disclose information which is confidential. The reason is that the public interest in the administration of justice requires such information to be disclosed, and is deemed to prevail over any public interest in preserving confidentiality.

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The courts will try to avoid forcing witnesses to commit breaches of confidentiality, and will not do so if the information can be obtained from another source or if it is not essential. But if it is essential, or at least if it 'will serve a useful purpose in relation to the proceedings in hand' (see *A-G v Mulholland* [1963] 1 All ER 767 at 772; [1963] 2 QB 477 at 492 per DONOVAN LJ) disclosure will be ordered. The law to that effect is well established. It is subject to exception in a very few cases where, in the public interest, immunity from disclosure has been recognised by law on grounds which were recently considered in this House in *D* v *National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589; [1978] AC 171. These exceptions include disclosure of information affecting the security of the state, and information as to the identity of police informers and of informers to the NSPCC, but they do not include information imparted in confidence by patients to their doctors or penitents to their priests or informers to journalists and the news media: see *A-G* v *Clough* [1963] 1 All ER 420; [1963] 1 QB 773, *A-G* v *Mulholland* [1963] 1 All ER 767; [1963] 2 QB 477 and *HM Advocate* v *Airs* 1975 JC 64 at 70."

At 481h, LORD RUSSELL OF KILLOWEN stated:

> "My Lords, in general terms I recognise a public interest in the free flow of information, and that there may be some obstruction to that flow if a source is not entitled in law to rely on an undertaking by a journalist to treat the identity of the source as confidential to him. But where, as here, the undertaking results in or would perpetuate the gross wrong and injustice done to BSC, to accede to such contention would indeed encourage the doing of injustice. I cannot accept that the public interest in the prevention of injustice is here negatived by any public interest in a free flow of information."

2. No confidentiality in iniquity

This point is graphically expressed thus by SIR ROBERT MEGARRY VC at 434g:

> "It is indeed trite that there is no confidentiality in iniquity; and Granada's participation in the breach of confidence, if nothing worse, was flagrant. The case is one not of the exposure of iniquity, but of exposure by iniquity, and of exploiting the fruits of wrongdoing."

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TEMPLEMAN LJ had this to say on this matter at 447d-e:

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> "The striking features of this case are that Granada knew full well that the BSC employee had no right to hand over the BSC documents and Granada knew full well that they had no right to publish extracts and confidential information from those documents.
>
> As a general rule, the court should not, in my judgment, allow the media knowingly to break the law, civil or criminal, and claim the immunity. The media should not be allowed to exploit the immunity by promising a wrongdoer concealment so that he may break the law with impunity or by rewarding a wrongdoer with a promise that the media will conceal his guilt, when the wrongdoing is committed with the object and is successful in achieving the object of enabling the media in turn to break the law provided they are successful in evading an injunction and are willing to pay damages. There is no acceptable public interest in upholding the secrecy of unlawful communications made for the purposes of unlawful publication."

And at 447j he said this:

> "For the sake of imparting dramatic impact to a topical television programme, Granada knowingly succumbed to the temptation unlawfully to use confidential material unlawfully obtained. No principle of public policy or freedom of the press or freedom of information or journalistic ethics justifies resistance in these circumstances to BSC's claim to discover from Granada the identity of BSC's employee who broke his promise to BSC, enabled Granada to breach their duty to BSC and now shelters behind Granada's promise of concealment."

However, in this connection it is important to note what STEPHENSON LJ said in *Lion Laboratories Ltd* v *Evans & Ors* [1984] 2 All ER 417 (CA), a case in which the plaintiff sought to restrain Express Newspapers from publishing confidential documentary information received from the first two defendants, former employees of the plaintiff, indicating doubts as to the reliability and accuracy of an instrument manufactured and marketed by the plaintiff to measure levels of intoxication by alcohol which the Police were using to test the breath of drivers of motor vehicles suspected of driving with an alcoholic concentration above the prescribed legal limit.

At 422h-j and 423a the learned LORD JUSTICE spoke thus:

> "The problem before the judge and before this court is how best to resolve, before trial, a conflict of two competing public interests. The first public

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> interest is the preservation of the right of organisations, as of individuals, to keep secret confidential information. The courts will restrain breaches of confidence, and breaches of copyright, unless there is just cause or excuse for breaking confidence or infringing copyright. The just cause or excuse with which this case is concerned is the public interest in admittedly confidential information. **There is confidential information which the public have a right to receive and others, in particular the press, now extended to the media, may have a right and even a duty to publish, even if the information has been unlawfully obtained in flagrant breach of confidence and irrespective of the motive of the informer** [my emphasis]. The duty of confidence, the public interest in maintaining it, is a restriction on the freedom of the press which is recognised by our law, as well as by art 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71(1953); Cmd 8969); the duty to publish, the countervailing interest of the public in being kept informed of matters which are of real public concern, is an inroad on the privacy of confidential matters."

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3. One wrongdoer may be compelled by the victim to disclose the identity of another wrongdoer where their offences are connected

TEMPLEMAN LJ referred to this point at 442g:

> "It has long been the law that one wrongdoer may be compelled by the victim to disclose the identity of another wrongdoer where their offences are connected: see *Norwich Pharmacal Co* v *Customs and Excise Comrs* [1973] 2 All ER 943 at 948-949; [1974] AC 133 at 175."

At 442j-443a, he qualified himself by saying:

> "An employee who discloses information confidential to his employer is guilty of wrongdoing unless the information relates to misconduct on the part of the employer."

4. If a newspaper acts irresponsibly, then it forfeits its claim to have its sources of information protected

LORD DENNING MR had this to say when raising and canvassing this point at 441g-j:

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> "The journalist has no privilege by which he can claim, as of right, to refuse to disclose the name. There may be exceptional cases in which, on balancing the various interests, the court decides that the name should be disclosed. Such as in *Garland* v *Torre* in the United States and *A-G v Mulholland* here. Have we any scales by which to hold the balance? Have we any yardstick by which to determine which cases are exceptional? It seems to me that the rule (by which a newspaper should not be compelled to disclose its source of information) is granted to a newspaper on condition that it acts with a due sense of responsibility. In order to be deserving of freedom, the press must show itself worthy of it. A free press must be a responsible press. The power of the press is great. It must not abuse its power. If a newspaper should act irresponsibly, then it forfeits its claim to protect its sources of information.
>
> To show what I mean by irresponsibly, let me give some examples. If a newspaper gets hold of an untrustworthy informant and uses his information unfairly to the detriment of innocent people, then it should not be at liberty to conceal his identity. If it pays money to an informant so as to buy scandal, and publishes it, then again it abuses its freedom. It should not be at liberty to conceal the source. But, if it gets hold of a trustworthy informant who gives information of which the public ought to know, then, even though it originated in confidence, the newspaper may well be held to act with a due sense of responsibility in publishing it. It should not be compelled to divulge its source."

It is apposite here to quote what BARTLETT J had to say on the question of the responsibility of the press in *Chinamasa v Jongwe P & P Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H) at 172:

> "The first observation is that I would not like this judgment to be regarded as affecting the new transparency of the press to which Mr Munyati referred. It is of critical importance to Zimbabwe's future that corruption in high places be exposed and that the highest persons in the land be held accountable for their actions. The press has an important role to play in this regard. But that does not mean that the press can act with the irresponsibility, and the serious irresponsibility, revealed in this case. I would hope that any journalist reading the judgment in this matter would realise the serious failings of *The People's Voice* in regard to the publication of the article complained of and be guided accordingly."

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12B. PRINCIPLES AND CONSIDERATIONS OF PUBLIC INTEREST OPERATING AGAINST DISCLOSURE OF THE IDENTITY OF A JOURNALIST'S SOURCE OF INFORMATION

1. It is in the public interest to preserve the liberty of the press

SIR ROBERT MEGARRY VC expressed himself thus on this proposition at 431a:

> "Furthermore, I can see no possible grounds for refusing to accept the proposition that it is in the public interest to preserve the liberty of the press. That liberty does not, of course, mean that the press is free to do with impunity whatever it chooses; but, speaking generally, it does mean that the press is free to publish what it wishes without prior censorship, and that what it publishes is then subject only to the ordinary law of the land."

LORD SALMON supported this principle most strongly in these terms, at 474c:

> "I agree with WATKINS LJ when he said (see p 448, *ante*): 'It is I believe well founded on ample legal authority that newspapers and television - are in principle immune from disclosing their confidential sources of information' ...

TEMPLEMAN LJ disagrees with the principle which I have already recited and which in my view has been accepted by the courts and acted on for over a hundred years. I consider this principle to be the very basis of the freedom of the press and accordingly a bastion of the freedom of man."

2. It is in the public interest that there should be a free flow of information

At 460a LORD WILBERFORCE spoke thus of this principle:

"There is a public interest in the free flow of information, the strength of which will vary from case to case. In some cases it may be very weak; in others it may be very strong. The court must take this into account."

At 480h LORD FRASER confirmed:

> "No doubt there is a public interest in maintaining the free flow of information to the press, and therefore against obstructing informers."

LORD RUSSELL OF KILLOWEN spoke in similar vein at 481h:

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> "My Lords, in general terms I recognise a public interest in the free flow of information, and that there may be some obstruction to that flow if a source is not entitled in law to rely on an undertaking by a journalist to treat the identity of the source as confidential to him."

3. A promise of confidence may strongly support a countervailing public interest

SIR ROBERT MEGARRY VC made this point at 429f:

> "One thing that clearly emerges from the NSPCC case is the re-affirmation of the view that a mere promise of confidentiality will not, without more, protect a communication from disclosure (see also *Science Research Council* v *Nassé* [1979] 3 All ER 673; [1980] AC 1028). Yet although not enough *per se*, a promise of confidence may strongly support a countervailing public interest."

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4. There is a public interest in upholding the claim of the media to immunity from disclosing their sources

TEMPLEMAN LJ expressed this proposition at 445g:

> "These authorities also support counsel for Granada's submission that there is a public interest in upholding the claim of the media to immunity from disclosing their sources but the authorities also establish that the immunity is not absolute and must be weighed against the interests of the community that justice shall not be denied."

At 445j-446a, TEMPLEMAN LJ went further when he said:

> "Counsel relied on the speech of LORD WILBERFORCE in *Science Research Council v Nassé* [1979] 3 All ER 673 at 681; [1980] AC 1028 at 1067 where LORD WILBEFORCE referred to authorities, including *A-G v Mulholland* and *A-G v Clough*, as examples 'of cases where the courts have recognised that confidences, particularly those of third persons, ought, if possible, in the interests of justice, to be respected'. He explained that -
>
> > 'the process is to consider fairly the strength and value of the interest of preserving confidentiality and the damage which may be caused by breaking it; then to consider whether the objective, to dispose fairly of the case, can be achieved without doing so, and only in a last resort to order discovery, subject if need be to protective measures.'"

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And at 446d, he said:

> "In my judgment, public policy considerations may also in a proper case protect the anonymity of sources of information to the media in an action for discovery, albeit that an injured plaintiff may be hampered or frustrated in his quest for justice."

At 446j, he added a proviso:

> "In my judgment, the court will strive to uphold the immunity of the media against discovery provided the media do not misuse information which they ought not to have received."

WATKINS LJ chipped in with his contribution at 449 b:

> "If legal constraints are needlessly placed on the activities of journalists, they will tend to become undesirably circumspect about their methods of seeking knowledge. Sources of it will be inhibited from passing on what they believe the public ought to know through fear of losing their anonymity. The promise of confidentiality going from journalist to source may become untrustworthy. This state of affairs must not arise. If it does, it would react intolerably against the public interest."

At 440d, LORD DENNING MR made this observation:

> "But, whichever way it is put, the court has never in any of our cases compelled a newspaper to disclose the name of its informant. Save in the leading case of *A-G* v *Mulholland* [1963] 1 All ER 767; [1963] 2 QB 477, where on balance the public interest in compelling disclosure outweighed the public interest in protecting the sources of information."

At 441b-f, LORD DENNING explained the reason for the principle in his inimitable style:

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"After studying the cases it seems to me that the courts are reaching towards this principle: the public has a right of access to information which is of public concern and of which the public ought to know. The newspapers are the agents, so to speak, of the public to collect that information and to tell the public of it. In support of this right of access, the newspapers should not in general be compelled to disclose their sources of information. Neither by means of discovery before trial. Nor by questions or cross-examination at the trial. Nor by subpoena. The reason is because, if they were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their

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sources would dry up. Wrongdoing would not be disclosed. Charlatans would not be exposed. Unfairness would go unremedied. Misdeeds in the corridors of power, in companies or in government departments would never be known. Investigative journalism has proved itself as a valuable adjunct of the freedom of the press Notably in the Watergate exposure in the United States and the Poulson exposure in this country. It should not be unduly hampered or restricted by the law. Much of the information gathered by the press has been imparted to the informant in confidence. He is guilty of a breach of confidence in telling it to the press. But this is not a reason why his name should be disclosed. Otherwise much information that ought to be made public will never be made known ...So let the plaintiff sue the newspaper, without getting the name of their informant. I know that in some cases it might be relevant and useful, in the interests of justice, for a plaintiff to get to know the name of the newspaper's informant, so as to prove malice, for instance, but the plaintiff will have to forego this advantage in deference to the interest which the public has in seeing that newspapers should not be compelled to disclose their sources of information."

LORD WILBERFORCE had this to say at 459j:

"Although, as I have said, the media, and journalists, have no immunity, it remains true that there may be an element of public interest in protecting the revelation of the source. This appears from the speeches in *Norwich Pharmacal* (see *per* LORD REID, LORD MORRIS, VISCOUNT DILHORNE and LORD CROSS [1973] 2 All ER 943 at 948-949, 954, 960, 969; [1974] AC 133 at 175, 182, 188, 199), and from the judgments of the New Zealand Court of Appeal on the 'newspaper rule' (see *Broadcasting Corp of New Zealand* v *Alex Harvey Industries Ltd* [1980] 1 NZLR 163). The Court ought not to compel confidences *bona fide* given to be breached unless necessary in the interests of justice (see *Science Research Council* v *Nassé* [1979] 3 All ER 673; [1980] AC 1028)."

LORD SALMON stated at 475d:

"The immunity of the press to reveal its sources of information save in exceptional circumstances is in the public interest, and has been so accepted by the courts for so long that I consider it is wrong now to sweep this immunity away. The press has been deprived of this immunity only twice, namely in the *Clough and Mulholland* cases. And the exceptional circumstances in each of those cases were that the security of the nation required that the press's source of information must be revealed."

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And at 475e he said:

"The freedom of the press depends on this immunity. Were it to disappear so would the sources from which its information is obtained; and the public would be deprived of much of the information to which the public of a free nation is entitled."

5. A party can rely on the defence that disclosure of the informant's identity may tend to incriminate him.

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6. Those who for good reason disclose corruption or other iniquity are fully protected against discovery ("the iniquity rule").

This was stated by TEMPLEMAN LJ at 446h:

> "There will always be informants who, for good reason or bad, confide in the media. Those who for good reason disclose facts which the public are entitled to know, such as facts relating to corruption or misconduct, are fully protected against discovery."

At 449e WATKINS LJ stated:

> "If he (ie the journalist) commits a like civil wrong for the purpose of exposing the employer's iniquity which, in the public interest, should be revealed, his claim to press immunity should be granted."

LORD WILBERFORCE spoke thus of the iniquity rule at 455h:

> "There is an important exception to the limitations which may exist on the right of the media to reveal information otherwise restricted. That is based on what is commonly known as the 'iniquity rule'. It extends in fact beyond 'iniquity' to misconduct generally (see *Initial Services Ltd* v *Putterill & Anor* [1967] 3 All ER 145; [1968] 1 QB 396). It is recognised that, in cases where misconduct exists, publication may legitimately be made even if disclosure involves a breach of confidence such as would normally justify a prohibition against disclosure."

VISCOUNT DILHORNE mentioned this rule at 461h:

> "There are times when a breach of confidence by an employee is and can be justified, as, for instance, when it reveals some iniquity or crime ..."

LORD FRASER had his say on the rule at 479g:

> "The information did not reveal criminal conduct or anything that could

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be described as iniquity by BSC. If it had done so, its disclosure would have been justified and not wrongful: 'there is no confidence as to the disclosure of iniquity' (see *Gartside v Outram* (1856) 26 LJ Ch 113). If it had disclosed iniquity, Granada's appeal might well have succeeded."

Finally, LORD FRASER commented as follows at 480f:

> "The scope of the iniquity rule is therefore not in issue in this appeal, and the existence of the rule should protect the press from being ordered to disclose the identity of their source in any case where the behaviour of the source has been justified."

It will be appreciated, of course, that the application of the principles and propositions to which I have referred will depend on and vary according to the circumstances of each particular case. It was therefore with this in mind that I embarked upon the judicial exercise of balancing the interests which s 10 of the Civil Evidence Act enjoined me to weigh up in deciding whether to order Nyarota to identify his sources or to declare his evidence in that regard to be privileged in the public interest.

13. BALANCING OF INTEREST IN TERMS IN TERMS OF SECTION 10 OF THE CIVIL EVIDENCE ACT

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I deal first with the factors in this case which appear to favour the grant of an order that Nyarota reveal the identity of his sources.

(a) It is in the interests of justice that Nyarota be ordered to identify his sources, particularly his Police source, and it will be prejudicial to the plaintiff's action if this is not done. Even if not essential to the plaintiff's case, it is relevant and at least 'will serve a useful purpose in relation to the proceedings in hand' (see the *Granada* case at 476b per LORD FRASER) for Nyarota's sources to be identified.

(b) The information was imparted by Nyarota's sources in breach of confidence and, in the case of the senior police source, was surreptitiously solicited by Nyarota and given to him in serious breach of the law.

(c) Because the wrongs committed by Nyarota and his sources are connected, Nyarota should be compelled, at the plaintiff's instance, to disclose the identity of his sources.

(d) Because Nyarota acted irresponsibly in the unlawful manner in which he

obtained and made use of the information in *The Chronicle* article, he has forfeited his claim for the protection of his sources of information.

I now turn to consider the arguments which can be advanced to counter these factors.

(a) Despite the difficulties in which the defendants found themselves because of their failure to discover and produce the different Willowvale lists, except for a copy of the Willowvale Management list which was tendered by the defendants' counsel at the very last moment, I had no reason to doubt Nyarota's evidence that he had obtained the information on which *The Chronicle* article was based from workers at Willowvale and from a copy of the Willowvale Management list which was in the possession of the Police otherwise, as Nyarota remarked, how is it suggested that he came by that information.

However, bearing in mind that the defendants had the onus of proving the defences both of truth for the public benefit and of qualified privilege and that the issue of whether the defendants could discharge the onus of proving the truth of the objectionable words published would, in my opinion, be decided on the evidence led by the plaintiff and the defendants' witnesses, I was satisfied in my own mind that it would not prejudice the plaintiff's case if the identity of Nyarota's sources was not disclosed. Indeed, in my view, it would be only the defendants who could be prejudiced if Nyarota persisted in his refusal to reveal the identity of his sources.

Accordingly, even though it is true that in the event of Nyarota's sources being

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identified and any of them being called to testify, the plaintiff would have been able to question them on the exact nature and scope of, and the foundation for the information given by them to Nyarota, I saw no need, in the interests of justice or in order to avoid prejudice to the plaintiff's case, to direct that Nyarota disclose the identity of his sources. Certainly, I did not consider disclosure of the identity of Nyarota's sources to be a matter essential to the successful prosecution of the plaintiff's action. To the extent that it could be said to be a matter which was relevant, albeit not essential to the action or that it would "serve a useful purpose in relation to the proceedings in hand", I considered that this was something which was overridden by the other interests to which I shall refer.

The view which I took of the matter in this regard put paid to the grounds

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advanced by Mr *de Bourbon* for an order compelling Nyarota to reveal the identity of his sources. In passing, I would mention that I did not consider Mr *de Bourbon's* suggestion that Nyarota be ordered to identify his sources *in camera* to be a realistic solution.

(b) Although it is correct that the information was imparted by Nyarota's sources in breach of confidence and, in the case of his senior Police source, that it was surreptitiously solicited by Nyarota and given to him in serious breach of the law, I am in full agreement with the stand taken by the English courts that where the object of an anonymous employee (and here I treat the Police source as an employee of Government) is to unearth or uncover corruption or some other form of iniquity by his employer (it must be remembered that at the material time the then Acting Minister of Home Affairs, the Minister responsible for the Police, was one of the very Government ministers implicated in the Willowvale scandal) and the employee's behaviour in imparting the information to the press was, in the circumstances, justifiable or, I would add, defensible in the public interest, then the anonymity of the employee will be protected by the courts. However, there will be times when the employee or informer is not justified in going to the press but the public interest is best served by his giving the confidential information to the police or some other responsible body. See the *Initial Services case supra* at 148 1 (per LORD DENNING MR) and *Francome & Anor v Mirror Group Newspapers Ltd & Ors* [1984] 2 All ER 408 (CA) at 413d (per SIR JOHN DONALDSON MR).

Let us look first at the position of Nyarota's police source.

Here we had a senior police officer possessed of information indicating corruption at the highest government level which he, no doubt, believed might be suppressed, particularly when the then Acting Minister of Home Affairs was one of the government ministers implicated in the scandal.

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Where did he perceive his duty to lie? According to the law and his police code of conduct, he was obliged to keep the information confidential. But if he did this, he doubted whether the iniquity would ever be exposed publicly. What else could he do in the circumstances but give the confidential information to the press when approached by them?

Let us now consider Nyarota's position.

Here we had an editor who had received information from workers at

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Willowvale giving the names of government ministers and top officials involved in a scandal of mammoth proportions over the allocation and supply of motor vehicles at Willowvale and the re-sale of the motor vehicles at inflated prices. The editor conceived it as his duty to expose this scandal, all the more so because Vice-President Muzenda had earlier called upon journalists to expose corruption wherever it existed and the President had recently urged the press, if they had any evidence of corruption, to come forward with it. Accordingly, upon learning that the CID in Bulawayo were investigating the scandal at Willowvale, Nyarota approached the police and found a senior officer who was able and willing to assist him with information about the scandal. On his own admission, Nyarota was not concerned about whether his police source breached the law in furnishing him with the information he required in order to check whether the government ministers and top officials whose names the Willowvale workers had given him were involved in the scandal. And when the Acting Minister of Home Affairs threatened to have him and his assistant editor detained over the matter of the information which they had about Willowvale, Nyarota decided to go ahead and publish *The Chronicle* article without further delay.

It is of interest here to note that Mr *de Bourbon* did not urge the court, in terms of s 47(1)(a) of the Civil Evidence Act, to exclude or to refuse to allow the giving of the evidence obtained by Nyarota from the police on the ground that it was obtained illegally or improperly.

I find it pertinent here to quote the following extract from the judgment of LORD BRIDGE in *X Ltd & Anor v Morgan-Grampian (Publishers) Ltd* [1990] 2 All ER 1 at 9j to 10a-b:

> "One important factor will be the nature of the information obtained from the source. The greater the legitimate public interest in the information which the source has given to the publisher or intended publisher, the greater will be the importance of protecting the source. But another and perhaps more significant factor which will very much affect the importance of protecting the source will be the manner in which the information was itself obtained by the source. If it appears to the court that the information was obtained legitimately this will enhance the importance of protecting the source. Conversely, if it appears that the information was obtained illegally, this will diminish the importance of protecting the source **unless, of course, this factor is counterbalanced by a clear public interest in publication of the information as in the classic case where the source has acted for the purpose of exposing iniquity"** (my emphasis).

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To repeat what TEMPLEMAN LJ said in the *Granada* case at 446h:

> "Those who for good reason disclose facts which the public are entitled to know, such as facts relating to corruption or misconduct, are fully protected against discovery."

There is no doubt in my mind that, notwithstanding the unlawful behaviour of Nyarota and his police source when Nyarota solicited and procured the information from the latter, it was clearly in the public interest for Nyarota to expose the corruption taking place in high Government circles over the allocation, supply and re-sale of motor vehicles purchased direct from Willowvale by publishing the information in *The Chronicle* article on 14 December 1988; and that Nyarota was justified in giving his sources his personal guarantee that their identities would not be revealed if they furnished him with the information uncovering the corruption at Willowvale and naming the government ministers and top officials involved, on which *The Chronicle* article was based.

Put another way, but for Nyarota's courageous investigative journalism and for his having given his sources the guarantees they required before they were prepared to provide him with the information they had about the improper goings-on at Willowvale, including the names of the government ministers and top officials involved, and but for his publication of the information in *The Chronicle* article, it is almost certain that there would have been no **Sandura** Commission to inquire into the Willowvale affair and no resultant downfall of the Government ministers implicated in the scandal.

In my view, unless our courts are seen to be prepared to lean over backwards to protect, in the public interest, a journalist's source where the journalist has publicly uncovered corruption or some other form of iniquity on the part of those holding high office, whether in government or elsewhere, the courts will be guilty of a grave disservice to Zimbabwean society and the principles of democracy on which that society is founded.

In arriving at my conclusion, I have in the process necessarily disposed of the other factors mentioned as favouring disclosure of Nyarota's sources, namely, the factor of no confidentiality in iniquity, the principle that one wrongdoer may be compelled by the victim to disclose the identity of another wrongdoer where their wrong-doing is connected and the proposition that if a newspaper acts irresponsibly, then it forfeits its claim to have its sources of information protected.

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In the result, because I was satisfied that the detriment to the public interest if Nyarota was ordered to identify his sources would outweigh any prejudice to the plaintiff and to the interests of justice which might be caused by the non-disclosure of the identity of Nyarota's sources, I declared, in terms of s 10 of the Civil Evidence Act, that the evidence as to disclosure of the identity of Nyarota's sources be privileged.

I must say, in all honesty, that I was both gratified and relieved to have reached that decision since it was in keeping with the important and time-honoured principles which uphold the freedom of the press, a free flow of information, the observance of a promise of confidentiality

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given by a journalist to his source and the claim of the media to immunity from disclosing their sources, while at the same time protecting the anonymity of a person who, in the public interest, has furnished information to the press uncovering corruption or some other iniquity at the highest level in Government on the basis that his or his identity will not be revealed.

Before moving on, lest there be any confusion on the point, I wish to make it clear that if a policeman were to impart confidential information to a journalist for some improper purpose or were to take a bribe in return for information given to the press and his superiors were unaware of the identity of the culprit, I would have no hesitation, in civil proceedings which came before me as a result of the publication of such information, in ordering the journalist concerned to disclose the identity of his police source.

Nyarota then returned to the witness stand for Mr *de Bourbon* to resume his cross-examination of him.

[The learned judge then examined Nyarota's evidence and that of his defence witness Mabhena, and continued:]

The remainder of what happened is now history.

Certainly Lendrim appears to have been a chancer who, for his own ends, bandied about the plaintiff's name in a deceitful manner, thereby causing the plaintiff to be falsely implicated in the Willowvale scandal.

Having dealt with all the evidence, I now turn to address the issues which arise from the pleadings.

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14. FIRST ISSUE - WERE THE OBJECTIONABLE WORDS IN THE CHRONICLE ARTICLE DEFAMATORY OF THE PLAINTIFF?

(a) Onus

The onus is on the plaintiff to prove the defamatory content of the objectionable words.

(b) Test to determine the defamatory content of the objectionable words

I consider the test to determine the defamatory content of the objectionable words is best formulated thus:

Would a reasonable person of ordinary intelligence, upon coming across the objectionable words in *The Chronicle* article and giving them their natural and ordinary meaning, on an overall impression gather and understand from them, within the context of *The Chronicle* article as a whole, a meaning defamatory of the plaintiff; and does the imputation so conveyed lower the plaintiff in the estimation of ordinary, right-thinking persons generally (a test which, it appears, is no more and no less than the test of the reasonable person of ordinary intelligence

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expressed in a different form)?

Although the plaintiff has referred to an innuendo in his pleadings, what he in effect relies upon is an implied or inferred meaning arising from the natural and ordinary meaning of the objectionable words within the context of *The Chronicle* article as a whole. This point is dealt with more fully under the heading of "Determination of the natural and ordinary meaning of the objectionable words" in section (e) infra.

(c) Yardstick to be applied

The yardstick is that of the reasonable person of ordinary intelligence (see The Argus Co case *supra* at 20E-F per Corbett CJ) and, in my view, it applies to both inquiries inherent in the test formulated by me.

I say to both inquiries inherent in the test because in *SA Associated Newspapers Ltd & Anor* v *Samuels* 1980 (1) SA 24 (A) at 30 and Demmers v Wyllie, 1980 (1) SA 835 (A) at 840, JANSEN JA suggested a different standard should be applied to the second inquiry to determine whether the imputation is defamatory. However, I agree with Burchell when he writes in The Law of

Defamation in South Africa at pp 96 & 97 that since "the right-thinking" test of JANSEN JA is subject to certain ambiguities and difficulties (see JM Burchell (1974) 91 SALJ 178 at 180-2) and that the term can bear the meaning of persons who think rationally and ethically and sets a far stricter standard than that of the ordinary, reasonable reader, "the workable and well-tried test" of the reasonable person of ordinary intelligence should alone be applied.

(d) Application of the yardstick of the reasonable person of ordinary intelligence

The application of this yardstick was fully discussed by me in *Auridiam Zimbabwe (Pvt) Ltd v Modus Publications* (Pvt) Ltd 1993 (2) ZLR 359 (H) at 369-372 (a case involving an exception to the plaintiff's declaration) and by my brother BARTLETT in *Chinamasa* v *Jongwe P & P Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H) at 153-156.

In *Demmers* v *Wyllie & Ors supra* at 842 H, Muller JA spoke thus:

> "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..."

In *Dorfman v Afrikaanse Pers Publikasies (Edms) Bpk & Anor* 1966 (1) PH J9 (A) at 45, HOLMES JA referred to the hypothetical ordinary reader in the following way:

> "A court deciding whether a newspaper report is defamatory must ask itself what impression the ordinary reader would be likely to gain from it. In such enquiry the court must eschew any intellectual analysis of the contents of the report and of its implications, and must also be careful not to attribute to the ordinary reader a tendency towards such analysis or an ability to recall more than an outline or over-all impression of what he or she has just read. Furthermore, in view of the mass of material in a newspaper it is in general unlikely that the ordinary reader would peruse and ponder a single report in isolation."

It is important to note what DIEMONT JA had to say about that paragon, the reasonable man,

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in *Demmers v Wyllie & Ors supra* at 848G-H:

> "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**

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> **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"** (my emphasis).

DIEMONT JA then found it apposite at 848H-849A to quote LORD DEVLIN'S words in *Lewis v Daily Telegraph Ltd* [1963] 2 All ER 151 at 169:

> "My Lords, the natural and ordinary meaning of words ought in theory to be the same for the lawyer as for the layman, because the lawyer's first rule of construction is that words are to be given their natural and ordinary meaning as popularly understood. The proposition that ordinary words are the same for the lawyer as for the layman is as a matter of pure construction undoubtedly true. But it is very difficult to draw the line between pure construction and implication, and the layman's capacity for implication is much greater than the lawyer's. **The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely; and unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory" (my emphasis).**

(e) Determination of the natural and ordinary meaning of the objectionable words

In this case no innuendo in the true sense or secondary meaning is to be attributed to the objectionable words and therefore I am solely concerned with giving the words their natural and ordinary meaning within the context of *The Chronicle* article as a whole.

In this respect it is pertinent to quote the following extract from the recent judgment of CORBETT CJ in *the Argus Co* case *supra* at 20F-J & 21A-B.

> "In the absence of an innuendo, the reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning. In determining this natural and ordinary meaning the Court must take account not only of what the words expressly say, but also of what they imply. As it was put by LORD REID in *Lewis & Anor v Daily Telegraph Ltd; Same v Associated Newspapers Ltd* [1963] 2 All ER 151 (HL) at 154E-F:
>
> 'What the ordinary man would infer without special knowledge has

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> generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them and that is also regarded as part of their natural and ordinary meaning.'

And in *Jones* v *Skelton* [1963] 3 All ER 952 (PC) LORD MORRIS of BORTH-Y-GEST, citing

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Lewis's case, stated (at 958 F-G):

> 'The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words...'

(See also *Gatley on Libel and Slander 8* ed paras 86,93,97; *Duncan and Neill on Defamation* 2 ed paras 4.05 and 4.06; Burchell *The Law of Defamation in South Africa* at 85; cf *Sauls & Ors* v *Hendrickse* 1992(3) SA 912 (A) at 919E). And I must emphasise that such an implied meaning has nothing to do with innuendo, which relates to a secondary or unusual defamatory meaning which can be attributed to the words used only by the hearer having knowledge of special circumstances. (See National Union of Distributive Workers v Cleghorn & Harris Ltd 1946 AD 984 at 993-4, 997.)"

Accordingly, in determining the natural and ordinary meaning of the objectionable words through the eyes of a reasonable person of ordinary intelligence, the court must take account not only of what is expressly said, but also of what is implied.

The plaintiff alleges that the objectionable words published about him in *The Chronicle* were, within the context of the article, defamatory of him "in that they were intended and were understood by readers of the newspaper to mean that the plaintiff misused his position as a Minister of Government of Zimbabwe to authorise or direct the allocation of a motor vehicle to a company".

I now proceed to consider what the immediate impact would have been on the mind of the reasonable reader or what impression he would have gained

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upon reading the objectionable words within the context of The Chronicle article as a whole.

To answer this question, one must of course look at the general theme of *The Chronicle* article as indicated by its headlines and contents.

The main headline on the front page of The Chronicle screams out in large, bold type - "CARS RACKET - Willowgate Scandal: all the details". Also on the front page are a photograph of Nkala, the Minister of Defence and then Acting Minister of Home Affairs, with a headline below it - "Nkala threat to lock up editors" - and a photograph of a Toyota Cressida with the caption beneath it - "Cressidas galore at Tregers - management not talking".

The front page article is continued on p 3 under the headline - "Willowgate: all the details". There is also a photograph of non-constituent Member of Parliament, Martin Simela, above the caption - "Cde Simela-stories directed at the Ndebele ZANU(PF) leadership" and a photograph of one Mr Naran, both of whom feature in the article.

The article is concluded on the centrespread page under the headline - "Willowgate Scandal" - and under a photograph of Maurice Nyagumbo, the Senior Minister of Political Affairs, with the caption beneath it - "Cde Nyagumbo - issued instructions for six vehicles" and a photograph of the Minister of Higher Education, Dzingai Mutumbuka. Immediately underneath the headline

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"Willowgate Scandal" there is a box containing the words - "There is no suggestion that all the vehicles referred to in this article were resold for profit. Rather, that they were allocated from Willowvale directly to individuals".

The reasonable reader's appetite for exciting news and his curiosity about the proclaimed scandal at Willowvale was thus whetted.

The article commences as follows:

> "The Minister of Defence yesterday gave two senior members of *The Chronicle* staff until today to report in his office in Harare, failing which he said he would have them picked up by the army and detained.
>
> The ultimatum was given to the Editor, Cde Geoff Nyarota and the Assistant Editor, Cde Davison Maruziva.
>
> It was issued yesterday afternoon by Cde Enos Nkala following a telephone call to him yesterday morning by Cde Maruziva, during the

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> ongoing investigations into the circumstances in which new vehicles were allocated to certain individuals, mostly Government officials, by Willowvale Motors.
>
> Some of the vehicles were subsequently resold, allegedly at inflated prices."

The article goes on to state:

> "Cde Nkala is one of the Ministers who obtained a vehicle from Willowvale on the instructions of its chairman and former deputy Secretary for Industry and Technology, Cde Elias Mabhena. He acquired a Toyota Cressida in May.
>
> The Minister of Industry and Technology, Cde Callistus Ndlovu, explained last month that in view of the scarcity of new vehicles in Zimbabwe, the Government had devised a scheme whereby one new vehicle would be allocated to Ministers and Members of Parliament to make it easier for them to perform their duties.
>
> *The Chronicle* has been attempting to establish whether any of the vehicles allocated under the scheme have been resold, in negation of the spirit of the scheme. The purchasers have, therefore, been approached to explain if they still have their vehicles."

Further on appears the paragraph:

> "The list of names of people who obtained vehicles from Willowvale directly, was in fact, supplied to *The Chronicle* by certain workers of the assembly plant who called themselves 'revolutionaries who want this corruption brought to an end'."

Close by there is a paragraph:

> "The question which upset Cde Nkala yesterday was whether he still had his vehicle."

The article goes on to report:

> "Some Government officials apparently issued instructions for new vehicles to be allocated to themselves or to people or companies known to them.
>
> Some officials issued instructions for more than one vehicle to be allocated to themselves or to certain individuals or companies.

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Cde Maurice Nyagumbo, the Senior Minister of Political Affairs, for instance, between October, 1987 and last August issued six such instructions, according to our well-documented information."

The article then goes on to discuss the fate of the motor vehicles allocated to Minister Nyagumbo and to comment on the allocation of motor vehicles to other Government ministers and top officials.

The article mentions that the Toyota Cressida allocated to Merlin Limited in Bulawayo "was later allocated to one of their senior employees, Cde Mercy Sidile, who is known to be a close friend of Cde Elias Mabhena" and who "said she was purchasing the car with the assistance of the company".

The article then informs readers:

> "Cde Callistus Ndlovu issued instructions for vehicles to be allocated to three individuals, based in Bulawayo, who are neither MPs or Ministers.
>
> These are business tycoon Mr Manilal Naran, who purchased a Toyota Cressida, and two of his employees, Cde Don Ndlovu and Cde Alford Mpofu, who obtained a Mazda B2200 and a B1600 respectively.
>
> Our previous report quoted Cde Don Ndlovu as saying the trucks were handed over to Mr Naran and subsequently resold without Cde Mpofu having had the benefit of even setting his eyes on 'his' new acquisition."

Towards the end of the article there is a paragraph reading as follows:

> "Asked if he knew of anyone outside Matabeleland who was involved in any car racket, Cde Simela said, 'Yes, why don't you expose them too'?"

Immediately following this paragraph is the paragraph containing the objectionable words, the whole of which paragraph reads as follows:

> "The Willowvale list also shows that a certain Lendrim T S, a Harare based company was allocated a Mazda F1300 on the instructions of Cde Mabhena in conjunction with the Minister of Foreign Affairs, Cde Nathan Shamuyarira, while a Dr Bassoppo-Moyo, also of Harare, obtained a Mazda 323 with the assistance of the Vice President, Cde Simon Muzenda."

It will be seen that the main thrust of The Chronicle article was to expose that there was a racket or scandal involving Government ministers and top

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officials going on at Willowvale over the allocation and supply of motor vehicles directly to such Ministers and top officials or, at their instance, to persons or companies known to them and the re-sale of some of these motor vehicles at inflated prices.

It is important to note here what the Shorter Oxford English Dictionary 3 ed has to say about the meaning of the words "racket" and "scandal".

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The word "racket" is used in slang to connote any scheme for obtaining money or effecting some other object by illegal means.

"Scandal" has a variety of derogatory meanings, including that of a "grossly discreditable circumstance, event, or condition of things" and, concretely, a "person whose conduct is a gross disgrace to his class, country, position, etc".

Accordingly, in my view, a reasonable reader, on avidly skimming through *The Chronicle* article and on coming across the objectionable words, would have gained the distinct impression from them, within the context of the article as a whole, if not readily jumped to the derogatory conclusion that the plaintiff had misused his position or influence as a Government Minister to authorise or direct the allocation of a motor vehicle from Willowvale to a company and that he was thus implicated in the racket at Willowvale.

It follows that the reasonable person would have understood the objectionable words as conveying a meaning defamatory of the plaintiff.

15. SECOND ISSUE - DID THE OBJECTIONABLE WORDS HAVE ANY MEANING INJURIOUS TO THE PLANTIFF'S REPUTATION?

This question is easily answered because, in my view, there can be no doubt that, whether one applies the standard of the ordinary, right-thinking person as meaning the reasonable person of ordinary intelligence or the stricter standard suggested by JANSEN JA in *Samuel's* case *supra* or *Demmers* v *Wyllie supra* the imputation conveyed by the objectionable words involved an imputation against the plaintiff's moral character and therefore injured his reputation in the sense of lowering him in the estimation of ordinary, right-thinking persons generally.

Once the court has found, as it has, that the objectionable words published about the plaintiff were defamatory of him and injured his reputation, it is trite law that a presumption of unlawfulness arises which renders the defendants

liable to the plaintiff, on the basis of another presumption, for the general damages suffered by the plaintiff for the injury to his reputation (see *Tekere* v *Zimbabwe Newspapers* (1980) *Ltd & Anor* 1986 (1) ZLR 275 (H) at 279G-H & 280A-E, per SANDURA JP), unless the defendants can rebut the presumption of unlawfulness.

To rebut the presumption of unlawfulness, the defendants rely upon two defences, that of truth for the public benefit and, in the alternative, that of qualified privilege.

16. THIS LEADS TO THE THIRD ISSUE, NAMELY, WERE THE OBJECTIONABLE WORDS TRUE?

(a) Onus

The law on the question of onus where the defence of truth for the public benefit and the defence of qualified privilege are pleaded in a defamation suit was fully reviewed and settled

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beyond doubt by HOEXTER JA in the *Neethling* case *supra* at 760F to 770J when he concluded thus at 770H:

> "For all the aforegoing reasons I conclude that in our law a defendant in a defamation action is encumbered with a full onus in regard to the defences of truth in the public benefit and of qualified privilege. Such defences can be sustained by nothing less than proof on a balance of probabilities. In passing it may be mentioned that proof on a balance of probabilities is required also in England and those Commonwealth countries in which the common law of defamation allocates to the defendant the burden of proof in regard to the defence of truth and the defence of qualified privilege. In my respectful view the Court a quo erred in holding that the respondents were burdened with no more than an evidentiary burden."

Consequently, to succeed in this case the defendants bear a primary and full onus, as opposed to a mere evidentiary onus, to establish on a balance of probabilities either the defence of truth for the public benefit or of qualified privilege upon which they rely.

(b) Requirements of the defence of truth for the public benefit

The defendants must prove that the objectionable words were in all material respects true and that it was for the public benefit or in the public interest to

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publish them. Obviously if the defendants are unable to prove that the objectionable words were true, *caedit quaestio*.

When one talks about the truth of the objectionable words, one means the truth of the words insofar as they are of a defamatory nature. Accordingly, one is not concerned with the truth of whether the defendants had a list (or had compiled a list from their sources) showing that a Mazda F1300 had been allocated from Willowvale to "Lendrim, T S", a Harare based company, on the instructions of Mabhena in conjunction with the plaintiff but whether it is true that a Mazda F1300 had been so allocated on the instructions of Mabhena in conjunction with the plaintiff. See Melius de Villiers *The Roman and Roman-Dutch Law of Injuries* (1899) at 103.

(c) Whether the defence has been proved

From my detailed analysis of the evidence and my assessment of all those who gave evidence in this case, it is clear that the defendants have failed, indeed, have failed hopelessly in their attempt to discharge the onus on them of proving that the defamatory nature of the objectionable words was true.

Apart from the individual "Lendrim T S" not being a Harare based company, the defendants have failed to establish that through Mabhena the plaintiff caused Willowvale to allocate a Mazda F1300 motor vehicle to "Lendrim T S", with whom, it appears to be common cause, the plaintiff never had any dealings.

In this regard, I am entirely satisfied in my own mind that Mabhena was not telling the truth when he tried to have the court believe that the plaintiff had telephoned him and told him to arrange for a motor vehicle or motor vehicles to be allocated to Lendrim, P A or T S, from Willowvale and that Mabhena's false testimony to the Sandura Commission to that effect, as

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reported in The Chronicle article published on 26 January 1989, being annexure A to the notice of amendment of the defendants' plea filed on 13 November, 1991, was given to "save his own skin" because of the hot water he was already in over the allocation and supply of motor vehicles from Willowvale, he having manufactured the story about his alleged telephone conversation with the plaintiff after presumably seeing the plaintiff's name mentioned twice under the Remarks column of the Willowvale Management list, albeit with a question mark behind it, linked with his name; and that in an attempt to shore up his story in that respect, he put his present employee and former private secretary in the Ministry of Industry and Technology, Chinyere, up to her

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story about recalling, a number of years after the event, that she had taken a telephone message from the plaintiff.

In view of my assessment of Mabhena as an untruthful witness and since it appears from Nyarota's evidence that the information on which The Chronicle article was based came from a copy of the Willowvale Management list which was in the possession of the police and to which he was given access, allied to the information previously furnished to him by the Willowvale workers and which it seems the workers also obtained from or through management sources at Willowvale, there is nothing to disprove Gibson's evidence that the question marks which appear behind the plaintiff's name twice in the Remarks column of the Willowvale Management list, originated from the internal control sheet, Exhibit 3, completed by Gibson, after his telephone conversation with Mabhena, in which he placed a question mark above the plaintiff's name because he had reason to doubt the authenticity of Lendrim's claim that he had been referred to Gibson by the plaintiff.

Although because of my finding that the defendants have failed to prove the defence of justification, there is no need for me to say anything more in this connection, I would like to add that in finding Mabhena to have been an untruthful witness, I am confirmed in my conviction that the plaintiff was telling the truth when he denied ever having communicated with Mabhena or anyone else about obtaining a motor vehicle or motor vehicles for Lendrim from Willowvale. Indeed, in my view, everything points to the plaintiff's denial about his having done anything to obtain a motor vehicle for Lendrim from Willowvale as being completely true.

In view of my finding, there is no need for me to address the fourth issue, namely, was the publication of the objectionable words in the public interest. I therefore turn to deal with the fifth issue, being the defence of qualified privilege.

17. FIFTH ISSUE - WERE THE OBJECTIONABLE WORDS PUBLISHED ON A PRIVILEGED OCCASION?

(a) Onus

As I have pointed out when dealing with the defence of justification, the onus is full square on the defendants to prove the defence of qualified privilege.

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In the *Neethling* case *supra* at 771C to 784D, HOEXTER JA reviewed and

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clarified the law on the defence of qualified privilege. The learned judge extracted a number of broad propositions from the relevant authorities and I quote below those which are pertinent to this case.

(i) "At common law there is no general 'media privilege'; and there is no defence of 'fair information on a matter of public interest'. A journalist who obtains information reflecting on a public figure has no greater right than any other private citizen to publish his assertions to the world."

(ii) "The common law does not recognise a duty - interest relationship between a newspaper and its readers sufficient to support qualified privilege. Publication in the media is publication to the world; not everyone can be regarded as having a sufficient interest in the subject-matter. To this rule there are limited exceptions, such as replies to public attacks, and publication in 'crisis' cases, where speedy national warnings are necessary to to avert possible disaster."

(iii) "A newspaper publication is not the subject of qualified privilege merely because it gives the public information concerning a matter in which the public is interested. Qualified privilege requires publication pursuant to a duty, whether legal, moral or social, and the existence on the part of its readers of a corresponding interest or right to receive the defamatory communication. This reciprocity is essential. It connotes a common legitimate interest which is more than idle curiosity in the affairs of others."

(iv) "The test of the existence of a duty to publish is an objective one, based on the standards of the community concerned: would the great mass of right-minded persons in the position of the defamer have considered, in all the circumstances, that it was their duty to make the communication? The test is the common convenience and welfare of society."

(v) "In deciding whether a defamatory publication attracts qualified privilege the status of the matter communicated (i.e. its source and intrinsic quality) is of critical importance. In this connection obvious questions which suggest themselves (the examples given are not intended to be exhaustive) are : does the matter emanate from an official and identified source or does it spring from a source which is informal and anonymous? Does the matter involve a formal finding based on reasoned conclusions, after the weighing and sifting of evidence, or is it no more than an ex parte statement or mere hearsay?"

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At the outset I wish to put paid to Mr *Carter's* submission that I should treat this matter as an exception to the rule mentioned in proposition (ii) *supra* on the ground that it amounted to publication in a "crisis" case, where a speedy national warning was necessary to avert possible disaster.

With respect, if in the *Neethling* case it was not so much as suggested by the defendants that the alleged facts involving the supply of poison and soporifics by the appellant to an officer in the South African Police as part of a criminal scheme of murder and abduction qualified that

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case as a "crisis" case, then I cannot see, even by the wildest stretch of imagination, how a scandal involving Government ministers and top officials over the allocation, supply and re-sale of motor vehicles can be regarded as a "crisis" case where a speedy national warning was necessary to avert possible disaster.

I find it helpful here to highlight some of the *dicta* quoted by HOEXTER JA from the various decisions on which he based the broad propositions set forth by him in the *Neethling* case *supra* at 780D-J and 781A-D.

I first take, from 781J & 782A-D, an extract from the quoted judgment of STEPHENSON LJ in *Blackshaw v Lord & Anor* [1985] 2 All ER 311 (CA); [1983] 3 WLR 283, at 327a-j.

> "But where damaging allegations or charges have been made and are still under investigation (*Purcell* v *Sowler* (1877) 2 CPD 215), - there can be no duty to report them to the public.
>
> In this case, as counsel for the plaintiff points out, there is, when Mr Lord types his article, no allegation against the plaintiff which has been made good ...He may have been under a duty to inform the public of the £52m loss, but not to attribute blame to the plaintiff or to communicate information about his resignation, even if it was of public interest. The general topic of the waste of taxpayers' money was, counsel for the plaintiff concedes, a matter in which the public, including the readers of the *Daily Telegraph's* first edition, had a legitimate interest and which the press was under a duty to publish but they had no legitimate interest in Mr Lord's particular inferences and guesses, or even in Mr Smith's and the defendants had certainly no duty to publish what counsel for the plaintiff unkindly called 'half-baked' rumours about the plaintiff at that stage of Mr Lord's investigations.
>
> There may be extreme cases where the urgency of communicating a

> warning is so great, or the source of the information is so reliable, that publication of suspicion or speculation is justified; for example, where there is danger to the public from a suspected terrorist or the distribution of contaminated food or drugs; but there is nothing of that sort here. So Mr Lord took the risk of the defamatory matter, which he derived from what he said were Mr Smith's statements and assumptions turning out untrue."

Applying these considerations to the facts of this case, it will be noted that at the time the defendants published *The Chronicle* article containing the objectionable words:

(a) the motor scandal at Willowvale was under investigation by the Police;

(b) Nyarota had not bothered to follow-up the telephone message which he had left for the plaintiff to find out the plaintiff's response to the allegation against him;

(c) the allegation against the plaintiff had not been made good and was based not on fact but on mere suspicion of his implication, as borne out by the question marks against his name in the Willowvale Management list, a suspicion which still remained in the absence of any explanation from Nyarota as to why there should have been a query over the plaintiff's involvement in the case of both motor vehicles;

(d) while the defendants may have been under a duty to inform the public about the motor scandal at Willowvale involving Government ministers and top officials, there was no duty to name the plaintiff as being one of the Government ministers involved;

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(e) while the motor scandal at Willowvale was a matter in which the public, including readers of The Chronicle, had a legitimate interest and which the defendants were under a duty to publish, the public had no legitimate interest in, and the defendants had no duty to publish any defamatory matter about the plaintiff which Nyarota had obtained from informal, as opposed to official, sources who insisted on remaining anonymous and which amounted to no more than hearsay;

(f) this was not an extreme case of the sort where the urgency of communicating a warning was so great (on the contrary, the chief reason given by Nyarota for publishing *The Chronicle* article when he did,

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namely, the threat of his detention by the Minister of Defence and Acting Minister of Home Affairs, did not justify his rushed publication of The Chronicle article since, even if he had been detained, I do not see how this could have stopped him from causing the information he had from being published, thereby pointing to the irresistible conclusion that the true reason why Nyarota was so anxious to publish was because of the sensational news story he had) or where the source of Nyarota's information about the plaintiff was so reliable that publication of suspicion was justified; accordingly, the defendants took the risk of the defamatory matter about the plaintiff which Nyarota obtained from his sources turning out to be untrue and, therefore, they should not be heard to cry when that actually turns out to be the case.

HOEXTER JA, at 782H, also quoted the following observations made by PINCUS J in a case considered by the Federal Court of Australia in *Australian Broadcasting Corp* v *Comalco Ltd* (1986) 68 ALR 259 at 340:

"(A) thorough review of the authorities suggests that only in unusual circumstances will defamation emanating from neither an official nor quasi-official source come under the cloak of privilege on the broad ground being discussed. Most of the cases in which the defendant's claim has succeeded have involved publications of material from a person or body connected with government, or with some institution having responsibility for the administration of an aspect of community affairs. Perhaps the most important examples are the decisions of the Privy Council in *Perera v Peiris* (*supra*) and that of the House of Lords in Adam & Ward [1917] AC 309 ...**The nature of the source is the best practical guide to the likely result, at least where the material is published at large"** (my emphasis).

HOEXTER JA, at 782J & 783A-B, also quoted the following remarks of PINCUS J at 342:

"Despite a number of judicial denials that the categories are closed, it seems clear that the law has proceeded in this area with great caution and in such a way that the balance of authority is clearly against the existence of the privilege claimed by the appellant. Courts have evinced a strong reluctance to hold that the broad principle above supports the existence of a duty to publish any material not coming from or associated with an 'authoritative' source, particularly where the defamatory material is disclosed to the public at large. We were referred to no case in England

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or Australia in which there was held to be such a duty to publish such material to the public at large, in the public interest : it was not suggested that any of the established specific categories of common law privilege applied."

In the present case, the defamatory material did not emanate from an official or quasi-official and identified source. Certainly I am not prepared to hold that in our law there is a duty, in the public interest, to publish to the public at large any defamatory material not coming from or associated with an "authoritative" source.

HOEXTER, JA, at 783E-I, then referred to the case of *Doyle* v *Economist Newspaper* [1980] NILR 171 and I quote from his judgment:

> "In *Doyle* v *Economist Newspaper* [1980] NILR 171 the defendant published an article concerning the appointment of the plaintiff as a county court judge, implying that the appointment had not been made on merit. The freelance journalist, Miss Holland, who wrote the article, testified that it was based on interviews with senior members of the Bar and other eminent persons, but she declined to name her sources. It was held that although the quality of the county court bench was a matter in which the public had an interest there was no duty on the defendant to pass on to the general public views expressed in private discussions by unnamed persons, which views were untested for reliability or motive. In ruling against the defendant MURRAY J (at 179E-180A) tested the matter in the following way:
>
> > 'Put the matter the other way round. If Miss Holland had decided not to publish those views since they were, in effect, anonymous and untested for reliability or motive, who could possibly have said (with reason) that she was guilty of a breach of some recognisable duty? Moreover, if I approach the matter in the terms used by PEARSON J in *Webb's* case, I unhesitantly come to the conclusion that while the subject-matter of the words complained of, viz the integrity and quality of the county court bench, was undoubtedly a matter in which the public had an interest, the status of the material received by Miss Holland and passed on to the public was certainly not such as to attract privilege to its publication. As regards some of the other matters dealt with in the words complained of, Miss Holland said her unidentified source was a judge at the highest level. In my view this makes not the slightest difference : the material in question was still in effect from an

> > anonymous source and was not tested or probed in any way by any independent authority.'"

Let me now test this matter the other way round by adopting the language of MURRAY J in *Doyle* v *Economist Newspaper supra*.

If Nyarota had decided not to publish the defamatory matter about the plaintiff since it was, in effect, anonymous and untested for reliability or motive, who could possibly have said (with reason) that he was guilty of a breach of some recognisable duty? Or if the matter is approached in the other way referred to by MURRAY J, would one not unhesitantly come to the conclusion that while the subject-matter of *The Chronicle* article, viz the involvement of Government ministers and top officials over the improper allocation, supply and re-sale of motor vehicles from Willowvale, was undoubtedly a matter in which the public had an interest, the status of the defamatory material about the plaintiff obtained by Nyarota from sources whom he refused to identify and which he passed on to the public was certainly not such as to attract privilege to its publication. The fact that Nyarota obtained his information from an unidentified senior police officer makes not the slightest difference: the defamatory material was still in effect

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from an anonymous source and was not tested or probed in any way by any independent authority.

At this point it is apposite to repeat what COCKBURN CJ had to say in *Campbell* v *Spottiswoode* (1863) 3 B & S 769 at 777, as quoted by HOEXTER JA at 784B:

> "It is said that it is for the interests of society that the public conduct of men should be criticized without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men, and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation."

The point made by HOEXTER JA at 785B applies equally to this case in that, although *The Chronicle* article is a lengthy one with the matter defamatory of the plaintiff representing only a very small part of the whole article, that part of the article could well have been expunged altogether without appreciably whittling down the purpose for which the article had been written.

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In the final result, like the readers of *The Weekly Mail* in the *Neethling* case, the readers of *The Chronicle* had no possible legitimate interest in having communicated to them the untested and hearsay allegation against the plaintiff by anonymous and unidentified sources. To apply the logical test indicated by MURRAY J in *Doyle* v *Economist Newspaper supra* as was done by HOEXTER J A in the *Neethling* case at 786B, one asks whether, had the defendants in this case, upon due reflection, decided not to publish as part of *The Chronicle* article that portion defamatory of the plaintiff, a suggestion might reasonably have been advanced that they had been guilty of a dereliction of journalistic duty. I agree with HOEXTER JA that any such suggestion must be dismissed as grotesque.

In the premises, I find that the defendants have also failed to prove the alternate defence of qualified privilege.

18. THE FINAL ISSUE - THE QUANTIFICATION OF DAMAGES

I am now confronted with the difficult task of assessing the amount of damages which should be awarded to the plaintiff. This means, in effect, deciding upon a lump sum to compensate the plaintiff for the injury done to his good name and reputation and which takes account of any aggravating conduct on the part of the defendants.

Before embarking upon this task, it is perhaps prudent and beneficial to bring to the attention of the layman the following points.

(a) As Burchell comments in The Law of Defamation in South Africa at 291:

> "Compensation in defamation is primarily for sentimental loss, which, by its very nature, is not easily translated into monetary terms."

At 292, Burchell explains the purpose of an award of damages in a defamation suit by reference

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to the following judicial statement:

> "...as WINDEYER J recognized in *Uren v John Fairfax & Sons (Pty) Ltd*, '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' (1966) 117 CLR 115 at 150, quoted in Broome at 1071."

Cf LUDORF J in *Pienaar & Anor* v *Argus P & P Co Ltd* 1956 (4) SA 310 (W) at 323-4.

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The difficulty in assessing damages is expressed thus in Amerasinghe's *Defamation in the Law of South Africa and Ceylon.*

> "The assessment of damages for injury to feelings stemming from the loss of an abstraction such as reputation is not easy, since it involves the placing of a money value upon abstractions".

(b) LORD HAILSHAM put it quaintly when, in *Cassell & Co Ltd* v *Broome & Anor* [1972] 1 All ER 801 (HL) at 825e; (1972) AC 1027 at 1072 G, he said that "the whole process of assessing damages where they are 'at large' is essentially a matter of impression and not addition."

(c) In *Argus P & P Co Ltd* v *Inkatha Freedom Party* 1992 (3) SA 579 (A) at 590 E, GROSSKOPF JA, when delivering the judgment of the Appellate Division of South Africa, said:

> "Our Courts have not been generous in their awards for solatia. An action for defamation has been seen as the method whereby a plaintiff vindicates his reputation, and not as a road to riches."

The same is true of the courts in our jurisdiction.

I indicate below the relevant factors which I shall take into account when assessing damages in relation to the circumstances of this case.

A. The content of the article which includes the defamatory matter.

B. The nature and extent of the publication, including the aspect of republication of the defamatory matter.

C. The plaintiff's standing, that is to say, his reputation, character and status.

D. The nature of the defamation.

E. The probable consequences of the defamation.

F. The conduct of the defendants from the time the defamatory matter was published up to the time of judgment, including

(i) their reliance on and persistence in a plea of justification;

(ii) the question of any malice on their part;

(iii) the question of any retraction of and apology for the publication of the defamatory matter.

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G. The recklessness of the publication.

H. Comparable awards of damages in other defamation suits and the declining value of money.

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I shall now proceed to examine these factors seriatim in relation to the circumstances of this case.

A. The content of the article which includes the defamatory matter

The article occupied the whole of the front page of *The Chronicle* under the banner headline - "CARS RACKET: Willowgate Scandal : all the details" - and was continued prominently on p 3 and on the centrespread page and carried photographs of, *inter alia*, three Government ministers named in the article.

The content and main thrust of the article was about the involvement of Government and senior officials in a racket or scandal described as the "Willowgate Scandal" at Willowvale, a corrupt situation which, so the article said, certain workers at Willowvale calling themselves "revolutionaries" wanted brought to an end, over the allocation, supply and re-sale of motor vehicles from Willowvale.

By the defendants having named the plaintiff as one who had been instrumental in obtaining a motor vehicle from Willowvale for a Harare based company, there can be no doubt that the plaintiff was sucked into the scandal as one of the Government ministers involved.

B. The nature and extent of the publication, including the aspect of republication of the defamatory matter

The Chronicle is a national daily newspaper which is printed in Bulawayo. No evidence was led on *The Chronicle*'s circulation figures but the plaintiff was assisted in this regard when he agreed with the defendants' counsel that *The Chronicle* was a paper which was widely distributed in Zimbabwe and that it was widely read by the general public. Certainly, it can be accepted that *The Chronicle* is the newspaper which commands the attention of readers in Bulawayo and its environs and that it is also distributed to a lesser extent to other centres in the country. Moreover, I think it is safe to assume that when *The Chronicle* broke the Willowvale scandal in its edition on 14 December 1988, there would have been a great rush for copies wherever they were available. Accordingly, I am satisfied that *The Chronicle* article containing the defamatory matter about the plaintiff would have reached a wide readership in Zimbabwe.

In *Buthelezi* v *Poorter & Ors* 1975 (4) SA 608 (W) at 615A-F, WILLIAMSON AJ drew attention to the following point:

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> "Normally a person who publishes a defamatory statement is not liable for damages flowing from its unauthorised republication, but there are exceptions to the rule. Where republication is authorised or intended or where repetition is the natural and probable result then responsibility will attach; see *Vengtas* v *Nydoo & Ors* (5) 1963 (4) SA 358 (D) at 393E, *Moolman* v *Slovo* 1964 (1) SA 760 (W) at 763C.
>
> In the present instance republication in other newspapers and by word of mouth was the natural and probable result of the original defamatory publication. It was doubtless also the intended result. The editorial itself constituted news that was likely to be republished - as indeed it was in *Die Transvaaler* of 1 February 1974.
>
> I therefore hold that the publication for which the defendants are responsible went beyond the ordinary readership of the journal."

I would here mention that in *Buthelezi's* case the court was concerned with a weekly journal known as *To The Point.*

In this matter the plaintiff testified that statements from *The Chronicle* article filtered through to other newspapers and he recalled that this happened in the case of *The Makonde Star* in his constituency. He thought this also happened in the case of *The Herald.*

Since I am satisfied that there was a repetition in other newspapers and by word of mouth of the defamatory matter about the plaintiff as the natural and probable result of the publication of *The Chronicle* article, I find that the defamatory publication for which the defendants were responsible went beyond the ordinary readership of *The Chronicle*.

C. The plaintiff's standing, that is to say, his reputation, character and status

The plaintiff presently holds the portfolio of the Minister of Foreign Affairs and has been a Minister of the Government of Zimbabwe since 1980, thereby pointing to his being one of the Government's most trusted and trustworthy Ministers. Over the years he had earned himself a good and honest reputation as a Minister, a reputation of which he could be justly proud and which naturally he would wish jealously to preserve and safeguard.

It is apposite here to quote what WATERMEYER J said about the plaintiff, who

was a member of the Cabinet of the Government of South Africa, in the case of *Muller* v *SA Associated Newspapers Ltd & Ors* 1972 (2) SA 589 (C) at 595B:

> "The plaintiff is a public figure holding an office of great responsibility. He is in a particularly vulnerable position because he depends upon the goodwill of the electorate to retain that office. He is called upon to appear on public platforms and in Parliament where he would be sensitive to public feeling."

No evidence has been led by the defendants to suggest the plaintiff's reputation is tarnished in any way and that he is anything other than an honourable person of good character.

D. The nature of the defamation

In this regard, it must not be overlooked that on 21 October 1988 the defendants published a

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story by Nyarota in *The Chronicle,* which was introduced as Exhibit 6, which occupied the whole of the front page under the banner headline - "BIG RACKET IN NEW CARS : Top Govt. officials suspected of being involved" - and which was continued on, and occupied the whole of p 2 under the bold headline - "Car racket" - and was concluded on p 3.

In that story it was stated:

> "The practice whereby new vehicles are allocated to certain individuals in contravention of laid down regulations is, according to inside sources, widespread and allegedly involves top Government officials who utilise their influence to direct officials at the car assembly plants to allocate new vehicles to certain people, some of whom are used only as fronts.
>
> Toyota Cressidas, Nissan Sunnys and Mazda B2200 trucks have allegedly been allocated to dozens of people, mostly in Harare and Bulawayo.
>
> It is alleged that in some cases, the people receiving the cars have only had their names used with money being provided to them by certain individuals who later collected the vehicles."

After another paragraph, there is a paragraph reading as follows:

> "Most of the vehicles have then been resold at highly inflated prices, with Toyota Cressidas sold in the box by Willowvale for around $29 000

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being sold on the black market, often within 48 hours of collection, for up to $70 000."

Thus was the scene set for the publication of *The Chronicle* article on 14 December 1988.

Accordingly, to imply of the plaintiff in that article, when it was not true, that he had misused his position as a government minister to obtain a Mazda F1300 for a Harare based company from Willowvale at a time when there was a desperate shortage of motor vehicles in the country, thereby including him with the other named Government ministers and senior officials alleged to be involved in a racket or, to use Nyarota's words, "a scandal of major proportions" over the allocation, supply and re-sale of motor vehicles from Willowvale, was unquestionably a grave imputation against the plaintiff's reputation and character.

E. The probable consequences of the defamation

The plaintiff considered that the defamatory publication had had a very damaging effect on his standing as a government minister.

On their part, the defendants raised a number of points in an attempt to offset or minimise the consequences of the defamatory publication.

In an amendment to their plea, the defendants relied upon the further alternative defence that the publication of the defamatory matter on 14 December 1988 was not a *causa sine qua non* of any damages claimed by the plaintiff in respect of the period commencing on 26 January 1989 and that such damages would have occurred in any event, and did in fact occur, as a result of the privileged publication by the defendants on 26 January 1989 of the evidence given by Elias

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Mabhena to the Sandura Commission, as recorded in the article annexed to the defendants' notice of amendment as annexure A

I have already had occasion to deal with the evidence which, in that article, Mabhena is reported to have given to the Sandura Commission about the plaintiff's allegedly pleading with him over the telephone to assist Lendrim with two motor vehicles from Willowvale.

This line of defence cannot be entertained for a moment since, inasmuch as the court has found that Mabhena's evidence about his supposed telephonic

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conversation with the plaintiff was false, the damage caused to the plaintiff's reputation by the defamatory publication in *The Chronicle* on 14 December 1988 was actually aggravated by the defendants' privileged publication on 26 January 1989 of the false evidence given by Mabhena to the Sandura Commission. As the plaintiff pertinently remarked when under cross-examination, but for the defamatory matter which the defendants published about him in *The Chronicle* article on 14 December 1988 he would probably not have been involved in the Sandura Commission in the way he was and, consequently, there would have been no occasion for Mabhena to give false testimony against him.

The strength attaching to the defendants' argument that any damage caused to the plaintiff's reputation was repaired by the wide press coverage given by Zimpapers to the proceedings before the Sandura Commission, including the evidence led by the plaintiff, and to the Commission's findings, including its finding in respect of the plaintiff, and by the release to the public of the Report of the Sandura Commission on the proceedings before it and on its findings is undoubtedly weakened in the face of the defendants' plea and endeavour to prove in public right up to the end that the defamatory matter which they published about the plaintiff was true and by Nyarota's insistence in court that the plaintiff was fortunate to have "got away with it" before the Sandura Commission.

With regard to Nyarota's assertion that since the Sandura Commission, the plaintiff had become more powerful and influential, thereby implying that he had not been affected by the defamatory publication, I would refer to *Buthelezi's* case *supra* at 617F-H to 618A-D where WILLIAMSON AJ observed that the fact that a plaintiff may not have been adversely affected in his career as a result of the defamatory publication about him does not make the publication any the less defamatory nor should it affect the award of damages.

When dealing with the same argument in *Tekere v Zimbabwe Newspapers (1980) Ltd & Anor* 1986 (1) ZLR 275 (H) at 290C-D, Sandura JP stated:

> "In this regard Mr *de Bourbon* submitted that the fact that the plaintiff was elected Chairman of Zanu(PF) in Manicaland and was re-elected to Parliament in 1985 reduces the amount of damages recoverable because it shows that the publication of the defamatory statements did not affect his reputation and standing. I disagree because the fact that the words complained of did not achieve their objective does not make them less defamatory (*Buthelezi's* case *supra*)."

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In any event, the defamatory imputation about the plaintiff conveyed by *The Chronicle* article may have left an abiding impression upon the minds of many readers, it being impossible in this sort of situation, as WILLIAMSON AJ remarked in *Buthelezi's* case at 618C, "to know to what extent the standing of the plaintiff may have been affected in circles where he was not so well known".

In the circumstances, although I accept, as did the plaintiff, that the press coverage given by Zimpapers to the proceedings and findings of the Sandura Commission and the release of the Sandura Commission Report to the public went a long way towards undoing the damage caused to the plaintiff's reputation as a result of the defamatory publication about the plaintiff in *The Chronicle* article, a factor which I shall, of course, take into account when assessing the amount of damages to be awarded to the plaintiff, the fact remains that, in all probability, the consequences of the defamatory publication about the plaintiff were seriously detrimental to the plaintiff's standing as a Government Minister.

F. The conduct of the defendants from the time the defamatory matter was published up to the time of judgment

In *Gelb* v *Hawkins* 1960 (3) SA 687 (A) at 693D HOLMES AJA confirmed that the court is entitled to take into account the conduct of a defendant from the time of the libel to the judgment, if it is directly connected with the defamation sued on. See also *Salzman* v *Holmes* 1914 AD 471 at 480.

(i) The defendants' reliance on and persistence in a plea of justification

"An unsuccessful plea of justification seriously aggravates damages." See *Buthelezi's* case at 616A *per* WILLIAMSON AJ. See also *Payne* v *Sheffield* (1822) 2 EDC 166 at 176 where SHIPPARD J said: "It is well established that a plea of justification, so insisted on and maintained to the very last, must in the event of failure increase the damages"; and *South African Associated Newspapers Ltd & Anor* v *Yutar* 1969 (2) SA 442 (A) at 455H where Steyn CJ said that the fact that the appellants had throughout persisted in the attitude that the accusation directed at the respondent was justified was an aggravating circumstance.

As I have already mentioned, the defendants have, from the time of the defamatory publication in December 1988 right up to the present time, relied upon and persisted in a defence of justification, which I find disconcerting for the following reasons:

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(a) At the time the defendants published the defamatory matter about the plaintiff, Nyarota had based *The Chronicle* article solely on the information obtained by him from his Willowvale and police sources and was unaware that Mabhena would subsequently testify before the Sandura Commission about a supposed telephonic conversation between himself and the plaintiff. In other words, when he wrote *The Chronicle* article, Nyarota did not know as a fact that he could look to Mabhena for possible

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corroboration of the information obtained from his sources.

(b) Notwithstanding the fact that, according to the information which Nyarota obtained from his police source, there was a question mark against the plaintiff's name concerning his involvement in the procurement of the two motor vehicles in question from Willowvale and that Nyarota's sources at Willowvale could not confirm the plaintiff's involvement in the procurement of two motor vehicles, the defendants preferred to rely and act on Nyarota's sources at Willowvale, anonymous and completely unknown to him as they were, according to Nyarota, without Nyarota's having bothered to try to contact the plaintiff by telephone a second time to obtain his comments, which one would have surely expected Nyarota to take the precaution of doing in view of the question mark against the plaintiff's name, especially as Nyarota admitted that he could not be certain that the plaintiff had received his previous telephone message.

(c) Although the Sandura Commission had no hesitation in clearing the plaintiff of any wrongdoing, the defendants, through Nyarota, decided to pin their shirt to Mabhena's back on the question of the plaintiff's alleged implication in the Willowvale scandal, this despite the fact that Mabhena had not emerged with credit from the Sandura Commission Inquiry and, according to Nyarota, had been found by the Commission to be an unreliable witness.

As I see it, Nyarota allowed his judgment and impartiality as an editor to be clouded by his keen, personal interest in the Willowvale scandal and by his personal pride in seeking to prove, at all costs, that the article which he authored and published about Willowvale in *The Chronicle* on 14 December, 1988 was one hundred per cent correct, instead of choosing, after the release of the Sandura Commission Report, to bow out with good grace and accept that he was wrong in what he had published about the plaintiff. After all, this would not have detracted from the impressive fact that *The Chronicle* article appeared to be accurate in all other material respects. In this connection, Nyarota's answer to a question from me is perhaps instructive - "My

attitude is influenced by the fact that the credibility of this story is now under scrutiny so, in the circumstances, I'm doing my best to prove that there is substance in the story as published".

Nyarota apparently viewed his reputation as an editor as being on the line by his inclusion in *The Chronicle* article of the defamatory matter about the plaintiff and was influenced accordingly in his response to the plaintiff's action for damages.

Seeing that Nyarota had no financial risk in the matter, which he declared Zimpapers was carrying, obviously he had nothing to lose financially by digging in his heels in his attempt to justify the defamatory matter which he had written and published about the plaintiff.

Inexcusably, however, Nyarota set himself up to be the judge of this matter, to the extent that he had the arrogance to suggest that the Sandura Commission, comprising the Judge President of this court, a woman member who has since been appointed a judge of this court and a senior

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legal practitioner of many years standing, did not ask the plaintiff the questions which they should have, with the result that the plaintiff, in Nyarota's words, "got away with it" by being adjudged a reliable witness whereas Mabhena was unjustifiably found to be an unreliable witness. Significantly, however, neither Nyarota nor his counsel made any attempt to inform the court of the respects in which it was claimed by Nyarota that the Sandura Commissioners had been found wanting in their questioning of the plaintiff or to adduce any evidence to counter that relied upon by the Sandura Commission in coming to its conclusions about the plaintiff and Mabhena.

In the circumstances, I regard Nyarota's insistence that the plaintiff had "got away with it" before the Sandura Commission to be a most aggravating feature in this case, the more so in view of the court's finding that the defendants have failed hopelessly to prove the defence of justification upon which they relied to the very last. One can only hope that upon his reading the court's analysis of Mabhena's evidence and its assessment of Mabhena as a witness, Nyarota will be man enough to accept, as he told the court he was prepared to do, that he was decidedly wrong in viewing Mabhena as a reliable witness before the Sandura Commission.

One cannot help wondering how Nyarota would have felt had he, for example, found his name wrongly included in an opposition press report naming editors and senior journalists in the newspaper group by which he

was employed, as being involved in a scandal over the giving of bribes to Government officials to obtain inside information on certain topical confidential matters; and if, after he had been cleared by a Commission of Inquiry set up to inquire into the scandal, the journalist responsible for naming him in the report, when sued, together with his employer newspaper, for defamation by Nyarota, had persisted in his claim that the information published about Nyarota was true and had said that Nyarota had been lucky to get away with it in the proceedings before the Commission of Inquiry, but had refused to identify his sources beyond saying that his information came from officials in Government and from a top senior officer in the police, who had been investigating the matter; and had sought to rely upon a supposed telephone conversation between a senior Government official and Nyarota, which had only come to light during the proceedings before the Commission of Inquiry, in regard to which the former had falsely said that Nyarota had offered a bribe to him.

If Nyarota would have felt incensed and aggrieved about his being falsely implicated thus in the scandal mentioned, he will then appreciate why the plaintiff should have felt the same way when he found his name linked to the Willowvale scandal and why he should have required the defendants to publish a suitable and prominent retraction of and apology for the defamatory matter published about him.

(ii) The question of malice on the defendants' part

Although the plaintiff was convinced in his own mind that Nyarota had acted maliciously in publishing the defamatory matter about him, I am satisfied that this was not in fact the case. I

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say this because I believe Nyarota when he testified that he had published the plaintiff's name alongside the names of other Ministers and Government officials "for the simple reason that it (ie the plaintiff's name) appeared on the list which we had".

I also believe Nyarota when he says that he had been grateful to the plaintiff when, as Minister of Information, Posts and Telecommunications, he had defused an explosive situation which had arisen between Nyarota and Ministers Nkala and Ndlovu over the demand by the latter two Ministers for Nyarota's dismissal as the editor of *The Chronicle* and so, when he saw the plaintiff's name on the list "this incident came to my mind and, if anything, it would have influenced me against the publication of his name".

At worst, Nyarota was guilty of recklessness in including the plaintiff's name

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in *The Chronicle* article without first obtaining the plaintiff's comments in the light of the question marks against his name on the Police Willowvale list.

(iii) The question of any retraction of and apology for publication of the defamatory matte

Because of the defendants' reliance upon a plea of justification, there was obviously no question of the tender by them of a retraction of and apology for the defamatory publication about the plaintiff. This is a pity since it shone through the plaintiff's evidence that what he had wanted above all else was a suitable retraction and apology published prominently in The Chronicle to right the wrong done to him. Had the defendants tendered such a retraction and apology to the plaintiff in the early stages of this matter, I feel sure that that would have been an end to this unfortunate affair. Indeed, if I am to be honest, I must say that I find it surprising and sad that, after the Sandura Commission findings had been published, a reasonable accommodation could not have been reached between the parties. However, that is all water under the bridge.

G. The recklessness of the publication

While I appreciate the circumstances which rushed Nyatora into publishing *The Chronicle* article on 14 December, 1988, I believe that in the case of the plaintiff, Nyarota should have omitted his name from *The Chronicle* article seeing that:

(i) he should have been put on his guard because of the question mark which he saw against the plaintiff's name where it appeared twice on the police Willowvale list, which should have alerted him to the fact that there was a serious doubt about the plaintiff's implication in the Willowvale scandal;

(ii) it was neither safe nor satisfactory for Nyarota to rely upon information received over the telephone from anonymous and unknown sources at Willowvale that the plaintiff had been involved in the procurement of one motor vehicle from Willowvale;

(iii) he had not checked the position first with the plaintiff, a precaution which in the

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circumstances he should have taken;

(iv) the omission of the plaintiff's name would not have detracted from the thrust of *The Chronicle* article.

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In this connection, I wish to refer to Nyarota's answer to a question put to him under cross-examination about his failure to disclose in *The Chronicle* article that there had been a question mark against the plaintiff's name on the police Willowvale list. His reply was:

> "I've tried to answer that question. I took steps when I saw the question mark. I returned to my sources who assured me I could virtually disregard the question mark. It was at that point I felt vindicated when Shamuyarira did not deny assisting Lendrim at Zimoco, but Lendrim took the letter to Willowvale where he got the same result" (my emphasis).

In the first place, I wish to draw attention to the word "virtually" which appears in Nyarota's reply *supra* which indicates that Nyarota could not disregard the question mark against the plaintiff's name with certainty.

Secondly, it is a *non sequitur* for Nyarota to say that he felt vindicated when, before the Sandura Commission, the plaintiff did not deny assisting Lendrim at Zimoco. This was exactly the point which the plaintiff was at pains to make, that he had given Lendrim a letter to take to Zimoco and not to Willowvale. The fact that Lendrim supposedly took the letter to Willowvale "where he got the same result" had nothing to do with the plaintiff and, therefore, was something for which the plaintiff was not responsible.

H. *Comparable awards of damages in other defamation suits and the declining value of money*

(i) Comparable awards of damages in other defamation suits

I move now to look at the awards of damages for defamation in comparable cases.

Although to that end I have read a number of South African cases, I do not think much is to be gained by comparing the awards made by the courts in South Africa with those made by our courts, other than to repeat what GROSSKOPF JA said in the Argus Co case *supra* at 590E, a statement which applies equally in the case of our courts, namely, "Our Courts have not been generous in their awards for *solatia.* An action for defamation has been seen as the method whereby a plaintiff vindicates his reputation, and not as a road to riches"; and to refer to the cases of Pont v Geyser en 'n Ander 1968 (2) SA 545 (A) and *SA Assoc Newspapers Ltd & Anor v Yutar supra.*

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In Visser's and Potgieter's *Law of Damages through the Cases* at 452 & 453, the following

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synopsis is given of Geyser's case *supra*:

> "In an action for defamation instituted by the respondents, the first an ordained minister and the second a retired ordained minister, against the appellant, also an ordained minister, the trial court had awarded each respondent an amount of R10 000 as damages (see Geyser v Pont 1968 (4) SA 67 (W)).
>
> In an appeal against these awards the court, on an analysis of the evidence, found that the imputations as a whole were calculated to arouse such loathing against the respondents that, among a considerable number of the readers of the monthly paper in which the defamation had appeared, their good names would be ruined, and would be difficult to restore. In addition there were aggravating circumstances against the appellant such as his malicious disposition, his persistence with the defamation after he should at least have known that he had found himself on doubtful terrain and in that the defamation had continued over a long period. The Appellate Division held that the amounts awarded were unprecedented, but that the defamation was also unprecedented and even if it had appeared that the trial judge had in one or more respects misdirected himself with the result that the court itself had to decide on the amounts, that it would not have fixed lesser amounts. The appeal was accordingly dismissed."

In *Yutar's* case, the appellants, being the proprietor and printer and the editor of *The Sunday Times,* had in a poster and in an article in the newspaper stated that the respondent, the Deputy Attorney-General of The Transvaal, had misled the court when he had addressed it in a criminal trial. This statement was displayed in large and prominent characters on the poster and in the newspaper which had a wide circulation.

In an appeal against the sum of R10 000 awarded to the respondent as damages for defamation, STEYN CJ, at 458 C, said this:

> "The imputation that he deliberately misled the court was one of the most humiliating insults which could have been offered to any person in the position of the respondent...To ascribe such conduct to the respondent was defamatory in the highest degree, and calls for punitive damages...
>
> In all these circumstances an assessment of damages at an unusually high amount cannot be regarded as altogether inappropriate."

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The Appellate Division accordingly refused to interfere with the trial court's assessment of damages in the sum of R10 000.

I shall now consider the awards made by our courts in relevant cases.

Excluding an award of $45 000 which is presently subject to an appeal, the largest award of damages for defamation in our country was made by BARTLETT J in *Chinamasa* v *Jongwe P & P Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H) when he awarded the plaintiff, being the Attorney-General of Zimbabwe, the sum of $30 000.

I do not propose to recite the circumstances of that case and shall content myself with merely pointing out that the defamation was of a much more serious and far reaching nature than the defamation in the present case which, as the plaintiff's counsel submitted, put the matter in a class of its own and which warranted the learned judge's making a higher award than any that had been made previously.

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There are four cases which I consider to be both pertinent and helpful in arriving at the appropriate level of damages in this matter, namely, *Assoc Mine Workers Union & Bloomfield v Gwekwerere & Ors* GS-202-81 (not reported), *Tekere* v *Zimbabwe Newspapers (1980) Ltd & Anor* 1986 (1) ZLR 275 (H), *Zvobgo* v *Kingstons Ltd* 1986 (2) ZLR 310 (H) and *Chinengundu* v *Modus Publications (Pvt) Ltd* HH-135-92.

In *Bloomfield*'s case *supra* which concerned an uncontested action for damages for defamation and in which I note that Mr *de Bourbon* appeared for the plaintiffs, the first defendant had made the following two utterances about the second plaintiff - "Bloomfield earns $30 000 a year which he steals from the 40 cents contributions paid by the workers" and "Bloomfield has been an habitual thief and is now finished". These defamatory statements were made by the first defendant in the course of a radio broadcast and were repeated the next day by him at a meeting held at a mine.

I now quote from the judgment of Beck J at pp 1 and 2 of the cyclostyled judgment:

> "The second plaintiff is 60 years old. He became the president of the first plaintiff in 1953 and its general secretary in 1961, and he held both these posts until his retirement in May of this year. In addition, he has held office in many other bodies associated with industrial workers. In his

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> various capacities, but particularly in his capacity as the senior office-bearer of the first plaintiff, he has worked closely with Government, has needed - and has enjoyed - the highest confidence in his integrity, and has administered very large sums of money on behalf of the first plaintiff's 13 000 members. His services have earned him decorations from the former Government of Rhodesia and from Her Majesty's Government. The allegations by the defendants were widely disseminated and are grievously defamatory of the second plaintiff in the field of endeavour which has been his life's work, and in which he has enjoyed an unsullied reputation for honesty. The defamation is particularly scurrilous in that the second plaintiff's dishonesty was said to have been not only great and habitual, but at the expense of the very people whose interests it was his duty to protect. It was not made impetuously, but was deliberately persisted in and repeated the next day, and it calls for a punitive and exemplary award, as Mr *de Bourbon* rightly contended.
>
> Judgment is awarded in favour of the second plaintiff only against the first and second defendants jointly and severally, the one paying the other to be absolved, in the sum of $8 000 with costs of suit."

In *Tekere*'s case *supra* certain defamatory statements were published about the plaintiff, a Member of Parliament and a provincial chairman of ZANU (PF), in the editorial columns of *The Herald* newspaper on 11 August 1981 and 13 August 1981 under the headings "EDGAR TEKERE" and "Too many Tekeres". SANDURA JP awarded the plaintiff damages in the sum of $7 500 for imputing, in the first statement, that "Plaintiff was lazy and irresponsible and had been a leader who had done nothing for the poor people or the masses of Zimbabwe except to talk about revolution and socialism without living in a way appropriate to a revolutionary and a socialist". The plaintiff was awarded $12 500 for the second statement imputing that "Plaintiff posed as a revolutionary and as a humble party member, was . . . inefficient, was inattentive to his duties as secretary-general of the ruling party and as a member of Parliament professing concern for the poor and disadvantaged without translating that concern into parliamentary action, and that e was one of those leaders who spend most of their time drinking alcohol, consorting illicitly with women and driving cars at excessive speed and at the expense of the

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taxpayers".

In *Zvobgo's* case *supra* the plaintiff, a Government Minister, sued the defendant on the ground of the distribution by the defendant of a popular magazine called *Drum* containing an article alleged to be defamatory of him.

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The offensive portion of the article read as follows:

> "Hard-working Dr Nathan Shamuyarira, the intellectual confidant of Mugabe, came into the politburo instead of Dr Eddison Zvobgo - tipped not so long ago by many to be the only man to rival Mugabe.
>
> He certainly wasn't excluded simply because Mugabe feared him, if indeed he ever worried about him.
>
> Zvobgo has tripped up a few times, his behaviour is not always perhaps what Mugabe expects of leaders, and then of course he has been known on at least one occasion to have criticised the leadership of the country, and the leader is, of course, Mugabe.
>
> Zvobgo, sources within ZANU say, is an 'unashamed regionalist', and comes from the influential Karanga grouping of Shonas.
>
> It must have taken some courage on Mugabe's part to act so surefootedly and dump him."

The construction placed on this article by the plaintiff was that, by implication, he had "been referred to as a pretentious, irresponsible person, unworthy of leadership, and as a shameless, tribalistic divisionist within the party and/or Government".

REYNOLDS J awarded the plaintiff damages in the sum of $14 000.

Finally, in *Chinengundu's* case *supra* the plaintiff, who at the time was a Deputy Minister of Justice, Legal and Parliamentary Affairs and had been a member of the Legislative Senate since 1980, prior to his being appointed a judge of this court on 9 April 1990, had sued a weekly newspaper, *The Financial Gazette,* over its publication of an article which imputed that the plaintiff was dishonest and corrupt in that he was prepared to obtain votes by grossly improper means.

At the commencement of the trial, the defendant admitted that the words complained of were defamatory of the plaintiff and retracted the words published and tendered an apology to the plaintiff. However, the defendant denied that the plaintiff had suffered damage to his reputation in the amount claimed, being $50 000.

It is interesting to note the following passage in MUCHECHETERE J's judgment:

> "It (ie the article) painted him (ie the plaintiff) as a corrupt person during

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a period when corruption by Ministers and other high government personalities was the major talking point in the

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country - a few months before that the Sandura Commission which investigated the corrupt and illegal sales of motor vehicles by persons in the country had made known its findings which had implicated Ministers and others in the corruption and illegality."

The learned judge was of the view that the defamation of the plaintiff was more aggravated than in the Bloomfield, Tekere and Zvobgo cases and awarded the plaintiff the sum of $23 000 which took into account the sharply declined value of the Zimbabwean dollar.

(ii) The declining value of money

In *Zvobgo's* case *supra* at 327C-D REYNOLDS J, after saying that eighty years had passed since the case of *Botha* v *Pretoria Printing Works Ltd & Ors* 1906 TS 710 in which General Botha was awarded £250 damages on the basis that "attacks upon the character of public men are not to be lightly made", observed:

"Needless to say the value of money today is the merest fraction of what it was at the time of that judgment, and it is well established that the court may take into account the depreciation in the value of money (See, for example, Shield Insurance Co Ltd v Booysen 1979 (3) SA 953 (A) at 963C-D). Even in the last ten years the rate of inflation has had a very significant effect on values."

I would also refer to what BARTLETT J had to say on this subject in Chinamasa's case *supra* at 170, with which I am in respectful agreement:

"Mr Gillespie also argued that account must be taken of the declining value of money when comparing with awards in earlier cases. In this regard he referred to *SA Eagle Insurance Co* v *Hartley* 1990 (4) SA 833 at 841, and I take note of the comments made in that matter. I think, however, that the comments in Min of Defence & Anor v Jackson 1990 (2) ZLR 1 at 8 are also apposite. In particular I refer to the observation at p8 C-D, that the fall in the value of money is a fact which should be taken into account in terms of purchasing power, but not with such an adherence to mathematics which may lead to an unreasonable result. I also take note of the comment at p 8E-F that awards should reflect the state of economic development and general economic conditions of the country and tend towards conservatism. I am aware that *Min of Defence*

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& Anor v *Jackson* does not relate to defamation but to personal injuries. I am, however, of the view that those comments which I have quoted from GUBBAY JA (as he then was) are relevant in deciding the approach to damages in defamation matters as well."

Again, in *Buthelezi's* case *supra* at 618 H, WILLIAMSON AJ remarked:

"One factor in particular requires special consideration, and that is the very marked fall in the value of money since 1968. I would be doing an injustice to the plaintiff if I did not give proper weight to this feature."

I am now in a position to make my assessment of damages in this matter. Taking into account all the factors to which I have referred and having regard to the awards made in comparable cases in our jurisdiction and giving due weight to the decline in the value of money since those awards were made, I find it appropriate, in the circumstances of this case, to award the plaintiff damages in the sum of $15 000.

By this award the plaintiff's reputation has been completely vindicated and the wrong done to him righted, which it was clear to me from his evidence was what he primarily sought to achieve

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by pursuing this action against the defendants. It only remains for me to express the hope that Zimpapers will, in all good faith, give prominence in their newspapers to the fact that, by this judgment, the plaintiff has been cleared of any implication in the Willowvale scandal, as falsely imputed in *The Chronicle* article which was published on 14 December 1988.

The moral of this judgment is best summed up in the words of INNES CJ in *Botha's* case at 715:

> "The public acts of public men are, of course, matters of public interest, and criticism upon them does a great deal of good **provided corrupt motives are not imputed**. But the character of a public man is not only a possession precious to himself but is, in a very real sense, a public asset. If any person knows anything against the character of a public man which makes him unfit for the position which he occupies, such person is not only justified, but bound, if he occupies a position which casts that duty upon him, to inform the public of the facts and to substantiate them for the public benefit if necessary. **But if he makes attacks without verifying his facts, and is not prepared (or, I would add, able) to justify them, he incurs a liability for substantial damages**. These are

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elementary truths which are apt to be overlooked - **and I think the Court should, by its attitude, impress upon all concerned that attacks upon the private character of public men are not to be lightly made, and that if they are made, apart from privilege, they must be justified"** (my emphasis).

19. THE JUDGMENT

In the end result judgment is entered against the defendants jointly and severally, the one paying the other to be absolved, in the sum of $15 000, with interest thereon at the prescribed rate, presently being 25% *per annum,* from 18 May 1994, being the date of judgment, to the date of payment, together with costs of suit.

Chirunda, Chihambakwe & Partners, legal practitioners for the plaintiff *Honey & Blanckenberg*, legal practitioners for the defendant

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Endnotes

1 (Popup - Popup)

This judgement was drawn to the editor's attention too late to be included in 1993 (2) ZLR - *Editor*

2 (Popup - Popup)

An appeal was noted against this judgment

3 (Popup - Popup)

See 1994 (1) SA 708 - *Editor*

4 (Popup - Popup)

* See 1994 (1) SA 708 at 780 - *Editor*

5 (Popup - Popup)

* 1994 (1) SA 708 at p784 - *Editor*

6 (Popup - Popup)

The detailed scrutiny of the evidence of the court has been omitted from this report. The facts found by the court emerge in the portion of the judgment dealing with apportionment of damages. Essentially a pedestrian was knocked down by a motor vehicle as he was attempting to cross the street. One of the issues was whether the second defendant had so sounded his hooter prior to the accident. This is how the court decided this issue.

7 (Popup - Popup)

**** Editor's Note.***

Several pages of the judgment have been omitted from this report. The omitted part of the judgment summarises the testimoney of the various persos who gave evidence. It also refers to the findings of the Commission of Inquiry into the corruption scandal. It pointed out that the Commission of Inquiry int the corruption scandal. It pointed out that the Commission found that htere had been no wrongdoing on the part of the planitiff. The Commission disbelieved the testimony of the defendant's witness Mabhena that the plaintiff had contacted him by telephone and had used his influence as a Government Minister to persuade Mabhena to obtain motor vehicles fodr the Lendrims. The facts relating to the Commission of Inquiry are dealt with in the portion of the judgment which has been reported.

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