1994 (2)

THE ZIMBABWE LAW REPORTS 1994 [PART 2]

ANZ GRINDLAY BANK (ZIMBABWE) (PVT) LTD v HUNGWE 1994 (2) ZLR 1 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Muchechetere JA

Civil appeal

17 & 24 May 1994

Flynote

Employment - Labour Relations Act - 1985 - registration of order in terms of s 111(3) - whether covers registration of determination made by labour relations officer.

Headnote

The provisions in s 111 (3) of the Labour Relations Act 16 of 1985 cover only the registration of determinations either by a hearing officer to whom a labour relations officer has referred a matter or of the Labour Relations Board to which a labour relations officer has referred a matter. It does not cover a determination made by labour relations officer himself and such a determination therefore can not be registered in terms of s 111 (3).

D P Carter for the appellant

E W W Morris for the respondent

Judgment

Korsah JA: The sole point for determination in this appeal is one of pure law. Graphically stated, it is whether the order made by the Labour Relations Officer, in the circumstances of this case, is registerable as an order of the High Court, in terms of s 11(3) 1 of the Labour Relations Act No 16 of 1985, (the Act), thereby lending it the effect of a civil judgment of that court for the purpose of enforcement. It is against the affirmative decision of the High Court, Harare, that such an order was registerable, that this appeal has been lodged.

The respondent was the head of the Exchange Control Department of the appellant. It was alleged that, as a result of certain derelictions of her duties

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over the period of 8 February 1991 to 19 April 1991, losses were occasioned to the appellant.

On 13 November 1991, as instructed by the appellant, its employee relations manager, Mr Nhiwatiwa, wrote a letter to the respondent suspending her from duty with immediate effect without pay, pending permission from the Ministry of Labour, Manpower Planning and Social Welfare, "the Ministry", to terminate the respondent's employment contract in accordance with section 3 of Appendix IV of the Collective Bargaining Agreement of Banking Undertaking.

Mr Nhiwatiwa apprised the Ministry of the grounds of complaint against the respondent and applied for permission to terminate her contract of employment with the appellant in a letter dated 20 November 1991.

On 16 December 1991, the appellant, represented by Mr Nhiwatiwa, and the respondent, attended before Miss Saurombe, a Labour Relations Officer, for an investigation of the complaint against the respondent. No enquiry was conducted by Miss Saurombe as Mr Nhiwatiwa, for reasons that were not expressed at the time, withdrew the complaint and informed Miss Saurombe that:

> "ANZ Grindlays Bank has agreed to reinstate Mrs Constance Hungwe with immediate effect without loss of benefits."

Miss Saurombe recorded this agreement on Form LR 33, which form was duly signed by Mr Nhiwatiwa and the respondent's legal practitioner as well as Miss Saurombe.

The respondent, no doubt rejoicing in the turn of events, in the presence of her legal practitioner, immediately tendered her services to the appellant through Mr Nhiwatiwa. Mr Nhiwatiwa advised her to go home and await a letter from the appellant advising where and when to resume duty with the appellant. Having received no correspondence from the appellant by the end of December 1991, the respondents ought to and was successful in registering the order so obtained in terms of s 111(3) of the Act.

The relevant parts of s 109(2) of the Act recite that:

> "A labour relations officer to whom any matter has been referred in terms of subsection (1) or who is acting on his own initiative to redress any

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> dispute or unfair labour practice shall, as soon as possible, investigate such matter and, after due enquiry, may -
>
> (a) attempt to redress or rectify the matter through conciliation between the parties; or
>
> (b) make such determination in regard to the master as he deems fit, or
>
> (c) where it is necessary to do so, refer the matter to an appropriate workers committee, trade union, employers organization or employment council; or
>
> (d) **refer the matter to a hearing officer or the Board for determination**" (emphasis added).

The labour relations officer in the instant case, even if her recording of the agreement announced by Mr Nhiwatiwa and entered by her can be perceived as a determination, made a

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determination in terms of either pare (a) or (b) of s 109(2) *supra*.

Now, s 111(1) of the Act provides that:

> "After due inquiry into, and consideration of any matter that has been referred to it **in terms of paragraph (d) of subsection (2) of section one hundred and nine** a determining authority may -
>
> (a) make such order as it thinks appropriate for determining the dispute or rectifying the unfair labour practice concerned; or
>
> (b) if it considers that the matter ought not to have been referred to it or ought to be referred by it to some other determining authority or appropriate court, refer the matter to such other determining authority or appropriate court, or make such other order as it thinks appropriate in the circumstances" (emphasis added).

It is clear beyond peradventure that subs (3) of s 111 was intended to cover determinations by either a **hearing officer** to whom a labour relations officer has referred a matter or the **Labour Relations Board** to which a labour relations officer has referred a matter. A determination by a labour relations officer does not fall within the ambit of subs (3) of s 111 of the Act. That section reads:

> "Any party to whom an order made in terms of subsection (1) relates may submit for registration copies thereof, duly certified by the determining authority or presiding officer thereof, to whichever court would have had jurisdiction to make the order had the matter been determined by it."

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Mr *Carter's* submission, that the only order registerable under s 111 (3) of the Act is an order obtained in terms of s 109(2)(d) of the Act, and since dispute settlement by reconciliation is not a determination under s 109(2)(d) of the Act it is not registerable under s 111(3) of the Act, is unanswerable.

Mr *Morris* conceded the force of Mr *Carter's* argument in this regard, but contended that before the trial court was evidence that despite the agreement entered into by Mr Nhiwatiwa, as agent for the appellant, to reinstate the respondent, the appellant has refused to reinstate the respondent in breach of that agreement and the respondent had been without pay since 13 November 1991, and that an appropriate order for damages may be substituted for the order made by the High Court.

The difficulty with this argument is that the only remedy sought by the respondent before the trial court was the statutory right to register the order of the labour relations officer as an order of the High Court. With regard to this issue, whether or not Mr Nhiwatiwa was an agent of the appellant and therefore had, or had not, the authority to withdraw the appellant's application to dismiss the respondent is totally irrelevant. If the order of the labour relations officer is not one registerable in terms of s 111(3) of the Act *cadit quaestio*, the appeal must succeed.

The issue of Mr Nhiwatiwa's capacity to act as he did was a red herring. Although argument was addressed at length on that issue and the judgment appealed went into some detail in an attempt to resolve that matter, the order sought and granted was:

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"That the determination issued by the Labour Relations Officer on 16th day of December, 1991, in terms whereof respondent agreed to reinstate applicant with immediate effect without loss of benefits be and is hereby registered as a civil judgment in terms of section 111(3) of the Labour Relations Act No 16 of 1985.

That the respondent pay the costs of this application on an attorney-client scale."

There was no claim in the alternative. Other possible defences to an action for wrongful dismissal were not ventilated. Argument was therefore not addressed to, or entertained on, a claim for damages for wrongful dismissal or the quantum of such claim. There was no cross-appeal by the respondent before us.

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I venture to say it would be highly irregular, if not unfair and dangerous, for an appellate court to assume the jurisdiction of a court of first instance, and pronounce on issues which are properly cognisable in a court of first instance, but have not been canvassed before that court. To do so would be to deprive the losing party of the right to appeal should our determination be wrong.

Accordingly the appeal is allowed with costs. The order granted by the High Court is set aside, and in its place is substituted the following:

"The application is dismissed with costs."

McNally JA: I agree.

Muchechetere JA: I agree.

Atherstone & Cook, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

S v CHIKASHA 1994 (2) ZLR 6 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Muchechetere JA

Criminal appeal

19 & 26 May 1994

Flynote

Evidence - theft - proof of - documents in custody of State which could have confirmed or disproved defence advanced by appellant - State failing to produce documents and magistrate not ordering their production -

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effect of failure to produce documents

Headnote

In a case of theft the State must prove that no explanation is reasonably possible other than that the accused stole the money or goods.

Where the accused raises some defence and the State has in its custody documents the production of which would either prove or disprove the defence advanced, the State should produce these documents or the trial court should order their production.

Case cited:

S v Mapurisa S-53-94

The appellant in person

Mrs *J Zindi* for the respondent

Judgment

McNally JA: This relatively petty case has given us a great deal of difficulty. The appellant was charged with theft by conversion of the sum of $200 on 6 March 1993. He was a counter clerk at the Shurugwi Post Office. The allegation was that by making a false entry in his counter balance book he was able to remove $200 from his till and still balance his book.

I have commented before (*S v Mapurisa* S-53-94) on the problems facing the

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State when it seeks to prove, in effect, that the accused **must have stolen** the money or goods, rather than that he **did steal** them. Evidence has to be led which satisfies the court that no explanation can reasonably be possible other than that the accused stole the money or the goods.

In the present case there is no doubt that the appellant was in charge of the money and in charge of keeping a record of that money. He was a Post Office counter clerk, and had worked at that job for twenty-three years. The situation was therefore an appropriate one for the adoption of the approach known as "proof of a general deficiency" as referred to in s 286 of the Criminal Procedure and Evidence Act [*Chapter 59*].

The State's allegation was essentially a simple one. Each day the counter clerk is given a "float" so that he can make payments and/or give change. The appellant, on Saturday 6 March 1993, was given a float of $3 200. He signed for it, and there is no dispute that he received it. Yet in his counter balance book he recorded that his float was $3 000. This should have meant that, at the end of the day, he ended up with a surplus of $200. But he did not. His book balanced. Therefore, he must have stolen the surplus $200.

The appellant's defence, right from the beginning, was that the discrepancy was the result, not

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of a shortage of money, but of an error in the books.

He explains it this way:

1. He admits making a mistake by writing $3 000 instead of $3 200. He explains this by saying that the entry is made, not on receipt of the money, but at the end of the day. On this particular day the postmistress had already locked up the supporting vouchers by the time he came to do his reconciliation, and he forgot the correct figure. Before us he contended that the float was not always the same, although there is no evidence either to support or contradict this point.

2. He concedes that in the normal course of events this mistake would have thrown up a surplus of $200.

3. However, by coincidence, on this particular day, two other errors effectively masked this surplus.

4. To understand the first error one has to understand the form of the receipt book used by Post Office counter clerks. The receipts, as most of us know

from paying our telephone accounts, are long thin strips of cheap paper which are in a book. Each page of the book is made up of a number of these strips, separated by perforations, so that they can be torn out of the book (usually with some difficulty) and given to the customer. There is a duplicate and a fast copy and two sheets of carbon paper.

The normal practice, according to the appellant, is that the top(customer's) copy is date-stamped at the time of the transaction. But because of the presence of the carbon paper, the duplicate and triplicate copies are not date-stamped until the end of the page has been reached. At that stage the clerk removes the carbon paper, preparatory to inserting it between the next set of pages. But before inserting it he date-stamps each duplicate and triplicate all the way down the page.

5. What happened, he says, was this. On the previous day, Friday 5 March, he had issued a number of receipts, for school fees. The last two of these receipts, for $120 and $74 had been the top two on a page of the receipt book. In accordance with his practice he had date-stamped the customer's copy 5 March, 1993, but had not date-stamped the duplicate or the fast copy. These were only date-stamped the next day, after he had issued the rest of the receipts forming that page, removed the carbons, and date-stamped all the way down the page.

6. Thus his book showed that $194 had been received on 6 March when in fact that cash had been received and accounted for on 5 March. (This means, of course, that his books would not have balanced on 5 March).

7. In the normal course, this error would have shown up on reconciliation as a deficit of

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$194. But because of the earlier compensating error, no deficit was shown. In fact there was a small surplus of $6.

8. He explains the $6 error in a rather complicated way as follows:

   a. Deduct balance in hand at the close of business on 6 March ($6 005, 68) from the balance brought forward at the beginning Of the day ($6 063,37) and the answer is $57,69 which he says represents stamps sold.

   b. Add total receipts (correctly calculated) to the sum of $57,69 received for stamps, and you get a figure of $6 547,75. Compare this with the figure for payments of $6 541,75 and you find a discrepancy

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of $6. It should have shown up as a deficit, but again, by a remarkable coincidence, it balanced with the small surplus mentioned earlier.

Therefore, he claims, what would have shown up normally as a surplus of $200 was masked by the two errors which would otherwise have shown up as deficits of $194 and $6.

All this was set out, although not in such detail, in his defence outline.

The main witness for the State was the then postmistress of Shurugwi. She gave evidence as to how she discovered the deficit of $200 arising out of the incorrect entry by the appellant of the figure $3 000 when he should have entered $3 200.

She said the appellant was called back from his leave on the following Monday and asked to explain the deficit. She said he had "said something in connection with school fees receipts" but that he "did not explain to my satisfaction where the $200 had gone to."

It is quite clear from her evidence that the appellant had tried to offer an explanation based on the previous day's records. But the difficulty I have with her evidence is that only once and without detail does she say explicitly that the reconciliation of his receipts and payments on the previous day (the 5th) was checked by her and that they balanced. But unfortunately, the State did not produce as an exhibit the page from the counter balance book relating to the previous day. Although exhibit 4 is described in the record as "Copy of the Counter Receipt Book" the exhibit is, in fact, only the page from that book relating to the transactions of 6 March 1993.

Since it was quite clear from the defence outline that his defence involved an alleged carry over from the previous day, it seems to me that the State should have produced the page relating to that day, 5 March 1993. If that page were before us we could see whether or not there was a balance. Indeed by reference to the supporting documents, in particular the receipt book, we could have seen whether the two receipts totalling $194 for school fees had been included in

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the balance for that day. We might have been able to unravel the $6 error as well.

That evidence would have either confirmed or destroyed his defence. But it was not produced.

The record is a transcript (sometimes inaccurate) of the magistrate's notes,

McNALLY JA

and those notes are inevitably not verbatim. I must congratulate the transcriber on the way in which he/she managed to translate the magistrate's high-speed hieroglyphics into passable English. Nonetheless there are passages which are not very clear. I propose to set out the record of the postmistress's replies to questions relating to the carry over of the $194:

> "Q. Accused stated in his defence that it was your duty to check corrections and make necessary corrections because earlier on he had made such wrong entries prior to this offence, which $200 is compensated by two receipts of the previous day?
>
> A. No.
>
> Q. What is the post (position?) if moneys not posted on day transactions are entered?
>
> A. If receipts are not brought in then will be brought on to the next balance the following day with the cash. If receipts are brought and no cash, it would reflect there is no balance.
>
> Q. Anywhere where accused indicated there was simple (surplus?) cash which accused did not enter the previous day?
>
> A. No."

And later:

> "Q. He (accused) said he proceeded to include $194 he had received the previous day?
>
> A. No, its not included in that balance."

Under cross-examination there was considerable reference to the reconciliation of the transactions of the previous day - Friday 5 March. But the evidence lacks clarity, as may be seen from the following extracts:

> "Q. You didn't check on the 5th of March 1993?
>
> A. Yes, the balance for the 4th. We extract books of the previous day from 7.30 to 8 am we check the next morning.
>
> Q. Accused will say you did not check his work on the 5th and 6th and that you only checked on the 8th when he was absent?

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> A. Cash was checked on the 6th which was a Saturday, and all receipts were checked by the 8th - on Monday.

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Q. You did not check books on 5th and there is a stamp to confirm you checked on the 8th.

A. It was the 6th.

Q. Its an alteration from 8th to 6th?

A. Yes.

Q. You checked on the 8th?

A. No, on 6th March 1993.

Q. You only altered the figure when you realised you had not done your work properly?

A. Work for 5th was checked on the 6th and I can remember why the date was altered."

There is more of this unsatisfactory and unclear evidence, although it becomes clearer when the appellant dismissed his counsel and took over the cross-examination himself. At one stage he asked:

"Q. You checked my Friday books did you discover that I had not balanced my books?

A. Books balanced on Friday."

Now if that statement is true, it seems to me that the appellant's defence collapses. But because the appropriate page was not produced, the court effectively abandoned its judicial role in favour of the postmistress. She reached a conclusion about what was recorded on the Friday and she conveyed that conclusion to the court. The best evidence of what happened on Friday would have been the page from the counter receipt book (or counter balance book) relating to the transactions of 5 March. If that had been produced the court could have come to its own conclusion instead of relying on the opinion of the postmistress.

The postmistress was not an expert witness. But even if she were she would

fall into the same category as, for instance, finger print experts. They do not simply give the court their opinion. They produce the fingerprint records and point out to the court the points of similarity. The court must satisfy itself, by reference to these records, that the similarity is there.

This is in contradistinction to witnesses like medical doctors, who often given evidence as to the state of health of a person without needing to produce the person and point out the symptoms. If authority is needed for this proposition, the cases are collected in Storry *Rhodesian Criminal Practice* at p 241-242.

It is for this reason that we are left with a nagging doubt as to the guilt of the appellant. Clearly the postmistress considered him guilty, and she may well have been right. But unfortunately the magistrate adopted her view uncritically. He should have called for the relevant documents on which her conclusion was based, so as to satisfy himself that her conclusion was correct. This is the more important because, as I have indicated, the whole of the appellant's defence from the earliest stage was based on the fact that the deficit was not one of cash, but merely a

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book-keeping error. He clearly relied on the records of the Friday to establish his innocence. Since they were in the custody of the State they should have been produced and put before the postmistress for her comment and explanation.

In the circumstances we are obliged to hold that the offence has not been properly proved.

The appeal is allowed and the conviction and sentence are set aside.

The fine paid by the appellant must be refunded to him.

Korsah JA: I agree.

Muchechetere JA: I agree.

S v M 1994 (2) ZLR 13 (HC)

Court **High Court, Harare**

Bartlett J

Criminal review

1 June 1994

Flynote

Criminal law - general principles - intention - presumption that person aged under 14 is doli incapax - what court must do to satisfy itself that presumption is rebutted

Criminal law - specific common law offences - rape - presumption that male under 14 years incapable of committing rape - questionable status of presumption

Criminal procedure - juvenile - prosecution of for serious offence - requirement to obtain Attorney-General's authority to prosecute

Headnote

Where a juvenile under the age of 14 is charged with committing an offence, the authority of the Attorney-General must be obtained before a prosecution takes place. Failure to obtain such authority constitutes a serious irregularity.

There is a rebuttable presumption that a child between 7 and 14 years of age is *doli incapax*. Where such a child is asked to plead, the trial court should question him in detail about his appreciation of the wrongfulness of his actions.

The irrebuttable presumption that a boy aged under 14 is incapable of rape has been criticised by academic writers in South Africa and England as "quaint" and "silly". In both those countries the presumption has been made rebuttable by legislation and it would be advisable for

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Zimbabwe to follow suit.

BARTLETT J

Cases cited:

S v F (a juvenile) 1988 (1) ZLR 327 (H)

R v Eva 1967 RLR 113 (G)

S v Butau 1994 (1) ZLR 240 (H)

Judgment

Bartlett J: The accused, a juvenile who was aged between 12 and 13 at the time of the commission of the offence, was convicted on his plea of guilty of indecent assault. He was sentenced to receive in private a moderate whipping not exceeding 5 cuts and in addition he was given a 6 months suspended prison sentence.

The facts of the matter are that the accused raped a 4-year-old child. The medical report clearly establishes that penetration was effected and in addition the complainant was infected with a sexually transmitted disease.

The accused was charged with indecent assault because, being under the age of 14, he is presumed incapable of committing the offence of rape - see *S v F* 1988 (1) ZLR 327 at 328 F-G and *South African Criminal Law and Procedure Vol. II* (Hunt) at p 439.

On receiving the matter on review I raised with the learned trial magistrate the question of whether, in view of the age of the accused, the authority of the Attorney-General had been obtained for the prosecution. The magistrate advised that, although the general rule is that all dockets relating to juvenile offenders where serious offences are involved are automatically sent to the Attorney-General's Office for directives, this rule was not followed in this particular case. Accordingly the authority of the Attorney-General to prosecute the matter was not obtained. Since the accused is under the age of 14 years this constitutes a serious irregularity - see *R v Eva* 1967 RLR 113 (G) and *S v F supra*.

I also queried with the magistrate whether he had asked the accused questions to satisfy himself that the accused was *doli capax.* There is of course a rebuttable presumption that an accused aged between 7 and 14 years is *doli incapax*. In order to satisfy himself that the presumption should be rebutted, it would have been necessary for the magistrate to ask detailed questions regarding the accused's appreciation of the wrongfulness of his actions. Since the magistrate, from his answer to my query, was unaware of the position regarding the presumption it is apparent that the questions he asked to satisfy himself that the accused understood and admitted the essential elements of the offence were not sufficient.

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BARTLETT J

The answers to the questions he did ask were vague and unclear as to the question of *doli capax* and should have put the magistrate on his guard - if he had realised the need to clarify this aspect. For example the accused was asked the following questions:

> "Q What did you think you were doing?
>
> A. Playing.
>
> Q. Didn't you know it was unlawful to do that?
>
> A. I had never done that before.
>
> Q. Did you have the right to do that?
>
> A. Nil."

It is accordingly not even clear from the record that the accused was admitting the essential elements of the charge. It is completely unclear as to whether he was *doli capax* or *doli incapax*. The question of whether or not the accused was actually *doli incapax* not having been investigated, the State did not discharge the *onus* on it of showing that the accused knew his act to be wrongful - *S v F supra* at p 330 E-F.

A further aspect of this matter which requires comment is the approach of the magistrate to sentence. A probation officer's report was obtained in respect of the juvenile accused. This report painted a bleak picture of the accused's background. The accused's mother is dead and the accused's father is unemployed, blind and in South Africa. The accused had been staying with relatives who had asked the nearest police station to keep him because of their inability to control his behaviour. The probation officer reported that the policeman handling the matter also had difficulty in keeping the accused in the vicinity of the police station - and on occasions found the accused drinking alcohol when he was not restricted to the police camp. In view of the unfortunate background of the accused the probation officer quite sensibly recommended that the accused be placed at Highfield Probation Hostel where he could be expected to benefit from the controlled environment. The magistrate, for reasons which are difficult to understand, decided to ignore the probation officer's report and ordered corporal punishment, cojoined with a suspended prison sentence.

When I queried with the magistrate the reason for ignoring the probation officer's recommendation he pointed out that the report had been compiled in September 1992 and the accused was only sentenced in December 1993 - making the report outdated. The reason for the delay was that the accused had absconded in the interim. The reasons for the delay only serve to underline

BARTLETT J

the sensible nature of the probation officer's recommendation. As indicated, I cannot understand why the magistrate imposed corporal punishment and then released the accused to the unsatisfactory environment from which he had come. Even if corporal punishment had been

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appropriate, the magistrate incorrectly worded the ordering of that punishment. He should have followed the approach in regard to corporal punishment as laid down in *S v Butau* 1994 (1) ZLR 240 (H).

In view of the failure to refer the matter to the Attorney-General initially, in order for him to decide whether prosecution was appropriate, and in view of the failure of the magistrate to apply his mind to the question of whether the accused was *doli capax* or not, I am of the view that the conviction must be set aside. It will be necessary for the magistrate to refer the matter back to the prosecutor and for the prosecutor to refer the docket to the Attorney-General in order for the Attorney-General to decide whether he wishes the matter to be prosecuted. Should the Attorney-General decide to prosecute the accused in respect of this matter, the magistrate will obviously need to decide when the accused appears before him whether the presumption that the accused is *doli incapax* has been rebutted. It may well be difficult for the magistrate to decide this aspect because in view of the passage of time - the offence was committed in August 1992 - it will be no simple matter to decide whether at that time the accused was *doli capax.* This is an aspect the Attorney-General will need to consider in deciding whether to direct that the prosecution take place.

I would also point out that a further factor which will need to be considered is the fact that the accused has already been punished and received corporal punishment. That will need to be balanced against the fact that it is clear from the papers that the accused comes from a very unsatisfactory environment and that the institutionalisation suggested by the probation officer might well be his only prospect of both reforming and receiving a reasonable opportunity to have an education.

A further aspect of this matter which I feel needs comment is the legal position regarding the commission of the offence of rape by males under the age of 14 years.

The law, as I have already indicated, is clear that rape cannot be committed by an accused under the age of 14. It is equally clear from the facts of this case that the offence of rape was committed by the accused who was aged between 12 and 13 at the time. Hunt in *South African Criminal Law and Procedure*

BARTLETT J

Vol II refers to the legal position presuming that rape cannot be committed by a male under the age of 14 as a "quaint fiction". He also states that experience has shown that it is ridiculous to accept the presumption as true in fact. Glanville Williams' *Textbook of Criminal Law 2* ed adopts a similar viewpoint. The learned author at p 237 states as follows:

> "The other person who cannot be convicted of rape is a boy under 14, the reason advanced being that he is irrebuttably presumed not to have reached the age of puberty. This fiction is doubly silly. First, puberty may be obtained before 14, and secondly, puberty is not necessary for rape. Rape requires only penetration, not fertilisation, so that it is only an ability to have an erection, not an ability to emit semen, that is physically necessary for the crime."

In this country Prof Feltoe in *Legal Forum* (1989) Vol 1 No. 4 at p 5 also refers to the fiction of irrebuttably presuming that a boy under the age of 14 is incapable of committing rape and

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suggests that it should receive the attention of the Legislature.

The legal position has been altered in South Africa and the United Kingdom by legislation to avoid the consequences of the fiction. In South Africa s 1 of the Law of Evidence and Criminal Procedure Act Amendment Act 103 of 1987 makes the presumption a rebuttable one. Accordingly, the ability of an accused under the age of 14 to commit the offence of rape is treated on the same basis as to whether a person of that age is *doli capax* or *doli incapax*. In the United Kingdom there is a similar provision in the Sexual Offences Act of 1993.

I associate myself with the criticism of the presumption in the works of the learned authors to which I have referred. It seems to me that it would be advisable for Zimbabwe to follow the lead provided in South Africa and the United Kingdom and to legislate to make the presumption a rebuttable one.

I reiterate that it is abundantly clear on the facts of this case that the offence of rape was committed by a male well under the age of 14. It is also a regrettable fact of life that sexual activity is taking place between children of progressively younger ages and that sexual offences are consequently being committed by children of progressively younger ages. It is accordingly probably sadly necessary that the legislation which I have suggested should not be long delayed in finding its way to the statute book - the accused in this matter certainly deserved to have been charged with rape.

BARTLETT J

In all the circumstances the conviction and sentence are set aside, although the accused will have already received his corporal punishment. The magistrate is to refer the matter to the Attorney-General on the basis I have already indicated.

Smith J: agrees.

S v SIBANDA 1994 (2) ZLR 19 (HC)

Court **High Court, Harare**

Chidyausiku J

Criminal review

1 June 1994

Flynote

Criminal procedure - trial - right to trial within reasonable time - stay of proceedings - when and to whom may be applied for - correct procedure

Criminal procedure - review - uncompleted proceedings - refusal by magistrate to grant stay of proceedings -

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should not be brought before High Court on review

Headnote

The accused was brought to trial in January 1994 for a crime he allegedly committed and for which he was arrested in 1987. An application was made for a permanent stay of proceedings on the grounds of the lengthy delay in bringing the matter to trial. The application was opposed by the prosecution on various factual grounds and the magistrate ruled against the accused. The accused's legal practitioner filed a request for review and the matter was placed before the High Court.

Held, that the matter was improperly before the High Court. The provisions of s 63(1)(iii) of the Magistrates Court Act [*Chapter 18*] can only be invoked within three days of the completion of a criminal trial and this trial was not completed. Review before completion of a trial can only be considered in exceptional circumstances, and there was no attempt to set out the exceptional circumstances which would justify the review of the proceedings before their completion.

Held, further, that if there has been a failure to prosecute within a reasonable time, the accused can either:

CHIDYAUSIKU J

(a) apply to the trial court for a permanent stay of proceedings, in which case the magistrate is not obliged to refer the matter to the Supreme Court; or

(b) allege that his rights under s 18(2) of the Constitution have been violated and move that the matter be referred to the Supreme Court for determination.

In the latter case the magistrate must refer the matter to the Supreme Court unless he is of the opinion that the question being raised is frivolous or vexatious.

Cases cited:

Ndblovu v Regional Magistrate, Eastern Division & Anor 1989 (1) ZLR 264 (H)

In re *Mlambo* 1991 (2) ZLR 339 (S)

Judgment

Chidyausiku J: The accused in this case is charged with theft by conversion. The theft occurred, according to the indictment, on 13 May 1987. On 19 January 1994 the accused was brought to trial - a period in excess of six years, or almost seven years, since the arrest of the accused. According to the State outline attached to the indictment the accused was arrested on the same day as the theft namely 13 May 1987. It would appear that when the trial commenced before the accused pleaded, an application for a permanent stay of proceedings was made by Mr *Mangwana*, who appeared for the accused. Accused's counsel applied for a permanent stay of the proceedings on the basis that s 18(2) of the Constitution had been violated in that there has been a delay of some seven years in bringing this matter to trial.

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Section 18(2) of the Constitution reads as follows:

> "2. If any person is charged with a criminal offence, then, unless the charge is withdrawn the case shall be afforded a fair hearing **within a reasonable time** by an independent and impartial court established by law" (the emphasis is mine).

The State took the stance that there was no violation of the accused's right to trial within a reasonable time. It was argued that the delay was reasonable having regard to certain factors in this case. These were: the trial of the accused and his co-accused was set down for trial in May 1987. On that date the trial was aborted because the co-accused had absconded. The charges against the accused were then withdrawn before plea. In 1992, the State decided to proceed against the accused. Summons were issued but accused could not be located until late in 1993.

CHIDYAUSIKU J

In reply, defence counsel submitted that there was a *prima facie* case that the accused's rights have been violated and the matter should be referred to the High Court to determine the constitutionality of the proceedings. It is not clear on what basis the submission to refer the matter to the High Court is made, unless of course the reference to the High Court is a mistaken reference and counsel meant the Supreme Court. Reference to the Supreme Court is provided for under s 24(2) of the Constitution.

It would appear that the magistrate considered the matter and ruled against the accused. The trial did not proceed further. The defence counsel filed a request for review with the magistrates court. The magistrate in turn placed the matter before me for review. Attached to the record sent for review are the request for review and detailed reasons for the magistrate's ruling that the accused's right under s 18(3) of the Constitution had not been infringed.

The document filed by accused's counsel headed request for review reads as follows:

> "BE PLEASED TO TAKE NOTICE THAT Applicant hereby applies for the review of the decision of the Magistrates Court sitting at Chinhoyi on the 19th January, 1994 for the following reasons.
>
> 1. The learned Magistrate did not have jurisdiction to determine whether or not constitutional rights had been violated in terms of section 24(2) of the Constitution of Zimbabwe.
>
> 2. The learned Magistrate erred in finding that the rights of Applicant had not been violated when there was a delay in prosecuting the matter."

Although the above document does not explicitly say so, it would appear to me that the request for review is being made in terms of the proviso to s 63 of the Magistrates Court Act [*Chapter 18*]. If I am correct in this assumption then the matter is improperly before me. In my view, the provisions of s 63(1)(ii) of the Magistrates Court Act can only be invoked within three days of the completion of a criminal trial, that is to say, when the accused has been convicted and sentenced and not during the course of a criminal trial.

An accused who wishes to have his case reviewed before the trial is completed has to proceed by way of a court application in terms of Order 33 of the High Court Rules. That relief is not

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readily available. It is only in

CHIDYAUSIKU J

exceptional cases that this court will review criminal proceedings before they are completed. See *Ndhlovu v Regional Magistrate, Eastern Division & Anor* 1989 (1) ZLR 264 (H). There is no attempt to set out the exceptional circumstances that would justify the review of these proceedings before their completion. On this basis alone the matter should be dismissed as being improperly before me.

Even if I am wrong in concluding that the matter is improperly before me, the accused faces another insurmountable difficulty arising from his counsel's lack of appreciation of the provisions of ss 18(2) and 24(2) of the Constitution. From his submissions in court and the grounds for the request for review, it would appear that his understanding of the position is that once an accused applies for a stay of the prosecution on the grounds of the failure to prosecute within reasonable time, contrary to the provisions of s 18 (2) of the Constitution, the court should refer the matter to the Supreme Court in terms of s 24(2) of the Constitution. This is incorrect. The two sections are separate and distinct. In my view the correct position is as follows.

Section 18(2) of the Constitution provides, among other things, that an accused person should be tried within a reasonable time. Where there has been a failure to prosecute within a reasonable time, one of the remedies available to the accused is a permanent stay of the prosecution. See in re *Mlambo* 1991 (2) ZLR 339 (S). An accused can apply to the trial court for this relief. Upon such an application the trial court will enquire into the merits of such an application and make a determination. This is what apparently happened in this case. In such an application, the magistrate is not obliged to refer the matter to the Supreme Court for the determination of the constitutional issue.

It is also open to the accused to avail himself of the provisions of s 24(2) of the Constitution where he feels there has been undue delay in bringing him to trial. In that case, all that the accused has to do is to allege that his rights as set out in s 18(2) of the Constitution have been violated and move that the matter be referred to the Supreme Court for determination of that issue. Once such an application is made, the court is obliged to refer the matter to the Supreme Court, unless the court is of the opinion that the question being raised is frivolous or vexatious. The accused's counsel did not elect this option, which is somewhat surprising. Had he adopted this approach it is difficult to see how he could have failed to succeed. The delay in bringing the accused to trial in this case is for 7 years. It is difficult to see how an application involving a delay of 7 years can be said to be frivolous and

CHIDYAUSIKU J

vexatious. Indeed, it is also open to the accused to plead, as it were, in the alternative, that is to say, ask the court to stay prosecution or alternatively refer the matter to the Supreme Court. This, indeed, is what happened in re *Mlambo supra* with what must have been a satisfying result

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to the accused.

In the result the proceedings arc hereby ordered to continue. However, it is still open to the accused to apply to the court at the continued hearing that the issue of the delay in bringing him to trial be referred to the Supreme Court in terms of s 24(2) of the Constitution.

S v MOYO 1994 (2) ZLR 24 (HC)

Court **High Court, Harare**

Annotations Link to Case Annotations

Mtambanengwe J

Criminal review

1 June 1994

Flynote

Criminal procedure - court convicting accused of crime different from crime charged - no amendment to charge

Headnote

The accused had been charged with contravening s 2 of the Concealment of Birth Act [*Chapter 57*]. She was, however, convicted of infanticide without the charge being amended.

Held, that the magistrate had misdirected himself. There was no evidence that the accused had killed the child. The accused should have been convicted of the crime with which she had been charged.

Cases cited:

R v Ngcobo 1957 (1) SA 377 (N)

S v Guter 1975 (2) ZLR 77 (A)

S v Smith 1975 (2) ZLR 77 (A)

Judgment

Mtambanengwe J: The accused was charged with a contravention of s 2 of the Concealment of Birth Act [*Chapter 57*]. She pleaded guilty and was accordingly convicted. She was sentenced for infanticide to 3 years' imprisonment with labour, 18 months of the sentence being suspended on conditions.

The proceedings in this matter were brief, but reveal a total confusion. The confusion seems to have started with the labeling of the charges as -

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"c/s 2 OF THE CONCEALMENT OF BIRTH ACT CHAPTER 57 (INFANTICIDE)"

MTAMBANENGWE J

The Infanticide Act is Act No 27 of 1990 not Chapter 57.

Thereafter the facts alleged against the accused suggest that the accused killed the child. They were that:

"2. On 19 February 1994 between the hours of 1600-1700 hours, accused gave birth to a baby boy alone in her lodging room. She immediately wrapped the child with a blanket, thus preventing it from making any noise.

3. Accused kept the child until the evening (at) of the same day, after which she took a hoe and the child and proceeded to a vlei which is between Unit 'D' and 'C' Seke in Chitungwiza. She dug a shallow grave and buried the child."

While the above implies that the child was born alive, there is no allegation that the accused gave birth to a live child and that she killed the child.

In putting the essential elements to the accused the following questions were asked by the trial magistrate.

"Q. Did you give birth to a live baby and did you thereafter conceal it?

A. Yes.

Q. Was it dead when you buried it?

A. Yes, it was.

Q. Did you have any lawful authority to do so?

A. No.

Q. Do you have any defence to offer?

A. No.

Q. Is your plea of guilty an admission of all the essential elements?

A. Yes."

From the above one cannot say of what offence the trial magistrate thought he was trying the accused. However, in his reasons for sentence, he comes out clearly to show that he thought he was trying the accused for infanticide. Therein he makes the following observations:

"Infanticide is on the increase and stiff penalties are necessary. There was

MTAMBANENGWE J

premeditation and planning in this case resulting in the death and burial of the infant. Also that *S v Rusere*

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> HH-20-93 and *S v Shava* HH-195-92 are in point with regards to sentence."

The confusion in this case also applied to the public prosecutor whose address to the court on sentence is entirely based on the belief that the accused had been charged with and convicted of a contravention of s 2(1) of the Infanticide Act No. 27 of 1990. He is the one who cited the two cases that the magistrates says "are in point with regards to sentence". The accused in both those cases were charged with infanticide.

It is clear from the body of the charge that the charge the accused was facing is Concealment of Birth, ie contravening s 2 of Chapter 57:

> "In that on 19th February 1994 and at 4429 Unit 'D' Seke in Chitungwiza, ANN MOYO, a woman who gave birth to a child, unlawfully endeavoured to conceal the birth thereof by secret burial or other disposal of the body of the child."

With such a charge having been put to the accused and the above questions asked on the essential elements being put to the accused it beggars the imagination to find another explanation as to how the magistrate and the prosecutor came to be dealing with the accused finally as if she had been charged with and convicted of the crime of infanticide other than that neither was applying his mind to the matter in hand.

Apparently no *post mortem* report was furnished because no examination to determine the cause of death was possible due to the decomposition of the body. The body was buried on 19 February 1994 and it was exhumed on 11 March 1994.

There is no question of amending the charge in accordance with the principles discussed in cases like *R v Ngcobo* 1957 (1) SA 377 (N); *S v Guter* 1979 RLR 358 (A); *S v Smith* 1975 (2) RLR 77 (A). The accused was not asked whether she killed the child or not and her answers to the magistrate's questions cannot be regarded as an admission that she killed the child. Simply put, that enquiry was never made and there was no evidence before the trial court that the accused killed the child.

It follows that the trial magistrate misdirected himself on sentencing the accused on the basis that he had convicted her of infanticide. That sentence is accordingly set aside and the accused is sentenced as follows:

MTAMBANENGWE J

Two years' imprisonment with labour of which 1 year's imprisonment with labour is suspended on the same conditions as the magistrate previously imposed.

Smith J agrees.

FOOTE v FOOTE 1994 (2) ZLR 28 (HC)

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Court **High Court, Harare**

Adam J

Opposed civil matter

17 February & 1 June 1994

Flynote

Family law - maintenance - pendente lite - variation or setting aside of order already granted - onus

Family law - contribution to costs - increased contribution - application - what must be shown

Practice and procedure - applications for increase and setting aside of maintenance pendente lite by applicant and respondent respectively - onus

Headnote

The applicant applied to have the amount of maintenance *pendente lite* increased and also to have the amount previously awarded as a contribution to her legal costs increased. The respondent sought to have the maintenance *pendente lite* set aside.

Held, that the applicant had failed to establish that she was entitled to the increased amount of maintenance *pendente lite* but that the respondent had also failed to establish that there was good cause to set aside the original amount granted for maintenance *pendente lite*.

Held, further, that the applicant had failed to establish that there was any good cause for her application for an increased contribution towards her legal costs.

Cases cited:

Marufu v Moyo 1983 (2) ZLR 386 (S)

Chodokufa v Chodokufa 1988 (1) ZLR 14 (H)

ADAM J

Black v Black 1987 (1) ZLR 133 (S)

Barrass v Barrass 1978 RLR 384 (A)

Cattle Breeders Farm (Pvt) Ltd v Veldman (2) 1973 (2) RLR 261(A)

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

Hodgson v Hodgson S-190-92

Whiteley v Whiteley 1959 (2) SA 148 (E)

van Rippen v van Rippen 1949 (4) SA 634 (C)

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Botes v Botes 1969(2) RLR 238 (G)

Glazer v Glazer 1959 (3) SA 928 ( )

Roux v Roux 1956 R & N 476 (SR)

Zaduck v Zaduck (1) 1965 RLR 533 (G)

Muhlmann v Muhlmann 1984 (1) SA 413 (W)

Lindsay v Lindsay 1992 (1) ZLR 332 (H)

Mutenare v Mutenure HH-300-92

A Dyke for the applicant

J C Andersen SC for the respondent

Judgment

Adam J: The applicant wife was granted by this court in case no. H-4748-91 on 5 February 1992 as against the respondent husband maintenance *pendente lite* of $1 000 a month from the end of October 1991, the date of her application, as well as contribution of $1 500 towards her costs in a divorce action instituted by her. In the proceedings in case no. H-6259-93 she now seeks to have the maintenance *pendente lite* increased to $3 500 a month from the end of May 1993 together with the respondent making a further contribution of $2 500 towards her costs. On the other hand, the respondent, whose application was condoned by me in the proceedings in case no. H-748-94, seeks an order that the maintenance *pendente lite* be set aside. Both matters were heard at the same time.

The onus is on the applicant to show good cause for such a variation order: *Marufu v Moyo* 1983 (2) ZLR 386 (S) at 387-388 and *Chodokufa v Chodokufa* 1988 (1) ZLR 14 (H) at 16. Also, before a discharge of a maintenance order may be granted the respondent must establish that a change in the means or circumstances of any of the parties has occurred: *Black v Black* 1987 (1) ZLR 133 (S) at 136.

In her founding affidavit sworn on August 23,1993 the applicant attached a list of her annual expenses of $8 749, monthly expenses of $3 250, with the total combined expenses reflected as being $3 979 per month. She avers that the existing maintenance of $1 000 is grossly inadequate so it should be

ADAM J

increased to $3 500 a month. She attached a demand letter of 23 May 1993 from her legal practitioners to the respondent's legal practitioners in which it was stated that she required a minimum of $2 500 a month for maintenance. She asserted that the respondent's legal practitioners did not dispute that the respondent was well able to pay the amount claimed; that

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the respondent was a partner in a medical practice and a very prominent and successful gynaecologist in Harare.

[The learned judge then detailed the respondent's reply, including the itemization of his own income and expenditures and continued:]

He submits that the applicant has adequate funds of her own and assets with which to prosecute the divorce action. He has attached various documents to his affidavit. He prays that her application be dismissed with costs.

[The learned judge then set out the applicant's reply to the respondent's criticisms of her expenditures and continued:]

In his affidavit in the proceedings in case no. HC-648-94 sworn on 28 January 1994 the respondent states that in December 1993 he received a report that the respondent was employed at the Leopard Rock Hotel. He communicated with He management of that hotel who informed him that the respondent was being employed on a consultancy basis for a probationary period which expired at the end of January 1994, after which the hotel management wished it to be permanent. The respondent's board and lodging were provided. He also indicates that in November 1993 he learnt that the respondent appears to be a beneficiary in the estate of the late D Gobbolt, wherein a flat in Pretoria to the value of R59 000 was to be sold but the details of her inheritance and the net value has not been disclosed. He also states that a few days ago he learnt that her daughter was living in the respondent's house and that she had a lodger living in the house paying $1 000 a month in cash. He also learnt that she was employed in November 1993 at the Akropolis Restaurant for 3 weeks. He also indicates that he forgot to mention that she has a Building Society account in South Africa and that to the best of his knowledge in 1989 she had R4 000 in it. He avers that in the circumstances the respondent can fully support herself adequately and does not need maintenance from him.

In her affidavit in reply sworn on 12 February 1994, she accepts that she is engaged as a consultant at the Leopard Rock Hotel but even if her position becomes permanent she will still need the original maintenance plus a substantial increase in order to meet her monthly commitments and to live. She attached a salary slip which gave her net income for January 1994 as

ADAM J

$1 172,92. She admits she receives board and lodging but says that she finds it necessary at her age to keep a home in Harare for her accommodation when she is off at week-ends on leave and for her daughter and grandson's accommodation. She indicates that the inheritance in South Africa is R31 196,24 and which is in any event, totally irrelevant as anything she inherits is excluded in terms of the provisions of s 7(2)(a) of the Matrimonial Causes Act 1985 from being considered in the division of assets. She assumed that by mentioning this the respondent was attempting to show that she was not entitled to further maintenance. She states that she intends to invest this for her old age. She indicates that it is true that her daughter is

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living in her house to caretake for her and to ensure that no further damage happens to it whilst she is at the Leopard Rock Hotel. She was assisting her daughter by giving her the property without charging any rental because she is involved in a lengthy and bitterly contested divorce action. Her daughter is not getting any maintenance from her husband for her grandson and so is in no position to pay her rent. The lodger was there but for less than seven months. She was paying $900 per month which was allocated to the payment of household expenses, including electricity and water accounts, wages for two servants of $500 a month, pool chemicals, garden maintenance, more repairs and other recurrent expenses. She admits that she did work at the Akropolis Restaurant and also that she has a building society account. In May 1993 she had R3 706,94 in it but again she does not see the relevance of it to the present application. She states that she omitted to mention that the house which is registered in her name is subject to a condition that upon her death the property will be transferred to her four children from her former husband. She submits that the respondent's application to strike out the maintenance altogether is completely inappropriate, ill-founded and procedurally wrong and she persists in her original application for a very substantial increase.

In her supporting affidavit the applicant's daughter avers that she will inherit one quarter of the property registered in her mother's name, that she has been living in the house since December 1993, that a lodger moved into the house in August 1993 and left at the end of January 1994.

In his affidavit in response filed on 16 February 1994, the respondent avers that the lodger was not disclosed by the applicant when she made out her answering affidavit in October 1993. He asserts that the relevance of the applicant's building society account is that it must yield some sort of income and in any event it ought to have been disclosed by her.

In his heads of argument on behalf of the applicant, Mr *Dyke* submits that she

ADAM J

has on the papers filed made out a case that she is entitled to the order sought albeit in a lesser sum. He argues that the South African inheritance is not of relevance to these proceedings - s 7(2)(a) of the Matrimonial Causes Act 1985. He maintains that the applicant is not obliged to lease her house in order to raise income (*Barrass v Barrass* 1978 RLR 384 (A)) and the respondent would in any other circumstances be obliged to provide her accommodation: *Cattle Breeders Farm (Pvt) Ltd v Veldman* (2) 1973 (2) RLR 261 (A). As for additional contribution towards her costs in the divorce action, he argues that it is clear that costs of litigation have increased significantly since the grant of initial contribution, that sum will not suffice and that recent awards confer this: *Lindsay v Lindsay* 1993 (1) ZLR 195 (S); *Hodgson v Hodgson* S-190-92. He submits that an applicant should use her own resources in addition to the contribution but she is not obliged to liquidate her assets to do so: *Barrass v Barrass supra.*

In his heads of argument on behalf of the respondent, Mr *Andersen* submits that the *onus* is on the applicant to make out a good cause. If she has failed to be candid in so doing, her application will be dismissed: *Whiteley v Whiteley* 1959 (2) SA 148 (E). As for additional maintenance, he argues that the applicant is a highly qualified nursing sister accustomed to and

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capable of employment and is now employed at the Leopard Rock Hotel. Further, the applicant is not entitled to an order for variation with retrospective effect beyond, at the earliest, the date of her application: *Lindsay v Lindsay* 1993 (1) ZLR 195 (S) at 202-203. He submits that, as to the additional contribution towards costs, the applicant is effectively challenging the existing order on the sole basis that recent Supreme Court judgments have indicated greater amounts might be awarded. Such a ground is not a proper basis for her to seek variation, since this court has already made an order of contribution which was to cover the applicant's costs up to and including the first day of trial. In any event, a contribution is not intended to be for the full amount of the costs which might be involved: *van Rippen v van Rippen* 1949 (4) SA 634 (C). The applicant is, in addition, required to use her own resources where possible: *Botes v Botes* 1969 (2) RLR 238 (G) at 239-240.

In *Barrass v Barrass supra*, the applicant wife possessed jewellery valued at $500. She had in the Post Office Savings Bank some $2 400 and was earning $241 a month. The husband earned $685 nett a month, owned shares end kept horses. She claimed $200 a month maintenance pendente lite and $900 as a contribution towards her costs. She was awarded $150 a month maintenance *pendente lite* and $300 as a contribution towards her costs. BEADLE AJ said at 386-387:

ADAM J

> "In matters of this sort the court has to make a value judgment based on the income and assets of the respective parties, in an endeavour to arrive at a figure which will enable the wife to maintain a standard of living reasonably comparable to the standard that she maintained when she lived with her husband and which figure is within the husband's means.
>
> The respondent argues that she is not entitled to any contribution towards costs at all. He says that she has jewellery valued at $500 and liquid funds readily available in the amount of $2 400, and that she should exhaust all these sums before he should be obliged to make any contribution, whatsoever, towards her costs. The law on this matter has been stated by Hahlo *The South African Law of Husband and Wife* 4 ed at p 520 as follows:
>
> > 'The rule whereby a wife may obtain from her husband a contribution towards her costs also applies where the spouses are married out of community of property. In this case the husband's obligation is based purely and simply on his duty of support, and the *onus* is on the wife to show that she does not have the necessary means, while her husband is able to make the contribution. Where the husband is a rich man, the wife is not obliged to realize her possessions in order to finance her action and is entitled to litigate upon a scale commensurate with the means of the husband.'
>
> The expression 'rich man' in this context must be a relative one, depending on the assets possessed by each party. But where the wife possesses very little and the husband is a wealthy man well able to afford an adequate contribution, he is undoubtedly a rich man in relation to the wife and the principle laid down in the *Glazer* case 1959 (3) SA 928 will apply ... The same principles applicable to granting the wife maintenance *pendente tile* apply to a contribution towards her costs."

In *Glazer v Glazer supra* it was held by WILLIAMSON J that the applicant wife was not bound to realize all her meagre possessions in order to finance her divorce action, that she was entitled to litigate upon a scale commensurate with the means of the parties, that as he could support her, included in that support would be the contribution that she required in the sense of

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expenses necessary to litigate, and that she was entitled to a reasonable amount for maintenance, which would be that which was required to support her in a position similar to that which she would ordinarily be accustomed to as the wife of a very rich man.

ADAM J

It is clear that what *Barrass v Barrass supra* was concerned with was that it was inequitable to compel the wife to exhaust all her meagre assets before the husband should be called upon to make a contribution. It does not support Mr *Dyke's* contention that an applicant is not obliged to rent her house in order to raise money for herself. Further, the duty to provide accommodation as laid down in *Cattle Breeder's Farm (Pvt) Ltd v Veldman supra* is founded upon one of the incidents of the husband's duty of support. It follows that where an estranged wife has her own house or where accommodation is readily provided to her it cannot be maintained that this is reasonably required by her.

In her founding affidavit on the issue of contribution, the applicant states that she owns a house, that she has jewellery and household furniture, some of which she has sold. She did not believe that she had to sell this in order to support herself and to finance her costs. She said that in consequence of recent Supreme Court decisions an amount of $4 000 was not unreasonable as a contribution towards her costs and that the former contribution of $1 500 had been utilized. Mr *Dyke* argued that the applicant's South African inheritance is not relevant to these proceedings, relying on s 7(2)(a) of the Matrimonial Causes Act 1985. That section provides that, in granting a decree of divorce, judicial separation or nullity of marriage, the power to make an order with regard to the division, apportionment or distribution of assets shall not extend to any assets which have been acquired, whether before or during marriage by way of inheritance.

Mr *Andersen* submits that the applicant is not entitled to contribution toward her costs just because the Supreme Court upheld a contribution of $4 000 toward costs in *Lindsay v Lindsay supra*. The same principles that are applicable for awarding maintenance *pendente lite* apply to contribution towards her costs.

In *Whiteley v Whiteley supra* O'HAGAN J at 149-150 observed.

> "Broadly speaking the exercise of the Court's discretionary power will be dictated by considerations of fairness and justice in light of the claims of both parties. It must, however, be emphasized that it is for the party who seeks a variation to satisfy the court that sound reason for an alteration of the status quo exists ...
>
> An applicant who approaches the court for a variation of a maintenance order must provide the court with full details of all material circumstances

ADAM J

> relating to his financial position, and where the applicant fails in this respect, particularly where there is a suspicion that he has endeavoured to mislead the court, it seems to me that the court can have regard to such circumstances in considering whether a good cause for a variation has been made out."

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In *Whiteley*'s case, the applicant first deposed that he was earning a higher salary at the time of the divorce but since that date this had dropped to less than half. Subsequently, when challenged on this by the respondent, he conceded that he was not earning a higher salary at the time of the divorce. He gave no explanation about his original statement. In the opinion of O'HAGAN J this was a factor which weighed strongly against the applicant.

In *van Rippen v van Rippen supra* approved by this court in *Roux v Roux* 1956 R & N 476 (SR) and *Zaduck v Zaduck* (1) 1965 RLR 533 (G), OGILVIE THOMPSON J (as he then was) was of the view that a contribution towards costs was essentially for making funds available to the applicant in order to enable her to place her case before the court, that the quantum, ie what was sufficient for such purposes, was a discretionary matter for the court, guided by the general circumstances of the case and that the contribution ordered was never contemplated to be complete cover but must enable her to present her case adequately. In *Botes v Botes supra* MACAULAY J said at 240:

> "It seems to me that, the character of a contribution being the provision of funds to meet 'necessaries', an approach which fully recognizes and gives effect to this aspect is called for. If this is not observed, recklessness in their expenditure might be encouraged. Whilst a contribution is necessarily based on an estimate of future expenditure, it is obvious that a greater element of error can arise in assessing what is required for trial itself than in the case of the more predictable steps of litigation preparatory thereto. Divorce actions confidently expected to last several days are commonly settled on the first day. The authorities favour the view that, in general, and where no special circumstances exist, what is adequate so far as the trial itself is concerned ought not to be regarded as requiring provision beyond the first day of trial. This reduces the element of uncertainty as to the length of the trial to a position where what is anticipated in the way of expenditure falls more predictably into the category of necessaries."

He went on to consider the stage reached in the divorce action when the

application for contribution was made. In the case before him, he said that he was required to assess what was necessary at the stage reached which was after a substantial part of the pleadings had been fed. As there was nothing on the papers before him that expenses up to that stage had not been covered and in the absence of information showing some clear present commitment to discharge the earlier expenses, he approached the matter on the basis of what she required to continue and bring her case to court. The applicant wife had commenced action on 28 December 1968 claiming a decree of divorce and payment of £2 000 as her share from a common pool of earnings and jointly held property purchased from a common pool. On 30 December 1968 she demanded £200 as contribution towards costs. The respondent husband expressed his willingness to contribute £100. On 5 March 1969 the respondent filed his plea and counterclaim. On 8 March 1969 the applicant's legal practitioners sent a reminder in which £100 was accepted. This was not paid. Thereafter the applicant sought £200 and instituted proceedings. For the first time in court the respondent raised the contention that £100 was available to her based on the tender of £100 in the respondent's plea to the applicant's proprietary claim and that this was a reasonable sum, therefore, she was not entitled to a contribution. MACAULAY J accepted the respondent's argument that there was no allegation that the applicant had not given cover to her legal practitioners for He costs of the application for contribution. But the expenses for the application were incurred after she agreed to take £100,

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on the understanding that she would not need to make an application for contribution and that the application expenses were necessarily concurred for the purpose of ultimately presenting her case. He found that it was a fair inference that she committed herself to paying for these and so account must be taken of them in assessing the quantum of her needs. He referred to *Zaduck*'s case, where DAVIES J (as he then was) regarded a contribution of £100 a day in a four day trial as adequate for a litigant to present her case. MACAULAY J decided that the applicant would need something more than £100 which she was prepared to accept on 8 March 1969 so he concluded a fair estimate would be £150.

In her legal practitioners' letter of 19 April 1991, prior to her claim before MTAMBANENGWE J contribution of $1 000 was sought. In these proceedings the only mention in her legal practitioners' letter of 20 May 1993 was that for her maintenance "a substantial increase was justified by reference to not only the effects of inflation and cost of living but to her present inability through her medical problems from securing employment". It follows that this court can only consider the averments in the affidavits filed by her in which no figures are given of the actual fees required by her legal practitioner for trial

ADAM J

and no supporting affidavit from him: *Muhlmann v Muhlmann* 1984 (1) SA 413 (W) at 419.

It was common cause before MTAMBANENGWE J that the stage reached when her application was commenced was after the pleadings were closed and the applicant already had filed her notice to make discovery. Thereafter, in her founding affidavit of 8 October 1991, she "verily believed that $1 500 would constitute a reasonable contribution towards her costs in the main action". This was the position when MTAMBANENGWE J made his 5 February 1992 order.

Normally costs of interim applications already made have to be excluded from costs to which a contribution is sought: *Service v Service* 1968 (3) SA 526 (D) at 528. Also, prior to trial ordinarily an award of contribution is only up to and inclusive of the first day of trial: *Botes v Botes supra* at 240 and *Service v Service supra* at 528. Thereafter, should the trial continue, farther contributions may be claimed: *Muhlmann v Muhlmann supra* at 419.

It is clear that MTAMBANENGWE J agreed with her that $1 500 was a reasonable contribution towards her costs in the main action and in making his award he estimated her future expenditure. It follows that, as no special circumstances existed, he decided that she was only entitled to this as a contribution up to and including the first day of trial.

Mr *Dyke* argues that costs of litigation have increased significantly since the order of 5 February 1992 and that the sum awarded will not suffice as a contribution up to and including the first day of trial. But those were not her averments in the affidavits filed. What she said in her answering affidavit was that she agreed that her husband had made a contribution of $1 500 "but it was inadequate then, let alone now" and that "this has long since been exhausted".

In van *Rippen v van Rippen supra* at 637-639 OGILVIE THOMPSON J (as he then was) stated:

> "The claim for a contribution towards costs in a matrimonial suit is *sui generis*. It has its origins in the

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> Roman-Dutch procedure ... But in my view the application for a contribution towards costs essentially remains what its name indicates ... By ordering a contribution the court does provide the sinews of war; but so far as I am aware, the court has never under this contribution procedure provided the applicant's attorney with a complete advance cover for all his fees."

ADAM J

In a similar vein VAN DEN HEEVER J (as she then was) in *Micklem v Micklem* 1988 (3) SA 259 (C) at 262 said:

> "The principles applicable, though well known, may profitably be set out before I come to the merits of the application ...
>
> 5. The fact that a husband has unlimited means does not in our law entitle his wife to unlimited spending. There is a difference between her wants and her needs (*Grosso v Grosso* 1987 (1) SA 48 (C) at 59 G-H). What she is entitled to, is to maintain the standard of living to which she was accustomed, not to increase that.
>
> 6. A wife seeking a contribution towards costs is not entitled to payment in full of the costs she avers will be incurred in presenting her case to the court nor all costs incurred to date. In a matter such as the present, this may clash with the 'paramount consideration' that she should be enabled 'rely to place her case before the court' (*van Rippen v van Rippen* 1949 (4) SA 634 (C) at 638-9 in which the question of essential disbursements is a material factor. And what are essential disbursements is adjudged against the background of (a) the depth of his purse and (b) his own scale of litigation (*Glazer v Glazer* 1959 (3) SA 928 (W))."

In *Hodgson v Hodgson* S-190-92 the applicant claimed $3 000 as a contribution towards costs and maintenance of $1 000 a month *pendente lite* which this court rejected, basically because the applicant had provided inadequate details of her income and expenses. On appeal she was awarded $500 a month maintenance *pendente lite*. It seemed to McNALLY JA that $3 000 in this day and age is a modest contribution "which he was not satisfied that the husband could not contribute". She had a house and car and in her husband's possession were her clothing, furniture and ornaments. McNALLY JA indicated that she "should not have to dispose of them if he can afford a contribution". In *Lindsay v Lindsay* 1992 (1) ZLR 332 (H) the applicant claimed a contribution of $10 000 towards costs and maintenance of $9 500 a month *pendente lite*. Her legal practitioner conceded that her claims were too high and suggested $4 000 as a contribution towards costs with which the husband's legal practitioner agreed. That was the amount awarded to her, which KORSAH JA allowed to stand.

Before me in the affidavits filed, the applicant has a house, car, household effects, $1 000 in the CABS account, $479,23 in the Founders Building Society, R3 706,94 in a building society in South Africa and an inheritance

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of R31 196,24 in South Africa. She was employed as from December 1993, earning $1 172,92 net a month. She did not disclose in her answering affidavit that she had a tenant from August 1993 who was paying her rent of $900 a month. The tenant left in January 1994. Her daughter has been living in the house since 1 December 1993 as a caretaker.

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In the papers before me there is no allegation that the applicant had not given her legal practitioners cover for the costs of this application. The onus is on the applicant to show good cause when seeking a variation due to a change in the circumstances. She must set out on oath all relevant and material factors so this court can arrive at a proper assessment. The court should have been told why the $1 500 contribution claimed as a reasonable contribution in her founding affidavit of October 1991 is now in her answering affidavit of 27 October 1993 regarded as "inadequate then, let alone now". She merely asserts that $1 500 has been exhausted without further explanation.

I am informed by the Registrar of this court that a litigant's taxed party and party costs in a matrimonial action of two days duration normally fall in the range of $1 200 to $1 500. In the circumstances, it is my view that the application for a contribution of $2 500 has not been made out by her.

Her legal practitioner has conceded that though she is entitled to further maintenance it is in a lesser sum. It is clear that from her list of expenditures there has to be a reduction because she is provided with board and lodging at the Leopard Rock Hotel. Even allowing for the fact that she will be spending weekends and holidays at her house in Harare, now an amount not above $2 500 should be adequate. She earns $1 172,92 and could use the interest earned from her various building society accounts as well as from her South African inheritance to augment her income. This should, in my view, provide her in the region of about $700 a month without the necessity for her to liquidate what she owns. Although she has decided to have her daughter caretake the house and stay rent free with her grandchild, the applicant cannot expect the respondent to pay towards their upkeep. Looking at what she would now receive and adding to it the legal fees she will have to pay, it cannot be said that she does not need maintenance. In his opposing affidavit the respondent believed the additional $2 500 claimed was excessive and was not needed by her. He did not then challenge the maintenance of $1 000 a month awarded by MTAMBANENGWE J It is not being averred by the respondent that he cannot afford due to a change in his circumstances to provide maintenance of $1 000 a month *pendente lite*.

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In *Lindsay v Lindsay* 1992 (1) ZLR 332 (H) Smith J described the amount claimed for maintenance as extravagant. In that case reference was made to *Mutenure v Mutenure* HH-300-90 where SMITH J said:

> "It must be made clear to litigants that court proceedings are not a game where one inflates one's claim in order to allow for an element of reduction. Claims must be genuine, realistic and substantiated in order that a court can make a proper assessment on the claim and counterclaim, if any."

The conclusion I have reached is that the applicant has not established that she is entitled to $3 500 claimed by her or to a lesser figure. Although the applicant has not succeeded on her claim for increased maintenance and a further contribution of $2 500, this does not mean that the respondent is entitled to have the maintenance of $1 000 a month *pendente lite* ordered by MTAMBANENGWE J set aside. The onus is on the respondent to show that there is good cause shown for the discharge of that order. Since it is within this court's discretionary power "dictated by consideration of fairness and justice in light of the claims of both parties", in my

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view, sound reason does not exist to alter the *status quo*.

Accordingly, the wife's claim in case no. HC-6259-93 is dismissed with costs. The husband's claim in case no. HC-748-94 is also dismissed with costs.

D W Aitken & Co, applicant's legal practitioners

Byron Venturas & Partners, respondent's legal practitioners

MUTENDI v MURAMBA & ANOR 1994 (2) ZLR 41 (HC)

Court **High Court, Harare**

Annotations Link to Case Annotations

Smith J

30, 31 May & 8 June 1994

Civil trial

Flynote

Delict - motor accident - contributory negligence - driver waiting to turn right at robot - controlled intersection - starting to turn when robot turned red - other driver trying to beat the red - degrees of negligence

Damages - prospective damages - interest on - effect of the new s SA of Prescribed Rate of Interest Act 30 of 1985

Interpretation of statutes - presumption against retrospectivity - whether legislation providing for prospective payment to be measured by antecedent facts retroactive in effect.

Headnote

The plaintiff had entered a robot-controlled intersection when the light was green in his favour. He intended to turn right at this intersection. He stopped and waited until he thought it was safe to negotiate the turn. When the traffic light turned red he started to turn right. The vehicle being driven by the first defendant failed to stop at the red robot and collided with the plaintiff's vehicle.

The court found that, although the preponderance of blame lay with the first defendant because he had shot through a red robot at great speed, the plaintiff had been guilty of contributory negligence. He should not have assumed that the other vehicle, which was travelling at a considerable speed and was only a short distance from the intersection, would stop. Before turning across the intersection, a reasonable driver in the position of the plaintiff would have waited and satisfied himself that the oncoming motorist had stopped or was clearly showing signs that he would do so. The court assessed the plaintiffs degree of contributory negligence as

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being 20% and the first defendant's degree as being 80%.

The plaintiff claimed damages plus interest thereon from the date of judgment to the date of payment. A new section (s SA) had been inserted into the Prescribed Rate of Interest Act by an amending Act. The new provision provided that where the amount of the debt is fixed by the court, interest on unliquidated claims is payable at the prescribed rate on the amount of the debt from the date when the cause of action arose. The court, however, has certain discretionary powers to make variations relating to interest payable and the periods over which interest is payable.

This amending legislation came into operation after the motor accident had occurred (ie the cause of action had arisen) but prior to the date upon which the case was heard and the damages were determined by the court. The question arose as to whether the new provision was applicable in the present case. The court held it was. The presumption against retrospectivity of legislation did not apply in the present case, as this was not a situation where existing rights were being taken away or impaired or new obligations or disabilities were being imposed. All that the amendment was doing was to allow for a prospective payment to be measured by antecedent facts. Interest on a debt cannot be calculated until the amount of the debt is fixed by the court. Once the court fixes the amount to be paid interest thereon becomes payable. The quantum of the amount to be paid is then to be measured by antecedent facts. If the Legislature had intended that the new section should apply only where the cause of action arose after the date when the amending Act came into operation it would have expressly said so.

The court ordered that interest on the damages for pain, suffering and disfigurement should be calculated from the date of the accident. On the other hand, interest on the damages for repairs to the plaintiff's motor vehicle should run only from the time that the repairs were actually paid for by the plaintiff.

The court also pointed out that although the new provision relating to interest provided that the court may, *mero motu*, include an award for interest in its Judgment, the plaintiff should specifically claim interest in his summons or declaration. If he considers that interest should be calculated from different dates in respect of different components of the claim, that should be alleged.

Cases cited:

Haynes v Min of Defence & Anor 1992 (2) ZLR 262 (H)

S v Penberthy 1967 (2) PH 039 (N)

Norwich Union Fire Ins Soc Ltd v Chiduku 1971 (1) SA 599 (RA)

SMITH J

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Master Ladies Tailors Org v Min of Labour & National Service [1950] 3 All ER 525 (KB)

A-G v Thornton's Tpt Rhodesia (Pvt) Ltd 1964 RLR 150 (SR)

M Mahlangu for the plaintiff

I Muvingi for the defendant

Judgment

Smith J: The Plaintiff (hereinafter referred to as "Mutendi") was driving a car, a Peugeot pick-up, along Simon Mazorodze Road on 19 March 1991 at about 6.30 pm. He intended to turn right into Remembrance Drive. As he turned across Simon Mazorodze Road his vehicle was hit by a vehicle (hereinafter referred to as "the emergency taxi") which belonged to the second defendant (hereinafter referred to as 'Benjamin") and was being driven by the first defendant (hereinafter referred to as "Gideon"). Mutendi issued a summons claiming damages in the sum of $17 000 for repairs to his vehicle and of $5 000 for pain, suffering and disfigurement. He alleged that Benjamin was an emergency taxi operator and that at the time of the accident the emergency taxi was being driven by his brother, Gideon, during the course and scope of his employment by Benjamin. The accident was caused by Gideon's negligence.

The defendants admitted that Benjamin was an emergency taxi operator end that, at the time, Gideon was driving in the course and scope of his employment. However, they claimed that the accident was caused by the negligence of Mutendi in that he turned in the face of oncoming traffic.

Mutendi was the first witness. He said that as he approached the intersection, which is robot-controlled, the lights were green in his favour. There are two lanes for traffic turning right. He was driving in the left lane. There was a Renault R5 in the right lane. He entered the intersection and stopped in order to give way to oncoming traffic. The lights turned to amber and the oncoming cars stopped. When the lights turned red he proceeded through the intersection. The Renault R5 alongside him started forward when he did. There are two lanes for oncoming traffic. He crossed the first lane and as he was crossing the second lane he saw a car coming towards him. He expected it to stop but it did not. He applied his brakes but could not avoid the collision. The oncoming car, which was being driven by Gideon, hit his car on the left side and pushed it sideways so that it hit the Renault R5. His car was still in first gear when it was hit. There were 10 to 15 passengers in the emergency taxi. He estimated that Gideon was travelling about 90 to 100 km/h. He lost

consciousness and was taken to hospital where he was detained overnight. He suffered a deep cut on his left cheek, the scar from which is clearly visible, another under his chin and a third on the back of his head. He suffered a lot of pain from the cuts and has had headaches. There were glass fragments in his body which were removed at the hospital. He returned to the hospital twice to have the stitches removed. He had gone to two panel beaters to get a quote to have his car repaired. The lowest quote came to $17 000. He accepted it and the car was

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repaired.

Mutendi was subjected to a searching cross-examination but was not shaken. He said that at the time there was a lot of traffic coming out of town and that was why he had to stop in the intersection before turning right. He first saw the emergency taxi when it was some two lengths before the white stop line at the intersection. Gideon tried to stop his car but was going too fast. Mutendi said that he had to proceed through the intersection because the lights had changed and drivers wanting to cross blew their hooters to indicate that he should move. He saw the emergency taxi approaching but thought that it would stop because the lights had turned red against it. Gideon had applied his brakes because he heard the noise of tyres squealing. Gideon was braking when he, Mutendi, started to move but Gideon could not stop his car in time. After the accident the emergency taxi was upside-down on the road.

Mutendi gave his evidence very well. He was a very good witness.

The next witness was Robin Banga who was driving out of town at the time. His evidence was to the following effect. There was a lot of traffic driving out of town. All the cars were travelling quite fast at about 80 km/h. As he approached the intersection the lights turned to amber and the cars in front of him started to brake. A few seconds later he heard a loud noise and saw a pick-up truck in front of him fly up into the air. He parked on the verge of the road and ran to the scene. The pick-up was upside-down. There were lots of women who had been in the car lying on the road. Both Mutendi's car and the Renault R5 beside it had been involved in the accident. There had been 3 or 4 cars between him and the emergency taxi as they approached the intersection. In his opinion the lights were red against him and the emergency taxi at the moment of impact.

The next witness was Crispen Chaza, the driver of the Renault R5. His evidence was to the following effect. On 19 March 1991 at about 6 pm he was driving into the city. He wanted to turn right into Remembrance Drive. The lights at the intersection were green so he entered the intersection and stopped

for oncoming traffic. Whilst he was waiting in the right-hand turning lane Mutendi drove up beside him in the left turning lane and also came to a stop. When the lights turned to red he started to go forward, as did Mutendi. No cars came through on the amber light so when the lights turned red he thought that the oncoming cars would stop. The emergency taxi came into the intersection and hit Mutendi's car which was pushed onto his car. His car was damaged on the left door. He had seen the emergency taxi before it entered the intersection but he assumed it would stop. After the impact Gideon's car was overturned.

Both Banga and Chaza were cross-examined thoroughly. They gave their evidence well. They are independent witnesses and have no apparent motive for lying.

The final witness for the plaintiff was the managing director of the firm of panel beaters which repaired Mutendi's car. He described the damage to the car and certified that the cost of the

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repairs was $17 000 which he said was reasonable having regard to the damage to the car.

Mr *Muvingi* did not seriously dispute the quantum of damages to the car or the quantum of the plaintiff's medical damages. He admitted that Benjamin was the owner of the car which Gideon was caving and was vicariously liable for any damages which were attributable to Gideon's negligence.

Gideon gave evidence to the following effect. He was driving out of town, travelling at between 50 and 60 km/h. There was not much traffic on the road. As he approached the intersection the lights were green in his favour so he did not slow down. He did not see Mutendi's car. He just heard a noise as his car hit Mutendi's. His car was overturned and he lost consciousness. There were two males in the front seat beside him and some passengers in the back of the pick-up. Under cross-examination he said the following. He had obtained his driver's licence in February 1991, about a month before the accident, but he had been driving for some time before he got his licence. He was not operating an emergency taxi at the time. He had picked up a lot of people who wanted to go to Glen View. He was just helping them. He had not charged them for the lift. He knew the name of only one of the passengers in the front seat, a man called Takesure. He had not seen Mutendi's car, not even just before the impact. The lights were definitely green before he entered the intersection. When asked if there were many cars on the road he said that there were only a few going out of town. He did not notice if there were many going into town because it was dark.

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Gideon was a poor witness. He was hesitant and very unconvincing. The court could not accept his evidence that he was not operating an emergency taxi. He said that Benjamin had lent him the car for a private journey. Yet in the pleadings Benjamin admitted that he was an emergency taxi operator end that at all relevant times Gideon was "acting during the course and scope of his employment by Benjamin".

The next witness was Mr Jonga who said that he was driving along Remembrance Drive and had stopped at the intersection when the accident occurred. He intended to turn left into Simon Mazorodze Road when the lights turned green for him. He saw both Mutendi's car and the Renault R5 beside it. Mutendi cut in front of Gideon. As the lights were red against him they must have been green in Gideon's favour. Gideon was travelling in the right hand lane. Jonga said that when the lights turned green for him he drove off. Later he met Benjamin and told him that he had witnessed the accident. Under cross-examination Jonga said that he had accidently met Benjamin at a panel-beating firm when Benjamin was getting a quote for repairs to his car. When Benjamin described the accident he realized that that was the accident he had witnessed. He had not been asked to be a witness at the trial of Gideon. At the intersection the Renault R5 stopped but Mutendi did not. Mutendi entered the intersection and, without stopping, cut across in front of the emergency taxi. He did not see Mutendi's car hit into the Renault R5. After the accident the emergency taxi landed on its side. He could not remember which side.

This witness was not very impressive. I doubt whether he did in fact witness the accident. All the other witnesses, including Gideon, said that Gideon was in the left lane, not the right. They said

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that the emergency taxi landed on its hood, upside down, and not on its side. If the accident happened right in front of the witness why did he not see Mutendi's car being pushed against the Renault R5?

The last witness was Takesure who said that he had been a passenger in the front seat of the emergency taxi. He said that as they approached the intersection the lights were green in their favour. He saw Mutendi's car as it turned across the road in front of them. He had been injured in the accident and was taken to hospital. The pick-up landed on its side. He had to be helped out of the car. He estimated that Gideon was driving between 50 and 60 km/h. Under cross-examination he admitted that he could not drive a car. When asked how he could estimate the speed at which they were travelling he said that when he was at high school he and other pupils had been taken for a drive

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in a car and taught how to estimate the speed at which the car was travelling. He said that he had not been charged by Gideon for the lift to Glen View. He did not know what the normal charges were because he did not usually travel by emergency taxi and it was the first time he had got a lift to Glen View. He was not a very convincing witness. It is strange that his estimate of the speed at which the emergency taxi was travelling at the time was the same as Gideon's estimate.

I accept the evidence given by Mutendi. He gave his evidence well and his evidence was supported by Banga and Chaza, who both gave their evidence well. The same could not be said for Gideon and the other two witnesses, Jonga and Takesure. Furthermore the evidence of the defence witnesses was not consistent with each other or with the probabilities. The evidence of Mutendi, Banga and Chaza and the damage to Mutendi's car showed that the impact pushed Mutendi's car sideways and it crashed into the Renault R5. If Mutendi had not stopped but the Renault R5 had stopped, how could it have been beside Mutendi's car at the moment of impact?

I find that the plaintiff has proved that the accident took place when Gideon tried to beat the lights. Gideon drove into the intersection when the lights were red against him and therefore was responsible for causing the accident.

The damages claimed by the plaintiff in the sum of $17 000 for repairs to his car and $5 000 for pain, suffering and disfigurement were not disputed by the defendants. Benjamin has admitted vicarious liability for any damages caused by Gideon.

Mr *Muvingi* submitted that Mutendi should not have proceeded through the intersection when he saw Gideon approaching at a fast speed. In *Haynes v Min of Defence & Anor* 1992 (2) ZLR 262 (H) the court considered the question of contributory negligence where a motorist, at a robot-controlled intersection, turned right in front of an oncoming vehicle when the lights had turned to amber. At p 266 ROBINSON J said:

> "In *S v Penberthy* 1967 (2) PH 039 (N), it was held that a motorist who intends to turn right at a robot controlled intersection may not assume that, because the robot has changed to red for oncoming traffic, such traffic will

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come to a stop. He should judge from the oncoming vehicle's speed and its distance from the stop line whether it will be safe for him to turn across the oncoming vehicle's path.

A fortiori, a motorist intending to turn right at a robot-controlled

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intersection must be even more circumspect when the lights are on amber."

The learned judge went on to refer to *Norwich Union Fire Ins Soc Ltd v Chiduku* 1971 (1) SA 599 (RA) where BEADLE CJ at 601 said:

"Where there is a fair amount of traffic using such an intersection, the normal and reasonable practice for a motorist who wishes to turn to his right, is to enter the intersection when the lights are on green in his favour, then pause at the centre of the intersection and remain there until the lights change and the traffic using the road he is in is stopped by the red light".

In *S v Penberthy* 1967 (2) PH 039 (N), FANNIN J said:

"The appellant was not entitled to move across the path of oncoming traffic until it was safe for him to do so, and, in this case, whether it was safe depended upon whether the complainant would stop at the stop line or, at the least, make way for the appellant to complete his right hand turn. Whether the complainant would do either of these things depended upon a number of factors over which the appellant had no control at all. The complainant might, deliberately or inadvertently, ignore the amber light and try to 'beat the red'. Every driver knows, and the appellant ought, in my opinion, to have known, that that is by no means an uncommon thing."

In *Hayne*'s case *supra* ROBINSON J said that the determination of the degrees of fault was not an easy or an enviable task. However in that case the court was fortunate because plaintiff's counsel had submitted that the degrees of fault were 60/40 in favour of the plaintiff whereas defendant's counsel had suggested that apportionment on a 50/50 basis would be appropriate. He felt that apportionment on a 50/50 basis was more than fair and generous to the plaintiff and so accepted that basis. In that case the plaintiff turned right in the face of an oncoming vehicle when the light had turned to amber. The driver of the oncoming vehicle, an Army truck, accelerated and went through the intersection on "late amber". In this case, however, there is a vital distinction. The lights had turned red against the emergency taxi before it entered the intersection. Therefore the blameworthiness of the driver, Gideon, is much greater. With regard to Mutendi, he said that he saw the emergency taxi approaching the intersection at great speed - going between 90 and 100 km/in he estimated. Furthermore he first saw the emergency taxi when it was

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only a short distance from the intersection. He should not have assumed that it would stop and therefore start to go through the intersection. His action in doing so was extremely foolhardy. It as been said in many cases, and with good reason, that it is very common for motorists to try to "beat the red" reasonable driver should wait and satisfy himself that oncoming motorists have stopped, or are clearly showing signs that they will stop, before he turns across the face of the oncoming cars. As I have said, the blameworthiness of Gideon is much greater than that of

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Mutendi. I would assess the respective degrees of fault as being 80% that of Gideon and 20% that of Mutendi. Accordingly Mutendi will be awarded 80% of the damages he has claimed. He is, of course, also entitled to his costs.

The plaintiff claimed damages plus interest thereon from the date of judgment to the date of payment. However, the Prescribed Rate of Interest Amendment Act 2 of 1994 was promulgated on 20 May 1994 and came into operation on that day. It inserted s SA in the Prescribed Rate of Interest Act 30 of 1985 providing for interest on illiquid claims. The new section reads as follows:

> "5A. (1) Subject to this section and unless otherwise agreed, every debt arising out of an unliquidated claim shall bear interest calculated at the prescribed rate on the amount of the debt from the date when the cause of action arose, whether or not the amount of the debt is fixed by agreement between the parties, by arbitration or by the judgment of a court.
>
> (2) Where a court considers it fair and just in the circumstances of the case to do so, it may direct, in relation to a claim referred to in subsection (1), that -
>
> (a) no interest shall be payable on the amount of the debt; or
>
> (b) interest shall be payable on only part of the amount of the debt; or
>
> (c) interest shall be payable in respect of only a part of the period since the cause of action arose, or shall be calculated to run from a specified date; or
>
> (d) interest shall be payable at a rate lower than the prescribed rate;
>
> or may give any two or more of such directions.

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(3) Where proceedings have been instituted before a court in respect of a claim referred to in subsection (1) and no claim for interest has been made, the court may, on its own motion, after hearing the parties and subject to this section, include an award for interest in its judgment on the claim.

(4) Where, as a result of a notice in terms of section six, the prescribed rate of interest is altered during the period in respect of which interest is payable on a claim referred to in subsection (1), the rate of interest in respect of each part of that period shall, subject to any direction in terms of subsection (2), be the prescribed rate then prevailing." Does this section apply to every debt arising out of an unliquidated claim where the amount of the debt is fixed on or after 20 May 1994 or only to such debts where the cause of action arose on or after 20 May 1994?

As is said in *Maxwell on Interpretation of Statutes* 12 ed at p 215:

> "Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction

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appears very clearly in the terms of the Act, or arises by necessary and distinct implication."

Before the presumption against retrospectivity is applied, however, a court must be satisfied that the statutory provision is in fact retrospective. In *Craies on Statute Law* 6 ed p 386 it is said that a statute is retrospective "which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past". However, there are statutes which, though they relate to acts or events which are past, are not retrospective in the sense in which the word is used for the purposes of the rule against retrospectivity. That is, they are not retroactive. Three such cases are mentioned In *Maxwell on Interpretation of Statutes,* at p 217-8. One of the cases is *Master Ladies Tailors Org v Min of Labour* [1950] 3 All ER 525 (KB). The facts of that case were as follows. An order-in-council came into force on 15 August 1949. It made provision for holiday remuneration to accrue from 1 May 1948 which would be payable when a worker ceased to be

employed after 15 August 1949. It was argued that the provision for the accrual of remuneration before the order-in-council came into force made the order retrospective and hence *ultra vires* the statute under which it was made. SOMERVILLE LJ held that it was valid on the basis that the fact that a prospective benefit was to be measured by antecedent facts did not necessarily make the provision for that benefit retrospective. At p 528 the learned judge said:

"I have come to the conclusion that the effect of these provisions as to remuneration accruing, being, as I hold, to determine and limit the *quantum* of prospective payments, do not make this order retrospective in the sense which has to be given to the word in this issue."

In *A-G v Thornton's Transportation Rhodesia (Pvt) Ltd* 1964 RLR 150 (SR) a similar issue arose. Employment regulations were promulgated which provided for the payment of a gratuity to an employee who was discharged after completing 10 years' service. It was argued that the regulations in effect operated retrospectively and therefore were *ultra vires*. HATHORN J rejected the argument, saying at p 153:

"I cannot accept the contention. In this context there would have been true retrospective operation if the regulations had imposed an obligation on employers to pay higher minimum rates with effect from a date before the regulations came into force. But that is not the case here. The regulations prescribe what is to happen in the future, that is to say, after they come into operation. In doing this, they take account of what took place in the past, that is, the length of continuous service, and they define this phrase. They are not retrospective merely because they take into account past facts as a basis for what is to happen in the future. The words of LORD DENMAN CJ, giving the judgment of the court in *R v St Mary, Whitechapel,* are exactly in point. At p 814 he is reported as follows:

> ' It was said that the operation of the statute was confined to persons who had become widows after the Act passed, and that the presumption against a retrospective statute being intended supported this construction: but we have before shown that the statute is in its direct operation prospective, as it relates to future removals only, and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing.'"

In my view the effect of s SA of the Prescribed Rate of Interest Act 1985 is

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to provide for a prospective payment which is to be measured by antecedent facts. Subsection (1) thereof is not very happily worded because superficially it appears that the provision is retroactive in that it states that every debt arising out of an unliquidated claim shall bear interest calculated on the amount of the debt from the date when the cause of action arose. If, however, the provision is analysed one finds that its effect is much the same as the provision under consideration in the *Master Ladies Tailors Org* case *supra*. Interest cannot be calculated until the amount of the debt is fixed by the court. Once the court fixes the amount of the debt interest thereon becomes payable. The *quantum* of the amount to be paid is then to be measured by antecedent facts, ie the period between the date when the cause of action arose and the date the amount of the debt is fixed.

In my view, if the Legislature had intended that the section should apply only where the cause of action arose on or after 20 May 1994 it would have expressly said so. It did not. The provision applies from the date of promulgation of the Act. The Legislature recognized that there would be circumstances where it would be appropriate that interest on different parts of the debt should run from different dates or should not run at all. That is why, after stating in subs (1) the general principle that interest would automatically be calculated from the date the cause of action arose, a very wide discretion is conferred on the court by subss (2) and (3) in relation to making orders concerning the calculation of interest.

In this case the claim of the plaintiff for damages arising from the accident has two components, one being for pain, suffering and disfigurement and the other for repairs to his car. It seems to me that in relation to the damages for pain, suffering and disfigurement, interest should be calculated in accordance with the provisions of subs (1) of s 5A, which would be from the date of the accident (19 March 1991). In the case of the claim for repairs to the car, however, I consider that it would be fair and just that interest should be calculated to run from the date the plaintiff paid for the repairs. Although his vehicle was damaged on 19 March 1991, it was not until he actually paid for the repairs that he was out -of-pocket. As this aspect was not canvassed during the trial there is no evidence as to the date that the plaintiff paid for the repairs to his vehicle. However the invoice for the repairs was dated 31 October 1991. Ordinarily, such accounts must be paid within 30 days so I consider that, in relation to the repairs to the car, interest should be calculated from 1 December 1991.

Although subs (3) of s SA provides that where no claim for interest has been

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made the court may, *mero motu,* include an award for interest in its judgment, I consider that the plaintiff should specifically claim interest in his summons or declaration. If he considers that interest should be calculated from different dates in respect of different components of the claim, that should be alleged.

Judgment, with costs, is entered for the plaintiff against the defendants jointly and severally, the

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one paying the other to be absolved, in the sum of -

(a) $13 600 in respect of the damage to his car, with interest thereon at the rate of 12,5% *per annum* from 1 December 1991 to September 1993 end et 25% *per annum* from 10 September 1993 to the date of payment;

(b) $4 000 in respect of pain, suffering and disfigurement, with interest thereon at the rate of 12,5% *per annum* from 19 March 1991 to 9 September 1993 and at 25% *per annum* from 10 September to the date of payment.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Muvingi & Machaya, defendants' legal practitioners

RATTIGAN & ORS v CHIEF IMMIGRATION OFFICER & ORS 1994 (2) ZLR 54 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

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

Application in terms of s 24 of the Constitution

26 May & 13 June 1994

Flynote

Constitution of Zimbabwe 1980 - Declaration of Rights ss 11 and 22 - status of s 11 - right of residence - right of Zimbabwean women breached when husband not allowed to reside with her in Zimbabwe

Family law - husband and wife - marriage bond - nature of

Headnote

The three applicant women were all Zimbabwean citizens. The Department of Immigration had refused to allow their husbands, who were all aliens, permanent residence in Zimbabwe. The wives then brought an application direct to the Supreme Court for an order declaring that their rights as citizens under ss 11 and 22 of the Constitution had been breached.

Held, that s 11 of the Constitution embodied substantive rights, and is not a mere preamble.

Held, further, that the rights of the applicant wives under s 22 of the Constitution had been breached as they had a right to have their husbands reside with them in Zimbabwe.

The nature of the marriage bond and the rights and duties flowing from it were outlined in the judgment

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Cases cited:

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

Bull v Min of Home Affairs 1986 (1) ZLR 202 (S); 1986 (3) SA 870 (ZS)

Nkomo & Anor v A-G & Ors 1993 (2) ZLR 422 (S); 1994 (1) SACR 302 (ZS)

GUBBAY CJ

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

Hunter et al v Southam Inc (1984) 9 CRR 355 (SC, Canada)

Govt of the Rep of Namibia & Anor v Cultura 200 & Anor 1994 (1) SA 407 (NmSC)

Re *Munhumeso & Ors* 1994 (1) ZLR 49 (S)

Webber v Webber 1915 AD 329

Macnaught v Caledonian Hotel 1938 TPD 577

Platt v Platt 1965 (2) PH B 15 (N)

T v T 1968 (2) RLR 178 (G); 1968 (3) SA 554 (R)

van Oosten v van Oosten 1923 CPD 409

Excell v Douglas 1924 CPD 472

Loving v Virginia 388 US 1 (1967)

Maynard v Hill 125 US 190 (1887)

Aumeeruddy-Cziffra & Ors v Mauritius (1981) 62 International Law Reports 255 *Abdulaziz Cabales & Balkandali v UK* (1985) 7 EHRR 471

Berrehab v Netherlands (1989) 11 EHRR 322

Moustaquim v Belgium (1991) 13 EHRR 802

Beljoudi v France (1992) 14 EHRR 801

Application No. 9773/82 v UK (1983) 5 EHRR 296

A P de Bourbon SC, with him *F B Greenland,* for applicants

A V M Chikumira, with him *F M Zenda,* respondents

Judgment

Gubbay CJ: The short and undisputed facts of this joint application conceal a problem of

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considerable constitutional significance and no little difficulty. It concerns the pervasive issue of whether a female citizen of Zimbabwe married to a man who is an alien, being a citizen of a foreign country, is entitled to the right to reside permanently with her husband in Zimbabwe.

THE FACTUAL BACKGROUND

The first applicant, Devagi Rattigan, née Naidoo, was born in Bulawayo on 25 July 1960, and is a citizen of Zimbabwe. She married John David Rattigan, at Harare, on 18 January 1992. He was born in Hamilton, Scotland, on 4 April 1950 and is a British subject. He entered Zimbabwe on 1 June 1991, for a three-month holiday and shortly thereafter met and fell in love with the first applicant. He was denied a permit to work or reside in Zimbabwe as, in the opinion of the immigration authorities, he has no scarce skill to offer. In consequence of being issued with a notice to leave Zimbabwe, he and the first

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applicant departed for England where they presently reside. Both are anxious to return and set up their matrimonial home in Zimbabwe. They have no children.

The second applicant, Marchelle Caroline Butler-Rees, née Morta, was born in Bulawayo on 2 February 1959, and is a citizen of Zimbabwe. She married Steven James Butler-Rees on 4 January 1992. He was born on 27 November 1961, in Dublin, Ireland, and is a citizen of that country. He first entered Zimbabwe on 7 June 1993, and thereafter made numerous visits to the country. He too was denied a permit to work or reside in Zimbabwe as he possessed no scarce skill. The last refusal was on 16 August 1993. He is presently in the country on an extended visitor's permit and lives with the second applicant in a house in Bulawayo. She is pregnant with his child. Both ardently desire to establish a matrimonial abode permanently in Zimbabwe.

The third applicant, Edith May Caules, née Stroud, was born in Bulawayo on 17 May 1942, and is a citizen of Zimbabwe. She married Frank Caules on 29 February 1972. He was born on 8 August 1928, in Dublin, Ireland, and is a citizen of that country. Twin children were born of the marriage on 13 April 1973. Since May 1980, the third applicant and the children have been living in Bulawayo and from the latter part of 1988, Mr Caules has resided continuously with them. He was initially allowed entry on a visitor's permit but subsequently was granted a two-year residence permit. This was extended for a further three-year period, expiring on 29 September 1993. His application for a permanent residence permit was refused on 24 August 1993, on the ground that he has absolutely nothing to offer the country. On 4 December 1993, an interdict was granted by the High Court prohibiting the deportation of Mr Caules pending the determination of this application. Both he and the third applicant wish to remain living in their home in Bulawayo, together with the children, who have been granted permanent residence permits and have applied to become citizens of Zimbabwe.

I shall henceforth refer to the applicants as "the wives".

THE RESPONDENTS' STANCE

It is not contended by the first respondent, who is the Chief Immigration Officer, that the

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marriages in question were contracted in an effort to evade the immigration laws of the country or in order to persuade the immigration authorities to allow the alien husbands to remain living unimpeded in the country of their wives. In other words, these were not marriages of convenience.

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They were genuinely entered into by the respective couples with the intention of establishing a common home and consortium between them "for better or for worse".

The policy adopted by the Chief Immigration Officer, who speaks as well for the second and third respondents, being the Minister of Home Affairs and the Attorney-General, is outlined in his opposing affidavit. It is to the following effect:

> " ... the principal applicant for a family residence permit should always be the husband unless the wife is a highly qualified professional, eg medical practitioner, offering a scarce skill in her own right, in which case the husband may be treated as [a] dependent.
>
> Where a foreign husband applies to come and settle here, a residence permit may only be issued if he fulfils one of the following requirements:
>
> (a) possesses a skill considered to be in a critical skills shortage area;
>
> (b) invests substantial capital in a project approved by the Zimbabwe Investment centre;
>
> (c) be retired with sufficient financial means to sustain himself and family without resort to public funds during his stay in the country.
>
> None of the husbands concerned could meet the basic requirements for issuance of residence permits at the time of application."

It is firmly disputed that the disability thereby imposed on the husbands in any way circumscribes the constitutional rights of the wives.

THE RULE OF CONSTITUTIONAL CONSTRUCTION

This court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits, should be narrowly or strictly construed. See *Min of Home Affairs & Ors v Dabengwa & Anor* 1982 (1) ZLR 236 (S) at 243G-244A, 1982 (4) SA 301 (ZS) at 306E-H; *Bull v Min of Home affairs* 1986 (1) ZLR 202 (S) at 210E-211C; 1986 (3) SA 870 (ZS) at 880J-881D; *Nkomo & Anor*

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v A-G, Zimbabwe & Ors 1993 (2) ZLR 422 (S); 1994 (1) SACR 302 (AS) at 309E-F. A recent

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reminder that courts cannot allow a Constitution to be "a lifeless museum piece" but must continue to breathe life into it from time to time when opportune to do so, was graphically expressed by AGUDA JA in *Dow v A-G* [1992] LRC (Const) 623 (Botswana Court of Appeal) at 668f-h:

> " ... the over-riding principle must be an adherence to the general picture presented by the Constitution into which each individual provision must fit in order to maintain in essential details the picture which the framers could have painted had they been faced win circumstances of today. To hold otherwise would be to stultify the living Constitution in its growth. It seems to me that a stultification of the Constitution must be prevented if this is possible without doing extreme violence to the language of the Constitution. I conceive it that the primary duty of the Judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever-developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity."

See, too, *Hunter* et al v *Southam Inc* (1984) 9 CRR 355 (SC Canada) at 364; *Govt of the Republic of Namibia & Anor v Cultura 2000 & Anor* 1994 (1) SA 407 (NmS) at 418F-G.

THE STATUS OF SECTION 11 OF THE CONSTITUTION

Considerable argument was addressed by counsel as to whether s 11 in the Declaration of Rights, which forms Chapter III of the Constitution, is a mere preamble to the other sections which follow or a substantive provision. It 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;
>
> (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;

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> 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."

In in re *Munhumeso & Ors* 1994 (1) ZLR 49 (S) this court was of the view that the upgraded status of the provision from a preamble in each of the four earlier Constitutions, to a numbered section, signified that it is to be regarded as conferring substantive rights on the individual, and not merely a guide to the intention of the framers in enacting Chapter III. It was accepted to be "the key or umbrella provision" in the Declaration of Rights under which all rights and freedoms must be subsumed, and 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 or limiting ensuing ss 12 to 23.

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I can perceive of no warrant to differ from that analysis and reiterate my respectful concurrence with the reasoning of AMISSAH JP and AGUDA JA in *Dow v A-G supra* in the passages of their respective judgments at 636e-637c and 669i-670c. I would simply add that their conclusion is much supported by the meaning given to "Declaration of Rights" in s 113(1) as "the Declaration of Rights set out in Chapter III". That Chapter comprises ss 11 to 26 (not ss 12 to 26) and it is in relation to an alleged contravention or likely contravention of the Declaration of Rights as so defined that s 24(1) gives the right to any person to apply to the Supreme Court for redress.

Thus under s 11 **every** person in Zimbabwe is guaranteed, *inter alia*, the right to life, liberty, security of the person and the protection of the law, and protection for the privacy of his home, subject to their enjoyment and exercise not prejudicing the rights and freedoms of others or the public interest.

THE ALLEGED VIOLATION OF SECTION 22(1) OF THE DECLARATION OF RIGHTS

Subs (1) of s 22 mandates that "no person shall be deprived of his freedom of movement". Embodied in such protection are: (i) the right to move freely throughout Zimbabwe; (ii) the right to reside in any part of Zimbabwe; (iii) the right to enter and leave Zimbabwe; and (iv) immunity from expulsion

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from Zimbabwe. Under subs (2) any restriction on the person's freedom of movement that is involved in his lawful detention shall not be held to be a contravention of subs (1). The further derogations specified in subs (3) fall outside the issue debated, in particular, pare (d) only permits the imposition of restrictions on the movement or residence within Zimbabwe, or the exclusion or expulsion from Zimbabwe, of persons who are neither citizens of Zimbabwe nor regarded by virtue of a written law as permanently resident in Zimbabwe. Subsection (4), as read with subs (3)(a), provides that, although in the interests of defence, public safety, public order, public morality or public health, it is lawful to restrict the freedom of movement of persons, such right is not to be construed as authorising a law preventing a citizen from leaving Zimbabwe or excluding or expelling him from the country. In the present context subs (3)(d) and (4) are significant only to the extent that they underscore the importance placed by the Constitution, which is the supreme law of Zimbabwe, upon the protection of the right of a citizen to freedom of movement in the manner that phrase is particularised.

The case made by the wives is that the refusal of the Chief Immigration Officer to issue a residence permit to each husband in terms of s 17(1)(a) of the Immigration Regulations 1979 (RUIN 373/79), or an alien's permit pursuant to s 38(1) thereof, and the consequent requirement that they leave the country circumscribe their fundamental and unqualified right as citizens to freedom of movement. If the husbands are compelled to depart (an actuality in respect of Mr Rattigan) the right of the wives to reside in Zimbabwe is directly affected. In essence, the freedom of movement of the wives is determined by what happens to their husbands, for in order to secure and maintain the marital relationship they would have to accompany them.

The respondents' answer is that the freedom of movement of the wives is not restricted by the

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refusal to permit the husbands to reside in Zimbabwe. They may move in and out of the country as often as they wish and remain for indefinite periods of time. But so far as establishing the matrimonial home in Zimbabwe is concerned they must decide either to exercise their constitutional right to reside in Zimbabwe without their husbands or accompany them to the countries of their citizenship and live together there. This may cause inconvenience but no more. Their right of freedom of movement in any of its aspects has not been removed from them or indeed infringed.

The predicament of each wife has not been caused by the decision of the

husband, as head of the family, to establish the common household in a country other than Zimbabwe. If that were so then, provided the decision was not unreasonable, the wife, if she wished the marriage to survive, would be obliged to accept it and leave Zimbabwe. See *Webber v Webber* 1915 AD 139 at 246; *Macnaught v Caledonian Hotel* 1938 TED 577 at 579; *Platt v Platt* 1965 (2) PH B15 (N) at 73. To the contrary, the husbands share the desire of the wives that the matrimonial abode be located in Zimbabwe. The impediment is the alien status of the husbands and the refusal of the immigration authorities to permit them to remain in Zimbabwe.

Marriage is a juristic act *sui generis*. It gives rise to a physical, moral and spiritual community of life - a consortium *omnis vitae*. It obliges the husband and wife to live together for life (more realistically, for as long as the marriage endures) and to confer sexual privileges exclusively upon each other. Conjugal love embraces three components: (i) *eros* (passion); (ii) *philia* (companionship); and (iii) *agape* (self-giving brotherly love). See *T v T* 1968 (2) RLR 178 (G) at 180G-H; 1968 (3) SA 554 (R) at 555E. The duties of cohabitation, loyalty, fidelity, and mutual assistance and support, flow from the marital relationship. To live together as spouses in community of life, to afford each other marital privileges and to be ever faithful, are the inherent commands which lie at the very heart of marriage. See *Van Oosten v Van Oosten* 1923 CPD 409 at 411; *Excell v Douglas* 1924 CPD 472 at 476 *in fine*; and, generally, Schäfer *Family Law Service s* AS at p 2. "Marriage", as observed by WARREN CJ in *Loving v Virginia* 388 US 1 (1967) at 12, "is one of the basic rights of man, fundamental to our very existence and survival". Eighty years earlier in *Maynard v Hill* 125 US 190 (1887) at 212-212 JUSTICE FIELD spoke eloquently of marriage as:

> "an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilisation nor progress ... It is ... a social relation, like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilisation, the purest tie of social life, and the true basis of human progress ... In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these uncontrollable by any contract which they can make. When formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract."

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These sentiments hold as few today as they did then.

It is in the light of the institution of marriage as I have ventured to portray it that the claim by the wives to an infringement of their fundamental right to freedom of movement has to be adjudged.

In support of the wives' contention, their counsel relied strongly on the second aspect of the *Dow* case *supra*. It was there argued by the Attorney-General that Mrs Dow had no *locus standi* to have brought the application in the court *a quo* since at issue was the right of her two young children to citizenship of their birth, their father being an alien. AMISSAH JP at 659g-h summed up Mrs Dow's answer to this submission in these words:

> "The case which I understand the respondent to make is that due to the disabilities under which her children were likely to be placed in her own country of birth by the provisions of the Citizenship Act 1984, her own freedom of movement protected by s 14 of the Constitution (the equivalent to s 22 of the Constitution of Zimbabwe) was correspondingly likely to be infringed and that gave her the right under section 18(1) to come to court to test the validity of the Act. What she says is that it is her freedom which has been circumscribed by the disabilities placed on her children."

The learned JUDGE PRESIDENT then proceeded to rule in favour of Mrs Dow. He said at 660c-e:

> "It is totally unrealistic to think that you could permanently keep the child out of Botswana and yet by that not interfere with the freedom of movement of the mother. When the freedom of the mother to enter Botswana to live and to leave when she wishes is indirectly controlled by the location of the child, excluding the child from Botswana is in effect excluding the mother from Botswana. If the exclusion is the result of a determination of the child's citizenship which is wrong, surely this would amount to an interference with, and therefore an infringement of, the mother's freedom of movement."

To like effect AGUDA JA remarked at 678d-e:

> "In my view it is too artificial and unnatural to hold that in these circumstances (the two children being subject to expulsion from Botswana away from the mother and away from the only place they regarded as their home) the respondent's ... right to free movement within and into and out of Botswana (has) not been breached."

GUBBAY CJ

BIZOS JA, the third member of the majority of the court, at 684e, stressed the strength of the bond between a mother and her children as the determinative factor.

Mrs Dow's situation seems to me analogous to that which pertains to the wives. The bond between husband and wife may be equally as strong as that between mother and child. Marriages are almost invariably entered into by parties who have deep affection for one another and who intend to devote the remainder of their lives together. Although the condition of matrimony does not, as a concept of law, make the spouses one flesh - *una caro* - it nonetheless embodies the obligations to found a home, to cohabit, to have children and to live together as a family unit. It is the most fundamental institution known to mankind - "the first step from barbarism" and "the true basis of human progress".

Decisions concerning art 17 of the International Covenant on Civil and Political Rights, and art

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8(1) of the European Convention on Human Rights, both provisions of which afford protection against interference with family life, lay emphasis upon the importance of preserving well established family ties.

In *Aumeeruddy-Cziffra & Ors v Mauritius* (1981) 62 International Law Reports 255, the United Nations Human Rights Committee examined the effect of a law passed by the Government of Mauritius which removed the right of alien husbands of Mauritian women citizens to residence and immunity from deportation, and found that it infringed art 17 of the Covenant. It was stated at 293-294:

> "The Committee takes the view that the common residence of husband and wife has to be considered as the normal behaviour of a family. Hence, and as the State party has admitted, the exclusion of a person from a country where close members of his family are living can amount to an interference within the meaning of Article 17. In principle, Article 17(1) applies also when one of the spouses is an alien. Whether the existence and application of immigration laws affecting the residence of a family member is compatible with the Covenant depends on whether such interference is either 'arbitrary or unlawful' as stated in Article 17(1), or conflicts in any other way with the State party's obligations under the Covenant.
>
> In the present cases, not only the future possibility of deportation, but the

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> existing precarious residence situation of foreign husbands in Mauritius represents, in the opinion of the Committee, an interference by the authorities of the State party with the family life of the Mauritian wives and their husbands. The statutes in question have rendered it uncertain for the families concerned whether and for how long it will be possible for them to continue their family life by residing together in Mauritius."

The European Court of Human Rights, in *Abdulaziz Cabales & Balkandali v UK* (1985) 7 EHRR 471 at para 62 and *Berrehab v Netherlands* (1989) 11 EHRR 322 at para 21, indicated that the relationship created between two spouses to a lawful and genuine marriage had to be regarded as "family life" within the meaning of art 8 of the Convention, and was sufficient to attract such respect as may be due under that article.

In *Moustaquim v Belgium* (1991) 13 EHRR 802 at para 36 and *Beljoudi v France* (1992) 14 EHRR 801 at paras 56 and 57, the same court held in each instance that, notwithstanding the fairly formidable criminal records possessed by the applicant, the deportation order issued against him was, in the particular circumstances of his close family ties in the country, likely to compromise the continuation of his family life and accordingly amounted to an interference with the right to respect for family life.

I must also mention the judgment of the European Commission of Human Rights in *Application No. 9773/82 v UK*(1983) 5 EHRR 296, for reliance was placed upon it by the respondents' counsel. Alluded to was the statement that: "a right to marry and found a family does not, in principle, include the right to choose the geographical location of the marriage". In the context of the particular facts of that case the observation was probably justifiable, for the applicant was seeking to establish a new relationship by marrying a foreign woman whom he had never actually met, who had been refused entry into the United Kingdom and, if admitted, would be dependent, in all probability, on public funds. The action taken, therefore, caused no actual

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interference with family life.

Although there is no provision in the Constitution of Zimbabwe which equates directly to art 17 of the Covenant or art 8(1) of the Convention, s 11 guarantees every person "protection for the privacy of his home". Taken in conjunction with s 22(1) and interpreting the whole generously and purposively so as to eschew the "austerity of tabulated legalism", I reach the conclusion that to prohibit the husbands from residing in Zimbabwe and so disable them from living with their wives in the country of which they are citizens and to

which they owe allegiance, is in effect to undermine and devalue the protection of freedom of movement accorded to each of the wives as a member of a family unit.

THE ORDER

In the result:

1. The application is allowed with costs to be paid by the second respondent, save for such costs as were occasioned in the preparation of pp 27 to 46 (inclusive) in the affidavit of Edith May Caules.

2. It is hereby declared that the right of the applicants under s 22(1) of the Constitution of Zimbabwe to freedom of movement, that is to say, the right to move freely throughout Zimbabwe, the right to reside in any part of Zimbabwe, and the right to enter and to leave Zimbabwe, has been contravened by the decision of the first respondent not to permit their alien husbands to reside with them in Zimbabwe.

McNally JA: I agree.

Korsah JA: I agree.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Scanlen & Holderness, applicants' legal practitioners

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

S v BHERO & ANOR 1994 (2) ZLR 66 (SC)

Court **Supreme Court**

Gubbay CJ, Korsah JA & Ebrahim JA

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Criminal appeal

6 & 13 June 1994

Flynote

Criminal procedure (sentence) - common law offences - attempted murder - hired assassins shooting victim in head with shotgun - victim fortunate to survive but severely injured and permanently disfigured and disabled - appropriate sentence

Criminal procedure (sentence) - general principles - factors affecting - deterrence - excessive devotion to deterrence should not lead to sentence disproportionate to offender's desserts

Headnote

The appellants, both Mozambican nationals, were employed as loaders at a Harare company, the managing director of which was one Chingono. The complainant was employed by the same company as its accountant. He discovered that the company had been defrauded of a large sum of money and had reason to suspect that Chingono was the perpetrator. He told the company chairman of his suspicions. This report came to Chingono's attention.

Chingono approached the appellants and offered to pay them $2 000 each if they would kill a company employee who, he said, was sexually harassing women members of staff. He did not name the person. He later procured a shotgun and arranged for the security guard at his home to teach the appellants how to use it. The following day he took the appellants to the complainant's home and told them to wait for the complainant. When the complainant arrived home, the first appellant, who was carrying the shotgun, shot the complainant in the face. The appellants then fled and joined Chingono, who paid them $1 000 each.

GUBBAY CJ

The complainant sustained serious injuries, which resulted In him being permanently disfigured and disabled.

At their trial, the appellants pleaded guilty and were sentenced to 20 years' imprisonment with labour. Leave to appeal against sentence was granted by the trial judge. On appeal, *Held,* that attempted murder is a crime which, save in the most exceptional circumstances, is always treated as being extremely serious. It has the effect of holding human life cheap and differs from murder only in that the intended result did not materialise. The moral reprehensibility is equal. In this case, the complainant was extremely lucky to survive. Had he not, the appellants would have been sentenced to death, for where a victim has been murdered by hired assassins it is well nigh impossible to make a finding of extenuating circumstances. The appellants were free agents and had heartlessly agreed to murder the complainant for reward. This was an abhorrent crime, in which the factors of deterrence, natural indignation and public expectations regarding punishment had to be viewed as paramount.

Held, further, that nevertheless what must be guarded against where exemplary sentences are imposed is the risk that excessive devotion to the cause of deterrence may lead to a

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punishment which is disproportionate to the offender's just deserts. The sentence imposed by the trial court had that effect. The crime had been planned and organised entirely by Chingono, whose influence over the appellants was persistent. Taking that into account, as well as the confessions of guilt and attendant remorse, a sentence of fifteen years was appropriate.

Cases cited:

S v Nyoni AD-38-71

S v Human 1979 (3) SA 331 (E)

R v Karg 1961 (1) SA 231 (A)

S v Beahan 1991 (2) ZLR 98 (S)

Appellants in person

Mrs *J Zindi* for the respondent

Judgment

Gubbay CJ: The two appellants were convicted in the High Court, upon pleas of guilty, of the crime of attempted murder. The indictment alleged that on 12 June 1993, and at Avondale, Harare, they unlawfully and with intent to kill, shot George Dhlamini in the face with a Greener shotgun. Each was ordered to serve twenty years' imprisonment with labour. With the leave of the trial judge, they now appeal to this court against what they urge is a manifestly excessive punishment.

GUBBAY CJ

The material background facts leading up to the commission of the offence may be summarised as follows.

Both appellants are Mozambican nationals, in their early twenties. They were employed in the capacity of loaders by Industrial Confirming (Pvt) Ltd at its business premises in Harare. The managing director of the company was one Amos Chingono.

In December 1992 the complainant, who was engaged by the company as its accountant, discovered that it had been defrauded in an amount exceeding $400 000. His investigations caused him to believe that Chingono was the perpetrator and he communicated his well-grounded suspicions to the company's chairman. This disclosure came to the attention of Chingono.

During the first week of June 1993, Chingono approached one appellants with the proposition that he would pay them $2 000 each if they were prepared to shoot and kill an employee of the company, whom he did not name. He gave out as the reason for the criminal enterprise that the man concerned was sexually harassing women members of staff. The appellants agreed to perform the task for the fee offered, but informed Chingono that neither possessed a firearm nor

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had any training in the use thereof.

On 11 June 1993, Chingono procured a Greener shotgun and immediately arranged for the security guard at his homestead to teach the appellants how to fire it. This was done. However, it was only the first appellant who gained some degree of proficiency in the operation of the shotgun.

Early the following evening Chingono conveyed the appellants in his motor vehicle to the residence of the complainant at Mendel Road, Avondale, for it was he that the appellants were to kill. Chingono instructed them to wait near the gate for the complainant to arrive. He then drove off and parked a short distance away, out of sight of the property.

At 6.30 pm the complainant and his wife returned home. The complainant, who was driving, stopped the vehicle close to the front entrance. He and his wife alighted. Both appellants walked towards them. The first appellant, who was armed with the firearm, shot the complainant, at close range, in the face. The two then fled and joined Chingono who was waiting for them. He drove them from the scene to his house where they received $1 000 each.

The appellants were arrested three days later.

1994 (2) ZLR p69

GUBBAY CJ

The complainant was admitted to Parirenyatwa Hospital in a serious condition. He had sustained a complete fragmentation of the anterior mandible from canine to canine, with several small pieces of shrapnel embedded in the tissues. Two large pieces of shrapnel were embedded on both angles of the mandible. The floor of his mouth and tongue muscles were avulsed and there was soft tissue loss from the left to the right cheek. He was operated upon and the fractured mandible was reduced and fixed by interosseous wiring and the missing parts reconstructed by means of a Kirschner wire. In the event, the complainant's injuries have resulted in him being permanently disfigured and disabled.

Attempted murder is a crime which, save in the most exceptional circumstances, is always treated as being extremely serious. This is because it has the effect of holding human life cheap. It differs from murder only in that the intended result did not materialise. But the moral reprehensibility is there in equal degree. See *S v Nyoni* A-38-7 1 (not reported); *S v Human* 1979 (3) SA 331 (E) at 337C-D.

In this matter there can be no doubt that the complainant, in relation to whom the appellants entertained an actual intention to kill, was lucky to escape with his life. A shot in the face at close range could easily have caused death. Thus it was only by good fortune that the charge against the appellants was not murder. If it had been then almost inevitably they would have been sentenced to death; for where a victim has been murdered by hired assassins it is well nigh impossible to make a finding of extenuating circumstances.

The appellants agreed to murder the complainant for reward. Both were free agents. Their wills were not swayed by any illegitimate means or pressure.

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They came into the mission at a set time and for a specific purpose. There was ample opportunity for reflection. Neither harboured a grudge against the complainant. They knew nothing about him other than what Chingono had misrepresented. They heartlessly agreed to murder him for the basest of motives - financial gain - and they performed their mandate in a cold blooded, brutal and cowardly manner, typical of hired assassins. A defenceless man, while in the privacy of his property, was violently set upon. He was utterly vulnerable. He was given no warning; no chance to escape or plead for his life. And it is difficult to imagine the horror, trauma and agony, that the shooting must have caused the complainant's wife.

This was an abhorrent crime. It was one in which the factors of deterrence,

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natural indignation and public expectations regarding punishment, had to be viewed as paramount. See *R v Karg* 1961 (1) SA 231 (A) at 236B-C. As the learned trial judge so aptly observed, society must be protected from persons like the appellants - they and all others must be shown that there is no place in Zimbabwe for hired killers.

Nonetheless, what has to be guarded against where exemplary sentences such as the present are imposed, is the risk that excessive devotion to the cause of deterrence may lead to a punishment which is disproportionate to the offender's desserts. See *S v Beahan* 1991 (2) ZLR 98 (S) at 124C.

With all deference I regard the length of imprisonment to which the appellants were subjected as having that effect.

The appellants were young unsophisticated persons with blameless records. They were lowly paid employees over whom Chingono wielded much authority. To disobey may well have placed their precious employment in jeopardy. Certainly they would have believed that to be so. They were engaged to carry out a murder, planned and organised entirely by Chingono, at what to them was an enormous financial temptation. It was Chingono who obtained the murder weapon. It was he who arranged for the appellants to be schooled in its use. It was he who took them to the scene, instructed them to await the complainant's arrival and, subsequently, facilitated their escape. Chingono was at all times near at hand to ensure that his commission was executed. His influence over the appellants was persistent.

The weight of these features, taken in conjunction with the confessions of guilt and attendant remorse, to my mind, warrants a some what greater degree of mercy than that accorded by the learned judge. In consequence, I would alter the period of twenty years' imprisonment with labour to fifteen years. I am satisfied that the reduced term will still satisfy the aspects of deterrence and public expectations.

Accordingly, I would allow these appeals to the extent of substituting fifteen years' imprisonment with labour for the sentences of twenty years' imprisonment with labour imposed by the trial court.

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Korsah JA: I agree.

Ebrahim JA: I agree.

PTC v RETROFIT (PVT) LTD 1994 (2) ZLR 71 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

2 & 27 June 1994

Flynote

Interpretation of statutes - similar statute - two statutes on related subjects, enacted at the same time, and with cross - references to one another - must be read together

Posts and telecommunications - PTC - licensing powers - whether may issue licence to operate mobile cellular radio telephone system - Radiocommunication Services Act [Chapter 252] - s 14 - PTC not entitled to grant radio licences other than to small private systems

Headnote

The applicant company (the respondent in the appeal) wished to operate a mobile cellular radio telephone system in Zimbabwe and wished the PTC to issue it with a licence for this purpose. The PTC claimed that it had no power under the relevant legislation to issue such a licence. The relevant statutes were the Postal and Telecommunications Services Act [*Chapter 250*] and the Radiocommunications Services Act [*Chapter 252*]. Both these Acts came into operation on 1 April 1973, when technology was not as advanced as it is now. It was easy to say then that Chapter 250 was concerned with the postal system and the telephone and telegraph systems while Chapter 252 dealt with public broadcasting and the activities of a limited number of "ham" radio operators. The applicant argued that it fell under Chapter 252, as it sought to provide a radiocommunication service, although it conceded that the service it wished to provide was a telecommunication service.

Chapter 250 gives the PTC a monopoly in establishing, maintaining and working telecommunication services in Zimbabwe, subject to some

exceptions, such as the National Railways' telecommunications service and limited private services. The definition of telecommunications service includes radio communication service. The respondent argued that "private" referred to the person who ran the service, rather than the service itself. It also argued that an amendment made to Chapter 250 in 1977, which made the PTC's monopoly "subject to" the provisions of Chapter 252, put a limit on the exclusivity of the

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PTC's monopoly.

Held, that the word "private", in describing a telecommunications service, clearly referred to the service, not to the person providing the service, and was intended to link a number of persons with each other and not with the public at large, such as taxi-drivers, doctors and so on.

Held, further, that had the legislature intended in 1977 that the blanket monopoly granted to the PTC was not to apply to radio communication services, it would have altered the definition of telecommunication service to delete reference to radio communication service.

Held, further, that the PTC's powers to licence radio stations did not extend to cellular radio systems, which were unknown at He time the legislation was introduced. The powers were intended to cover such people as farmers and safari operators for whom ordinary telephone services could not be provided. Such radio stations and systems were intended to be small and private. The powers of the PTC to licence such systems could not be extended to licensing a full system covering the whole county. There was no intention on the part of the legislature to remove the PTC's monopoly or to allow it to divest itself of that monopoly.

Held, further, that to hold otherwise would lead to the situation where one statute gave the PTC a monopoly and the other took it away. Statutes must be read together, particularly where they are enacted together and form part of a unified whole.

Cases cited:

A-G v Edison Telephone Co of London Ltd (1880) 6 QBD 244

Postmaster-General v National Telephone Co Ltd [1909] AC 269

Hawkins v Admin SWA 1924 SWA 57

Hickman v A-G 1980 ZLR 24 (G)

Comr of Police v Wilson 1981 ZLR 451 (S)

S v Marwane 1982 (3) SA 717 (A)

CIR, Transkei & Anor v JALC Hldgs (SA) (Pty) Ltd & Anor 1991 (4) SA 646 (Tk)

SA Eagle Versekeringsmaatskappy Bpk v Steyn 1991 (4) SA 841 (A)

Ex p *Smit:* In re *Boedel Smit* 1983 (3) SA 438 (1)

Kent NO v SA Rlys & Anor 1946 AD 398

McNALLY JA

J C Anderson SC for the appellant

A P de Bourbon SC for the respondent

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Judgment

McNally JA: The two parties, to whom I will refer as "the PTC" and "the applicant company" respectively, are in dispute over the interpretation of two statutes. The applicant company wishes to operate a mobile cellular radio telephone system in Zimbabwe. It wants the PTC to issue it with a licence for this purpose. The PTC claims it has no power, under the relevant legislation, to do so. The applicant company says it has.

The applicant company succeeded in persuading GIBSON J, in the High Court, to accept its contentions. It did not succeed in obtaining the order it sought, namely, that:

> "The respondent (the PTC) be and is hereby directed to licence and authorise the applicant to operate a mobile cellular radio telephone system in Zimbabwe within 7 days of this order being served on the respondent."

But it did obtain part of its alternative order, namely, that:

> "The matter be sent back to the respondent for its consideration of the application for a licence for a mobile radio communications system in terms of Chapter 252 and that the respondent give its decision within two (2) months of the date hereof."

The PTC now appeals from that decision' essentially on the grounds that the court *a quo* erred in its understanding of the two statutes involved. The PTC repeats its contention that it is not empowered, in terms of the legislation, to licence the applicant company's proposed activity.

A great deal was made, in argument, about the public interest in having an efficient telephone system, and about the alleged obstructiveness of the PTC in refusing to allow private enterprise to come to the rescue of the long suffering public.

These are sentiments which must appeal to anyone, even a judge, who uses the Zimbabwe telephone system. But actually they have nothing to do with the case. The case is concerned, and concerned only, with a question of statutory interpretation. Does the legislation provide for a licence of this nature or does it not?

McNALLY JA

If it does not, then the appeal must succeed. That will mean that the question is properly a political and not a legal one. Should Parliament amend the legislation to remove the PTC's monopoly? That is for Parliament to decide.

I turn now to consider the two statutes involved, namely the Postal and Telecommunications Services Act [*Chapter 250*], and the Radio-communications Services Act [*Chapter 252*]. The long titles of these Acts recite in broad terms their ambit and scope, and I set them out as follows.

The Postal and Telecommunications Services Act [*Chapter 250*] is intended:

> "To confer privileges on the Posts and Telecommunications Corporation in connexion with postal and telecommunication services; to regulate and control the provision of postal and telecommunication services within, into, and from Zimbabwe; and to provide for matters incidental to or connected with the foregoing."

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The Radiocommunications Services Act [*Chapter 252*] is intended:

> "To provide for the control of and supervision over radiocommunication services within, into and from Zimbabwe; to provide for the provision of radiocommunication services by the Posts and Telecommunications Corporation; and to provide for matters incidental to or connected with the foregoing."

Both these Acts came into operation on 1 April 1973. Part of the problem is that technology was not then as advanced as it is now. It was easy to say then that Chapter 250 concerned itself with the postal system and the telephone and telegram (telegraph) systems, while Chapter 252 was concerned with public broadcasting and the activities of the limited number of private operators of radio transmitters and receivers, known generally as "ham" or amateur operators. The new technology cuts across those simple distinctions, as it did in *A-G v Edison Telephone Co of London Ltd* (1880) 6 QBD 244, a case which is otherwise not particularly relevant.

The applicant company therefore claimed that it was not affected by Chapter 250. It sought to provide a radiocommunication service, and therefore it fell squarely under Chapter 252. If it did fall in any way under Chapter 250 it fell under s 26(4) because it was a "private telecommunication service". It should, therefore, be entitled to a licence.

McNALLY JA

It is worthy of comment that the applicant company was clearly uncertain which section of which Act was the proper one under which it should be licensed. The draft order did not refer to any section, or to either of the Acts. It simply asked that "Respondent be and is hereby directed to licence ... applicant ... ". It was only in the subsequent amendment that it asked, in the alternative, for a licence under Chapter 252, presumably under s 14 thereof.

In the preceding correspondence the applicant company seemed to rely only on the provisions of s 26 of Chapter 250. In his founding affidavit the Chief Executive Officer of the applicant company said nothing about Chapter 252. In fact he seemed to accept that his proposed service fell under Chapter 250. He said, *inter alia:*

> "Broadly speaking, the PTC's service and the cellular service which the applicant wishes to establish are known as telecommunication services."

And later:

> "Radiocommunications is a sub-division of telecommunication ..."

These concessions had to be made, because in the definitions section of Chapter 250 "telecommunications service" is defined as meaning:

> "any service by means of which signs, signals, sounds, pictures or communications are conveyed by the agency of electricity, magnetism or electro magnetism or by any agency of a like nature, whether with or .without the aid of wires, **and includes telephony** and telegraphy **and any improvements and developments thereof, including a radio communication service** and a diffusion service" (my emphasis).

Thus his primary, indeed his only, contention in the affidavit was that the applicant company fell under the exception to the monopoly provided for in s 26 of Chapter 250. I will deal with that contention first, although I am aware that in the High Court this argument was not dealt with.

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The argument that succeeded was that, because of the 1977 amendment of s 26, introducing a reference to Chapter 252, the applicant company should be treated as having applied for a licence under Chapter 252. Since the PTC had never considered the matter on that basis the learned judge did not order it to grant a licence under Chapter 252, but only to consider the application afresh under the provisions (presumably s 14) of Chapter 252. I shall deal with that conclusion second.

McNALLY JA

1. THE ARGUMENT THAT THE APPLICANT COMPANY IS ESTABLISHING A PRIVATE TELECOMMUNICATIONS SERVICE

It is necessary to set out the relevant parts of s 26 of Chapter 250. They are as follows:

> "26. (1) Subject to the provisions of this section and of the Radiocommunication Services Act [*Chapter 252*], the Corporation shall have the exclusive privilege of establishing, maintaining and working telecommunication services within, into and from Zimbabwe:
>
> Provided that ... (irrelevant)
>
> (2) (Provides for the National Railways of Zimbabwe to run their own telecommunication service for the purposes of operating the railway system).
>
> (3) A person may, subject to the provisions of this Act -
>
> (a) establish, maintain and work solely for his own use a private telecommunication service that is contained within a single building, and is not connected with a telecommunication service established, maintained or worked by the Corporation
>
> (b) establish and maintain a private telecommunication service such as is referred to in paragraph (a) on behalf of a person who is entitled in terms of that paragraph to establish, maintain and work such a service.
>
> (4) A person may, subject to the provisions of this Act -
>
> (a) establish, maintain and work a private telecommunication service that extends beyond a single building, or is connected with a telecommunication service established, maintained or worked by the Corporation -
>
> (i) in accordance with the prescribed conditions of a licence issued by the Corporation and on payment of the prescribed fees; or
>
> (ii) (in accordance with the conditions of a special licence)
>
> Provided that ..."

Mr *de Bourbon*'s argument, in essence, is that the word "private" in connection with a telecommunication service applies to the operator and not to the operation. In other words, it means a service operated by a person other than the Corporation. Thus the Corporation is authorised to licence the

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applicant company because the applicant company is a person other than the Corporation and it wishes "to establish, maintain and work a telecommunication service that extends beyond a single building" in terms of s 26(4).

I am satisfied that this argument is untenable, both logically and grammatically. Logically it does not make sense to grant a monopoly in s 26(1) and to destroy that monopoly in s 126(4). Grammatically, the position of the word "private" makes it clear beyond doubt that it is the service which is to be private, not the person. Thus subsection (3) makes an exception in favour of an "in-house" communication system, and subsection (4) extends it outside a building to allow for the linking of a number of persons with each other and not with the public at large - eg doctors, taxi-drivers etc. The system envisaged by the applicant company is clearly a public system to which anyone able and willing to pay the fees will have access (just as, in theory at least, we have access to the PTC's telephone system). I cannot accept therefore that the applicant company is capable of being licensed in terms of the provisions of s 26 of Chapter 250. I find general support for this conclusion in the decision in *Postmaster-General v National Telephone Co Ltd* [1909] AC 269.

2. THE ARGUMENT RELATING TO THE 1977 AMENDMENT

Section 16 of the General Laws Amendment Act 37 of 1977 amended s 26 of Chapter 250 by introducing into subsection (1) after "section" the words "and of the Radiocommunication Services Act [*Chapter 252*] ". I have set out the subsection, as amended, earlier in this judgment. In effect the provisions of s 26(1) were made subject to the provisions of the Radiocommunication Services Act.

What was the purpose of this amendment?

Mr *de Bourbon*, for the applicant company, argued that it put a further limitation upon the exclusivity of the PTC's monopoly. Mr *Andersen,* for the PTC, argued that it simply plugged what may have been perceived as a loophole in the exclusive privilege of the PTC.

Mr *de Bourbon* is right to a degree. "Subject to" is a commonly used and simple phrase. It means "except as curtailed by" - see *Hawkins v Administration of South West Africa* 1924 SWA 57. It may not always be easy to know in what way the one thing is curtailed by the other - see, for

example, *R v Rahman* 1940 NPD 398 at 399 *in fine* to 400, but that is another matter.

See also *Hickman v A-G* 1980 ZLR 24 (G); *Comr of Police v Wilson* 1981 ZLR 451 (S) at 463D; *S v Marwane* 1982 (3) SA 717 (A); *CIR, Transkei & Anor v JALC Holdings (SA) (Pty) Ltd & Anor* 1991 (4) SA 646 (Tk); *SA Eagle Versekeringsmaatskappy Bpk v Steyn* 1991 (4) SA 841 (A) at 848A-D.

It is unfortunate that the legislature has chosen to express itself so vaguely and broadly in the

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phrase "subject to the provisions of the Radiocommunication Services Act". One has to search through the whole of the latter Act to discover what the provisions are to which s 26 is made subject. It would have been clearer if the section or sections had been identified.

But one thing, it seems to me, can be said with some certainty. If it had been the intention of the legislature to say in 1977 that the blanket monopoly in regard to telecommunication services granted to the PTC was not to apply to radiocommunication services, it would have altered the definition of "telecommunication services" cited above, by deleting the words "including a radiocommunication service". Failure to do that is a clear indication, to my mind, that the monopoly remains.

Against that background I have searched through Chapter 252 to discover which of its provisions could have been in the mind of the legislature (or the parliamentary craftsman) when those words were introduced.

The first section in which the PTC's power to licence is mentioned is s 14. This deals with licences required in respect of "radio stations". The definition of "radio stations" is contained in the Schedule to the Act, and it includes some seventeen different types of station, but does not include either a broadcasting station or an ordinary radio receiver such as is used to listen to ZBC broadcasts.

The argument is that the service which the applicant company wishes to introduce consists of "base stations" and "mobile stations" which are referred to in the Schedule. Therefore the service which the applicant company wishes to introduce may be licensed in terms of the provisions of s 14 of Chapter 252. (For some reason both s 14 and s 20 are worded negatively, but I do not think this is of any significance.)

The argument is ingenious but I think it is demonstrably fallacious.

McNALLY JA

One must bear in mind that at the time the Acts were enacted mobile cellular radio telephones were not known in Zimbabwe. What was envisaged, as is clear if one looks at Part IX of the regulations in RGN 390/1973, was that there might well be people - remote clinics, farmers, safari operators and the like - for whom ordinary telephone services could not be provided. Such people might be licensed, under Chapter 252, to set up what the regulations describe as "a private enterprise radiocommunication system". But it is clear, from ss 46, 47 and 48 of these regulations, that these "stations" or "systems" were intended to be both small and private. Thus, in s 47, it is laid down that the station is to be worked "solely for the purpose of transmitting and receiving messages relating to the business of the licensee". In s 48 it is said that a radio station so licensed "shall communicate with only such other station or stations as may be authorised by the Corporation".

I do not consider it realistic, except perhaps half cynically and half humorously, to describe the situation in Zimbabwe generally in the terms used in s 46, namely:

> "Where Corporation telegraph, telephone and radiocommunication services do not exist, and when it is not

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practicable, convenient or expedient for the Corporation to provide such services and where, in the opinion of the Corporation, the circumstances justify the use of radiocommunication, it may, subject to the provisions of this Part, licence a radio station to be used for the purpose of a private enterprise radiocommunication system."

It is straining the language to argue that the exceptional provisions for the licensing of radio stations under Chapter 252 can be used for the licensing of a full-scale telecommunication system throughout Zimbabwe. This is so particularly when, as I have said, the definition of "telecommunication system" in Chapter 250 has not been amended. "Telecommunication system" still includes "radiocommunication system".

In my view, therefore, the amendment of 1977 was intended to make it clear that small geographically remote areas of Zimbabwe could be removed from the scope of the PTC's monopoly on telecommunication services, where the PTC agreed that this was necessary. To allow the licensing of small radio stations for this purpose under Chapter 252 was the extent of the derogation from the general scope of the monopoly under s 26 of Chapter 250. I would suspect that the amendment was made *ex abundante cautela,* to

ensure that the licensing of these small stations was not attacked in the courts as being In conflict with the provisions of s 26 of Chapter 250 granting the PTC a monopoly in telecommunication services. One must remember that the two Acts, Chapter 250 and 252, were enacted together on 1 April 1972. Five years later Chapter 250 was amended to make a particular provision in Chapter 250 "subject to" Chapter 252. The most likely explanation of the amendment is that it was introduced, not so much to change the law, as to make clear what was perhaps not clear before, viz that the provisions in s 14 of Chapter 252 were exceptions to rather than in conflict with the provisions of s 26 of Chapter 250. In this sense, therefore, Mr *Andersen's* interpretation, cited earlier, is probably correct.

It was not intended, by amending s 26, to make it possible for the PTC to divest itself entirely of its monopoly in the provision of telecommunication services. Those services, whether they happened to use radiocommunication via Hertzian waves or telecommunication via conventional wires, remained, in general, a monopoly.

Otherwise one would have the situation in which two simultaneously enacted statutes are interpreted in such a way that the one gives the PTC a monopoly over telephones, whether conventional or wireless, and the other takes it away. It is "a well-known principle of statutory construction, viz that statutes must be read together", as VAN DYK J said in Ex p *Smit:* In re *Boedel Smit* 1983 (3) SA 438 (T) at 443, citing WATERMEYER CJ in *Kent NO v SA Rlwys & Anor* 1946 AD 398 at 405; *a fortiori* of course when the statutes were enacted together and indeed form part of a unified whole. See generally Cockram *Interpretation of Statutes* 3 ed pp 102-104, and Devenish *Interpretation of Statutes* p 279 *et seq.*

Chapter 250 is specifically stated - see the definitions of "telecommunication service" and "telephone service" in s 2 of that chapter - to be the statute governing all forms of telephone communication, whether conventional or wireless. It would be wrong, therefore, to interpret Chapter 252 in such a way that it allows the Corporation to give up the monopoly which it is

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granted under Chapter 250. It would equally be wrong to interpret Chapter 252 in such a way that a licence under that enactment could authorise a person to introduce a nation-wide telecommunication system when such systems are governed by Chapter 250.

I am fortified, therefore, in my view, that Chapter 252, and in particular s 14 thereof, cannot be used for the licensing of a nation-wide telecommunication

McNALLY JA

system simply because that system happens to be a radio communication system.

I am further fortified in my view by referring to the powers of the PTC as set out in s 19 of Chapter 251 - the Posts and Telecommunications Corporation Act. In summary the relevant functions of the PTC are there set out as:

a. To provide telecommunications services;

b. To regulate, control and supervise radio stations;

c. To establish radio communication services.

There is no mention of regulating (ie licensing) radio communication services.

I conclude therefore that when the legislature, in 1977, amended s 26(1) of Chapter 250 by making its provisions "subject to" the provisions of Chapter 252, it meant, to use the words of FIELDSEND CJ in *Comr of Police v Wilson supra* at 463D-E, that the provisions of that section would be -

" ... without prejudice to what is provided by or what may be done under (Chapter 252)".

The system proposed by the applicant company is, in the words of its own chief executive officer, a telecommunications service, which is governed by the provisions of Chapter 250. It is not covered either by the exceptions set out in s 26 of Chapter 250, or by the provisions of Chapter 252. Therefore the PTC is not empowered, under the legislation as it stands at present, to licence its operation. Only Parliament can alter that situation.

Accordingly it is not necessary to consider various other points raised by counsel. The appeal must be allowed with costs. The order of the High Court is altered to read:

"The application is dismissed with costs."

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Kantor & Immerman respondent's legal practitioners

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CITY OF HARARE v TA PROPERTIES (PVT) LTD 1994 (2) ZLR 82 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

13 & 30 June 1994

Flynote

Statutes - Urban Councils Act [Chapter 214] - s 172(1)(b) - health levy - validity - meaning of "charges"

Headnote

The City of Harare decided in 1990 to impose a 10% health levy. This levy was to be an additional amount imposed on rate payers. The respondent, a property owner, refused to pay the health levy, contending that it was invalid, as it was a rate and not a charge. The City of Harare contended that s 172(1)(b) of the Urban Councils Act [*Chapter 214*] allowed it to raise such a levy as a charge, and disputed that it was in effect a rate.

The matter went by way of a summons claiming the outstanding levy on a special case stated to the High Court which found that the health levy was invalid, and that s 172(1)(b) of the Act did not authorise the raising of such a levy. On appeal,

Held, the health levy was *prima facie* a rate, and not a charge. Taking the various financial provisions of the statute as a whole, the legislation did not authorise the raising of the levy under s 172(1)(b). Appeal accordingly dismissed.

Cases cited:

Germiston Municipality v Rand Cold Storage Co Ltd 1913 TPD 530

R v Dawood 1915 CPD 841

Peninsular Abattoirs Ltd v Cape Town Corp 1915 AD 665

Luzon Invtms (Pty) Ltd v Strand Municipality & Anor 1990 (1) SA 215 (C)

Municipality of Graham's Town v Ford & Jeffreys (1844) 3 Menz 506

McNALLY CJ

PTC v Retrofit (Pvt) Ltd 1994 (2) ZLR 71 (S)

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Aziz v Divisional Council, Cape & Anor 1962 (4) SA 719 (A)

Sehume v Atteridgeville City Council & Anor 1992 (1) SA 41 (A)

J C Andersen SC for appellant

A P de Bourbon SC for respondent

Judgment

McNally JA: This is a dispute essentially about the meaning of the word "charges" in s 172(1)(b) of the Urban Councils Act [*Chapter 214*]. I will refer to the parties as "the Council" and "TA Properties" respectively.

The parties brought the matter before the High Court (CHIDYAUSIKU J) by way of a special case stated for the opinion of the court under Order 29. The facts, in very brief summary, are these.

In July 1990 the Council needed more money to provide health services. It decided to raise that money by imposing a 10% "health levy" by passing a resolution in terms of s 172 of the Urban Councils Act [*Chapter 214*].

TA Properties refused to pay the 10%. It contended that the Council had no authority to impose such a charge under s 172. If the Council wanted to increase the rates it should have done so under the procedures set out in Part XVIII of the Act. So, the parties submitted the matter for a ruling in July 1992. In April 1993 CHIDYAUSIKU J ruled against the Council and in favour of TA Properties. The Council now appeals.

Section 172 (1) of the Act is in Part XIV of the Act, and the Part deals generally with what are called "Other Powers of Council". It reads:

> "172. (1) A council may, by resolution passed by a majority of the total membership of the Council -
>
> (a) fix tariffs & or charges for -
>
> (i) the supply of electricity or water or of refuse removal services; or
>
> (ii) the conveyance of sewage or made effluent in public sewers and its treatment at a sewage treatment works; or
>
> (iii) any other services which a council may provide in terms of this Act;
>
> (b) fix charges to be payable in respect of certificates, licences or permits issued, inspections carried out, services rendered or any act, matter or thing done by the Council in terms of this Act;

> (c) fix deposits to be paid in connection with any services provided by the council in terms of this Act
>
> Provided that ... (irrelevant)"

Mr *Andersen*, appearing for the Council, contended that s 172(1)(b) gives the Council very wide

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powers, and he pointed in particular to the words:

> " A council may, by resolution, ... fix charges to be payable in respect of ... any act, matter or thing done by the Council in terms of this Act".

It is common cause that the provision of health services is a "thing done by the Council in terms of this Act."

Mr *de Bourbon* countered that the section provides for individual charges to be made for services rendered to individuals, whether rate-payers or not. "Charge" must be understood as being different from a "rate". The latter is a general levy on rate-payers as a body. Whether they use the service or not is immaterial. A charge, however, is a fee. If you require the service (or the certificate or licence or permit) you pay for it. How much you pay is determined by the Council by resolution. The "health levy" is in fact a rate, and may not be raised as a charge.

We are required, therefore, to look at the scheme of the Act. We start from the premise that the Council is a creature of statute, and can therefore raise only those charges which the statute authorises it to raise.

This principle was laid down in *Germiston Municipality v Rand Cold Storage Ltd* 1913 TPD 530 at 536 and *R v Dawood* 1915 CPD 841 at 846 and approved in the Appellate Division in *Peninsula Abattoirs Ltd v Cape Town Corp* 1915 AD 665 at 677. See also *Luzon Invtms (Pty) Ltd v Strand Municipality & Anor* 1990 (1) SA 215 (C) at 226H-J.

It is interesting that these cases moved away from an earlier judicial approach exemplified by *Municipality of Graham's Town v Ford & Jeffreys* (1844) 3 Menz 506. In that case it was held that a municipality was entitled to impose a market duty, even though the ordinance creating it gave it no specific power to do so. The court implied the power to raise revenue, provided that the tax served some purpose of general utility - see *Municipal Law* by Dönges and van Winsen, 2 ed at 681. The case was followed with some reluctance, until it was specifically disapproved in the cases to which I have referred above, first in the Transvaal, then in the Cape, and finally in the Appellate Division.

McNALLY JA

What is significant in these cases is that a loosely permissive approach was abandoned in the favour of a strict approach in the interpretation of the money-raising powers of a city council or municipality.

There are a number of ways, in terms of the Act, in which the Council can raise money. The basic method is, of course, the rate. Part XVIII of the Act deals with the rating of property. More specifically s 220 deals with a council's power to impose a general rate and s 221 with a special rate.

The Act does not define a rate in any helpful way. It provides that:

> " 'rate', subject to the provisions of sub-section (4) means a rate levied in terms of this Act."

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Section 220 provides that a council may "fix and levy" "a general rate upon all rateable property".

So in broad terms the Act assumes that we will understand what a rate is in the light of the historical development of English and South African and Zimbabwean municipal administration.

A rate is the principal method by which councils raise money. It is related to property, and is levied upon the owner of that property as a percentage of the value of the property. This is why valuation of property within the council area is so important, as is provided for in Part XVI of the Act. A rate is thus a charge levied upon all owners of property in proportion to the value of that property. It is to pay for the common services provided by the Council. But the charge is payable without regard to the extent to which the owner uses the facilities provided by the Council. It is, in effect, the municipal equivalent of income tax.

In England the law of rating can be traced from the Poor Relief Act of 1601 ("The poor rate") and from church rates levied still earlier by vestries. See Wade *Administrative Law* 6 ed at p 124. The inequities of this tax on owners, based on their property value, rather than on residents, based on their use of the facilities, led to the introduction of the controversial community charge or "poll tax" in 1990.

In South Africa, from the outdated material available to me, municipalities were entitled, indeed obliged, to levy a general rate each year. In addition they could raise a special rate. This latter might be in a defined area, for a particular

McNALLY JA

service to that area (as in our s 221), or it might be applicable throughout the municipal area, as for example, a special water rate, or a sewerage rate. See Dönges and van Winsen *op cit* pp 813-185. But it is always expressed in terms of property value. It is always so many pence in the pound or so many cents in the rend, multiplied by the value of the property. Hence, as explained earlier, the importance of property valuation in municipal finance.

So, historically, rates are a municipal tax on property owners.

In addition to its rating powers a council may raise money in other ways.

1. It may by resolution under s 172 fix tariffs, charges and deposits to be part
2. It may borrow money under s 238.
3. It may impose a surcharge for use of water that is rationed or restricted in an emergency under s 134A.
4. It may sell land under s 160.
5. It may charge for certain services - sewerage disposal, water and electricity supply and refuse removal - even where the owner does not use the services. But such

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charge must not exceed the minimum rate payable by actual users.

6. Central government may make grants.

The "health levy" with which we are concerned is described in the papers before us as being designed to cover the cost of those health services provided by the Council which are not properly or conveniently or equitably chargeable to the individual consumer. Examples given are:

- the routine monitoring of the environment to detect and abate any deterioration;
- inspection of food outlets;
- inspection of creches;
- sampling of water supplies and water in public baths;
- monitoring of mosquitoes, rodents, pests and vermin.

It is also designed to cover the subsidy element in services provided to members of the public at below cost price.

McNALLY JA

It is finally also designed to cover the increasing shortfall due to the proportionally reducing grant from central government.

This health levy is expressed as being 10% of the rate/supplementary charge. In other words it is payable only by rate-payers or by those in the high-density suburbs who pay supplementary charges instead of rates, in terms of s 84A(1)(g) of the Rural Councils Act [*Chapter 211*]. (I refer to all such people collectively as "rate-payers".)

It is therefore charged as a rate. It is a tax surcharge on rate-payers. So it is *prima facie* a rate.

But, says Mr *Andersen*, for the Council, look at the wording of s 172(1) of the Act, under which the Council purported to act. If the decision can lawfully be fitted into that section, that is an end of the matter. It is of no concern that it could equally have been done under s 220.

I have set out the wording of s 172(1) earlier in this judgment. So it is now necessary to decide whether this health levy falls properly under the words in s 172(1)(b) which I repeat here for convenience:

> "A council may by resolution ... fix charges to be payable in respect of any act, matter or thing done by the Council in terms of this Act."

I am not wholly convinced that a health levy can actually be described as a charge "in respect of an act, matter or thing done by council". One asks "what act?" "What thing done?" But perhaps it can be described as a charge in respect of a "matter" where that "matter" is health.

Assuming that to be so, one can conclude that, looked at in isolation, the imposing of a health

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levy by resolution under s 172(1)(b) is valid.

But we cannot look at the section in isolation. I have indicated very recently in *PTC v Retrofit (Pvt) Ltd* 1994 (2) ZLR 71 (S) that one must read two contemporaneous statutes together. HOEXTER JA made the same point about the sub-sections of a statute in *Aziz v Divisional Council, Cape & Anor* 1962 (4) SA 719 (A) at 726E.

If one looks at the two sections, 172 and 220, together, one sees that the one is about charges payable by individuals for services in the widest sense rendered to them individually. The other is about the taxation of property

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McNALLY JA

owners for the general revenue of the council out of which general services are performed by the Council.

Mr *Andersen*'s definition would abolish that distinction. Therefore, it seems to me, s 172(1)(b) must be read as if it were worded roughly as follows:

> "A council may by resolution fix charges to be payable by **individuals** in respect of any act, matter if thing done **for them individually** by the council in terms of the Act."

If this were not so, as Mr *de Bourbon* pointed out, s 171 would not be necessary. That section, as amended, permits the Council to charge a property owner for certain services, **even if he does not receive them**. On the wide interpretation of s 172 as suggested, s 171 would be redundant. Such persons could be charged under s 172.

Finally I rely on the case to which Mr *Andersen* very properly referred us. Despite his valiant effort to distinguish it, it is exactly in point, allowing for the obvious differences in the wording of the statutes.

I refer to the decision in *Sehume v Atteridgeville City Council & Anor* 1992 (1) S A 41 (A). In that matter the facts are the other way round, as appears from the words of KRIEGLER AJA at 57I - J:

> "To sum up, the council has purported to exercise the power to impose levies, conferred upon it by s 23(1)(p) of the Act, for a purpose not contemplated by such paragraph, namely to introduce increases in its tariff of charges for municipal services. That it cannot do."

In the context of our legislation a health levy on rate - payers is a tax or rate to be imposed under s 220, not a charge to be imposed by resolution under s 172(1)(b). I consider the decision in the court *a quo* was right. In the circumstances the appeal is dismissed with costs.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

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Winterton, Holmes & Hill, respondent's legal practitioners

S v JAHWI 1994 (2) ZLR 89 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Criminal appeal 21 & 30 June 1994

Flynote

Local government - Urban Councils Act [Chapter 214] - s 82(1) - councillor having pecuniary interest in matter being considered by council - when councillor may be said to have an interest - triviality of interest irrelevant

Headnote

A councillor who has any pecuniary interest, direct or indirect, in a contract or proposed contract or other matter and who is present at a meeting of the council or committee at which the matter is to be considered is required by s 82(1) of the Urban Councils Act [*Chapter 214*] to disclose his interest, withdraw from the meeting and not vote on the matter. Once such an interest is established, its triviality is irrelevant. The councillor's presence at the meeting becomes unlawful. The general test as to whether a councillor has a pecuniary interest in a contract or other matter is whether he is so connected with its existence or performance that his financial position is affected by it either beneficially or detrimentally. By using the words "direct or indirect", the legislature aimed to extend the disqualification beyond the immediate parties to the contract or other matter. The provisions of s 82(2), which specify two situations where a councillor is deemed to have an indirect pecuniary interest, are merely instances of such an interest being held and do not preclude others.

Cases cited:

R v Edwards 1934 EDL 2

R v Froneman 1954 (4) SA 293 (N)

Olley v Maasdorp & Anor 1948 (4) SA 657 (A)

Woods v East London Municipality & Ors 1974 (4) SA 541 (E)

GUBBAY CJ

J. R Devittie for the appellant

Mrs J Zindi for the respondent

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Judgment

Gubbay CJ: The appellant, who is a councillor and former mayor of the City of Mutare, was convicted in the magistrates Court of contravening s 82(1) of the Urban Councils Act [*Chapter 214*]. Omitting the proviso, the section reads:

> "If a councillor or other member of a committee has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter and is present at a meeting of the council or committee at which that contract or other matter is the subject of consideration, he shall at that meeting, as soon as practicable after the commencement of the discussion of the item in which he has a pecuniary interest, disclose his interest and shall withdraw from that meeting while that item is under consideration and shall not vote at that or any other meeting on any question relating to that contract or other matter."

Liability to a fine not exceeding $1 000 is prescribed in subs (6) for a councillor who knowingly contravenes subs (1). The fine imposed upon the appellant was $100.

It was not in contention at the trial that on 10 September 1992, the appellant attended a meeting of the General Purposes Committee chaired by the then mayor of Mutare, Mr Abisha Mutore. The meeting had been called for the purpose of debating the recommendation of the town clerk that Stand 28, Dangamvura Township, should be repossessed. The stand had been sold by the Council on 24 October 1983, to Batanai Co- operative, but transfer had not been effected as the required commercial development thereon had not been carried out. The appellant, who was believed to have a pecuniary interest in the matter of Stand 28, was requested to withdraw from the meeting. This he adamantly refused to do. He vociferously proclaimed that he had no pecuniary interest, either direct or indirect, and that he was not a member of Batanai Co-operative. Nonetheless he proceeded to urge the meeting to allow the Co-operative a twelve-month period of grace in which to commercially develop Stand 28.

That he had no pecuniary interest in Stand 28 was the defence raised by the appellant in answer to the resultant charge brought against him. A fellow councillor, one Onias Nyandoro, supported the appellant's stance. He testified that the appellant had been approached to assist the Co-operative in

overcoming the problems facing it in securing transfer of Stand 28 from the City of Mutare, and that it was never intended that he was to benefit financially from whatever he did in furtherance thereof.

Taking account of the nature and extent of the appellant's actions, the presiding magistrate rejected the assertion of altruistic assistance. The issue before this court is whether he was right in doing so. Stated otherwise, whether on a conspectus of the whole evidence of the appellant's conduct, the only reasonably possible inference arising therefrom was that he had a pecuniary interest in the matter of Stand 28.

The effect of subsections (1) and (6) of s 82 of the Act is to proscribe attendance by a councillor or member of a committee at a meeting of the council or committee where a contract or other matter in which he knowingly has a pecuniary interest is discussed. Once such an

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interest is established, triviality thereof is irrelevant; his presence becomes unlawful. The mischief aimed at is a pecuniary interest differing from that shared by the general body of rate-payers. It is one which is peculiar to the councillor or committee member. He must not permit his pecuniary interest to conflict with the duty he owes to rate -payers. See, generally, *R v Edwards* 1934 EDL 2 at 8; *R v Garb* 1934 CPD 66 at 69-70; *R v Froneman* 1954 (4) SA 293 (N) at 295E-H.

Under the proviso to s 82(1), three situations, none of which on the facts of the case were apposite to the appellant, are excluded from the purview of subs (1). Subsection (2), however, specifies two situations in which a person shall be deemed to have an indirect pecuniary interest in the contract or other matter under consideration. They are where:

> "(a) he or any nominee of his is a member of a company or other body with which the contract is made or is proposed to be made or which has a direct pecuniary interest in such other matter; or
>
> (b) he is a partner or is in the employment of a person with whom the contract is made or is proposed to be made or who has a direct pecuniary interest in such other matter."

Again, the exempting provisos to this sub-section were of no application to the appellant.

It is clear that paras (a) and (b) to s 82(2) were not intended by the lawmaker to amount to a comprehensive definition of the words "indirect pecuniary interest". They merely cite instances in which such interest shall be held to exist, without precluding others. I respectfully agree and adopt the general

GUBBAY CJ

test enunciated by WATERMEYER CJ in *Olley v Maasdorp & Anor* 1948 (4) SA 657 (A) at 665 that

> " ... *prima facie* ... a person has a pecuniary interest in a contract (or other matter) if he is so connected with its existence or performance, or in other words so circumstanced with respect to it, that his financial position is affected by it either beneficially or detrimentally.'

As the learned CHIEF JUSTICE went on to point out, by using both words "direct" and "indirect" the Legislature aimed to extend the disqualification beyond the immediate parties to the contract or other matter (see at 665 *in fine*). See also *Woods v East London Municipality & Ors* 1974 (4) SA 541 (E) at 548H.

I come now to the facts of the case, which were either common cause or proved conclusively in evidence.

1. On 24 October 1983, the City of Mutare sold Stand 28, Dangamvura Township, to a body calling itself Batanai Co-operative. It was a term of the written agreement of sale that the stand was to be developed and used as trading premises. Unknown to the seller, Batanai Co-operative had not been registered as a co-operative society under s 8(1) of the Co operative Societies Act [*Chapter 193*]. It was merely a loose association of eleven named individuals.

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2. Some time in 1990 the appellant advised Mr Stewart Matsikira, the chief legal and administrative officer in the employ of the Council, that he was a representative of Batanai Co-operative and requested the title deeds to Stand 28. Matsikira declined. He explained that, as the required development of the stand had not taken place, transfer could not be registered.

3. On a later occasion, probably during 1991, the appellant informed Matsikira that Batanai Co-operative was using his residential address as its own. And he submitted certain correspondence concerning Batanai Co-operative to Matsikira.

4. In February 1992, the town clerk, Mr Verbas Matamisa, circulated a report in which he recommended to the General Purposes Committee that Stand 28 be repossessed by the Council. He emphasised that for the past nine years no development had been undertaken on the stand and

GUBBAY CJ

that he had been unable to trace the whereabouts of the Batanai Co-operative - letters sent to all known addresses had been returned. Albeit not one of the original eleven members, the appellant objected to the recommendation. He claimed that the Co-operative was still in existence and that its members were willing and ready to develop the stand.

5. During March 1992, the appellant instructed the firm of legal practitioners, Gargan Brothers and Chadder, to attend to the transfer of Stand 28 to Batanai Co-operative. The necessary papers were prepared and were signed by the appellant on behalf of the Co- operative.

6. On 14 May 1992, the appellant was the first signatory to a document containing the following declaration:

"We the undersigned agree to form a society for the purpose of trading business(ses) anywhere in Zimbabwe under the trading name of Batanai Co-operative."

Four other persons placed their signatures below the appellant's, of whom only Nyandoro remained as one of the 1983 members.

7. The appellant handed a copy of this document to Matsikira who, on noting that the names of the signatories differed from those of the original members, instructed the aforementioned legal practitioners not to proceed with the transfer of Stand 28.

8. Copies of the declaration of 14 May 1992 and the Co-operative's proposed Constitution were tendered by the appellant to the district officer of co-operatives, Mrs Barbara Mlambo. He enquired of her the procedures to be followed in registering a co-operative.

9. At the meeting held on 8 September 1992 the chairperson requested the appellant to withdraw from the discussions concerning Stand 28 as the Town Clerk's report

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revealed that he had a pecuniary interest in the matter. The appellant refused to leave the meeting. He protested that the allegation of interest was based on gossip. In the result it was resolved that the debate on Batanai Co-operative be deferred to 10 September 1992.

It seems to me - as I put to counsel during the course of argument - that the existence of the document of 14 May 1992, was sufficient in itself,

GUBBAY CJ

without recourse to any of his other actions, to bring the appellant squarely within the ambit of para (a) to s 82(2) of the Act.

The document had been prepared and signed with the object of seeking to obtain registered title to Stand 28 and to resist the risk of it being repossessed by the Council. It proclaimed that five persons, inclusive of the appellant, had agreed to form a co-operative society for the purpose of carrying on trade under the name of Batanai Co-operative. Where were the trading premises to be located? Unquestionably Stand 28 was in mind. Viewed in its factual setting, the document disclosed that a body, consisting of five persons, had a direct pecuniary interest in the matter concerning the fate of Stand 28, for the body desired to trade profitably therefrom. Accordingly, the appellant, as a member of that body, must be deemed to have had an indirect pecuniary interest in such matter, which was due to be debated on 10 September 1992.

The same conclusion is reached by having regard to the appellant's actual involvement with Stand 28, as already outlined. Taken as a whole his actions completely belie an absence of any pecuniary interest. It is inconceivable that the appellant would have gone to the lengths he did - to the extent of being the first signatory to the document of 14 May 1992 and signing the transfer papers on behalf of the Co-operative - merely to lend assistance, at the request of Nyandoro, who was only one of eleven individuals who had associated together in 1983 and thereafter disbanded. The appellant, therefore, was not acting on behalf of the original members. The old Batanai Co-operative had ceased to exist. His actions were clearly designed to rescue Stand 28 from being repossessed so that he, Nyandoro and three others, could form a co-operative society, obtain transfer of the commercial property and profitably trade thereon. In short, the appellant was so circumstanced with respect to Stand 28 that his financial position, either advantageously or detrimentally, was bound to be affected by the decision of the General Purposes Committee. This is the only possible inference that the objective facts permit.

I would, accordingly, dismiss this appeal, which lay solely against the conviction.

Korsah JA: I agree.

Muchechetere JA: I agree.

Bere & Assocs, appellant's legal practitioners

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MOTALA v HOVE, MUTASA & ASSCS & ANOR 1994 (2) ZLR 95 (HC)

Court **High Court, Bulawayo**

Blackie J

Civil application

20 May 1994

Flynote

Criminal procedure - arrest - without warrant - grounds for - contempt of Court - not competent for police officer to arrest a person for contempt of court in absence of order by court that the person is guilty of that offence

Headnote

The applicant was a landlord who had issued one summons out of the magistrates court against two different persons. The claim against the first person was for the repayment of a loan. The claim against the second person was for ejectment from a flat owned by the applicant. An order for ejectment against the second person (who apparently co-habited with the first) was granted. The second person obtained an order against the applicant that he be reinstated in the flat, but the applicant failed to obey this order. The respondent firm of legal practitioners, who acted for the second person, requested the police to arrest the applicant for contempt of court. The applicant was arrested and taken to a police station. He brought an action against the respondent and their client for wrongful arrest.

The only point at issue in this application was whether it is lawful for a police officer to arrest a person for contempt of court before there has been an order declaring that that person was guilty of contempt.

Held, that a person who disobeys an order made by a magistrates Court against him, whether in a civil or a criminal case, may commit the crime of contempt of Court, both at common law and in terms of s 79 of the Magistrates Court act [*Chapter 18*]. However, in the absence of very specific requirements, a police of ricer does not have general or unlimited

BLACKIE J

powers of arrest. Arrest without a warrant may only be carried out in respect of an offence specified in the First Schedule to the Criminal Procedure and Evidence Act [*Chapter 59*]. Contempt of court is excluded from that Schedule on two grounds: by name, as a common law offence; and by implication, in respect of the offence under the Magistrates Court Act, by reason of the penalty provided.

Cases cited:

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R v Bowden 1919 SR 93

S v Beyers 1968 (3) SA 70 (A)

J K Stirling for the applicant

P Dzimba for the respondents

Judgment

Blackie J: It is common cause:

(a) that a magistrates court issued an order against the applicant that "Rashid Mohamed be reinstated in Flat No 275 Main Street ... until such time as the applicant properly sues him end obtains judgment against trim in that regard";

(b) that the applicant did not reinstate Rashid Mohamed in the flat;

(c) that the respondent, acting for Rashid Mohamed, advised him to have the applicant arrested for contempt of court and directed the police to arrest the applicant for that contempt;

(d) that the police, acting without a warrant, arrested the applicant and took him to a police station.

The applicant has sued the respondent and Rashid Mohamed for damages for wrongful arrest. The parties have agreed that the action shall be determined on two issues. These issues are:

> "(1) Can a police officer (lawfully) arrest a person for contempt of court before there is a declaratory order to that effect?
>
> (2) The quantum of damages and the liability for costs."

In this application I am asked to determine only the first of these two issues.

The facts of this case, other that those which I have already set out as common cause, are not essential in the determination of this application. However, they provide the background to the case, some light relief to it and a lesson in how it is possible for a very big mess to start from a very small case.

BLACKIE J

The applicant's legal practitioner (not the one who appeared in this court, nor the firm of that legal practitioner) issued a summons out of the magistrates court in a country town. In that one summons there were two claims: firstly, one against a Miss Millar, as first defendant, for ejectment from the flat, payment of $97 and costs; and, secondly, one against Rashid Mohamed, for the repayment of a loan of $200 and costs. The flat was the address for service for both defendants in the summons.

The particulars for the claim of ejectment against Miss Millar are excipiable. That, however, is a

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detail against the combining, in one summons, two entirely different claims against two completely separate defendants without any stated link between them.

Neither defendant entered appearance to defend. The applicant took judgment against both of them. He issued a writ against Rashid Mohamed, based on the judgment, for the repayment of the loan. That writ claimed both execution against property and ejectment from the flat. The return of service given to me in this application shows only that the messenger attached some property at the flat. However, there must have been an ejectment because the respondent comes into the picture, flung off letters of protest against the ejectment - one to the applicant demanding reinstatement, one to the messenger demanding an immediate start to interpleader proceedings, and one to the magistrate demanding that the ejectment writ be cancelled.

There was an opposed application to cancel the ejectment writ. The applicant said it was valid because Rashid Mohamed cohabited with Miss Millar. The magistrate made the order that I have set out at the beginning of this judgment.

It is clear that a person who disobeys an order made against him by a magistrates court may commit the criminal offence of contempt of court both at common law (*R v Bowden* 1919 SR 93) and in terms of s 79 of the Magistrates Court Act [*Chapter 18*]. It does not matter whether the court order was made in a civil or criminal case: *S v Beyers* 1968 (3) SA 70 (A) 77F-G. However, in the absence of a court order of committal for contempt, for which there are very specific requirements, a police officer does not have general or unlimited powers of arrest. The Criminal Procedure and Evidence Act [*Chapter 59*] sets out the powers of a police officer to arrest without warrant There is no other relevant legislation. Section 29(1)(b) of that Act is the only section which might apply to the facts of this case. That section permits a police officer to so arrest "every person whom he has reasonable

grounds to suspect of having committed any of the offences mentioned in the First Schedule" to the Act.-Contempt of court is, however, excluded from the First Schedule: by name in respect of the common law; by implication in respect of the Magistrates Court act, by reason of the penalty provided for a contravention of s 79.

In the result, therefore, it is not lawful for a police officer to arrest a person for contempt of court in the absence of an order by a court that he is guilty of that offence.

In accordance with the agreement between the parties the question of costs of this application is reserved for determination when the second issue in action is heard.

Coghlan & Welsh, applicant's legal practitioners

Hove, Mutasa & Associates, respondent's legal practitioners

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S v SHAND 1994 (2) ZLR 99 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Criminal appeal

7 July 1994

Flynote

Criminal procedure - charge - amendment of - substitution of one charge for another - not an amendment within meaning of s 191 of Criminal Procedure and Evidence Act [Chapter 59]

Headnote

In terms of s 191(1) of the Criminal Procedure and Evidence Act [*Chapter 59*], a court may, in certain circumstances, amend a charge. This provision only allows the court to make corrections to the existing charge; it does not allow the court to substitute a totally different charge.

In any event, in the present case there was a possibility of prejudicing the appellant if the Supreme Court were to allow the substitution of a new charge.

Cases cited:

S v Moyo (2) 1978 RLR 469 (G)

S v Mngadi & Ors 1986 (1) SA 526 (N)

S v Kruger en Andere 1989 (1) SA 785 (A)

S v Chitengu 1979 RLR 228 (G)

D P Carter for the appellant

Miss T Searl for the respondent

Judgment

Gubbay CJ: At approximately 22:20 hours on 27 November 1990, the appellant, who was the manager of Shamva Gold Mine, telephoned the regional mining inspector, Mr Trevor Wharren, to notify him that a fatal accident had occurred. He related that he had been informed that an hour or

BLACKIE J

so earlier an underground lasher, one Wilson Nyakudyana, while working underground at 9 17E middle sub-level, had fallen down an ore pass raise together with his wheelbarrow, and that his body had been recovered. Wharren instructed the appellant to seal off the area and advised

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that he would attend the scene the next morning to carry out investigations.

On arrival at the Mine at 08:00 hours Mr Wharren proceeded to 9 17E middle sub-level. Although "No Entry" signs had been posted at the entrance, it was quite obvious to him that the scene of the accident had been disturbed or altered. A new tipping barricade, comprising vertical poles and strong wire strands, had been erected in place of the one existing at the time of the accident. Enquiries revealed that this had been done at the instance of the senior gang leader, Pontino Zulu, by other subordinate employees without the appellant's knowledge.

This scenario led to the prosecution of the appellant on a single charge of contravening s 9(1)(a), as read with s 301(1), of the Mining (Management and Safety) Regulations 1990 (SI 109 of 1990), it being alleged that, as manager of a mine and being given a lawful order by an inspector of mines to seal off the scene of the accident, he had failed to comply with such order.

In convicting the appellant, the trial magistrate held that the scene of the accident had been tampered with. Undoubtedly the proved facts established that it had been, but such disturbance, albeit the thrust of the State's case, did not constitute the particular offence charged. What was overlooked was the clear evidence of Mr Wharren that the area of the accident had been sealed off by the erection of the "No Entry" signs. In other words, it was accepted by Mr Wharren that his instruction to the appellant the evening before had been complied with.

Not surprisingly Miss *Searl,* who appeared for the State, was constrained to concede that the conviction on the charge laid could not be sustained. She sought to argue, however, that it was nonetheless appropriate for this court to amend the charge in terms of s 191(1) of the Criminal Procedure and Evidence Act [*Chapter 59*] to one of contravening s 269(2) of the Regulations, and to substitute a conviction for that offence.

Section 269(2) of the Regulations reads:

> "After the occurrence of an accident involving the death of any person or the injury of any person which results or is likely to result in death, the

> place where the accident occurred shall not, without the consent of an inspector, be disturbed or altered before it has been examined by an inspector:
>
> Provided that this subsection shall not apply to such disturbance or alterations as is unavoidable to prevent further accidents, to remove bodies or to rescue persons from danger."

I entertain not the slightest doubt that the suggested course would be incompetent. It would amount to substituting a totally different charge rather than merely effecting the type of amendment contemplated by s 191. In this regard reference may be made to *S v Moyo* (2) 1978 RLR 469 (G) where at 471E-H it was said:

> "In *Risley v Gough* [1953] Tas SR 78, the Supreme Court of Tasmania considered the meaning to be assigned to the word 'amended' in a section of the Justice Procedure Act of 1919, which made provision for the amending of grounds of appeal. GIBSON J at page 79 said:
>
> > '... I cannot construe the word 'amend' other than to mean the perfecting or ameliorating of an existing

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thing-not supplying a vacuum with something that should be there.' (Quoted in Words and Phrases Legally Defined, 2 ed, Vol 1 at p 78-79).

I think this is the meaning to be applied to s 191. It amply demonstrates that not every alteration, particularly one that causes the complete destruction of the 'existing thing' or its substitution by something else, can properly be deemed an amendment. In *R v Mnyekwa* 1947 (4) SA 433 (E), LEWIS J obviously had this in mind in holding that the substitution of one offence for another was not an amendment within the meaning of the relevant section of the South African Criminal Procedure and Evidence Act."

See also *S v Mngadi & Ors* 1986 (1) SA 526 (N) at 530D-G; *S v Kruger en Andere* 1989 (1) SA 785 (A) at 796D-E; and compare *S v Chitengu* 1979 RLR 228 (G) at 230A-D.

Furthermore, the possibility of prejudicing the appellant in the conduct of his defence, by permitting a substitution of charges, cannot be discounted. If the appellant had been faced with a contravention of s 269(2) of the Regulations, it is highly likely that some effort would have been made to show that the

requirements of the provisio had been satisfied, that is, that the construction of the new tipping barricade he was unavoidable to prevent further accidents.

It was essentially for these reasons that, at the conclusion of the arguments presented by counsel, appeal was allowed and the conviction and sentence set aside.

McNally JA: I agree.

Korsah JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

TAKAFUMA v TAKAFUMA 1994 (2) ZLR 103 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

14 July 1994

Flynote

Family law - divorce - division of assets - principles and procedure to be followed

Headnote

When the spouses in this case obtained a divorce, a dispute arose as to the division of a major

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asset, namely, a house. The house was registered in the names of the husband and the wife and the wife had an undivided half share in the house.

Held, that in dividing up the assets the court must not simply lump all property together and then divide it up in as fair a way as possible. The correct approach is first to sort out the property into three lots, which may be termed "his", "hers" and "theirs". Then the court should concentrate on the lot marked "theirs". It must apportion this lot using the criteria set out in s 7(1) of the Matrimonial Causes Act 33 of 1985. It must then allocate to the husband the items marked "his", plus an appropriate share of the items marked "theirs". It must then go through the same process in relation to the wife. Having completed this exercise, the court must finally look at the overall result and again, applying the criteria set out in s 7(1) of the Act, consider whether the objective has been achieved of placing the parties in the position they would have been in had the marriage continued, insofar as this is reasonably practicable and just, having regard to the conduct of the spouses.

Held, further, that in the present case the correct approach should have been to start by dividing equally the proceeds of the sale of the jointly owned house, and then to make adjustments in the light of the contributions made by the parties towards the purchase of the house and improvements upon the house, and income received by the parties from the house.

1994 (2) ZLR p104

McNALLY JA

Cases cited:

Ncube v Ncube S-6-93

Chikomba v Nkomo S-62-91

S Moyo for the appellant

P Carter for the respondent

Judgment

McNally JA: The parties in this matter were married to each other and although they are no longer married it will be convenient to refer to them as "the husband" and "the wife". The husband instituted proceedings against the wife for divorce and ancillary relief in the High Court. She counter claimed for divorce and ancillary relief

The divorce was granted to the husband on an unopposed basis. There is no dispute about that. What is in dispute is the court's order in respect of the division of a major asset of the parties, namely the immovable property at 68 Bargate, Vainona. The stand number was not given. It should have been.

The order of the court *a quo* was defective in that it omitted to mention what was to be transferred. It is also confusing that the date of the defective order is shown as "October 5, 1992", whereas the judgment is headed "Harare, 5 October 1992 and 24 February 1993" which suggests that the matter was heard on the former date but that judgment was handed down on

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the latter date. The attention of the Deputy - Registrar is drawn to these errors. They should not be allowed to occur.

Be that as it may, the parties are agreed that the effect of the defective order is that the wife is ordered to transfer her share in the property at 68 Bargate (which I will call "the Vainona property") to the husband or his nominee, against payment by him to her of the sum of $12 000. Of that sum, $9 000 represents her share in the property, namely one half of one twenty-fifth of the value of the property which was agreed as $450 000. The remaining $3 000 represents a rough calculation of one-fifth of the net profit by way of rentals which the husband kept for himself.

The question which arises here is whether the learned judge has correctly applied the law to the facts.

Let me begin by setting out the relevant facts.

The parties were married out of community of property at Harare on 10 November 1982. He is a mining metallurgist of some seniority; she is a town

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planner. They have no children. When they were first married he lived in a mine house at the Trojan Nickel Mine, Bindura, and she lived there for a few months. However, her job was in Harare, so from February 1983 she stayed overnight at her father's house in Marimba Park in Harare quite frequently.

Then in March 1984 he got a job in Harare and they rented the same house in Marimba Park. In December 1984 his mining employers gave him a 100% guarantee to buy a house. The parties bought the Vainona property and it was registered in their names jointly, ie in equal undivided shares.

They lived together in that house from the end of December 1984 until she left in October 1985. Thereafter he remained in the house until the end of June 1987 when he was transferred to Zvishavane as General Manager of the ZMDC Gold Division. He subsequently occupied a mine house in Zvishavane, paying a nominal rental. She, after leaving him in October 1985, acquired the house in Marimba Park where she has since lived. He remarried, by customary law, in April 1987, and had a child. He and his new wife and child live in the mine accommodation provided by his employers in Zvishavane.

There are numerous disputed allegations about which of them paid for various motor cars, licences, groceries, maintenance works on the house, etc. none of which were of much assistance. But in general the disputes over items of movable property were resolved. As to the house she purchased from her father, or her father's estate, at 50 Marimba Park, it appears she did so by raising a bond, which she financed from her own resources after they separated. So that house does not fall into the common estate.

The only question therefore was - how should the court divide the Vainona property?

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The learned judge relied on the provisions of s 7(1) of the Matrimonial Causes Act 33 of 1985 and assessed her contributions towards the purchase of the Vainona property at one half of one twenty-fifth of the value of the house, or one fiftieth of $450 000 which was the agreed value of the house. This led to his award to her of $9 000, as earlier indicated.

It seems to me, with respect, that that approach is fundamentally flawed, because it fails to take account of the fact that she was (and is) the registered owner of an undivided half share in the Vainona property.

The registration of rights in immovable property in terms of the Deeds Registries Act [*Chapter 139*] is not a mere matter of form. Nor is it simply

a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of "real right" in s 2 of the Act. The real right of ownership, or *jus in re propria*, is "the sum total of all the possible rights in a thing" - see Wille's *Principles of South African Law* 8 ed p 255.

The duty of a court in terms of s 7 of the Matrimonial Causes Act involves the exercise of a considerable discretion, but it is a discretion which must be exercised judicially. The court does not simply lump all the property together and then hand it out in as fair a way as possible. It must begin, I would suggest, by sorting out the property into three lots, which I will term "his", "hers", and "theirs". Then it will concentrate on the third lot marked "theirs". It will apportion this lot using the criteria set out in s 7(3) of the Act. Then it will allocate to the husband the items marked "his", plus the appropriate share of the items marked "theirs". And the same to the wife. That is the first stage.

Next it will look at the overall result, again applying the criteria set out in s 7(3) and consider whether the objective has been achieved, namely, "as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses ... in the position they would have been in had a normal marriage relationship continued ...".

Only at that stage, I would suggest, should the court consider taking away from one or other of the spouses something which is actually "his" or "hers".

In the present case there is no question of penalising one or other of the parties "having regard to their conduct". Each party blamed the other for the failure of the marriage, and the court, quite properly, did not go into the matter. It was satisfied that the marriage had broken down irretrievably, and did not apportion blame. So that criterion was not applicable, and was rightly not applied. Compare *Hughes v Hughes* S-207-92.

The error lay, with respect, in treating the Vainona property as if it had been registered in his name. It should have been treated as half "his" and half "hers". She had a real right to an undivided half share of that property. That is the starting point. If the property had been registered in his name, as is so often the case in divorce matters, then the court would start from the premise that the property was "his". It would then have worked out, by the application

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of the criteria mentioned, how much of it should be taken away from him and given to her. But the property was not registered in his name, so that approach was not the right one to adopt. Yet it was the approach adopted by the court *a quo.*

McNALLY JA

To put it another way, the court should not have asked "How much of the value of the property should be given to her?" It should have asked "How much of the value of her half share should be taken away from her?"

I may interpose here to remark that the learned judge was mistaken when he commented that:

> " ... it seems to me extremely unjust to sell the house, which plaintiff and his new family regard as their home ..."

In fact the husband has been living since mid-1987 in a mine house in Zvishavane, and the Vainona property has been rented out by him. And he has kept the rentals.

The approach which I have outlined is consistent with an earlier decision of this court. In *Ncube v Ncube* S-6-93 (unreported) KORSAH JA dealt with a similar situation at pp 9-12 of the judgment. He adopted the approach of starting from a position of 50-50 ownership and only moving away from that position if the justice and equity of the case required it. I refer, in particular, to the following passages at p 11 of the judgment:

> "It is incorrect to say that the appellant as a registered joint owner is not entitled to a half share of the value of the Napier Avenue property because she did not contribute money or money's worth towards the acquisition of the property. As a registered joint owner she is in law entitled to a half share of the value of that property.
>
> The proper approach is to accord her her share of that property and then, taking into account all the assets of both spouses to endeavour as far as is reasonable and practicable and is just to do so, to place the spouses in the position they would have been in had a normal marriage relationship continued between them. In the performance of this duty a court is empowered, in the exercise of its discretion, to order that any asset be transferred from one spouse to the other."

See also *Chikomba v Nkomo* S-62-91 at p 5.

In *Ncube*'s case *supra* the wife owned two other immovable properties and the husband had nothing but his half share in the Napier Avenue property. The court, on those facts, ordered her to transfer her half share to him. In the present case the facts are different. She has one other property, which is bonded. But he, though he has no other fixed property, has an extremely

McNALLY JA

valuable right, by virtue of his employment. That is the right to subsidised housing on the mine where he works. In addition he has apparently the privilege of obtaining a loan to buy a house, at a low rate of interest.

In effect, therefore, their housing situations are roughly balanced. The Vainona property is, in effect, a joint investment. There is no reason in equity to disturb that situation. The duration of

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the marriage is of no relevance.

I would start, therefore, from the position that each of them is entitled to a half share in the Vainona property. But an adjustment must be made to take account of the fact that he has invested certain sums in the property. He has paid off the full purchase price, which they should have paid jointly. He has paid for the walling of the house, which they should have paid jointly. Maintenance expenses do not come into this exercise, but he had also paid, apparently, for the construction of a "garage of steel wire bars".

He is, therefore, entitled to claim as a deduction from her half share:

(a) half the payments he made towards the purchase of the house (but not including any interest payments);

(b) half the cost of the walling;

(c) half the cost of the garage;

(d) interest on these amounts from date of payment by him at the court rate.

It is not possible for the court to calculate these figures. But they should be easily calculable and I would hope that the legal representatives of the parties can agree on the appropriate figure. If not, the panics will have to come back to court.

It may be noted that this method of calculation allows both parties to benefit from the considerable increase in the value of their joint investment. This is the situation they would have been in "had a normal marriage relationship continued".

It remains only to consider the $3 000 awarded to her by way of compensation from his retention of the whole of the rent which has accrued since mid-1987. She claims the right to half of that rent. It seems to me that the claim cannot be disputed. She is entitled to the fruits of her property. There is an interest factor here too, which will have to be calculated. The parties must agree on a figure, or go back to court and place the figures before the court for decision.

If no other agreement can be reached, the Vainona property will have to be sold. But if he is able and willing to pay her the figure computed and agreed

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McNALLY JA

in terms of this judgment, then her half share of the property may be transferred into his name.

Accordingly, the appeal is allowed with costs. The order of the High Court dated 5 October 1992, but probably issued on 24 February 1993, is set aside, save insofar as it relates to the granting of a divorce. The following order is substituted in regard to ancillary relief:

"A. Unless otherwise agreed between the parties, the immovable property described as 68 Bargate, Vainona, Harare is to be sold to best advantage and the net proceeds are to be divided equally between the parties, subject to the following adjustments:

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1. the Plaintiff shall be entitled to set off against the defendant's share:

   (a) half of the payments he made towards the purchase of the property, excluding any interest payments;

   (b) half of the cost of the improvements he effected.

2. the defendant shall be entitled to set off against the Plaintiff's share a claim for half of the net rentals received in respect of the premises since he ceased to live there.

3. an appropriate allowance is to be made for interest, at the court rate, due by the defendant to the Plaintiff in respect of the amounts paid as under 1 above, and by the Plaintiff to the defendant in respect of the rentals received as under 2 above.

B. Failing agreement on the calculations referred to above the parties are given leave to set the matter down afresh for final adjudication.

C. There will be no order as to costs."

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Muvingi & Machaya, respondent's legal practitioners

MAARSCHALK v MAARSCHALK 1994 (2) ZLR 110 (HC)

Court **High Court, Harare**

Smith J

Divorce action

6 & 27 July 1994

Flynote

Family law - child - custody and guardianship - joint custody and joint guardianship - when may be awarded following divorce - principles

Family law - Matrimonial Causes Act 1985 - s 10(2) - whether section permits making of award of joint custody

Headnote

The parties were married in 1978 end had two sons, aged 12 and 10 at the time of the divorce. Before the divorce, the parties had been separated for five years, but had discussed matters concerning the children in an amicable way. The children had stayed with their mother during the week but spent most weekends with their father. The divorce was unopposed and the

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consent paper provided that joint custody and guardianship be awarded to the two parties. After a review of South African authorities on the subject of whether joint custody and guardianship can or should be ordered,

Held, that although s 10(2) of the Matrimonial Causes Act 1985 allows the court to commit the children into the custody of "such of the parties ... as the court may deem best fitted to have such custody", the context of the section did not preclude the application of s 8(2) of the Interpretation Act [*Chapter 1*], in terms of which the singular includes the plural. Accordingly, if the court deemed such a course to be in the best interests of the children, it was not precluded by the Act from making a joint award of custody.

Held, further, that although the parties discussed decisions about the children in an amicable way and their primary concern was the well-being of the

SMITH J

children, the award of custody to only one of the parties would not prevent them from carrying on their present commendable arrangements. However, although the good faith of the parties was not in doubt, they were not infallible. Other unforeseen events, such as the remarriage of either party, could well adversely affect the present amicable arrangements. The power to make awards of joint custody is rarely exercised and should be used cautiously in view of the obvious pitfalls. Only if the interests of the children clearly called for such an award should it be made. In this case, it had not been established that the children's interests did call for such an award, and consequently it would not be made.

Held, further, that in terms of s 2 of the Guardianship of Minors Act [*Chapter 34*], where the parents are divorced or living apart and sole guardianship of the children has not been awarded to one of the parents, the rights of guardianship are exercised by the father in consultation with the mother, who may apply to a judge in chambers for an appropriate order if a decision of the father is contrary to her wishes. No case had been made out for an award of joint guardianship.

Cases cited:

Edwards v Edwards 1960 (2) SA 523 (D)

Kastan v Kastan 1985 (3) SA 235 (C)

Venton v Venton 1993 (1) SA 763 (D)

Pinion v Pinion 1994 (2) SA 725 (D)

Schlebusch v Schlebusch 1988 (4) SA 548 (E)

Miss *K Grier* for the Plaintiff

No appearance for the defendant

Judgment

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Smith J: The parties were married to each other on 7 July 1978. There are two minor children of the marriage, both boys, one of whom is 12 years old and the other is 10. The marriage has broken down irretrievably and the plaintiff has filed for divorce. The application is not opposed. The parties have entered into a consent paper which they want to be incorporated in the court order. The consent paper provides for the plaintiff and the defendant to be awarded joint custody and guardianship of the two children. It also provides that the children will reside with the plaintiff and the defendant shall be entitled to reasonable access. It further provides that decisions concerning the future education of the children will be made jointly by the parties and the children's wishes and abilities will be taken into consideration in deciding on the choice of schools and tertiary education.

SMITH J

I asked why the parties wanted guardianship and custody to be awarded jointly. The plaintiff filed a supplementary affidavit in which she made the following points. She and the defendant have been separated for five years. In that time they have discussed any decisions affecting the children in an amicable way. The children stay with her from Monday to Saturday and spend most weekends with their father, the defendant. The parties have found this to be a satisfactory way of enabling both of them to participate in the upbringing of the children. The primary concern of the parties is the well-being of the children.

In Hahlo's *The South African Law of Husband and Wife* 5 ed at p 402 the learned author states:

> "The spouses may enter into an agreement relating to custody, guardianship and access. The court, if satisfied that the proposed arrangements are in the best interests of the children, will incorporate it in the divorce order. As a child must know where it stands, the courts are loath to allow responsibility to be divided or to put the non-custodian spouse in a position where he can dispute or undermine the authority of the custodian parent. Accordingly, they will generally refuse to accept an agreement under which the spouses agree on joint custody or a young child is to spend alternate periods of approximately equal length with each parent. 'It is most undesirable that a child of tender years should be subject to these constant changes.'"

The court, in *Edwards v Edwards* 1960 (2) SA 523 (D), refused to incorporate as part of the court order an agreement whereunder the custody of a child was to be shared between the father and mother. At p 524F-H JANSEN J said:

> "It will be noticed that the main provision in regard to custody of Woodfield is that the custody will be shared equally between the mother and the father. The effect of an agreement of this nature which has not been made an order of court is a matter of some difficulty. I regret that due to the urgency of this matter there has not been more time to investigate the legal effect of such an agreement. It is plain that an agreement of this nature should not be made an order of court. In this regard I refer to the case of *Heiman v Heiman* 1948 (4) SA 926 (T), where MURRAY J refused to make a similar agreement in respect of custody an order of court. It seems to me a legal impossibility that the legal custody of a child could be shared equally between two individuals. The legal custody involves the privilege and responsibility of taking certain

SMITH J

> decisions in regard to, for example, the education of the child. It would seem that such a decision should appertain to a single individual. If the responsibility is shared between two individuals there is the continuing

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possibility of a deadlock arising over every triviality."

However, in *Kastan v Kastan* 1985 (3) SA 235 (C), where the parties had entered into a consent paper making provision for the joint custody of three young girls, the court took a contrary view. At p 236C-F KING AJ said:

"Section 6(3) of the Divorce Act 70 of 1979 is very wide in its terms and certainly allows for an order of this nature. Its very wideness seems to me to be a recognition by the Legislature that pre-eminently matters involving the regulation of the lives of young children should be left to the discretion of the court as upper guardian and that that discretion should, as far as possible, be free and unfettered. It is a discretion which must be exercised within the framework of one guiding rule. It must be exercised so as best to promote the welfare and advance and protect the interests of young children. Orders for joint custody are rare. Such few examples as can be gleaned from the law reports would seem to point emphatically in a direction away from orders of this nature and the reason for this, I would think, is clear. Custody of children involves day to day decisions and also decisions of longer and more permanent duration involving their education, training, religious upbringing, freedom of association and generally the determination of how best to ensure their good health, welfare and happiness. To leave decisions of this nature to the joint decision of parents who are no longer husband and wife could be courting disaster, particularly where the divorce has been preceded by acrimony and disharmony between the parents. It is because of my concern at these inherent risks that I requested counsel to place some evidence before me."

The learned judge went on to say that evidence from a psychiatrist and from a clinical psychologist who was also the director of the Child Guidance Clinic of the University of Cape Town was led. They persuaded him that in the particular circumstances of that case it would be in the best interests of the children for an order in terms of the consent paper to be made. The factors which influenced the two experts and the learned judge were stated as follows at pp 236-7:

"Both the parties are experienced and competent parents. All three of the children are equally bonded to both their parents. They love their parents

very much. Both parents reciprocate this love. The children, young as they are, have expressed their satisfaction with and approval of this arrangement. It has removed from their young minds and hearts the fear that they would lose a parent. Both parents are willing to accept this arrangement and what, of course, is more important, are determined to make it work because they both recognise that it is in their children's interest. In the almost six months since the divorce the parties have established a far better relationship between themselves. The animosities which had previously existed and which the pending litigation had exacerbated have largely subsided. The parties are conciliatory and compromising towards each other. In fact, over the period since the divorce the children have experienced a relationship *vis-à-vis* their parents not essentially dissimilar to what is now envisaged and it has proved beneficial to them."

The learned judge concluded his judgment by saying that the experts had told him that joint custody was being resorted to with greater frequency overseas, more particularly in the United States of America and the United Kingdom, with marked success and that joint custody of children was more and more being regarded by experts in the field as a means of ensuring the continued relationship of both parents with their children.

An order providing for joint custody was also granted by DIDCOTT J in *Venton v Venton* 1993 (1) SA 763 (D). The learned judge said that the parties wanted an order for joint custody but were advised that no such order had ever been made in Natal. However, that advice was wrong

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because orders providing for joint custody had been granted in Natal. He knew of three recent instances, all unreported, and there may have been others of which he was unaware. He conceded that requests for joint custody were rare in Natal and presumably elsewhere too. As he said:

> "The reason seems obvious. The personal circumstances of parents who live separately are seldom conducive to the request. Nor is it ordinarily compatible with their ruptured relationship."

After referring to *Edwards v Edwards* 1960 (2) SA 523 (D) where JANSEN J said that it seemed to him to be a legal impossibility that the legal custody of a child could be shared equally between two individuals, DIDCOTT J said that he disagreed with that view. At p 766D-H he continued:

> "For I do not see why joint custody should be regarded as 'a legal

> impossibility'. The difficulties raised by JANSEN J do not strike me as reasons for taking that view. Instead they suggest that joint custody may well be a practical impossibility. So, of course, it usually is. Everything depends, however, on the particular circumstances of each individual matter. Joint custody will not be awarded unless they satisfy the court that no practical impossibility of any consequence seems likely to ensue. And, if some unforeseen trouble happens to develop after the grant of the order and a dispute erupts over it, that will hardly be a calamity. The court will simply have to be approached to resolve the dispute, as JANSEN J was. I thus feel free to state, as I do, that I fully agree with KING AJ when it comes to the way in which cases of this sort ought to be tackled. I too consider that the court has the power to award joint custody, that the power should be cautiously used in view of the obvious pitfalls, but that its exercise is required once the interests of the child or children appear to call clearly for such. The advantages and disadvantages of joint custody were canvassed by Professor Ivan Schafer in his discussion of the topic which was published in (1987) 104 *South African Law Journal* 149 (at 158-60). Conditions thought to favour its award were listed by him (at 160-1), and in *The Law of Custody* by Hoffman and Pincus (at 53). Neither inventory is exhaustive. Nor are there any hard and fast rules, except for the 'one guiding rule', as KING AJ called it (at 236D), the rule governing all questions of custody, the rule that the interests of the child or children are paramount. And those must always be assessed with reference to the particular circumstances of the case."

A report from the Family Advocate was filed. It was accompanied by reports from a family counsellor and a clinical psychologist. DIDCOTT J described the reports as "thorough, incisive and most illuminating". The clear picture which emerged from the reports was described at 767C-H as follows:

> "The plaintiff and the defendant were sensible, mature, responsible and temperamentally stable people. The relationship between them was a remarkably good one for a couple whose marriage had collapsed. They respected, trusted and remained fond of each other. Throughout their cohabitation they had shared the duties of parenthood, co-operating amicably and constructively on every master that concerned the children. With similar outlooks and values, they had usually seen eye-to-eye in such areas as routine, discipline, hygiene, upbringing and education. Compromise rather than altercation had been their way of coping with

> any difference of opinion that happened to arise. None of that had changed since they parted. They were acutely conscious of the need to render their parting as painless to the children as it could be. To that end each took care

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to say nothing to either boy or in his presence which might be understood as criticism or disparagement of the other. Indeed, they made a point of praising one another in front of the children. The danger inherent in the situation that the boys might try to exploit it by manipulating them was one to which they were alert and for which they felt prepared. They were committed to the experiment of joint custody and dedicated to its success. In effect they had acted as joint custodians ever since their separation. And they planned to continue doing so, even if they were not appointed as such. The children appeared to have adapted themselves well to their altered pattern of life, and to be happy and contented.

I was not sure whether that state of affairs ranked as a Utopian one. But I certainly thought that it made the prospects for joint custody look pretty good on the present occasion. And that was sufficient to persuade me, in all the circumstances of the case, that the interests of the children called clearly for such an award."

A more cautious attitude towards the making of an order providing for joint custody was adopted by PAGE J in *Pinion v Pinion* 1994 (2) SA 725 (D). In that case the parties felt so strongly about having joint custody, believing that it was in their daughter's best interests, that they did not want a divorce if the court would not award them joint custody. The Family Counsellor recommended that joint custody be awarded and the Family Advocate concurred with the recommendation. At p 728F-H PAGE J said:

"There can be no doubt that the court has the power, under s 6(3) of the Divorce Act 70 of 1979, to grant the order sought (see Hahlo *The South African Law of Husband and Wife* 5 ed at 389 *in fin*; *Kastan v Kastan* 1985 (3) SA 235 (C); *Venton v Venton* 1993 (1) SA 763 (D). It is equally clear, however, that such an order will only be made when it is in the best interests of the child to do so.

There are obvious disadvantages inherent in such an order, which have led in the past to the courts usually refusing to make an order for joint custody even though the parties request it. In *Heimann v Heimann* 1948 (4) SA 926 (W) MURRAY J (as he then was) observed in the course of refusing such an order that

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'it was desirable that there should be one parent directly responsible for the child'.

Hahlo (*op cit* at 402) states with reference to this and similar decisions:

'As a child must know where it stands, the courts are loath to allow responsibility to be divided or to put the non-custodian spouse in a position where he can dispute or undermine the authority of the custodian parent.

Accordingly, they will generally refuse to accept an agreement under which the spouses agree on joint custody...'"

He then referred to remarks made by JANSEN J in *Edwards'* case *supra* and to Hoffmann and Pincus *The Law of Custody,* which was published in 1989, at 53-6 where the learned authors expressed their own views as follows:

"In our opinion, however, joint custody is a particularly delicate matter, with far-reaching implications. It is a recommendation that should only be made in special cases where it has been clearly demonstrated to the courts that the parents retain no hostility or resentment towards each other, that they are mutually supportive of each other in regard to the children, and that they have a great deal of respect for each other and mutually desire joint custody. Joint custody should, without exception, only be awarded to those parents who are truly adult in their dealings with each other, and mature in the way they relate to their children. To grant custody to a couple who

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have not resolved their differences, who frequently place their children in the middle of their conflicts and who are unable to communicate effectively with each other in an open, honest and informative manner, would be courting disaster. Such a judgment would merely add fuel to the fore and clearly not be in the best interest of the child."

Reference was also made by the learned judge to *Schlebusch v Schlebusch* 1988 (4) SA 548 (E) at 551h-552D where MULLINS J stated:

"Nevertheless the interests of the child still remain paramount in deciding questions of custody after divorce. Judges claim no expert knowledge which excludes the possibility of a wrong decision in determining custody issues. Furthermore, the views of the parents themselves and the children must be given due weight. However, at the risk of being labelled

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SMITH J

a legal traditionalist (see Professor Schafer's article 154), I view with concern any trend towards the granting of joint custody orders.

While there may in rare cases be a continuing situation where joint decision-making is possible and where the children continue, even years after a divorce, to regard their parents with equal affection and loyalty, such a Utopian state of affairs rarely in practice exists. While 'parents are forever' (to use Professor Schafer's phrase) in a purely biological sense, I cannot agree that the awarding of joint custody will, or is even likely to, ensure 'a continuing relationship between the child and both its parents, so that it need not feel deserted, abandoned or rejected by the absent (*sic)* parent'.

After all, modern children are also aware of the consequences of divorce. It no longer carries the social stigma of earlier generations, and is often welcomed by children as affording relief from unendurable tension and domestic strife. Any sensible child today, even while retaining undiminished affection and loyalty for both parents, would appreciate that their divorce necessarily involves change in domestic control and discipline. If after divorce disputes arise as to matters such as maintenance, access and control, a joint custody order is not likely to avoid such a situation, as occurred in *Edwards'* case *supra*.

Nor do I agree with the other 'obvious additional advantages' of a joint custody order. It does not seem to me that such an order will reduce or eliminate the kidnapping of children or improve parental co-operation. In fact, a joint custody order is more likely to encourage a tug-of-war between the parents if, as so frequently happens, one or both the parents remarry or if one moves to another town. It is the altitude of the parents that will achieve the most beneficial relationship between both parents and the child, not the form of the court's order."

At 730-1 PAGE J concluded:

"Whilst the learned Judge's reference to a Utopian state of affairs elicited a sarcastic allusion in *Venton*'s case, there is undoubted truth in the observation that human relationships are not constant. The future behaviour of parents, as of other humans, is unpredictable; and where their potential behaviour can give rise to a situation which will be detrimental to the interests of the minor concerned, it would, in my view, be better to exclude that possibility by avoiding creating a situation

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SMITH J

where it can occur, unless the advantages to the minor of such a course are so significant as to justify taking the risk involved. I do not think that the fact that the parties may approach the court afresh should the risk materialise is any justification for taking it; it would serve the minor's interests far better not to take it at all.

In the present case the parties are firmly convinced that they will be able jointly to discharge the function of

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custodian parents without friction or deadlock. They have faith in their ability to resolve any disputes which may arise by discussion. Whilst I do not doubt the *bona fides* of their belief, I do doubt their infallibility. I am unconvinced that there is no real risk of acrimonious or irresolute disagreement between them in the future, which will redound to the detriment of the minor. The risk involved is enhanced by the extremely wide field which will have to be covered by their joint decisions as custodian parents, and the extremely long period over which they will be required to function as such. It is, of course, possible that they may be entirely successful; but there exists a very real danger that they will not. Moreover, even if they do succeed ultimately in resolving their differences by discussion, it will not be practically possible to conceal those differences from or present a united front to the minor, particularly as she grows older. It is, in my view, imperative that a child should know, in such a situation, with whom the ultimate say lies, and not be afforded the opportunity of playing one parent off against the other.

As against this, I am unable to see any substantial advantage to the minor in being under the legal custody of both her parents. It is open to the parties to regulate the upbringing of the child by agreement *inter se* irrespective of the fact that legal custody vests only in one of them. Indeed, that is what they professed to intend doing whether an order is granted or not. There is no suggestion in the matter before me that such an arrangement will have any detrimental effect on the child or be any less satisfactory from her point of view than a joint custody order. It will, however, have the undoubted advantage of excluding the risks to which I have already referred.

In the premises, I am of the view that it will be in the best interests of the minor to make an order awarding custody to the plaintiff and defendant jointly."

Section 10 of the Matrimonial Causes Act 33 of 1985 provides that where

SMITH J

there are any children of a marriage the court, before granting a decree of divorce, may require evidence to be produced for the purpose of determining whether or not proper provision has been made for the custody of the children. Subsection (2) thereof provides that, after hearing evidence, the court "may commit the children into the custody of such of the parties or such other person as the court may deem best fitted to have such custody".

Usually there are only two parties to a divorce action, so the reference to "such of the parties" must mean such one of the parties. However, if there is a co-respondent, there could be three parties to the action or, if there is a counterclaim, four parties. In such a case, the reference to "such of the parties" could be construed as a reference to two persons, for instance the defendant and his or her paramour. Subsection (2) also provides that the court may commit the children into the custody of such other person as the court deems best fitted to have such custody. In terms of s 8(2) of the Interpretation Act [*Chapter 11*], any reference in an Act to the singular includes the plural. There is nothing in the context of the Matrimonial Causes Act 1985 to preclude the application of this provision. As the court is the "upper guardian" of minors within its jurisdiction and it must always be guided by what it considers to be the best interests of any particular minor, it seems to me that in interpreting the powers conferred on the court by s 10(2) of the Matrimonial Causes Act 1985 a wide, benevolent interpretation should be given rather than a narrow, constricted one. The court should not be prevented from making an order which it considers to be in the best interests of a child merely because it could be argued that it is doubtful that the Legislature intended to confer such a power. Subsection (3) of s 10 of the Matrimonial Causes Act 1985 provides that that section shall not be deemed to derogate in any way from the powers conferred upon the court by any other law in respect of custody. "Any other law" would include the common law. To my mind, that provision shows that it was the

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intention of the Legislature that the powers of the court should not be narrowly circumscribed. Under the common law, during marriage the custody of the children is shared by the parents so the concept of joint custody is accepted. For the reasons spelt out in the cases referred to above, on divorce custody is usually granted to only one party. It seems to me, however, that where the circumstances justify the award of joint custody, the court should not be precluded from making such an award. As I have tried to point out above, in my opinion s 10(2) of the Matrimonial Causes Act 1985 permits a court to make such an award.

Should the court in this case make an award of joint custody as desired by the parties? I have not had the benefit of expert evidence as was available to the

SMITH J

courts in *Venton*'s case and *Pinion*'s case *supra*. In her supplementary affidavit the plaintiff says that the parties want an award of joint custody because the way they share the upbringing of the two children is satisfactory and enables them both to participate. Furthermore they discuss any decisions affecting the children in an amicable way and their primary concern is the well-being of the children. However, if legal custody vests in only one of the parties they will not be prevented from carrying on their present arrangements, which are commendable. As said by PAGE J in *Pinion*'s case *supra* I do not doubt the *bona fides* of the parties but I do doubt their infallibility. One or other or both of the parties may well remarry before the children attain their majority. That would throw a new factor into the equation and may well affect adversely the present good relationship between the parties. The consent paper provides that the minor children shall reside with the plaintiff and the defendant shall be entitled to reasonable access. That is consistent with the concept of sole custody. It also provides that decisions concerning the future education of the children shall be made jointly. Therefore, if sole custody is awarded to the plaintiff, the defendant will still be entitled to an equal say concerning the future education of the children. If the present good relationship between the parties continues, then the granting of sole custody to the plaintiff should not affect the upbringing of the children. The present arrangements could continue without interruption or disturbance.

In all the cases referred to above, the judge concerned has emphasized that awards of joint custody are rarely made. As DIDCOTT J said in *Venton*'s case *supra* the power to make such an award should be cautiously used in view of the obvious pitfalls. Only if the interests of the children clearly call for such an award should it be made. I do not consider that it has been established in this case that the interests of the two children clearly call for an award of joint custody. Accordingly I decline to make such an award.

The parties also seek an order providing for joint guardianship of the children. Section 2 of the Guardianship of Minors Act [*Chapter 34*] provides as follows:

> "2. Where the parents of a minor -
>
> (a) are living together lawfully as husband and wife; or
>
> (b) are divorced or are living apart and the sole guardianship of such minor has not been granted to either of them by order of the High Court or a judge;

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the rights of guardianship of the father shall be exercised in consultation with the mother, and if a decision of the father on any matter relating to

SMITH J

guardianship is contrary to her wishes and in her opinion likely to affect the life, health or morals of the minor to his detriment, the mother may apply to a judge in chambers, who may make such order in the matter as he thinks proper."

This provision reflects what the position was under the common law: see *Calitz v Calitz* 1939 AD 63. No case has been made by the parties for the award of joint guardianship. I can see no good reason for making such an award. The provisions of s 2 set out above protect the rights of both parties.

It is ordered that:

1. A decree of divorce is granted.

2. Custody of the two minor children -
Ryan Maarschalk (born 20 March 1982) and
Gregory Maarschalk (born 12 March 1984)
is awarded to the plaintiff.

3. The consent paper signed by the parties and filed of record and annexed to this order shall regulate the following matters -

   (a) the rights to maintenance and other payments and benefits for the plaintiff and the minor children;

   (b) access to the minor children and decisions regarding their future education;

   (c) the proprietary rights of the parties as between themselves; and

   (d) other matters specified in the consent paper, including costs.

Paragraph 1 of the consent paper regarding joint custody and joint guardianship shall have no force or effect.

VH Fitzpatrick, plaintiff's legal practitioners

Coghlan, Welsh & Guest, defendant's legal practitioners

PATEL v SIGAUKE & ANOR 1994 (2) ZLR 123 (SC)

Court **Supreme Court, Harare**

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Gubbay CJ, McNally JA & Korsah JA

Civil appeal

4 & 28 July 1994

Flynote

Customs and excise - Customs and Excise Act [Chapter 177] - s 176(a) - seizure of goods - motor car brought into country on immigrant's rebate and sold before expiry of year from date of import - car seized from buyer - to whom vehicle should be returned

Real rights - possession - nature of right - person lawfully dispossessed of unlawfully obtained goods - whether entitled to reclaim possession

Contract - illegality - goods imported under rebate sold contrary to terms of importation - whether such contract void ab initio or merely voidable

Headnote

A Zimbabwean diplomat who had been stationed abroad imported a motor vehicle on her return to Zimbabwe. She did not pay duty by virtue of the immigrant's rebate, in terms of which she was not permitted to dispose of the vehicle within twelve months of the date on which the goods were imported. In spite of this, she arranged to sell the vehicle to one Mereki only six months after it had been imported. He resold it to one Mutero, with a condition that ownership should not pass until the anniversary of the date on which the vehicle was imported and until payment had been made in full. Mutero's cheque was dishonoured and Mereki agreed to wait for the money. In the meantime, Mutero sold the vehicle to the appellant, who paid a price lower than the duty-paid value of the car. A few months after the appellant took possession of it, the car was seized by the Director of Customs, who advised the importer that it would be released on payment of the duty and a fine. Another person arranged with

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McNALLY JA

the importer to pay the duty and the fine and most of the purchase price to Mereki.

The appellant claimed in the High Court that he should be declared the owner and that the vehicle should be released to him. The High Court rejected his claim. On appeal the claim for ownership was abandoned, but it was argued that the Director should have released the car to the appellant and to no-one else. It was also argued that the appellant had rights flowing from the *ius possessionis.*

Held, that the Director was under no obligation to return the vehicle to the person from whom he had seized it. Such a person might be a thief or a mere custodian. In this case, it was apparent **that** the appellant had not paid the true value of the car and must have realised that he was benefitting illegally from the immigrant's rebate. Consequently, he was not entitled to the protection of s 176(3) of the Customs and Excise Act [*Chapter 177*] and the Director was entitled to return the vehicle to the original owner.

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Held, further, that the appellant was lawfully dispossessed by the Director. The *ius possessionis* is nothing more than the right flowing from the fact of possession. It is not a right to possession but a right of possession, and disappears once possession is lost.

Semble, that the series of agreements under which the vehicle changed hands were void, rather than voidable. If they were voidable, they were voidable at the instance of the Director, who was not a party to them.

Cases cited:

York Ests Ltd v Wareham 1949 SR 197; 1950 (1) SA 125 (SR)

Neugarten & Ors v Standard Bank of SA Ltd 1989 (1) SA 797 (A)

AP de Bourbon SC for the appellant

W Ncube for the first respondent

M J Gillespie for the second respondent

Judgment

McNally JA: This is an argument about who is entitled to a Mercedes Benz 250D motor car imported by Ms Sigauke under an immigrant's rebate and disposed of by her before the expiry of the twelve-month period required by the provisions of s 86(5) of SI 344 of 1991

The facts are these. Ms Sigauke, a returning diplomat who had been serving in the Zimbabwean High Commission in London, imported the vehicle on 28 January 1992. She was exempted from paying customs duty in terms of the legislation already mentioned, provided that she did not dispose of it before 28 January 1993.

McNALLY JA

The regulation reads as follows:

> "No immigrant to whom a rebate of duty has been granted in terms of this section shall sell, offer or display for sale, lease, hire, lend, pledge or in any manner whatsoever, whether gratuitously or otherwise, dispose of to any other person any effects or other goods in respect of which such rebate was granted within twelve months of the date of their entry under rebate ..."

The vehicle registration book in respect of the vehicle was endorsed in two places with the words:

> "Ownership of this vehicle may not be (changed?) before 28.1.93. without Customs Control authority." (The word in brackets is not clear on my copy.)

Ms Sigauke claims that she was misled by this endorsement into believing that she could dispose of the vehicle before the expiry of the twelve month period provided that the change of

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ownership was not registered until after the expiry of the period.

Acting on this alleged belief, on 18 August 1992 she entered into an agreement with one Mereki to exchange the vehicle for a house. The agreement was, she says, drawn up by a lawyer. If it was, there is some reason to suspect, in the phrasing of clauses 4 and 5 of the agreement, that the lawyer was aware of the illegality and was seeking to gloss over it. If that is so, it is to be deplored.

I have referred to Ms Sigauke's "alleged belief" because it appears from her own letter to the Director of Customs and Excise (to whom I will refer as "the Director") on 21 April 1993 that her job in London was that of "Consular Officer responsible for immigration customs and passport enquiries". It is difficult in the circumstances to believe that she could have been ignorant of the provisions of SI 344 of 1991 - the Customs and Excise (General) Regulations. These regulations came into force on 15 November 1991, but the section in question is largely a re-enactment of the old s 71(4) of the equivalent 1980 regulations.

Then in November 1992, Mereki sold the vehicle to one Mutero, again subject to a condition that ownership would not pass until 28 January 1993 and until the purchase price was paid. The purchase price was $488 000. The cheque was dishonoured, and when it was re-presented payment was stopped.

McNALLY JA

Mereki agreed to wait until February 1993 for his money. But in the event he never got it.

Meanwhile, on 5 January 1993 Mutero sold the vehicle to Patel, the appellant. He and Patel say the price was $250 000. However at one stage Mutero is said to have confessed to the police that the actual price was $500 000, half of it payable abroad. Patel denies this latter allegation. He paid the $250 000 by cheque.

Patel took possession of the car, spent a certain amount of money on it and as soon as the 28 January 1993 deadline was reached, registered the vehicle in his name. However, in April 1993 the vehicle was seized from him by the Customs authorities, acting, it seems, on information from Mereki via the police.

On 21 April 1993 Ms Sigauke wrote to the Director asking that the vehicle be released to her "as I am the legitimate owner". On 28 May she was advised that the vehicle would be released to her from seizure on payment of the duty ($93 483,20) and a fine ($10 000).

She did not have the money. However, through Mereki she got in touch with a Dr Mundawarara who was willing to buy the vehicle. He paid the customs duty and the fine, by cheque to the Department of Customs & Excise. He paid most of the balance, at Ms Sigauke's request, to Mereki. He still owes $75 000 of the $404 000 purchase price.

Assuming that he will pay the balance, Ms Sigauke will be slightly better off than she would have been under her illegal original agreement with Mereki.

Meanwhile, however, Patel was active. He first took legal action against the Director to try to

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stop him releasing the vehicle to Ms Sigauke. He obtained a provisional order to that effect on 7 June 1993, but before it was served on the Director he released the vehicle.

Next, Patel instituted proceedings to oblige Ms Sigauke to return the vehicle to the Director. A provisional order was made placing the vehicle in the hands of the Deputy Sheriff pending the final outcome of Patel's application. The vehicle remains with the Deputy Sheriff.

In the High Court Patel failed in his claim that he be declared owner and that the vehicle be released to him. He now appeals.

McNALLY JA

Mr *de Bourbon*, who appeared for him on appeal, specifically abandoned the claim for ownership. He sought an order simply that Patel was entitled to free and undisturbed possession of the vehicle. He based this claim on the fact that the Director, having seized the vehicle from Patel, should have released it to him and to no-one else.

I can find no basis for the assertion that the Director is under an obligation to return seized goods only to the person from whom they were seized and to no other person. That person, after all, might be a thief, or a mere custodian. And I note in s 176(a) a provision that proceedings may be instituted by "the person from whom the goods have been seized **or the owner thereof"** (my emphasis).

It is, moreover, impossible to conclude that Patel's possession was entirely innocent. Section 176(3) of the Act provides:

> "(3) No seizure shall be made in terms of subsection (1) where more than two years have elapsed since the articles first became liable to seizure or where such articles have been acquired after importation for their true value by a person who was unaware at the time of his acquisition that they were liable to seizure:
>
> Provided that -
>
> (i) ... (not relevant)
>
> (ii) proof that a person was unaware that the goods he acquired were liable to seizure shall lie on him."

The first part of the section does not apply, so the question is:

> "Was the vehicle acquired after importation by Patel for its true value and has he proved that he was unaware that it was liable for seizure?"

He fails this test on two counts. First, the evidence suggests that $250 000 was less than the true value of the vehicle after duty was paid. Second, the evidence is that he was given the registration book on or about 5 January 1993, when he bought the vehicle. He then realised, according to his lawyer's letter of 29 April 1993, that the ownership of the vehicle could not be transferred until the end of January. He does not say that he could not have stopped payment on his cheque at that point. All he says, through his lawyers, is "having paid the purchase price our client took possession of the registration book and discovered only then that he could not

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take over ownership of the car until 28 January 1993". He does not say when he got the book.

McNALLY JA

I am not satisfied that Patel acted in good faith. He, like everyone else involved (except Dr Mundawarara), must have realised he was benefiting illegally from the immigrant's rebate.

Moreover, counsel for the appellant expressly pinned his faith on the *jus possessionis* as distinct from the *jus possidendi.* He acknowledged that ownership did not pass from Mereki to Mutero because of Mutero's failure to pay the price; and that, therefore, Mutero could not pass ownership to him (Patel). This is why he limited his claim to possession.

It is a complete answer to Patel's claim for possession, that he was lawfully dispossessed by the Director. The *jus possessionis,* as *Professor Ncube* (who appeared for Ms Sigauke) correctly pointed out, is nothing more than the right flowing from the fact of possession. It is not a right to possession, but the right of possession. It disappears once possession is lost. See generally Silberberg & Schoeman *The Law of Property in South Africa* 3 ed pp 113-4, and Joubert *The Law of South Africa* Vol 27 p 50.

It does not seem to me to be necessary to go into the more difficult question as to whether the series of agreements, Sigauke-Mereki, Mereki-Mutero and Mutero-Patel were void or merely voidable. I am inclined to think they are void, if only because the concept of voidability does not seem to me to fit easily into the facts of this type of contract. "Voidability" usually means voidability at the instance of one or other of the parties. Yet here we are talking of contracts which, if they are voidable, are voidable at the instance of the Director, who is not a party. The facts are close to those in *York Estates Ltd v Wareham* 1949 SR 197. See also *Neugarten & Ors v Standard Bank of SA Ltd* 1989 (1) SA 797 (A) at 808-813.

In general I would agree with the views expressed on the matter in the court *a quo* by ZIYAMBI J

The appeal is dismissed with costs.

Gubbay CJ: I agree.

Korsah JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Gula Ndebele & Manase, first respondent's legal practitioners

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

S v DULLABH 1994 (2) ZLR 129 (HC)

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Court **High Court, Harare**

Adam J, Ziyambi J & Garwe J

Criminal appeal

31 May & 3 August 1994

Flynote

Criminal procedure (sentence) - appeal - sentence - grounds upon which appeal court may interfere with sentence imposed by trial court

Criminal procedure (sentence) - statutory offences - Prevention of Corruption Act 34 of 1985 - soliciting a bribe (s 3) - city councillor soliciting small bribe from members of co-operative for whom had secured employment - whether community service suitable punishment for such an offence

Criminal procedure (sentence) - community service - offences for what community service must be appropriate - principles

Headnote

The appellant, who was a city councillor, corruptly solicited a bribe in the sum of $220 from certain members of a co-operative society for whom he had secured employment. He was convicted of contravening s 3 of the Prevention of Corruption Act 34 of 1985. The appellant also had a previous conviction for theft. The trial court sentenced him to five months' imprisonment with labour, of which three months was conditionally suspended on condition of good behaviour. The appellant appealed against sentence.

Held, (ADAM J dissenting), dismissing the appeal, that -

(i) as there had been no misdirection on the part of the trial magistrate and the sentence imposed was not manifestly excessive, there was no basis for interference by the appeal court with the sentence imposed; and

ADAM J

(ii) community service was not an appropriate sentence in a case where a person holding a public office and who has a previous conviction for theft solicits a bribe from members of the public he has assisted to secure employment; bribery and corruption were so prevalent that the option of community service was precluded.

ADAM J, dissenting, would have found that the court was at large regarding sentence as the trial court had not expressly considered the option of community service. He would have allowed the appeal by altering the sentence by suspending a portion of the custodial sentence on condition that the appellant perform community service.

Cases cited:

S v Pandukai HH-269-90

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S v Chihawa S-59-88

A-G v Chinyerere & Anor 1983 (2) ZLR 329 (S)

S v Fahy HB-25-88

S v Ballard HB-20-93

S v Narker & Anor 1975 (1) SA 583 (A)

S v Ramushu & Ors S-25-93

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

S v Mhlanga S-134-92

S v Maponga S-121-92

S v Ngwezuka S-57-92

S v Charekira S-4-92

S v Makusa S-206-93

S v Mudururi HH-270-90

S v Bere HB-88-90

S v Phiri HB-5-91

S v Tigere HH-225-93

S v Chikomo HH-107-94

S v Nyamukapa HH-108-94

S v Wilson HH-125-94

S v Choba S-114-92

S v van der Westhuizen 1974 (4) SA 61 (C)

S v Mumvuri HH-106-94

G Dhliwayo for the appellant

T Masendeke for the respondent

Judgment

Adam J: The court which heard this appeal could not agree, so GARWE J became its third member. The appellant on his guilty plea was convicted of

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ADAM J

the contravention of s 3 of the Prevention of Corruption Act 1985 and sentenced to five months' imprisonment with labour, of which three months' imprisonment with labour was suspended for three years on condition of "good behaviour". It is common cause that the appellant was a city councillor who in September 1993 secured employment with the City of Harare for members of Belvedere Ward 5 Co-operative Society and in return demanded and received $220 from them as a favour for obtaining them employment.

In mitigation of sentence, the appellant, who gave evidence under oath, besides mentioning his personal circumstances and the contribution he made to his ward as city councillor, said that his 21-year-old daughter was mentally handicapped, requiring expensive medication, that he asked for forgiveness and regretted what he did. He also indicated that he could pay a reasonable fine or do community service. In his submission, his counsel cited *S v Pandukai* HH-269-90 and *S v Chihawa* S-59-88 and said that the appellant had offered to do community service.

In his reasons for sentence, the trial magistrate stated that he took into account the nature of the offence, the offender, the interests of society and the appellant's position, and that corruption is a serious offence and is on the increase. He found that it was sheer greed that led the appellant to commit the crime as he earned $2 000 net per month. He concluded that the appellant's "position betrayed him and therefore the interests of society outweigh the personal circumstances" of the appellant.

The appellant filed his notice of appeal against the sentence. In one of his grounds of appeal the appellant indicates that the trial magistrate failed to impose a fine instead of imprisonment since the amount involved in the crime did not warrant a custodial sentence and that the offence committed was against the community and his sentence should have been the form of community service. The appellant asks that this court substitute a fine, a wholly suspended custodial term or a term of imprisonment suspended on condition of community service.

The record of proceedings and the notice of appeal were referred to the trial magistrate. His response was "no comment see the record (of proceedings)".

In the appellant's heads of argument, Mr *Dhliwayo* submitted that the trial magistrate should have imposed a fine instead of a custodial sentence. He cites *A-G v Chinyerere & Anor* 1983 (2) ZLR 329 (S), *S v Pandukai supra*, *S v Fahy* HB-25-88 and *S v Ballard* HB-20-93. He also submits that, in view

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of the nature of the offence committed by the appellant, the trial magistrate should have considered community service.

In the respondent's heads of argument, Mr *Masendeke* submitted that it was not the appellant's

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ground of appeal that the sentence was so harsh as to cause a sense of shock or that the magistrate's approach to sentence was correct; that in the absence of a misdirection, gross irregularity or abuse of the judicial function the sentence imposed cannot be interfered with: *S v Narker & Anor* 1975 (1) SA 583 (A) and *S v Ramushu & Ors* S-25-93; that the seriousness of the offence was correctly emphasized by the magistrate: *S v Ngara* 1987 (1) ZLR 91 (S); that the Legislature has by Act 22 of 1992 increased the penalty to a fine of $100 000 or 20 years' imprisonment or both; that the sentence imposed is not out of line with similar cases: *S v Mhlanga* S-134-92, *S v Maponga* S-121-92, *S v Choba* S-114-92, *S v Ngwezuka* S-57-92, *S v Charekira* S-4-92, *S v Makusa* S-206-93 and *S v Mudururi* HH-270-90; and that the appellant must be able to show that the sentence imposed was disturbingly inappropriate. He submitted that the magistrate properly exercised his discretion by imposing a sentence that was merited and his approach was not vitiated by any misdirection.

The appellant was not a first offender, having been convicted very many years ago of venous statutory offences and in August 1993 of theft (shoplifting), for which offence he was sentenced to a fine of $50 or, in default of payment, 20 days' imprisonment with labour.

In *S v Ngara* 1987 (1) ZLR 91 (S) at 101, GUBBAY JA (as he then was) stated:

> "Any form of corruption resorted to by government servants, especially police officers whose duty is to uphold the law and by their conduct set an example of impeccable honesty and integrity, is rightly viewed by the courts with abhorrence. It is a dangerous and insidious evil in any community and in particular requires to be guarded against in a developing country.
>
> Corruption is a crime difficult to detect and more difficult to eradicate. If unchecked or inadequately punished, it will disadvantage society by depriving it of a good, fair and orderly administration. Deterrence and public indignation are the factors which must predominate above all others in the assessment of penalty."

But this must be seen in the light of *A-G v Chinyerere & Anor* 1983 (2) ZLR

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329 (S) at 332 and what was stressed by HOLMES JA in *S v Narker & Anor* 1975 (1) SA 583 (A) at 586:

> "However, this denunciatively emotive description of the crime, although accurate, should not be allowed to transcend all other considerations in arriving at a just and balanced sentence."

It therefore follows from the diverse sentences imposed for this offence by all our courts that in order to achieve "a just and balanced sentence" the proper approach is that enunciated in *S v Kumalo* 1973 (3) SA 697 (A) at 698:

> "Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to circumstances. The last of these four elements of justice is sometimes overlooked."

Although fines have been imposed for this offence, in most of those cases the offender was an ordinary citizen: *S v Fahy supra*, *S v Bere* HB-88-90; *S v Pandukai supra*; *S v Phiri* HB-5-91; *S v Ballard supra*; while in some of those cases minor officials were involved - *A-G v Chinyerere & Anor supra*.

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It is also clear that an appellate court can only interfere where there has been an irregularity or misdirection or where the sentence is shockingly excessive: *S v Ramushu & Ors supra*. This means that this court must look at the approach of the trial magistrate in arriving at the sentence imposed by him. The record of proceedings indicates that the appellant, as well as his legal practitioner, made submissions about community service and it was a pert of the grounds of appeal. But neither the magistrate's reasons for sentence, nor his response to the notice of appeal, deals with this. In my view, this constitutes a misdirection on the part of the magistrate.

I have no quarrel with the actual custodial term imposed, but what concerns me is the failure of the trial magistrate to apply his mind to the provisions of s 337 of the Criminal Procedure and Evidence Act, which empowers a court, in its discretion, to postpone or suspend a sentence on such conditions as the court may specify. These conditions may relate to matters of good conduct, compensation for damage or pecuniary loss, the rendering of service for the benefit of the community, etc.

It is accepted that corruption is a serious offence - *S v Ngara supra* at 101; *A-G v Chinyerere & Anor supra* at 332 - and that the Legislature has provided, for such contraventions, a fine not exceeding three times the value

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of the gift or consideration or $100 000 whichever is the greater, or imprisonment not exceeding 20 years, or both such fine and such imprisonment.

In *S v Tigere* HH 225 93 BARTLETT J spoke of guidelines which indicate that only where appropriate offenders would benefit and where the sentence imposed is 12 months or less should a trial magistrate consider community service. In *S v Chikomo* HH-107-94 the same learned judge made reference to an effective term of 12 months or less and to the nature of the offence when considering community service. In *S v Nyamukapa* HH-108-94 he talked about unsuitable offenders who "will do the image of community service no good". In *S v Wilson* HH-125-94 he indicated that community service is not appropriate for serious offences such as murder, rape and armed robbery.

It should also be mentioned that in terms of the Criminal Procedure and Evidence Act, the Sixth Schedule excludes from the provisions of s 337 murder, other than the murder by a woman of her newly born child, conspiracy or incitement to commit pounder and any offence in respect of which any enactment imposes a minimum sentence or conspiracy, incitement or attempt to commit any such offence.

From the foregoing, it can be seen that suspension of a sentence is not prohibited because the accused is not a first offender. The guidelines mentioned by BARTLETT J do not exclude that type of an offender as well. Since our courts have been imposing fines for this offence, and fines have usually been imposed in order to keep such offenders from prison, it follows that for this offence *per se* community service cannot be held to be inappropriate despite the fact that it is a serious offence.

This means that this court has to look at the nature of the offence, whether the appellant is an

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appropriate offender who will benefit from the imposition of community service, and whether the appellant is an unsuitable offender.

Undoubtedly the offence committed by the appellant was serious; but was it such that the application of s 337 of the Criminal Procedure and Evidence Act would not be appropriate? The State has not challenged part of the sentence imposed suspended on condition of "good behaviour", which means that, at least to that extent, the State is prepared to concede the application of s 337 to the appellant even though he is not a first offender.

Reference has been made to *S v Mudawuri* HH-270-90*, S v Choba* S-114-92 and *S v Maponga* S-121-92, where effective custodial terms had been upheld.

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But those decisions were prior to the amendment to the Criminal Procedure and Evidence Act which permitted suspension on condition of performing community service. I am not persuaded that, had this court or the Supreme Court had the option of community service in those cases, it would not have considered that option.

From the age, personal and family circumstances of the appellant it cannot be said that community service was inappropriate for him. His position as a former councillor did mean that he should have conducted himself above reproach. But as reiterated by BAKER J in *S v van der Westhuizen* 1974 (4) SA 61 (C) at 66:

> "... justice must be done, but it must be done with compassion and humanity, not by rule of thumb, and ... a sentence must be assessed not callously or arbitrarily or vindictively, but with due regard to the weakness of human beings and their propensity to succumbing to temptation ... But it must also be borne in mind that the consideration of mercy must not be allowed to lead to the condonation or minimisation of serious crimes."

In my view, when all He circumstances are taken into account, suspending a further 2 months' imprisonment with labour on condition that the appellant did 80 hours of community service, does not reflect as a "condonation or minimisation" of this offence.

I would accordingly allow the appeal by altering the sentence as follows:

> "5 months' imprisonment with labour of which 3 months' imprisonment are suspended for 3 years on condition that during that period the accused does not commit any offence involving the contravention of section 3 of the prevention of Corruption Act 1985 and for which he is sentenced to imprisonment without the option of a fine and a further 2 months' imprisonment with labour are suspended on condition the accused does 80 hours of community service and for that purpose the matter is remitted to the trial magistrate so that he can set the place and time within which the 80 hours community service must be performed."

Ziyambi J: The appellant in this matter was convicted in the magistrates court of contravening s 3(1)(a) as read with s 3(2) of the Prevention of Corruption Act 34 of 1985. The allegation against him was that, being a councillor of the Harare City Council and, as such, an employee of the said

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City Council, he corruptly solicited and obtained for himself a bribe in the sum of $220 from certain members of a co-operative society for whom he had secured employment with the City Council. He was sentenced to undergo 5 months' imprisonment with labour, of which 3 months' imprisonment with labour was suspended for 3 years on conditions. Against this sentence the appellant appealed on the following grounds, as set out in his notice of appeal:

> "1. The learned court [sic] failed to take cognizance of the fact that the appellant showed contrition for his crime, co-operated with the police and admitted his complicity in the crime as well as pleaded guilty to the charge thereto.
>
> 2. The learned court failed to impose a pecuniary penalty (fine) as an alternative to the custodial sentence imposed. The amount in question in the offence did not warrant the imposition of a custodial sentence without the option of a fine. The Supreme court has also made numerous policy statements encouraging the imposition of alternative forms of sentence such as community service. This form of sentence was entirely appropriate in the appellant's case. The appellant committed an offence against the community and his sentence should have reflected a punishment that entails restitution to the community in the form of service to the community.
>
> 3. The learned court failed to take cognizance of the appellant's personal circumstances in imposing its sentence. The appellant is married with four children. The appellant's 21-year-old daughter is mentally handicapped and requires considerable financial support. If the appellant's family loses its principal breadwinner because of his incarceration this will cause great suffering for her and all his children.
>
> WHEREUPON the appellant prays for a setting aside of the custodial sentence (5 months' imprisonment with labour of which 3 months were suspended for 5 years on condition that the accused is not again convicted of an offence of which dishonesty is an element and to which he is sentenced to a term of imprisonment without the option of a fine) and the substitution of a wholly suspended custodial term and/or the alternative imposition of a pecuniary penalty (a fine) or a form of community service."

Mr *Dhliwayo,* who appeared on behalf of the appellant, argued that the court

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should have imposed a sentence that provided for an alternative of a fine. He submitted further that the court should also have considered the imposition of community service as an alternative form of punishment.

It is trite that, in the absence of a misdirection or gross irregularity or abuse of the judicial function, an appellate court will not interfere with the sentence imposed by the seal court unless the sentence is viewed as disturbingly inappropriate.

In *S v Ramushu & Ors* S-25-93 GUBBAY CJ reiterated this principle as follows:

> "But in every appeal against sentence, save where it is vitiated by irregularity or misdirection, the guiding principle to be applied is that sentence is pre-eminently a matter for the discretion of the trial court, and that an appellate court should be careful not to erode such discretion. The propriety of a sentence, attacked on the general ground of being excessive, should only be altered if it is viewed as being disturbingly inappropriate."

No misdirection or irregularity has been alleged nor is any apparent on the record. The issue of community service was before the magistrate. I do not consider it a misdirection that the

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magistrate did not mention it in his judgment. It is clear from the magistrate's reasons for sentence that he considered, and correctly so in my view, that imprisonment was the only appropriate sentence. However, even if I am wrong on this point, had this court been at large to pass sentence on the appellant, I would have imposed an effective sentence of imprisonment, as I do not consider this to be a proper case for community service. The trial court's approach to sentence, in my view, cannot be faulted. The court took into account the appellant's personal circumstances, the nature of the offence, the interests of society and the position held by the appellant.

At p 3 of the record the magistrate remarked:

> "The accused held a very high public position and he should have used his age to guide others and to lead a life which is beyond reproach. If corruption is left unchecked it will erode good governance of any institution whether it is the public or private sector. The courts should not be used to condone crime and it is their duty to mete out the appropriate sentences. Accused held a public office as a councillor who indeed should have been in a position to assist the people in his ward."

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The magistrate, in the exercise of his discretion, chose to impose sentence of imprisonment, rather than a fine or community service. The question that remains to be decided is whether the sentence imposed is disturbingly inappropriate.

The appellant has undoubtedly been convicted of a very serious offence. In the words of GUBBAY JA (as he then was) in *S v Ngara* 1987 (1) ZLR 91 (S) at 101:

> "Corruption is a crime difficult to detect and more difficult to eradicate. If unchecked or inadequately punished, it will disadvantage society by depriving it of a good, fair and orderly administration. Deterrence and public indignation are factors which must predominate above all others in the assessment of the penalty."

The Legislature has emphasised the seriousness with which it views the offence of corruption by increasing the penalty provisions for this offence.

Section 16 of the General Laws Amendment Act 22 of 1992 increases the penalty prescribed for this offence to a fine not exceeding $100 000 or imprisonment not exceeding 20 years or both such fine and such imprisonment. Previously the maximum penalty was a fine of $5 000 or imprisonment for 5 years or both.

The abhorrence with which our courts view this offence is reflected in the sentences which have been imposed in the past.

In *S v Choba* S-114-92 the appellant, a police officer, was convicted of contravening s 3(1)(a) of the Act in that he solicited $135 from the complainant in order to drop charges which the latter was likely to face. He was sentenced to 12 months' imprisonment with labour, of which 2 months was suspended. The Supreme Court held that the sentence was not open to criticism as being too heavy.

In *S v Maponga* S-121-92 the appellant was convicted of contravening s 3(1)(b)(i) of the Act and sentenced to 7 months' imprisonment with labour, of which 2 months was suspended. The

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case arose out of a request which the appellant, a public servant, made to her colleague to provide her with copies of certain examination papers. In making the request the appellant gave her colleague $10 in cash and offered to pay a further $50 for the required papers. The sentence was held to be appropriate.

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In *S v Mudawuri* HH-270-90 the appellant offered $30 to a security guard to allow the appellant to remove 30 extra crates of beer over and above those he had paid for. He was convicted of contravening s 3(1)(b) of the Act and sentenced to 9 months' imprisonment with labour, of which 3 months was suspended. In dismissing his appeal against sentence, GIBSON J held that:

> "bribery and corruption are regarded with thorough disapproval since they undermine the fabric and orderly function of the country's institutions. In such cases the proper punishment should be imprisonment unless there are circumstances which indicate that this would be inappropriate."

It will be seen that the amounts involved in these cases are considerably less than the amount involved in the present case.

Not only is the sentence in line with the sentences imposed in similar cases decided by our courts but the appellant is not a first offender. He has, since 1970, been convicted on 7 occasions of various statutory offences which are not relevant for the purposes of sentence in this matter. Of relevance to the present matter, however, is that on 5 August 1993, the appellant was convicted of shop-lifting and sentenced to a fine of $50 or in default of payment 20 days' imprisonment with labour. In imposing a custodial sentence the magistrate had this to say:

> "Accused earns a net salary of $2 000 and owns a business in Chegutu but it is sheer greed that led him to obtain a favour from the poor souls who wanted to make ends meet. A custodial sentence in the circumstances is called for to deter the accused and others of like mind from benefiting from crime. Society expects to be led by men and women whose integrity is beyond reproach. The offence is serious."

With reference to the contention by Mr *Dhliwayo,* for the appellant, that the magistrate ought to have suspended the sentence of imprisonment on condition that the appellant performed community service, it is my view that the seriousness with which the courts and the Legislature view this offence and the prevalence of it in our nation precludes the imposition of community service as an appropriate sentencing option. The appellant holds a prominent position as a city councillor. As such he is entrusted with the welfare of the people of his ward. His actions in soliciting payment for services rendered to them constitute a breach of that trust.

Although the guidelines referred to in *S v Tigere supra* indicate that

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community service should be considered in all cases where a sentence of 12 months' imprisonment w less has been imposed, the imposition of such a sentence is only a starting point qualifying the accused for consideration for community service. Thereafter the court will have to consider whether the offence of which the accused stands convicted is one for which a

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sentence of community service can properly be imposed, having regard to the interests of society as well as those of the accused. There will always be cases where, even in respect of first offenders, imprisonment will be the only appropriate sentence. The imposition of community service in a case such as this can -

> "only reduce public confidence in the alternative of community service ... Unless magistrates impose community service with commonsense and caution there is a danger that the new sentencing option will fall into disrepute. It is important that such a significant reform to the Zimbabwe sentencing system as community service should succeed. I reiterate, however, that it will only succeed where it is imposed in appropriate circumstances" (*per* BARTLETT J in *S v Mumvuri* HH 106-94).

Taking all the above considerations into account I am unable to hold that the sentence imposed by the trial court is disturbingly inappropriate. The appeal is therefore dismissed.

Garwe J: I find no reasonable basis for interfering with the sentence imposed by the trial magistrate. I am not persuaded that community service would be appropriate in a case, such as this one, where a man holding a public position and who has a previous conviction for theft solicits a bribe from members of the public he has assisted in securing employment. I agree with the remarks by ZIYAMBI J that, taking into account all the circumstances, it cannot be said the sentence is so excessive as to warrant interference.

McNaught Wickwar, appellant's legal practitioners

BARON v GEORGE 1994 (2) ZLR 141 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Civil appeal

18 July & 4 August 1994

Flynote

Court - order - interpretation - must be presumed, where not ambiguous, to mean what it says - no evidence admissible to contradict, alter or add to contents of court order - order appointing legal practitioner as administrator of trust set up under a deceased estate - no mention in order of remuneration - no entitlement to remuneration in terms of order

Administration of estates - executor dative and administrator of estate - administrator of trust set up in terms of will - whether entitled to remuneration from estate

Trusts - administrator of trust set up in terms of will - whether entitled to remuneration - law applicable

Headnote

The appellant, a legal practitioner, had been appointed by the court as administrator of the deceased estate of the respondent's father and as trustee of the testamentary trust set up under

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the will. There was no provision in the court order for remuneration, but the appellant had paid himself certain sums of money for the performance of his functions as trustee. The respondent sought, and obtained, an order that he should repay those sums to the trust. The appellant argued that he was entitled to remuneration for his services.

Held, that in interpreting an order of court, such an order must be presumed, where it is not ambiguous, to mean what it says. No evidence is admissible to contradict, alter or add to the contents of the order. As the

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court order said nothing about remuneration, the appellant could not rely on the order as entitling him to remuneration. This finding did not, however, preclude the appellant from approaching the court again to request authored to charge for his services.

Held, further, that under English law of trusts, the general rule was against remuneration. The English law of trusts has, at least partially, been received into our law. Such authorities as there are are contradictory on the point as to whether in our law the administrator of a trust is entitled to remuneration; in the final analysis there is no clear principle one way or the other. In the result, the appeal could not succeed.

Cases cited:

Atmore v Chaddock (1896) 13 SC 205

Min of Home Affairs & Anor v Albertson & Ors 1941 SR 240

Griessel v Bankorp Trust Bpk 1990 (2) SA 328 (O)

Firestone SA (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A)

Admin, Cape & Anor v Ntshwaqela & Ors 1990 (1) SA 705 (A)

Postmasburg Motors (Pty) Ltd v Peens & Ors 1970 (2) SA 35 (NC)

Hiddingh v de Villiers (1887) 5 SC 298 (PC)

SA Assn NO v Hoffman 1913 AD 377

P Carter for the appellant

A P de Bourbon SC for the respondent

Judgment

McNally JA: The respondent, whom I will call Miss George, brought an application against the appellant, whom I will call Mr Baron, in the High Court in Bulawayo.

The relief that she sought was, in summary, that Mr Baron should render an account of his dealings as executor dative and administrator of the estate of the late George Vernon George

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(the deceased), and that he should repay to the trust, set up under the deceased's will, certain sums which he had paid himself for the performance of his functions in the latter capacity.

She was successful, and he now appeals. However, since it appears that she is of limited mental capacity (though able, before a notary public, to complete an enduring power of attorney in favour of her brother David) and he, by reason of advanced years, is incapable of acting for himself, the affidavits have been sworn by her brother and by Mr Baron's former partner, Mr Longhurst.

The state of affairs revealed by these affidavits is as follows. The deceased

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made a will in 1963 and died later the same year. He created a trust in favour of his daughter, Miss George, and appointed the Standard Bank Limited to be his executor and administrator. He left nothing to his son David, and especially directed that David should not be permitted to have custody of Miss George or to attend to any financial matters on her behalf connected with her interest in the trust fund.

Despite the appointment of the Standard Bank, the court made an order in January 1964, on the petition of Benjamin Baron himself, supported by Miss George, her brother David and her mother (since deceased), appointing Mr Baron as administrator of the estate. The petition speaks of Mr Baron as "Benjamin Baron, Attorney of Bulawayo". However, the letters of administration issued to him on 3 January 1964 describe him simply as "Benjamin Baron". He remained in that capacity and as trustee of the testamentary trust until shortly before 10 June 1992, on which date Mr Sansole of Sansole and Senda, Legal Practitioners, was appointed in his place following his resignation.

Two points are in issue, both having been decided in the court *a quo* in favour of Miss George.

The first was this. How can David George, in the face of the explicit terms of the will, be allowed virtually to act for his sister in this application?

It is true that the court has no general power to vary the terms of a testamentary trust. See Lee and Honoré *Family, Things and Succession* 2 ed para 700, and also Honoré *SA Law of Trusts* 4 ed pp 434-5. But at common law the court has such a power when it is necessary to avoid frustrating the trust object or prejudicing the beneficiaries - Honoré *op cit* at foot of p 435. In the present case it is difficult to see who else could speak for Miss George in the circumstances. In any event, the point is well taken by Mr *de Bourbon* that the application is in the name of Miss George. Her brother's affidavits give the necessary evidence, but technically she is the applicant, and no one has challenged her ability or capacity to make the application. He is her witness rather than her agent.

In addition to this, there is a recent development which alters the situation. Owing to the death, or legally presumed death, of one of the other beneficiaries, David George has become a residuary heir on intestacy to part of the estate, and has been recognised as such by the court. He, therefore, has a legitimate personal interest in the preservation of the *corpus* of the estate.

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For these

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reasons I agree with the decision of the learned judge *a quo* to reject this attempt to defeat the application *in limine*.

The second and substantive issue was this. Where no specific provision for remuneration exists, is the administrator of a trust entitled to any remuneration at all?

Mr *de Bourbon* says he is not. He relies for his proposition on *Halsbury's Laws of England* 4 ed vol 48 para 803. For its applicability in Zimbabwe, he relied upon *Atmore v Chaddock* (1896) 13 SC 205 at 208 and *Minister of Home Affairs & Anor v Albertson & Ors* 1941 SR 240 at 279.

Mr *Carter* counters this argument by saying first that *Albertson*'s case *supra* relates to the liability of an administrator and not to the question of his remuneration. He says the law is correctly set out in *Griessel v Bankorp Trust Bpk* 1990 (2) SA 328 (O) and that it is confirmed in three textbooks, namely: Lee and Honoré *Family, Things and Succession* 2 ed para 693; Meyerowitz *Law and Practice of Administration of Estates* 5 ed para 23.47; 6 ed pare 23.27; and Honoré *SA Law of Trusts* 4 ed p 289 para 219.

These various contentions require consideration.

I begin with Halsbury. At para 803 the following is stated:

> "Except under an express or implied direction in the instruments creating the trust, or an express order of court, or by virtue of an express stipulation on the subject which he has made with a beneficiary before he accepted the trust, or where the trust property is in a country in which he is allowed remuneration by the local law, a trustee is not entitled to a salary or compensation for personal trouble and loss of time."

In the list of exceptions, it is significant that only in the first of them do the words "or implied" appear after "express". I have no doubt, therefore, that in the original testamentary appointment of the Standard Bank, there would have been a strong case for the bank to have argued that there was an implied direction that it would be entitled to receive the usual remuneration chargeable in such cases.

But Mr Baron was appointed by order of court assuming, as we must in the absence of a copy of that order, that it is silent on the question of remuneration (because the petition says nothing about remuneration and neither do the

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letters of administration), then there is no express order of court allowing remuneration. And whereas one may speak of implied terms in documents or contracts, it is not so easy to read words into an order of court.

By saying that, I do not wish to imply that an order of court is to be interpreted differently from

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any other document. See *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304D-H; end *Admin, Cape & Anor v Ntshwaqela & Ors* 1990 (1) SA 705 (A) at 715F. But I do say that where the petition is launched by an officer of court himself and the order is made by the High Court, and the appointment is made of an individual who is a lawyer, rather than of his firm, one must assume that the petitioner knew the law and knew what he was asking for. In those circumstances, I can see no room for any addition to the order on grounds such as that the addition is necessary to give business efficacy to the order. A business contract may require interpretation to give it business efficacy. An order of court must be presumed, where it is not ambiguous, to mean what it says. VAN DEN HEEVER J (as she then was) said in *Postmasburg Motors (Pty) Ltd v Peens & Ors* 1970 (2) SA 35 (NC) at 39 (in translation):

> "[I]t is clear from the authorities just cited that no evidence is admissible to contradict, alter or add to the contents of an order of court ... This is a rule of law and not only a rule of evidence which the parties may waive ... which loses none of its validity as a result of the fact that in given circumstances the court may amend its order by eg adding an order for costs thereto (*West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173)."

I am strengthened in this belief, not only by the fact that the general English law rule is against remuneration, but also by the fact that there is nothing to prevent Mr Baron from approaching the court again for authority to charge for his services (I say nothing as to whether or not the court would grant such a request) See generally Herbstein & van Winsen *The Civil Practice of the Superior Courts* in SA 3 ed p 467 and Harms *Civil Procedure in the Supreme Court section* O5 at p 419.

As to whether the English law of trusts has been received into our law, Mr *de Bourbon* relies on *Atmore v Chaddock supra*. DE VILLIERS CJ in that case said:

> "In its main features our law relating to the liability of executors, administrators and other persons holding a like fiduciary position, does not differ materially from the law of England"

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That statement was made In the Colony of the Cape of Good Hope on 9 June 1896, and in terms of our Constitution (s 89) the common law of Zimbabwe "shall be the law in force in the Colony of the Cape of Good Hope on 10th June 1891".

Honoré (*op cit*) makes the point at p 16 that "There has indeed been only a partial reception of English trust law in South Africa" And it is true that DE VILLIERS CJ was speaking there of the **liability** of trustees, as Mr *Carter* pointed out. But RUSSELL CJ in *Albertson*'s case *supra* also relied on Voet 36.1.61, which states that a fiduciary may claim disbursements. It seems to be implied from this that a fiduciary may not claim remuneration.

Certainly, the matter is uncertain. Two of three authorities to which Mr *Carter* referred us were agreed on this. No doubt this is why in South Africa legislation has been introduced to clarify the matter. Lee and Honoré *op cit* say at para 693:

> "There is no common law principle that trustees must be remunerated or that they must act gratuitously."

Honoré says *op cit* para 219 p 289:

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"But the common law position is obscure, since there was no clear principle that, in default of provision in the trust instrument, trustees must be remunerated or that they must act gratuitously."

Meyerowitz *op cit* at para 23:47 says:

"No tariff of remuneration is fixed for administrators as there is for executors, but administrators are entitled to a fair and reasonable remuneration." *(1)

McNALLY JA

He relied for this proposition on two early cases, *Hiddingh v de Villiers* (1887) 5 SC 298 (PC) and *SA Association NO v Hoffman* 1913 AD 377. In the first of these cases, the matter is dealt with at p 305. It is evident from what their Lordships in the Judicial Committee of the Privy Council say at that page that the testator provided for the payment of a commission to his administrators. The question was only one of interpretation - on what basis were they to be paid?

In the second case, the decision of the Appellate Division seems to me not to support Meyerowitz's contention or that of Mr *Carter*. This was a case where the appellant was what we would now call a trust company, with a recognised scale of charges for such work. Not only that, the testator had been a director of the appellant, and knew it raised such charges. Despite all that, the court held:

"However strongly, therefore, we may now be convinced that the testator De Korte did intend that the administrators appointed by him should make the charges against his estate which he had always assisted in making against other estates, we cannot, in the absence of any specific direction to that effect in the will, sanction such charges, if, as held by the Privy Council, they are not lawful charges."

True, the ratio of the Judgment was that unlawful charges could not be raised. So it does not go against Mr *Carter's* contention, it merely does not support it. Similarly, he is not helped by *Griessel*'s case *supra*, because there it was common cause that remuneration was payable. The question was - how much?

In the final analysis, it is not necessary to go further than to say that under the common law there is no clear principle one way or the other. That statement, it seems to me, is enough to defeat the appeal. It demonstrates that the court order appointing Mr Baron does not require interpretation. It means what it says. It says nothing about remuneration. There is no reason to suppose that the omission was accidental or unintentional. Mr Longhurst, the present senior partner in Ben Baron and Partners, conceded in his affidavit that:

"... the respondent was appointed Executor and Administrator of the estate of the late George Vernon George in his personal capacity and not in his capacity as a partner or the senior per net of Ben Baron Partners."

McNALLY JA

In those circumstances there can be no presumption about remuneration. He drew the petition. He did not ask for remuneration. Remuneration was not ordered. That is the end of the matter.

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The appeal is dismissed with costs.

Korsah JA: I agree.

Ebrahim JA: I agree.

Ben Baron & Partners, appellant's legal practitioners

Sansole & Senda, respondent's legal practitioners

SMIT v SMIT 1994 (2) ZLR 149 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

21 July & 9 August 1994

Flynote

Family law - maintenance - order - variation of - onus on party seeking variation to show that as result of changed circumstances he is unable to pay amount ordered - duty of court to satiny itself that change in circumstances has occurred and is such as to warrant variation - Maintenance Act [Chapter 35] - s 8(4) - nature of enquiry to be made

Headnote

Where, following divorce, maintenance is ordered to be paid, the onus is on the party who applies for a variation of the maintenance order to put before the court cogent evidence to show that as a result of changed circumstances he is unable to pay the amount ordered at the time of the divorce. This does not, however, detract from the responsibility cast on the court by s 8(4) of the Maintenance Act [*Chapter 35*] to conduct an investigation regarding the means and circumstances of the the applicant, so as to satisfy itself that the alteration in the means and circumstances not only has occurred but is such as to warrant a variation of the original order.

The enquiry under the Act is two-tiered. Firstly, the court must consider whether the application is frivolous or vexatious. If it is, then the application is dismissed. If it is not, and there appears to be a change in means or circumstances, the court then investigates the alteration to satisfy itself whether a variation is justified. The evidence placed before the court must be such as would assist the investigation of the party's means and circumstances. While full disclosure must be made, this does not obviate the duty to investigate. If there is evidence suggestive of a failure to make full disclosure of some means or circumstances

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representing a change, the clear duty of the court is to enquire or investigate and take into account such means or circumstances, and not merely to dismiss the application. The court should ascertain whether there has been a change in circumstances in the light of which the financial arrangements were made and, if so, to determine what would be the appropriate adjustment to make. In such an exercise, the court must take into account not only what monies the husband admits to having but also what monies could reasonably be made available to him if he so wishes.

Cases cited:

Laxman v Laxman S-177-90 (not reported)

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

Ratcliffe v Ratcliffe [1962] 3 All ER 993 (CA)

O'Donnell v O'Donnell [1975] 2 All ER 993 (CA)

A P de Bourbon SC for the appellant

Chatikobo for the respondent

Judgment

Korsah JA: This is an appeal from the determination of the maintenance cow t, Harare, dismissing with costs an application, in terms of s 8 of the Maintenance Act [*Chapter 35*] ("the Act"), for variation of a maintenance order entered by the High Court, with the consent of the parties, on 13 November 1991.

By that order, the appellant was obliged to pay maintenance in the sum of $3 500 per month, whereof each of his two children by the respondent was to benefit by $1 000 and the remainder, being $1 500, was for the benefit of the respondent.

In September 1992, the appellant applied to have the order for maintenance reduced to $100 per month for each child and his wife, resulting in a total amount of maintenance of $300 per month for the three.

The reasons proffered in support of a variation of the order for maintenance are that at the time of the divorce the appellant was operating a business, in which his wife was a fifty percent shareholder, and exercising managerial functions within that business By December 1992, he had fallen on hard times and had been obliged to abandon his business to his creditors. He has obtained employment at $4 000 per month which, after tax, leaves him with $2 509,07.

The change in status from a self-employed manager of a business to a salaried employee of a

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company was not disputed by the respondent, in whose heads of argument it was stated that:

> "Due to his (the appellant's) own inability to run a business he has had to sell half of it and, further, due to his lack of managerial skills, he has had to leave the business to take salaried employment from which at the time of the application in the court *a quo*, he earned $4 000 per month."

Although it is evident from the foregoing that there has been a change of status, it is unclear whether that change in status has wrought a change in the means or financial circumstances of the appellant to justify a variation of the maintenance order.

I entirely agree with the assertion by Mr *Chatikobo* that the onus is on the party who applies for a variation of a maintenance order to put before the court cogent evidence to show that as a result of the changed circumstances he is unable to pay the amount ordered at the time of the divorce: *Laxman v Laxman* S-177-90 (not reported).

However, this does not detract from the responsibility, cast upon the court by s 8(4) of the Act, to conduct an investigation regarding the means and circumstances of the party applying, to satisfy itself that such alteration in his means or circumstances has not only occurred, but is such as to warrant a variation of the original order.

If, for instance, a millionaire were to lose his position as managing director of a business, that alteration in circumstance may not in itself affect his means so as to justify a variation of a maintenance order made against him.

The enquiry under the Act, as I apprehend it, is two-tiered. Firstly, the court considers whether the application is frivolous or vexatious. If it is of opinion that it is frivolous or vexatious, that is the end of the matter; the application is dismissed. Secondly, if the application is neither frivolous nor vexatious, and there appears to be a change in means or circumstances, the court investigates such alteration to satisfy itself whether a variation of an order is justified.

The evidence placed before the court must be such as would assist in the investigation of a party's means and circumstances. While full disclosure must be made, it does not obviate the duty to investigate. If there is evidence

KORSAH JA

suggestive of a failure to make full disclosure of some means or circumstances representing a change, the clear duty of the court is to enquire or investigate and take into account such means or circumstances, and not merely to dismiss the application.

It was alleged in the proceedings before the trial court that it was partly to induce his wife to relinquish her half share in the business that the appellant agreed to pay maintenance at the rate of $3 500. It was admitted that, having acquired his wife's share in the business, he sold fifty-one percent of the business for $200 000. Of that purchase price, $50 000 had been paid and received by the appellant. He said he used the proceeds so received to settle certain liabilities, inclusive of paying maintenance to the respondent.

The balance of the purchase price, that is $150 000, was to be paid once the business, now

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jointly owned by the appellant and the purchaser of the fifty one percent share, started to realise profits. These factors were not concealed from the court. They were before the court and due attention should have been paid to them.

No investigation was conducted regarding the performance of the business, the likelihood of payment of the balance outstanding, or the appellant's forty nine percent share in the business. Had such an enquiry been undertaken, the court might well have arrived at a more realistic conclusion than it did.

As Mr *de Bourbon* rightly pointed out, the trial magistrate appreciated the plight of the appellant, because of the appellant's own shortcomings, when he made the following comments in his judgment

> "The applicant has no hope that the business will ever get off the ground again";
>
> "However, in this case there is no prospect of the business becoming viable and therefore no prospect of the applicant ever being able to pay $3 500 per month or anything near that amount"; and
>
> "The applicant has proved that he has no ability for business management. There is therefore no reason why he should not sell everything and become an employee. Even if the court accepted that he had squandered all the assets and that the only means he now has are (*sic*) his salary of $4 000, would the court accept that the applicant was making a reasonable offer by asking to pay $300 per month for a wife and two children whom he had judged as worth $3 500 per month."

KORSAH JA

Having found that the appellant's means and circumstances had so altered that he could not afford to pay maintenance in the amount of $3 500 or anything near that amount, and that he had not deliberately impoverished himself with the result that he had no resources to make the payments due from him, as in *Lindsay v Lindsay* 1993 (1) ZLR 195 (S) (see also *Ratcliffe v Ratcliffe* [1962] 3 All ER 993 (CA)), the trial magistrate then turned his attention to the offer made by the appellant and said:

> "I think his application is ridiculous. It is very unreasonable. It only goes to show the applicant does not take his duty to maintain his family seriously. If he took his duty seriously he would not offer a sum less than $1 000."

With all due deference to the trial magistrate, he totally misconceived the roll of a maintenance court and failed to address the relevant issues placed before him.

It seems to me that the Act tasks the court with the duty of ascertaining whether there has been a change of circumstances in the light of which the financial arrangements were made and, if so, depending on the nature and degree of such change, to determine what, in its discretion, would be the appropriate adjustment to make, having regard to all the circumstances. In such an exercise, a court must take into account, not only what monies the husband admits to having, but also what monies could reasonably be made available to him if he so wished: *O'Donnell v O'Donnell* [1975] 2 Al 1 ER 993 (CA). A court shirks this duty if it refuses to exercise its discretion because an applicant for variation has made what it considers to be an unreasonable offer by way of variation. The plain duty of the court is to make an order, after due enquiry, by way of variation as appears just in all the circumstances. This the court failed to

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do, and to that extent the appeal must succeed.

We now have a situation where the trial court has found that the appellant's circumstances have so altered that he cannot comply with the order-to pay maintenance in the sum of $3 500 per month. But his application for variation has been dismissed, thus effectively condemning him to comply with an order which, in the view of the trial court, was impossible to obey. Meanwhile the respondent and her children will be disadvantaged if no meaningful order is made in place of the one which plainly, on the findings of the trial court, appears impossible for the appellant to comply with.

On the question of costs, I am of the view that if the appellant had taken the

KORSAH JA

trial court into his confidence and been absolutely candid, the court might have been placed in a better position to resolve the issue of variation of the order of maintenance and must, therefore, bear the costs in the lower court. In this court, both parties have achieved what I consider to be an equal measure of success.

Accordingly, I make the following order:

(a) the decision dismissing the appellant's application for a variation of the maintenance order is hereby set aside,

(b) the matter is remitted to the trial court to be set down as a matter of urgency for a proper investigation of the means and circumstances of the appellant with a view to determining whether a variation of the maintenance order is justified and, if so, to what extent,

(c) the appellant is to pay to the respondent the sum of $1 500 per month as maintenance for herself and the children of the marriage as from 19 March 1993, pending a review of his means and circumstances within six months from the date of this order;

(d) in addition, the appellant is hereby ordered to account for -

(i) the purchase price of fifty-one percent shares in Micron (Pvt) Ltd sold to the purchaser;

(ii) his forty-nine percent equity share in the said business; as well as;

(iii) his remuneration in his current employment; to enable the maintenance court to arrive at a just contribution to be made to the respondent by way of maintenance for the minor children and herself; and

(e) each party is to bear its own costs of this appeal;

(f) it is directed that a copy of this judgment be sent to the relevant maintenance court for necessary action.

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Ebrahim JA: I agree.

Muchechetere JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Atherstone & Cook, respondent's legal practitioners

IN RE WOOD & ANOR 1994 (2) ZLR 155 (SC)

Court **Supreme Court, Harare**

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

Constitutional case

28 July & 9 August 1994

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 22 - freedom of movement - persons who are neither citizens nor permanent residents of Zimbabwe - such persons being spouse or parent of permanent resident or citizen - whether can claim right to protection of s 22

Headnote

The immigration authorities had refused residence permits to Mrs Wood and Mrs Hansard and caused them to be prosecuted for remaining in Zimbabwe without permits to do so. At their trial before the magistrates court, the accused women raised the question of whether they had a constitutional right to remain in Zimbabwe and the magistrate referred the matter to the Supreme Court in terms of s 24(2) of the Constitution.

The two women claimed that they were entitled to reside permanently in Zimbabwe. They maintained that they had this right by virtue of the protection of freedom of movement afforded under s 22(1) of the Constitution. Mrs Wood, though not a Zimbabwean citizen, had a minor child who was a Zimbabwean citizen by birth. She argued that s 22(1) of the Constitution afforded her the right to reside permanently with her minor child in Zimbabwe; if she were forced to leave Zimbabwe with her son, his constitutional right as a citizen would be infringed and therefore she had some sort of collateral right to reside permanently in Zimbabwe with her son.

Mrs Hansard, who was also an alien, was married to a man who was not a Zimbabwean citizen but had permanent residence status. She had

GUBBAY CJ

separated from him but returned to Zimbabwe and claimed to have been reconciled with him.

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She argued that s 22(1) of the Constitution afforded her the right to reside permanently in Zimbabwe with her husband.

Held, that only citizens and permanent residents had a constitutional right to reside permanently in Zimbabwe. Neither of the two women had such a constitutional right and therefore they had no basis for arguing that their freedom of movement was being unlawfully Interfered with by the immigration authorities. The persons who might be entitled to claim that their constitutional rights to freedom of movement were being infringed by die expulsion from Zimbabwe of these two women were Mrs Wood's minor child and Mrs Hansard's husband. Mrs Woods' child might claim that his right to reside in Zimbabwe was being infringed by the expulsion of his mother as he would be forced to accompany her in order to avoid separation from his mother and this would interfere with his freedom of movement. If there had in fact been a reconciliation between Mr and Mrs Hansard, Mr Hansard might argue that his freedom of movement was being interfered by the expulsion of his wife from Zimbabwe because he would be obliged to accompany her and establish the matrimonial house outside Zimbabwe in order to maintain the marital relationship.

Cases cited:

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

Rattigan & Ors v Chief Immigration Officer & Ors 1994 (2) ZLR 54 (S)

Zinyemba v Min of Public Svc & Anor 1989 (3) ZLR 351 (S)

JB Colegrave for the accused

Miss *T Searl* for the State

Judgment

Gubbay CJ: In this matter the questions which fall for decision were referred to this court by the presiding magistrate in terms of s 24(2) of the Constitution of Zimbabwe, at the request of counsel who represented the two accused at their trial. They are whether the first accused, Mrs Sarah Jane Isabella Wood, a British national but the mother of a minor child who is a citizen of Zimbabwe by birth, is entitled to reside permanently with him in Zimbabwe by virtue of the protection of freedom of movement afforded to persons under s 22(1) of the Declaration of Rights. And whether the second accused, Mrs June Hansard, an alien married to a British subject who is regarded for the purposes of the Immigration Act 1979, as residing permanently in Zimbabwe, is entitled to reside permanently with her husband in Zimbabwe pursuant to the same constitutional protection.

GUBBAY CJ

Subsection (1) of s 22 mandates that "no person shall be deprived of his freedom of movement". Embodied in such protection are: (i) the right to move freely throughout Zimbabwe; (ii) the right to reside in any part of Zimbabwe; (iii) the right to enter and leave Zimbabwe; and (iv) immunity from expulsion from Zimbabwe. Under subs (2) any restriction on the person's

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freedom of movement that is involved in his lawful detention shall not be held to be a contravention of subs (1). The further derogations specified in subs (3) fall outside the present issues, save for pare (d), which permits the imposition of restrictions on the movement or residence within Zimbabwe, or the exclusion or expulsion from Zimbabwe, of persons who are neither citizens of Zimbabwe nor regarded by virtue of a written law as permanently resident in Zimbabwe. Subsection (4) as read with subs (3)(a) provides that, although in the interests of defence, public safety, public order, public morality or public health, it is lawful to restrict the freedom of movement of persons, such right is not to be construed as authorising a law preventing a citizen (but not a permanent resident) from leaving Zimbabwe or excluding or expelling him from the country.

The material and undisputed background facts which gave rise to this reference are these.

Mrs Wood, who is the daughter of Mrs Hansard, first came to the country in 1972. On 27 March 1978, being at that time married to Gert Martin Furstenberg, she gave birth, in Gwanda, to a son named Martin Bruce Furstenberg. The marriage was, however, dissolved by order of the High Court on 3 October 1980, with custody and, subsequently, guardianship of Martin being awarded to his mother. During 1985 Mrs Wood, who by then had remarried, left Zimbabwe with her new husband and Martin to settle in South Africa. That marriage also failed and terminated, on 15 January 1989, in divorce.

Mrs Hansard, likewise, emigrated to this country in 1972. On 19 January 1977, being a divorcee, she married Brian Owen Hansard. In 1985 the parties separated by mutual consent and Mrs Hansard returned to South Africa to live. Her husband continued to reside in Zimbabwe.

On 6 January 1992, Mrs Wood and Mrs Hansard submitted applications for permanent residence permits to the immigration authorities. Each was sponsored by a Mr Herbert Moresby-White. He falsely declared upon the requisite forms that he was the great- grandfather of Mrs Wood and the grandfather of Mrs Hansard.

GUBBAY CJ

On 10 February 1992 the two women entered Zimbabwe on visitor's entry certificates allowing them to remain in the country for a prescribed length of tune. Martin accompanied them. These certificates were renewed on thirteen occasions, usually for maximum of thirty days, until ultimately they expired on 16 April 1993.

On 10 November 1992, each application for a residence permit was refused by the Chief Immigration Officer.

It seems that for most, if not all, of the period from February 1992 to November 1993, Mrs Wood, Mrs Hansard and Martin occupied a house in Bulawayo owned by Moresby-White, while he stayed in the Cape Province. Martin was admitted to a school in Bulawayo. Shortly after Moresby-White's return to the country, the relationship between him and the two women deteriorated, with the result that they left his house and went to live with Mr Hansard.

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On 12 January 1994, Mrs Wood and Mrs Hansard were arrested and charged with contravening s 29(1)(a) of the Immigration Act 1979, in that they had remained in Zimbabwe from 17 April 1993 without a permit to do so. At their joint trial (to which no objection was taken, albeit the State had erred in not framing a separate charge against each) both testified that they had been misled by Moresby-White into the genuine belief that, through his efforts, their further stay in the country had been regularised and permanent resident status approved.

At the closure of the defence case the magistrate held that *mens rea* was not an essential element of the offence charged - its absence being solely of a mitigatory nature. But being of the opinion that the other issues raised were neither frivolous nor vexatious, she adjourned the proceedings pending their determination by this court.

On behalf of Mrs Wood, Mr *Colegrave* submitted that if she were to be expelled from Zimbabwe a decision taken, as guardian and custodian parent, that Martin was to accompany her, would directly infringe his constitutional right as a citizen to reside in this country; and that separation would deprive him of a parental home, and mother and guardian close at hand. Thus, in order both to avoid impairing, if not destroying, the family unit and to preserve and not circumscribe the exercise by Martin of the freedom of movement afforded trim under s 22(1) of the Declaration of Rights, it is essential that Mrs Wood live with her son in Zimbabwe; a situation that will persist until Martin attains majority.

GUBBAY CJ

Counsel sought to derive support for his contention from the majority decision of the Botswana Court of Appeal in *Dow v A-G* [1992] LRC (Const) 523. However, that case, far from being of assistance, is against him. It emerges clearly from the lead judgment of AMISSAH JP that Mrs Dow had *locus standi in judicio* to bring the application before the court *a quo*, because, as a citizen of Botswana, her **own** freedom of movement, protected by s 14 of the Constitution, was circumscribed by the disabilities in respect of citizenship placed on her two young legitimate children by the provisions of the Citizenship Act, their father being an alien. As emphatically stated by the learned JUDGE PRESIDENT at 660c-e:

> "It is totally unrealistic to think that you could permanently keep the child out of Botswana and yet by that not interfere with the freedom of movement of the mother. When the freedom of the mother to enter Botswana to live and to leave when she wishes is indirectly controlled by the location of the child, excluding the child from Botswana is in effect excluding the mother from Botswana. If the exclusion is the result of a determination of the child's citizenship which is wrong, surely this would amount to an interference with, and therefore an infringement of, the mother's freedom of movement."

See also AGUDA JA at 678d-e.

Similarly, in *Rattigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54 it was the three wives who, as citizens of Zimbabwe, proclaimed their rights under s 22(1) and not the alien husbands. It was held that to disable the latter from living with their wives in Zimbabwe in a matrimonial regime in effect undermined and devalued the protection of freedom of movement of each wife as a member of a family unit.

In the present matter, as Mr *Colegrave* so fairly and graphically put it, Mrs Wood is seeking to

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assert a right to reside in Zimbabwe by hanging onto Martin's coat-tails. Her claim, which she acknowledges she does not otherwise possess, is to some form of collateral right to the protection afforded a citizen or permanent resident under s 22(1). Such a stance, in my view, is quite untenable.

Under subs (1) of s 24 of the Constitution, and by inevitable implication under subs (2) as well, the applicant or party to the proceedings, save only in relation to a detained person, must be able to allege that a provision of the Declaration of Rights has been, is being, or is likely to be, contravened in respect of **him**.

GUBBAY CJ

He must, therefore, sue only for the acts or threats to himself. Yet Mrs Wood does not assert, nor could she, that a constitutional right afforded **her** is being contravened by the decision to refuse the grant of a residence permit. Plainly it is not her freedom of movement that is being unlawfully interfered with by the action of the Immigration authorities.

The answer, insofar as Mrs Hansard is concerned, is equally certain. The protest should be voiced by her husband and not by her. It is he who, as a permanent resident, has an unimpeded right to reside in Zimbabwe. It is he who must say that he has now become Duly reconciled with his wife and that were she compelled to leave the country, his right to freedom of movement would be infringed; for in order to secure and maintain the marital relationship in the sense of living together as a family unit, he would have to accompany her and establish the matrimonial home outside Zimbabwe. See *Rattigan & Ors v Chief Immigration Officer & Ors supra*. In short, it is not Mrs Hansard who has the requisite *locus standi* to complain of a threatened or actual contravention of s 22(1) of the Declaration of Rights. The protection relates to her husband and not to her.

Whether Mr Hansard is desirous of his wife continuing to live with him in this country is not known. He was not called to testify at the trial.

I regard with some suspicion Mrs Hansard's averment that her reason for returning to Zimbabwe in February 1992, was to effect a reconciliation. I think it strange that it was Moresby-White who sponsored her application for a permanent residence permit and who, with her knowledge and consent, falsely declared a blood relationship. Why, one wonders, was that subterfuge resorted to if Mr Hansard was prepared to accept his wife back? In the second place, it was only towards the end of 1993, when Mrs Hansard and Moresby-White had fallen out, that she left his household and commenced to reside with her husband.

If I do Mrs Hansard an injustice in expressing the tentative view that the claimed reconciliation with her husband is one of convenience, entered into without the real intention of establishing a proper marital relationship but simply as a ploy to enable her to remain living in Zimbabwe, then it is open to Mr Hansard to seek judicial redress.

It is for these reasons that the constitutional questions referred and argued are decided adversely to both women.

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Before concluding I should point out that it was also submitted at the trial that

GUBBAY CJ

since Mr Hansard is domiciled in Zimbabwe and as Mrs Hansard is still married to him, she too is domiciled in this country. Consequently, in terms of subs (2)(a) of s 29, the provisions of subs (1) under which the charge was brought, are inapplicable, thereby making it unnecessary for her to obtain a permanent residence permit. The presiding magistrate did not rule on this particular defence. She ought to have, for if considered to be sound, there would have been no need to have recourse to the procedure under s 24(2) of the Constitution. See *Zinyemba v Ministry of Public Service & Anor* 1989 (3) ZLR 351 (S) at 355D-F. Certainly it was not permissible to refer that issue to this court as she purported to do. It did not involve a contravention of the Declaration of Rights. If it were not that this court was obliged to decide the question referred in respect of Mrs Wood, we would have declined the reference relating to Mrs Hansard as being premature.

The questions having been answered, the magistrate must now bring the criminal proceedings in which they were raised to finality.

McNally JA: I agree.

Korsah JA: I agree.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Calderwood, Bryce Hendrie & Partners, accuseds' legal practitioners

NATIONAL SOCIAL SECURITY AUTHORITY v MINISTER OF DEFENCE 1994 (2) ZLR 162 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

7 July & 18 August 1994

Flynote

Constitutional law - State - statutory corporation - when may be regarded as an organ of the State - National Social Security Authority - whether can sue the State in its own name - National Social Security Authority Act

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12 of 1989

Headnote

The National Social Security Authority (NSSA) was set up in terms of Act 12 of 1989 and took over several of the functions of the Workers' Compensation Insurance Fund. In terms of s 4 of the Act, the NSSA was said to be a body corporate, capable of suing and being sued and performing all acts that bodies corporate may be law perform. In terms of s 10(1)(b) of the NSSA (Accident Prevention and Workers' Compensation Scheme) Notice (SI 68/1990), where the NSSA is obliged to pay compensation under the Act following an accident to a worker protected by the Scheme, the NSSA or the worker's employer shall, if the accident was one which created a legal liability in a third party, have a right of action against the third party for the recovery of the compensation paid.

In this case, the NSSA paid compensation to the dependents of a worker who was killed in a motor accident allegedly caused by the negligence of a member of the Zimbabwe National Army, while that person was acting in the course and scope of his employment. The NSSA sought to recover the compensation from the respondent Minister. A plea in abatement claimed that the action was between one organ of the State and another and was thus a nullity. The judge *a quo* upheld the plea and the NSSA appealed.

1994 (2) ZLR p163

Held, that before the NSSA could bring an action against the State, it was necessary to find that there was a separation in identity between the NSSA and the State sufficient to entitle it to approach the court for relief. Apart from s 4, which specifically established the NSSA as a body corporate, other sections of the Act supported the concept of separation.

Under s 21, the NSSA advises the Minister of Labour on matters concerning the operation of schemes and on matters relating to social security generally. Section 22 empowers the NSSA to perform twenty one functions set out in the Schedule to the Act, and only 4 of these require Ministerial approval. Under s 29(1), the NSSA is authorised to withdraw monies from its own banking account, pending transfer to a fund or reserve. Section 45 permits the NSSA's Board to recover against any person in a court of competent jurisdiction the value or amount of a benefit paid in error. In addition, but subject to Ministerial approval, the NSSA may appoint a general manager and assign functions to him, appoint an actuary and auditors, establish funds in respect of schemes and establish and maintain a reserve at a level recommended by the actuary. On the other hand, the Minister was given exclusive powers in a number of instances, including the establishment of schemes, appointment of members of the Board, the period during which the members of the Board hold office, their remuneration, the attendance of a member of the Public Service at Board meetings, the giving of directions to the NSSA in the exercise of its functions, and the keeping of accounts and records.

Held, therefore, that although the NSSA was not an entitly completely severable from the State, there was sufficient separation in identity to allow the NSSA to bring an action against the State.

Cases cited:

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Natal Provincial Admins v SAR & H 1936 NPD 643

R v Jones 1962 (1) SA 503 (SR)

Govt of Kwa Zulu v Govt of the Rep of SA & Anor 1982 (4) SA 387 (D)

R v Sec of State for Foreign & Commonwealth Affairs ex p *Indian Assn of Alberta & Ors* [1982] 2 All ER 118 (CA)

Govt of the Rep of SA & Anor v Govt of Kwa Zulu & Anor 1983 (1) SA 164 (A)

Lerros Motors (Pvt) Ltd v Min of Labour 1990 (1) ZLR 349 (S)

Cooper v Matipano HB-222-86 (not reported)

A P de Bourbon SC for the appellant

D P Carter for the respondent

GUBBAY CJ

Judgment

Gubbay CJ: This is an appeal against the order of the High Court upholding, with costs, a plea in abatement to the declaration filed by the appellant, in which it sought to recover from the respondent, in his capacity as the Minister responsible for the Ministry of Defence and the Zimbabwe National Army, the sum of $80 690, by virtue of the powers granted it under the National Social Security Authority Act 12 of 1989 ("the Act") as read with s 10(1)(b) of the National Social Security Authority (Accident Prevention and Workers' Compensation Scheme) Notice, S 168 of 1990 ("the Scheme"). The Act, which repealed the Workers' Compensation Act, took effect on 30 March 1990.

The claim instituted by the appellant arose in consequence of a collision that occurred on 11 March 1989, between a Renault 4 motor vehicle driven by a "worker", Mr E N Mataire, and a Mercedes - Benz truck, averred to have been negligently driven by a member of the Zimbabwe National Army in the course and scope of his employment. Mr Mataire died in the collision and the appellant became obliged under the Act to pay compensation to his dependents in the aforementioned amount.

Section 4 of the Act, which gave birth to the appellant, reads:

> "There is hereby established an authority to be known as the National Social Security Authority, which shall be a body corporate and, in the name of the National Social Security Authority, shall be capable of suing and being sued and, subject to this Act, of performing all acts that bodies corporate may by law perform."

And s 10(1)(b) of the Scheme, which grants the specific right, provides:

> "(1). Where an accident in respect of which compensation is payable was caused in circumstances creating a legal liability in some person other than the employer (hereinafter referred to as the third park) to pay damages to

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the worker in respect thereof -

(a) ...

(b) the general manager (of the National Social Security Authority) or the employer individually liable by whom compensation is payable shall have a right of action against the third party for the recovery of the compensation he is obliged to pay under this

GUBBAY CJ

Scheme as the result of the accident, and may exercise such right either by intervening in the proceedings instituted by the worker against the third party or by instituting separate proceedings.

Provided that ..."

The plea in abatement alleged that the action, as framed in the declaration, was between one organ of the State proceeding against another - the National Social Security Authority, a servant or agent of the State against the Minister of Defence, he being merely a nominal defendant representing the State - and as such is not permitted in law and constitutes a nullity.

The learned judge *a quo* ruled that the appellant is not a separate entity from the State and so cannot sue another organ of the State. It was the submission of Mr *de Bourbon*, for the appellant, that he had erred in law in respect of both conclusions. These are precisely the questions this court is now called upon to answer.

The first case to which regard is to be had is *Natal Provincial Admins v SAR & H* 1936 NPD 643. It held that since both parties fell within the ambit of the Crown the Administration was precluded Tom bringing an action against the Railways and Harbours, for it would effectively be suing itself. See MATHEWS J at 662 and HATHORN J at 666.

This decision was given during an era when South Africa had a monarchistic form of government and was based upon a series of cases where the court was concerned with an organ or department of the Crown suing another organ of the Crown. At that time the indivisibility of the Crown was a feature to be taken into account as a matter of public policy as well as of juristic truth. But since South Africa became a republic in 1961 the concept that the Crown is one and indivisible is no longer applicable. Moreover, the original doctrine of the indivisibility of the Crown subsequently underwent a marked change with the constitutional development of the various parts of the Common Wealth. See *R v Jones* 1962 (1) SA 503 (SR) at 505C *per* LEWIS J (as he then was); *Govt of Kwa Zulu v Govt of the Republic of SA & Anor* 1982 (4) SA 387 (D) at 388H and 389E-F *per* SHEARER J; *R v Sec of State for Foreign & Commonwealth Affairs;* ex p *Indian Assn of Alberta & Ors* [1982] 2 All ER 118 (CA) at 127 *in fine* 128e.

In the well-known litigation between the respective Governments of South

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Africa and Kwa Zulu, a succession of cows refused to accept the narrow concept that unless entirely severed from one another, organs of the Sate cannot sue each other. Giving the unanimous judgment of the Appellate Division, reported as *Govt of the Republic of SA & Anor v Govt of Kwa Zulu & Anor* 1983 (1) SA 164 (A), RABE CJ said at 205H-206A:

> "I accept that, as was submitted by the appellants, it is a general principle of our law that one organ of the State cannot sue another organ of the State. I accept, also, that the provisions of the 1971 Act (National States Constitution Act 21 of 1971) show that Kwa Zulu is not an entity that is completely severed from the State. As to this point it is my view, however, that we should hold that **there is sufficient separation in identity between the first respondent (Kwa Zulu), on the one hand, and the appellants, on the other hand, to entitle the first respondent, in the circumstances of this case, to approach the court for relief"** (my emphasis).

The circumstances or features which led the court to find that a sufficient separation in identity existed were: the degree of autonomy permitted to the Government of Kwa Zulu by the South African Parliament; the fact that the territory of Kwa Zulu had its own flag and national anthem; and the ability of Kwa Zulu to conclude conventions, treaties and agreements with the South African Government.

In reaching the conclusion that the appellant was not an entity separate from the State, the learned judge placed great reliance upon the judgment of this court in *Lerros Motors (Pvt) Ltd v Minister of Labour* 1990 (1) ZLR 349 (S). In that case it was held that the Workers' Compensation Insurance Fund established under the Workers Compensation Act [*Chapter 269*] and the predecessor of the appellant, was not an entity separate from the State. The facts were that the appellant was a tenant in premises registered in the name of the Workers' Compensation Insurance Fund. When the lease, which was for a period of one year, expired, the respondent applied for an order of ejectment. The appellant resisted, asserting that, as a statutory tenant in terms of the Commercial Premises (Rent) Regulations 1983, it was entitled to remain in occupation. The respondent, on the other hand, contended that by virtue of s 2(2), the Regulations were not applicable to the letting of commercial premises by the State. In resolving the issue, MANYARARA JA reasoned as follows at 352A-E:

> "The fund is not only a creature of statute but s 89, which establishes the

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> Fund and vests it in the respondent as the responsible Minister, also gives him sole management of the Fund (subject to the provisions of the Act).
>
> Turning to the purposes and State control of the Fund, s 90 details how the Fund shall be utilized by the Commissioner who is appointed by the respondent as is the rest of his staff, subject to the laws relating to the Public Service (s 27). The remuneration of the Commissioner and his officers is paid out of the Consolidated Revenue Fund and reimbursed from the moneys of the Workers' Compensation Insurance Fund. In terms of s 91(a), the Commissioner's power to borrow money for the Fund is subject to the approval of the respondent in consultation with the Minister of Finance. The latter may also lend to the Fund moneys appropriated by Parliament. Section 94 requires the accounts of the Fund to be audited by the Auditor - General as public funds.
>
> In short, nowhere in the Act is the Fund established as a separate entity from the State of the National Social Security Act 1989, s 4 which establishes the successor to the Fund as a corporate body capable of suing and

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being sued in its own name.

In terms of s 91(b) of the Act, the Commissioner may acquire and alienate property for the purposes of the Fund, subject again to the approval of the respondent in consultation with the Minister of Finance. However - and this is the crucial point - all property so acquired shall be held in the name of the respondent in trust for the Fund."

In reality, the Workers' Compensation Insurance Fund, to borrow the language used by the same learned judge in *Cooper v Matipano* HB-222-86 (unreported), "had stamped on (it) all the attributes of a politico-administrative organ of the State".

In comparing the position of the appellant with that of its precursor as dealt with in the *Lerros Motors* case *supra*, Mr *de Bourbon* justifiably placed much reliance on s 4 of the Act under which the appellant is established as a separate corporate entity capable of suing and being sued in its own name, with no express restriction being placed upon whom it may sue. He submitted that once the State determines through Parliament to conduct a function through a corporate body, it must be taken to have accepted that such corporate body will be distinct from the State and capable of suing or being sued by the S late. In other words, in vesting corporate identity in the appellant with the express power to sue without limitation, the Legislature (an arm of

the State) decided to divorce the corporate identity thus created from the State and to allow a totally separate existence to the appellant. Counsel refer for further support, to the contrast drawn by MANYARARA JA in *Lerros Motors v Minister of Labour, Manpower Planning & Social Welfare supra* at 352D, between the status of the Workers' Compensation Insurance and that of the appellant.

It admits of no doubt that the appellant is imbued with more autonomy, and subjected to a far less degree of ministerial control, than the Workers' Compensation Insurance Fund ever was. The difference is a significant factor as to the intention of the lawmaker in creating the appellant as a replacement for the Fund, yet by no means a conclusive one. The determination of whether the appellant is an entity completely severed from the State or, if not, that there is, nevertheless, a sufficient separation in identity between it and the State to entitle it to institute an action against the State, depends upon a close examination of the Act.

Apart from s 4, Mr *de Bourbon* referred to other provisions of the Act which, he urged, strengthen the submission that the appellant is a totally separate entity from the State. In particular:

(a) Section 21 mandates that the appellant shall administer every scheme (for the provision of benefits of employees) as well as the fund established under the Act. On all matters concerning the operation of schemes and on matters relating to social security generally, the appellant merely advises Minister of Labour, Manpower, Planning and Social Welfare, but is not subject to his control.

(b) Section 22 empowers the appellant to do all, or any of the things particularised in the Schedule to the Act, either absolutely or conditionally, and either solely or jointly with

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others. Of the twenty-one powers set out, only four, paras 4,8,10 and 19, require the appellant to seek ministerial approval for their exercise. These relate to the disposal of assets not required for the operation of its function; the raising of loans or borrowing of money; the establishment and administration of funds and reserves not specifically provided for in the Act; the making of gifts, bonuses and the like to employees; the provision of services and the fees chargeable therefor. The remaining powers are diverse. They include the acquisition of premises; the mortgaging of assets; the entering into of contracts, suretyships and guarantees; the employment of personnel; the payment of remuneration and allowances; the construction of dwellings

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for employees; the selling or leasing of dwelling houses and land for residential purposes to employees; the making of loans to employees for the purchase of vehicles or equipment to be used in the fulfilment of duties; and generally -

"to do all such things as are calculated to facilitate or are incidental or conducive to the performance of the functions of the Authority in terms of this Act or any other enactment."

(c) Section 29(1) authorises the appellant, pending transfer to a fund or to a reserve, to withdraw monies by means of cheques signed by persons designated by the appellant's Board, from a banking account into which all monies received by the appellant must be paid.

(d) Section 45 permits the Board to recover against any person in a court of competent jurisdiction, the value or amount of a benefit granted or paid in error.

(e) In addition, but subject to Ministerial approval, the appellant may appoint a general manager *ex officio* and assign to him such functions as its Board thinks fit (s 25); appoint an actuary (s 26(1) and auditors (s 33); establish one or more funds in respect of any scheme (s 28); establish and maintain such reserve at such levels as may be recommended by the appointed actuary (s 30(1).

On the other hand, Mr *Carter*, who appeared for the respondent, correctly drew attention to instances in which the Minister is given exclusive powers.

These are:

(i) Section 3, pursuant to which the Minister may establish, amend or abolish schemes for the provision of benefits to employees in consultation with the appellant's Board and the Minister responsible for finance.

(ii) Section 6, which provides that the Minister appoints members of the Board, including a chairman, deputy chairman and alternates.

(iii) Section 7, in terms whereof the Minister fixes the period, not to exceed three years, for which the members of the Board hold office.

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(iv) Sections 10 and 11 under which the Minister may require members of the Board to vacate office and himself fill any vacancy.

(v) Section 14, which permits the Minister, with the approval of the Minister responsible for finance, to fix the remuneration and expenses of members of the Board and of committees, to be paid by the appellant from its funds.

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(vi) Section 15, which provides that the Minister may designate of ricers of the public service to attend meetings of the Board.

(vii) Section 24, which obliges the appellant to submit any report the Minister may require.

(viii) Section 27, pursuant to which the Minister may give the appellant directions in the exercise of its function as appear to him requisite in the national interest.

(ix) Section 32(1), which enables the Minister to direct that particular accounts and records be kept by the Board.

(x) Section 38, which allows the Minister to appoint persons to be inspectors for the purposes of the Act. (xi) Section 43 (1), under which the Minister may cause an investigation to be made into the affairs of the appellant.

This analysis of the relevant sections of the Act convinces me that the appellant is not an entity completely severed from the State. The extent of Ministerial control over it renders unacceptable the argument advanced to the contrary. But I am wholly persuaded that what is revealed is a sufficient separation in identity between the appellant and the State. The requisite degree of independence is afforded the appellant by the cumulative effect of the unqualified powers which the lawmaker has bestowed upon it. I would stress especially, the right to sue in its own name, to administer every scheme and fund established under the Act, and its varied and wide-ranging activities as set out in the Schedule.

Consequently, the appeal is allowed with costs. The order of the court *a quo* is altered to read:

"The plea in abatement is dismissed win costs."

McNally JA: I agree.

Korsah JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

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

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ROBINSON v MINISTER OF LANDS AGRICULTURE & RURAL RESETTLEMENT & ANOR 1994 (2) ZLR 171 (SC)

Court **Supreme Court, Harare**

Gubby CJ, McNally JA & Korsah JA

Appeal against determination of Administrative court

26 July & 18 August 1994

Flynote

Administrative law - appeal - against decision of Administrative Court - grounds that decision was so unreasonable as to amount to an improper exercise of discretion - what must be shown Town and country planning - general plan - application for cancellation of general plan and, in particular, a road servitude

Headnote

The appellant applied to the respondent Minister for the cancellation of a general plan and, in particular, the cancellation of a road servitude. The application was made in terms of s 44(4) of the Land Survey Act [*Chapter 147*]. The Minister rejected the application. The appellant then appealed against the Minister's decision to the Administrative Court. The Administrative Court rejected the appeal and upheld the decision of the Minister. The appellant appealed to the Supreme Court against the determination of the Administrative Court. The main basis of the appeal by the appellant was that the decision by the Administrative Court was so unreasonable as to amount to an improper exercise of its discretion.

Held, that no good planning reasons were advanced for the cancellation of the road servitude and the decision of the Administrative Court was unassailable.

Cases cited:

Tselentis v Salisbury City Council 1965 RLR 282 (G); 1965 (4) SA 50(R)

KORSAH JA

Jackson v Adams 1957 R & N 161; 1957 (2) SA 50 (SR)

Jackson v Adams 1958 R & N 747; 1958 (4) SA 78 (SR)

Sec for State for Education & Science v Metropolitan Borough of Tameside [1976] 3 All ER 665 (CA)

E Chatikobo for the appellant

No appearance for the first respondent

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T Hussein for the second respondent

Judgment

Korsah JA: This is an appeal from a determination of the Administrative Court, handed down on 15 June 1993, wherein the court upheld the decision of the first respondent (the Minister) rejecting an application by the appellant, made in terms of subs (4) of s 44 of the Land Survey Act [*Chapter 147*], for a cancellation of Kilner Road from General Plan CG 1685, which is the present zone classification of subdivision B of Carrick Creagh and subdivision of subdivision B of Carrick Creagh, both of section 4 Borrowdale Estate, Harare.

To commence at the beginning, in 1959, that part of Carrick Creagh, the subject matter of this appeal, was, by General Plan CG 1685 sub-divided for the purpose of building seven town houses. The plan included a proposed road, to be known as Kilner Road, to which the seven town houses would have had access and which would have given access to the said town houses. The plan split Carrick Creagh into the sub-divisions already mentioned. The seven town houses and the proposed road were not, and have never been, built.

The area of which Carrick Creagh forms a part falls within zone 9 Rural (Economic Farming Unit) of the operative City of Harare combined north east 1-4 Town Planning Scheme, and is, therefore, classified for agricultural purposes.

In 1984 the appellant acquired her two pieces of the Carsick Creagh property, with the proposed plan extant, for the purpose of farming. In August 1989, she sought to consolidate her two pieces of land by applying for a cancellation of General Plan CG 1685.

Having duly complied with the requirements for such an application, the appellant was advised by the Surveyor General's Office that her application had been objected to, in part, by the second respondent.

The second respondent's objection was that, as the owner of Stands 78 and

79 as well as the remainder of subdivision B of Carrick Creagh, being subdivision B 245-46, his only access to Hesser Road was by way of Kilner Road. He and his successors in title will have no access from his property onto Hesser Road if Kilner Road were removed and the servitude thereby created lost.

On the basis of this objection the Surveyor General recommended to the Secretary for Lands, Agriculture end Rural Settlement that the consolidation be permitted, subject to the preservation of Kilner Road as an access road to Hesser Road.

In compliance with subs (3) of s 44 of the Act the Minister responsible gave his blessing to the consolidation, subject to the preservation of Kilner Road as an access road to Hesser Road.

The Minister's reasons for the retention of the Kilner Road servitude were that, looking at the plan annexed to the permit it is clear that provision has been made for a road width portion from

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the remainder of subdivision extending south-westwards across the stream to link up with Kilner Road between stands 4 and 5.

This is irrefutable evidence that Kilner Road was not intended as a service road for stands 1 to 7 only, as envisaged by the appellant, but designed as an access road for the remainder of subdivision B of Carrick Creagh. Such reasoning is fortified by the fact that if Kilner Road had been intended as a service road for only the seven stands, it would have been designed as a cul-de-sac with stands 4 and 5 sharing a common boundary at the end thereat. The existence on plan CG 1685 of a road width portion from the remainder of subdivision B extending south-westwards across the stream to link up with Kilner Road between stands 4 and 5 negates the assertion by the appellant that Kilner Road was not intended as an access road to the remainder of subdivision B of Carrick Creagh.

Having established that Kilner Road was designed so as to create a servitude in favour of the remainder of subdivision B as well, this was in effect an application for the abolition of a servitude, and the onus, at all times, rested with the appellant to show cause why the Minister should consent to the cancellation of the general plan and, in particular, the cancellation of the road servitude.

With the apparent abandonment of the plan to develop the seven stands, it was eminently reasonable that the Minister, in the exercise of his discretion,

KORSAH JA

permitted the consolidation of the seven plots. The abolition of the servitude created by the provision for Kilner Road fell to be determined likewise on Be continuation of the requirement for such a road.

Provision was made in general plan CG 1685 for Kilner Road to be an access road for the remainder of subdivision B into Hesser Road. The appellant was unable to demonstrate that, between 1959, when the plan was hatched, and the present day, some change had occurred to render the need for Kilner Road as an access road from the remainder of subdivision B to Hesser Road unnecessary.

The second respondent is the owner of stands 78 and 79 as well as the remainder of subdivision B The three properties are not consolidated. For the moment the remainder of subdivision B enjoys access through stands 78 and 79. Should the second respondent sell stands 78 and 79, then the only access to the remainder of subdivision B will be through Kilner Road, which was obviously provided for, at least partly, in anticipation of such occurrences.

The importance of the designation of Kilner Road as an access road to the remainder of subdivision B is made manifest by the absence of any other road, featuring on any plan, designed to provide access to the remainder of subdivision B Oakland, Sanda and Sunland are all planned as closes. Furthermore, Oakland Close and Sanda Close can only be extended to the remainder of subdivision B through other properties. Similarly, Sunland Close can be extended to the remainder of subdivision B through two properties. There being no provision for such extensions of these closes in the relevant operative Town Planning Scheme and relevant

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title deeds, it would be folly not to preserve the road servitude which Kilner Road is designated to provide in favour of the remainder of subdivision B of Carrick Creagh.

The appellant's complaint - that the designated existence of Kilner Road interferes with her agricultural pursuits - overlooks the fact of the existence of the servitude was created prior to the acquisition of her property.

The ground for the appellant's challenge of the Minister's decision was that it was grossly unreasonable. Since public notice has to be given of an application for cancellation or amendment of a general plan, and objections to the application invited and considered, there is cast upon the Minister responsible the duty to act with reasonableness in the malting of administrative decisions. An appeal from the Minister's decision lies to the Administrative Court, with a further appeal from that court to the Supreme Court.

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As BEADLE CJ observed in *Tselentis v Salisbury City Council* 1965 RLR 282 (A); 1965 (4) SA 61 (SRA), "the proper approach of this court to an appeal from the town planning court has virtually been determined" by such authorities as *Jackson v Adams* 1957 R & N 161 at 168; 1957 (2) SA 50 (SR) at 56, followed by QUENET J (as he then was) in *Jackson v Adams* 1958 R & N 747 (SR) at 753; 1958 (4) SA 78 (SR) at 82 where he is reported as saying:

> "I agree with the respondent's counsel that this court should only interfere with the town planning court's judgment if it finds that the decision was not based on reasonable grounds, that some wrong principle was applied, that matters were taken into account which should not have been considered, or that matters were not considered which should have been taken into account."

The main thrust of the appellant's attack on the decision of the Administrative Court was that it was "so unreasonable as to amount to an improper exercise of discretion, in that relevant considerations such as alternative means of access to second respondent's property were not properly considered". But as LORD DIPLOCK said in *Secretary for State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665 (my) at 695e:

> "My Lords, in public law 'unreasonable' as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt."

The appellant, as the second respondent successfully demonstrated, advanced no good planning reasons for the cancellation of the right of way. It follows that the Administrative Court's view - "that it would be unreasonable in the extreme to sacrifice, town (and country) planning principles, which are objective, for individual needs which are subjective" - is unassailable.

The appeal is accordingly dismissed with costs.

Gubbay CJ: I agree.

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McNally JA: I agree.

B M W Kahari, appellant's legal practitioner

Atherstone & Cook, second respondent's legal practitioners

CARMICHAEL v MOYO 1994 (2) ZLR 176 (SC)

Court **Supreme Court, Bulawayo**

Mcnally JA & Ebrahim JA

Civil appeal

1 & 18 August 1994

Flynote

Delict - actio injuriarum - adultery - locus standi - man married to woman in an unregistered customary law union - whether has right to sue for adultery damages in customary law

Customary law - adultery - whether husband married to woman in an unregistered customary law union has a right to sue for adultery

Headnote

A husband in an unregistered or unsolemnised customary law union recognised by customary law has a legal right to sue in a court administering customary law for adultery committed with his spouse.

Although s 3(1) of the African Marriages Act [*Chapter 238*] provides that no marriage contracted according to customary law is valid unless it is solemnised in terms of that Act, the effect of legislation introduced in 1970 was to restore the husband's right to sue in customary law for adultery damages, even though the marriage is not solemnised in terms of the Act. This legislation was the African Law and Tribal Courts Act 24 of 1969 which became Chapter 237. The right of the husband to sue for adultery was established by what became s 3(1) of Chapter 237. The decision by the court in *Maso v Nyamaya Zhaukwakinyu* 1971 AAC 1 that a husband cannot sue for adultery because his unsolemnised marriage is invalid overlooked the change introduced in 1970 and is therefore an incorrect decision. The change in 1970 was also overlooked by Goldin and Gelfand in their book *African Law and Custom in Zimbabwe* in their assertion at p 216 that a husband cannot sue for adultery damages if his marriage is unsolemnised.

McNALLY JA

The African Law and Tribal Courts Act wars replaced by the Customary Law and Primary

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Courts Act 6 of 1981. Subsequently the Customary Law and Primary Courts Act was replaced by the Customary Law and Local Courts Act 2 of 1990. Correctly interpreted, both the Customary Law and Primary Courts Act and the Customary Law and Local Courts Act maintained the right of the husband in an unsolemnised customary law union to sue in customary law for adultery damages. One important consideration in reaching this conclusion is that, if a husband in an unsolemnised or unregistered customary law union is primarily responsible for the maintenance of his wife, customary law Courts must recognise the correlative right of the husband to claim damages for adultery.

Cases cited:

Dube v Khumalo 1986 (2) ZLR 103 (S)

Maso v Nyamaya Zhuwankinyu 1971 AAC 1

Mverechena v Mverechena 1988 (1) ZLR 205 (S)

Mudzingwa v Mudzingwa 1989 (2) ZLR 182 (S)

Zimnat Ins Co Ltd v Chawanda 1990 (2) ZLR 143 (S)

Mujawo v Chogugudze 1992 (2) ZLR 321 (S)

Appellant in person

No appearance for the respondent

Judgment

McNally JA: Mr Moyo instituted proceedings before the Kezi assistant magistrate (customary law) for damages for adultery against the appellant in the sum of $10 000. The matter was heard on 7 July 1993. The appellant admitted the adultery and offered to pay $1 000. The court ordered him to pay $3 000. He appealed to the district appeal court at Gwanda. His appeal was dismissed by the provincial magistrate on 16 November 1993. He now appeals to this court

The first point raised before us, and before the district appeal court, was that the complainant's marriage was an unregistered (unsolemnised) customary law marriage and therefore not a valid marriage. Accordingly it should not have been recognised as a marriage for the purposes of awarding damages for adultery. Secondly, the appellant contended that the award should have been only $1 000.

The first point is an interesting one. There is some authority for the appellant's proposition in Goldin and Gelfand *African Law and Custom in Rhodesia* p 216 where it is said:

McNALLY JA

> "To constitute adultery it is essential that the woman must be validly married to the Plaintiff. A husband who is married by customary law which was not solemnised in terms of s 3 of the African Marriages Act [*Chapter 105*] has no right of action for adultery."

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A number of cases are cited from the Court of Appeal for African Civil Cases as authority for this proposition. And the extract was cited with approval in this court (although in a common law context) in *Dube v Khumalo* 1986 (2) ZLR 103 (S) at 108D.

Now, it is true that the provisions of s 3(1) of the African Marriages Act [*Chapter 238*] are quite specific. The subsection reads:

> "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 solemnised in terms of this Act; or"

Subsection 3 provides for en exception where children are concerned. On the face of it, therefore, Goldin and Gelfand seem to be on few ground. The African Marriages Act was promulgated on 1 January 1951.

It is notable, however, that Goldin and Gelfand *op cit* goes on to say:

> "Tribal Courts do award damages for adultery in cases where the customary marriage had not been solemnised as required by the Act.
>
> Among Africans a marriage is concluded when the traditional laws and customs which constitute such a marriage have been observed. Notwithstanding legislation which requires such a marriage to be registered or solemnised to render it a valid marriage, these requirements are often not complied with out of ignorance concerning their existence or legal effect."

(Or, I would interpose, because *lobola* or *roora* has not yet been paid in full.)

> "Tribal courts frequently, but not invariably, grant orders dissolving marriages, for the return of marriage consideration, **or claims by a husband for adultery** or other relief as if a valid marriage was in existence ... This has been the attitude and practice among Africans

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McNALLY JA

> since registration of marriages was introduced by the Native Marriages Ordinance 1901" (my emphasis).

The book, which was published in 1975, goes on to say that in such cases the father of the woman has a claim for seduction, since he is and remains the guardian of his daughter until the marriage is solemnised in terms of the Act. It continues:

> "While tribal courts do not appear to take this view, and consider an action for adultery to lie, this is the position at law resulting from the need for registration of such a marriage."

This position has, of course, been materially altered by the Legal Age of Majority Act 15 of 1992. The father would have no claim for seduction, at any rate when the wife is over eighteen, as she is in this case.

It seems to me, however, and with respect to the learned authors, that they have overlooked a change in the law introduced in 1970.

On 6 November 1970 the African Law and Tribal Courts Act 24 of 1969, now *Chapter 237,* was

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brought into effect by GN 1061 of 1970. It was the first of a series of enactments in which customary law was more and more fully recognised.

Section 3(1) of *Chapter 237* provided:

> "Subject to the provisions of this section and of any other enactment . . .customary law shall be deemed to be applicable in any case which is between Africans and which relates to -
>
> (i) seduction or adultery; or
>
> ...
>
> (vi) a marriage between Africans contracted under customary law, **whether or not it has been solemnised** under the African Marriages Act [*Chapter 238*]" (my emphasis).

In the light of that provision, and with some diffidence because the matter was not developed in argument before us, I venture to say that the learned authors of *African Law and Custom in Rhodesia* were wrong, in 1975, in making the first statement I have quoted; as was His Honour Judge PITTMAN (as he then was) in the last of the authorities cited, namely *Maso v Nyamuya Zhuwankinyu* 1971 AAC 1. That case was heard on 10 August 1971 and was an appeal from a decision of the District Officer, Marandellas (now Marondera) some time

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after May 1971. It should, therefore, have taken account of the provisions of the new enactment. Instead, the court upheld the District Officer's ruling which dismissed the claim for damages for adultery on the grounds that the customary marriage was invalid by reason of s 3 of the African Marriages Act. No reference was made to s 3(1) of the African Law and Tribal Courts Act.

Section 3(1) was itself amended by s 3 of Act 11 of 1977, but not, in the context of this case, significantly. Then, in 1981, Chapter 237 was repealed *in toto,* and replaced by the Customary Law and Primary Courts Act 6 of 1981.

In a sense this new Act reintroduced confusion, because s 3(1) provided:

> "Subject to the provisions of this section and of any other enactment, unless the justice of the case otherwise requires -
>
> (a) customary law shall be applicable in any civil case where -
>
> (i) ...;
>
> (ii) ...;
>
> (iii) having regard to the nature of the case and the surrounding circumstances it appears **just and proper that it** should apply."

The phrase "subject to the provisions of ... **any other enactment**" on the face of it seems to resurrect the restrictions imposed by s 3 of the African Marriages Act on claims for seduction and adultery. But that cannot have been the intention of the Legislature. After all, this was one

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of the first enactments of the Legislature of the newly independent Zimbabwe, and was intended to accentuate the status of customary law. The right of a husband in an unsolemnised customary law union to sue for damages for adultery with his wife had been specifically restored on 6 November 1970. I cannot accept that it was the intention of the new Zimbabwe Legislature to abolish it.

I would hold that that right was preserved, either by reliance on the phrase "unless the justice of the case otherwise requires", or by reliance on the provisions of the proviso to subs (3), which reads:

> "The capacity of any person to enter into any transaction or to enforce or defend any rights in a court of law shall, subject to any enactment affecting any such capacity, be determined in accordance with the general law of Zimbabwe:

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> Provided that, if the existence or extent of any right held or alleged to be held by any person or of any obligation vesting or alleged to be vesting in any person depends upon or is governed by customary law, the capacity of the person concerned in relation to any matter affecting that right or obligation shall be governed by customary law."

In short, I am saying that the provisions of Act No 6 of 1981, construed in their historical context, must be interpreted so as to limit the meaning of the word "valid" in s 3(1) of the African Marriages Act to the context of the general law. As far as the customary law is concerned, a marriage entered into in accordance with that law is valid, whether solemnised or not. I appreciate that this may involve a restrictive interpretation of the opening words of s 6 of Act 2 of 1990, but that question need not be decided in this judgment.

Act No 6 of 1981 has now been replaced by the Customary Law and Local Courts Act 2 of 1990. Sections 3 and 4 of that Act substantially reproduce the provisions of s 3 of the repealed Act, which I have cited. The basic situation remains unaltered.

This interpretation is supported by a number of considerations:

In the first place, s 12(4)(a) of the Customary Law and Primary Courts Act 1981 recognised that:

> "For the purposes of an order for maintenance in terms of subsection (3) a community court shall, notwithstanding anything to the contrary contained in customary law, regard the person who, according to customary law, is the husband of the woman as being primarily responsible for the maintenance of that woman during the marriage, and after the dissolution of their marriage, until her remarriage ..."

See *Mverechena v Mverechena* 1988 (1) ZLR 205 (S) at 207 *et seq.* The point was made by the CHIEF JUSTICE in *Mudzingwa v Mudzingwa* 1989 (2) ZLR 182 (S) at 189A, arising out of the provision, that:

> "Clearly it is only a community court which, when making an order for maintenance in accordance with the provisions of the Maintenance Act, is empowered to regard a customary law husband as being responsible for the maintenance of his customary law wife."

If he is responsible for her maintenance even when the marriage has not been

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solemnised, and can be obliged to pay maintenance if the action is brought in a community court, it would seem to me to follow logically that he can, in that court's successor, claim damages for her adultery. As noted earlier, the Customary Law and Primary Courts Act 1981 has been repealed and replaced by the Customary Law and Local Courts Act 2 of 1990. However, the effect of the provision to which I have referred has been preserved by the amendment made in terms of that Act to the Maintenance Act [*Chapter 35*]. The new s 6(3) of that Act makes the necessary provision, as set out later in this judgment.

Secondly, in *Zimnat Ins Co Ltd v Chawanda* 1990 (2) ZLR 143 (S), this court ruled that the provisions of ss 12(3) and 12(4)(a) of the Customary Law and Primary Courts Act make it appropriate for the courts to hold that a widow under an unregistered customary union had a claim for damages for loss of support when her husband in that union was killed negligently or unlawfully.

Thirdly, at that time the new Customary Law and Local Courts Act 2 of 1990 had not yet come into effect. It was promulgated on 6 April 1990 but came into effect only on 25 March 1993. Thus, when the present case came before the court in Kezi in July 1993, the Maintenance Act had been amended (by Part III, s 4, of Act 2 of 1990) by the introduction of s 6(3), in the following terms:

> "For the purpose of determining whether or not a person who is subject to customary law is legally liable to maintain another person, a maintenance court shall regard -
>
> (a) husbands and wives at customary law as primarily responsible for each other's maintenance;
>
> (b) ..."

The position is therefore essentially the same as it was under the previous 1981 Act. If a husband in an unsolemnised or unregistered customary law union is to be primarily responsible for the maintenance of his wife, the law must recognise that, in the courts of customary law, he must have the correlative right of claiming damages for adultery. That was clearly the practice of the courts of customary law in the past. Moreover, it gives effect to the point made by MANYARARA JA in *Mujawo v Chogugudze* 1992 (2) ZLR 321 (S) at 328H that "the two systems of law no longer overlap but exist separately, each in its own right as part of the laws of Zimbabwe".

I conclude, therefore, that in a court in which customary law is administered,

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it is lawful for a husband in an unregistered or unsolemnised customary union recognised by customary law to sue for damages for adultery committed with his spouse.

I should add that it was clearly established in the trial court that this was a proper customary

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union which had lasted for some ten years and from which five children had been born.

I turn next to **the** question of *quantum.*

The first point which was of concern was whether the court had jurisdiction to make an order for more than $1 000 by reason of the provisions of s 15(1)(b)(ii) of Act 2 of 1990.

However, I am satisfied that that section relates to a community court, whereas, by the time this action was instituted, community court presiding officers had been upgraded to assistant magistrates under the new s 82(1) of the Magistrates Court act [*Chapter 18*], introduced under Part II, s 4, of Act 2 of 1990.

In his capacity as assistant magistrate, the judicial officer in Kezi had the monetary jurisdiction granted under the Magistrates Court act, which is sufficient to cover the award in this case.

The award is substantial, but we were not shown any comparable cases in which lower awards were made. Nor has any misdirection been alleged. The wrong was committed when the appellant was acting headmaster of a rural school, and, as already indicated, the respondent and his spouse had been married customarily for ten years and had five children. The offence was therefore a serious inroad into an established, albeit unsolemnised, marriage. I do not think this court can interfere.

Since the respondent did not appear, no order as to costs is called for.

The appeal is dismissed.

Ebrahim JA: I agree.

S v MUGONI 1994 (2) ZLR 184 (CA)

Court **Court Martial Appeal Court, Bulawayo**

Gubbay CJ, Korsah JA & Muchechetere JA

Appeal from general Court martial

1 & 18 August 1994

Flynote

Military law - courts martial - judge advocate - duty to advise panel - comments on evidence given to court - limits as to opinion which may be expressed on such evidence

Military law - Defence Act [Chapter 94] - First Schedule, para 36 - behaving in a scandalous manner, unbecoming the character of an officer and gentleman - meaning - conducting affair with wife of lower ranking officer

Appeal - Court Martial Appeal Court - powers - misdirection at court martial - whether conviction must be set aside - sentence - Appeal Court's powers

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Headnote

The appellant, a major in the Zimbabwe National Army, had been tried by a general court martial of contravening para 36 of the First Schedule to the Defence Act [*Chapter 94*], that is, with behaving in a scandalous manner unbecoming the character of an officer and gentleman. It was alleged that he had engaged in an extra-marital relationship with the wife of a fellow officer who was of a lower rank. He was convicted and sentenced to be cashiered from the Defence Forces. The finding and sentence were confirmed on review by the Confirming Authority.

On appeal, the manner of summing up by the judge advocate was in issue. In particular, it was argued that the judge advocate had -

(a) omitted to direct the court martial as to the essential elements of the offence;

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(b) erred in failing to direct the court martial to disregard certain hearsay evidence;

(c) improperly commented on the credibility of a State witness.

Held, that although it was not easy for the judge advocate to have proffered elucidation as to the meaning of the charge, he had shirked that task. He should have indicated that the behaviour complained of may be of a military or a social character, and be such as to show that the accused is unfit to remain an officer. He should also have pointed out that the words "unbecoming the character of an officer and gentleman" are used adjectivally to qualify the meaning "behaves in a scandalous manner". The behaviour must not only be scandalous but also unbecoming.

Held, further, that the judge advocate should have commented on the hearsay evidence of a confession of adultery by the wife of the complainant. He should have directed the court martial that the evidence was hearsay and should be disregarded and would only have been admissible if tendered in order to establish, not the truth of the confession, but the fact that it was made.

Held, further, that the judge advocate's expressions of his personal opinion about the credibility of a prosecution witness went too far and were so forcefully expressed as to tend to usurp the function of the court martial as the triers of fact. The judge advocate's role is one of some delicacy and requires the utmost care to ensure that his summing up is impartial and fair. It should be made clear to the triers of fact that they should not accept the comments made in the summing up merely because they come from an experienced lawyer, unless those comments have been agreed to.

Held, further, that in spite of these misdirections, the conviction could not be set aside unless, as a matter of fact or law, it was unreasonable or unjustified or if there was a miscarriage of justice. The appeal court would dismiss the appeal if it was convinced that a reasonable court martial, properly instructed, must have convicted.

Held, further, on the facts, that the evidence did establish a relationship between the appellant and the other officer's wife which was of an exceedingly affectionate nature. It was highly

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reprehensible for the appellant, as a married man and senior officer, to enter into and persist in an affectionate liaison with the wife of a junior officer while the latter was deployed away from his unit. Such behaviour brought disrepute to the Army and fell within the purview of para 36.

Held, further, that because the appeal had been dismissed, the appeal court had no power to interfere with the sentence. This was regrettable, because, in addressing the court martial, it was erroneously submitted

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that the court, on conviction, had no option but to order that the appellant be cashiered. Cashiering was not the only permissible punishment and but for this misdirection the court martial might have imposed a lesser penalty.

Cases cited:

S v Mutonhodza S-98-89

S v Chibanda 1991 (1) ZLR 172 (S)

S v Chikoko S-119-93

Subramanian v Public Prosecutor [1956] 1 WLR 965 (PC)

R v O'Donnell (1917) 12 Cr App Rep 219

R v Damer & Ors 1961 R & N 870 (FS)

Martin v Royal College of Veterinary Surgeons' Disciplinary Committee [1966] 1 QB 1

Terry v Est Agents' Council 1979 RLR 365 (G)

Major Hanson v The State CM Appeal No 31/77 (Ghana)

S v Steele 1972 (1) RLR 377 (CMAppC)

S v Nyathi 1981 ZLR 108 (G)

S v Mapuranga S-33-88

S v Mafuwe S-162-89

J James for the appellant

Capt *E Mugugu,* with him Capt *D Tarukwana,* for the respondent

Judgment

Gubbay CJ: This court sits as a Court Martial Appeal Court under the provisions of Part VIII of the Defence Act [*Chapter 94*], the members having been appointed by me in terms of s 87(1).

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The appellant, a major in the Zimbabwe National Army serving under 2 Signals Regiment, appeared before a general court martial, comprising the president and four members, charged with behaving in a scandalous manner unbecoming the character of an officer and a gentleman, in contravention of para 36 of the First Schedule to the Defence Act. The specific allegation was that during the period extending from July to October 1992, and at Bulawayo, he had engaged in an extra-marital relationship with Mrs Theresa Maphosa, the wife of Captain E Maphosa, a fellow officer of 1 Signals Squadron. The bare particulars in the charge sheet were amplified by an outline of the State's case produced by the prosecutor. This was to the effect that while Captain Maphosa was on transfer from 1 Signals Squadron, Bulawayo, to 1 Signals Regiment, Harare, the appellant took advantage of his absence to engage in a relationship with Mrs Maphosa, who remained living in Bulawayo. On

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divers occasions during the period afore-mentioned he had collected Mrs Maphosa from her house, in his service vehicle, and the two would go off together. This continued until, eventually, Captain Maphosa revealed that he was aware of the association. It led to the break-up of the marriage.

I am satisfied that, as read with the State outline, the charge was sufficiently explicit as to enable the appellant to understand what he had to answer, and so complied with s 20(1)(b) of the Defence Forces (Court Martial Procedure) Regulations, FGN 85/1956 (hereinafter referred to as "the Regulations").

The appellant denied the charge. He was represented at the trial by a legal practitioner who prepared and lodged a defence outline on his behalf. Nonetheless, after the judge advocate had summed up, the general court martial returned a finding of guilty. The sentence passed upon the appellant was that he was to be cashiered from the Zimbabwe Defence Forces.

On 17 November 1993, the finding and sentence were confirmed on review by the Confirming Authority in terms of s 71(1)(a) of the Defence Act.

Aggrieved by the outcome of the proceedings and the confirmation thereof, the appellant, in the exercise of a right under s 88(1) of the Defence Act to so do, noted an appeal to this court. Clearly appreciative that the manner of his trial was akin to that before a judge and jury, the grounds relied upon as warranting interference constituted an attack upon the summing up of the judge advocate. See *S v Mutonhodza* S-98-89 (not reported); *S v Chibanda* 1991 (1) ZLR 172 (S) at 173F; *S v Chikoko* S-119-93 (not reported). They are that the judge advocate:

(i) omitted to direct the general court martial as to the essential elements of the offence;

(ii) erred in not directing the general court martial to disregard entirely hearsay evidence relating to a confession of adultery by Mrs Maphosa; and

(iii) improperly commended Elizabeth Hoffman as a State witness of the highest credibility, implying that the contrary evidence of the appellant be rejected.

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These grounds were pressed by Mr *James* in argument. I shall deal with each in sequence.

It is correct that the judge advocate gave no direction as to the meaning of the

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phrase "scandalous (behaviour) unbecoming the character of an officer and a gentleman". To proffer elucidation was not an easy task but ought not to have been shirked. The judge advocate should have indicated that such behaviour may be either of a military or social character, as is mentioned in s 6 of Chapter 16 of the Adjutant General's Standing Orders 1984. Reference to the commentary on the analogously worded s 64 of the British Army Act 1955, in the *Manual of Military Law* Part I (1972), would have alerted the members of the general court martial to the requirement that such behaviour "should not be made the subject of a charge unless it is such as to demonstrate that the accused is unfit to remain an officer", and to necessitate in the interests of discipline and the good name of the service that he be dismissed.

Furthermore, the judge advocate should have pointed out that the words "unbecoming the character of an officer and a gentleman" are used adjectivally to qualify the meaning of "behaves in a scandalous manner". And that it is an ingredient of the offence that the behaviour must not only be scandalous but also unbecoming. See Halsbury The *Laws of England* 4 ed vol 41 para 428. It was, accordingly, incumbent on the judge advocate to advise the general court martial not to find the charge proved unless satisfied that the behaviour of the appellant had that effect.

Any assumption on the part of the judge advocate that it was unnecessary to explain the purport of the charge to the general court martial, as it was a specialist body, was not justified. It was his duty under s 39(4) of the Regulations to advise on the law, and this he omitted to do.

The second complaint is likewise validly made out. Evidence was admitted, without objection, from Staff Sergeant Dhlamini, the lady cousin of Captain Maphosa, to the effect that Mrs Maphosa confessed to her that she had committed adultery with the appellant and had requested that her apology be conveyed to her husband. The judge advocate did not comment at all on this evidence. He should have directed that as Mrs Maphosa had not been called to confirm the confession its content, as comprising the truth, was hearsay and was to be disregarded; but that the evidence was admissible if tendered in order to establish, not the truth of the confession, but the fact that it was made. See *Subramanian v Public Prosecutor* [1956] 1 WLR 965 (PC) at 970. As no instruction was given to them, and as procedurally the reasons for the finding of guilt are not revealed, it is not known to what extent, if at all, the members of the general court martial paid regard to the truth of Mrs Maphosa's alleged confession.

McNALLY JA

The final criticism also appears to me to have merit. Subsections (d) and (g) of s 84 of the Regulations provide that the judge advocate:

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> "(d) at the conclusion of the case ... shall sum up the evidence and advise the court upon the law relating to the case before the court deliberate on their finding;" and
>
> "(g) . .. shall be careful to maintain an entirely impartial position."

In summing up the State's case, the judge advocate indicated to the general court martial that he felt compelled to comment on the evidence of Elizabeth Hoffman. He offered the view, without any hesitation, that the contention that she had been coached "is far fetched, **to say the least**" (emphasis supplied). And he added that her evidence was "so clear and unequivocal that to suggest that she was coached is, to me, **a wild and vain attempt** to destroy her credibility. In fact, for her age, **she impressed me as one of the best witnesses I have listened to in my about twelve years with the courts**" (emphasis supplied).

I consider that these expressions of personal opinion went too far and were so forcefully pronounced as to tend to usurp the function of the general court martial as the triers of fact. Their impact was insufficiently neutralised by the added injunction: "However, I will leave the Court to make its own finding".

In this connection it is apposite to repeat the words of LORD READING CJ in *R v O'Donnell* (1917) 12 Cr App Rep 219 at 221:

> "A judge obviously is not justified in directing a jury, or using in the course of his summing up such language as leads them to think that he is directing them, that they must find the facts in the way which he indicates. But he may express a view that the facts ought to be dealt with in a particular way, or ought not to be accepted by the jury at all."

The judge advocate's position, like that of a judge in a jury trial, is one of some delicacy. It necessitates that the utmost care be taken to ensure that the summing up, viewed as a whole, is balanced with both sides of the case fairly and impartially represented. It must be made absolutely clear to the triers of fact that they should not accept the comments made in the summing up merely because they fall from the lips of an experienced lawyer, unless agreed to.

In this matter it seems to me that the comment: "On the other hand, the

accused's defence was a complete denial and an alibi on the date in question", failed to give adequate credit to the defence. In fact, the appellant admitted calling for Mrs Maphosa in the mornings and transporting her to her workplace in his service vehicle. He said he did so at the request of Captain Maphosa, who was a close friend. The alibi was raised in relation to the evidence of Captain Maphosa and Elizabeth Hoffman that, on the evening of 7 September 1992, the appellant and Mrs Maphosa were observed intimately embracing one another.

In the result, I am satisfied - and this much I understood was conceded by counsel who appeared for the State - that the judge advocate's summing up was faulty in the respects mentioned.

However, unlike the ordinary judge and jury situation where, in consequence, the conviction would have been quashed, in order to achieve success the appellant must overcome the

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provisions of s 89 of the Defence Act. It reads:

> "Subject to the provisions of section *ninety*, on an appeal in terms of this Part against conviction the Appeal Court shall quash the conviction only if it thinks that the finding of the court martial is unreasonable or is not justified -
>
> (a) having regard to the evidence; or
>
> (b) on the ground of a wrong decision of any question of law;
>
> or that on any ground there was a miscarriage of justice:
>
> Provided that the Appeal Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

It follows that, notwithstanding the existence of any misdirection in the summing up, the finding of guilt cannot be set aside unless, as a matter of fact or law, it is unreasonable or not justified; or that there was a miscarriage of justice. However, under the proviso the appeal court **may** dismiss the appeal if it considers that no **substantial** miscarriage of justice has actually occurred. It will so consider if convinced that a reasonable court martial, properly instructed, must have convicted. The enquiry is not as to what would have happened before this general court martial which did convict, for it was not properly instructed. The position has to be tested by assuming the case to be before a court martial which was properly instructed. See *R v Damer & Ors* 1961 R&N 870 (FS) at 871H-872A.

McNALLY JA

The question now for this court to decide is whether, having regard to the evidence placed before the general court martial, and to the law, the finding of guilt is unreasonable or not justified, or that there was a miscarriage of justice. If the answer is adverse to the appellant the conviction must stand, and the proviso will not arise.

I do not propose to detail and analyse the evidence adduced by the State and the defence. A careful reading of the full transcript of the proceedings, in particular the impartial testimony of the former domestic servant, Elizabeth Hoffman, convinces me - despite the forceful submissions advanced by Mr *James* - that the following incidents relating to the behaviour of the appellant were proved beyond a reasonable doubt:

(i) During a period prior to 4 September 1992, the appellant would arrive in the mornings at the residence of Mrs Maphosa and drive her in his service vehicle to her place of work. She would be his only passenger. Sometimes he would enter the house and, if Mrs Maphosa was bathing, wait for her there. On other occasions, if she was not ready, he would knock at the bedroom door.

(ii) On 4 September 1992, Captain Maphosa who, unknown to the appellant, had just returned to Bulawayo, noticed the appellant stop his service vehicle outside the house. The appellant's explanation for his presence there aroused Captain Maphosa's suspicion.

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(iii) On the evening of 7 September 1992, the appellant and Mrs Maphosa drove up to the house. They entered and after a short time came outside together and went around the corner of the house. It was there that they were seen by Captain Maphosa, who was keeping the house under observation, and quite fortuitously by Elizabeth Hoffman, to embrace one another in an intimate manner.

(iv) Subsequently, Captain Maphosa on other occasions saw the appellant with his wife. The appellant would call for Mrs Maphosa and the two would depart together.

(v) At 0900 hours on Sunday 25 October 1992, the appellant called at the house and he and Mrs Maphosa drove away together. Mrs Maphosa only returned home in the evening.

(vi) On the morning of 27 October 1992, the appellant again arrived at the

McNALLY JA

house. He rang the front door bell and then waited at his vehicle. Mrs Maphosa appeared and went over to talk to him. Having overheard them arrange where they would meet, Captain Maphosa revealed his presence. He announced that he had been watching them and that if the appellant loved his wife so much he should take her. The appellant said that he would do so.

This evidence clearly established that the relationship engaged in by the appellant with Mrs Maphosa, while falling short of adultery, was of an exceedingly affectionate nature. But did the association involve the appellant in behaving in a scandalous manner unbecoming the character of an officer and a gentleman? Was the finding of the general court martial that it did, unreasonable or not justified?

I do not consider that the word "scandalous" is in any sense a term of art, bearing a special meaning. In accordance with the usual rule, it is to be given its natural and popular meaning, namely: "something said or done that offends moral feelings; a sense of propriety or ideas of etiquette; something calling forth condemnation". See Funk and Wagnall's *International Dictionary* vol 2 at p 1123; *Concise Oxford Dictionary* 7 ed at p 935. This meaning is qualified, however, by the phrase "unbecoming the character of an officer and a gentleman". Thus, behaviour which is not necessarily scandalous for an ordinary man may be scandalous for an Army officer and a gentleman; some personal behaviour unfitting of his rank or grade. The concept was well expressed by LORD PARKER CJ in *Martin v Royal College of Veterinary Surgeons' Disciplinary Committee* [1966] 1 QB 1 at 9C-E:

> "But if the conduct, though reprehensible in anyone is in the case of the professional man so much more reprehensible as to be defined as disgraceful, it may, depending on the circumstances, amount to conduct disgraceful of him in a professional respect in the sense that it tends to bring disgrace on the profession which he practises. It seems to me, although I do not put this forward in any sense as a definition, that the conception of conduct which is disgraceful to a man in his professional capacity is conduct disgraceful to him as reflecting on his profession, or, in the present case, conduct disgraceful to him as a practising veterinary surgeon."

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See also *Terry v Estate Agents Council* 1979 RLR 365 (G) at 366D-H.

To my mind, it was highly reprehensible for the appellant, a married man and

McNALLY JA

senior officer, to enter into and persist in an affectionate liaison with the wife of an officer of lower rank while the latter was deployed away from his unit. It was behaviour that brought disrepute to the Army. How could the appellant expect respect and obedience from Captain Maphosa, who was in the same corps and in his direct line of command? I agree entirely with the remarks of ARCHER JA (as he then was) in the Ghanaian case of *Major Hanson v The State* CM Appeal No 31/77, decided on 24 April 1978, that:

> "Military officers cannot be likened unto paragons of virtue and morality but in order to maintain and preserve good order and discipline in the Army one would expect senior officers to comport themselves and conduct their private lives in a way that will not court disrespect and disobedience from their subordinates. Moreover, if senior officers expect their lower ranks to be disciplined, one would also expect the senior officers to be self- disciplined. In this respect, self-discipline (in my view) will relate not only to official duties but all other conduct, including the suppression of indiscriminate sexual belligerency towards the wives of other members of the Army."

In the circumstances of this matter, I am unable to reach the conclusion that the finding of the general court martial that the appellant's behaviour fell within the purview of para 36 of the First Schedule to the Defence Act was unreasonable or not justified as a matter of law.

As it was correctly not contended that, on any other ground, the trial amounted to a miscarriage of justice, there is no alternative but to dismiss the appeal.

Since this court has upheld the conviction, it is precluded under the Defence Act from altering the sentence imposed. See *S v Steele* 1972 (1) RLR 377 (CMAppC) at 379F; *S v Chibanda supra* at 174D. This inability is regrettable, because in addressing the general court martial it was erroneously submitted that as para 36 mandated that "a person convicted shall be liable to be cashiered", there was no option except to order that the appellant be cashiered. That was a serious misdirection. The words "and **liable** to be cashiered" are not to be construed as meaning "**shall be** cashiered". To be cashiered from the Zimbabwe Defence Forces is the ultimate punishment. It is not the only permissible punishment. See *S v Nyathi* 1981 ZLR 108 (G) at 109H-110A; *S v Mapuranga* S-33-88; *S v Mafuwe* S-162-89 (both unreported). The error was repeated by the judge advocate, in his minute of 1 November 1993, to the Confirming Authority. But for this duplicated

McNALLY JA

misdirection, it is possible that the general court martial would have imposed a lesser penalty upon the appellant; and, if not, that the Confirming Authority would have reduced it.

It is the earnest hope of this court that some remedial administrative action will be taken under which the sentence is reassessed and, if considered to be inappropriate, reduced.

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Korsah JA: I agree.

Muchechetere JA: I agree.

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

Directorate of Legal Services, respondent's legal practitioners

WOODS & ORS v MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS & ORS 1994 (2) ZLR 195 (SC)

Court **Supreme Court, Harare**

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

Constitutional case

28 July & 12 September 1994

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 20 - freedom of expression and freedom from interference with correspondence - restrictions on right of maximum security prisoners to send and receive letters more than once in every four weeks - whether violates freedom of expression guarantee - whether restrictions reasonably justifiable in a democratic society

Headnote

The applicants were three convicted prisoners who were classed as maximum security risk prisoners. The prison regulation relating to this class of prisoners, s 141 (1)(a) of the Prison Regulations 1956, severely restricted their right to send and receive letters. Prisoners were only allowed to write and receive one letter every four weeks. The applicants applied to the Supreme Court for an order that this prison regulation was *ultra vires* the Constitution because it violated the freedom of expression guarantee (which includes freedom from interference with correspondence) in s 20 of the Constitution.

The respondents argued that this restriction on such prisoners' correspondence was a necessary restriction in order to preserve security, order and discipline. They argued that because all prisoners' mail had to be inspected, prison staff would be overstretched if more correspondence were to be allowed. They pointed out that the regulations also gave the prison authorities the discretion to allow further correspondence on compassionate grounds and in the best interests of prisoners and their families.

Held, that the right to freedom of expression is among the most precious of all the protected freedoms, lying at the very foundation of a democratic society.

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Held, further, that when a person is imprisoned he retains all his basic rights, save those withdrawn by law or those inconsistent with legitimate penological considerations. Restrictions upon a prisoner's personal correspondence cannot be justified solely as a feature inherent or implicit in the condition of penal incarceration and the legal status of the prisoner.

Held, further, that the Constitution permits restrictions to be imposed upon freedom of expression in the interests of public safety or public order to the extent that is reasonably justifiable in a democratic society.

Held, further, that the only legal yardstick to decide whether a law is reasonably justifiable in a democratic society is to examine whether the law arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual.

Held, further, that although the courts will accord the prison authorities a substantial measure of deference in the adoption and execution of policies and practices needed to preserve security, order and discipline, this restriction on prisoners' correspondence was far wider and deeper than was necessary or essential to protect the interests of security, order and discipline, in that it allowed scarcely any meaningful contact between prisoners and their family members, relatives and friends. The restriction thus went beyond what was reasonably justifiable in a democratic society in that it arbitrarily or excessively curtailed prisoners' rights.

Held, therefore, that s 141(1)(a) of the Prison Regulations is *ultra vires* the Constitution and is invalid.

Cases cited:

In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S)

Milwaukee Social Democratic Publishing Co v Burleson 255 US 407 (1921)

Conjwayo v Min of Justice & Ors 1991 (1) ZLR 105 (S); 1992 (2) SA 56 (ZS)

Turner v Safley 482 US 78 (1987)

Golder v UK (1975) 1 EHRR 524

Silver & Ors v UK (1983) 5 EHRR 347

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

Parrish v Johnson 800 F 2d 600 (6th Cir 1986)

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Procunier v Martinez 416 US 369 (1984)

Thornburg v Abbott 490 US 401 (1989)

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Battle v Anderson 376 F Supp 402 (1974)

Sostre v McGinnis 442 F 2d 178 (2d Cir 1971)

J Sayce for the applicants

A V M Chikumira, with him *B Q P Simelani*, for the respondents

Judgment

Gubbay CJ: Kevin Woods, Philip Conjwayo and Michael Smith are Class D maximum security risk prisoners. They are serving sentences of life imprisonment at Chikurubi Maximum Security Prison. As Class D prisoners they come under s 141(1)(a) of the Prison Regulations 1956 ("the Regulations"). Save for a single outgoing and incoming letter on admission to prison, that regulation only permits them, as of right, to write and receive one letter every four weeks. It is this limitation upon the enjoyment of their freedom of expression - which embodies freedom from interference with correspondence - as guaranteed by s 20(1) of the Declaration of Rights in the Constitution of Zimbabwe, that has prompted the three prisoners to apply jointly to this court for relief. They are the first to challenge the constitutionality of s 141(1)(a) and to seek an order that it be declared *ultra vires*.

The prison authorities (who speak as well for the Minister of Justice, Legal and Parliamentary Affairs) dispute the validity of the prisoners' contention. They raise a number of justifications for the restrictions imposed by s 141(1)(a) of the Regulations. First, the fundamental right of freedom of expression must be considered in the context of a prison environment, with the consequent and imperative need to maintain internal order and discipline, to secure the penal institutions against unauthorised access or escape and to rehabilitate the inmates placed in custody. Second, the procedures which precede the actual despatch of a prisoner's letter, and those involved in the receipt of a letter addressed to him, are time-consuming and labour intensive. To allow a prisoner the entitlement to write and receive letters in excess of one every four weeks would overstretch the capacity of prison personnel to effectively censor all outgoing and incoming mail for subversive content or physical contraband. Third, the Director of Prisons, in his discretion and as a privilege, is empowered, under s 141(4) of the Regulations, to permit the prisoner to write and receive more than one letter every four weeks on compassionate grounds. And an officer-in-charge, pursuant to s 141(5) of the Regulations, may also permit the prisoner to write and receive additional letters, if of the opinion that the best interests of the prisoner, or his family, are likely to be promoted thereby.

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In In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S) at p 57B this court characterised the right to freedom of expression as among the most precious of all the protected freedoms, lying at the very foundation of a democratic society; and one always to be jealously guarded by the courts. Nor is the pre-eminent importance of this fundamental right little diminished if exercised through the postal service. For as the redoubtable Mr JUSTICE HOLMES observed, over seventy years ago, in *Milwaukee Social Democratic Publishing Co v Burleson* 255 US 407 (1921) at 437:

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"... the use of the mails is almost as much a part of free speech as the right to use our tongues."

The view no longer holds firm in this jurisdiction, and in many others, that by reason of his crime a prisoner sheds all basic rights at the prison gate. Rather, he retains all the rights of a free citizen save those withdrawn from him by law, expressly or by implication, or those inconsistent with the legitimate penological objectives of the corrections system. See *Conjwayo v Minister of Justice & Ors* 1991 (1) ZLR 105 (S) at 109G-111G; 1992 (2) SA 56 (ZS) at 61B-62E; *Turner v Safley* 482 US 78 (1987) at 84-85.

It follows from this tenet that the restrictions placed on a prisoner's personal correspondence by s 141(1)(a) of the Regulations cannot be justified solely as a feature inherent or implicit in the condition of penal incarceration and the legal status of the prisoner. See *Golder v United Kingdom* (1975) 1 EHRR 524 at 539 para 44; *Silver & Ors v United Kingdom* (1983) 5 EHRR 347 at 371 para 84; van Dijk and van Hoof *Theory and Practice of the European Convention on Human Rights* 2 ed at p 393. It is an abridgement that **hinders** the prisoner in the enjoyment of his freedom of expression. As such, its validity is really dependent upon whether it falls within the ambit of s 20(2)(a) of the Constitution.

The relevant wording of s 20(2)(a) permits the enactment of a law, or anything done under the authority thereof, which derogates from the right to freedom of expression in the interest of public safety or public order, to an extent which is reasonably justifiable in a democratic society.

Notwithstanding the contrary argument addressed on behalf of the prisoners, I am prepared to assume in favour of the prison authorities that s 141(1)(a) of the Regulations is a law that makes provision in the interests of public safety or public order relative to prison administration. Thus, what these prisoners have to show, as challengers of the constitutionality of s 141 (1)(a),

is that it is a provision not reasonably justifiable in a democratic society on the grounds of public safety or public order. If they succeed in doing so then, as the responsible Minister was represented at the hearing of these proceedings, it will be unnecessary to issue a rule *nisi* in terms of s 24(5) of the Constitution. A final order may be made.

What is reasonably justifiable in a democratic society is an elusive concept. It is one that defies precise definition by the courts. There is no legal yardstick, save that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual. See In re *Munhumeso & Ors supra* at 14; and generally, *CoT v C W (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 390F-372C; 1990 (2) SA 245 (ZS) at 265B-266D. It is to this end that I now turn.

The restriction on the number of letters a prisoner as of right may write and receive cannot be considered in isolation. Assessment of its rationality must be made in the light of s 141(1) of the Regulations. This permits of censorship of every letter from and to a prisoner. Such supervision by prison personnel is aimed at the preservation of order and discipline inside the prison, the prevention of smuggling of illicit matter, the maintenance of security against escape or

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unauthorised entry, and the need to ensure that criminal activity is not facilitated. This imperative substantial interest, so it seems to me, is effectively served and secured by the scrutiny of all correspondence before despatch by and delivery to the prisoner.

However, implementation of the procedure may, in turn, warrant a limit being set on the number of letters a prisoner may send or receive. See *Parrish v Johnson* 800 F 2d 600 (6th Cir 1986) at 603 *in fine* - 604; Jacobs *The European Convention on Human Rights* at p 141, re article 8. The permissibility of such a limitation is also recognised in the United Nations Standard Minimum Rules for the Treatment of Prisoners, rule 37 of which provides that prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at **regular intervals** both by correspondence and by receiving visitors. But a reasonable and fair quota, as opposed to an irrational and arbitrary one, will not place an intolerable burden on those delegated to perform the task. It will not pose a threat to prison order and security.

Viewed in this setting, there are two features which, taken cumulatively,

clearly establish, to my mind, that s 141(1)(a) is a provision not reasonably justifiable in a democratic society in the interests of public safety or public order.

First, the restrictions impinge on the protection from interference with correspondence of the non-prisoner, whether that person be the author or intended recipient of a particular letter. The interests of both the prisoner and his "freeworld" correspondent are inextricably meshed. A wife, for instance, who is limited in the receipt of letters from her prisoner husband suffers an abridgment of her fundamental right in communicating with him as plain as that which results from the withholding by the prison authorities of more than one letter every four weeks from her to him. She has a legitimate demand to enter the prison environment through the written word. See *Procunier v Martinez 416 US 369* (1974) at 409; *Thornburgh v Abbott* 490 US 401 (1989) at 407; *Battle v Anderson* 376 F Supp 402 (1974) at 425. In short, prison walls cannot be utilised to prevent, or excessively curtail, free citizens from exercising their own constitutional rights by reaching out to those inside.

Second, it must not be overlooked that a severe limitation upon the ability to send and receive letters isolates the prisoner from contact with those nearest and dearest - from family, friends and clergy - who seek to sustain relationships with him. These ties are vital to the success of the prisoner's later return to society. As so eloquently expressed by KAUFMAN J in *Sostre v McGinnis* 442 F 2d 178 (2d Cir 1971) at 199:

> "Letter writing keeps an inmate in contact with the outside world, helps to hold in check some of the morbidity and hopelessness produced by prison life and isolation, stimulates his more natural and human impulses, and otherwise may make contributions to better mental attitudes and reformation."

The sweep of s 141(1)(a) is unnecessarily broad. It lacks the quality of reasonableness. It arbitrarily or excessively invades the enjoyment by the prisoner and his "freeworld" correspondent of their constitutionally guaranteed right of freedom of expression. It makes it scarcely possible for meaningful contact to be maintained between a prisoner and his

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immediate family, let alone between him and his relatives, close friends and professional advisers. After all, the right to correspond is not a luxury. Nor is it a privilege to be afforded at the discretion of the prison authorities. It fulfils a fundamental and primary need. To suppress it to the extent prescribed by s 141(1)(a) is, in the words of MR JUSTICE MARSHALL in *Procunier v Martinez supra* at 427, "to

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reject the basic human desire for recognition and affront the individual's worth and dignity".

This court readily acknowledges that a substantial measure of deference is due to prison administration in the adoption and execution of policies and practices needed to preserve security, order and discipline. See *Conjwayo v Minister of Justice, Legal & Parliamentary Affairs supra* at 109C-D and 60G-H respectively. But the rule of deference loses much of its impact and credibility where, as in this case, courts are faced with a prison regulation the terms of which are far wider or deeper than is necessary or essential to protect such interests.

In the result:

1. It is hereby declared that s 141(1)(a) of the Prison Regulations **1956** is *ultra vires* s 20 of the Constitution of Zimbabwe and, accordingly, invalid.

2. The costs of the application are to be borne by the Minister of Justice, Legal and Parliamentary Affairs.

McNally JA: I agree.

Korsah JA: I agree.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Coghlan, Welsh & Guest, applicants' legal practitioners

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

MULEYA v BULLE 1994 (2) ZLR 202 (HC)

Court **High Court, Harare**

Robinson J

Civil application

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20 September 1994

Flynote

Contract - illegality - interest claimed in excess of Moneylending and Rates of Interest Act [Chapter 299] - does not preclude claim of sum lent, together with lawful interest

Interest - loan agreement prescribing usurious rate of interest - whether loan amount recoverable

Headnote

The applicant sought to recover the sum advanced by him to the respondent under a loan agreement. The respondent contended that the loan agreement was invalid and unenforceable, because the applicant had charged interest at a rate in excess of that which he was entitled to charge in terms of the Moneylending and Rates of Interest Act [*Chapter 299*].

Held, that s 10(1)(a) of the Moneylending and Rates of Interest Act is designed only to prohibit a lender from recovering from a borrower a rate of interest on a loan in excess of the maximum rate permitted by that Act. Where, as in the present case, the loan agreement complies with s 13(1) of the Moneylending and Rates of Interest Act, the applicant is entitled to rely on the loan agreement to sustain a claim for payment of the loan amount. Where, on the other hand, s 13(1) has not been complied with, there is nothing to stop the applicant from abandoning reliance on the loan agreement and instead recovering the loan amount by way of the remedy of *condictio*.

Cases cited:

van Swieten v Pienaar 1928 TPD 407

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Knightbridge Invstmts (Pvt) Ltd v Gurland 1963 R & N 37 (SR); 1964 (4) SA 273 (SR)

Hanan v Turner 1967 RLR 293

Vermeulen v Ogilvy 1981 ZLR 255

Spencer v Merchants' Credit Corp 1933 WLD 69

Radnan v Rabinowictz 1949 (4) SA 497 (C)

R J Stumbles for the applicant

Respondent in default

Judgment

Robinson J: The applicant has applied for summary judgment to be entered against the respondent in the sum of $400 000 in respect of a loan of money advanced by the applicant to the respondent ("the loan amount") in terms of a written agreement of loan signed by the parties at Harare on 4 June 1993 ("the loan agreement"), together with interest on the loan amount at

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the rate stipulated in the loan agreement and costs of suit, as claimed in the applicant's summons issued under rule 13, order 3 of the Rules of the High Court.

The loan agreement, which features as annexure "A" to the applicant's summons, provides as follows:

"Memorandum of Agreement between

ERNEST LEONARD BULLE

and

RICHWELL MULEYA

whereas E L BULLE of 6 Curser Close, Highlands, Harare wishes to obtain a short term loan of $400 000 (four hundred thousand dollars) for a period of one (1) month from 4th June 1993 and whereas R MULEYA is willing to give the said loan to E L BULLE at an interest rate of 35% of the said loan value

And whereas E L BULLE will repay such loan plus the said interest on the 5th July 1993.

It is agreed that:

1. R MULEYA provides the said loan of $400 000 (four hundred thousand dollars) on the 4th June 1993 for the benefit of E L BULLE.

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2. E L BULLE provides to repay the said loan of $400 000 (four hundred thousand) plus interest of 35% on the 5th July 1993, upon which failure to do so, he will be liable to pay an interest at the rate of 2,5% per week from due date.

This is done and signed at Harare on this 4th day of June 1993.

Witness: (signed) (signed) E L BULLE

This is done and signed at Harare this 4th day of June 1993.

Witness: (signed) (signed) R MULEYA".

It is significant to note that in his opposing affidavit, the respondent does not deny that the loan amount was actually lent and paid to him by the applicant, but contends that the loan agreement is invalid and unenforceable because the applicant has charged interest at a rate in excess of that which he was entitled to charge in terms of the Moneylending and Rates of Interest Act [*Chapter 299*] ("the Act").

It is not understood what the respondent means when he makes the following allegations in pares 5 to 8 inclusive of his opposing affidavit:

"5. That when an illegal transaction goes sour the Applicant cannot now run to this Honourable Court and ask for protection without fully taking the court to (sic) his confidence and making an honest declaration on the true facts relating to the matter.

6. That the Applicant was a Bank Clerk and would have not honestly made the amount of $400 000,00 to

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loan to the Respondent.

7. That Respondent is being used as a pawn in the matter. When it suits Applicant to hide his spoils he calls on Respondent, when the deal goes sour he solicites (sic) the court to intervene on his behalf without laying bare the facts of the matter.

8. That this honourable court cannot now be asked to condone illegality."

If, as the respondent suggests, something untoward has happened behind the scenes in this matter, the onus was on him to make a full disclosure of the true facts to the court. Otherwise, if the court is left in the dark, the respondent

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proceeds at his peril and has only himself to blame for the consequences of his silence.

When this application was called in court, I received a message through my clerk that, according to the respondent's secretary, the respondent, who had drawn the papers and was representing himself in this matter, had had a motor breakdown after KweKwe while on his way to Harare, so that he was unable to attend court. However, this being the second occasion on which the respondent had sought a postponement, which was opposed by the applicant, and since it appeared clear to me from the papers that the respondent did not have a good *prima facie* defence to the applicant's action, I allowed the application to proceed.

In view of the defence raised by the respondent that the applicant "was bound by the Moneylenders (*sic*) and Prescribed (*sic*) Rate (*sic*) of Interest Act (Chapter 299) and that it (*sic*) has been charging interest in excess of the rate it (*sic*) was entitled to charge in terms of the Act", I permitted the admission of the affidavit purportedly filed by the applicant on 17 June 1994 to supplement the applicant's supporting affidavit insofar as, in para 2 of the supplementary affidavit, it is averred that the applicant had complied with s 15 of the Act, thereby entitling the applicant to charge a rate of interest in excess of 10% (see s 4(2) of the Moneylending and Rates of Interest Regulations 1985 ("SI 53 of 1985)).

Certainly the rates of interest claimed on the loan amount

(a) from 4 June 1993 to 5 July 1993, being "an interest rate of 35% of the said loan value", that is to say, the sum of $140 000,00, and

(b) from 5 July 1993, being "an interest at the rate of 2,5% per week", that is to say, at the rate of 130% *per annum*,

contravene the provisions of s 4 of SI 53 of 1985 (as amended by s 2 of SI 126 of 1993 which came into force on 19 March 1993), which provide as follows:

"(1) No lender shall, in respect of any loan of money, stipulate for, demand or receive from the borrower interest at a rate greater than-

(a) fifty *per centum* where the total amount of money lent by the lender, directly or indirectly, to the borrower within any period of three months does not in the aggregate exceed one hundred dollars;

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(b) thirty-five *per centum* per annum where the total amount lent as

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aforesaid is more than one hundred dollars but does not in the aggregate exceed ten thousand dollars;

(c) twenty-five *per centum per annum* where the total amount lent as aforesaid is more than ten thousand dollars but does not in the aggregate exceed one hundred thousand dollars;

(d) a rate which is equivalent to-

(i) the re-discount rate as fixed by the Reserve Bank from time to time; or

(ii) the rate fixed by the commercial and merchant banks in respect of bankers' acceptances;

whichever is the higher, plus a maximum of three *per centum* for administrative costs where the total amount lent exceeds in the aggregate one hundred thousand dollars."

The basis of the respondent's opposition to the application for summary judgment is that the loan agreement is invalid and unenforceable, on the ground that it provides for a rate of interest which is usurious, in that the rate exceeds the rate which may be charged in terms of the Act.

The counter to this line of opposition can be tracked thus.

1. The loan agreement complies with s 13(1) of the Act, which provides that every "instrument of debt" (which is defined as including a "... written contract or agreement or other document containing the terms of any contract or agreement in respect of any loan of money ...") "other than a mortgage or general covering bond executed within Zimbabwe after 30 September 1930, in respect of a loan of money shall separately and distinctly set forth-

(a) that it is executed for money lent; and

(b) the amount actually paid to the borrower; and

(c) the rate of interest which is to be charged in respect of the loan."

To the extent that it may be argued, as it was in van *Swieten v Pienaar* 1928 TPD 407, that since interest at an excessive rate is set forth in the loan agreement, s 13(1)(c) of the Act is infringed just as much as if no rate of interest had been set forth at all, SOLOMON J put paid to this point in *van Swieten*'s case *supra* at 411 where he said:

"It appears to me, however, that as the note in fact sets forth the rate of interest which is to be charged in respect of the loan, s 5(1)(c) (the equivalent of our s 13(1)(c)) has been complied with, even although the rate of interest may be an illegal one".

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2. It follows that, unlike the case where an agreement does not comply with s 13(1) of the

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Act (see *Knightsbridge Investments (Pvt) Ltd v Gurland* 1963 R & N 37 (SR) at 43A-H and 44A-C per LEWIS J (as he then was); 1964 (4) SA 273 (SR) at 277C-H & 278A & E-F),the loan agreement can be relied upon by the applicant to sustain a claim for payment of the loan amount.

In passing, I would point out that if the loan agreement had not complied with s 13(1) of the Act and, for that reason, the applicant had not been able to rely upon it to recover payment of the loan amount from the respondent, there would have been nothing to stop the applicant from abandoning reliance upon the loan agreement and, after an appropriate amendment to his particulars of claim, from relying on the mere Act of the loan to recover et least the loan amount from the respondent by way of the remedy of the *condictio.* In this connection, I find it pertinent to quote the following extract from the judgment of LEWIS J (as he then was) in *Hanan v Turner* 1967 RLR 293 (G) at 294H-I, 295 & 296A:

> "Mr *Scoble*, for the respondent, contends that nothing is recoverable from respondent by the petitioner, not even the capital sum lent. This proposition is quite untenable. All that case (ie *Knightsbridge Investments (Pvt) Ltd v Garland supra*) decided was that if the Plaintiff chooses to found his cause of action on the instrument of debt, which does not and cannot comply with s 13 of the Usury Act dealing with the requirements of an instrument of debt because it is a sham agreement, the court will not grant him relief. That is to say, it will not allow him to sue on that instrument of debt. In the action pending between the parties the Plaintiff has not, in fact, relied on any written agreement in his summons, but he is merely seeking to recover the money which he lent to the respondent All that I am concerned with in the present case is the question whether or not there is, in fact, a valid debt entitling him to apply for a final order in this case."
>
> There is nothing in the decision in the *Knightsbridge Investments* case (*supra*), or any other South African case, to prevent a lender from abandoning reliance upon an instrument of debt, if there has been an instrument of debt, and relying on the mere fact of the loan to recover at least the capital sum by means of the remedy of the *condictio.*
>
> In the *Knightsbridge Investments* case the defendant admitted that the *condictio* would have been available to the Plaintiff, as against the borrower, to recover the capital sum, but contended, and rightly, as the

> court held, that it was not available against the defendant himself as a surety firstly, because it was the borrower and not the surety who had had the benefit of the money lent and been enriched thereby, and secondly, because the surety had only bound himself as a surety for the obligations of the borrower as contained in the instrument of debt itself, to which he was a party, and not for any other liability falling outside the written agreement.
>
> It seems quite clear that the common law position is that, notwithstanding that usurious interest has been illegally charged, this does not preclude the lender from recovering the capital amount of the loan, together with any amount of interest which the law legally allows him to recover.
>
> In the case of *van Swieten v Pienaar* 1928 TPD 407, MR JUSTICE SOLOMON, with whose judgment MR JUSTICE KRAUSE concurred, said at p 412: 'At common law the defence of usury does not non-suit the Plaintiff but reduces the amount of his claim to the amount of his capital plus the rate of interest allowed by law. See *Taylor v Hollard* 2 SAR 78 and *Reuter v Yates* 1904 TS 855.' That was followed in the later case of *Spencer v The Merchants' Credit Corporation Ltd* 1933 WLD 69.
>
> Apart from the fact that there is clear authority for this proposition, it would be manifestly absurd if the law were to allow a borrower to be unjustly enriched by retaining the capital amount received at the expense of the lender. The law only castigates the charging of usurious interest on the capital, not the lending of the capital itself. Section

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10 of the Usury Act in my view reflects the common law position and clarifies it to the extent that it makes clear what amount of interest can be recovered by a lender in addition to the capital, when excessive interest has been charged in contravention of s 9. In my view, therefore, the respondent is clearly liable to repay at least the capital amount of the loan in this case, and, even if the respondent is entitled to set off the whole or part of the amount of £800 already paid by her by way of usurious interest, it is abundantly clear that she remains indebted to the petitioner in the sum of at least £1 800. That ground of opposition accordingly must fail".

See also *Vermeulen v Ogilvy* 1981 ZLR 255 at 256G - H & 257A - B, per PITTMAN J

3. Consequently, in so far es the loan agreement complies with s 13(1) of the Act and s 10(1)(a) of the Act is designed only to prohibit a lender, "under any

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contract of loan of money", from obtaining judgment for or from recovering from the borrower

"an amount which exceeds a capital amount which, added to any sum already paid in respect of the capital debt, equals the sum actually advanced to and received by the borrower under the contract plus - (a) interest at a rate not exceeding the prescribed rate of interest ",

the applicant is entitled to recover interest on the loan amount at the maximum rate permitted by the Act. See *van Swieten*'s case *supra* at 411 & 412 *per* SOLOMON J and *Spencer v The Merchants' Credit Corporation Ltd* 1933 WLD 69 at 72, where SOLOMON J stated:

"The case of *van Swieten v Pienaar* 1928 TPD 407 by which I am bound, appears to me to have laid down that in a contract of this kind, when the amount of interest stipulated for is in excess of that allowed by the Usury Act, the lender is entitled to recover the maximum amount allowed by the Usury Act."

See also *Radnan v Rabinowitz* 1949 (4) SA 497 (C) at 508 & 509 per SEARLE J and *Hanan v Turner supra* at 295H-I where LEWIS J (as he then was) stated.

"The law only castigates the charging of usurious interest on the capital, not the lending of the capital itself. Section 10 of the Usury Act in my view reflects the common law position and clarifies it to the extent that it makes clear what amount of interest can be recovered by a lender in addition to the capital, when excessive interest has been charged in contravention of s 9."

4. In the result, the defence on which the respondent seeks to base his opposition to the application is both ill-founded and spurious, thereby leading one to the inescapable conclusion that the respondent is merely resorting to delaying tactics to try to postpone the day of reckoning when he will be required to pay back the loan amount to the applicant, together with such interest as the law permits the applicant to recover from the respondent.

Accordingly, since the applicant has agreed to reduce and limit his claim for interest to the maximum rate permitted by the Act, summary judgment is entered for the applicant against the respondent in the capital sum of $400 000 together with interest thereon at the maximum rate allowed in terms of s 4(1)(d) of SI 53 of 1985 from 4 June 1993 to the date of payment.

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On the question of costs, although the respondent has correctly drawn attention to the excessive rates of interest provided for in the loan agreement, he has failed miserably in his attempt to avoid paying back the loan amount, together with the maximum rate of interest allowed by the Act. I therefore see no reason for not awarding the applicant his costs and, consequently, the respondent is ordered to pay the applicant's costs, including the costs of this application but exclusive of the costs relating to the applicant's supplementary heads of argument filed on 13 September 1994.

Mr *Stumbles* entreated me not to direct the Attorney-General to investigate the question of instituting criminal proceedings against the applicant by virtue of the applicant's contravention of s 9(1) of the Act on the basis that the rate of 35% of the loan value was intended to be the rate of 35% *per annum*. The short answer to this is that this is not what the loan agreement says and, in any event, the interest rate of 2,5% per week is clearly usurious. However, since the Attorney-General will, in the normal course of events, receive a copy of this judgment, I shall leave it to him to decide whether any action should be taken against the applicant.

Stumbles & Rowe, applicant's legal practitioners

UNITED BOTTLERS (A DIVISION OF DELTA CONSOLIDATED (PVT) LTD) v NKOMO 1994 (2) ZLR 211 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Appeal against decision of Labour Relations Tribunal

13 & 26 September 1994

Flynote

Employment - Labour Relations Act 1985 - amendment thereto abolishing Labour Relations Board - appeal which could have been noted to Board but was not noted bed ore abolition of Board - whether chairman of Labour Relations Tribunal could condone late noting of appeal and hear the appeal "appeal pending" - meaning - Labour Relations Amendment Act 12 of 1992 - s 30

Headnote

The respondent had been dismissed from her employment with the appellant company and her dismissal had been approved by a labour relations officer. An appeal to a regional hearing officer was dismissed on 13 October 1992. She was advised of her right to appeal to the Labour Relations Board. In terms of the regulations governing that Board, she had fourteen days in which to note an appeal, but failed to do so in time. As required by the Regulations, she sought the leave of the regional hearing officer to appeal, but leave was refused on the ground that the appeal was out of time. He advised her that she could approach any member of the Board for leave to appeal. That advice was given on 14 January 1993. However, on 31 December 1992, the Board had, because of the provisions of the Labour Relations Amendment Act 12 of 1992,

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ceased to exist, save for certain purposes. One of these purposes was the disposal of any appeal pending before it immediately before 31 December 1992.

Under the amending Act, the Labour Relations Tribunal took over the Board's appeal functions. The Chairman of the Tribunal purported to

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condone her application for the late noting of her appeal. The appellant appealed against the Chairman's ruling.

Held, that there was no provision in the (now repealed) Regulations governing the Labour Relations Board for the condonation of failure to comply with the Regulations or for authorising a departure from them. The Regulations governing the Tribunal gave the Chairman power to condone failure to comply with those Regulations only, not the failure to comply with other regulations.

Held, further, that although the amending Act allowed the Board to continue to function for the purpose of determining any appeal pending before it on 31 December 1992, there was no appeal from the respondent "pending". There was only a document, purporting to be a notice of appeal, filed out of time and thus invalid. It could not be said that there was an appeal pending simply because, in the mind of the party, there was an intention to attempt to rectify her failure to note an appeal and some invalid steps had been taken in pursuance of that intention.

Held, further, that the Tribunal therefore had no jurisdiction in the matter.

Cases cited:

De Kuszaba-Dabrowski et Uxor v Steel NO 1966 RLR 60 (A)

Muzuva v United Bottlers (Pvt) Ltd 1994 (1) ZLR 217 (S)

Santambank Bpk v Dempers 1987 (4) SA 639 (O)

Arab Monetary Fund v Hashim (No 4) [1992] 1 All ER 645 (Ch)

Musgrove v McDonald (1905) 3 CLR 132

Natl Bank of New Zealand Ltd v Chapman [1975] 1 NZLR 480

Noah v Union Natl South British Ins Co 1979 (1) SA 330 (T)

A G Matika for the appellant

D T Mwonzora for the respondent

Judgment

McNally JA: This appeal raises the question whether the Chairman of the Labour Relations Tribunal was correct in cordoning Ms Nkomo's late noting of her appeal against a decision by a

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regional hearing officer approving her dismissal by her employers.

It should be made clear at the outset that the question is not whether the Chairman correctly exercised his discretion. The question is whether he had any discretion to exercise. In other words, the appellant's contention is that the Chairman had no jurisdiction in the matter. That is a question of law, appealable in terms of s 108(2) of the Labour Relations Act 1985, as amended.

McNALLY JA

The appellant's case is in effect that the equities of the matter have nothing to do with it. The contention is that Ms Nkomo has, unfortunately for her, been caught by the change in the law brought about by the Labour Relations Amendment Act 12 of 1992.

Mr *Mwonzora*, for the respondent, has argued for fairness, equity, flexibility, and a spirit of justice. Mr *Matika*, for the appellant, has submitted that the Labour Relations Board ("the Board") and the Labour Relations Tribunal ("the Tribunal") are creatures of statute. They can do only what the statute empowers them to do.

The law governing labour relations, and particularly labour disputes, changed extensively on 1 January 1993, the date on which the Labour Relations Amendment Act 1992 came into effect. For the purposes of this judgment, it is necessary only to say that under the amended law the Board ceased to exist on that date, except to the extent of the transitional provisions contained in s 30 of the amending Act.

Mr *Matika's* contention is simply that Ms Nkomo's appeal was not pending before the Board on 1 January 1993 and therefore was not saved by the provisions of s 30 of the amending Act.

The facts are these. Ms Nkomo was dismissed, with the concurrence of a labour relations officer. She appealed to a regional hearing officer ("the RHO"). Her appeal was dismissed on 13 October 1992. She was notified of that fact on 19 October 1992. She decided to appeal to the Board, as she was entitled to do.

The procedure for such an appeal was set out in SI 368/85. In terms of s 18(1) of those Regulations, she had fourteen days to "note ... an appeal to the Board in Form LT 27, in triplicate". So she had to note her appeal by 3 November 1992.

But, before noting the appeal, Ms Nkomo had to obtain leave to appeal from the RHO in terms of s 18(2). That leave was refused by the RHO "for the simple reason that the appeal has been noted out of time". According to the RHO (and this is not disputed), she handed him her notice of appeal forms only on 10 December 1992, ie some five weeks out of time. He therefore refused leave to appeal, but advised her that she could approach any member of the Board for leave to appear, in terms of s 18(2). However, that advice was wrong, because it was given in a letter dated 14 January 1993, by which time

McNALLY JA

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the Board, save for particular purposes, had ceased to exist. I should add, however, that the papers reveal that her lawyers had made oral enquiries as to whether or not they were out of time as early as 26 November 1992. So she was not prejudiced by the wrong advice.

The point to be stressed here is that, although the RHO used the phrase "the appeal has been noted out of timed the appeal had in fact not been noted at all. There are two reasons for this:

1. s 18(1) had no provision for noting an appeal after the expiry of the fourteen day period; and

2. an appellant was required by s 18(2), "before noting an appeal in terms of subs(1)", to seek the leave of the RHO. Without his leave, or the leave of a Board member, he/she had no right to note an appeal. No such leave was obtained.

It may be further observed that there was no provision in these Regulations for condonation of failure to comply with Be Regulations or for authorisation of departure from the Regulations. There was such a provision in SI 369/85, the immediately following Statutory Instrument, governing the procedure of the Tribunal. The chairman of the Tribunal was given power, in s 23 of SI 369/85, to "condone any failure to comply with these Regulations". He was not given power to condone any failure to comply with any other Regulations. I use the past tense because both these statutory instruments were repealed by SI 30 and SI 31 of 1993.

The Chairman of the Tribunal relied on the principles governing the exercise of discretion in the condonation of late noting of appeals as set out in *de Kuszaba-Dabrowski et Uxor v Steel NO* 1966 RLR 60 (A). But those principles govern the situation in a court or tribunal which either has inherent jurisdiction to exercise a discretion or is granted that discretion in the statute creating it or the statutory instrument governing it.

In *de Kuszaba-Dabrowski* there was both inherent jurisdiction and specific provision for the exercise of discretion in such matters in the rules of court.

In the rules governing the Tribunal, there was also specific provision for the exercise of discretion in the granting of condonation for a breach of the rules. Without that provision the Tribunal would have no discretion. It is a creature of statute.

McNALLY JA

In the rules governing the Board there was no provision for discretion or condonation. The omission is pointed because it contrasts with the provision for the Tribunal. The empowering statutory instruments were published consecutively - 368 and 369 of 1985, promulgated on the same day, 13 December 1985. SI 369 gave the Chairman of the Tribunal a discretion. SI 368 gave the Chairman of the Board no discretion.

So the position was that as at 1 January 1993, Ms Nkomo had not noted an appeal to the Board against her dismissal. True, she had given various explanations for her failure to do so. True, she had shown a consistent intention to do so. But in fact she had not noted an appeal.

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The provisions of s 30(1) of the amending Act are reasonably clear. It reads:

> "Nowithstanding section **twenty-three**" (I think it should be "twenty one", but for present purposes it does not matter) "the Labour Relations Board shall continue to function for a period of six months from the date of commencement of this Act for the purpose of determining any appeal pending before it immediately before that date ..."

What is "an appeal pending"? The Chairman of the Tribunal relied on the dictionary definition "waiting to tee decided". But that begs the question. One asks "what is meant by 'waiting'?"

This court, in *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S) considered the meaning of the word "pending" in the very context with which we are concerned. The CHIEF JUSTICE, after referring to legal dictionaries and other authorities, said:

> "all an appeal is pending before the Tribunal if, immediately before 1 January 1993, it had been noted yet awaited the Tribunal's determination."

For "Tribunal" read "Board", and you have the situation in the present case. If anything was pending before the Board in this case, it was not an appeal, but a document, purporting to be a notice of appeal, filed out of time and thus invalid.

It is true that there may be circumstances in which the word "pending" is used in a looser sense. Thus the phrase "pending action" is often used in interim interdicts to refer to an action which has not yet been instituted but which is about to be instituted. See *Santambank Bpk v Dempers* 1987 (4) SA 639 (O) at 645C-G, and the cases there referred to.

McNALLY JA

But in other contexts it is used as a term of art to indicate that the appropriate proceedings have actually been instituted. This will, I think, normally be the case where definition and certainty are required. Thus in *Arab Monetary Fund v Hashim (No 4)* [1992] 1 All ER 645 (ChD), it was held that an action is pending if the writ has been issued, whether or not it has been served; in *Musgrove v McDonald* (1905) 3 CLR 132 at 147, it was held that an application for a new trial after verdict, upon whatever ground, did not fall within the words "appeals from all judgments, decrees, orders and sentences" of Federal Courts or Supreme Courts; in *National Bank of New Zealand Ltd v Chapman* [1975] 1 NZLR 480 at 482 it was stated that a legal proceeding can be said to be pending as soon as it has been commenced; and in *Noah v Union National South British Ins Co* 1979 (1) SA 330 (It) at 333 it was said that "merely because action was threatened an action was not yet pending".

In the case under consideration, the time within which an appeal had to be noted had elapsed. No appeal had been noted. It cannot be said that an appeal was pending simply because, in the mind of the party, there was an intention to attempt to rectify her failure to note an appeal, and some invalid steps had been taken in persuade of that intention.

When the matter came before the Chairman of the Tribunal on 14 February 1993 it was described as an application in terms of s 23 of the Labour Relations (Labour Relations Tribunal) Regulations 1985 (SI 371/85) for condonation of the late noting of her appeal. In the fast place,

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those Regulations were not to be found in SI 371/85, but in SI 369/85. In the second place, those Regulations had by then been repealed. In the third place, s 23, as I have indicated earlier, gave the Chairman power to condone failures to comply with the Regulations in SI 369/85 but gave him no authority to condone similar failures in regard to SI 368/85. In the fourth place, she wanted to appeal to the by then defunct Board. She was given leave to appeal to the Tribunal. In terms of s 30(4) of the amending Act, this could only be done if the appeal was pending before the Board.

It seems to me, with respect, that the Tribunal had no jurisdiction in the matter. Ms Nkomo had, up to 3 November 1992, a right to appeal to the Board. She failed to exercise that right. The ruling of the RHO thus stood unappealed. She applied out of time for leave to appeal. That leave was refused. She might then, before 1 January 1993, have applied for leave to a member of the Board. But she did not. Her application to the Board in February 1993 was a nullity. The Board no longer existed except for certain

purposes. The receiving of applications for leave to appeal was not one of those purposes. The Tribunal had no power to hear appeals from a regional hearing officer's decision unless the Board had been seized of, and had not yet disposed of, that appeal.

MS Nkomo's application should have been rejected for want of jurisdiction. The appeal succeeds with costs as prayed. The order of the Tribunal dated 18 February 1994 is set aside. In its place the following order is substituted:

> "The application is dismissed."

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Gambe, Chinyenze & Partners, respondents legal practitioners

S v MIDZI & ORS 1994 (2) ZLR 218 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Application for permanent stay of criminal proceedings

15 & 26 September 1994

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Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(2) - right to trial within reasonable period of time - when right violated - what time period is sufficient to trigger inquiry - accused person on bail - factors to be considered

Headnote

A period of twelve months' delay in bringing a matter for trial is not normally regarded as sufficient to"tagger the enquiry" into whether an individual's fundamental human right to a trial within a reasonable period of time has been infringed. This applies more especially where the accused have been remanded out of custody on bail throughout.

In the present case, the appellants had been charged with fraud, alternatively with contraventions of the Prevention of Corruption Act 34 of 1985. The delay in bringing the case for trial was less than twelve months and the appellants had been on bail throughout. It was argued, however, that this was an exceptional case and the court should order a permanent stay of proceedings. The reason why it was exceptional was that the appellants had been subjected to financial burdens and hardship because measures had been taken under the Act to disallow them access to monies in their bank and building society accounts.

The Supreme Court noted that there was a remedy for the financial hardship, namely, that the investigator appointed in terms of the Act could be requested to use his power to approve the use of funds by appellants from their accounts. If the persons affected believed that the investigator was unjustifiably refusing to allow them to use any of those funds, the matter could be taken on review to the High Court, as was in fact teeing done in

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McNALLY JA

> the present case. Such hardship as may have been caused by the allegedly unco-operative attitude of the investigator was thus not, in the particular circumstances, a relevant consideration in an application for relief under s 18(2) of the Constitution.

Cases cited:

In re *Mlambo* 1991 (2) ZLR 339 (S)

Mlauzi v A-G 1992 (1) ZLR 260 (S)

S v Matarutse S-101-94

In re Mutevera S-106-94

M J Gillespie for the applicants

Miss *T Searl* for the respondent

Judgment

McNally JA: This is an application for a permanent stay of proceedings by the State against the

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various applicants. The contention is that their rights under s 18(2) of the Constitution to "a fair hearing within a reasonable time" have been infringed.

The principles which govern applications of this nature were set out in In re *Mlambo* 1991 (2) ZLR 339 (S). They have since been applied on a number of occasions, from *Mlauzi v Attorney-General* 1992 (1) ZLR 260 (S) to *S v Matarutse* S-101-94 and In re *Mutevera* S-106-94.

It seems that the applicants on this occasion are involved in two separate sets of allegations and that they are to be tried in two (or possibly more) separate trials. But all of them have a common history as far as the present allegations are concerned.

All of them were officially notified that they were to be charged with fraud, alternatively contraventions of the Prevention of Corruption Act 34 of 1985, on 14 June 1993. All were arrested on 16 June 1993. All were remanded out of custody on that date on bail. Subsequently all were formally charged and invited to make statements under warn and caution. They did so, denying the allegations. (The allegations apparently involve large sums of money.)

Between 14 June 1993 and 24 June 1994 they were remanded seven times. On 22 February 1994, under pressure from the defence, the court remanded them "for the last time" to 25 March 1994. However, on that date, a junior defence lawyer, unaware of the facts, agreed to a further remand to 24 June 1994. It was on that date that an application was made that the court should refuse to remand them again.

McNALLY JA

It appears (though papers before us are deficient in this regard) that the magistrate did not make a ruling, but simply referred the matter to this court in terms of s 24(2 of the Constitution. However, since he did not in fact remand them, their bail conditions have fallen away.

A period of twelve months' delay is not normally regarded as sufficient to "trigger the enquiry" into whether an individual's fundamental human rights have been infringed. More especially is this so where, as here, the accused persons have been on bail throughout. But it is argued that the situation here is exceptional because of the added burdens which have been placed upon the applicants.

On 20 July 1993, by order of the High Court, the applicants were interdicted from withdrawing any money from a number of banks and building societies with which they or various companies or organisations had accounts. The banks and building societies were similarly interdicted from paying out any monies in these accounts to any person whatsoever.

This interdict was further extended in August for six months. At the expiry of that period there was a hiatus during which the police purported to seize the contents of the bank and building society accounts. Finally, on 13 May 1994 the applicants were "specified" under the Prevention of Corruption Act and an investigator was appointed.

Accordingly they have effectively been deprived of access to funds since 20 July 1993. But it

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must be noted that the Prevention of Corruption Act, as amended by s 16 of Act 22 of 1992, allows the investigator to approve the use of funds in bad accounts, etc. No details were given in the applications before us, though it was alleged that they have various financial problems because of their inability to gain access to their accounts.

We were informed from the Bar that proceedings have been instituted in the High Court, which are to be heard later this year, to challenge the way in which the investigator is carrying out his duties. In our view, that is the proper way in which to tackle this particular problem. Such hardship as may have been caused by the allegedly unco-operative attitude of the investigator is not, in these circumstances, a relevant consideration in an application for relief under s 18(2) of the Constitution. We do not say that it can never be. But in these circumstances it is not.

Leaving that consideration aside, to be dealt with in other proceedings, what

remains is not in our view sufficient to justify the relief sought. We are advised from the Bar by the State that their trials will be set down for hearing in the first term of 1995. We have considered the possibility of postponing this application for a period of, say, six months, but we see no reason on the present facts to do so. The delay is not abnormal. Imprisonment is not an issue. While we remain conscious of the hardship, sometimes grave hardship, facing persons charged but not yet tried, we consider in this case the hardship is due largely to the impact of the "specification" of the applicants. For that hardship there is another remedy.

The applications by the five applicants are dismissed. No order for costs was sought.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Kantor & Immerman, applicants' legal practitioners

INDEPENDENCE MINING (PVT) LTD v FAWCETT SECURITY OPERATIONS (PVT) LTD 1994 (2) ZLR 222 (HC)

Court **High Court, Harare**

Chidyausiku J

Civil action

24 June & 5 October 1994

Flynote

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Carrier - common carrier - who is - security firm delivering bullion on behalf of mining company - bullion stolen en route by armed robbers - liability of common carrier

Headnote

The defendant company was a registered security organisation. It had been providing security services to mines operated by the plaintiff. These services included the provision of guards, the delivery of wages and cash and the collection and transportation of bullion produced at the mines. The contract under which the defendant collected and delivered bullion contained two exclusion clauses.

On 30 October 1989, one of the defendant's vehicles was sent to How Mine near Bulawayo to collect bullion. The bullion, to the value of $1 228 746.95, was collected but on the way back to Bulawayo the vehicle was stopped by armed robbers, who killed the driver and another employee of the defendant and stole the box containing the bullion. The bullion was never recovered.

The plaintiff set out two causes of action. Firstly, it claimed that the defendant was a common carrier and had strict liability to deliver the consignment it had received. Although carriage was not its main business, it did carry out, as one of its businesses, the trade of carriage. Secondly, it claimed that the defendant was negligent in that it had failed to take steps which would have avoided the robbery or would have allowed the robbery to be successfully resisted.

The defendant argued that it was not a common carrier because it did not

exercise the profession of carrying goods and was not compelled to accept goods from members of the public. It carried goods on behalf of individual clients on the basis of individual contracts. With regard to the claim based on negligence, it argued that the relationship between the parties arose from and was governed by the contract between them. If there was any duty of care, it arose from the contract. If there was no breach of contract, there was no negligence.

Held, that there was no doubt that strict liability attached to a public carrier by land. As to whether the defendant was a carder, a casual act of carriage did not bring one into the ambit of the Praetor's Edict, which imposed strict liability. One must be a carrier of goods by profession. This does not mean that before a party can be a public carrier, its trade or profession must be the carriage of goods to the exclusion of all other trades or professions. If the carriage of goods is part of that party's business, that is sufficient to make the party a public carder. On the evidence, part of the defendant's business was the carriage of goods and thus the defendant was a public carrier.

Held, further, that although strict liability attached to a public carrier, the carrier would not be liable if it established *vis maior*. The authorities were clear that robbery was a form of *vis maior* which relieved the carrier of liability. The defendant had established the defence and accordingly could not be held liable as a carrier.

Held, further, that it would be inconsistent to find that the loss was caused by *vis major* and then proceed to find in the alternative that the defendant was negligent and therefore delictually

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liable. Any duty of care arose from the contract between the parties. There was no averment by the plaintiff of any breach of the written provisions of the agreement. The plaintiff had also alleged, as particulars of negligence, various ways in which the robbery could have been averted and security enhanced. There was, however, no evidence to establish that if any of these steps had been taken the loss of bullion would have been prevented. Indeed, the plaintiff was fully aware of the security arrangements involved in the transportation of the bullion and at the very least tacitly accepted those arrangements as adequate.

Held, therefore, that the action should be dismissed.

Cases cited:

CMB v NRZ 1988 (1) ZLR 304 (S); 1990 (1) SA 582 (ZS)

Prinsloo v Venter 1964 (3) SA 626 (O)

Hall-Thermotank Africa Ltd v Prinsloo 1979 (4) SA 91 (T)

CHIDYAUSIKU J

A P de Bourbon SC for the Plaintiff

M J Gillespie for the defendant

Judgment

Chidyausiku J: The plaintiff in this case is suing the defendant for the payment of the sum of $1 228 746.95, being the value of gold bullion and silver belonging to the plaintiff which was lost during the course of an armed robbery while being transported by the defendant from How Mine to Bulawayo. The facts of this case are to a large extent common cause. Indeed, the plaintiff did not lead any evidence. Most of the facts the plaintiff relies on are set out in the statement of agreed facts submitted by the parties. The defendant led evidence from one witness, a Mr Bristow. His evidence relates mainly to the manner in which the defendant conducts its business.

The facts of this case which are common cause and are set out in the agreed statement of facts are as follows.

The plaintiff is an associated company of Lonrho Zimbabwe Ltd and operates How Mine, which is 32 km outside Bulawayo. The defendant is a registered security organisation in teens of the Private Investigators and Security Guards (Control) Act 23 of 1977. It has been in this business for many years. It advertises itself as a leader in the field of security services.

The defendant has been providing security services to How Mine and other mines in Zimbabwe for many years. These security services include the provision of guards, the delivery of wages and cash and the collection and transportation of the bullion produced at How Mine and other mines.

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The contract between the parties was regulated in terms of a letter dated 10 October 1983, contained in the bundle of documents handed by consent as exhibit 1. The letter appears on pp 14 to 16 of the bundle of documents. The letter essentially sets out when and how, among other things, gold bullion was to be collected from How Mine. At p 3 of the letter there is provision describing the type of vehicles used by the defendant. It reads as follows:

> "*Vehicles*: Our Company operates the largest fleet of specially designed security vehicles in the country and all vehicles are manned by trained crews who are normally armed. Our operations are supported by extensive radio networks in the VHF and HF bands. Cash runs are occasionally served in unmarked vehicles where security considerations make this desirable."

CHIDYAUSIKU J

The letter of 10 October was in turn superseded by the agreement no. 174 contained in the bundle at pp 17 and 18 of the bundle. This agreement contains two exclusion clauses, namely, clause 2 and clause 4. In part, the defendant relies upon these two exclusion clauses to avoid liability. This agreement was to some extent amended by the letter dated 19 May 1987. The amendments in the letter of 19 May 1987 relate to the times of collection of the bullion and the destination. The letter does not amend the standard conditions set out in the above contract not 174. Agreement no 0105 signed on 19 May 1987 is identical to agreement no. 174 previously signed by the parties.

In terms of the written contract between the parties, the defendant was required to send a vehicle to How Mine to collect the bullion, return it to Bulawayo and keep it overnight in a secured place. The following day the defendant was obliged to transport the bullion, and other bullion collected from other locations, by road to Harare. In Harare, the bullion was kept in a secured place by the defendant and thereafter delivered to the Reserve Bank of Zimbabwe. In return for the services the defendant was paid by the Plaintiff, the contract price at the time of the loss being $1 732 per month.

All producers of gold are required to sell their whole production of gold to the Reserve Bank of Zimbabwe. Lonrho Zimbabwe Ltd specified the dates when the bullion was to be sent to Harare. When the Plaintiff required bullion to tee collected, telephonic contact was made with the defendant's Bulawayo branch and the necessary arrangements were made. This is what occurred on 30 October 1989.

When the defendant was instructed to collect the bullion from How Mine on the 30 October 1989 it provided a soft-skinned Datsun pick-up for the purpose. The vehicle was painted dark blue, in the colours of the defendant, and had the defendant's name and emblem painted on it. The vehicle left Bulawayo at approximately 14:30 hours. It was being driven by Samuel Sibanda, who held the rank of sergeant with the defendant. He was not in uniform but was armed with a .38 revolver contained in a holster on a belt around his waist. He was accompanied by Sidney Mudzingwa who was in uniform. Mr Mudzingwa was armed with a .303 automatic rifle and ammunition.

The 32 km trip to How Mine involves approximately 12 km of tarred road followed by 20 km of rural gravel road. The vehicle arrived at How Mine shortly after 15:30 hours. A locked metal box

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containing 4 bars of gold bullion was placed in the back of the vehicle. The back of the vehicle

CHIDYAUSIKU J

consisted of a light metal canopy and a wire mesh cage. The box was placed inside the cage. The back door of the vehicle was locked.

The vehicle left How Mine shortly before 16:00 hours. Mr Sibanda was driving and Mr Mudzingwa was seated in the front passenger seat next to him. Approximately 2,4 km from the mine the vehicle was fired upon and stopped. The assailants, whose identities are unknown, shot and killed both occupants. They then shot the lock of[the back of the vehicle and stole the box containing the bullion. The bullion has never been recovered.

The stolen metal box contained 45,8949 kg of gold and 2,7919 kg of silver. The value of the bullion was $1228 746,95. The plaintiff has been paid in terms of its insurance policy in respect of the loss and sues the defendant under subrogation for the amount concerned.

Since the incident, the parties have concluded two separate contracts relating to the transportion of the bullion at How Mine. Copies of the new agreements were produced as exhibits. These in brief are the facts giving rise to this action.

I now turn to consider the issues that fall for determination in this case. The plaintiff in its declaration sets out two causes of action. Firstly, the plaintiff avers that when the defendant received the bullion for transportation it was acting as a common carrier. As a common carrier, the defendant had strict liability to deliver the consignment it failed to deliver. Secondly, and in the alternative, the defendant was negligent in its dealing with the consignment of the bullion, which negligence led to its loss. The effect of the first allegation - that the defendant is a common or public carrier - is that, if established, it will impose upon the defendant strict liability for the loss of the bullion without the need for the plaintiff to establish fault on the part of the defendant. In that event, the defendant can only escape liability if it establishes one of the exceptions to the strict liability imposed on common or public carriers by the praetorian edict.

The second cause of action will only succeed if the plaintiff establishes negligence or fault on the part of the defendant. The onus to establish such negligence or fault lies on the plaintiff.

The defendant's stance is that it denies being a common carrier. The defendant also pleads the existence of a written contract containing an exclusion clause disclaiming liability for any loss from any cause

CHIDYAUSIKU J

beyond the defendant's control. This clause, the defendant contends, places upon the plaintiff the need to prove negligence before it can succeed.

The defendant further pleads, in the alternative, that the plaintiff consented to the assumption of risk inherent in the steps actually taken to transport the bullion. The basis of this claim is that the

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plaintiff was fully aware of the manner or method employed in the transportation of the bullion. He accepted the method of the transportation, at the very least tacitly.

At the pre-trial conference the issues were defined by both counsel representing the parties to be the following:

(a) whether the defendant was a public carrier;

(b) whether the defendant was negligent;

(c) the respects, if any, in which it was negligent;

(d) the effect of clause 2, the exclusion clause of the contract;

(e) whether the loss was caused by an event covered by clause 2 of the contract;

(f) whether the defendant's duty of care arose solely from the contract;

(g) whether the defendant should have foreseen and prevented the loss;

(h) whether the plaintiff assumed the risk of the loss arising in the circumstances;

(i) the value of the bullion on the date of the robbery;

(j) whether liability is limited to $1 000 000.

Some of the above issues are closely interrelated and can conveniently be dealt with together. I am satisfied that the issues as set out above encompass all the possible issues that have to be determined in this case.

I will now turn to deal, firstly, with the issue of whether or not the defendant is a common or public carrier. In Roman law, the Praetor's Edict provided that mariners, innkeepers or stable-keepers are responsible, except in cases of *damnum fatale* or *vis major*, for loss of or damage to goods received by them, without proof that there has been negligence. There is no dispute that this rule has been incorporated in the Roman-Dutch Law, which is applicable in Zimbabwe. Prior to 1988 there might have been some dispute as to whether the Praetor's Edict applied to public carriers by land. The issue was put beyond doubt in *Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe* 1988 (1) ZLR 304 (S); 1990 (1) SA 582 (ZS). In that case it was held that strict liability imposed by the praetorian edict applies, in Zimbabwe, to carriers by land such as the National Railways of Zimbabwe. DUMBUTSHENA CJ, after a thorough review of the various authorities on this point, came to the following conclusion at p 315D:

CHIDYAUSIKU J

> "I cannot see any good reason why the strict liability imposed by the Edict on public canters by water should not be extended to public carriers by land. The principle is the same: the carrier is liable for loss of the goods (or injury to the goods) because he does not deliver them in an undamaged condition or at all. This makes good law and it is also good common sense.

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> I have, like other judges in this country, come to the view that the Edict applies to public carriers by land. Happily, counsel in this case are also agreed that it does apply to public carriers by land."

There is no doubt, therefore, that strict liability attaches to a public carrier by land for goods lost or damaged in transit. The question, therefore, is, whether the defendant, a company principally concerned with providing security service, is a public carrier. In the *Cotton Marketing Board* case *supra*, the question of whether the National Railways of Zimbabwe was a public carrier was never an issue, therefore the question of what constitutes a public carrier was never discussed in any detail or determined in that case.

Mr *de Bourbon* submitted that the defendant is a public carrier. He argued that, although that might not be its sole business, it carried out, as one of its businesses, the trade of carriage. He cited the heading of the agreement between the parties which reads "Security Carriage Service Agreement" as clearly supporting his contention that the defendant is a public carrier. Mr *Gillespie,* on the other hand, contended that the defendant was not a public carrier, because it does not exercise the profession of carrying goods and it is not compelled to receive goods from members of the public in the course of that profession. He argued that the defendant provides a range of security services, one of which is the secure transportation of cash or of valuables, which involves carriage. The defendant is under no duty to accept instructions to provide this secure carriage service, but does so on the basis of individual contracts entered into with individual clients according to the circumstances of each case. He further argues that the contract entered into in this case is not one of public carriage but one *sui generis* and best described as one for a security carriage service. In his submission, the liability of the defendant is accordingly governed by the terms of the contract.

Dönges *The Liability for Safe Carriage of Goods in Roman-Dutch Law* maintains that the Praetor's Edict applies to those who exercise the profession of mariners, innkeepers and stable-keepers. A casual act of carriage does not bring one into the ambit of the edict. Indeed, the following passage appears at pp 61-62 of the learned author's work:

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> "The application of the Praetor's Edict is limited to those '*nautae, caupones et stabularii*' who exercise these respective professions. The person who has undertaken a casual act of carrying does not fall within the provisions of the edict. This is clear from the texts themselves."

In *Prinsloo v Venter* 1964 (3) SA 626 (O), a farmer undertook to transport a steel framework for a fee. He arranged with a carrier to carry the steel frame. The question of whether the defendant was a public carrier was specifically left open, but SMIT JP, at p 627E, had this to say on who might be a public carrier:

> "It does not appear from the evidence that the defendant was a public carrier in the sense that the carriage of goods was his trade or profession. He was a farmer end had apparently arranged with another carrier to do the conveying of the steel frame he had agreed to deliver."

The suggestion here is that for one to be a public carrier one has to be a carrier of goods by profession. In *Hall-Thermotank Africa Ltd v Prinsloo* 1979 (4) SA 91 (I it was stated *obiter* that there is no distinction in our law between a public carrier and an ordinary carrier. The only

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question in law as to whether there is absolute liability or not is whether the carriage is for reward or is gratuitous. Once the carriage is for reward, there is absolute liability on the part of the carrier. This rule was intended to ensure that the goods which he receives are delivered undamaged. Mr *Gillespie* has submitted that Dönges, who is cited as authority for the above proposition, does not support this proposition. He further argued that, for this reason, I should not be persuaded by the *Hall-Thermotank* case *supra*. There appears to be substance in the criticism that Dönges, the authority cited for the above proposition, does not support the proposition.

What is clear, however, from the authorities is that a party whose trade or profession is the carnage of goods is a public carrier. There is nothing in the authorities to suggest that before a party can be a public carrier its trade or profession has to be the carnage of goods to the exclusion of all other trades or professions. For this reason, I am not persuaded by Mr *Gillespie's* submission that the defendant is not a public carrier because its main business is not the carriage of goods. For a party to be a public carrier, it is not necessary for that party to have as its main business the carriage of goods. When a party carries on the trade or profession of carriage of goods as part of its business, that is sufficient to make that party a public carrier. There is nothing in the authorities to suggest that a party has to have as its sole business

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the carriage of goods before it can be regarded as a public carrier. On this basis, I accept Mr *de Bourbon*'s submission that the defendant is a public carrier, although that may not be its sole business.

The evidence before me clearly establishes that the defendant carried out as one of its businesses the trade of carriage of valuable goods. Indeed, the incident giving rise to this action arose while the defendant was transporting the Plaintiff's goods, the gold bullion, for reward. This carriage of goods was, as Mr *de Bourbon* was quick to point out, not an isolated occasion. The defendant transported and was contracted to transport the Plaintiff's goods in the form of bullion from its various mines in Zimbabwe to Bulawayo and Harare. In the letter of 10 October 1983, which both parties agree forms part of the agreement between the parties, the defendant, in a passage I have quoted above, boasts of operating the largest fleet of vehicles in this country designed for the secure transportation of valuables such as cash. It is also apparent from this same letter that charges for the service rendered to some extent were calculated on the basis of time and mileage expended on the transportation of the goods. In my view, this is a clear indication that the defendant exercised the profession or trade of carriage of goods in the form of valuables. In the result, I am satisfied on the evidence before me that the defendant's main business was to provide a security service, but it also provided a carnage service, thus making part of its profession the provision of carriage of valuables. Indeed the title to the agreement itself is very eloquent in this regard. The agreement describes itself in the heading as a **Security Carriage Service Agreement.** This heading clearly indicates that the defendant undertook to provide security, **to provide carriage** and to provide service. I am satisfied that the evidence establishes that the defendant is a public carrier of goods in respect of whom the praetorian edict applies.

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It is common cause that the goods in this case were lost as a result of an armed robbery in which two employees of the defendant who were transporting the bullion were both killed. Having held that the defendant is a public carrier, it is thus strictly liable for loss unless it has established that armed robbery is *vis major* exempting the defendant from liability. Dönges *op cit* at pp 50 to 51 discusses the issue of armed robbery as a defence of *vis major*. He demonstrates [that] the conclusion that armed robbery does not constitute vis major is not supported by the jurists. He maintains armed robbery is *vis major* and constitutes a defence to an action founded on the Praetor's Edict. In support of this proposition he cites Voet *Commentary on the Pandects* 4.9.2 and Grivellus *Decisiones* 49.12. The learned author also makes the following observation at p 51:

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> "The case of robbery seems to accord well with our analysis of *casus fortuitous*. It has the essentials of that conception and there seems no reason for distinguishing between robbers by sea (pirates) and robbers by land (*praedones*)."

As I have stated earlier, the case of *Cotton Marketing Board supra* extended the liability of sea carriers to carriers by road or land. In the light of this, I find irresistible Mr *Gillespie's* submission that if the depredations of pirates, sea borne robbers, constitutes *vis major*, so too should the murderous activities of the highway robbers, now that the liability of sea carriers has been extended to carriers by land. In the result, I have come to the conclusion that armed robbery, such as occurred in this case, constitutes *vis major* exempting the defendant from liability. I have come to this conclusion on the authority of Dönges and the authorities he has cited, namely Voet and Grivellus. Indeed, even if it were not for the above authorities, this would have been a proper case of extending the defence of *vis major* to include armed robbery, in line with the extension of the Praetor's Edict to cover land carriers. As was pointed out by DUMBUTSHENA CJ *in Cotton Marking Board supra*, Zimbabwe is a land-locked country and the principal mode of transport is by land. There are hardly any carriers by sea in Zimbabwe, so to talk of pirates in the Zimbabwean context does not make much sense. The problem that Zimbabwean land carriers may have to deal with is armed robbers. In the result, I find against the Plaintiff on his first cause of action, on the basis that, although the defendant is a public carrier, the defendant has established the defence of *vis major* in the form of the fatal armed robbery that caused the loss of the goods.

I now turn to deal with the plaintiff's second cause of action. This cause of action is set out in pares 7 and 8 of the plaintiff's declaration. In this regard, the plaintiff alleges that the defendant owed the plaintiff a duty to take reasonable steps to protect the gold and the silver from loss. In breach of that duty, the defendant acted negligently, in that he failed to provide adequate security guards to protect the bullion; the defendant failed to provide a means of transport that was adequate to protect the gold; the defendant failed to provide proper communication between the vehicle carrying the bullion and its offices in Bulawayo and Harare; the defendant failed to take adequate steps to protect the bullion; the defendant failed to provide adequate firearms; the defendant failed to provide a back up or escort vehicle to prevent the theft of bullion; the defendant carried the said consignment based on a fixed and set routine, thus jeopardising the security of the carriage; and the defendant failed to observe the standards of

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security required of a company, such as the

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defendant, professing to be an expert in the field of security operations.

The second cause of action as stated in the declaration arises, it would seem, from delict. It does not seem to arise from the contract of security carnage service which was entered into by the parties. The defendant's altitude to this cause of action is that the relationship between the parties arises from and is governed by the written contract between the parties. If there is any duty of care that the defendant owed to the Plaintiff, that duty of care only arises from the contract. If no breach of contract is established, there can be no negligence on the part of the defendant.

I find myself persuaded by this argument for a number of reasons. The Plaintiff, in its first cause of action, relied on the provisions of the Praetor's Edict, which placed upon the defendant a strict liability which is much higher than the delictual duty of care based on negligence. It would appear to me that it would be incongruous for a court to find, as I have found, that the loss was caused by *vis major* and then proceed to find in the alternative that the defendant was negligent, and therefore delictually liable.

It is, however, open to parties to contract out the provisions of the praetorian edict. Where parties have entered into an agreement for the carnage of goods, one naturally looks to that agreement to determine the rights and obligations of the parties. There is no averment by the Plaintiff that there was a breach of any of the written provisions of the agreement between the parties. On this basis, I am satisfied that the defendant has not breached any duty of care owed to the Plaintiff arising from the contract between the parties.

It would appear from the particulars of the negligence alleged that the Plaintiff's contention is that, had the defendant taken certain measures as a prudent security carriage service provider, the robbery could have been avoided and/or the attack could have been successfully resisted and the loss of gold bullion avoided. The *onus* to establish this is on the Plaintiff. The Plaintiff did no more than list a number of possible ways the security could have been enhanced. There was no evidence that had the security been enhanced in the manner suggested in the particulars of negligence the bullion would not have been lost. For example, it is suggested that had different routes been used whenever gold bullion was collected the robbery might have been avoided. There is no evidence that more than one road connects Bulawayo to How Mine. It was also suggested that had an unmarked vehicle been used the robbery might have been avoided. There is no evidence on how the vehicle carrying the bullion was identified. Was it an inside job or not?

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There is no evidence. It is also suggested that had more armed guards been used to guard the bullion the loss might have been prevented. There is no suggestion how many armed guards

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should have been used to prevent the robbery and whether that number was within what was agreed as between the parties in terms of the agreement. In brief, there is no evidence to establish, on the balance of probabilities, that had measures suggested by the Plaintiff been implemented the loss of bullion would have been prevented. However, the most telling point against the Plaintiff on this issue is that it was fully aware of the security arrangements involved in the transportation of the bullion and at the very least tacitly accepted that arrangement as adequate. On that basis the facility provided was in terms of the agreement between the parties. I have therefore come to the conclusion that the Plaintiff has not established on a balance of probability that the defendant was negligent and that that negligence was the cause of the loss of the gold bullion.

I accordingly dismiss the Plaintiff's action with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

CHINYERERE v FRASER NO 1994 (2) ZLR 234 (HC)

Court **High Court, Harare**

Adam J Special case

26 May & 12 October 1994

Flynote

Contract - breach - damages - sale of property - agreed purchase price to be paid partly in cash and partly by purchaser carrying out certain building work for buyer - purchaser thereafter failing to complete such work - whether damages limited to difference between purchase price and the cash paid or whether should encompass cost of carrying out the incompleted work

Contract - implied terms - when implied - when intention of parties clear from contract, no terms may be implied

Contract - performance - method of - performance per aequipollens or equivalent act - when act may be said to be equivalent

Interest - from what date allowed - breach of contract - damages not assessed as at date when contract repudiated - interest nevertheless to run from that date

Headnote

The Plaintiff claimed damages from the defendant, the liquidator of a company named McLennan Prestige Homes (Pvt) Ltd for breach of contract. Under the contract, the company bought from the Plaintiff five stands in a residential suburb of Harare. The purchase price was $220 000. The agreement provided that instead of paying the full purchase price, the company would pay $20 000 in cash and construct certain buildings on various stands owned by the Plaintiff in the same suburb. Before the buildings could be completed, the company went into

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liquidation.

The Plaintiff claimed from the defendant, as liquidator, the sum of $1 075 000, which it claimed represented the cost of completing the buildings, calculated at the date on which the company gave notice that it would not complete the building work it had undertaken. It was argued that the wording of the contract did not give the company a choice of paying the $200 000 or erecting the buildings; its obligation was to erect the buildings. The contract was one in terms of which the price was to be partly in cash and partly in kind.

The defendant argued that the company's obligation was to pay no more than $220 000, even though part of the price was to be paid in a specific manner. Damages due were therefore not more than $200 000, representing the original purchase price, less the deposit of $20 000. It was accepted by the defendant that the contract did not specifically say this, but that it was argued that this should be inferred.

The question also arose whether the Plaintiff was entitled to interest and, if so, from what date.

Held, that the intention of the parties must be gathered from the terms of the contract. The court must seek to find what the parties would have wished if their attention had been specifically directed to the question of whether the condition was to be fulfilled in *forma specifica* or *per aequipollens*, that is, by an equivalent act.

Held, further, that terms could only be implied if, having regard to the express terms of the agreement, there was any room for importing the alleged implied terms. In this case, it could not be said that, applying the "officious bystander" test, the parties would have agreed that, had the company failed to erect the buildings, it would have to pay the Plaintiff $200 000.

Held, further, that before a contract could be said to have been fulfilled *per aequipollens*, it was necessary that the act or performance tendered must be equivalent to that mentioned in the contract, that is, to building the houses contracted for. Accordingly, it was not sufficient to tender the sum of $200 000. There had been a breech of contract when the company repudiated its obligations and the cost of putting the innocent party in the same position as it would have been if the contract had been duly performed was the agreed figure of $1 075 000.

Held, further, that interest became due on the date that the cause of action arose, whether or not the amount of debt had been fixed at that time. The cause of action arose when the company repudiated the contract, and interest should run from that date.

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Cases cited:

van Diggelen v de Bruin & Anor 1954 (1) SA 188 (SWA)

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Steenkamp v Webster 1955 (1) SA 525 (A)

Chatenay v Brazilian Submarine Telegraph Co [1891] 1 QB 85; [1886 90] All ER Rep 1135 (CA)

Scottish Union & National Ins Co Ltd v Native Recruiting Corp Ltd 1934 AD 458

Wastie v Security Motors (Pty) Ltd 1972 (2) SA 129 (C)

Mountbatten Invtms (Pty) Ltd v Mahomed 1989 (1) SA 172 (D)

Sassoon Confirming & Acceptance Co (Pty) Ltd v Barclays Natl Bank Ltd 1974 (1) SA 641 (A)

Alfred McAlpine & Son (Pty) Ltd v Tvl Provincial Admin 1974 (3) 506 (A)

Pan American World Airways Inc v SA Fire & Accident Ins Co Ltd 1965 (3) SA 150 (A)

SA Mutual Aid Soc v Cape Town Chamber of Commerce 1962 (1) SA 598 (A)

Freeth & Anor v Burr & Anor (1874) LR 9 CP 208; [1874-80] All ER Rep 751 (CP)

Street v Dublin 1961 (2) SA 4 (W)

van Rooyen v Min van Openbare Werke en Gemeenskapsbou 1978 (2) SA 835 (A)

Ross T Smyth & Co Ltd v TD Bailey, Son & Co [1940] 3 All ER 60 (HL)

Metalmil (Pty) Ltd v AECI Explosives & Chemicals Ltd 1994 (3) SA 673 (A)

ISEP Structural Eng & Plating (Pty) Ltd v Inland Expl Co (Pty) Ltd 1981 (4) SA 1 (A)

Pirie v Frankel 1936 AD 397

Victoria Falls & Tvl Power Co Ltd v Consol Langlaagte Mines Ltd 1915 AD 1

P C Paul for the Plaintiff

E W W Morris for the defendant

Judgment

Adam J: The Plaintiff's claim against the defendant is for damages arising from breach of contract. For purposes of this special case the following facts were common cause. The Plaintiff on 16 October 1990 entered into an agreement with McLennan Prestige Homes (Pvt) Ltd ("the Company"). The agreement is Annexure A to the special case in terms of which Stands 376 to 380 Quinnington Township 14 of Subdivision O of Quinnington of Borrowdale Estate (the "properties") were transferred to the company and the Plaintiff

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received $20 000 in cash. The company was placed in compulsory liquidation on 22 January 1992. In terms of the Insolvency Act, as read with the Companies Act, the defendant gave

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notice that he would not complete the building work undertaken in terms of Annexure A In terms of the above Acts, the plaintiffs claim for damages for breach of contract is preserved.

At the date of the defendant's notification, the fair and reasonable cost of completing the building work was $1 075 000. The defendant contends that, as a matter of law, the plaintiff's measure of damages is $200 000, as the amount outstanding on the purchase price of the properties. The point of law which the parties request this court to determine is whether the measure of damages is $1 075 000 or $200 000 (or some other sum) and whether the plaintiff is entitled to interest a *tempore morae* and if so from what date.

In terms of the agreement prepared by a firm of legal practitioners, the plaintiff sold the properties to the company. According to clause 2 (headed "Purchase Price") this price, which was payable by the company, was "$220 000 to be set off in manner hereinafter described". In clause 6 (headed "Set-Off"), it was stated that, in lieu of paying the purchase price of $220 000, the company undertook to catty out certain constructions on Stand 329 Quinnington Township 14 and on Stand 373 Quinnington Township 14 that the plaintiff owned and that the buildings to be constructed would be commenced on approval of building plans by the relevant authority and would be completed 4 months after receipt of the approved drawings. The amount of $20 000 in cash would be paid to the plaintiff on signature of the agreement.

It is accepted by both parties in their heads of argument that reference to "Set-Off" in the agreement is inappropriate or inaccurate.

In the plaintiff's heads of argument, Mr *Paul* submits that the liquidation of the company has no bearing on the question of law and that the measure of damages claimable as a result of a breach of an executory contract is unaffected by a supervening liquidation. He argues that damages for a breach of contract can be restitutionary, but that in most cases the measure of damages is the payment of a sum that would put the injured party in the same position he would have been had the contract been fulfilled: Wille & Millin *Mercantile Law* 17 ed at pp 110-111. He submits that, since the properties have been transferred or have fallen into the insolvent estate, restitution is impossible and therefore restitutionary damages cannot be given. He asserts that the agreement records $220 000 as the purchase price, but provides that

the obligation to effect payment is to be discharged, not by payment of money, but by the company constructing certain buildings. He points out that the defendant takes the attitude that he can either pay the money or erect the building, but the contract gives him no such choice. He argues that the defendant cannot adjust the agreement to his own wishes and that, had there been no supervening liquidation, the company could not be heard to say that it was now electing to effect payment and that it was going to ignore clause 6. He submits that the correct measure of damages is the cost of erecting the buildings.

In the defendant's heads of argument, Mr *Morris* submits that on a proper interpretation of the agreement the plaintiff sold certain properties to the company at a price of $220 000 and thereafter it went on to provide the manner in which the purchase price was to be paid. He

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maintains that it is the defendant's case that the obligation placed on the company was to pay $220 000 and the claim contemplated by the parties in the event of the company's failure to pay $220 000 was no more than the usual sequelae arising when a debtor to a contract fails to make payment. He argues that the contract describes the plaintiff as the seller and the company as a purchaser, that clause 4 indicates that the properties are sold *voetstoots* without any warranty against latent defects and it is only in contracts of sale that there exists the implied warranty against latent defects. He asserts that if the agreement was not a sale then there would have been no need of clause 4. He submits that, assuming that the agreement was a sale, then the company's obligation was to pay $220 000 and that remains the obligation, even though the purchase price was to be paid in a certain manner set out in clause 6. He maintains that clause 6 cannot detract from the fact that the company's obligation is to pay the purchase price and it is that obligation which the company failed to carry out. A vendor's sole remedy when a purchaser fails to pay the price is to cancel the contract or to sue for the purchase price. Mr *Morris* argues that the parties must have intended $220 000 to have meant something and must have inserted it for some reason. The only reason for it is that was the measure of damages contemplated by the parties in the event of the company's failure to build the houses. When asked if he had any authority to support his argument, Mr *Morris* candidly replied that he did not. He also submits that the parties have put a contractual value on the services to be rendered in terms of clause 6 and the court cannot go behind this value by saying it should be something greater. If the parties had contemplated a claim for damages calculated on the actual value of the construction work to be performed, the contract would have been silent as to the purchase price and $220 000 would have been omitted altogether. He argues that another way

of coming to the same conclusion is to say that the company, due to its liquidation, is unable to perform its contractural obligation *in forma specifica*, but the contract, by quoting a figure of $220 000, is contemplating performance *per aequipollens*: *van Diggelen v de Bruin & Anor* 1954 (1) SA 188 (SWA) at 192-193. He states that it can also be argued that performance in *forma specifica* consists in money payment, but the parties actually contracted for performance *per aequipollens*. Thus, when this became objectively impossible, the company must revert to money payment. He further submits that in terms of the *contra stipulationem* rule, it was perfectly easy for the vendor to have made his intentions clear and to have stipulated for damages in the event of the company's failure to build the houses. Thus an ambiguity does exist which must work in the defendant's favour.

The points that were argued referred to a written contract in Annexure "A" which in clauses 2 and 6 states:

> "2.
>
> PURCHASE PRICE
>
> That the purchase price payable by the purchaser to the Seller is the sum of $220 000,00 (TWO HUNDRED AND TWENTY THOUSAND DOLLARS) to be set off in manner hereinafter described.
>
> ...

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6.

SET-OFF

That in lieu of paying to the Seller the purchase price of $220 000,00 (TWO HUNDRED AND TWENTY THOUSAND DOLLARS) the Purchaser undertakes the following:

6.1. To construct on STAND 375 a house similar to the house already constructed by the Purchaser ...

6.2. To construct on STAND 373 QUINNINGTON TOWNSHIP 14 a dwelling house of the same plans as the house already in existence ...

6.3. To construct on STAND 373 QUINNINGTON TOWNSHIP 14 double domestic quarters for the Seller.

6.4. All the above buildings, to be constructed on land owned by the Seller, will be commenced on the building plans being approved by the relevant authority and will be completed four months after receipt

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6.5. The balance of $20 000,00 (TWENTY THOUSAND DOLLARS) shall be paid in cash by the Purchaser to the Seller on signature of this agreement."

In *Steenkamp v Webster* 1955 (1) SA 525 (A) at 530A-D CENTLIVRES CJ said:

"We have to take the document as it stands with the appended signatures and when we find from the document itself that Steenkamp signed it without any reservation, it must be taken that he agreed to all its terms ... *Williston on Contracts* (revised ed vol 1 s 35) states the principle as follows:

> 'Throughout the formation of contracts it is to be observed that not assent, but what the other party is justified as regarding as assent, is essential ... This rule, dough frequently harsh in application, rests upon the fundamental principle of security of business transactions, and the integrity of contracts demands that it be rigidly enforced by the Courts... '

The principle laid down by *Williston* listed is similar to the rule of interpretation of contracts enunciated by my brother GREENBERG in *Worman v Hughes & Ors* 1948 (3) SA 495 at 505 (A), where he said that the rule

> 'is to ascertain, not what the parties' intention was, but what the language used in die contact means, ie what their intention was as expressed in the contact. As was said by SOLOMON J in *Van Platzan v Henning* 1913 AD 82 at 99 "the intention of the parties must be gathered from their language, not from what either of them may have had in mind" .'"

In *Chatenay v Brazilian Submarine Telegraph Co* [1891] 1 QB at 85 LINDLEY LJ stated:

"The expression 'construction' as applied to a document ... includes two things: first, the meaning of the words; secondly, ... the effect which is to be given to them. The meaning of the words I take to be a question of fact in all cases."

Further, WESSELS CJ in *Scottish Union & National Ins Co Ltd v Native Recruiting Corp Ltd* 1934 AD 458 at 465-466 laid down when a court is called upon to do when he observed:

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> "Now in construing a contract we must not only consider the intention of one party ... but we must see what both parties intended, and we must guard ourselves against making a contract for the parties. We have no right, because we may think that the contract is a hard bargain, to lean towards a construction more reasonable . .. than the contract constituted by the words of the document ... We must gather the intention of the parties from the language of the contract itself, and if the language is clear, we must give effect to what the parties themselves have said; and we must presume that they know the meaning of the words they used. It has been repeatedly decided in our courts that in construing every kind of written contract the court must give effect to the grammatical and ordinary meaning of the words used therein. In ascertaining this meaning, we must give to the words used by the parties their plain, ordinary and popular meaning, unless it appears clearly from the context that both parties intended them to bear a different meaning. If, therefore, there is no ambiguity in the words of the contract, Here is no room for a more reasonable interpretation than the words themselves convey. If, however, the ordinary sense of the words necessarily leads to some absurdity or inconsistency with the rest of the contract, then the court may modify the words just so much as to avoid that abusdity or inconsistency, but no more."

For a contract of sale to be concluded there must be complete agreement between the parties as to the *merx* (thing) to be bought and the *pretium* (price) to be paid. J B Moyle *The Contract of Sale in the Civil Law* indicated at pp 39 and 66-67:

> "In fact, however, they must be agreed upon not only the essential points of the bargain (*merx* and *pretium*), but on all its subsidiary or ancillary terms as well ...
>
> Nor is it strictly necessary that consideration should consist entirely in money: the purchaser may promise, in addition to the price of an estate ... to repair a house for him."

Huber's *Jurisprudence of my Time* 3.4.3 (Gane's translation vol 1 p 409) regards "price reckoned in money" as essential in a contract of sale and states:

> "If you give partly money and partly kind, then it is reckoned as a sale, if the money is the larger amount; if the kind is worth more, then it is held

to be barter; if the am ts are about the same, then it is held to be sale, since sale is more use fan barter, and the presumption always applies in favour of what is most usual."

Voet *Commentary on the Pandects* 18.1.22 (Gane's translation vol 3 pp 276-277), when referring to price, says:

> "The price, which means the value put upon the thing, and which is needed to make a purchase, must .. also consist of payment in cash money ...
>
> If partly money and partly something else is given for a thing, we must look to see what was in the mind of the contacting parties, whether purchase or barter. If the matter is not at all clear, the transaction must be classified according to its leading factor. Thus if there is more in money, and less in the value of other things given, the contract ought to be deemed to have been one of sale; but the contrary if there is more in the thing given than in the money."

It appears that when the price is partly money and partly kind Voet regards the question as one concerning the actual intention of the parties.

In *Wastie v Security Motors (Pty) Ltd* 1972 (2) SA 129 (C) the plaintiff sold his second-hand

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Valiant motor vehicle for R1 250. The purchase price paid by the defendant was R400 in cash, the plaintiff taking as trade-in defendant's second-hand Peugeot motor vehicle. Subsequently, the plaintiff discovered that the Peugeot had a cracked cylinder block which cost the plaintiff R120 to repair. The plaintiff demanded this amount from the defendant who repudiated liability. VAN ZIJL J at 13-132 said:

> "When we have to do with a contract where one party intends to part with the ownership in a thing and the other party intends to acquire the ownership in that thing and the *quid pro quo* consists in part of money and in part of a thing other than money, the question then arises as to the nature of the contract with which we have to deal. Is it a sale or is it an exchange? ... The nature of the contract is determined by the true intention of the parties. See *Zandberg v van Zyl* 1910 AD 302 at 309 *et seq* ...
>
> Defendant alleges that he cannot be sued successfully by plaintiff or any latent defects in the Peugeot, as the Peugeot is a portion of the *pretium* for the Valiant and the *actio quanti minoris* entitles a purchaser to

ADAM J

> compensation for a latent defect in the *merx*, but does not entitle the seller to compensation for a latent defect in the *pretium.*
>
> I have been able to find no authority dealing directly with this point, but an analysis of the law on sale and exchange leads to the conclusion that where the portion of the purchase price consists of something other than money, the same principles that apply to the *merx* must apply with equal force to the non-money portion of the *pretium*.
>
> The remedies given to a purchaser in a contract of sale are given to both the contracting parties in a contract of exchange...
>
> We have, therefore, the position that in contracts of exchange both parties are protected by the aedilitian actions against latent defects in the things which are the subject matter of these contracts. It would indeed be unfair and illogical not to afford similar protection to the seller in respect of the *pretium*...
>
> Where, however, in addition to money a specific thing has been made portion of the purchase price, this thing can be subject to a latent defect. In respect of this thing, this portion of the *pretium*, the parties find themselves in the same position as barterers."

Similarly, in *Mountbatten Investments (Pty) Ltd v Mahomed* 1989 (1) SA 172 (D), the plaintiff sold a 1986 BMW motor vehicle for R58 535. The price paid by the defendant was R14 535 in cash and a BMW 733i motor vehicle as a trade-in, which the defendant represented was a 1985 model but was in fact a 1983 model. BRISTOWE J observed at 177-179:

> "To summarise on this aspect, it seems to me to be correct both in principle and on authority to say that:
>
> (a) If no part of the consideration for the delivery of a *res* is in cash the contract cannot be classified as a sale and must be regarded as barter.
>
> (b) If part of the consideration is in cash and part is in kind the intention of the parties must be looked to in order to determine whether the contract is truly a sale or whether it is barter.
>
> (c) If the parties disagree as to their intention or if there is reason not to accept their description of what contract they intended to enter into, the relative values of the cash and kind should be looked to as one of the factors relevant to the determination of the issue. There may of course be other factors.

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ADAM J

(d) Only if all else fails or is equivocal should the presumption described by Voet and Huber be resorted to ...

In all the circumstances therefore it seems to me inescapable that one contract was entered into in terms of which the defendant bought and the plaintiff sold the 1986 BMW. In terms of that contract the 1983 BMW was delivered in part payment of the purchase price payable for the 1986 BMW. The 1983 BMW was not sold, nor was it bartered."

Turning now to the question of performance in *forma specifica* and *per aequipollens*, Pothier stated:

"Our principle that conditions ought to be accomplished in the manner that was probably intended by the parties, serves to decide the question made by the doctors, whether conditions ought to be accomplished literally *in forma specifica*? The answer is, that commonly they ought to be accomplished *in forma specifica*, but they may nevertheless sometimes be accomplished *per aequipollens*, when from the subject matter it appears that such was probably the intention of the parties: and this intention is presumed, when the person, in whose favour the condition is made, has no interest in its being accomplished in one manner rather than another ...

The decision of the question depends upon the nature of the fact, and upon the examination of the intention of the contracting parties. If the fact, which is the object of the condition, is personal, if it is the act of a particular person, rather than the mere act itself, which the parties had in view, the condition can only be accomplished by that person." (M Pothier *A Treatise on the Law of Obligations or Contracts* translated by W D Evans, London, 1806, vol I at pares 206-207).

In *van Diggelen v de Bruin & Anor supra*, on the sale of certain farms by the plaintiff, a condition of sale provided for the defendant purchasers to take over the bond on the property, with the plaintiff seller obtaining the bondholder's consent. The bondholder was prepared only to grant a smaller amount on a higher interest. The plaintiff seller tendered a second bond for the difference and on terms arranged in such a way that the total interest payable by the defendant purchasers would not be more than that payable on the whole amount of the existing bond. The defendant purchasers refused this and CLAASSEN J held that the purchasers were entitled to performance *in specifica*. In reaching this decision he said at 193-194 that he:

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"..should proceed along the following lines:

(1) The court must gather from the surrounding circumstances what the parties contemplated. It must take into consideration everything which can give a clue to the intention of the parties. It must seek to find out what the parties would have wished if their minds had been specially directed to the question whether the condition was to be fulfilled *in forma specifica* or by an equivalent act. See Wessels *The Law Of Contract in South Africa* 2 ed vol I para 1335; *Hanomag SA (Pty) Ltd v Otto* 1940 CPD 437 at 443; *Robertson Municipality v Jansen* 1944 CPD 526.

(2) If however the circumstances afford no clue then there is a presumption that the condition must be performed *in forma specifica* (Wessels para 1337; Pothier *Oblig* 206). This presumption is rebuttable by the promiser, but it cannot be rebutted where it is clear from the terms of the contract and surrounding circumstances that performance *in forma specifica* was stipulated in the contract. Wessels Vol II pares

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2638-9.

(3) The court will in cases of doubt be more likely to find in favour of performance *per aequipollens* if the manner of performing the condition is not material or also where performance in *forma specifica* is impossible through no serious fault on the part of the promiser. Impossibility should probably be interpreted in the sense it was interpreted in *Peters Flamman & Co v Kokstad Municipality* 1919 AD 427.

It is clearly not sufficient for the promiser to tender performance of an equivalent act merely because performance *in forma specifica* is difficult, inconvenient or expensive (*Yodaiken v Angehrn & Piel* 1914 TPD 260). The promiser undertakes such a risk (Wessels para 2668).

(4) The act or performance tendered *per aequipollens* where such is permissible must in the first instance be an equivalent act to that mentioned in the contract or be of such a nature that it can make no material difference to the promises. Such seems to be the position if any immaterial difference or inequality can be put right by compensating the promisee in damages.

(5) The court's paramount concern is always, within the frameworth of the law, to do justice between man and man. It will be guided by the terms and circumstances of the contract under consideration. Thus

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ADAM J

in cases where the promiser discharged the onus mentioned in (2) above, there may be circumstances falling short of impossibility, and even where there may have been some fault on the part of the promiser, and where the court may nevertheless come to the conclusion that the promisor's performance or tendered performance amounted to substantial performance (Cheshire & Fifoot *Law of Contract* 1 ed p 352), or is of such a nature that the promisee can be compensated in damages for any shortfall (*Strachan v Prinsloo,* 1925 TPD 709 at 717).

It seems to me the process of reasoning by which the court is required to arrive at the true intention of the parties or at what was within the contemplation of the parties is the same process as that by which the court has to determine whether an implied term is to be read into a contract."

In *Sassoon Conjuring & Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A), when dealing with rule (1) above, JANSEN JA observed at 646:

"It is to be noted that the rule as here stated lets in surrounding circumstances as material from which to gather the intention of the parties without reference to an prerequisite of ambiguity or uncertainty in the language of the contract ...

However, despite its respectable descent, the rule has been severely criticised by VAN DEN HEEVER JA in *Frumer v Maitland* 1954 (3) SA 840 (A) at 849D-850B, in so far as it

' is not limited to instances where the condition is ambiguous or its meaning otherwise doubtful ...'

This rule, although recognised in *Hanomag SA (Pty) Ltd v Otto supra* was not invoked before us, nor its ambit and effect argued. In view of the conclusion at which I have arrived in this case, it may be assumed (without deciding) that the rule does not constitute an exception to the ordinary rules of construction, but is to be considered as subservient to those rules."

It is common cause that the defendant refused to complete the building work undertaken in terms of the contract. The defendant is in breach of contract. He argues that measure of damages is $200 000, the amount outstanding on the purchase price. Mr *Morris*, for the defendant, accepts that the plaintiff sold certain immovable property for $220 000 and that the

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manner of

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payment of the purchase price was cash payment of $20 000 and the balance by way of certain work and materials. It is his contention that the obligation placed on the defendant was to pay $220 000 and the claim contemplated by the parties in the event of failure to pay it was for an action to recover it. This contention of Mr *Morris* does not arise by way of an express provision in the contract. He is asking this court to infer something which the parties intended or which is deemed to have been intended. In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531-533 CORBETT AJA (as he then was) described it as follows:

> "In legal parlance the expression 'implied' is an ambiguous one in that it is often used, without discrimination, to denote two, possibly, three, distinct concepts. In the first place, it is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provisions of the contract. On the other hand, it does not originate in the contractual consensus: it is imposed by the law without. Indeed, terms are often implied by law in cases where it is by no means clear that the parties would have agreed to incorporate them in their contract. Ready examples of such terms implied by law are to be found in the law of sale eg the seller's implied guarantee or warranty against defects... Such implied terms may derive from the common law, trade usage or custom, or from statute ... It is a naturalism of the contract in question.
>
> In the second place, 'implied term' is used to denote an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the court, in truth, declares the whole contract entered into by the parties. In this connection the concept, common intention of the parties, comprehends, it would seem, not only the actual intention but also an imputed intention. In other words, the court implies not only terms which the parties must actually have had in mind but did not trouble to express, but also terms which the parties, whether or not would have expressed if the question, or the situation requiring the term, had been drawn to their attention
>
> The distinction between terms implied by law and implied terms based

ADAM J

> upon the actual or imputed intention of the parties to the contract was emphasised in *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A) at 197 ... Various expressions have been suggested in order to distinguish the two concepts involved. It is not a matter of great moment what terminology is adopted but in the interests of continuity I shall use the expression 'implied term' and 'tacit term ...'
>
> The significance of this distinction is not merely academic. The implied term (in the above-defined sense) is essentially a standardised one, amounting to a rule of law which the court will apply unless validly excluded by the contract itself . .. The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. Factors which might fail to exclude an implied term might nevertheless negative the inference of a tacit term, ... The court does not readily import a tacit term. It cannot make contracts for people, nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises, that the parties intended to contract on the basis of the suggested term ... The practical test to

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be applied - and one which has been consistently approved and adopted in this court - is that formulated by SCRUTTON LJ in the well-known case of *Reigate v Union Manufacturing* Co 118 LT 479 at 483:

> 'You must only imply a term if it is necessary . .. to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties: "What will happen in such a case?" they would have both replied: "Of course, so-and-so. We did not trouble to say that; it is too clear".'

This is often referred to as the 'bystander test'."

Further, as RUMPFF JA in *Pan American World Airways Inc v SA Fire & Accident Ins Co Ltd* 1965 (3) SA 150 (A) at 175 said:

> "When dealing with the problem of an implied term the first enquiry, of course, is whether, regard being had to the express terms of the agreement, there is any room for importing the alleged implied term."

ADAM J

Also, as pointed out by VAN WINSEN JA in *SA Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615:

> "Where the parties have expressly agreed upon a term and given expression to that agreement in the written contract in unambiguous terms, no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement."

I turn now to a consideration of whether, upon a true construction of the contract, this court can readily import a tacit term. Looking at the express terms in clauses 2 and 6 there is no room for importing the alleged implied term. There is no ambiguity in clauses 2 and 6. Also, when applying the "bystander test" it cannot be confidently said that both parties would have replied "Of course, if, the defendant fails to build the houses, he must pay the plaintiff $200 000. We did not trouble to say that because it is so clear".

As for the argument advanced by Mr *Morris* - that, owing to the liquidation, the defendant is unable to perform *in forma specifica* but since the amount of $220 000 was quoted as the purchase price, the contract contemplated performance *per aequipollens* - this fails to take account of the requirement that the act or performance tendered must be equivalent to that mentioned in the contract, which is, that it must be equivalent to building those houses.

Further, Mr *Morris* seems to suggest that the contract indicates that performance *in forma specifica* consists in paying money, while the parties actually contracted for a form of performance *per aequipollens*. But this ignores the express terms of clauses 2 and 6 which specifies the purchase price and payment. In other words, the purchase price (*pretium*) was partly in cash and in kind. It follows that, from the contract, performance *in forma specifica* requires payment of $20 000 in cash and the building of those houses. The parties do not usually contract for performance *per aequipollens*, since this normally only arises when a party fails to perform *in forma specifica* and tenders performance *per aequipollens*.

In *Freeth v Burr & Anor* (1874) LR 9 CP 208 at 214 LORD COLERIDGE said:

> "... the true question is whether the acts or conduct of the party evince an intention no longer to be bound by the

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contract."

In *Street v Dublin* 1961 (2) SA 4 (W) at 10 WILLIAMSON J (as he then was) proposed that:

ADAM J

"The test es to whether conduct amounts to such repudiation is whether, fairly interpreted, it exhibits a deliberate and unequivocal intention no longer to be bound."

I agree with him that "repudiation is normally a species of anticipatory breach of contract".

RABIE JA (as he then was) in van *Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (V SA 835 (A) at 845 considered that the above two tests "were not complete and applicable in all cases".

In *Ross T Smyth & Co Ltd v T D Bailey, Son & Co* [1940] 3 All ER 60 (HL) at 73, LORD WRIGHT observed:

"I do not say that it is necessary to show that the party alleged to have repudiated should have an actual intention not to fulfil the contract. He may intend in fact to fulfil it, but may be determined to do so only in a manner substantially inconsistent with his obligations, and in no other way."

After relying on the foregoing, HOWIE JA and MAHOMED AJA in *Metalmil (Pty) Ltd v AECI Explosives & Chemicals Ltd* 1994 (3) SA 673 (A) at 685 stated:

"The test which must be applied is whether respondent 'acted in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his pert of the contract' (*Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401 at 436; [1957] 2 All ER 70 (QB))."

In the present case, the defendant's notification that he would not complete the buildings did reflect his intentions of not wanting to comply with the terms of clauses 2 and 6 of the contract. His conduct in law amounts to a repudiation of the contract.

Furthermore, I am of the view that the breach of a method or manner of payment for the immovable property can be properly regarded as an ordinary breach of contract which renders the defendant liable to the ordinary consequences of a breach of contract. Repudiation of the contract does not preclude a claim for damages **on** the basis of positive interesse. Normally, damages are determined on the basis that the innocent party be put in the same position as if the contract had been duly performed: *ISEP Structural*

ADAM J

Engineering & Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd 1981 (4) SA 1 (A) at 8. Therefore, the damages claimed in this case must be assessed on the amount for which the plaintiff could have got a competent builder to complete the work at the time the defendant repudiated the contract *Pirie v Frankel* 1936 AD 397 at 407. The parties have agreed that the fair and reasonable cost at that time for completing the work was $1 075 000.

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On the question of interest, it is clear from *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 31-33 that, if it is not possible for the plaintiff to determine what damage the defendant's breach has caused him, *mora* interest is only payable from the date when the plaintiff has estimated the damage. But s 5A of the Prescribed Rate of Interest Act 1985, as amended, provides that unless otherwise agreed, every debt arising from an unliquidated claim shall bear interest calculated at the prescribed rate from the date when the cause of action arose, whether or not the amount of the debt is fixed.

Accordingly, I would answer the point of law that the measure of damages is $1075 000 and that interest *a tempore morae* is payable from the date when the cause of action arose, which is at the time of the defendant's repudiation of the contract.

Winterton, Holmes & Hill, plaintiff's legal practitioners

D W Aitken, defendant's legal practitioners

S v MAPOSA 1994 (2) ZLR 252 (HC)

Court **High Court, Harare**

Annotations Link to Case Annotations

Adam J

Criminal review

19 October 1994

Flynote

Criminal procedure - review - High Court's powers on - caution and discharge by lower court - whether reviewable by High Court - High Court of Zimbabwe Act 29 of 1981 - s 29

Criminal procedure (sentence) - general principles - caution and discharge - offences for which appropriate

Criminal procedure (sentence) - common law offences - abortion - young first offender carrying out abortion upon herself - appropriate sentence

Headnote

A twenty-five-year-old pregnant girl had carried out an abortion upon herself. She was a student doing a teacher's course. The man who had made her pregnant had refused to take responsibility for her pregnancy.

The woman's mother had threatened to take her own life if the woman became pregnant whilst at college. The woman was a first offender. The woman displayed contrition and remorse at her trial.

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The seal magistrate had cautioned and discharged the woman. On review,

Held, that a caution and discharge is suitable only for petty or technical offences.

Held, further, that the present crime was not petty or technical in nature and the appropriate sentence in this case would have been either a fine or a suspended sentence.

Cases cited:

R v Sandi 1928 EDL 321

ADAM J

Johannesburg Consol Invtm *Co v Johannesburg Town Council* 1903 TS 111

Wayland v Cawood NO & Anor (1) 1979 RLR 175 (G)

A P v S (1895) 2 OR 103

S v Collop 1979 (4) SA 381 (C)

S v Collop 1981 (1) SA 150 (A)

S v Maparunga HB-242-86

R v C 1961 (3) SA 675 (SR)

R v Ncube AD-151-66

S v Sibanda GB-41-77

R v Mahlatse 1949 (4) SA 455 (O)

R v Feun 1954 (1) SA 58 (T)

R v Keschner 1961 (3) SA 309 (A)

S v Suping 1967 (1) SA 22 (O)

S v Magidson 1984 (3) SA 825 (T)

A-G v Chinyerere & Anor 1983 (2) ZLR 329 (S)

S v Fahy HB-25-88

S v Ballard HB-20-93

S v Narker & Anor 1975 (1) SA 583 (A)

S v Ramushu & Ors S-25-93

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

S v Mhlanga S-134-92

S v Maponga S-121-92

S v Ngwezuka S-57-92

S v Charekira S4-92

S v Makusa S-206-93

S v Mudururi HH-270-90

S v Bere HB-88-90

S v Phiri HB-5-91

S v Tigere HH-225-93

S v Chikomo HH-107-94

S v Nyamukapa HH-108-94

S v Wilson HH-125-94

S v Choba S-114-92

S v van der Westhuizen 1974 (4) SA 61 (C)

S v Mumvari HH-106-94

Dhliwayo for the appellant

T Masendeke for the respondent

Judgment

Adam J: The accused was convicted on her guilty plea of abortion and the provincial magistrate "warned, cautioned and discharged her".

ADAM J

In response to a query concerning the sentence, the provincial magistrate informed the Chief Magistrate that, in passing sentence, he "did consider the fact that the accused was a first offender. She was doing her third year. The man who impregnated her refused responsibility. Her mother had promised to take her own life if ever she got pregnant at school". It was the provincial magistrate's opinion that the above led the accused to do what she did. He states that when she appeared before him she was in a very sorry state, openly cried in court and showed remorse. Faced with such a situation, it was the provincial magistrate's view that he was not going to be of any help if he sent the accused to prison. In his opinion, it was in the best

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interests of justice to warn, caution and discharge her. He did not lose sight of the gravity of the offence, but he thought each case should be treated on its own merit.

The matter has been referred by the Chief Magistrate to this court for review.

The record of proceedings discloses that the accused was aged 25 years, a third-year student at Mutare Teachers College, who had been about 6 months pregnant. At about 1.00 am whilst in her room she inserted a stick with a sharp point into her vagina and uterus pricking the foetus. As a result she induced the expulsion of the foetus, which she took to a place near a river and buried. The medical report tendered at the trial shows that her breasts were congested and expressed milk and that the uterus was bulky (plus or minus 10 weeks). The report also indicated that this was a case of induced abortion, but it was difficult to say how old the pregnancy was since this had happened 6 days before.

Now in *R v Sandi* 1928 EDL 321 the accused was convicted of cruelly overriding a horse in contravention of s 3(1) of Act 8 of 1914; as amended. He was reprimanded and discharged. The accused was unrepresented at trial, but a legal practitioner submitted the matter for review as not being in accordance with justice in terms of Act 32 of 1917, as emended. GANE AJ (as he then was) said at 321:

> "The special powers of review given by s 95 (4) of Act 32 of 1917 ... cover only criminal cases in which the court has imposed a sentence. Under s 360 of Act 31 of 1917, a discharge with a reprimand is to have all the effects of an acquittal, and the offender is 'deemed to have been discharged without a verdict being taken'. If that is the effect of such action, it is difficult to see how a reprimand can be called a sentence. I therefore take no action."

ADAM J

However, in *R v Ngcongo* 1943 NED 157 SELKE J stated at 158:

> "... there is a doubt of the ability of this court to deal with the matter by way of automatic review in the exercise of its powers under Chapter XIV of Act No 32 of 1917 because, although the accused has been found guilty no sentence has been passed upon him - vice *R v Fource* 1940 OPD 282 and *R v Sandi* 1928 EDL 321. But it seems to me that assuming that the language of ... Act 32 of 1917 does limit the powers of this court to interfere by way of review, as of course, to cases in which a sentence has been imposed, this court can interfere at the present stage of the matter by virtue of the powers possessed by it under s 8 of the Supreme Court act No 39 of 1896 (Natal). That section confers upon the Supreme Court full power, authority and jurisdiction to review all proceedings of inferior Courts of justice or tribunals, and to exercise full supervision and control over all magistrates and other judicial officers, and, if necessary, to set aside, amend or correct their proceedings."

However, the High Court of Zimbabwe Act 1981, in s 29(4), provides that powers conferred in terms of s 29(1) and (2) may be exercised whenever it comes to the notice of the High Court that any criminal proceedings of an inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court, and have not been submitted to the High Court for review. Under s 29(2)(b), if, on review of criminal proceedings of an inferior court, the High Court considers that the proceedings are not in accordance with real and substantial justice, it may interfere in a number of ways laid down in that section.

Now in *Johannesburg Consol Invtm Co v Johannesburg Town Council* 1903 TS 111 (followed

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by this court in *Wayland v Cawood NO & Anor* 1979 RLR 175 (G) at 176 and 437 (A) at 440) it was pointed out that "review" is capable of three distinct and separate meanings. First, in its most usual sense, it denotes the process by which proceedings of inferior Courts, civil and criminal, are brought before a superior court in respect of grave irregularities or illegalities occurring during the course of such proceedings. Second, it denotes the process by which, where a public body has a duty imposed upon it by statute and is guilty of gross irregularity or clear illegality in the performance of that duty, its proceedings may be set aside or corrected; a wider power specially given under particular statutes. As to the third meaning, INNES CJ observed at 117:

> "... in the instances to which reference has been made the Legislature

ADAM J

> meant to use the word 'review' in its widest and what may be called its popular sense. So employed, the expression 'review' seems to mean 'examine' or 'take into consideration'. And when a court of law is charged with the duty of examining or considering a matter already dealt win by an inferior court, and no restrictions are placed upon it in so doing, it would appear to me that the powers intended to be conferred upon it are unlimited."

It follows that this court has full power, authority and jurisdiction to review this matter.

In a note to Voet 5.1.57 (*Commentary on the Pandects*, Gane's translation, vol 2 at 72) concerning the duties of a presiding officer in imposing punishment, it was stated:

> "It is true also that it would be desirable that they who hold office of judges should be like the laws, which approach punishment not in spirit of anger but in one of equity.
>
> Among the faults of judges which are most harmful to the commonwealth the following stand out: (i) Hastiness ... (ii) The striving after severity ... (iii) Misplaced pity is no less to be censured - the 'crime of pity' Leyser not inappropriately calls it."

Again in Voet 48.19.4 (Gane's translation, vol 7 at 504) it was pointed out:

> "... it is certainly wholesome advice which was given by Marcianus that a judge must be watchful to see that no step is taken either more harshly or more indulgently than is called for by the case ... In trivial cases indeed judges ought to be more inclined to mildness; but in more serious cases to follow the severity of the laws with a certain moderation of generosity."

Although the foregoing is addressed to judges, it is equally applicable to magistrates and those who are called to adjudicate and impose disciplinary measures.

Some Roman-Dutch jurists dealt with abortion. Matthaeus *de Criminibus* 47.5.1.2 regarded the killing *in utero* of an embryo that had developed into a child as a capital offence. Huber *Jurisprudence of my Time* 6.13.39 (Gane's translation, vol 2 at 433) indicated that an abortion of a foetus with a perfect

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body and life was deemed to be murder and punished accordingly, but if the foetus did not

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have life the punishment was banishment. Voet 47.11.3 (Gane's translation, vol 7 at 255-257) defined abortion as

> "... the untimely forcing out or getting rid of an embryo which had been ... conceived as when she has been bribed to inflict violence on her inward parts by substitutes ...
>
> It does not matter in what way the abortion is procured provided that the guileful purpose of aborting the offspring is present."

According to him, the penalty depended upon "a growth which already has life, and of one which has yet no life" with extreme punishment fixed for the former and discretionary penalty for the latter. Van der Keessel *Praelectiones ad Jus Criminale* 47.2.7 (*Lectures in Criminal Law* Beinart and Van Warmelo's translation, vol 1 at 341-343 and 362-363) stated that in early Roman law abortion of a foetus went unpunished, but later, under Severus and Autoninus, it was treated as an extra-ordinary crime, with the penalty being exile. He elaborated that a distinction was drawn by Cujacius, Matthaeus and other commentators between abortion of a live foetus (*partus animates*) and an embryo (*partus non animates*) in such a way that, for the former, capital punishment was imposed and, for the latter, a lighter penalty. This distinction was enacted in the article 133 of the law of the Criminal Constitution of Charles V, which prescribed the death penalty for the former. For the latter the penalty was discretionary. Van der Keessel felt that this distinction could not be substantiated from the text of the Roman Law. He pointed out that the new criminal code of Holland held that the

> "crime of abortion or of damaging a foetus by inducing a miscarriage, or the untimely birth of a premature child, can be committed equally by external acts of violence employed for that purpose as by administration of abortion medicines internally."

The punishment for a woman who committed it herself was imprisonment or banishment not exceeding 6 years. For accessories who, with her knowledge, committed it the penalty was similar. But where others committed it without her knowledge the punishment was imprisonment or banishment not exceeding 8 years, which Van der Keessel considered to be quite moderate. Van der Linden *Institutes of Holland* 2.5.12 and 13 (Jute's translation at 217-218) held that infanticide may be committed if, when procuring an abortion, the birth of the child is prevented. Where this was done with the intention of

causing the child's death, it was regarded as actual murder. According to him, the penalty for procuring abortion depended greatly upon the circumstances, with the death penalty where the intention was to cause the child's death and, in other circumstances imprisonment, banishment or corporal punishment. In *A P v State* 1895 SAR 103 at 105, KOTZÉ CJ held that under Roman-Dutch law infanticide could be committed upon a foetus (citing Van der Linden).

In *S v Collop* 1979 (4) SA 381(C) at 389, VAN WINSEN J held that abortion related to the termination of pregnancy after the fertilization of the ovum and that the South African Abortion and Sterilization Act 1975 set out to codify the law. But on appeal - 1981 (1) SA 150 (A) at 164-165 - DIEMONT JA was hesitant to accept the word "codify", as there was a divergence of opinion among writers of the 17th and 18th centuries both as to the nature of the offence and

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as to punishment. He made reference to Voet who, he indicated, "nowhere suggest. that the abortion of offspring must go unpunished". He continued that the unanimous view of the writers on criminal law was that it was not necessary that any definite period should have elapsed after fertilization of the ovum as long as the foetus was not dead at the time of the *actus reus* of the crime of abortion. He held that there:

> "... is, therefore, no foundation for the proposition that at common law the crime of abortion could only be committed on a woman whose pregnancy had advanced beyond ... the embryonic state."

Our Termination of Pregnancy Act 29 of 1977 provides, in s 3, that no person may terminate a pregnancy otherwise than in accordance with that Act.

"Pregnancy" is defined as an intra-uterine pregnancy where the foetus is alive. A "foetus" includes an embryo. The circumstances in which a pregnancy may be terminated in terms of s 4 are (a) where the life of the mother is endangered or Here is serious threat of permanent impairment of her physical health; (b) where there is serious risk that the child will be born with a physical or mental defect that will permanently and seriously handicap the child; (c) where there is a reasonable possibility that the pregnancy was as a reset of an unlawful intercourse.

In *S v Mapuranga* HB-242-86 where the accused was charged with abortion, MANYARARA J (as he then was) was of the view that the law relating to abortion had been changed and that the accused should have been charged with contravening s 3 of the Termination of Pregnancy Act. However, at common law, abortion is defined as the killing and causing expulsion from the uterus of a live foetus: *R v Owen* 1942 AD 387 at 394-5.

ADAM J

Now, in *R v C* 1961 (3) SA 675 (SR), where the accused was convicted of inciting a medical doctor to procure an abortion on his girlfriend, the sentence was altered to a fine. In *R v Ncube* AD-151-66, where the accused for a fee procured an abortion on a 17-year-old schoolgirl, a sentence of 12 monks' imprisonment with labour was upheld. In *S v Sibanda* GB-41-77 the accused, who was a nganga, was convicted of attempting to procure an abortion. GUBBAY J (as he then was) imposed a sentence of 12 months' imprisonment with labour, of which 6 months was suspended. In *S v Mapuranga supra,* where an 18-year-old student had taken some noxious substance that terminated her pregnancy, she was convicted on her guilty plea of the crime of abortion. MANYARARA J (as he then was) could not fault the magistrate for treating it as a serious offence but concluded that she should have been dealt with under s 337 of the Criminal Procedure and Evidence Act by postponing the passing of sentence. Since it was too late to do this, a fine was imposed instead.

As for discharge with a caution or reprimand, this is most suited for petty or technical offences. In *R v Mahlatse* 1949 (4) SA 455 (Q), the conviction that led to the caution and discharge was for being a hawker without the requisite licence contrary to the regulations. In *R v Feun* 1954 (1) SA 58 (1) the offence pertained to not paying the cost-of-living allowances to employees, contrary to the regulations. In *R v Keschner* 1961 (3) SA 309 (A), the offence concerned not paying the prescribed wages contrary to the regulations. In *S v Suping* 1967 (1) SA 22 (O), the offence was for not being in possession of the reference book issued to the accused contrary to

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the regulations. In *S v Magidson* 1984 (3) SA 825 (my, the offence related to being in possession of a plastic key ring with a reproduction of a South African Bank note, contrary to the Reserve Bank Act 1944. ACKERMANN J observed at 833:

> "The contravention in this case is of a highly technical nature. Literally thousands of people must, to the knowledge of the police, have been in possession of such keyrings ... Nobody has been prosecuted for unlawfully possessing such a keyring. It also seems highly unlikely that the accused would have been prosecuted had he not made all the enquiries that he did make. In all the circumstances it seems to me the lightest sentence should be imposed on the accused that the law permits. Such a punishment would seem to me to be a caution and discharge."

It is clear from the foregoing that the punishment imposed by the trial magistrate was extremely lenient for an offence which cannot be described as petty or technical in nature. An appropriate sentence in this case would

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ADAM J

have been either a fine or a suspended sentence. Accordingly I decline to certify the proceedings as being in accordance with real and substantial justice.

MSORWA v MUNYUKI 1994 (2) ZLR 261 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Civil appeal

10 & 20 October 1994

Flynote

Animals - injury by - dogs - dogs escaping from fenced property and biting passer - by - liability of owner - claim based on negligence - what must be established - claim under actio de pauperie - whether more appropriate cause of action

Appeal - factual findings by trial court - confusing reasoning, with no findings of credibility nor analysis of the probabilities - approach by appeal court

Headnote

The defendant resided in the Harare suburb of Eastlea. Around his property was a four-foot wire fence in which was a motorised gate. A hedge grew immediately next to the fence. The defendant owned two dogs. In the six years he had been there, neither dog had ever jumped over the fence or chased after motor vehicles or cyclists or run into the road unaccompanied. Nothing in their behaviour led him to believe that the dogs had vicious or aggressive properties.

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Late one evening, the defendant returned home. While inside, he heard a person cry out. He went out and found the plaintiff outside the property, leaning against the gate. The larger of his dogs had its paws against the plaintiff's upper body. The defendant grabbed the dog and lifted it over the gate back into his property. The plaintiff had been bitten and was bleeding. The defendant at no time saw the smaller dog outside the property, though the plaintiff said that both dogs had emerged from a hole in the fence and attacked him as he walked home along the road. The smaller dog had made its way back into the property through the hole in the fence.

1994 (2) ZLR p262

The plaintiff claimed damages, the summons alleging that the defendant had negligently let his dogs loose. No attempt was made in the summons to found liability, in the alternative, on the *actio de pauperie*. The trial was conducted in the basis that the issue was negligence; neither the claim nor the defence were conducted with the *actio de pauperie* in mind. The trial magistrate held the defendant liable, and the defendant appealed.

The trial magistrate's judgment was confused and little reliance could be placed in his reasoning. There were no findings of credibility, adverse or otherwise, nor any analysis of the probabilities.

Held, that the appeal court could come to its own conclusions on the facts, although it suffered from the disadvantage of not having been steeped in the atmosphere of the trial.

Held, further, that legal liability of a person in the defendant's situation would arise if a *diligens paterfamilias* in the same situation would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss and failed to take reasonable steps to guard against such occurrence. Only the general nature of the hand that actually eventuated, not its precise extent or the manner of its occurrence, is required to be reasonably foreseeable. A reasonable man in the defendant's position would have foreseen that if one or other of the dogs were to stray onto the road, it might cause damage to the person or property of road users.

Held, further, that the next enquiry was whether the plaintiff had proved that the precautionary steps taken by the defendant to prevent the foreseeable harm were not reasonable. This was a question of fact and the onus lay on the plaintiff. There was no evidence that the defendant knew or ought to have known of the hole in the fence. The occupier of property in a residential area away from a busy main road with fast moving traffic is not expected to frequently inspect a surrounding fence, especially in the absence of any prior indication that his dogs ever spayed from the property. If there were such a duty, an unreasonably high and totally impracticable standard of care would be created. The plaintiff called no evidence of and omitted even to suggest what reasonable precautions the defendant should have taken to guard against the dogs escaping.

Consequently, it had not been shown that the defendant was negligent.

Held, further, that the action should have been based on *pauperies*. A decree of absolution from the instance would enable the plaintiff to pursue his correct remedy.

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Cases cited:

Rocky Lodge (Pvt) Ltd v Livie 1977 RLR 218 (A)

GUBBAY CJ

Joyce v Venter 1979 RLR 478 (G)

Geldenhuis v Wilson 1949 (4) SA 534 (T)

Pieters v Botha 1989 (3) SA 607 (I)

Maree v Diedericks 1962 (1) SA 231 (I)

R v Dhlumayo & Anor 1948 (2) SA 677 (A)

Wakefield & Sons (Pty) Ltd v Anderson 1965 (4) SA 453 (N)

Hayes v Bar Council 1981 ZLR 183 (A); 1981 (3) SA 1070 (ZS)

Kruger v Coetzee 1966 (2) SA 428 (A)

Lomagundi Sheetmetal & Eng (Pvt) Ltd v Basson 1973 (1) RLR 356 (A); 1973 (4) SA 523 (RA)

Deysel v Karsten 1994 (1) SA 447 (A)

Robertson v Durban Turf Club & Ors 1970 (4) SA 649 (N)

van Wyk v Thrills Inc (Pty) Ltd 1978 (2) SA 614 (A)

City of Salisbury v King 1970 (1) RLR 71 (A)

G Bhera for the appellant

P Makombe for the respondent

Judgment

Gubbay CJ: This is an appeal from a judgment of the magistrates court, held at Harare. Under it, the sum of $3 795,40, and costs of suit, were awarded to the plaintiff in an action in which he claimed damages for personal injuries as a result of bites inflicted by the defendant's two dogs. I shall continue to refer to the respondent as "the plaintiff" and to the appellant as "the defendant".

It was alleged by the plaintiff in his summons that on 19 June 1991, the defendant negligently let loose his two vicious dogs and that he was attacked by them while walking along Buckingham Road.

No deliberate attempt was made to found liability, in the alternative, on the *actio de pauperie*. A careful pleader would have done so. Because negligence, as the cause of action, stood in the forefront of the summons, it is necessary to decide whether the allegations made were sufficient

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to serve as a foundation for the *actio de pauperie* as well.

The summons did not expressly allege, as it should have, that the defendant was the owner of the dogs, even though the use of the word "his" could imply that to be the case. More significantly, it did not allege that, in biting the plaintiff, the dogs, being domesticated animals, acted "*contra naturam sui generic*". Rather, the characterisation of the dogs as "vicious" would appear to suggest that they had been trained to so act. See *Rocky Lodge (Pvt) Ltd v*

GUBBAY CJ

Livie 1977 RLR 218 (A) at 225G-H; 1977 (3) SA 231 (RA) at 235H; *Joyce* v *Venter* 1979 RLR 478 (G) at 479E.

I do not believe that a defendant reading this summons would perceive it to disclose two causes of action; and that the defences he should raise to it were to include those available to the *actio de pauperie*. See *Geldenhuis v Wilson* 1949 (4) SA 534 (1) at 537. Indeed, the plea was not drawn on the basis of the claim for damages resting, in the alternative, on the *pauperian* action. Moreover, at the pre-trial conference held before a magistrate, the issue relating to liability, as agreed by the legal representatives for the parties, was recorded to be: "Whether the defendant was negligent in allowing one or two dogs to leave his property".

Not surprisingly, the conduct of the trial reveals that neither the claim nor the defence were contested with the *actio de pauperie* in mind. I am, thus, far from satisfied that counsel for the defendant would have limited cross-examination of the plaintiff in the manner he did, or have contented himself with calling his client as the sole witness, if he thought that damages were not only being sought on the ground of negligence. Even in his address to the magistrate, counsel made it plain that his understanding was that the claim was brought under the *Lex Aquilia*. In this he was not contradicted.

The possibility of prejudice to the defendant, were this court to now consider the claim as one under the *actio de pauperie*, cannot be excluded. The defendant may well have endeavoured to establish at the trial that the plaintiff had provoked the dogs which caused his injuries. See *Pieters v Botha* 1989 (3) SA 607 (T) at 621 C-F.

To the extent, then, that the decision in *Maree v Diedericks* 1962 (1) SA 231 (T) is in conflict with this view, I would respectfully disagree with it.

It follows that the contention advanced by the plaintiff, that the judgment in his favour is supportable on the basis of liability under the *actio de pauperie*, cannot be sustained.

The magistrate delivered a somewhat confused judgment. It is not clear whether he held the defendant liable on account of negligence, or *pauperies*, or a mixture of both. Mention that the defendant was unable to prove culpable conduct on the part of the plaintiff or that the dogs had been provoked to attack, suggests that the decision was founded on the principles of *pauperies*. On the other hand, the reference to the defendant not exercising proper control over the dogs points in the direction of fault. Little reliance can be

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GUBBAY CJ

placed on the reasoning. There are no findings of credibility, adverse or otherwise; nor any analysis of the probabilities. Consequently, this court is entirely free to come to its own conclusions, albeit it suffers from the disadvantage of not having been steeped in the atmosphere of the trial. See *R v Dhlumayo & Anor* 1948 (2) SA 677 (A) at 706; *Wakefield & Sons (Pty) Ltd v Anderson* 1965 (4) SA 453 (N) at 455B-D; *Hayes v Bar Council* 1981 ZLR 183 (A) at 204H; 1981 (3) SA 1070 (ZA) at 1085 *in fine*.

Save in one respect, the facts were not seriously in dispute and are relatively simple.

The defendant resided in a house situated at 25 Buckingham Road, in the low-density suburb of Eastlea, in Harare. The property was enclosed by a four-foot wire fence in which was a motorised gate of equal height. A hedge had been grown immediately adjacent to the fence. The defendant's two dogs were confined to the property and not permitted to roam outside. The larger was a mixed breed male, the smaller a bull terrier female.

During the period of six years that the defendant had been in occupation of the property, the larger dog had not escaped onto the road by jumping over the gate. The bull terrier was too small to do so. Neither animal, to the defendant's knowledge, had ever chased after motor vehicles, cyclists or run into the road unaccompanied. Nothing in their behaviour led him to suspect that they were possessed of vicious or aggressive propensities.

It was late in the evening of 19 June 1991 that the defendant returned to the property. He alighted from his motor vehicle, unlocked the gate and drove in. He then relocked the gate as he was accustomed to do. At that stage, both dogs were on the front verandah. The defendant entered the house, made preparations for a meal and went to take a bath. While in the bathroom, he heard a human cry coming from the road. He got out of the bath and, in a state of nakedness, opened the front door to investigate. He saw the plaintiff leaning against the gate. The larger dog had its paws against the plaintiff's upper body. The defendant ran to the gate, grabbed the dog and lifted it over the gate. Having dressed, he attended to the plaintiff, who had been bitten and was bleeding from his wounds. After lending what assistance he could, the defendant drove the plaintiff to the hospital where his injuries were treated.

At no time did the defendant notice the bull terrier outside the property. The plaintiff, however, testified that he had been attacked by both dogs while walking along Buckingham Road on his way to where he lived in nearby

GUBBAY CJ

Cumberland Road. He had been at the Morris Depot Police Club from about 7.00 pm to after closing time at 10.30 pm. He had consumed six pints of beer, but was not drunk. When about 150 metres from the defendant's property he observed the two dogs emerge through a hole in the fence. Initially both roamed around somewhat aimlessly. All of a sudden, and for no apparent reason, they attacked him. The larger dog jumped up, trying to get at his throat. He

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fended it off but was bitten on the chest. The bull terrier settled for his legs and thighs. The plaintiff managed to take hold of the larger dog by the collar and proceeded to drag it towards the defendant's gate. The bull terrier returned to the property through the same hole in the fence. The plaintiff rattled the gate and shouted out. The defendant appeared. He got hold of the larger dog and threw it back over the gate.

The plaintiff suffered several fairly severe bites; in particular, three to the left upper chest near the armpit, one to the right side of the chest, another to the right front thigh, and one more to the rear of the left thigh. His jacket, trousers and shirt were torn.

It was firmly denied by the defendant that there was a hole in the wire fence through which the dogs had escaped onto the road. He maintained that only the larger dog had bitten the plaintiff. Since the defendant had not witnessed the attack, there is no justification to disbelieve the plaintiff that the bull terrier was a co-assailant. Accepting its presence at the scene, the plaintiff must be correct in his assertion that it made its way back to the property through a hole in the fence. On the other hand, I think it improbable that, from a distance of 150 metres and at night, the plaintiff was able to see the dogs emerge through the hole in the fence. It may well be that, having noticed the bull terrier return through a hole in the fence, he rationalised *ex post facto* that it was by such route that **both** dogs had gained access to the road. It seems to me that the larger dog could have leaped the gate.

What, then, is the legal liability of a defendant whose dogs, in the scenario afore-described, stray onto a public road and bite a passer-by? The general principles of liability to such a party were lucidly enunciated by HOLMES JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G as follows:

> "For the purposes of liability *culpa* arises if -
>
> (a) a *diligens paterfamilias* in the position of the defendant -
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

GUBBAY CJ

> (ii) would take reasonable steps to guard against such occurrence; and
>
> (b) the defendant failed to take such steps.
>
> This has been constantly stated by this court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases."

See also *Lomagundi Sheetmetal & Engineering (Pvt) Ltd v Basson* 1973 (1) RLR 356 (A) at 363D-G; 1973 (4) SA 523 (RA) at 524H-525B.

In applying these principles, it is to be borne in mind that only the general nature of the kind of harm that actually eventuated is required to be reasonably foreseeable. The precise extent or

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manner of the occurrence need not be reasonably foreseeable.

I think a reasonable man in the defendant's position would have foreseen that if one or other of the dogs were to stray onto the road, it might cause damage to the person or property of road users. Surely, one of the main reasons the two dogs were confined was just that anticipation on the part of the defendant.

This view accords with the recent decision of the South African Appellate Division in *Deysel v Karsten* 1994 (1) SA 447 (A). There, the appellant's minor son sustained injuries due to a fall from his motorcycle when a puppy, belonging to the respondent, ran into his path. The puppy had been confined to the respondent's back yard and the only way it could have gained access to the road was through a side gate in the fence enclosing the back yard, or through the house itself. VAN HEERDEN JA, giving the lead judgment, pointed out, at 454I-455A, that according to human experience dogs have a tendency to run into streets for one reason or another, and thereby create a danger for the users thereof. He went on to say, at 455B-C, that the reasonable owner, **as a rule**, would foresee that if his dog were allowed to wander freely, it could cause damage to the person or property of a road user. But where the dog was too old, too young, too feeble, or too well-disciplined, the notional possibility of it doing so would be too remote to be taken into account by the reasonable owner. The learned JUDGE OF APPEAL held on the facts that the respondent ought to have foreseen that the puppy, despite its

youth, could run into the street and cause damage to a passer-by. Nonetheless, liability did not attach to the respondent, as it had not been proved that he had failed to take reasonable precautions to guard against the escape of the puppy; and that the respondent's wife, children or maid could either have left the side gate open or allowed the puppy to move through the house.

In a short concurring judgment, VAN DEN HEEVER JA preferred to distance herself from the proposition that it was **as a rule** foreseeable that a dog, should it run across the street, could cause damage to others. She considered that such a conclusion was dependent upon all the relevant circumstances - the type and the nature of the environment, including the type of traffic generally found in the area (see at 457J-458A). Her Ladyship was of the opinion that the respondent had not foreseen that the puppy could cause damage to others if it was struck by a passer-by. But she agreed that, if there was a duty on the respondent to keep the puppy confined, it had not been proved that he had failed to take reasonable precautions to do so, or that he himself had been negligent (see at 458B).

It should be noted that the case does not lay down that every person whose dog strays onto the street would be liable for injury caused by the dog, unless he took proper and adequate steps to contain it on his premises (vice the examples given by VAN HEERDEN JA). The main judgment disapproved of the proposition, accepted by the court below (see 1992 (3) SA 290 (E) at 296E), that merely to allow a dog onto a street does not, in the absence of special circumstances, impose liability on the owner if an accident results.

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The next enquiry is whether the plaintiff proved that the precautionary steps taken by the defendant to prevent the foreseeable harm were not reasonable. This is an issue of fact In resolving it, the observations of MILLER J (as he then was) in *Robertson v Durban Turf Club & Ors* 1970 (4) SA 649 (N) at 653E-F provide useful guidance:

> "Although it is relevant, when considering whether such reasonable precautions were in fact taken, to have regard to other precautions which could have been taken and which might have been more effective, the defendant will not necessarily have failed in its duty merely because it is shown that other and better precautions could possibly have been taken by one who happened to think of them. It is not the quality of the defendant's imagination, nor the degree of the defendant's ingenuity, which is the touchstone, but the reasonableness of what was actually done to guard against harm."

GUBBAY CJ

This passage was quoted with approval in van *Wyk v Thrills Incorporated (Pty) Ltd* 1978 (2) SA 614 (A) at 623C-E.

It must also not be overlooked, as underlined by HOLMES JA in *Kruger v Coetzee supra*, at 431F-432D, that the plaintiff bears the onus of establishing that the defendant had failed to take reasonable steps to prevent the harm. And if the court does not have sufficient persuasive evidence before it to conclude that the steps taken by the defendant were inadequate, negligence on his part will not have been shown. See also *City of Salisbury v King* 1970 (1) RLR 71 (A) at 73B-C; 1970 (2) SA 528 (RA) at 529E-F; Burchell *Principles of Delict* at p 103.

To revert to the present matter the defendant's property was entirely fenced and the motor gate constantly kept locked. There is no warrant to doubt that the defendant believed that the fence, with adjacent growing hedge, formed an impenetrable barrier against his dogs gaining access to the road. Certainly, he was unaware of the existence of the hole. But what was not proved by the plaintiff was that the defect in the fence had been sufficiently long-standing that the defendant ought to have known of it. No evidence was offered on that aspect. I do not consider that it is to be expected of an occupier of property in a residential area, away from a busy main road with fast-moving traffic, that he is duty bound to frequently inspect a surrounding fence, especially where there has been no prior indication of his dogs ever straying from the property. If such were the duty, an unreasonably high and totally impracticable standard of care would be created.

The plaintiff omitted to call any evidence of, or even to suggest, what reasonable precautions the defendant should have taken to guard against the escape of the dogs. There was no complaint that the fence and gate were of inadequate height or construction to achieve their designated purpose of containing the dogs upon the property.

It follows that the appeal must succeed. The plaintiff at the outset should have based his action on pauperies. Unfortunately for him, he relied solely on negligence. This court, therefore, has been compelled to exclude from consideration damages resulting from *pauperies.* A decree of absolution from the instance will enable the plaintiff to pursue his correct remedy.

Accordingly, I would allow the appeal with costs and order that the judgment of the magistrate

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be altered to read:

> "Absolution from the instance with costs."

GUBBAY CJ

Korsah JA: I agree.

Muchechetere JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Guni, Wabatagore & Company, respondent's legal practitioners

S v BANANA 1994 (2) ZLR 271 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Criminal appeal 18 & 24 October 1994

Flynote

> Criminal law - defences - private defence - killing in defence of life and property - householder killing intruder - when measures taken excessive or disproportionate

Headnote

The appellant shot and killed an intruder. He had been asleep in his house with his girl friend when a number of intruders had broken into his house and stolen his property. The intruders had then attempted to break down his locked bedroom door. The appellant had fired two shots at the lower part of the bedroom door. Despite this warning that the appellant had a firearm, the intruders next came round the outside of the house and smashed a pane in the window next to the latch. The appellant then fired another non-lethal shot downwards through the bottom pane. This further warning to those outside was not heeded, as the appellant then saw two men with knives right by the window. He then fired two shots through the window. After a pause he feed two more. One of the intruders was hit and died soon afterwards.

The appellant was charged with murder but convicted of culpable homicide, the trial court finding that he had acted too precipitately and had exceeded the lawful bounds of private defence. In an appeal against conviction,

Held, that in deciding whether the measures taken by a person in defence of himself and his property were reasonably justifiable in the circumstances, the court must avoid adopting an armchair approach and must instead fully take into account the predicament faced by the

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person under attack.

McNALLY JA

Held, further, that in the circumstances of this case, in which the appellant was faced with a terrifying and determined attack, it could not be held that he had exceeded the reasonable bounds of self-defence.

Held, therefore, that the appeal against conviction must be allowed.

Cases cited:

S v Ngomane 1979 (3) SA 859 (A)

S v Ntuli 1975 (1) SA 429 (A)

S v Nicolle 1991 (1) ZLR 211 (S)

S v Mandizha S-200-91

S v Phiri S-190-82

S v Moyo S-45-84

R v Detsera 1958 R & N 51; 1958 (1) SA 762 (FS)

J C Andersen SC for the appellant

T Chitapi for the respondent

Judgment

McNally JA: The appellant was charged with murder and convicted of culpable homicide. He was sentenced to three years' imprisonment with labour of which half was suspended. He now appeals against conviction and sentence.

It is sometimes said that there is no smoke without fire. That means that when there is gossip, scandal, suspicion and rumour there may well be a factual basis for the allegations that are circulating. This case shows how dangerous it can be to apply, in the criminal law, a maxim whose proper place is in folk lore and fairy tales. Certainly where there are rumours of dark deeds the police should investigate. But in court, it is not the rumours but the facts which are relevant.

The evidence led in this case bears no resemblance whatever to the "smoke" which presumably led to the charge of murder. There is not a jot of evidence of murder. The evidence is entirely consistent with the story which the appellant told from the beginning. It was a version of events which the learned trial judge accepted. It raises the issue "when is a householder entitled to shoot and kill an intruder?" That is the only issue.

The facts, after one has blown away the obscuring clouds of smoke, are these. The appellant

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and his girlfriend lived in a house in Braeside. The appellant, then an Air Force officer, had a service revolver. On the night of 8 August 1988 they had retired to bed at about 9.30 pm. Perhaps a quarter of an hour

McNALLY JA

later someone knocked on the window and asked if Kingsley was there. She replied "No". The man (she says it was the deceased) went away. They went to sleep. The radio was on. The bedroom door was locked. About an hour later she was woken by footsteps in the house. She woke the appellant. He heard them too. Someone banged on the bedroom door, and there was a sound of a tap running. The appellant got up, took out his service pistol and loaded it. He switched off the light and sat on the edge of the bed. Someone started to kick the door as if trying to kick it down. The appellant aimed at the lower half of the door and fired two shots downwards through the door. There was a noise of running feet and a crashing, which was probably a french door in the living room, which was later found broken.

Almost at once after that someone from outside smashed the window pane in the window behind the bed. The appellant got up from the end of the bed where he had been sitting facing the door. He moved to a point next to the window and fired a shot out of the window. He fired this shot downwards towards the ground. He then peeped out of the window and saw two people holding knives in a stabbing position right next to the window.

By this time he was seriously frightened. He was up against a group of people who had broken into his house late at night, tried to break down his door, and now, undeterred by the shots he had fired, were at his window with knives.

He thought they were determined to get into the bedroom. He might have been even more concerned if he had known what only became apparent later, that the intruders had already stolen his fridge and that the one man at the window had a large kitchen knife (from the appellant's kitchen) in the one hand and a smaller knife and a screwdriver in the other. In addition, he had a mask over the lower half of his face.

He then fired two shots out of the window. After a pause, he fired two more. He peeped out and saw a figure lying on the ground right by the window. There was a gurgling or choking noise. He heard running footsteps, someone shouted "Let's go" and a car started up and drove away.

They tried to get out of the bedroom door, but it was jammed. They could not open it. So they sat there. After about fifteen minutes a man came. It was about 11.45 pm. He lived in the staff quarters. They called him. He came to the window (a different window). They told him the story. He checked the body and found it dead. He then managed to open their bedroom door from the outside. They called the police.

McNALLY JA

It transpired that the deceased was known to the appellant's girlfriend. She had, at one time,

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gone out with his brother, she said. They were a fairly wild group, she said. They drank and took drugs.

Those are the relevant facts. And it seems to me at once that, at worst, the degree of moral turpitude, the degree of wickedness, on the part of the appellant is very small. But it is arguable that he did nothing wrong. It is necessary to examine the law and the cases on the subject of killing in defence of life and property.

I begin with the text-book. Burchell and Hunt South African Criminal Law and Procedure 2 ed vol 1 at p 326 *et seq* sets out the three criteria for the exclusion of criminal liability. They are:

1. the defence must be directed against the attacker;

2. the defence must be necessary to avert the attack;

3. the means used must be reasonable in the circumstances.

Where the self-defence involves excessive or disproportionate force there may be a finding of guilty of culpable homicide. This is on the basis that the accused was mistaken in thinking himself justified in killing. As TROLLIP JA put it in *S v Ngomane* 1979 (3) SA 859 (A):

> "... although he acted in self-defence, he ought reasonably to have realised that he was acting too precipitately and using excessive force, and that, by stabbing the deceased with such a lethal weapon on the upper part of the body, he might unnecessarily kill him."

But also, as HOLMES JA said in *S v Ntuli* 1975 (1) SA 429 (A):

> ". . . the court adopts a robust approach, not seeking to measure with nice intellectual callipers the precise bounds of legitimate self-defence."

See also *S v Nicolle* 1991 (1) ZLR 211 (S) at 217B-D, and the judgment of the CHIEF JUSTICE in *S v Mandizha* S-200-91, which dealt specifically with the question whether the self-defence was excessive. It repeated the point, made earlier in *S v Phiri* S- 190-82, that one cannot take an armchair view of events. They must be seen and judged in the light of the circumstances of the occasion. Finally, I refer to *S v Moyo* S-45-84 where the then CHIEF JUSTICE, DUMBUTSHENA CJ, stressed the fact that it was for the State to negative the plea of self-defence.

McNALLY JA

However, as always in this type of case, we must look at the facts of the particular case. The learned judge did so, with some care. He referred to *S v Phiri supra* and to *R v Dotsera* 1958 R & N 51 (FS). He concluded, with the concurrence of the two assessors, that the appellant-

1. acted precipitately;

2. erred in the excessive zeal with which he pursued the lawful objective of defending himself or his property;

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3. made an error of judgment; and

4. exceeded the lawful bounds of use of force.

I find myself in respectful disagreement with this conclusion.

I begin with the circumstance that the appellant was peacefully and lawfully asleep in his own house at night. A number of intruders broke into the house and stole his property. Not content with that, they attempted to break down his locked bedroom door. Being lawfully armed with a service revolver, and in legitimate defence of his own and his girlfriend's life, not to mention his property, he loaded the gun and fired two non-lethal shots through the lower part of the bedroom door. Those shots were adequate warning that he was armed with a gun and was prepared to use it. Far from being deterred or warned off by this act, the intruders next came around the outside of the house and smashed a pane in the window over the bed. The broken pane was next to the latch. True, there were burglar bars on the window. But burglar bars, unless they are of the highest quality, are not necessarily an immovable barrier.

He moved across to the window, flattened himself against the wall by the window, and fired another non-lethal shot downwards through the bottom pane, while keeping his body out of sight. This was a further warning to anyone outside to go away.

But that warning also was not effective. Because when he peeped out again he saw not one but two men with knives right by the window.

What was he to do? Warning shots were ineffective. They had already had two warnings. Their response was to come at him with knives. They were persistent. How was he to know they would not wrench aside the burglar bars,

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McNALLY JA

or make another attempt on the door if he drove them from die window? It seems to me that he was in a very frightening situation. They had not used guns, but could he be sure they did not have any?

He does not actually say he fired at these two men. He simply fired two shots through the window, and then two more. It seems to me that, if the assailants did not heed the warning, they had to face the consequences.

If one were to pin-point a misdirection in the judgment of the learned judge, I would point to the conclusion that the appellant acted "precipitately". The word means "hastily, rashly, without consideration" (I paraphrase slightly the *Concise Oxford Dictionary*). He had already fired two warning shots and then a third. He had, in so doing, acted properly. But if your wanting shots are ignored, what do you do next?

The body of the deceased was found right next to the window. As I mentioned earlier he had a large knife in one hand, a small knife and a screwdriver beside him and a mask disguising the lower half of his face.

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I am not satisfied that the State established that the appellant exceeded the reasonable bounds of self-defence in all the circumstances of this case as they appear on the record. In my view the appeal must be allowed and the conviction and sentence set aside, and it is so ordered.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

WHATA v WHATA 1994 (2) ZLR 277 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

27 October & 3 November 1994

Flynote

Appeal - execution - pending determination of appeal - whether trial judge may mero motu order execution in absence of application by successful party and without giving unsuccessful party an opportunity to voice its opposition

Court - contempt of - failure to obey invalid order of court - person acting on incorrect legal advice - person still in contempt - correct course of action

Headnote

At the end of a trial in the High Court over the custody of, maintenance for and access to the minor children of the marriage between the parties, the trial judge (ADAM J) awarded custody of one of the children to the respondent. However, he added a caveat to his order, that in the event of an appeal being noted, this part of the order would be operative, in spite of the noting of the appeal. The judge adopted this course without any application having been made by the respondent and without affording the appellant an opportunity to voice opposition.

Shortly after the appeal was noted, the respondent's legal practitioner demanded that the child be handed to the respondent, despite the noting of the appeal. The appellant's legal practitioner took the stance that the judge's special order was incompetent. The respondent applied for the appellant to be committed to prison for contempt of the order. ROBINSON J held that the appellant was in contempt and ordered him to comply. An appeal was noted against ROBINSON J's order.

Held, that the order made by ADAM J was incompetent. Where an appeal is

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noted, the order is suspended unless special leave of the court is granted after special application is made by the successful party. Before the court can grant such leave, it must consider whether that course would be just and equitable in all the circumstances. This enquiry involves assessing such factors as the potentiality of irreparable harm being sustained by either party and, if by both, the balance of prejudice; the prospects of success on appeal; and whether the appeal is frivolous or vexatious. It would therefore be contrary to the interests of natural justice for a court to order that its judgment be operational before giving the unsuccessful party the right to be heard.

Held, further, that generally a person may not refuse to obey an order of court merely because it was wrongly made. To do so would be seriously detrimental to the standing and authority of the court. The correct approach is for the person to obey the invalid order and thereafter seek redress by way of appeal or review.

Held, further, that it is not an inevitable consequence that disobedience to a wrong order of court constitutes the crime of contempt. The crime must be committed intentionally and in relation to the administration of justice in the Courts. Where, as here, the person was advised by his legal practitioner that he was not obliged to comply with the special order, his mistake was one of law. Mistakes of law are normally no excuse, unless the person has been misled by the advice of a responsible representative of the State. This exception did not apply in the present case and accordingly ROBINSON J was obliged to find the appellant in contempt

Held, further, that as the special order made by ADAM J was bad, any proceedings based on it would also be bad.

Cases cited:

Zaduck v Zaduck (2) 1965 RLR 635 (G)

Cohen v Cohen (1) 1979 RLR 184 (G)

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

Arches (Pvt) Ltd v Guthrie Hldgs (Pvt) Ltd 1989 (1) ZLR 152 (H)

Oliphants Tin "B" Synd v de Jager 1912 AD 477

Levin v Felt & Tweeds Ltd 1951 (1) SA 213 (C)

South Cape Corp (Pty) Ltd v Eng Mgmt Svcs (Pty) Ltd 1977 (3) SA 534 (A)

S v Mushonga 1994 (1) ZLR 296 (S)

S v Davy 1988 (1) ZLR 386 (S)

G Chikumbirike for the appellant

A Ebrahim for the respondent

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GUBBAY CJ

Judgment

Gubbay CJ: The parties to these two inter-related appeals, set down together for urgent hearing, were formerly husband and wife. They were bitter contestants in a trial before the High Court over the custody of, maintenance for, and access to, their minor children, and proprietary rights. At its conclusion, one of the orders made by ADAM J which awarded custody of the minor child Fiona to the respondent, as well as maintenance in the sum of $750 per month, had the following caveat attached to it:

> "That in the event of an appeal being noted, notwithstanding such noting of appeal, this part of the order is hereby declared operative in effect and shall not be suspended."

The learned judge was correct in predicting an appeal, for notice thereof was filed within two days of the judgment being handed down. In it, the correctness of the orders in regard to the custody of and maintenance for the child Fiona (para 2), the grant of thirty-five *per centum* of the value of the matrimonial home to the respondent (para 8), and costs (para 9), were challenged.

Shortly after being served with the notice of appeal, the respondent's legal practitioner demanded that, despite the pending appeal, the child be placed forthwith into the custody of his client. A warning was issued that refusal to comply could lead to the institution of contempt proceedings against the appellant. The response of the legal practitioner acting for the appellant was that the special order made by ADAM J was not legally competent and that any attempt to execute upon its terms would be strongly resisted.

Disputing the soundness of the appellant's stance, the respondent filed a court application in which she claimed the committal of the appellant to prison, until he purged his contempt of the special order by delivering the child to her. The appellant opposed the grant of that relief. He cited in support the advice conveyed to him that the respondent had misconstrued the law in adopting and seeking to implement the erroneous special order.

This application came before ROBINSON J the ruled that the appellant:

> "is found to be in contempt of court by virtue of his failure to deliver the parties' minor child and to pay maintenance for such child .... notwithstanding the noting of an appeal against such order, in view of the order made by ADAM J that in the event of an appeal being noted against such order (it) was to remain operative and not to be suspended."

GUBBAY CJ

No punishment was imposed. The appellant was directed to comply forthwith with the special order of ADAM J failing which the respondent would be entitled to re-approach the court for appropriate relief upon forty-eight hours notice, to him. The appellant was ordered to pay the

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costs of the application.

An appeal was noted against the order of ROBINSON J but only after the appellant had made a determined attempt to physically hand over the child to the respondent. The child, however, resisted being taken away by the respondent. She screamed and struggled to such an extent that the parties resolved that she should remain living with the appellant for the time being.

This sequence of events makes it necessary to decide whether the special order of ADAM J was validly made. And if it was not, whether the appellant was rightly held by ROBINSON J to be in contempt of court in disobeying it.

Counsel were agreed that at common law the execution of all judgments is automatically suspended upon the noting of an appeal. And, also, that the court has a general discretion to refuse suspension where real and substantial justice so demands. Certainly it has been so held on many occasions in this jurisdiction. See, for instance, *Zaduck v Zaduck* (2) 1965 RLR 635 (G) at 636F-I; *Cohen v Cohen (1)* 1979 RLR 184 (G) at 187C-D; *Santam Ins Co Ltd v Paget (2)* 1981 ZLR 132 (G) at 134H-135A.

What was in contention was whether it is permissible for a court, in the absence of an application made to it by the successful party and without affording the unsuccessful party an opportunity to voice opposition, to order that, notwithstanding the noting of an appeal, its judgment is to be given immediate effect to.

One merely has to state the proposition to become awake of its intrinsic fallacy. Surprisingly, ADAM J appears to have overlooked his prior remarks in *Arches (Pvt) Ltd v Guthrie Hldgs (Pvt) Ltd* 1989 (1) ZLR 152 (H) at 154 G-H that -

> "... pending the appeal, the order could not be carried out except with the leave of this court and in order to obtain such leave **special application had to be made by the applicant**" (my emphasis).

That *dictum* is entirely correct and accords with high authority. See, generally, *Oliphants Tin 'B' Synd v De Jager* 1912 AD 477 at 481; *Levin v Felt & Tweeds Ltd* 1951 (1) SA 213 (C) at 217F-H; *South Cape Corp (Pty) Ltd v Eng*

GUBBAY CJ

Mgmt Svcs (Pty) Ltd 1977 (3) SA 534 (A) at 545A. Nor is the position any different where an appeal has been noted against a custody order. See Spiro *Law of Parent and Child* 4 ed at p 322.

The principle to be applied by the court considering the grant of an application for leave to execute on a judgment under appeal is what is just and equitable in all the circumstances. The enquiry normally involves assessing such factors as: the potentiality of irreparable harm or prejudice being sustained by either the successful or the losing party, and, if by both, the balance of hardship or convenience; and the prospects of success on appeal, including whether the appeal is frivolous or vexatious or has been noted for some indirect purpose, such as to gain time or harass the other party. See the *South Cape Corporation* case *supra* at 545E-G.

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The need to take account of such factors serves to underscore that it is contrary to the basic tenets of natural justice for a court to order that its judgment be operative and not be suspended, before giving the unsuccessful party the right to be heard as to why execution should be stayed.

It follows that the appeal against the restriction entered in para 2 of the order in case no. HC 2936/90 is to be upheld with costs, inclusive of the costs incurred in the preparation of the application for an urgent hearing of the appeal. The order is amended by the deletion of the final sentence in para 2.

It was counsel's submission that, if this court were to decide that the special order of ADAM J was wrongly made, the order of ROBINSON J founded upon it would be similarly tainted. This because it is not unlawful for a person to refuse to obey an invalid order of court. The appellant, so it was urged, was not, therefore, in contempt of court in disobeying the special order.

The proposition advanced was closely considered by this court in *S v Mushonga* 1994 (1) ZLR 296 (S). It was there held, after a review of the cases, 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 to the standing and authority of the court. The judgment went on to point out that the proper approach was for the person first to obey the supposed invalid order and thereafter to seek redress, if any, by way of appeal or review. It was not for him to determine for himself whether the order ought not to have been made. He should come to the court for relief if advised that it was invalid. The exception being where the order was blatantly absurd in its command and would itself tend to weaken respect for the administration

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GUBBAY CJ

of justice. Only in that remote eventuality would disobedience not be regarded as contemptuous.

However, as was noted in *S v Mushonga supra,* it is not an inevitable consequence that disobedience to a simply wrong order of court constitutes the crime of contempt. It must be committed intentionally and in relation to the administration of justice in the courts. Contempt is not an offence of strict liability. *Mens rea* remains an essential element to be proved.

The appellant was given advice by his legal practitioner that he was not obliged to comply with the special order. The advice was incorrect. The appellant, of course, was not to know that. He was misled into believing that he could disobey the order. His mistake was one of law.

In *S v Davy* 1988 (1) ZLR 386 (S) at 400D-G. I ventured the opinion, which this court still adheres to, that:

> "... the rule that ignorance or mistake of law is no excuse, which judicial officers have applied for so long in this country in conformity with both English law and the decisions of the South African Courts prior to the advent of *de Blom's* case 1977 (3) SA 513 (A), remains valid. Its strength has hardly been shaken. It is, however, subject to the exception that where the accused acted upon incorrect advice as to the law, given by a Government official who is primarily responsible for the administration of the particular statute to which the matter relates, his ensuing mistake of law is a good defence. See *S v Zemura* 1973 (2) RLR 357 (A) at 377E-G. As stressed by LEWIS AJP

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in *S v Bledig & Anor* 1974 (1) RLR 100 (A) at 109A:

> 'There is something in the nature of an estoppel present when the State prosecutes a person for certain conduct when he has been induced by advice received from a responsible representative of the State to embark on such conduct.'

Clearly the exception is grounded in reasons of public policy. Where the State has misled a man into a contravention of the law, as a matter of public policy he should be entitled to an acquittal."

Since the mentioned exception was of no application, ROBINSON J was obliged to find the appellant in contempt of the special order of ADAM J

Accordingly, the appeal in case no. HC 3693/94 is dismissed with costs.

GUBBAY CJ

Lest the dismissal of this appeal cause misunderstanding, I must make it clear that as the special order of ADAM J has been set aside as bad, any proceedings based upon it now will likewise be bad. Put differently, no further relief is available to the respondent under the order of ROBINSON J

McNally JA: I agree.

Korsah JA: I agree.

Chikumbirike & Assocs, appellant's legal practitioners

Ali Ebrahim, respondent's legal practitioner

S v CHUMA 1994 (2) ZLR 284 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Criminal appeal

24 October & 7 November 1994

Flynote

Criminal procedure (sentence) - rape - of 5-year-old girl at crêche, by caretaker at crêche - appropriate sentence

Headnote

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All crimes of rape are horrible end rapes against small children are particularly horrible. Sentences for rape have been increasing over the years, but the view that no sentence is severe enough for rape cannot be endorsed. The Supreme Court therefore disagreed with the views expressed by ADAM J in *S v Moyo* 1992 (1) ZLR 158 (H), where the judge had criticised the Supreme Court for imposing inadequate sentences in certain rape cases.

In the present case the appellant, a man aged 24, who was employed at a crêche, raped a young girl at the crêche. The gynaecologist who had examined the girl noted that there had not been complete penetration and the physical and mental state of the child was good. The appellant had pleaded guilty to the charge. The trial court sentenced him to twelve years' imprisonment with labour.

After comparing the sentence in this case with the sentences imposed in similar cases over the last few years, the Supreme Court decided that sentence had to be reduced to seven years, to keep it within the present range of sentences considered appropriate in such cases. This was not a suitable case to impose an exemplary sentence of an order different from those imposed in similar cases. Although the case involved the rape of a child, the child had suffered minimal physical and psychological harm and there was no evidence of long-term psychological or physical damage.

1994 (2) ZLR p285

McNALLY JA

Cases cited:

S v Moyo 1992 (1) ZLR 158 (H)

S v Mutume 1985 (2) ZLR 94 (S)

S v Matawo HH-61-89

S v Zindoga HH-106-90

S v Gwanzura S-66-91

S v Muguti & Anor S-218-92

S v T HH-226-93

S v Sibanda S-55-94

S v Mutizwa S-68-94

A P de Bourbon SC for the appellant

Miss T Searl for the respondent

Judgment

McNally JA: This is an appeal against the severity of a sentence for rape. The learned judge

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sentenced the appellant to serve twelve years' imprisonment with labour.

It may be stated at once that the task of this court is made easier by two facts:

1. the learned judge gave leave to appeal on the grounds that a higher court might take the view that the sentence was excessive because of the appellant's age (by which he meant "youth") and that part of the sentence should have been suspended; and

2. the State, on appeal, conceded that the sentence was too high.

All crimes of rape are horrible, and sentences for rape have been increasing over the years. Without going into detail, one can say that, where sentences of three to four years were commonplace ten years ago, sentences nowadays range around the figure of seven years and over.

There are those who feel that no sentence is severe enough for a rapist. Some encouragement for their views is given by ADAM J in *S v Moyo* 1992 (1) ZLR 158 (H). This court does not endorse the opinions somewhat acerbically expressed in that judgment.

The present case has features both of aggravation and of mitigation. The aggravating features are that the complainant was a child of five years of age and that the appellant was in a position of trust in that he was a caretaker at a crêche. Too much cannot be made of that latter point, because he was merely a youth of 24, earning $200 a month, which even in 1992 was not a great deal. Nonetheless, he was responsible for the well-being of these little children and he abused that responsibility quite shamefully.

McNALLY JA

The children were leaving the crêche kitchen on this particular morning when the appellant asked the child to stay behind. He pulled her to him as he sat on a stool and forced his penis partially into her vagina. She shed tears and he desisted, not so much because of her tears, but because his foreskin split, causing him pain. He did not ejaculate.

The child was examined the next day by a doctor who found that the hymen was partially absent and that there was "no completed penetration ... "The doctor, a gynaecological specialist, noted that the child's physical and mental state was good. There is no evidence, therefore, of long-term psychological or physical damage. It was a minimal rape.

The appellant pleaded guilty.

We have examined the cases to which we have been referred by counsel. Apart from the one already mentioned, they are: *S v Mutume* 1985 (2) ZLR 94 (S) - eight years, two suspended; *S v Matawo* HH-61-89 - five years, two suspended; *S v Zindoga* HH-106-90 - sentence not stated; *S v Gwanzura* S-66-91 - six years, two suspended; *S v Muguti & Anor* S-218-92 - seven years, three suspended; *S v T* HH-226-93 - three years, all suspended (the accused was 15 years old); *S v Sibanda* S-55-94 - nine years, two suspended; *S v Mutizwa* S-68-94 - seven years, one suspended.

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Although rape committed against a small child has its own particular horror, the court cannot ignore the fact that the child suffered minimal physical and psychological harm. This is not, therefore, a suitable case for an exemplary sentence of an order different from those imposed in the cases mentioned.

In our view, a severe sentence is appropriate, within the range of present practice. We remain within that range by imposing a sentence of seven years' imprisonment with labour. We mark our abhorrence of the conduct of the appellant by declining to suspend any part of that sentence, as has been done in the case of younger offenders.

Accordingly, the appeal succeeds to the extent that the sentence is reduced from twelve to seven years' imprisonment with labour. It is so ordered.

Gubbay CJ: I agree.

Korsah JA: I agree.

Pro Deo

1994 (2) ZLR p287

SALEM v CHEF IMMIGRATION OFFICER & ANOR 1994 (2) ZLR 287 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

Gubbay CJ, Korsah JA & Ebrahim JA

Application under s 24 of Constitution

31 October & 8 November 1994

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 22 - right of citizen to freedom of movement, residence etc - right of female citizen to have her non-citizen husband to reside permanently and to engage in employment or other activity

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 24(1) - right to apply to Supreme Court for redress of alleged breach of constitutional right - s 24(4) - orders which court should make

Family law - husband and wife - support - mutual duty - right of wife to look to husband for partial or total support

Headnote

The applicant was a citizen of Zimbabwe by birth and a permanent resident of Zimbabwe. She had mother husband, a British citizen, in South Africa and married him in Zimbabwe. He applied to the first respondent for the issue of a residence permit and was told by the second respondent that he would have to leave the country and wait outside the country for the

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outcome of his application.

The applicant brought an application before the Supreme Court under s 24 of the Constitution. The application sought to extend the ruling given by the Supreme Court in *Rattigan & Ors v Chief immigration Officer & Ors* 1994 (2) ZLR 54 (S), to embrace, within her right to reside permanently with her husband, the right of her husband to engage lawfully in employment or other gainful activity within Zimbabwe. She deposed

that she was pregnant and with the arrival of her child would need her husband to support her and her child. It was argued on her behalf that if a citizen's alien husband were not allowed to engage in gainful employment, it could frequently lead to the situation where the citizen would be forced to leave the country in order to accompany her husband to a country where he was not prohibited from earning a livelihood.

Held, that the requirement imposed by the second respondent that the applicant's husband should leave the country to await the outcome of his application was in knowing defiance of the applicant's constitutional right to have her husband living with her in Zimbabwe. The second respondent's disdainful disregard of the court's previous ruling was deserving of censure.

Held, further, that a generous and purposive interpretation should be given to the protection expressed in s 22(1). While the word "reside" is ambiguous and has a variety of meanings, to ascribe to it the strict meaning of the place where an individual sleeps and eats would diminish the guaranteed wife of a citizen wife who, for whatever cause, is unable to provide sufficiently for her alien husband and children. It would differentiate between the affluent wife, who is not dependent on her husband for support, and the wife who is partially or wholly dependent on him. The latter would have no option but to leave the country in order to live in a country where her husband could assume the role of breadwinner.

Held, further, that as between husband and wife there is a mutual duty of support *stante matrimonio*. In practice, the primary duty of maintaining the household rests on the husband. He must do so on a scale commensurate with the social position, financial means and standard of living of the spouses. He cannot evade that responsibility by showing that his wife is receiving assistance from relations, friends or charitable institutions. Consequently, unless the protection guaranteed under s 22(1) of the Constitution embraces the entitlement of a citizen wife, residing permanently in Zimbabwe, to look to him for partial or total support, the execise of her unqualified right to remain here as a member of a family unit is put in jeopardy.

Held, further, that the attitude of the respondents was such as to enjoin the court, so as to ensure that the applicant's rights would be given effect to, to issue directives to the first respondent, rawer than adopt the preferred expedient of merely declaring the existence of the applicant's rights.

Orders issued accordingly.

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GUBBAY CJ

Cases cited:

Rattigan & Ors v Chief Immigration Officer & Ors 1994 (2) ZLR 54 (S)

Re *Bowie,* ex p *Breull* (1880) 16 ChD 484 (CA)

Ex p *Pyke* 1947 SR 142; 1948 (1) SA 526 (SR)

S v Naicker 1967 (4) SA 214 (N)

Woodhead v Woodhead 1955 SR 70

McKelvey v Cowan NO 1980 ZLR 235 (G)

Witham v Min of Home Affairs 1987 (2) ZLR 143 (H)

Miller v Miller 1940 CPD 466

Edelstein v Edelstein NO 1952 (3) SA 1 (A)

Gammon v McClure 1925 CPD 137

Karim v Karim 1962 (1) PH B4 (D)

A P de Bourbon SC, for the applicant

No appearance for the respondents

Judgment

Gubbay CJ: In the recent decision in *Rattigan & Ors v Chief immigration Officer & Ors* 1994 (2) ZLR 54 (S) this court declared that a female citizen of Zimbabwe, married to an alien, being a national of another country, is entitled, by virtue of the protection of freedom of movement under s 22(1) of the Constitution of Zimbabwe, to reside permanently with her husband in any part of Zimbabwe. For to prohibit the husband of a marriage, genuinely entered into with the mutual intention of establishing a consortium *omnis vitae*, from residing in Zimbabwe, would undermine and devalue the exercise of the fundamental and unqualified right of the wife, as a citizen and member of a family unit, to live here.

The present application brought by Patricia Ann Salem, née Campbell, a citizen of Zimbabwe by birth and a permanent resident of the country, seeks to extend the ruling in *Rattigan* to embrace, within her own mobility rights, the right of her husband, Charles Christopher John Salem, to lawfully engage in employment or other gainful activity in Zimbabwe.

The applicant met her husband, a British subject, in early April 1992, while on a working holiday in South Africa. They fell in love and were married in Harare on 16 April 1994. Both desire to establish a faced abode in Zimbabwe. It is here that the applicant's parents and siblings reside.

On 2 June 1994, Mr Salem applied to the first respondent, the Chief Immigration Of ricer, for the issue of a residence permit. He was advised in a letter written on 23 August 1994, by the

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second respondent, an immigration

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officer, that it was necessary that he leave the country in order to await the outcome of the application. An immediate query as to the reason for imposing the requirement elicited the following response from the second respondent:

> "I wish to advise that the Supreme Court judgment does not state that foreign husbands shall not be required to apply for permits; neither does it say the granting of such permits should be automatic. What we are talking about in this case is purely an immigration requirement which has nothing to do with the Supreme Court judgment.
>
> I wish to advise once again that your client must leave the country and await the outcome of his application outside the country, and his departure must be confirmed."

In the absence of a stated suspicion that the marriage was one of convenience, the second respondent, by his insistence that Mr Salem was to leave the country, knowingly acted in defiance of the applicant's constitutional right to have her husband living with her in Zimbabwe. He disdainfully disregarded a judgment of this court that clearly enunciated the rights of three citizen wives whose situation was indistinguishable from that of the applicant. Such an attitude by a Government official is deserving of censure. It enjoins this court, so as to ensure that such rights are given effect to, to issue directives to the Chief Immigration Officer, rather than adopt the preferred expedient of merely declaring their existence under the Constitution.

The applicant deposed that she is pregnant and due to give birth some time in March 1995. With the advancement of her pregnant condition and after the birth of the child, she will not be able to continue in employment; she will need her husband to support first her and then herself and their child. Her founding affidavit ends with these words:

> "If my husband cannot work to support me and my unborn child then I will be forced to leave Zimbabwe, which surely is against the spirit of the order (*sic*). If he leaves and is denied entry whilst his application is being considered at such future date as suits the Department, the result will be the same."

Although the application was served on both the respondents, neither filed an opposing affidavit. Service was also effected upon the Civil Division of the Attorney-General's Office. Thereafter, notice of set down was served upon the Civil Division, as were the heads of argument prepared by the applicant's

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counsel. No response was forthcoming. At the hearing, both the respondents were in default of appearance.

It was submitted by Mr *de Bourbon*, who appeared for the applicant, that to construe the phrase, "the right to reside in any part of Zimbabwe" in s 22(1) of the Constitution, as merely entitling a citizen wife to have her alien husband living with her in the country, without affording him the ability to engage in gainful employment, would be unduly restrictive of that fundamental right.

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Frequently it would lead to the dilemma cited by the applicant. One in which, notwithstanding a common desire to locate the matrimonial home in Zimbabwe, a citizen wife, through inability adequately to support her alien husband and children, is compelled by necessity to forego her right to remain living in the country and accompany her husband to a land where he is not prohibited from earning a livelihood.

I agree that a generous and purposive interpretation is to be given to the protection expressed in s 22(1). This was so held in *Rattigan & Ors v Chief Immigration Officer & Ors supra*.

The word "reside" is ambiguous. It may have a variety of meanings, in accordance with the intent and object of the enactment in which it appears. See Re *Bowie* Ex p *Breull* (1880) 16 Ch D 484 (CA) at 487; Ex p *Pyke* 1947 SR 142 at 143; 1948 (1) SA 526 (SR) at 527; *S v Naicker* 1967 (4) SA 214 (N) at 222H. To ascribe it the strict meaning of the place where an individual eats and sleeps after the work of the day is done would be to diminish the guaranteed right of the citizen wife who, through such causes as old age, poverty, illiteracy, redundancy, physical or mental disability, is unable sufficiently to provide for her alien husband and children in Zimbabwe. And so, in order to secure and maintain the marital relationship, she is left no option but to depart with her husband to a country where he is in a position to assume the role and responsibility of breadwinner. Put otherwise, to impart the normally narrow meaning to "the right to reside in any part of Zimbabwe" would be to differentiate between the affluent wife, who is not dependent upon the support of her husband for herself and children, and her who is impoverished or destitute, and partly or wholly dependent upon him.

It has long been recognised that there is a reciprocal duty of support as between husband and wife. See, for instance, *Woodhead v Woodhead* 1955 SR 70 at 72; 1955 (3) SA 138 (SR) at 139H-140A; *McKelvey v Cowan NO* 1980 ZLR 235 (G) at 236E-F; 1980 (4) SA 525 (Z) at 526G; *Witham v Minister of Home Affairs* 1987 (2) ZLR 143 (H) at 164D-E; 1989 (1) SA 116 (ZH)

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at 131F-G. The duty, of course, endures *stante matrimonio*. It depends on the one spouse's need for support and the other's ability to provide it.

In practice, however, the primary duty of maintaining the household rests upon the husband. See *Miller v Miller* 1940 CPD 466 at 469; *Edelstein v Edelstein NO* 1952 (3) SA 1 (A) at 15E-F; Hahlo *The South African Law of Husband and Wife* 5 ed at p 135; Boberg *The Law of Persons and the Family* at p 252. It is he who has to provide the matrimonial home as well as food, clothing, medical and dental care, and whatever else is reasonably required. He must do so on a scale commensurate with the social position, financial means and standard of living of the spouses. He cannot evade that responsibility by showing that his wife is receiving assistance from blood relations, friends or charitable institutions. See *Gammon v McClure* 1925 CPD 137 at 139; *Karim v Karim* 1962 (1) PH B4 (D).

It follows, in my view, that unless the protection guaranteed under s 22(1) of the Constitution embraces the entitlement of a citizen wife, residing permanently with her alien husband in Zimbabwe, to look to him for partial or total support, depending upon her circumstances, the

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exercise of her unqualified right to remain residing in this country, as a member of a family unit, is put in jeopardy.

Accordingly, the applicant is due the relief claimed. In the result:

1. The application is allowed, with costs to be paid by the first respondent.

2. It is hereby declared that the right of the applicant under s 22(1) of the Constitution of Zimbabwe to Freedom of movement, that is to say, the right to reside in any part of Zimbabwe, has been contravened by the actions of the first and second respondents.

3. By virtue of the applicant's right under the aforementioned s 22(1) to have her husband residing with her in any part of Zimbabwe, it is hereby ordered that -

   (a) the first respondent issue to Charles Christopher John Salem, within thirty days hereof, such written authority as is necessary to enable him to remain in Zimbabwe on the same standing as any other alien who is a permanent resident;

   (b) the said Charles Christopher John Salem be accorded the same rights

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as are enjoyed by all permanent residents of Zimbabwe, including the right to engage in employment or other gainful activity in any part of Zimbabwe, and that the first respondent impose no restriction upon such right.

Korsah JA: I agree.

Ebrahim: I agree.

Byron Venturas & Partners, applicant's legal practitioners

DAVIES & ORS v MINISTER OF LANDS, AGRICULTURE & WATER DEVELOPMENT 1994 (2) ZLR 294 (HC)

Court **High Court, Harare**

Chidyausiku J

Civil application

5 July & 9 November 1994

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - ss 11 and 16 - right to property and protection against compulsory acquisition of property - whether Part IV of Land Acquisition Act 3 of 1992 is

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ultra vires the provisions of the Constitution - whether designation of land without compensation amounts to acquisition of interest in property without payment of compensation

Immovable property - land - acquisition of interest in land - whether designation of land amounts to acquisition of interest in land such that compensation must tee paid in terms of s 16 of Constitution of Zimbabwe 1980

Real rights - ownership - doctrine of eminent domain of state over personal and private property - whether part of our law

Headnote

The applicant's farm had been designated by the respondent in terms of s 12(1) of the Land Acquisition Act 3 of 1992. He brought en application, on behalf of himself and several other farmers whose farms had also been designated, for an order declaring that the provisions in the Land Acquisition Act allowing for the designation of land, namely ss 12 to 15, are *ultra vires* ss 11 and 16 of the Constitution. Sections 11 and 16 of the Constitution require the payment of compensation wherever properly or an interest in property is compulsorily acquired. The applicant argued that designation of land amounts to acquisition of an interest in property.

As no compensation is payable when land is designated, this violates ss 11 and 16 of the Constitution and is *ultra vires* the Constitution.

Held, that as the sovereign State of Zimbabwe has eminent domain over all private property owned by people under its jurisdiction, it can acquire such property or an interest in such property in the public interest. However, the Zimbabwean Constitution lays down that when the state acquires property or an interest in property in the public interest it must pay compensation to the person whose property or interest in property is acquired.

Held, further, that the State of Zimbabwe also has the right to control or regulate the use of private property under its jurisdiction in the public interest. Where the state exercises this power reasonably and properly, no compensation is payable to the persons affected. Only if the regulation or control goes so far that it amounts to acquisition will the state be obliged to pay compensation.

Held, further, that designation of land in terms of Land Acquisition Act is a control measure and is not acquisition of property or an interest in property. Whether or not the land is designated, the land is liable to be compulsorily acquired by the State in the public interest. The State does not acquire a further right to acquire the land upon designation that it did not already possess. The landowner loses nothing and the State gains nothing by the designation of the land. Thus the owner of the land has no right to receive compensation from the State when his land is designated.

Held, further, that only if the Minister refuses permission to sell, dispose of or lease designated land could it be argued that the owner has lost something, namely, his right to sell, dispose of or lease the land. In these circumstances, it could be strongly argued that the Sate has gone further than simply controlling and is now acquiring. But the landowner whose ownership is thereby diminished then has the right in terms of s 14(5) of the Land Acquisition Act to demand that the acquiring authority acquire that designated land and once the authority so acquires the

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land compensation is payable. This indirect method of acquiring compensation then brings the provisions of the Land Acquisition Act pertaining to designation *intra vires* s 16 the Constitution.

Held, further, that it is such common knowledge that land acquisition for resettlement is a matter of public interest in Zimbabwe that the the court can take judicial notice of this. Designation of land is part of the process of acquiring land for resettlement and is a way of reconciling the conflicting interests of landowners and the landless. Designation therefore is clearly in the public interest.

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Held, therefore, that ss 12 to 15 of the Land Acquisition Act are not *ultra vires* the Constitution of Zimbabwe.

Cases cited:

Miller v Schoene 276 US 272 (1927)

Pennsylvania Coal Co v Malon 260 US 393 (1922)

Hawaii Housing Authority v Midkiff 467 US 229 (1984)

Berman v Parker 348 US 26 (1954)

Agrins v Tiburon 447 US 255 (1980)

Foley alias *Melville Trustees of Insolvent Est of v Natal Bank* (1883) 4 NLR 26

Ex p *de Jager* (1926) 47 NLR 413

Ex p *Mather NO & Ors* 1971 (3) SA 381 (p)

Britz NO v Sniegocki & Ors 1989 (4) SA 372 (p)

A P de Bourbon SC for the applicants

A V M Chikumira, with him Mrs A *Guvava*, for the respondent

Judgment

Chidyausiku J: This is an application by a Mr Davies, a farmer whose farm, Charlton Farm, has been designated by the respondent in terms of s 12(1) of the Land Acquisition Act 3 of 1992. I shall refer to this Act hereinafter as "the Act". He brings the application on his own behalf and on behalf of several other farmers whose farms have been similarly designated by the respondent. The fact of designation is common cause. There are some disputes of fact emerging on the papers regarding the details of the land designated and the circumstances of the designation. These disputes are of very little relevance to the issue in this case. The crux of the matter in this case is whether Part IV of the Act is *ultra vires* the provisions of the Constitution, in particular ss 11 and 16 of the Constitution. It is contended for the applicants

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that Part IV of the Act, consisting of ss 12 to 15, which provides for the designation of land is *ultra vires* the Constitution of Zimbabwe, because that Part provides for the acquisition of property or an interest or a right in property without providing for compensation as required by ss 11 and 16 of the Constitution of Zimbabwe.

Mr *Chikumira* rested the respondent's case on two main submissions. He submitted that the State, as a sovereign, has what is generally known in American jurisprudence as eminent domain. He also submitted that the State also has what is known in American jurisprudence as "police powers". It was submitted that the State derives both these powers from the common law of the land.

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The respondent contended that whenever the state exercises its powers of eminent domain and expropriates a person's property compensation is payable. When the state, however, exercises its police powers or control power no compensation is payable unless the law providing for such control provides for the compensation. Part IV of the Act is a measure of control and the state is exercising its control powers. It does not provide for compensation and no compensation is therefore payable. For this stance, Mr *Chikumira* relied heavily on a number of American cases, to which I shall refer later on.

Mr *de Bourbon*, on the other hand, took the stance that the concepts of eminent domain and police powers and the distinction between them is foreign to our law and is not applicable or is no longer applicable in Zimbabwe. For this proposition he relied on Jowitt's *Dictionary of English Law* vol 1 p 694 and on *Joyce & McGregor Ltd v Cape Provincial Administration* 1946 AD 658 at 671, Silberberg and Schoeman *Law of Property* 3 ed p 316 and *Joubert's Law of SA* vol 10 (by Geldenhuys and Grobler) p 1 n 5. My understanding of the above cited authorities is that the concept of eminent domain is not known in English common law and that in South Africa there is in existence statute law that governs expropriation, leaving little, if any, scope at all for the application of common law on matters of expropriation.

Mr *de Bourbon* also argued that, whatever the common law position might be, Part IV of the Act in essence provides for the acquisition of property or an interest or right in property and fails to provide for compensation and consequently is *ultra vires* the Constitution.

I will first deal with the issue of whether the concepts of eminent domain and police or control powers are part and parcel of our law. As I said, Mr *Chikumira* submitted that every sovereign state has the right to take, deprive or authorise the taking of private property for public use. He submitted that this power is inherent in state sovereignty. In Zimbabwe, this power is exercised subject to the provisions of the Constitution, because the Constitution specifically provides for the circumstances of the exercise of that power. It was argued, further, that closely associated with the power of eminent domain was the power to regulate the use of private property for public interest. This power is known as police powers. It would appear to me that police powers and control powers are one and the same thing and I will use the phrases interchangeably without meaning different things. Mr *Chikumira* submitted that the State has inherent police powers. It was also argued that when the State exercises its police powers, no compensation is

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payable

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unless the compensation is specifically provided for in the enactment in question. For the existence of these two doctrines and the distinctions between them, Mr *Chikumira* relied on a number of American cases. I will now refer to some of these cases.

The American Constitution provides, in the Fifth Amendment, that -

> "nor shall private property be taken for public use without just compensation."

In the cases cited by Mr *Chikumira*, various litigants challenged certain governmental actions or statutes on the basis that they constituted the taking of private property for public use without just compensation contrary to the above quoted provision of the Constitution. The following are some of the American cases that were cited:

Miller v Schoene 276 US 272 (1927). In that case it was held by the United States Supreme Court that the owner of ornamental cedar trees was not deprived of his property without due process of law or without compensation by the state when the state ordered the destruction of some cedar trees in order to avoid the infecting of apple orchards in the vicinity with cedar rust. The court concluded that when a state official ordered the destruction of the cedar trees he was exercising police powers and not eminent domain and consequently no compensation was payable.

In *Pennsylvania Coal Co v Malon* 260 US 393 (1922), a statute forbade the mining of anthracite coal in such a way as to cause the subsidence of, among other things, any structure used as a business habitation. The issue that arose was whether the enactment of that statute was a legitimate exercise of police power. The Supreme Court held that the forbidding of mining of coal under private dwellings or streets or cities in places where the right to mine such coal is reserved in the grant was unconstitutional, as it amounted to a talking of property without due process of the law. Homes J who delivered the majority judgment, remarked as follows at p 415:

> "The general rule, at least, is that while property may be regulated to a certain extent, if the regulation goes too far it will be recognised as a taking".

The other American cases I was referred to are *Hawaii Housing Authority v Midkiff* 467 US 229 (1984); *Berman v Parker* 348 US 26 (1954) and Agrins

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v *Tiburon* 447 US 255 (1980). These cases are to the same effect as the cases of *Pennsylvania Coal Co supra* and *Millar supra* to which I have adverted in some detail. The general principle that emerges from these American cases is that, as a general rule, when the state takes or exercises its powers of eminent domain compensation has to be paid. The same applies when the state seeks to regulate but goes too far and the regulation amounts to a taking

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- compensation has to be paid. If the regulation is reasonable or amounts to a proper use of the police powers, no compensation is payable as of right nor is the use of such power *ultra vires* the Constitution of the United States.

If the American approach were to be applied to the facts of this case, I have no doubt in my mind that what is being complained of amounts to no more than the exercise of police powers and no compensation is payable. It cannot be said on the facts of this case that by providing for the requirement of the Minister's consent prior to the disposal of land the regulation has gone too far and beyond the legitimate use of police powers. This is particularly so if one compares the facts of this case to the facts of *Millar*'s case *supra*.

Whether or not in Zimbabwe the courts should adopt the same approach as the American Courts is the issue I wish to examine now.

A perusal of the writings of some of the eminent Roman-Dutch jurists reveals the existence or recognition of the theory of or the doctrine of eminent domain in Roman-Dutch Law, which is the common law of this country. For instance, Voet recognises the power of government to acquire private property in cases of public necessity. In his *Commentary on the Pandects* 1.7.7 (Gane's translation) the following passage appears under the heading "how far private right may be overridden by penalty or by public interest:

> "Meanwhile nobody doubts that for pressing cause an accrued right may be duly taken from a private person by the Emperor. This may be done either by way of penalty, when an estate or part of it is confiscated for crime; or when the claims of necessity or public advantage demand such a course; provided that in the latter case an equivalent is given to fill up the place of the thing lost or right lost and that the right of the owner is cut down as sparingly as possible..."

Digest VIII 4.13.1; Code VII 13.2 and Code VIII, II(12)9 are cited by Voet as authority for the above proposition. The power to compulsorily acquire private property would appear to be derived from sovereignty. In *Dutch Jurisprudence; Hugo Grotius* at p 403, Sharer comments on *Hugo Grotius*' writing on the subject of eminent domain as follows:

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> "**LXV**. Grotius treats here of *dominium eminens* or as Bynkershoek and Thomasius prefer to call it *imperium eminens*. Grotius has treated the subject at great length in his *De Jure Belli et Pacis* and Puffendorf and if I am not mistaken all who wrote either before or after Grotius agree with him that the sovereign power has more right over **the goods of its subjects than the owners of those goods themselves**."

These two very eminent Roman-Dutch jurists recognise that **a sovereign is** vested with eminent domain over the property of the subject.

On these authorities, I have no doubt that the sovereign in Zimbabwe is vested with *dominium eminens* over the property of its subject, entitling the sovereign to compulsorily acquire such property in the public interest. This power in Zimbabwe has to be exercised subject to the Constitution of Zimbabwe, which has made specific provision of the exercise of that power. This position seems to be accepted by both counsel.

The next issue that falls for determination is this: if the State is vested with *dominium eminens*,

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as I have found, is it also vested with the lesser power of control over the use of private property? Put differently, does the State have police powers? I have no doubt that the State is vested with police powers or the power to control the use of private property in the public interest for a number of reasons.

Firstly, if the State has the greater power of eminent domain, it then must have the lesser power of compulsory control, on the principle of *omne majus continet in se minus* (the greater includes the less). On this basis alone, I would agree with Mr *Chikumira's* submission that the State is also vested with powers of control or police powers.

The eminent South African author Geldenhuys deals with the subject of state power of control or police powers in his book *Guteieningsreg* pp 18 to 21. The learned author expresses the view that the power of the state to take measures of control of the use of private property is beyond question in all states. He contends that the state has to set itself the task of promoting, by legislative and other measures, the economic prosperity, safety, health and morals of its subjects. To that end, restrictions are imposed on free trade, free use of ground and the erection of buildings and so on. He concludes that measures of this sort are often referred to as measures of control or, in America, police powers.

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I find myself in agreement with the views of the learned author, which I find consistent with common sense and the realities of a modern state. In my view, life would be impossible if there were to be no control of any sort over how an individual uses his property. For instance, pollution would make any country uninhabitable if no control were imposed on how industrialists and manufacturers operate or use their machines. Imagine what would happen if every property owner were allowed to use his property as he pleases. In a situation of no control, the individual would be entitled to bury his dead in his backyard or, indeed, do worse things in his backyard. On this basis the inescapable conclusion is that the State has both eminent domain and police powers or control powers.

I will deal next with the question of whether compensation is payable whenever the State exercises its powers of control or police powers. In America, the State only pays compensation if control powers are exercised to such an extent as to amount to or constitutes a taking. In Zimbabwe, the Constitution provides for compensation for the acquisition of property or interest or right in a property. The Constitution does not provide specifically for loss or restrictions arising from the exercise of control powers by the state. The American Constitution is equally silent, but their Courts have adopted the above approach. The American approach seems to be consistent with common sense and to some extent with what is already happening in Zimbabwe. For instance, there are numerous enactments in our statute books that provide for control, but do not provide for compensation for any loss or restriction arising from those measures of control. This, to some extent, gives a clear indication that by and large measures of control can be enacted without provision for compensation. The following are examples of statutory provisions providing for control without compensation. Section 40 of the Regional Country and Town Planning Act 27 of 1976 prohibits the subdivision of property without the permission of the Minister. There is no provision for compensation for the diminution of the right

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of ownership to all land owners who are affected by this provision. The same section also prohibits the leasing of a portion of any undivided land for a period in excess of 10 years without permission. It is interesting to note that the restrictions imposed on land owners by s 40 of the Regional, Country and Town Planning Act are very similar to the restrictions imposed on owners of designated land by Part IV of the Act under consideration. The following hypothetical situation serves to demonstrate that compensation cannot be provided for in respect of all control measures. Assume it was established that it was in the public interest to control the sale of land to foreigners in Zimbabwe and the state was to enact legislation providing that no person shall sell or lease land to a foreigner

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without the prior written permission of the Minister. Such an enactment would be similar to s 14 of the Land Acquisition Act. The question is, would such an enactment be contrary to the Constitution of Zimbabwe by reason of its failure to provide for compensation? To contend that such an enactment has to provide compensation to every Zimbabwean who is a title deeds holder is not only impractical but ridiculous. On the other hand, to suggest that the state cannot by such an enactment protect its land from massive acquisition by foreigners seems untenable.

In the result, I have come to the conclusion that the state of Zimbabwe, as a sovereign state, has inherent jurisdiction or power, in terms of common law of the land, not only to compulsorily acquire private property, including the land, but that it also has the power to control the use of private property, including the land. That power, however, has to be exercised in accordance with the provisions of the Constitution of Zimbabwe. The Constitution recognises and codifies the state's right to compulsorily acquire property. The Constitution also recognises, and indeed elevates the individual's entitlement to compensation for compulsory acquisition to the level of a fundamental right. It therefore follows that every acquisition or every enactment that provides for the acquisition of private property has to provide for compensation. It would appear to me that every measure of control that is excessive and is in effect an acquisition of property, interest or right therein has to provide for compensation. The language of the provisions complained of in this case clearly suggests that the provisions fall in the category of control measures. Are the control measures set out in Part IV of the Act so excessive as to constitute a taking? Or do the provisions complained of constitute an acquiring of an interest or a right in the land?

I would like to now consider specifically provisions of Part IV of the Act in the light of the above analysis and conclusion. The question is, are the provisions of Part IV of the Act *intra vires* or *ultra vires* the provisions of the Constitution? Mr *de Bourbon* contends that Part IV of the Act is *ultra vires* the Constitution. Mr *Chikumira* submits that Part IV of the Act is *intra vires* the Constitution. This is to a very large extent an exercise in statutory interpretation.

The Constitution of Zimbabwe provides that every person in Zimbabwe is entitled to certain fundamental rights. Among the fundamental rights protected by the Constitution is the right to compensation upon compulsory acquisition of private property. Section 11 (c) of the Constitution provides that every person has a fundamental right to the:

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> "(c) protection for the privacy of his home and other property and **from the compulsory acquisition of property without compensation** ..." (my emphasis).

This section by implication recognises the state's *dominium eminens* or the right to compulsorily acquire private property. The section also raises the individual's entitlement to compensation in the event of the exercise of *dominium eminens* in respect of his property to a human right.

Section 16 of the Constitution provides in detail what has to be contained in any law authorising compulsory acquisition of property including land or **any interest or right therein**. In the present case, it is common cause that the disputed provisions do not provide for the acquisition of the land. It is contended by the applicant that Part IV of the Act compulsorily acquires **an interest or a right in** the land without providing for compensation. In particular, it is contended that Part IV of the Act does not comply with s 16(1)(c)(d)(e) and (I) of the Constitution. The respondent, on the other hand, contends that Part IV of the Act merely seeks to control the use of land the state intends to compulsorily acquire at some future date without acquiring any interest or right therein.

The allegedly offending Part IV of the Act consists of 4 sections, namely ss 12, 13, 14 and 15. The applicant seeks to have the four sections declared *ultra vires* the Constitution. I have some difficulty in accepting that the four sections stand or fall together. No cogent reason has been advanced as to why these sections should stand or fall together. It is for this reason that I intend to examine the four sections separately to see if each and every one of them impinges on the Constitution or the combined effect of the four sections impinges on the Constitution. I will examine the sections in their numerical order.

Section 12 of the Act provides that the Minister may at any time designate any area or rural land as land that will be compulsorily acquired in terms of s 3 of the Act. Section 3 of the Act is the section that provides for the actual acquisition of land. It is accepted by both counsel that s 3 of the Act is *intra vires* the Constitution as it provides for compensation. Section 12 also provides for the method of notification of the owner and the public of the fact of designation. Designation may be revoked with the consent of the landowner. Mr *de Bourbon* has submitted that upon designation the respondent acquires a *ius in personam ad rem acquirendem* by the act of designation. I am unable to accept this submission. It is accepted that the respondent has the power to

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acquire any land at any time in terms of s 3 of the Act. The act of revealing his intention in advance of designation, as provided for in s 12 of the Act, does not add to or detract from the respondent's power to acquire land in terms of s 3. Whether the applicant's land is designated or not, it is liable to be compulsorily acquired by the respondent in terms of s 3 of the Act at any time. The respondent's right to compulsorily acquire the applicant's land, if that is what Mr *de*

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Bourbon means by the *ius in personam ad rem acquirendam*, is created by the need to compulsorily acquire the applicant's land in the public interest. It is not created by the act of designation. The respondent has an *ius in personam ad rem acquirendam* in every property that public interest demands be compulsorily acquired. Whether the respondent exercises that right or not is besides the point. That right is not created by an act of designation in terms of s 12 as contended by the applicant.

Another way of looking at this issue is to see whether the applicant loses anything and the respondent gains something from the act of designation. In my view, the applicant loses nothing from designation in terms of s 12. All the attributes of ownership remain intact upon the designation of the land ie the owner can still sell, lease or dispose the designated land with the consent of the Minister. The owner of designated land can use and develop the land as he pleases.

Mr *de Bourbon* has argued that once land has been designated it cannot be mortgaged. In this regard he relied on the following cases: *Trustees of the Insolvent Estate of Foley v Natal Bank* (1883) 4 NLR 26, Ex p *de Jager* (1926) 47 NLR 413, Ex p *Mather NO & Ors* 1971 (3) SA 381 (D) and *Britz NO v Sniegocki & Ors* 1989(4) SA 372 (D). The effect of the authorities cited above is that mortgaging a property is a prelude to selling and, if one's title in the property forbids selling, then one cannot mortgage the property. Section 12 of the Act does not prohibit the owner of the designated land from selling it. Section 14 ,which I shall deal with later, is the only section that provides some form of restriction, in that it requires that the Minister's permission be obtained prior to a sale or leasing of designated land. The permission of the Minister perhaps is not a formality and cannot be taken for granted. Where such permission is refused, it may well be argued that the owner of the designated land's title is severely impaired. By refusing permission to sell, lease or dispose, the Minister's action may amount to a taking of a right or interest of the owner of the designated land. However, that situation may well entitle the owner of the designated land to compensation. Such compensation is indirectly provided for in s 14(4) of the Act. I will address this issue further when I come to deal with s 14 of the Act. I do not accept the proposition that

designated land cannot be mortgaged. It may well be that prospective mortgagors will be frightened by designation and refuse to accept the land as security, but that is different from the assertion that the owner of designated land as a matter of law cannot mortgage the property after designation. For the above reasons, it would appear to me that by operation of s 12 of the Act the applicants lose nothing and the respondent gains nothing in the designated land upon such designation.

It is also quite apparent from the wording of s 12 of the Act that designation is a prelude to acquisition. It is not an acquisition itself.

For the foregoing reasons, I am satisfied that s 12 of the Act can stand on its own and that it is consistent with the provisions of the Constitution. Section 13 immediately follows s 12. This section provides for representations that can be made by the owner of the designated land to

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the Minister if he wants the Minister to reconsider his decision. I see nothing in this section that could possibly fall foul of the Constitution. The same cannot be said of s 14 which bore the brunt of Mr *de Bourbon's* attack.

Section 14 of the Act provides that no person shall sell, lease or otherwise dispose of any designated land except in accordance with the written permission of the Minister given prior to such sale, lease or disposal. The section also provides for the procedure to be followed in an application for permission to sell, lease or dispose of designated land. In the event of the Minister refusing to grant permission, the owner of the land can call upon the acquiring authority to acquire the land in terms of s 3 of the Act and the acquiring authority shall forthwith take steps to acquire the concerned land in terms of the Act.

Thus, s 14 of the Act essentially prohibits the sale, disposal or leasing of designated land without the prior written consent of the respondent. The sale, disposal or leasing of designated lend *per se* is not prohibited. The refusal to permit the sale, lease or disposal of designated land may have the effect of prohibiting such sale, lease or disposal. Other than this restriction, all the other rights or attributes of ownership in the designated land are not in any way affected. In the light of the above, has the respondent, by providing that his consent be obtained first, acquired the land or an interest or a right therein as envisaged by s 16 of the Constitution?

In the case where the owner of the designated land wishes to sell, lease or dispose of such land and the Minister consents to that, the owner of

designated land loses nothing and the Minister gains nothing. In such, a situation, I have some difficulty in accepting that the Minister has gained something from the owner of designated land.

In a situation where the Minister refuses to permit the sale, disposal or leasing of designated land it can be argued that the owner of designated land will have lost something, namely the right to sell, dispose of or lease his land. In those circumstances the argument or submission that there has been an acquisition becomes very cogent. It may well be that the state will have overstepped tile mark of control and is now acquiring. I leave that question entirely open. Where the respondent declines or refuses to permit the sale, the leasing or disposal of designated land compensation is provided for in effect in s 14(5) of the Act. In that subsection it is provided that, where the Minister has refused to grant permission for the sale, lease or disposal of any designated land, the owner of the land may call upon acquiring authority to acquire the land and the acquiring authority shall forthwith take steps to acquire the land concerned in terms of the Act. As I said, s 3 of the Act provides for such acquisition and payment of compensation. Thus, in effect, every owner of designated land whose right of ownership has been diminished by the refusal to permit the sale, lease or disposal of such land is entitled to compensation from the acquiring authority by demanding that such authority acquires such land in terms of s 3 of the Act.

Thus it is wrong to contend, as the applicants do, that Part IV of the Act does not provide for compensation. Section 14(5), in effect, provides for compensation, perhaps indirectly, but it

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certainly does it in a manner that brings the whole of s 14 *intra vires* the provisions of s 16 of the Constitution.

Even if I am wrong in the above approach, I have already concluded that the state or the sovereign has the inherent power of eminent domain over all property under its jurisdiction under common law. I have also concluded that sovereignty confers on the state the power to control the use of any property under its jurisdiction. In enacting s 14 of the Act, the state is exercising its power to control the use of property under its jurisdiction. Section 14 does not confer on the state the right to control the use of land, but rather it is a manifestation of how the state intends to use its power of control over certain private property. Whenever the state exercises its power of control or police powers, compensation is not necessarily payable. The statute book and the text books abound win examples of instances where the state exercises its powers of control without having to provide for compensation.

CHIDYAUSIKU J

Silberberg & Schoeman *The Law of Property* 2 ed p 162 to 202 give numerous examples, in South Africa, of enactments controlling the use of private property, which provide for no compensation, thus clearly demonstrating the state's competence to enact such laws. In this country, the state, by virtue of sovereignty, has power to control and regulate the use of private property, subject to the provisions of the Constitution. The power of control is always there, even if it is latent and gets activated by some enactment. The language of s 14 of the Act clearly shows that the state is using its power of controlling the use of private property through the medium of s 14.

Even if I am wrong in concluding that s 14 of the Act of the Act is *intra vires* the Constitution and that it is in fact *ultra vires* the Constitution, that should not necessarily mean the other sections of that part are also *ultra vires*. Section 14 of the Act can be excised from the Act without affecting the other provisions.

Section 15 of the Act is the final section of Part IV of the Act I am invited to declare invalid. I see nothing in this section that impinges on the Constitution. The section affirms and reiterates that the rights of the owner of designated land are not affected by designation. How can such a provision possibly impinge on the Constitution?

Finally, the point was made that the respondent's affidavit made no attempt to make out a case that acquisition in this case was a legitimate requirement of public interest and that there was need for designation prior to acquisition. It was argued that an attempt to justify acquisition was only made in the heads of argument when it should have been made in the affidavits. I did not understand this to be a submission that the application should succeed because it has not been established by the respondent on the papers that acquisition and designation was in the public interest. If I misunderstood the submission and indeed this is the contention I would make the following observations.

I accept that, perhaps, some attempt should have been made to include averments establishing that acquisition and designation was in the public interest in the affidavits filed by the

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respondent, as this was his case. But the fact of the matter is that the facts that make land acquisition for resettlement a matter of public interest in Zimbabwe are so obvious that even the blind can see them. These facts make the resettlement of people a legitimate public interest. In my view, anybody who has lived in Zimbabwe long enough needs

no affidavit to know the allowing facts, which are common knowledge, which make acquisition of land and for resettlement imperative in public interest. These are: once upon a time all the land in Zimbabwe belonged to the African people of this country. By some means foul or fair, depending on who you are in Zimbabwe, about half that land ended up in the hands of a very small minority of Zimbabweans of European descent. The other half remained in the hands of the large majority, who were Africans. The perception of the majority of Africans was that the one-half in the hands of the minority was by far the better and more fertile land, while the other half, which they occupied, was poor and semi-arable. It is also common knowledge that, when the Africans lost half their land to the Europeans, they were paid nothing by way of compensation. Successive enactments on the land entrenched the inequity of the land distribution in this country. The Land Commission of 1925, the Land Apportionment Act 30 of 1930 and the Land Tenure Act 55 of 1969 ensured that the Africans in Zimbabwe, who formed the vast majority of the population, were overcrowded in semi-arable land, referred to sometimes as native reserves, whilst the minority Europeans retained the better half. In terms of the above statutes, the land in this country was divided into European and African areas. In terms of the Second Schedule to the 1969 Land Tenure Act, the total extent of the African area was 44 949 100 acres and the total extent of the European area was 44 949 300 acres. The vast differences in the population of the two groups counted for nothing in the distribution of the land. Attempts to redress the land issue by peaceful means were not successful. The Africans took up arms and an armed struggle ensued. The Lancaster House agreement marked the end of the armed struggle and the transfer of political power to the Africans. The Constitution that came out of the Lancaster House agreement imposed certain restrictions regarding the redistribution of land. As of now, the perception still exists that still large portions of the land remains in the hands of a small minority of European descent, while the majority of the Africans are still crowded in semi-arable communal land. The majority of the Europeans who own land are able and willing to release some of the land to resettle Africans. They are willing to sell it to a cash strapped Government at a premium. On the other hand, the majority of Africans who are still crowded in the communal areas are more than anxious to be resettled on land they see as their own taken from them wrongly in the first place. They see no merit in having to pay for land that was taken from them without compensation in the first place.

It is in an effort to reconcile and meet these conflicting expectations and demands that Government has embarked on a programme to acquire land for resettlement and designation is part of that process. There is no doubt that

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such a programme is in the public interest. If any authority is required for the proposition that resettlement of people is a legitimate public interest the case of *Hawaii Housing v Midkiff* 467 US 229 (1984) is a case in point. The facts of that case are very similar to the facts of the Zimbabwean situation as set out above. The facts in the *Hawaii* case *supra* are these. The Hawaiian Islands were originally settled by Polynesian immigrants from the Western Pacific. These settlers developed an economy around a feudal land tenure system in which one island chief controlled the land which was assigned to lesser chiefs for development. All land belonged to the chief and there was no private ownership. Beginning in the early 1800s, Hawaiian leaders and American settlers attempted to divide the land among the Crown, the chiefs and the common people. The efforts were largely unsuccessful and the land remained in the hands of a few. By the 1960s it was established that the Government owned 49% of the land and 47% of the land was in the hands of only 72 landowners. Eighteen of the 72 landowners owned 40% of the 47% of the land. In Oahu, the most urbanized of the islands, 22 landowners owned 72% of the land. The Hawaiian legislature concluded that concentrated land ownership distorted land value by pushing up land prices and consequently injured public tranquillity and welfare. To redress these problems the legislature decided to compel the large landowners to break up their estates and have them sold to the common people. The constitutionality of the Land Reform Act seeking to achieve this was challenged on the ground, among others, that land redistribution was not in the public interest because it is the taking of land from an individual and giving it to another individual. It is not a taking for the public interest. The Supreme Court of the United States came to the conclusion that the people of Hawaii and the settlers had attempted to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchy. The land oligopoly had forced thousands of Hawaiians homeowners to lease, rather than buy, the land on which their homes were built. The Supreme Court concluded that regulating oligopoly and the evils associated with it was within public interest and therefore constitutional. The court also concluded that it would not substitute its judgment as to what constitutes a public use unless the use is palpably without reasonable foundation. This court has no basis for doubting that acquisition of land and resettlement is in the public interest and therefore defers to the state's perception that there is need for land redistribution and designation as a prelude to such acquisition.

In the result, I have come to the following conclusions, that -

(1) facts that are common knowledge which the court can take judicial

notice of establish that the programme of resettlement of people is in the public interest and designation is part of that programme;

(2) Roman-Dutch jurists establish that sovereignty confers on the state eminent domain over private property owned by people under its jurisdiction. In Zimbabwe, the exercise of eminent domain is subject to the provisions of the Constitution, which has made the State's obligation to pay compensation compulsory and elevated the individual's entitlement to compensation to a human right;

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(3) the State has inherent jurisdiction to control the use of private property of persons under its jurisdiction. This power is derived from the same source as eminent domain on the basis that the greater includes the less. In Zimbabwe, the power to control is subject to the provisions of the Constitution;

(4) in Part IV of the Land Acquisition Act, the state is exercising powers of control in a manner that calls for no compulsory compensation in terms of the Constitution;

(5) none of the provisions of Part IV of the Act on their own, namely ss 12, 13, 14 and 15 are *ultra vires* the Constitution nor does the combined effect of those provisions make them *ultra vires*.

In the result I am satisfied that this application has no merit and is hereby dismissed with costs.

Atherstone & Cook, applicants' legal practitioners

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

SEDCO v GUVHEYA 1994 (2) ZLR 311 (HC)

Court **High Court, Harare**

Smith J

Application for summary judgment

1 & 9 November 1994

Flynote

Practice and procedure - debtor liquidated demand - collection commission - whether competent to claim legal practitioner's collection commission as well as the sum claimed and costs - summons - claim for payment of collection commission - when collection commission may be claimed

Headnote

The respondent borrowed a sum of money from the applicant. One of the conditions of the loan agreement was that he agreed to pay all costs, charges and legal expenses which the applicant might incur in enforcing or obtaining payment of the sum or sums due to it by him. He defaulted on the loan for reasons which did not amount to a defence to the applicant's claim for payment of the principal sum plus interest. In its summons, the applicant claimed payment of the principal plus interest, collection commission calculated in terms of the Law Society tariff and costs on a legal practitioner and client basis. Costs on that basis were justified in terms of the notarial bond executed by the respondent in favour of the applicant. The question arose whether the applicant could claim collection commission where it had applied to the court for judgment and had obtained an order for its costs of suit.

Held, it was not appropriate to order that collection commission be paid as well as costs. A

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contractual provision to that effect would be penal in nature. Collection commission can only be charged on moneys actually collected by the legal practitioner. Once summons has been issued for any debt, the legal practitioner is entitled to claim his costs, but not collection commission, unless subsequent to the service of the summons the debtor has agreed to pay collection commission.

SMITH J

Cases cited:

D & DH Fraser Ltd v Walker 1916 AD 494

Steytler v Smuts (1833) 1 Menz 40

Smit v Naude 1957 (4) SA 70 (O)

von Zhan v Credit Corp of SA Ltd 1963 (3) SA 554 (T)

Dan Perkins & Co (Pty) Ltd v Mather 1968 (1) RLR 60 (G)

udc Rhodesia Ltd v Ushewokunze 1972 (2) RLR 97 (G)

G V Mamvura for the applicant

No appearance for the respondent

Judgment

Smith J: The applicant issued summons claiming from the respondent payment of $50 299,93 with interest thereon, collection commission calculated in terms of the Law Society tariff and costs of suit as between legal practitioner and client. The applicant lent the respondent $60 119. It claims that the respondent failed to pay the monthly repayment instalments in terms of the loan agreement and has therefore applied for summary judgment. It alleges that the respondent has no valid defence to the claim and that the appearance to defend is solely for the purpose of delay. The respondent, in his opposing affidavit, sets out a numbers of reasons why he has failed to comply with his obligations under the loan agreement. They include the economic structural adjustment programme, the drought in 1991 and the delay in the granting of his loan which he applied for in November 1991 and was advised on 7 July 1992 that it was available. He then signed the acknowledgment of debt and loan on 18 February 1993 but the loan was not actually forthcoming until 4 March 1993.

It is not disputed that the respondent failed to comply with his obligations in terms of the loan agreement. The reasons for his failure do not constitute a valid defence to the applicant's claim for payment of the principal and interest due in terms of the loan agreement. The terms and conditions of the loan agreement contain the following term:

> "7. The borrower undertakes to pay all costs, charges, commissions and legal expenses which SEDCO may in the course of its operations charge against him and all costs, charges and expenses which SEDCO may incur in

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enforcing or obtaining payment of the sums or sum of money due to it by him from time to time."

The respondent also executed a notarial bond in favour of the applicant. One of the conditions of that bond was that the respondent accepted that he would

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"pay all legal fees and stamp duties incurred in the preparation of documents related to the facilities granted to the Mortgagor and the costs of any legal proceedings which may be taken by the Mortgagee to enforce its claim hereunder, including costs on a legal practitioner and client scale, collection charges and any costs incurred by the Mortgagee in tracing the whereabouts of the Mortgagor, costs in filing claims in the Mortgagor's deceased estate, or in insolvency or liquidation."

It is clear from the above that the applicant's claim for costs on the higher scale cannot be disputed. It is also clear that the respondent has agreed to pay collection commission. However, can the applicant claim collection commission where it has applied to court for judgment and obtained an order for its costs of suit? I considered that it was not appropriate to order that collection commission be paid. I accordingly issued the order, suitably amended so as to exclude collection commission, and indicated that I would give my reasons for so doing. They are as follows.

In *D & DH Fraser Ltd v Walker* 1916 AD 494 the court dealt fully with the question of the recovery of costs of collection. The court followed the principle laid down in *Steytler v Smuts* (1833) 1 Menz 40 and followed in many later cases that a stipulation for the payment of a percentage commission to cover costs of collection in case of default was a penal stipulation. In his judgment at p 501 INNES CJ said:

"Commission cannot be recovered from the debtor under such a clause as the one before us, unless and in so far as it is shown to represent costs of collection for which the creditor is liable to his agent. If the debt has actually been collected without recourse to law, then assuming the percentage rate to be a reasonable one, the full commission would be due. If only portion of the debt has been so collected, then the commission would be calculated upon that portion. But there may be cases in which expense has been actually incurred in unsuccessful attempts to collect. If so, every expense for which the creditor is so liable to his agent would be recoverable from the debtor."

Then, after referring to a number of cases, including *Steytler*'s case *supra* the learned CHIEF JUSTICE continued:

"But the point is that the costs recoverable must be costs of collection. Collection in the sense in which the word is used in this clause is a different process from recovery by action. The assistance of the court is

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invoked after the collector has failed. The attorney who conducts the case recovers the money at law, and is remunerated by the costs awarded him. He cannot claim against his principal a commission upon the amount of the judgment; nor can the agent; for neither of them has collected the debt. And it would make no difference should the capacities of collecting agent and attorney happen to be united in the same individual. If it were otherwise, there would be a double charge - costs plus commission - upon the debtor in every case in which an

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instrument of debt containing a collection clause was sued upon."

The principles enunciated in the *D & DH Fraser* case *supra* have been cited with approval and followed in many cases. See *Smit v Naude* 1957 (4) SA 70 (O), *von Zahn v Credit Corporation of South Africa Ltd* 1963 (3) SA 554 (T) and *Dan Perkins & Co (Pty) Ltd v Mather* 1968 (1) RLR 60 (G). In the last mentioned case, which concerned a hire-purchase agreement that provided, *inter alia*, that the purchaser would pay "10 per cent collection charges on .... instalments", GOLDIN J refused the claim for collection charges on the grounds that the provision was penal and the Courts would only award under a penalty clause such loss or damage as the plaintiff has actually sustained. In *udc Rhodesia Ltd v Ushewokunze* 1972 (2) RLR 97 (G) DAVIES J also dealt with the question of the recovery of collection commission. In the case before him, the agreement between the parties dealt with the lease of a motor vehicle and provided that in the event of the premature termination of the hiring, the hirer would pay the owner of the motor vehicle all legal expenses and all other fees and charges incurred by the owner with attorneys or collection agents, including attorney and client charges, collection commission, etc. DAVIES J distinguished the cases of *D & DH Fraser* and *Dan Perkins supra* in that in those cases the stipulation was that the purchaser should pay a fixed percentage commission for collection, the indication being that that was to be payable whether or not such collection charges were incurred. In the case before him, however, the provision in the lease agreement provided only for an obligation on the hirer to pay such collection commission charges as were incurred. After referring to the statements made by INNES CJ in *D & DH Fraser supra* which I have set out above, DAVIES J at p 100-1 said:

"Mr Rosettenstein, a member of the firm which acts for the plaintiff, gave evidence to the effect that where, as a result of a judgment debt, a warrant of execution was issued, and the judgment debt or part thereof was recovered as a result of such execution, it was not the practice of attorneys to charge collection commission upon the amount so recovered, even though the deputy sheriff might effect payment of the proceeds of

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any warrant of execution through the attorneys. This is in accord with what is suggested by INNES CJ. If in fact there was such a practice, then to my mind it would clearly be a wrong practice because the attorney would then be recovering what would be a double charge, that is, costs plus commission. Mr Rosettenstein, however, indicated that if the debtor, as a result of the judgment against him, were to pay the amount of the judgment debt, even though such payment were made direct to the plaintiff, then as between plaintiff and his attorney his attorneys would claim a commission. In my view if this is, in fact, the position, then again it contravenes the principle set out by INNES CJ, in respect of a clause of this nature.

It seem s to me that, applying what is there stated, the proper interpretation of clause 9 (e) (iii) of this particular agreement is that collection commission is not intended to cover any costs which might be recoverable by the plaintiff's attorneys from the plaintiff after judgment has been obtained. Collection commission is essentially a charge made by an attorney or a commission agent when payments have been obtained through his services prior to judgment. If the matter has to proceed to judgment, then what is recovered is not recovered as a result of a collection by the attorney, but as a result of the judgment of the court and the process that follows thereafter.

If in point of fact in the present case what should happen is that the defendant is unable to satisfy the judgment debt at once, but wishes to make payment by instalments, and this is acceptable to the plaintiff, then of course there is nothing whatsoever to stop the plaintiff agreeing or insisting that the defendant should make such instalment payments of the judgment debt through his attorneys, and in such event there would be nothing at all to prevent the plaintiff from insisting that the defendant should pay the collection charge in respect of the collection

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of such judgment debt. This, of course, would be in effect an entirely new agreement. But, as I view the position, the plaintiff is not entitled to recover from the defendant at this stage a sum to represent commission charges which he has not in fact incurred. He is completely protected so far as his costs are concerned by the provisions of the clause, which would entitle him to claim all legal expenses and all other fees incurred by him, but they must be incurred, and in my view he is not entitled to claim for future possible collection commission which would become payable, not upon the collection of the indebtedness, but upon the collection of the judgment debt."

SMITH J

The Law Society of Zimbabwe has, in its by-laws which were promulgated in SI 314 of 1982, laid down the rate of collection commission which a legal practitioner who is instructed to collect an uncontested claim (which term is defined) for trade debt (also defined) shall be entitled and obliged, in lieu of any other fees and charges, save for disbursements, to charge his client. In my view, having regard to the views expressed by DAVIES J with which I respectfully concur, collection charges at the rate so prescribed may be recovered but only in respect of payments obtained through services prior to judgment, unless, however, there has been a judgment and the debtor is unable to satisfy the judgment debt at once and he agrees to pay the judgment debt in instalments together with collection charges.

To sum up, therefore, once summons has been issued for any debt, the legal practitioner is entitled to claim his costs but not collection commission unless subsequent to the service of the summons the debtor has agreed to pay collection commission. Collection commission can only be charged on moneys actually collected by the legal practitioner.

Scanlen & Holderness, applicant's legal practitioners

S v KUDYA 1994 (2) ZLR 317 (HC)

Court **High Court, Harare**

Garwe J

Criminal review

9 November 1994

Flynote

Criminal procedure - compensation in terms of Part XIV of the Criminal Procedure and Evidence Act [Chapter 59] - award - when may be made - accused damaging another's motor vehicle through act of negligent driving - not an offence for which award of compensation may be made

Headnote

The accused, a public servant, had pleaded not guilty to a charge of driving without due care and attention. He had lost control of the Government owned car he was driving and hit a tree,

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causing damage to the car. The value of the damage was assessed by the Central Mechanical and Equipment Department at some $13 000. The magistrate awarded compensation in that sum in favour of the accused's Ministry, purporting to act in terms of s 343 of the Criminal Procedure and Evidence Act [*Chapter 59*].

Held, that it was not competent to award compensation in terms of s 343, as that section related only to compensation for personal injury.

Held, further, that although s 342(1) of the Act authorises the award of compensation to any person whose right or interest in property has been lost or diminished as a direct result of an offence, s 345A(1) precludes the payment of compensation where the loss or diminution of a right results from an accident arising out of the presence of a vehicle on a road, unless it arises from damage resulting from theft. As this vehicle had not been stolen, the award of compensation was incompetent.

Held, further, that in any event an award of compensation is, by virtue of s 345 A (1) (b) (iii), not competent unless the court is satisfied that the

GARWE J

accused will suffer no prejudice if the claim for compensation is dealt with in terms of Part XIX of the Criminal Procedure and Evidence Act. This the court could not have been satisfied of, as under s 22(3) of the Audit and Exchequer Act [*Chapter 168*] the Secretary to the Treasury is not obliged to recover the full amount but only what the Secretary considers to be just and equitable. It was quite possible that the Secretary might not have required full restitution. Furthermore, the accused had not been heard on the question of the quantum of damages.

Case cited:

Quigley v Stokes [1977] 2 All ER 317

Judgment

Garwe J: The accused in this matter is employed by the Ministry of Justice, Legal and Parliamentary Affairs as an acting regional magistrate.

He was convicted by another regional magistrate of driving without due care and attention in contravention of s 42(1) of the Road Traffic Act 48 of 1976.

The facts reveal that the accused was driving a Mazda 323 sedan along the old Mutoko/Murewa Road. This is a gravel road. He lost control of the vehicle and hit a tree. The vehicle was extensively damaged. The damage was assessed by the Central Mechanical and Equipment Department at $13 220.

The accused pleaded not guilty and told the court that a dog suddenly crossed the road in front of him. The car swerved to the right and he applied brakes. The car skidded and he then lost control. The car came to a stop after colliding with a tree on the left side of the road.

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The magistrate found that the accused must have been driving et en excessive speed in the circumstances. On that basis he found the accused guilty as charged. He sentenced him to pay a fine of $75 or in default to undergo 20 days' imprisonment with labour. In addition, he awarded compensation in the sum of $13 220 in favour of the Ministry of Justice, Legal and Parliamentary Affairs. In making this award, the trial magistrate purported to act in terms of s 343 of the Criminal Procedure and Evidence Act. His reason for awarding compensation was that since the accident occurred outside the road, the accident could not be said to have arisen out of the presence of a motor vehicle on a road.

Not satisfied with the award of compensation, the accused requested that the matter be forwarded on review. He submitted that the trial magistrate had

GARWE J

erred in making such an award and that in any event "it is the Ministry of Finance which has the final say on the amount which can be raised as a disallowance".

Having perused the provisions of s 345A(1) of the Criminal Procedure and Evidence Act, my view was that compensation should not have been awarded and that this was really a matter for the relevant Ministry to take up with Treasury in terms of the Audit and Exchequer Act [*Chapter 168*].

I sought the views of the Attorney-General on the propriety of the order of compensation. The Attorney-General agrees with me that the award of compensation should not have been made. I quote *in extenso* his remarks in this regard:

> "... the court erred in ordering compensation in terms of s 343 of the Act because compensation in terms of that section relates to personal injury suffered, rather than a loss or diminution of a right or interest in property. The court should have made the order in terms of s 342 (1) of the Act. However this misdirection is not prejudicial to the accused.
>
> Section 342 (1) of the Act empowers the court to order compensation in favour of any person whose right or interest in property of any description has been lost or diminished as a direct result of the offence for which the court would have convicted the accused. The catch-words in the provision, for the purposes of this argument, are 'whose right or interest in the property of any description has been lost or diminished as a direct result of the offence'. It is clear from the ordinary grammatical meaning of the above words that the court can only order compensation when the loss or diminution of a right or interest is as a direct result of the offence for which the accused has been convicted. It is therefore apposite to consider the essential elements of the offence the accused was convicted of and ascertain whether the loss or diminution of the Ministry's right in the vehicle was a direct result of the offence.
>
> Section 42 (1) of the Road Traffic Act provides that 'A person who drives a vehicle on a road without due care and attention or reasonable consideration for other road users shall be guilty of an offence ...' For the accused person to be convicted he must:
>
> (a) drive a vehicle
>
> (b) on a road
>
> (c) without due care and attention or consideration for other road users.

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GARWE J

The court properly convicted the accused because the essential elements were satisfied. For the court to make an order in terms of s 342 (1) of the Act, it must have been satisfied that the damage to the vehicle was as a direct result of accused's **driving a vehicle on a road without due care and attention or reasonable consideration for other road users**.

Since the court found that the damage was a direct result of the offence for which it convicted the accused this means that the loss resulted from an accident arising out of the presence of a vehicle on a road. Had that not been the case, the accused would not have been convicted of contravening s 42 (1) of the Road Traffic Act because one of the essential elements of the offence is driving a vehicle **on a road**.

Section 345A (1)(a) of the Act prohibits the court convicting the accused from ordering compensation in terms of s 342 (1) where the loss results from an accident **arising out of the presence of a vehicle on a road.** In *Black's Legal Dictionary* an accident is defined as "an unexpected and unintentional occurrence". It is not in dispute that the loss was due to an accident. The accident occurred when the accused lost control of the vehicle and the vehicle left the road colliding with a bee. This was a continuous course of events which cannot and should not be compartmentalised. Had the unexpected and unintentional event not happened, that is, the loss of the control of the vehicle leading to its veering off from the road, the collision with the tree would not have happened and loss would not have resulted. It is therefore submitted that there is no ambiguity in the phrase in question. Having said that, it appears to me that where a vehicle has been involved in an accident while being driven on a road a court can order compensation only in circumstances covered by s 342(2)(b) of the Act. That would not apply in this case because the vehicle had not been stolen. See *Quigley v Stokes* [1977] 2 All ER 317.

Taking into account that:

(a) the accident occurred as a result of accused's negligence whilst driving a vehicle on a road;

(b) there was a continuous course of events from the moment accused lost control until the impact with the tree;

(c) compensation can only be ordered if the loss is as a direct result of the offence for which the accused was convicted;

it is respectfully submitted that the court erred in awarding compensation against the accused.

GARWE J

If counsel is wrong in this argument then it is necessary to consider the provisions of s 345A(b)(iii) of the Act which provides that a court cannot order compensation in terms of s 342 'unless the court is satisfied that the convicted person will not suffer prejudice as a result of the claim for compensation or restitution, as the case may be, being dealt with in terms of this part'. A court must be satisfied that the accused would not be prejudiced before it can order compensation. There is nothing in the record to show that the court was alive to this provision of the Act. It is submitted that had the court applied its mind to these provisions it would not have made the order for compensation because the provisions of s 22 of the Audit and Exchequer Act [*Chapter 168*] would have made it clear that accused would suffer prejudice if the claim was dealt with in terms of Part XIX of the Act.

Section 22(3) of the Audit and Exchequer Act empowers the Secretary to the Treasury to make an order against an employee responsible for the loss or damage to State property. In making that order and determining the amount recoverable from the State employee, the Secretary to the Treasury takes into account the report and recommendations of the Accounting Officer of the employee's Ministry and the employee's explanations of the loss or damage, and may consult other bodies or persons. A trial court would not take these factors into account in assessing the amount to be paid as compensation. It is important to note that the Secretary to the Treasury is not

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obliged to order full recovery but what he considers, at his discretion, is equitable in the circumstances. It is apparent that the accused would suffer prejudice if the claim is allowed to be dealt with in terms of Part XIX of the Act because -

(a) he was not heard in respect to the *quantum* of damages. He was not given a chance to mitigate.

(b) the Secretary to the Treasury may have taken into account his degree of negligence (blameworthiness) in assessing the amount recoverable.

It is therefore submitted that the court should have found that the accused would be prejudiced and should not have made the compensation order.

CONCLUSION

From what has been said in the preceding paragraphs it is submitted that when one considers the offence for which accused was convicted, the

GARWE J

provisions of ss 345A(i)(a) and 345A(1)(b)(iii) of the Act and the provisions of s 22 of the Audit and Exchequer Act, it is apparent that the trial court misdirected itself in awarding compensation to the Ministry of Justice, Legal and Parliamentary Affairs. In any case the Ministry can recover its loss through other remedies.

It is submitted that this court should interfere with sentence to the extent that the accused should not be ordered to pay compensation in terms of s 242(i) of the Act."

I agree entirely with the above remarks. Section 345A(1) of the Criminal Procedure and Evidence Act provides that a court cannot award compensation in terms of s 342 in respect of any loss or diminution of a right or personal injury where such loss, diminution or injury results from an accident arising out of the presence of a vehicle on a road **unless the loss arises from damage resulting from theft** as provided for in s 342(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*]. As the loss in the present matter does not arise from damage resulting from theft, an award of compensation was therefore not competent. Further, there can be no argument that the damage resulted from an accident arising out of the presence of a vehicle on a road. The fact that the vehicle veered off the road and ended up colliding with a tree on the verge is really neither here nor there.

It follows from what I have said above that the award of compensation is not proper and must therefore be set aside. The Ministry of Justice, Legal and Parliamentary Affairs can proceed in terms of s 22 of the Audit and Exchequer Act [*Chapter 168*].

In the result, the order awarding compensation to the Ministry of Justice, Legal and Parliamentary Affairs in the sum of $13 220 is set aside.

The proceedings are otherwise confirmed.

Bartlett J agrees.

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S v GUMBI 1994 (2) ZLR 323 (SC)

Court **Supreme Court, Bulawayo**

McNally JA & Ebrahim JA

Criminal appeal

5 & 12 November 1994

Flynote

Criminal law - murder - attempt - intent - constructive intent - guard firing shotgun at night at fleeing poachers - degree of negligence required before necessary intent can be said to exist - more than gross negligence required to constitute recklessness amounting to constructive intent

Headnote

The appellant was employed **as a guard** on a farm on which poaching, snaring, unlawful hunting, stock theft and fence cutting were rife. He was armed with a 12-bore shotgun, loaded with buckshot. One night he came across three poachers with dogs. He called on them to stop. They heard him and decided to run away. He fired two shots at them, both, he thought, well to one side. The poachers did not stop. It turned out that one of the poachers had been hit in the back by at least eight pellets, which had penetrated deeply into his back, affecting his lungs. He was hospitalised and suffered permanent partial disablement. On this basis the appellant was convicted of attempted murder, the magistrate finding a constructive intent to kill. On appeal,

Held, that constructive intent is not an easy concept to apply to a set of facts, especially when a gun is involved. The difficulty arises in separating the facts, on the one hand, from those which show an actual intent to 1611 and, on the other, from those which show negligence falling short of recklessness. Mere negligence cannot found an intent to kill, there must be even more than gross negligence to constitute that form of recklessness which amounts to constructive intent. There must be, in the mind of the accused, a volitional component, whereby the accused can be said to

McNALLY JA

have consented to the consequence, reconciled it or taken it into account. In effect, the accused must say to himself: "I know I may kill this person if I shoot, but I am going to shoot anyway."

Held, on the facts, that it was not possible to say that the appellant had been anything more than negligent. His negligence had also to be considered in the light of the appellant's duties, where he had to reconcile the duty to arrest and the duty not to kill.

Held, further, that it was therefore unnecessary to decide the question of whether the appellant's actions could be justified in terms of s 46 of the Criminal Procedure and Evidence Act [*Chapter 52*].

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Cases cited:

S v Kware S-85-93

S v Frazer S-110-94

S v Ndhlovu S-131-90

S v Henderson S-17-84

S v Lungu 1989 (3) ZLR 27 (S)

R v Kadongoro 1980 ZLR 54 (G)

S v Ngubane 1985 (3) SA 677 (A)

Ex p *Min van Justisie*: in re *S v SAUK* 1992 (4) SA 804 (A)

K A Esat for the appellant

K Hodzi for the respondent

Judgment

McNally JA: The appellant was charged with and convicted of attempted murder. He was a farm guard with a 12-bore shotgun loaded with buckshot. On the night of 14 May 1992 he came across three poachers with dogs on the farm. He called on them to stop and they heard him but decided to run away. He fired two shots, both well to one side of the fleeing poachers, according to his evidence. He says he wanted to frighten them into stopping. They did not stop and he went home.

Later it transpired that he had hit one of the poachers in the back with at least eight pellets. We do not know if this was with his first shot or his second shot, or both, because, strangely, the complainant felt nothing by way of impact. But he felt pain. Nonetheless he managed to run a long distance and he got home and slept the rest of the night. The next morning he had problems breathing. He was taken to the hospital. It was found the pellets had penetrated quite deeply into his back and his lungs were affected. He was seriously ill for some time and is permanently partially disabled.

McNALLY JA

The regional magistrate found a constructive intention to kill. But we have had a problem with this conclusion partly because of the inadequate presentation of the evidence.

Two recent cases are relevant. In *S v Kware* S-85-93 KORSAH JA dealt with the case of a farm guard shooting and injuring an escaping maize thief. And in *S v Frazer* S-110-94 I dealt with the case of a farmer shooting at a poacher's dog (lawfully - see s 50 of Act 14 of 1975) and, without knowing it, hitting a poacher. The charge in the first case was common assault and in

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the second culpable homicide.

In these cases commonly two questions arise. The first relates to the intent of the person shooting. The second relates to the justification for shooting at or towards or near to or in the general direction of persons refusing to stop when found involved in unlawful activity.

In the present case it is important to understand the background. The farm in question was one on which poaching, snaring, illegal hunting with dogs, cattle-rustling and the breaking of fences and stealing of fence wire were rife. For this reason the farmer was allowed by the police to employ and arm guards. The firearm in question was licensed.

A judicial officer must stand aside from any sympathy he may feel either for poachers or for farmers, or indeed for the animals. The fact is that cattle theft and poaching are illegal, and the arming of guards to attempt to stop these activities is legal. Whether one likes the law or not is irrelevant.

These three men had been unlawfully hunting with dogs on private property. Their dogs had chased a wild pig which had gone to ground in a hole. They had tried to dig it out and had failed (although it seems the pig died in the process). They had just started to go home when they heard a call to stop. One of them described how he saw "a whitish object and we realised it was a person". They stopped briefly and then ran. They explained candidly that they ran because they knew they had been doing wrong. In other words, they ran to avoid arrest, prosecution and probable imprisonment.

In concluding that the subsequent shooting was done with constructive intent to kill, the magistrate took into account the following factors:

1. a gun was used, which is *per se* dangerous;
2. the distance involved was less than fifty metres;
3. the fact that one of them was hit showed that he must have fired in their direction and not to one side;

McNALLY JA

4. the shot was fired at chest height rather than into the air;
5. he had instructions not to shoot at people.

Constructive intent to kill is not an easy concept to apply to a set of facts, especially when a gun is involved. The difficulty arises in separating the facts, on the one hand from those which show an actual intent to kill, and on the other from those which show negligence in shooting which falls short of recklessness.

We are not concerned in the present case with an actual intent to kill. We are concerned with the other distinction, between mere negligence and negligence so gross as to amount to recklessness. Mere negligence cannot found an intent to kill. Compare *S v Ndlovu* S-131-90

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(not reported) and *S v Henderson* S-17-84.

I will look in turn et each of the factors considered by the regional magistrate.

1. **A gun was used**. This is undoubtedly so.

2. **The distance involved was less than fifty metres**. Here it is unfortunate that the State did not adduce expert ballistic evidence. Judicial officers are not usually familiar with the lethal range of various types of gun. We know that, except at very short range, a rifle is more dangerous to life than a shotgun. We know that a shotgun loaded with buckshot (as this one was) is more dangerous (to humans) than one loaded with bird shot. But we do not know their lethal ranges; we do not know how many pellets there are in an average cartridge of buckshot (I am not sure that the concession made in this case was properly made); nor was any effort made to establish the distance between the appellant and the complainant when the shots were fired. Only limited assistance can be obtained from books on forensic science.

3. **The fact that one of the three was hit showed that the appellant did not take any care to fire to one side as he claimed**. This reasoning, it seems to me, fails to take into account the appellant's case. His case was that he thought they were running together, but that one of them must have been running, unbeknown to him, in a different direction. Yet this argument was rejected because it was said the moon was shining and there were no trees.

   It must be noted that -

   a. When the two poachers gave evidence, it seems that the uninjured

McNALLY JA

   one was running with the third poacher, while the complainant was separate. The other two did not know he had been hurt until he got home.

   b. It is true there was moonlight, but it was not bright. The poachers saw "a whitish object" which was the appellant. If they wore dark clothing they would have been very hard to see. They themselves described how they almost fell into a stream, before they were accosted. So it was not very bright.

   c. They were in a relatively clear patch, but they ran into bushes.

   The evidence, it seems to me, does not rule out the reasonable possibility that he fired to one side not realizing that one of the three, having diverged, was just where he was firing. It was a *bona fide* error of fact. Compare *S v Lungu* 1989 (3) ZLR 27 (S) at 29B.

4. **The shot was fired at chest height.** This was certainly more dangerous than firing in the air. But in the heat of the moment, can it be said to be reckless, when his defence is that he thought it was safe?

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5. **He had instructions not to kill people.** This is certainly true, but does not take the matter any further, since he claims he did not intend to kill or hit any of the poachers.

The point, in essence, is that there must be more than negligence and even more than gross negligence to constitute that form of recklessness which amounts to constructive intent or *dolus eventualis*. As was said by BEADLE AJ (as he then was, having retired as Chief Justice) in *R v Kadongoro* 1980 ZLR 54 (G) at 55B:

> "It seemed to me that the magistrate was clearly wrong in confusing *dolus eventualis* with gross negligence ..."

There must be, in the mind of the accused person, what has been called "a volitional component". See the judgment of JANSEN JA in *S v Ngubane* 1985 (3) SA 677 (A) at 685D. In other words he must, in effect, say to himself "I know I may kill this person if I shoot. But I am going to shoot anyway". As JANSEN JA went on to say:

> "Our cases often speak of the agent being 'reckless' of that consequence, but in this context it means 'consenting', 'reconciling' or 'taking into the bargain', and not the 'recklessness' of the Anglo-American systems, nor an aggravated degree of negligence."

McNALLY JA

See also Ex p *Minister van Justisie*: In re *S v SAUK* 1992 (4) SA 804 (A) at 808A.

It seems to me impossible to say in the circumstances of this case that the appellant's version of the state of his mind might not reasonably be true. If he is being truthful - or even fairly truthful - then I do not find it possible to say that he was anything more than negligent. I say that on the basis that he should have fired well above their heads rather than to the side of where he thought they were.

I bear in mind particularly that he was a simple uneducated man who had a duty to perform. That duty was to protect his employer's cattle and the wild game on the farm and the fences, by the use of a firearm, to detect poachers and cattle thieves, to deter them, and in a proper case to arrest them. He had lawful authority to use the firearm to effect an arrest, but he was instructed not to kill.

This was a very difficult duty to perform, especially at night. His negligence must be seen in that light, as the performance of a difficult duty in a way which tilted too far in the direction of his duty to arrest and too far away from his duty not to kill.

I think he was guilty of negligent wounding with a firearm, and I think that the legislature might wish to consider creating such a crime by statute, as has been done in other countries. I do not consider it has been shown that he had a constructive intent to kill, or to assault - see *S v Frazer supra*.

In my view, therefore, the appeal must succeed. It is unnecessary to consider the justification argument under s 46 of the Criminal Procedure and Evidence Act Hunting without a permit is an offence under s 47 of the Parks and Wild Life Act 14 of 1975; there is a presumption in s 84(15)(a) of that Act which would assist the appellant; there is a penalty of eighteen months'

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imprisonment provided in s 115(2)(a) of that Act; therefore hunting is a First Schedule offence for the purpose of s 46 of the Code. As to reasonable suspicion, what else would they be doing by night, with dogs, on a private farm? But I do no more than summarise the argument. It is unnecessary to give a ruling on it.

Accordingly the appeal is allowed and the conviction and sentence are set aside.

Ebrahim JA: I agree.

Joel Pincus, Konson & Wolhuter, appellant's legal practitioners

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HEALTH PROFESSIONS COUNCIL v McGOWN 1994 (2) ZLR 329 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

24 October & 15 November 1994

Flynote

Administrative law - audi alteram partem rule - applicability of - controlling body imposing restrictive condition upon medical practice by medical practitioner - whether medical practitioner entitled to be heard before such condition imposed - breach of rule by controlling body - whether can be cured by subsequent hearing

Headnote

When renewing the practice certificate of a medical practitioner the Practice Control Committee of the Health Professions Council, acting in terms of s 39D(2) of the Medical, Dental and Allied Professions Act [*Chapter 224*], imposed a restrictive condition upon the medical practitioner as to the type of procedures he could employ when practising. The medical practitioner was not given an opportunity to make any representations to the Committee before the decision was made to impose the restrictive condition.

The Act provides that in a number of circumstances, such as where the Practice Control Committee proposes to refuse to issue or renew a practising certificate, or to withdraw a practising certificate, the medical practitioner has an express right to make representations before the decision is made. However, where the Practice Control Committee is proposing to impose a restrictive condition acting under s 39D(2), the Act does not provide expressly that the practitioner has a right to make representations before the decision is made.

Held, that where, as in the present case, the restrictive condition imposed on the practising certificate of the medical practitioner is highly prejudicial and damaging to his standing as a

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professional man, he has a right to be

GUBBAY CJ

afforded a reasonable opportunity to make representations before the restrictive condition is imposed The taking of the decision without affording the medical practitioner an opportunity to make representations is a violation of principles of natural justice.

Held, further, that once a decision has been reached in violation of principles of natural justice, the general rule is that a subsequent hearing will not serve to cure the breach of natural justice and be a meaningful substitute for an original fair hearing. There are certain limited exceptions to this rule but none of these exceptions applied in the present case.

Held, further, that the trial court should have remitted this matter back to the Practice Control Committee for it to consider afresh the desirability of imposing any conditions on the practising certificate in the light of any representations made by the medical practitioner.

Cases cited:

PF-ZAPU v Min of Justice (2) 1985 (1) ZLR 305 (S); 1986 (1) SA 532 (ZS)

Heatherdale Farms (Pty) Ltd & Ors v Deputy Min of Agriculture & Anor 1980 (3) SA 476 (T)

Ibhayi City Council v Yantolo 1991 (3) SA 665 (E)

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

Admin, Tvl & Ors v Traub & Ors 1989 (4) SA 731 (A)

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

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

Min of Justice, Transkei v Gemi 1994 (3) SA 28 (TkA)

McGown v Health Professions Council 1994 (1) ZLR 86 (H)

Omar & Fani v Min of Law & Order & Ors 1987 (3) SA 859 (A)

Sachs v Min of Justice 1934 AD 11

Momoniat & Naidoo v Min of Law & Order & Ors 1986 (2) SA 264 (W)

Cabinet for the Territory of SWA v Chikane & Anor 1989 (1) SA 349 (A)

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

A P de Bourbon SC for the appellant

J C Andersen SC for the respondent

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Judgment

Gubbay CJ: Richard Gladwell McGown is a registered medical practitioner. He has practised as an anaesthetist for the past thirty years, having received training in that speciality from the University Hospital of Uppsala, in Sweden, and the Royal Infirmary of Edinburgh, in Scotland. He claims to be a renowned authority in paediatric caudal anaesthesia, with the most experience of caudal anaesthesia in Zimbabwe and, quite possibly, the world.

1994 (2) ZLR p331

GUBBAY CJ

At least thirty days before his practising certificate for the period 1 October 1992 to 30 September 1993 was due to expire, Dr McGown applied to the Practice control Committee of the Health Professions Council for its renewal. He did so pursuant to s 39C of the Medical, Dental and Allied Professions Act [*Chapter 224*], it being provided in s 39B(1) thereof that a registered medical practitioner is not permitted to practise as such unless he is the holder of a valid practising certificate.

On 26 October 1992, the Practice Control Committee decided to renew the practising certificate of Dr McGown, but imposed the condition that he was not to administer any epidural opiods. The restriction was not protested.

Subsequent to that decision, Dr McGown was arrested on five counts of murder alleged to have been committed upon patients to whom he had administered epidural or caudal anaesthesia. He was remanded on bail, one of the conditions being that he was prohibited from using morphine on any patient or lignocaine for the anaesthesia of children. Ultimately Dr McGown was indicted by the Attorney-General, and stood trial on five counts of culpable homicide.

Dr McGown's application for renewal of his practising certificate for the year 1 October 1993 to 30 September 1994 was viewed with even greater disfavour. At its meeting on 17 August 1993, the Practice Control Committee was of the opinion that his practising certificate should be withdrawn since, being under investigation on allegations of having committed five counts of murder, he could not be considered a fit and proper person to hold such a certificate. The decision to withdraw the practising certificate was never conveyed to Dr McGown. It was later reversed.

In a letter of 27 September 1993, Dr McGown was advised that, at its meeting of 21 September 1993, the Practice Control Committee had renewed his practising certificate subject to the condition, considered desirable in the public interest, that he was restricted from performing any form of spinal anaesthesia, including epidural and caudals.

Dismayed at this new limitation placed upon his practising certificate, Dr McGown consulted a legal practitioner in October 1993. He was concerned with the propriety of the condition which he believed to be unfair and unjustified. He instructed that representations be made to the Practice Control Committee in respect of it. However, due to pressure of work, his legal practitioner was not able to attend to the matter timeously.

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GUBBAY CJ

On 10 November 1993, Dr McGown performed a spinal anaesthetic in breach of the condition placed upon his practising certificate. On the same day, he wrote personally to the Registrar of the Health Professions Council objecting to the restrictive condition imposed by the Practice Control Committee. He expressed an intention to challenge the decision. The next day his legal practitioner addressed a further letter. It stated the view that, having regard to the very successful extent to which Dr McGown had performed spinal anaesthetics by way of caudals or epidurals, the decision of the Practice Control Committee was irrational. In addition, a complaint was laid that the restrictive condition - one that prejudiced Dr McGown's ability to earn a living - had been placed on the practising certificate without affording him the opportunity to make representations. On both grounds it was urged that the condition be set aside.

In a reply dated 12 November 1993, the Health Professions Council advised that "this matter" would be put before the Practice Control Committee at its meeting to be held on 16 November. And on 1 December 1993, Dr McGown's legal practitioner was informed by letter of 23 November 1993, that at the aforementioned meeting the Practice control Committee had determined that there was no reason to vary the condition imposed.

On 16 December 1993, Dr McGown instituted an application in the High Court in which he sought a review of the decision taken by the Practice Control Committee on the grounds of irrationality and procedural impropriety. These criticisms were denied by the Chairman of the Health Professions Council in his opposing affidavit.

The application succeeded with costs before GIBSON J Her Ladyship held that where, in issuing or reviewing a practising certificate, the Practice Control Committee considers it desirable, in the public interest, to impose restrictive conditions which would have the effect of prejudicing the practice and income earning capacity of the person concerned, it must first afford him an opportunity to make representations; that such right was implicit in s 39D(2) of the Medical, Dental and Allied Professions Act. Since no opportunity had been given Dr McGown, the decision to restrict him from performing any form of spinal anaesthetic was to be set aside. In the event, the Court *a quo* did not determine whether the decision was also susceptible of successful challenge on the ground of irrationality in the sense used in *PF-ZAPU v Min of Justice* (2) 1985 (1) ZLR 305 (S) at 326E-327G: 1986 (1) SA 532 (ZS) at 548G-549E.

GUBBAY CJ

I pass immediately to the issue of whether the learned judge was correct in her view that the right to make representations to the Practice Control Committee is not excluded by s 39D(2) of the Act.

The maxim *audi alteram partem* is founded upon the flexible criteria of fundamental fairness. It is not a rule of fixed content, but varies with the circumstances. In its fullest extent it may include all the facilities allowed a litigant in a judicial trial. Yet in appropriate cases the "right to be heard" may be confined to the submission of written representations. See *Heatherdale*

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Farms (Pty) Ltd & Ors v Deputy Minister of Agriculture & Anor 1980 (3) SA 476 (T) at 486D-G; *Ibhayi City Council v Yantolo* 1991 (3) SA 665 (E) at 671B.

In *Metsola v Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S) at 155C-E, I expressed the view that:

> "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 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 of Delegates & Anor* 1989 (3) SA 221 (A) at 235I. 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."

I went on to discuss the legitimate expectation test. I remarked that that catchphrase was no more than a manifestation of the duty to act fairly and apply the principles of natural justice before reaching any decision that will adversely affect the legitimate expectations of the aggrieved party. It is clearly connected with the right to be heard (see at 155F-G).

The judgment in *Metsola* preceded the official report of that of CORBETT CJ in *Administrator, Transvaal, & Ors v Traub & Ors* 1989 (4) SA 731 (A). It was there said that a legitimate or reasonable expectation may arise even where there is no existing right to be heard. It may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which a claimant can reasonably expect to continue. These

features are not prerequisites to the application of the doctrine. They are not the sole test as to whether the decision-maker is obliged to hear the person affected (see at 761H-762B). The right to be heard, on the classic ground that the decision prejudicially impaired the individual's liberty, property or existing rights, remains an available and enforceable formula unless, of course, the statute expressly or by implication indicates the contrary. *Admin Tvl & Ors v Zenzile & Ors* 1991 (1) SA 21 (A) at 34C-D; *Admin Natal, & Anor v Sibiya & Anor* 1992 (4) SA 532 (A) at 538G and 538J-539C; *Minister of Justice, Transkei v Gemi* 1994 (3) SA 28 (TkA) at 33C-D. In short, the legitimate expectation doctrine, as enunciated in *Traub*, simply extended the principle of natural justice beyond the established concept that a person was not entitled to a hearing unless he could show that some existing right of his had been infringed by the quasi-judicial body (see at 761D-F). Fairness is the overriding factor in deciding whether a person may claim a legitimate entitlement to be heard (see at 758G-759A).

I do not think, therefore, that the passage I have cited from the judgment in *Metsola* is inconsistent with the approach and *dicta* in *Traub*.

The determination of whether the lawmaker intended the conferment of a right to be heard and, if so, the extent of such hearing, where the Practice Control Committee proposes to issue or renew a practising certificate subject to the imposition of a restrictive condition, depends upon a close examination of s 39D(2), in the context of other material provisions of the Medical, Dental

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and Allied Professions Act. The section reads:

> "In issuing or renewing a practising certificate to any person, the Practice control Committee may impose conditions restricting the person concerned -
>
> (a) to employment in a designated health institution or to some other form of employment; or
>
> (b) to a particular branch of the profession or calling concerned; or
>
> (c) in any other way whatsoever, whether similar or not to the restrictions mentioned in paragraph (a) or (b);
>
> which the Practice control Committee considers desirable in the public interest."

GUBBAY CJ

Mr *de Bourbon*, on behalf of the Health Professions Council, submitted that the Practice control Committee has no obligation to form a preliminary opinion that a condition should be imposed and then refer its proposal to the practitioner affected for his representations before imposing it. He pointed out that where the legislature intended a hearing to take place, or representations to be made, it had enacted specific provisions. Particular attention was directed, and rightly so, to s 39D(5) and s 39E(2) which require the Practice Control Committee, if it proposes to refuse to issue or renew a practising certificate, or to withdraw a practising certificate, to advise the person concerned of its proposal, stating the reasons and affording him a reasonable opportunity to make representations. The Practice Control Committee 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 furnished. Likewise, pursuant to the provisos to s 32(5) and s 35(6a), and in terms of s 38(5), before the Health Professions Council refuses to register an applicant, cancels a provisional registration, or directs, in specified circumstances, an erasure to be made from the register, it must afford the person so affected the opportunity of showing cause. Lastly, before exercising its powers with respect to any person, the Disciplinary Committee must afford him a reasonable opportunity of being heard either by himself or by a legal representative (s 40(2)(b)); and before dealing with a person convicted of an offence, afford him an opportunity of tendering an explanation in writing, or in person, or by his legal representative (s 42(2)).

In conclusion, it was contended by counsel that seen against the deliberately comprehensive framework of protective measures favouring the practitioner, the legislature manifestly intended by the omission of any comparable safeguard in s 39D(2), to exclude the *audi* rule from any action taken thereunder by the Practice Control Committee.

Per contra, Mr *Andersen* argued that the absence from s 39D(2) of an express provision, similar to the other sections in the Act, which permits of an opportunity to make representations, does not necessarily lead to the inference that the lawmaker intended the Practice Control Committee to act as it pleased in imposing restrictions, no matter how prejudicial these might be to a practitioner. Significantly, so the argument went, the sections in which the right is specifically spelt out are those in which in all circumstances a reasonable opportunity should be granted. But this is not to imply the converse: that there is no obligation to do so under s 39D(2),

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notwithstanding that the action proposed is inherently prejudicial. There may be circumstances in which a restriction made under s 39D(2) would not be prejudicial and

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where the right to be heard would not therefore arise - for instance, the restriction might be a standard one placed on the issue and/or renewal of the practising certificates of all practitioners or a particular class of practitioners. It could not have been intended that s 39D(2) be used to impose restrictions so far reaching in their effect as to achieve the same consequence as a refusal to renew the practising certificate in terms of s 39D(5), whilst avoiding the requirement to permit representations to be made. In essence, the Practice Control Committee has to exercise a value judgment, based on principles of fundamental fairness, as to whether the restriction it proposes necessitates giving the practitioner the opportunity to be heard. No absolute right to be heard in advance vests in the practitioner in all circumstances.

It was this argument that prevailed in the lower court, as well as before SMITH J in an earlier encounter between the parties. See *McGown v Health Professions Council* 1994 (1) ZLR 86 (H). I too accept it as correct. I am thus satisfied that it is not a necessary implication of s 39D(2) that the right to be heard is excluded whatever the circumstances.

It is not open to doubt that the condition imposed on the practising certificate of Dr McGown was highly prejudicial and damaging to his standing as a professional man. He described its impact upon him in these graphic terms:

> "Although epidural administration is involved in only 10-20% of all the cases which I anaesthetise, they are a crucial percentage. Without being able to give a caudal, or some form of spinal anaesthesia I cannot undertake to work for a urological surgeon, since ... such anaesthesia is almost mandatory for transurethral prostatectomy, which is a meaningful proportion of any urological surgeon's work; I cannot undertake major vascular surgery; I cannot anaesthetise frail or elderly orthopaedic patients, nor can I anaesthetise small babies for bowel resections. I can anaesthetise adults for bowel resections and hysterectomies and vaginal operations, but only in the knowledge that I am not doing my best for my patient or my surgeon, and I must needlessly submit my patient to a painful awakening after haemorrhoidectomy and circumcision. In the circumstances where a surgeon's list includes an operation which would require some form of spinal anaesthesia among other operations, the surgeon would not be prepared to change anaesthetists half way through and would invariably ask another anaesthetist to do the entire list. Accordingly, my ability to practise as an anaesthetist is severely restricted."

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Plainly, the ambit of the right to be heard under s 39D(2) can be no more extensive than that given by s 39D(5)(a) when it is proposed to refuse to issue or renew a practising certificate; namely, to:

> "advise the person concerned of its proposal stating the reasons therefor, and ... afford him a reasonable opportunity to make such representations as he may wish in regard to the proposal in writing or, at the discretion of the Practice Control Committee, in some other way."

The next substantive issue debated was whether the Practice Control Committee had cured its

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procedural omission by convening a meeting on 16 November 1993.

The general rule is that once a decision has been reached in violation of natural justice, even if it has not been implemented, a subsequent hearing will be no meaningful substitute. The prejudicial decision taken will be set aside as procedurally invalid. In this way the human inclination to adhere to the decision is avoided. See the remarks of HOEXTER JA in *Omar & Fani v Minister of Law & Order & Ors* 1987 (3) SA 859 (A) at 906E-F.

The exceptions to the rule are set out by Professor Baxter in his work on Administrative Law at pp 587-588, as follows:

> "(i) Where a statute authorises emergency, *ex parte*, action, it might be implicit in the statute that, unless natural justice is excluded altogether, a hearing need only be given after the decision is taken. If there is no urgency, however, the court will require natural justice to be observed beforehand.
>
> (ii) A court may accept as sufficient compliance with natural justice a hearing held after the decision has been taken where
>
> - there is a sufficient interval between the taking of the decision and its implementation to allow for a fair hearing;
>
> - the decision-maker retains a sufficiently open mind to allow himself to be persuaded that he should change his decision; and
>
> - the affected individual has not thereby suffered prejudice.
>
> These are concessions to the demands of administrative efficiency, but they are limited. A hearing held after the decision can only be acceptable if, in all the circumstances, it was sufficiently fair as to have the effect of 'curing' the failure to hold one before."

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Authority for the first exception is to be found in *Sachs v Minister of Justice* 1934 AD 11 at 22 and 38; *Momoniat & Naidoo v Minister of Law & Order & Ors* 1986 (2) SA 264 (W) at 275B-C; *Omar & Fani v Minister of Law & Order & Ors supra* at 906G-H; *Cabinet for the Territory of South West Africa v Chicane &Anor* 1989 (1) SA 349 (A) at 379F-G; *Administrator, Transvaal, & Ors v Traub & Ors supra* at 750C-F.

The first exception is not apposite to the present matter. The condition was imposed only after the application for renewal of the practising certificate for the year ending 30 September 1994 had been made. If the Practice control Committee had considered that expedition was necessary it would have proceeded in terms of s 39E of the Act, instead of awaiting the expiration of the certificate for the previous year. In any event, this was not the justification relied upon by the Health Professional Council in its opposition to the application. There is simply no basis for concluding that for any reason a hearing prior to the decision was not feasible.

In order to come within the second exception, a fair re-hearing must have taken place at which the opportunity to make representations was afforded to the aggrieved party. Was such a

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hearing given Dr McGown?

The letter of 27 September 1993, advising Dr McGown of the condition imposed on his practising certificate by the Practice Control Committee cited no reasons for that decision. In the response of 11 November 1993, a request was made that the decision be set aside so that the application for renewal could be considered afresh. To be eschewed was a situation in which the restrictive condition was to stand with the onus upon Dr McGown to convince the Practice Control Committee that its earlier decision was wrong.

Representations were, of course, contained in the letter written by Dr McGown on 10 November 1993, and in the one of his legal practitioner. But as it was only possible to speculate as to what had influenced the Practice Control Committee in reaching its decision on 21 September 1993, Dr McGown should have been told, prior to the meeting of 16 November 1993, why it was considered that the condition was desirable in the public interest. If he had been, he would have been able to make full representations. And he might well have wished to provide supporting statements from other colleagues that his standard of competence or proficiency in his specialised field had in no respect deteriorated. In fact he was not asked to present any representations at the meeting to be held on 16 November 1993; and, in any event, four days notice thereof was wholly insufficient to allow him to do so.

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Another unsatisfactory feature is that no evidence was adduced that any form of *de novo* hearing took place on 16 November 1993. The minutes of the meeting were not disclosed to the court *a quo*. If anything, the indication from the letter of 23 November 1993, which advised the outcome, is that the Practice Control Committee considered that what was before it was an appeal against its decision of 21 September 1993.

It follows in my judgment that the failure of the Practice Control Committee to afford Dr McGown a hearing on 21 September 1993, was not subsequently cured.

The infringement of Dr McGown's existing rights warranted, as found by the court *a quo*, that the decision to impose the restrictive condition on his practising certificate, be set aside.

This conclusion makes it unnecessary to deal with the alternative argument based on the supposed irrationality of the decision.

The practising certificate with which this court was concerned had expired by the date the appeal was heard. A new practising certificate for the year ending 30 September 1995 has been issued to Dr McGown. It imposes a condition apparently acceptable to him.

Although now of no practical implication, save perhaps, with regard to costs, Mr *de Bourbon* argued that GIBSON J had erred in not remitting the matter back to the Practice Control Committee for it to consider afresh the desirability of imposing any conditions on the practising certificate in the light of representations to be made by Dr McGown. That by failing to do so, the learned judge had substituted her own decision for that of an administrative and specialist body, vested by the lawmaker with a discretion. In effect, she had granted Dr McGown an

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unconditional practising certificate until its expiration on 30 September 1994 - a position hardly in accord with the condition imposed, and not challenged, on the previous year's certificate.

Mr *Andersen*, on the other hand, submitted that the learned judge had not ordered that the practising certificate be free of any condition. She had simply set aside the decision of the Practice Control Committee, leaving it to that body, if so disposed, to convene another meeting for the purpose of reconsidering whether to impose any restriction.

I am unable to agree with this construction of the order. In the absence of any

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addition to the order relating to referral, it is wholly understandable that the Health Professions Council read it to mean that the High Court had granted Dr McGown a clean practising certificate for that year, and that the Practice Control Committee had no further say to the matter.

In *Director of Civil Aviation v Hall* 1990 (2) ZLR 354 (S) at 361E-H it was stated that a court will not normally interfere in the sphere of practical administration unless certain listed criteria are fulfilled. It has not been suggested that any of them were met in this case.

In the result, I consider that the learned judge *a quo* ought to have referred the matter of whether any restrictive condition should be placed on Dr McGown's practising certificate back to the Practicing Control Committee to be decided afresh.

With regard to the costs of the appeal, it seems to me that the slight success achieved by the Health Professions Council is deserving of recognition for discussion of the issue took up some of the time of this court. The appeal is dismissed. The Health Professions Council is to pay three quarters of Dr McGown's costs.

McNally JA: I agree.

Korsah JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

UNITED AIR CHARTERS (PVT) LTD v JARMAN 1994 (2) ZLR 341 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

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3 & 17 November 1994

Flynote

Employment - contract - breach - by employee - damages for - special or extrinsic damages - whether contemplation principle or convention principle applies in deciding claim for such damages - pilot employed by air charter company - training costs to be paid for by company, with undertaking by pilot to pay pro rata if he left before a specified time - whether would also be liable for loss of profits by company if he left before that time

Practice and procedure - absolution from the instance - grounds on which absolution may be granted - principles

Headnote

There are two possible tests that could be applied to decide whether special or extrinsic damages can be recovered for breach of contract. These are the "contemplation" principle and the "convention" principle. The test applied under the contemplation principle is whether the contracting parties actually or presumptively foresaw that the breach of contract in question would result in the type of loss being sued for. Under the convention principle it is not enough that the type of loss was within the contemplation of the parties; the defendant would only be liable if he had entered into a contractual undertaking with the plaintiff that he would be liable for such damage if he breached the contact.

In Zimbabwe the Courts are not bound by the South African ruling applying the convention principle, namely Shatz Invtms (Pty) *Ltd v Kalovyrnas* 1976 (2) SA 545 (A) and that decision does not seem ever to have been applied in Zimbabwe. It is also seems likely that when the South African

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Appellate Division eventually reconsiders this matter, it will make contemplation or foresight alone the basis of liability for special damages.

In the present case the respondent had breached his contract of employment. He was a pilot employed by the appellant air charter company for a two-year contract, in terms of which the company paid for certain training costs. He undertook to repay a pro rata portion of those costs if he left before the two-year period was completed. He breached his contract by leaving before the two-year period was over. The appellant sought to recover special damages from him, based on the fact that it would be impossible to replace him for three months and the company would lose certain revenue as a result. The Supreme Court found that even if the less rigorous contemplation principle were applied to decide the matter, the employee would not be liable as the parties had not foreseen or contemplated that the type of loss being claimed would result from the breach in question.

Cases cited:

Supreme Svc Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd 1971 (1) RLR (A)

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Lourenco v Raja Dry Cleaners & Steam Laundry (Pvt) Ltd 1984 (2) ZLR 151 (S)

Holmdene Brickworks (Pty) Ltd v Roberts Const Co Ltd 1977 (3) SA 670 (A)

Katzenellenbogen Ltd v Mullin 1977 (4) SA 855 (A)

Shatz Invstms (Pty) Ltd v Kalovyrnas 1976 (2) SA 545 (A)

Victoria Falls & Tvl Power Co Ltd v Consol Langlaagte Mines Ltd 1915 AD 1

Jockey v Meyer 1945 AD 354

Whitfield v Phillips & Anor 1953 (3) SA 318 (A)

North & Son (Pty) Ltd v Albertyn 1962 (2) SA 212 (A)

Kroonstad Westelike Boere Ko-op Vereniging Bpk v Botha & Anor 1964 (3) SA 561 (A)

Lavery & Co Ltd v Jungheinrich 1931 AD 156

M R D Stonier for the appellant

E W W Morris for the respondent

Judgment

Gubbay CJ: The appellant company, to which I shall refer as "the plaintiff" sued the respondent, henceforth "the defendant", in the High Court for damages in the sum of $19 843, for breech of a contract of employment. In his plea, the defendant admitted the breach but denied that the plaintiff had

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suffered any damages in consequence thereof. In the alternative, he averred that any damages sustained were too remote to be recoverable from him and that, in any event, the plaintiff had failed to mitigate its loss.

At the close of the plaintiff's case, the defendant applied for absolution from the instance. The application was granted with costs by the learned judge. Against that order the plaintiff now appeals.

The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought (o) find for him. See *Supreme Svc Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at 5D-E; *Lourenco v Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) at 158B-E.

It was abundantly clear at the trial, from the manner in which the declaration was framed, that what the plaintiff was seeking to recover from the defendant was what are known as "special or

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extrinsic damages" rather than "general or intrinsic damages". Paragraphs 6 and 7 thereof read:

> "6. In consequence of defendant's conduct plaintiff has suffered damages in the sum of $19 843 which is made up as follows:
>
> (a) defendant's average monthly flying hours during the period of his employ with plaintiff were 43,8 hours per month;
>
> (b) on the basis of the Baron Aircraft based in Harare which has a selling price of $571 per hour, plaintiff would not make any profit on such aircraft until such time as it has flown 23 hours in a month. The profit thereafter is $318 per hour and the direct operating cost on such an aircraft is therefore $253 per hour,
>
> (c) in consequence plaintiff would have expected a total of 20,8 hours of profitable flying time from defendant in every month;
>
> (d) plaintiff was unable to adequately replace defendant with another suitable qualified pilot for a period of three months from the date that defendant left plaintiff employ. Thus the formula for the calculation of the damages due is:
>
> 20,8 hours x $318 per hour x 3 months.

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> 7. It was at all material times within the contemplation of the parties, that in the event of defendant breaching his contract as aforesaid, that plaintiff would suffer damages as a result thereof by way of loss of profits."

In order to determine whether the learned judge was correct in granting absolution from the instance on the evidence of the plaintiff's managing director, Carole Ann Brooks, it is necessary to bear in mind the difference between the two types of damages; and then, to decide what criteria are to be applied for the recovery of special damages.

General or intrinsic damages do not have to be specially pleaded. They flow naturally and generally from the breach of contract. It is presumed by the law that when the contract was concluded that such damages were actually foreseen or reasonably foreseeable by the parties, and were thus within their contemplation. See, for instance, *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687D-E; *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A) at 879H. For that reason they are recoverable without more ado; only their extent has to be proved. A good example is the loss of interest consequent upon the failure to pay a sum of money.

Special or extrinsic damages, on the other hand, have to be expressly pleaded. They are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, it can be deduced that the parties **actually** or **presumptively** foresaw that they would probably flow from its breach (and thus, that it was within their contemplation). This is the so-called **contemplation principle**. See *Shatz Invtms (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 550D-E; *Holmdene Brickworks (Pty) Ltd v Roberts Const Co Ltd supra* at 687E-F. To ascertain what the parties actually contemplated, or may be supposed to have contemplated, it is of assistance to look to: (a) the subject matter and terms of the contract itself; (b) the special circumstances known to both parties at the time they

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contracted.

Under the so-called **convention principle**, however, mere contemplation is not sufficient to found liability for special or extrinsic damages. The plaintiff is required to allege and prove a contractual undertaking by the defendant that he would be liable for such loss; that he would compensate for such damage. This principle was considered by TROMP JA in the *Shatz* case *supra* to represent the law and govern the recovery of extrinsic loss. The learned JUDGE OF APPEAL, for a unanimous court, stated at 554B-G:

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> "Have our courts now jettisoned the convention principle? Some writers say so ... But until the judgment of WESSELS JA, apparently concurred in by the majority of the other learned Judges, in *Lavery*'s case in this court has been authoritatively overruled, that view cannot be sustained. The view expressed by G A Mulligan in 73 *SALJ* at pp 37-40, that the *dicta* by WESSELS JA on the convention principle were *obiter* does not seem sustainable in the light of the extracts from his judgment quoted above.
>
> Should the convention principle not be jettisoned now and merely the contemplation principle be retained? If so, should the other concomitant requirement not also go by the board, namely, that the contract must have been entered into 'on the basis' of or 'with a view' to the parties' common knowledge of the special circumstances? For, in regard to the latter, the American law and (now) English law do not insist on it; and, in the artificial context in which the contemplation principle has usually to be applied, to insist on that requirement too seems merely to add unnecessarily to that criticisable artificiality.
>
> Doubtlessly in the present case the plaintiff's onus of proving defendant's liability for the special damages claimed would be appreciably alleviated if only the singular principle of contemplation need be applied. But, as previously observed, this is not the proper case in which the principles enumerated in *Lavery*'s case should be reconsidered and overhauled and the above questions answered. Hence, at present the convention principle, as there expounded, must still be regarded as subsisting."

In *Holmdene Brickworks (Pty) Ltd v Roberts Const Co Ltd supra* the South African Appellate Division declined to accede to the invitation to resolve the controversy of whether the contemplation principle or the convention principle should prevail, as only general damages were involved (see at 688A).

The pronouncement that the convention principle is part of the Law of South Africa has attracted sharp and trenchant criticism from leading academic writers. See Farlam and Hathway *Contract* 3 ed para 6 at pp 626-627; *Law of South Africa* vol 7 para 26 at p 15 (Gauntlett and Erasmus); Visser and Potgieter *Law of Damages* para 5:5:3 at p 249; van der Merwe *et al Contract - General Principles* at p 307. Christie in his acclaimed work *The Law of Contract in South Africa* 2 ed at pp 646-647, pertinently remarks:

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> "... if special damages are to be awarded only on the basis of agreement the normal test of the existence of tacit terms ought to be applied, and a normal application of the officious bystander test would result in special damages not being awarded in many cases where it would generally be thought fair to award them."

And Professor Kerr, in *Law of Contract* 3 ed at 456, expresses the view that the main objection

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to the proposition that the convention principle represents the law is that - "

> "... while there appears to be no case in which (it) has actually been applied, there is a long line of leading cases in the Appellate Division and elsewhere which must be considered to have been wrongly decided if it has the role which is claimed for it."

The learned author cites in support *Victoria Falls & Tvl Power Co Ltd v Consol Langlaagte Mines Ltd* 1915 AD 1; *Jockey v Meyer* 1945 AD 354; *Whitfield v Phillips & Anor* 1953 (3) SA 318 (A); *North & Son (Pty) Ltd v Albertyn* 1962 (2) SA 212 (A) and *Kroonstad Westelike Boere Ko-operatiewe Vereeniging Bpk v Botha & Anor* 1964 (3) SA 561 (A).

It seems to me reasonably certain - especially from what was said by TROLLIP JA in the passage quoted above - that upon eventual reconsideration of the principle, the South African Appellate Division will make foresight alone the basis of liability for special damages. However that may be, this court is not bound by the ruling in *Shatz*, grounded as it is upon certain *dicta* of WESSELS JA in *Lavery & Co Ltd v Jungheinrich* 1931 AD 156 at 176. The latter decision, as far as I have been able to ascertain, has never been directly applied or, indeed, referred to, by the courts of this country.

The issue as to which of these competing principles is applicable was not considered by the learned judge *a quo*, nor debated by counsel before this court. Notwithstanding, I am prepared to assume for the purpose of this appeal, that the defendant's liability for the special damages claimed is to be tested in accordance with the contemplation principle.

The relevant evidence adduced from the plaintiff's witness, Mrs Brooks, revealed what now follows.

The plaintiff operated a fleet of twin engine aircraft which it made available for charter flights from its three centres at Harare, Kariba and Victoria Falls.

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It employed a number of full-time pilots and engaged free-lance pilots as well to service such flights.

On 14 September 1987 the plaintiff, in the person of Mrs Brooks, entered into a written contract with the defendant, then aged twenty years, in terms of which he was to be engaged as a pilot with almost immediate effect. The contract provided, in the last paragraph on the first page, that:

> "A contract period of two years will be binding upon you, as due to your limited experience at this time, the funds which will necessarily have to be allocated to train you to Charter Pilot standard are considerable."

This clause was inserted because the defendant did not have a twin-engine aircraft on his pilot's licence and had no twin-engine instrument rating. He had only flown 356 hours instead of the necessary 1 000 hours. Accordingly, it was made clear to the defendant that his services were required for a minimum period of two years because of the cost to the plaintiff in training him and the length of time such training would take.

It appears that the defendant became fully operational with a twin engine instrument rating by

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26 October 1987. Thereafter he was employed at all three of the plaintiff's centres. However, by letter dated 29 August 1988, he gave notice, albeit unlawfully, that he intended to terminate the contract of employment with effect from 30 September 1988. This was not acceptable to the plaintiff.

The plaintiff characterised its loss as one of "loss of profits". I would think "loss of trade" to be a preferable description in relation to a breach of a service contract. But in so far as this particular enquiry is concerned nothing turns on such terminology.

The issue to be decided is whether there was evidence upon which a court, applying its mind reasonably, could or might find that, in the special circumstances attending the conclusion of the contract I have set out, Mrs Brooks and the defendant **actually or presumptively** contemplated that the nature of the loss subsequently sued for would probably result from the breach.

There is little authority on damages for breach of contract by an employee. Plainly the most likely measure contemplated is the amount it would cost to replace the defaulting employee with a person of equivalent standing. *In*

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casu, the wasted cost incurred in training the defendant and the additional salary, if any, payable to another pilot employed in the defendant's position, was the loss which naturally and generally flowed from the defendant's breach. I did not understand this to be in contention. Nonetheless, in principle, special damages also may be recoverable from an employee.

There is no question of Mrs Brooks **actually** foreseeing, at the conclusion of the contract, that if the defendant were to breach it, he would be liable to compensate the plaintiff for the type of damages claimed. She admitted under cross-examination that no thought was given to a breach by the defendant, let alone to the nature of the loss that would be sustained thereby. This is not surprising. Parties seldom contemplate damages at the moment of contracting; it is normally when a breach has been committed that loss comes to mind. See *Shatz Investments (Pty) Ltd v Kalovyrnas supra* at 551E-F.

Mrs Brooks went on to say that it was an unprecedented step to sue a departing pilot for loss of profits. In her words:

> "We had never been in this position before that we took a young man like the defendant, trained him and he had breached his contract".

Asked if this entitled the plaintiff to proceed against the defendant for loss of profits when it was not provided for in the contract, she replied:

> "We had to do what we think is right."

And later:

> "We took legal advice and acted upon the advice received."

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On whether she had mentioned loss of profits to the defendant, Mrs Brook's evidence reads:

> "Q. You never pointed that out to him, did you? A No.
>
> Q. You never pointed out to him on what basis the company earned its profits, did you? A No.
>
> Q. You never even pointed out to him the details regarding the revenues and costs relevant to flying this Baron aircraft, did you? A No.
>
> Q. And you never said to him verbally if you breach your contract with us we will sue you for loss of profits, did you? A No."

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As Mrs Brooks did not **actually** foresee such loss arising, the defendant, an inexperienced youth, could hardly have done so.

Yet could or might the parties **presumptively** have foreseen that the type of loss now claimed (which ordinarily in law is regarded as too remote to be recoverable) in the special circumstances of their contract, would probably result from a breach by the defendant? In this regard the telling features are these.

First, Mrs Brooks believed that the defendant's services would become profitable to the plaintiff only after two years; for that reason, so she asserted, his contract was different from those entered into previously with other pilots. This is a *non sequitur*. The plaintiff was under a two-year contract. Upon its expiration he was free to leave, a contingency known to both parties. How then could it, or might it, have been reasonably foreseeable by either that special damages would probably flow from a breach by the defendant?

Second, the clause in the contract to which reference has been made, was such as to throw the defendant "off the scent". It laid stress on the considerable cost of training him to the requisite standard of proficiency. That was the type of loss in Mrs Brook's mind and to which the defendant was directed. It was what the plaintiff was then concerned about, and not loss of profits.

Third, it was admitted by Mrs Brooks that Regulation No 4.5 was known to all pilots entering the employment of the plaintiff. Clause 1 thereof laid down:

> "Management will dictate whatever aircraft types pilots will be required to fly. The cost of conversions and, if necessary, initial Instrument Ratings will be borne by the Company but subject to the following conditions:
>
> a. If a pilot leaves the Company, at his own request, before completing two years service, he will be billed for a proportion of the total cost. This will be calculated on the ratio of the number of months to serve to 24.
>
> b. Once a pilot has completed two years service, he will not tee charged for the flying training.
>
> c. The cost per hour will be at staff rates which is 50% of the prevailing charter cost."

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This was a special circumstance present to the minds of Mrs Brooks and the defendant at the inception of the contract. It points firmly away from loss of profits presumptively being in their contemplation as a probable consequence of a breach of the contract by the defendant.

In sum, the evidence of Mrs Brooks made it impossible to find any chance of either party presumptively foreseeing, on breach, the type of loss sought to be recovered by the plaintiff in its action.

Thus, even on this less rigorous test I am satisfied that the learned trial judge was correct in allowing the application for absolution.

Accordingly the appeal must be dismissed with costs.

Korsah JA: I agree.

Ebrahim JA: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

Byron Venturas & Travlos, respondent's legal practitioners

BHAZUWERE v MUNENE 1994 (2) ZLR 351 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

8 & 17 November 1994

Flynote

Delict - actio injuriarum - breach of promise to marry - whether action still exists in general or customary law - relevance of type of marriage promised - defences - when promiser entitled to repudiate promise

Contract - engagement - breach of contract - whether action still exists in general or customary law - grounds on which promise to marry may be repudiated

Headnote

Although the action under the common law for a breach of promise to marry is not favoured in modem times and has been abolished in most jurisdictions in the world, it still exists in our law. A woman who has reached majority, and who has proper grounds, may sue under the general law of Zimbabwe for breach of promise to marry, whether the promised marriage was a customary union or a civil marriage under the Marriage Act [*Chapter 37*]. There may be a difference in the *quantum* of damages that may be awarded, depending on the nature of the

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marriage promised.

Semble, that failure by the woman to tell the man that she had previously had a child by another man could amount to *justa causa* for repudiating the promise to marry.

Cases cited:

Katekwe v Muchabaiwa 1984 (2) ZLR 112 (S)

Guggenheim v Rosenbaum (2) 1961 (4) SA 21 (W)

Bull v Taylor 1965 (4) SA 29 (A)

McNALLY JA

Ngulube v Siziba HB-8-88

Five v Mbambo 1953 SRN 613

Mupasiri v Maggie 1968 AAC 5

Mazarire v Magoronga 1992 (1) ZLR 282 (S)

Muparanyama v Mhuka S-242-92

T Hussein for the appellant

Respondent in person

Judgment

McNally JA: In the Magistrates Court, Mutare, the plaintiff sued the defendant for relief under three heads. First, she sought delictual damages of $3 000 on the grounds that he had had sexual intercourse with her against her will, resulting in the birth of a son (I imagine this was meant as a claim for seduction damages). Second, she sough/contumelious damages of $1 500 for breach of promise of marriage. Third, she sought an increase in the maintenance payable in respect of her son by an amount of $150 per month.

I do not know what happened about the maintenance claim. The magistrate did not refer to it in his judgment, and there is no appeal on that aspect. But he lumped the other two claims together and seems to have regarded them as a claim based on seduction. Since the plaintiff admitted she was not a virgin at the time of the intercourse, he dismissed the claim with costs. I should add that the evidence did not reveal a rape, but only an act of intercourse.

Presumably, therefore, the magistrate was treating the seduction claim as a claim under the general law, as opposed to the customary law, of Zimbabwe. Under customary law virginity is not relevant in a seduction claim, according to Goldin & Gelfand *African Law & Custom in Rhodesia* p 209. But, of course, under customary law it is the father or guardian of the woman who sues. He is the one who suffers diminution in *roora* or *lobola* as a result of the seduction.

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See Ncube *Family Law in Zimbabwe* p 32 para 2.2. Similarly, given that the plaintiff was over eighteen at the time, the father or guardian no longer had a right to sue: see *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (S).

Therefore, the magistrate was correct in assuming that a claim for seduction damages by a woman over eighteen had to be dealt with under the general law. Thus it followed that her admission of previous intercourse with another man destroyed her claim.

But her claim for damages for breach of promise to marry stood on another

McNALLY JA

footing. In her appeal, she accepts the dismissal of the claim based on seduction, but asserts that her claim for breach of promise to marry should not have been dismissed on the same basis. In this she is undoubtedly right.

The magistrate, perhaps confused by the unclear way in which the particulars of claim were formulated, treated the two claims as one, which was wrong.

But that does not mean that she must succeed. There are two points which were not adequately dealt with. One was raised by the defendant, the other is a question of law which was raised by this court in the course of the appeal.

The first point is this. The defendant's defence, if proved, is arguably a good one. He admits the sexual relationship, the birth of the child, and the promise (or at least intention) to marry. But he says he learned at a late stage something which the plaintiff had never told him before, namely, that she had previously had a child by another man. He considered this fact justified his repudiation of his promise to marry her. It was "just cause" for the repudiation. The point was not put to her clearly and properly, but she did admit that she was not a virgin at the time they first had intercourse. Such an admission often (though not always) implies an admission that a child was born of the earlier act of intercourse. The magistrate should make a ruling on this point, since it will be decisive of the breach of promise issue from the aspect of *justa causa*. See *Family Law in Zimbabwe* at p 36.

The second point is a legal one. The parties refer to *Guggenheim v Rosenbaum* 1961 (4) SA 21 and *Bull v Taylor* 1965 (4) SA 29 (A).

In addition the plaintiff refers to *Ngulube v Siziba* HB-8-88. These cases show that under the common law an action for breach of promise certainly exists. It is not favoured in modern times. Professor Ncube points out in his *Family Law in Zimbabwe* at p 35 n 49 that "in most jurisdictions in the world breach of promise actions have been abolished".

But it may be important to ask, and answer, the question "What kind of marriage are we talking about?" Did he promise to marry her in terms of the Marriage Act [*Chapter 37*], or was he talking about a customary law marriage?

We do not know the answer to that question, because no thought was given to it in the court *a quo*. But it may make a difference. Do we look to the common law or to the customary law for

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an answer to the question "Is a

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breach of promise to enter into a customary law union actionable at the instance of the woman jilted"? If we look to customary law then there is authority in the case of *Five v Mbambo* 1953 SRN 613 for saying there is no such action. And it has been held that Roman-Dutch law cannot be relied upon either - see *Mupasiri v Maggie* 1968 AAC 5. See generally Goldin and Gelfand *op cit* p 139.

On the other hand, Goldin and Gelfand go on to say that "tribal courts do in fact entertain actions for damages arising from a breach of promise". And this court has said, in *Mazarire v Magoronga* 1992 (1) ZLR 282 (S), that a claim for breach of promise by a woman should not be disallowed simply because the woman has not communicated the promise to her aunt. It is to be noted that the remark was *obiter* and that the question "what kind of marriage?" was not raised.

Again, in *Muparanyama v Mhuka* S-242-92, this court dealt with a breech of promise action, but in that case it was assumed, for two reasons, that the parties intended to apply common law. The one reason was the very fact that the action had been instituted in the magistrates court and not in the community court. The other reason was that the question of virginity was an issue. This is only relevant under the common law. But the point was not raised in this case either - "what kind of marriage was promised?"

One has to bear in mind that Goldin and Gelfand, writing before the new Legal Age of Majority Act 15 of 1982, were dealing with a situation entirely different from what we face now. The guardian was the plaintiff. The point is made by Professor Ncube *op cit* at p 38 that awards of damages are still being made (though it is not clear in the case cited whether it was the woman or her father who sued).

It seems to me, although without full argument I make no final ruling, that a woman who has reached majority, and who has proper grounds, may sue for breach of promise to marry, under the general law of Zimbabwe, whether the marriage promised was a customary union or a civil marriage under the Marriage Act [*Chapter 37*]. The only difference may be, and I do not say that it should be, in the *quantum* of damages.

Accordingly, in this case, the appellant has made out a *prima facie* case for damages for breech of promise to marry. For purposes of clarification, which may be relevant to *quantum*, it should be ascertained whether the marriage promised was a customary or a civil one. But prior to this the magistrate must

McNALLY JA

decide whether or not the defence of *justa causa* was established, as I have earlier indicated.

This is, therefore, a proper case for remittal in terms of s 20(1)(iv) of the Supreme Court of

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Zimbabwe Act 28 of 1981. In view of the turn of events, no order as to costs will be made.

Accordingly the following order is made:

1. The appeal is allowed to the extent that the order of the magistrate is set aside and the matter is remitted for the leading of such further evidence as the parties may desire, and for further consideration in the light of this judgment, either by the same or a different magistrate.

2. There will be no order as to costs.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Gargan Brothers & Chadder, appellant's legal practitioners

MUGABE & ANOR v LAW SOCIETY OF ZIMBABWE 1994 (2) ZLR 356 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Appeal against decision of Legal Practitioners Disciplinary Tribunal

24 October & 21 November 1994

Flynote

Legal practitioner - discipline - Disciplinary Tribunal - proceedings before - standard of proof required - disciplinary offence with criminal connotations - proof beyond reasonable doubt required - other disciplinary offences need only be proved on balance of probabilities - allegation of misappropriation of trust funds - offence which must be proved beyond reasonable doubt

Headnote

The burden of proof at disciplinary proceedings before the Legal Practitioners Disciplinary Tribunal varies with the gravity of the offence charged. Where the offence has strong criminal connotations, such as misappropriation of trust moneys, the burden is on the Law Society to prove its case beyond reasonable doubt. The fact that the legal practitioner concerned has already been convicted of a criminal offence would be regarded in the Tribunal as *prima facie* proof that he had in fact committed the offence. Where there has been no such conviction, nothing less than proof beyond reasonable doubt is required from the Society.

Where the offence bears no criminal connotation, such as an allegation of some breach of professional etiquette or other professional misconduct not involving an element of deceit or moral turpitude, the burden is the ordinary civil burden of proof on a balance of probabilities.

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In the present case, the appellants' trust funds showed a shortfall of over $38 000. Their financial records were in such a state of disarray that the auditors were unable to check the details. However, no book entry was established showing financial prejudice to any trust client. Accordingly,

KORSAH JA

it could not be said beyond reasonable doubt that theft or misappropriation had occurred, even though there was a suspicion of chicanery with the trust account. It could only be said with confidence that misappropriation had taken place if payment of amounts due had been called for and not made. Failure to maintain proper records of trust accounts is nonetheless a very serious offence, but even taking into account the over offences of which the appellants were guilty, it was not appropriate in this case to strike the appellants off the roll of legal practitioners and a lesser penalty would be imposed.

Cases cited:

Inc Law Soc of Tvl v C 1954 (4) SA 410 (T)

Pitluk v Law Soc of Rhodesia 1974 (2) RLR 245 (A); 1975 (2) SA 21 (RA)

Inc Law Soc v van Os 1906 TS 733

Hassim v Inc Law Soc of Natal 1977 (2) SA 757 (A)

Law Soc, Cape v Koch 1985 (4) SA 379 (C)

Olivier v Cape Bar Council 1972 (3) SA 485 (A)

Rheeder v Ingelyfde Wetsgenootskap van die Oranje-Vrystaat 1972 (3) SA 502 (A)

Chizikani v Law Soc of Zimbabwe 1994 (1) ZLR 382 (S)

Nyekete v Law Soc of Zimbabwe S-39-94 (not reported)

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

Inc Law Soc, Till v Visse & Ors 1958 (4) SA 115 (T)

J B Colegrave for the first appellant

J C Andersen SC for the second appellant

B D Brighton for the respondent

Judgment

Korsah JA: On 16 December 1993, the Legal Practitioners Disciplinary Tribunal (the Tribunal), upon application presented by the Law Society of Zimbabwe (the Society), declared the

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appellants guilty of unprofessional, dishonourable or unworthy conduct and ordered:

(a) that the names of the appellants be deleted from the Register of Legal Practitioners, Notaries Public and Conveyancers;

(b) that the appellants jointly and severally pay the costs of this application in terms of the High Court Tariff; and

(c) that the appellants jointly and severally pay the costs of the special audits of their trust account incurred by the applicant.

KORSAH JA

Aggrieved and dissatisfied with the findings of the Tribunal and the orders made consequent thereupon, the appellants lodged separate appeals challenging the conclusions arrived at by the Tribunal from the evidence placed before it, resulting in the imposition of penalties, which the appellants aver, are far more excessive than were warranted by the proven facts.

The facts are that the appellants and two other legal practitioners were in partnership as legal practitioners under the name and style of Mugabe Mutezo and Partners. The second appellant was admitted to practice on 25 February 1985, the first on 11 February 1987, and the other two practitioners in 1989 and 1991 respectively.

The partnership between the appellants was dissolved on 30 June 1993, after the other two practitioners had left it at the end of May 1993.

It was common cause that during the subsistence of the partnership, a copy of the audit certificate submitted by the partners in order to obtain a renewal of their Practicing Certificates for the 1993 calendar year and covering a period of twelve months immediately preceding 31 October 1992, revealed trust account shortfalls on the two dates that the accounts of the partnership were examined by their auditor, as follows.

In July 1992, the audit disclosed a shortfall of $49 505,19 in the partnership trust account. In October 1992, there was a shortfall of $36 657,49 in the trust account of the partnership. The audit certificate, however, intimated that "A cheque of $36 000 was deposited on the 7 December 1992 to clear the above shortfall and that no further work was done to determine the exact amount of the shortfall as at 7 December 1992".

Confronted with this remarkable audit certificate, the Secretary of the Society, in a letter of 15 January 1993, acting on the principle that trust shortfalls, unless otherwise explained, are *prima facie* evidence of misappropriation of clients' trust monies, not unnaturally sought from the partners an explanation as to how the shortfalls arose on each occasion, when the errors were first detected, when the shortfalls were corrected and what steps had been taken to ensure that such shortfalls did not arise again.

Receiving no response to his query from the appellants within fourteen days, the Secretary dispatched a reminder of his query on 1 February 1993, intimating that the appellants should respond immediately and also explain their tardiness in replying to his letter of 15 January 1993.

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When the Secretary

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was not favoured with an explanation as requested in his letters of 15 January and 1 February 1993, he informed the appellants in his fetter of 16 February 1993, that he was forwarding the papers to the Disciplinary Committee for consideration. In a letter dated 11 March 1993, the Secretary advised the appellants that the Council of the Law Society had directed that an audit of the partnership trust account be carried out by Messrs Deloitte & Touche in terms of s 14(2) of the Legal Practitioners Act and that the master tee referred to the Tribunal.

By 12 March 1993, the appellants had still not accorded the Secretary with the Courtesy of a reply. Whereupon the Society applied to the Tribunal alleging that the appellants and their two juniors were jointly and severally guilty of unprofessional, dishonourable or unworthy conduct in that they had misappropriated clients trust funds and/or had failed to keep proper books of account as required by the Legal Practitioners Act and the relevant Regulations and By-laws, and praying that their names be expunged from the Register of Legal Practitioners.

It would appear that the appellants were eventually propelled into action by the contents of the Secretary's letter of 11 March; for the second appellant, on behalf of the partnership, apologised profusely for their laches in a letter dated 22 March 1993, addressed to the Secretary. He indicated in that letter H at he had instructed their staff not to obstruct Deloitte & Touche in the conduct of the special audit of the partnership trust account.

The special trust account audit by Deloitte & Touche, dated 25 March 1993, revealed numerous monthly substantial shortfalls. Deloitte & Touche attributed these shortfalls to "under-banking" and "over-transfers". The report states:

> "2.1 Under-banking
>
> In numerous instances trust monies received were not banked intact ... We were unable to obtain a satisfactory explanation regarding the reason for the under-banked sums."
>
> Over-transfers
>
> We noted that funds are transferred to the business account without the appropriate bills being raised against the trust creditors. This has resulted in the funds being transferred in excess of the amount available for a particular trust creditor."

KORSAH JA

From these bald statements one cannot be accused of falling into error if one were to conclude that a misappropriation of trust funds is manifest. I shall, however, return to this aspect of the matter later.

On the issue of trust monies received not being banked intact, in contravention of By-law 70F of the Law Society of Zimbabwe (Amendment) By Laws, 1986 (No. 1) (SI 191 of 1986), Deloitte &

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Touche identified sixteen cases where this had occurred.

In an attempted explanation of the under-banking of trust monies, the appellants said, in their letter of 16 April 1993, to the Secretary:

> "The reason for the under bankings is that sometimes clients came to pay money for a fee deposit as well as for transport and subsistence. The money is receipted in Trust and if the journey has to be made there and then and there is not enough petty cash on hand, part of that money receipted representing amounts charged for travel and subsistence would be taken from the amount receipted and replaced the following day."

This may explain the smaller shortfalls in the sixteen cases identified, but it certainly is no answer for the larger shortfalls - in one instance of $3 164 and in another $8 540. The mind boggles at the suggestion that such shortfalls were for travel and subsistence.

After remarking elsewhere in their report that the records of the partnership were in such a state of disarray that they were unable to check the details to reconcile their higher shortfall of $156 357 in the trust account for the month of July with the lower figure of $49 505 reflected for the same month in the audit certificate submitted for the renewal of their practising certificates, Deloitte & Touche later observed that -

> "During the year to October 1992 the record of trust balances was not accurate and amounts owing tended to be overstated due to the fact that practice invoices for work done on behalf of trust clients were not debited to the relevant trust cards. This has lead to some overstatement of the amount of the shortfall each month. As a result of dais transfers made to the practice were not directly supported by invoices. A complete rebuild of all transactions during the year would be required in order to obtain accurate trust balance figures."

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The overall picture painted by Deloitte & Touche is that the accounts of the partnership were in such a mess that it was impossible to conclude positively that anything is amiss.

It was against this background of doubt and uncertainty, as to whether or not there had been misappropriation of client's trust monies that, by a letter dated 26 May 1993, one Collias Garande complained to the respondent that despite demand the appellants had failed to account to him since May 1992 for an amount of $1 132,90. The respondent's letter calling for an explanation of the complaint evoked no response from the appellants until 31 September 1993, in their opposing affidavit. The respondent also received a letter dated 21 July 1992, written by B B Wamambo, in which the writer complained that the appellants had failed to account to him despite demand for an amount of $1 052. The respondent's letter of 23 July 1992 and reminders of 3 September 1992 and 3 June 1993, calling for an explanation of the complaint, went unheeded. In a letter of 4 March 1993, Coghlan Welsh & Guest, on behalf of one Edson Kadzombe, complained to the respondent that the appellants had failed to account to their client for monies held by the appellants in trust pending transfer of certain property, notwithstanding that such transfer had taken place.

Against the backdrop of unexplained shortfalls in their trust accounts, the absence of explanations from the appellants, within a reasonable time, regarding the complaints levelled at them by Garande, Wamambo and Kadzombe in respect of the appellants' failure to account to them severally, despite demand, reinforced the suspicion that misappropriation of trust funds

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had indeed occurred, or, that the appellants had unlawfully withheld the payment of trust monies in contravention of s 23(1)(d) of the Act, and have, in any event, by their failure timeously to provide an explanation for their conduct, contravened s 65 of the By-laws.

As regards Garande's complaint, the respondent, in an opposing affidavit filed as late as 3 September 1993, proffered the explanation to the Tribunal that except for the sum of $1 132,90 which was withheld by the partnership until costs and commission had been calculated, all sums due to Garande had been paid. They averred that all Garande had to do was to go and see the appellants about the matter. And, in any case, nothing was due to him.

In relation to Wamambo the appellants explained that they paid the capital amount and costs which they recovered on his behalf to Wamambo and discovered that their legal fees were $94 more than the amount they held in

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trust for Wamambo. Wamambo was called upon to settle, and had settled, the outstanding account of $94. Nothing was due to him.

The appellants admitted, in respect of Kadzombe, in their letter of 23 March 1993, that they were holding an amount of $9 667,95 for him after all deductions and tendered payment of that amount either to him directly or to his new legal practitioners, but made payment to neither.

In a supplementary affidavit dated 22 September 1993, the appellants deposed that they overlooked a payment of $2 000 for the account of Kadzombe and that the amount they are holding for Kadzombe is, in fact, $11 667,55. This is not surprising, having regard to the fact that even Deloitte & Touche were unable to unravel the mysteries of the appellants' system of accounting. In any case, information about the extra $2 000, gratuitously offered without it having been solicited, appears to support the theory that this was a result of mathematical or accounting error arising out of their chaotic accounting system rasher then a desire to misappropriate Kadzombe's funds.

The appellants averred that the amount they admit holding on behalf of Kadzombe has not been paid because Kadzombe has commenced legal proceedings against them for the recovery of a larger amount, but tendered payment of $11 667,85 nonetheless.

In the interim, Deloitte & Touche, at the instance of the respondent, carried out a second special audit of the appellants' trust account in June 1993. In their report bearing the date 28 June 1993, Deloitte & Touche indicated that as at 31 May 1993 there was a shortfall of $158 604 in the trust account of the appellants, but by 21 June 1993, obviously before Deloitte & Touche embarked on their audit, an amount of $120 000 was transferred from the business account to the trust account of the partnership. Mathematically this should have resulted in the shortfall in the trust account being reduced to $38 604.

It was contended before the Tribunal that this was a paper shortfall, regard being had to the appellant's "blundering incompetence in accounting".

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Before us, Mr *Andersen* and Mr *Colegrave* contended that insofar as the Tribunal did not reject the appellants' explanation that Garande had been paid what was due to him; and the Tribunal did not doubt the assertion that Wamambo had to reimburse the appellants the sum of $94; and finally that

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the Tribunal accepted the appellant's version that Kadzombe had claimed more money than was due him, but found that payment for the money admittedly due should have been made; payment of the amount admittedly owing having been tendered and there being no explanation as to why Kadzombe's legal practitioners did not ask for it to be paid there and then, no case of misappropriation of trust funds has been made out against the appellants in respect of these three persons. Indeed, the Tribunal rightly did not make any finding that the monies of the three named persons had been misappropriated.

There thus remains the unexplained shortfall of $38 604 which appears in the second special trust audit carried out by Deloitte & Touche. This raises squarely the issue of the burden of proof in matters coming before the Disciplinary Tribunal of the Law Society.

It seems to me, from a perusal of the authorities, that the burden of proof varies with the gravity of the offence charged. Where the offence has strong criminal connotations the burden, as submitted by counsel for the appellants, is on the Society to prove its case beyond reasonable doubt. On the other hand, where the offence bears no criminal implication, the burden is the ordinary civil one of a balance of probabilities.

The law is succinctly stated by the learned author of *The Law of South Africa* vol 14 p 371 para 360 as follows:

> "In an application to strike an attorney from the roll for misappropriation of a client's money, proof of guilt beyond reasonable doubt is required from the Law Society."

The two cases cited by the learned author for this proposition are *Inc Law Soc of the Tvl v C* 1954 (4) SA 410 (T) at 412G-413C, and *Pitluk v Law Soc of Rhodesia* 1975 (2) SA 21 (RA) at 29A-D. The learned author advances as a requirement for this higher standard of proof, the reason that:

> "Proceedings of this nature against an attorney are proceedings of a highly penal character. They are very analogous to criminal proceedings."

In support of this statement the learned author refers us to *Inc. Law Soc v van Os* 1906 TS 733 at 739. He, however, cautions that:

> "Disciplinary proceedings are in the nature of civil proceedings. *Hassim* (also known as *Essack*) *v Inc. Law Soc of Natal* 1977 (2) SA 757 (A)",

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notwithstanding that a higher standard of proof is demanded of the Society where it prefers charges that impute criminal conduct and the fact of an attorney's conviction of a criminal offence is regarded as *prima facie* proof that he had in fact committed the offence. In the instant case, there is no such conviction of the appellants and nothing less than proof beyond a reasonable doubt is required from the Society.

The learned author ends para 360 *supra* with the statement that:

> "If the allegation goes no further than alleging some breach of professional etiquette, then proof of that allegation need only be on a balance of probabilities: *Pitluk v Law Soc of Rhodesia supra*."

Counsel for the Society drew our attention to a conflict between the approach of the courts in South Africa and that of the courts in Zimbabwe regarding the onus of proof at disciplinary proceedings. BAKER J in *Law Society, Cape v Koch* 1985 (4) SA 379 (C), relying on the decisions in *Olivier v Cape Bar Council* 1972 (3) SA 485 (A) and *Rheeder Ingelyfde Wetsgenootskap van die Oranje-Vrystaat* 1972 (3) SA 502 (A) held that, in all civil cases or cases civil in character, such as disciplinary proceedings of tribunals before which the appellants appeared, proof on a balance of probabilities was the applicable measure of proof.

In *Pitluk v Law Soc of Rhodesia supra*, even though *Olivier's* case *supra* was brought to the attention of the court, BEADLE CJ at p 29B-D reflected that:

> "I think, however, that in order to remove any difficulty in deciding whether an allegation involves professional misconduct *simpliciter* or where an allegation involves an element of deceit or moral turpitude of a high order some indication should be given as to where to draw the line."

The learned CHIEF JUSTICE then advised.

> "The line, I consider, can appropriately be drawn between those allegations which might make the accused liable to criminal prosecution and those which might not. For example, if the allegation against the attorney was that he had embezzled trust funds, that allegation should be proved beyond a reasonable doubt, but if the allegation went no further than alleging some breach of professional etiquette, then proof of that allegation need only be proved on a balance of probabilities."

KORSAH JA

This view, expressed by the learned CHIEF JUSTICE, represents the law of Zimbabwe in respect of the issue of onus in proceedings such as that under consideration, whatever the law in South Africa on this subject may be. Misappropriation of trust funds attracts the striking off the Register the name of a legal practitioner: *Chizikani v Law Soc of Zimbabwe* 1994 (1) ZLR 382 (S). It would be grossly unfair to condemn a man and punish him for an offence of a criminal nature on the balance of probabilities rather than evidence which established the commission of the offence beyond a reasonable doubt.

Reverting then to the shortfall of $38 604, there was no evidence before the Tribunal that the trust funds of any client of the partnership was missing. The evidence was that such was the disarray in which the legal practitioners' records were that Deloitte & Touche were disabled from checking the details. The Tribunal accepted that the appellants' records were unreliable.

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Of this apparent shortfall in the trust accounts the Tribunal had this to say:

> "While it has been urged upon us that no trust money was actually stolen an inference must surely be drawn that this is the case ... The inescapable impression created by all this is that the first two respondents did not bother to keep their books in order because their misappropriation would have been much easier to pick up, both by their clients and the auditors, ... We, therefore, find that the shortfalls were not paper shortfalls but there was in all this chaos misappropriation of trust funds."

I must confess that my reading of the record left me with the impression, advocated by the Tribunal, that there had been some chicanery with the trust account, and that the chaotic accounting system may have been created as a cover-up. But the record is bereft of cogent evidence in support of this suspicion. In this connection, it is pertinent to note that the issues of onus and standard of proof were never canvassed before the Tribunal. The conclusion based on "the inescapable impression" suggests that the Tribunal employed the lower standard of proof of a balance of probabilities to find that misappropriation, an offence with criminal connotations, had actually occurred.

The strangest thing about this apparent shortfall of $38 604 is that the auditors could not link the amount to shortfalls in oust account or accounts of any specific client or clients, nor has any client come forward to claim that the partnership owed him money which has not been paid on demand.

KORSAH JA

True, such shortfall may in practice have little to do with actual theft of a particular client's trust monies, but this is a far cry from the proposition that there has been no general misappropriation of funds, if such be proved beyond a reasonable doubt.

Mr *Brighton* conceded that there was no theft as found by the Tribunal, but contended that if one borrows from trust accounts for unauthorised purposes it is theft. He cited s 13 of the Legal Practitioners Act, which requires that the whole of trust monies received from a client must be paid intact into the trust account without deductions. He argued that, even on the explanation proffered by the appellants, they were guilty of theft because the shortfall of $158 000 in the trust account, before being reduced by the deposit of $120 000 paid in from the business account, is the amount that should be looked at as having been misappropriated and not the resultant apparent shortfall of $38 000.

It is not outside the realms of possibility that such a shortfall reflects accurately a misappropriation of trust monies, but then again, regard being had to the chaotic system of accounting by the appellants and the absence of an unmet demand by a trust client, there may be only a paper shortfall in the trust account. We simply do not know. Without specific evidence linking the apparent shortfall to monies supposed to be held in trust for a client or clients, it seems to me, suspicious as it may seem, a charge of misappropriation was not made out beyond a reasonable doubt. To put it another way, no book entry to the financial prejudice of any trust client having been established, the finding of theft or misappropriation cannot be sustained.

As rightly submitted by Mr *Andersen*, it could only have been said with confidence that

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misappropriation had taken place if payments of amounts due had been called for and not made: *Nyekete v Law Soc of Zimbabwe* S-39-94 at p 4; *Chizikani v Law Soc of Zimbabwe supra* at p 9; *S v Harper & Anor* 1981 (2) SA 638 (D) at p 671B-C. There was insufficient evidence to support a charge of misappropriation. Accordingly, the finding by the Tribunal that the appellants misappropriated trust funds cannot be allowed to stand.

The charges against the members of the partnership were, as summarised by Mr *Andersen*:

(a) misappropriation or failure to keep proper records of trust accounts;

(b) failing to reply to correspondence from the Law Society timeously;

(c) improper conduct with regard to three clients;

KORSAH JA

(d) an improper claim for costs;

(e) failure to pay fees to the Deputy Sheriff and the messenger of court,

(f) a charge against the second appellant arising from a judgment of the Supreme Court in which an order was made for him to bear the costs *de bonis propriis*.

It was conceded by counsel for the appellants, in the face of the overwhelming evidence from the auditors, that the trust account was not properly maintained. I, however, do not subscribe to the view that the Tribunal overstated the seriousness of the situation. If trust accounts are not properly maintained in keeping with the provisions of s 13 of the Act, then the protection which the Society intends to afford the public will be eroded to the disadvantage of the Society.

I am of the view that there was incontrovertible evidence on record in support of the finding that the appellants had unreasonably failed to reply to correspondence from the Secretary timeously in breach of s 65 of the By-Laws (SI 314 of 1982).

The Tribunal made no adverse finding against the appellants in respect of the charge of improper conduct with regard to three named clients after they had proffered an explanation of their conduct, except a finding that the amounts admitted by the appellants to be due to Kadzombe should have been paid. Why that amount was not paid has been dealt with earlier in this judgment. It was because of the confusion in their system of accounting and not because of misappropriation.

The appellants accepted that they made a demand in respect of costs which had not been taxed and admitted acting improperly because it was not indicated by them that the amount claimed was an assessment. The matter was, however, resolved and no prejudice resulted therefrom.

In respect of the charges for delay in making payments to the Deputy Sheriff and to the messenger of court Kadoma and Harare, counsel for the appellants submitted that the Tribunal appeared to have accepted that, standing on its own, this charge was not serious enough to

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warrant disciplinary action. The Tribunal, however, expressed surprise that disbursements which were for the account of trust clients were not met timeously. The reason, again, can be ascribed to the chaotic condition of their trust account.

KORSAH JA

Lastly, notwithstanding order of this court to pay costs *de bonis propriis* and not to recover any p in of any costs of disbursement in case Nos 1104/91 and 2330/91 from his client, the second appellant issued a cheque on the partnership trust account settlement of counsel's fees and, furthermore failed to report the matter to the respondent as required by s 65A of the By-laws.

Mr *Andersen* submitted in respect of these infractions by the second appellant that his explanation that he failed to notify the Society of the special order against him because this court had directed that the order be served on the Society was not rejected by the Tribunal; nor was his explanation, that the fees were paid as a matter of routine from trust funds, turned down. Mr *Andersen* submitted that in the result it is not disputed that the second appellant had acted improperly, but that the default was a technical one not deserving of serious censure.

I entertain not the slightest doubt that, although the appellants sailed perilously close to the wind, but for the finding that the appellants had misappropriated trust funds, the Tribunal would not on any one of the other charges, taken in isolation or cumulatively, have ordered that their names be struck off the Register of Legal Practitioners. Having come to the conclusion that the finding of the Tribunal that the appellants had misappropriated trust funds was not justified on the evidence placed before it, this court is at large to reconsider the penalty to be imposed.

The appellants' failure to maintain proper records of trust accounts is a very serious offence. That a shortfall in trust funds is accepted as *prima facie* evidence of misappropriation is indicative of how the failure to keep proper books of accounts may result in a practitioner's name being deleted from the Register of practitioners.

BOSHOFF J in *Inc Law Soc, Tvl v Visse & Ors* 1958 (4) SA 115 at 123B expressed the view that:

> "Though there may be in the books an undigested mass of figures from which it may be possible to find out something about the condition of the trust account, there is no keeping of proper books in a business sense ... The particulars and information of trust moneys must therefore be contained in the narrative of the entries of the books of account and it should not be necessary to resort to documents and files to obtain such particulars and information."

KORSAH JA

This was the standard which the appellants failed to observe and which rendered it impossible for Deloitte & Touche to complete a proper audit.

In *Visse*'s case *supra* there was proof of misappropriation which resulted in the removal of the name of the practitioners from the roll. The appellants are fortunate that in all the evidence

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accumulated against them none has gone far enough, except only to raise a suspicion, to establish beyond a reasonable doubt that there has been a misappropriation of trust funds.

Although the appellants conducted their trust accounts in a most bizarre manner and failed to accord due regard to the Secretary of the Society, it is impossible to say that either of them, on the facts placed before the Tribunal, acted dishonestly, and was deserving of his name being struck off the Register of Legal Practitioners. But an appropriate sentence taking into account their failure to keep proper accounting systems must be imposed.

In the result, the appeal succeeds to this extent.

The order that the names of the appellants be deleted from the Register of Legal Practitioners, Notaries Public and Conveyancers, is hereby set aside. In its place is substituted the following:

(a) Each of the appellants is to pay a fine of $4 000 to the Law Society.

(b) Each of the appellants is suspended from practice for one year, the whole of which is suspended for three years on condition that, during the period of suspension, (i) each of them does not fall foul of keeping proper records of his trust account; (ii) each of them submits to a special audit by accountants appointed by the Society every six months, the cost of which audit shall be borne by each appellant; and (iii) each of them pays the fine of $4 000 on or before 28 February 1995.

(c) The order that the appellants jointly and severally pay the costs of the application before the Tribunal in terms of the High Court tariff is to stand.

(d) The order that the appellants jointly and severally pay the costs of the special audits of their trust accounts incurred by the Society is to stand.

(e) Each party is to bear his own costs of this appeal.

KORSAH JA

I am indebted to all three counsel in this matter, whose diligent researches and persuasive submissions were of immense assistance to me in arriving at these conclusions.

Gubbay CJ: I agree.

McNally JA: I agree.

Gula-Ndebele & Manase, appellants' legal practitioners

Honey & Blanckenburg, respondent's legal practitioners

CHIVERO & ORS v MUDZIMU UNOYERA APOSTOLIC CHURCH 1994 (2) ZLR 371 (SC)

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Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Appeal against judgment by consent

28 November 1994

Flynote

Appeal - judgment by consent - not a decision against which appeal may be made

Practice and procedure - judgment - by consent - not appealable

Headnote

Where a defendant in a magistrates court consents to judgment, the order granted by the magistrate is, essentially, a record of the agreement between the parties. It is not a judgment which requires the court to make any findings of facts proved. For a notice of appeal to be valid, it must specify the findings of fact or rulings of law appealed against. This is not possible where judgment is given by consent. Consequently, no appeal may be made against such a judgment.

Case cited:

Thambi v Stralka NO & Anor 1946 TPD 297

Appellants in person

H Simpson for the respondent

Judgment

Gubbay CJ: On 11 December 1992, the respondent instituted action in the magistrates court for the eviction of the three appellants from Bretton Farm, in the district of Mazowe. The appellants filed a plea and, eventually, the action was set down for hearing on 14 and 15 April 1994.

On the first day of the trial, and after the respondent's witness Mr Lancelot

KORSAH JA

Changa had testified, the parties apparently effected a settlement. The magistrate issued the following order:

> "By consent: The defendants to leave Bretton Farm by 14 July 1994. This serves as a period to harvest and shift, but they are not obliged to attend church. No party is allowed to antagonise the other during this period.?"

On 25 April 1994, a notice of appeal was filed. The ground specified was that one Enock Muchenje was not the owner of the church and thus not entitled to evict the appellants from Bretton Farm.

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The question to be decided is simply whether a defendant, who has consented to judgment being entered against him in the magistrates court, may then appeal against that judgment.

Section 41(2) of the Magistrates Court act [*Chapter 18*], as presently relevant, provides that, save where prior to the commencement of the hearing the parties lodge with the court a written agreement that its decision shall be final, an appeal to the Supreme Court shall lie against:

> "(a) any judgment of the nature described in sections *nineteen* and *forty*;
>
> (b) any rule or order made in such suit or proceeding and having the effect of a final and definitive judgment, including any order as to costs;
>
> (c) any decision overruling an exception when the parties concerned consent to such an appeal before proceeding further in an action or when it is appealed from in conjunction with the principal case or when it includes an order as to costs."

Section 19 refers to the various forms of judgment that may be granted, while s 40 deals with the power vesting in the magistrates court to rescind or vary a judgment granted by it, or correct any patent error therein. These provisions are not apposite.

Sections 82 and 83 of the South African Magistrates Court act 32 of 1944, contain provisions in virtually identical terms to those of s 41(2). So it is fair to assume that the South African Act was used as a model for Chapter 18. Consequently, the *dicta* of ROPER J in *Thambi v Stralka NO & Anor* 1946 TPD 297, concerning the precise point in issue, are pertinent. The learned judge said this at p 300:

KORSAH JA

> "It is clear that judgments contemplated in s 83(a) [our section 42(a)] are judgments given by a magistrate at the conclusion of a trial after the magistrate has considered the evidence; that subsection would not apply to a judgment by consent. It was not contended that the consent judgment fell under the provisions of s 83(b) [our s 42(b)]. These provisions in my opinion referred to decisions other than judgments falling under s 83(a). It is impossible to imagine any circumstances in which a party could appeal against a judgment by consent; he might have good grounds for setting aside or varying such a judgment but he would not and could not appeal against it."

I respectfully agree with this view. In further support thereof, I would draw attention to Rule 1(1) of Order 31 of the Magistrates Court (Civil) Rules 1980. This sets out that a magistrate must, within fourteen days, deliver a statement in writing of the facts found to be proved and his reasons for judgment. But for a judgment by consent there can be no finding of facts proved. And a notice of appeal, to be valid, must also specify the findings of fact or rulings of law appealed against. This is not possible where the judgment was given by consent.

In sum, where a defendant has consented to judgment, the order granted by the magistrates court is, in essence, merely a record of the agreement between the parties. It is not a judgment against which a party may appeal.

For these reasons the appeal must be struck off the roll. There will be no order as to costs as none was sought by the respondent.

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Korsah JA: I agree.

Muchechetere JA: I agree.

Chirunda, Chihambakwe & Partners, respondent's legal practitioners

RUTURI v HERITAGE CLOTHING (PVT) LTD 1994 (2) ZLR 374 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Appeal against decision of Labour Relations Tribunal

22 November & 1 December 1994

Flynote

Employment - contract - termination - agreement - Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 - s 2(1)(b) - provision that no employer may terminate contract of employment with an employee unless he and employee mutually agree in writing - letter from employer telling employee that his services were terminated and that employee should collect terminal benefits - not a compliance with s 2(1)(b)

Employment - contract - breach - unlawful termination of contract - remedy - damages - award of two years' back pay awarded as "damages" - where damages awarded, necessary to quantify amount

Headnote

The respondent company used to employ the appellant. Following a reorganization of the company, the general manager wrote to the appellant, advising him that it had been decided to terminate his contract of employment. The appellant was told to leave the company's premises and to return to collect his terminal benefits at the end of the month. He did so but subsequently brought an action in the Labour Relations Board for wrongful dismissal. The Board held that, by implication or otherwise, he had consented to the termination of his contract of employment.

On appeal, the Labour Relations Tribunal allowed the appeal, holding that in the circumstances the acceptance by the appellant of his terminal benefits did not constitute acceptance to termination of the contract and that in any case there had been no mutual agreement in writing, as required by s 2(1)(b) of the Labour Relations (General Conditions of

KORSAH JA

Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985). In considering what remedy to grant, the Tribunal accepted that reinstatement was not appropriate in this case and held that the appellant could only be compensated by an award of damages. The award was expressed as an order to compensate the appellant by an award of salary back payments

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for two years. When the respondent queried she order, the Tribunal amended it to convey that damages equivalent to two years' back pay were being awarded.

The appellant appealed to the Supreme Court against the Tribunal's decision not to grant back pay in addition to damages, while the respondent cross appealed, challenging (i) on a variety of grounds, mostly factual, the finding that the employee had not consented to the termination of the contract; and (ii) the propriety of the award of damages in the absence of evidence.

Held, that an appeal from the Tribunal could only be on questions of law and that there were only two questions of law before the court: (i) whether the letter written by the respondent to the appellant complied with the provisions of s 2(1)(b) of the Regulations; and (ii) whether the decision to award damages, unsupported by evidence, was a decision no reasonable tribunal could arrive at.

Held, further, that the general rule is that if the law requires an agreement to be in writing, it implies that the writing is to bear the signatures of both parties. There was no warrant to construe s 2(1)(b) any differently from the general rule. The use of the word "mutually" underlined the requirement that the assent of the parties to the termination of the contract must appear *ex facie* the document. The letter from the respondent to the appellant fell far short of complying with s 2(1)(b). Consequently, the Tribunal's decision in this respect was correct.

Held, further, that no evidence was led as far as the award of damages was concerned. While it would have been entirely within the Tribunal's discretion to award damages only and not make an award of back pay as well, it was necessary for the Tribunal to hear evidence in order to assess the damages. It was not proper for it to relate the damages to two years' back pay without even specifying the amount. The award would be set aside and the matter reknitted to the Tribunal to determine the issue of damages in the light of any evidence the parties were disposed to adduce before it.

Cases cited:

Commercial Careers College (1980) (Pvt) Ltd v Jarvis 1989 (1) ZLR 344 (S)

GUBBAY CJ

Muzuva v United Bottlers (Pvt) Ltd 1994 (1) ZLR 217 (S)

PG Merchandising (Pvt) Ltd v Dhliwayo S-178-94

Pooley v Driver (1876) 46 LJ Ch 466; 5 ChD 458

In re *New Eberhardt Co*, ex p *Menzies* (1889) 43 ChD 118 (CA)

Richmond v Crofton (1898) 25 SC 183

Poole & McLennan v Nourse 1918 AD 404

R v Birmingham Comp Appeal Tribunal, ex p *Road Haulage Executive* [1952] 2 All ER 100

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(QB)

Livestock & Meat Industries control Bd v Garda 1961 (1) SA 342 (A)

Art Corp Ltd v Moyana 1989 (1) ZLR 304 (S)

I E G Musimbe for the appellant

S Hwacha for the respondent

Judgment

Gubbay CJ: On 9 February 1994, the Labour Relations Tribunal ("the Tribunal") heard an appeal against the determination of the erstwhile Labour Relations Board that the appellant ("the employee") by implication, or otherwise, had consented to termination of his contract of employment with the respondent ("the company").

In its decision of 30 March 1994, the Tribunal allowed the appeal with costs and set aside the determination of the Board. It found that, in the particular circumstances, the acceptance by the employee of salary in lieu of notice and terminal benefits, did not constitute consent to termination of the contract of employment; and that, in any event, there was no mutual agreement in writing by the employee and the company to that effect, in compliance with s 2(1)(b) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 ("the Regulations"). In considering what remedy to afford the employee, the Tribunal noted that it was common cause that reinstatement, or employment in a job, was inapposite as there was no prospect of restoring a normal employer-employee relationship. See *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344 (S) at 349F-G. It held that the employee "can only be compensated by way of an award of damages" and that "substantial damages as would ameliorate (the employee's) suffering would be appropriate"; and proceeded to express the award in these words:

> "That (the company) be and is hereby ordered to compensate (the employee) by an award of salary back payments for a period of two years."

GUBBAY CJ

This formulation raised some doubt as to whether the Tribunal was awarding "back-pay" in terms of s 112(1)(a) of the Labour Relations Act 1985, or "an amount of damages" pursuant to the proviso to s 112(1)(c), equivalent to the employee's salary for a period of two years.

On 11 April 1994, and in consequence of a query by the employee, the Tribunal amended part of its order so as to convey that **damages** equivalent to salary back payments for a period of two years were awarded to the employee.

The decision not to grant back-pay, in addition to damages, in the main prompted the noting of an appeal by the employee. There were also a number of other inconsequential complaints. The company, too, felt aggrieved. It noted a cross-appeal in which it challenged: (i) upon a variety of grounds, mostly factual, the finding that the employee had not consented to

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termination of the contract of employment; and (ii) the propriety of making an award of damages in the absence of any evidence pertaining thereto having been adduced.

It is apparent from the manner in which both these notices were framed that little, if any, attention was directed to s 108(2) of the Labour Relations Act which, as from 1 January 1993, only allows an appeal from the Tribunal to the Supreme Court on a question of law. See, generally, *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S).

In the event, there were only two questions of law properly before this court for adjudication: first, whether the letter of 31 March 1989, written by the company to the employee, met the requirements of s 2(1)(b) of the Regulations; and, second, if it did not, whether the decision to award damages, unsupported by evidence, was one which no reasonable tribunal could arrive at. See *PG Merchandising (Pvt) Ltd v Dhliwayo* S-178-94 at p 3.

Lest there be any misunderstanding in the mind of the employee, I would indicate at this stage that the decision by the Tribunal not to grant back-pay in terms of s 112(1)(a) of the Act must be seen in the light of its decision to award damages. In other words, the Tribunal unquestionably considered that an award of damages **alone** would compensate the employee adequately for the unlawful termination of his contract of employment. That approach, in my view, cannot be criticised as an improper exercise of a judicial discretion and so does not give rise to an error of law.

The historical facts are short and unremarkable. The employee entered the

employment of the company on 2 November 1981 in the capacity of pattern maker-designer. Within six months he was promoted to design manager.

On 1 March 1989, the entire shareholding of the company was sold, thereby passing its control into over hands. Following upon this change, the new management decided that the employee was no longer to be retained as design manager but was to be employed in the design department, albeit at a slightly increased salary. This demotion in status was not acceptable to the employee. He complained about it to the National Employment Council for the Clothing Industry.

On 20 March 1989, the general manager of the company wrote to the Ministry of Labour advising, for reasons which he specified, that it had been decided to terminate the employee's contract of employment. This letter was not, and was not intended to be, an intimation that the employee had been suspended. Nor was it an application to a labour relations officer for an order or determination terminating the contract of employment. On the same day, the employee was told to leave the premises of the company and to collect his terminal benefits at the end of that month.

On 31 March 1989, the employee returned as instructed. He was handed a letter from the chief executive of the company, together with a cheque. The letter read:

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> "It is with regret that we advise your employment with this company will terminate on 31 March 1989. Enclosed please find a cheque covering one month's pay in lieu of notice and the leave pay due to you as at 31 April [*sic*] 1989."

Section 2(1)(b) of the Regulations provides:

> "(1) No employer shall, summarily or otherwise, terminate a contract of employment with an employee unless -
>
> ...
>
> (b) he and the employee mutually agree, in writing, to the termination of the contract ..."

The issue to be resolved is whether the phrase "mutually agree, in writing" evinces an intention on the part of the Minister of Labour, Manpower and Social Welfare, that termination is only lawful if the written agreement is signed by both employer and employee.

1994 (2) ZLR p379

GUBBAY CJ

Generally speaking, if the law requires an agreement to be in writing, it implies that the writing is to bear the signatures of the parties. See *Pooley v Driver* (1876) 46 LJ Ch 466 at 467 and 472; In re *New Eberhardt Co*, Ex p *Menzies* (1889) 43 ChD 118 (CA) at 130. In *Richmond v Crofton* (1898) 15 SC 183, the Supreme Court of the Cape of Good Hope was called upon to interpret an enactment which provided that "no contract of service made elsewhere than within the limits of the Colony shall be of force within the Colony, except the same shall have been made in writing". The document had been signed only by the employee in England. MAASDORP J held that it was not a written contract at all. He said at 189:

> "A contract of service being a bilateral contract requires the mutual consent of the parties thereto, and in case there is to be a written contract it cannot, it seems to me, be said to have been fully executed until the consent of the parties has been expressed by their signature upon the document or documents constituting the written contract. An instance of a contract required to be in writing is given by our writers in case of a contract of sale, where it is agreed that the sale shall not be taken to be concluded until the agreement has been reduced to writing. In that case they say the parties are not bound until the written contract has been fully executed for which purpose they say the signatures of the parties is essential."

DE VILLIERS CJ at 187-188 and BUCHANAN J at 188 concurred in separate judgments. See, also, *Poole & McLennan v Nourse* 1918 AD 404 at 416; Wessels' *Law of Contract* in South Africa vol I para 1769; Wille's *Principles of South African Law* 8 ed at p 426.

In my opinion, there is no warrant to construe s 2(1)(b) any differently from the general rule. In the context, the use of the word "mutually" is significant. It underlines the requirement that the assent of the parties to the termination of employment must appear *ex facie* the document. Put otherwise, that without the need to go beyond or outside the document the existence of an agreement to terminate is reflected. The document must stand on its own feet. It must constitute the sole permissible evidence of termination.

Clearly, on this test, the letter of 31 March 1989, which was not signed by the employee, and was not intended to be, falls far short of complying with s 2(1)(b) of the Regulations. It merely expressed a unilateral termination by the company of the employee's contract of employment.

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For the sake of completeness, I must add that, in any event, the finding of the

GUBBAY CJ

Tribunal that the employee had not tacitly agreed to termination by accepting his salary and other benefits, being one of fact, is not open to challenge in this court.

Insofar as the award of damages is concerned, it is apparent that no evidence was at any stage adduced. The Tribunal did not have recourse, as it ought to have, to s 18(1) of the Labour Relations (Settlement of Disputes) Regulations 1993 (SI 30 of 1993), which empowers it to require any witnesses to give evidence on oath or affirmation. In fairness, I point out that it was not requested to do so by the employee's legal representative. He simply confessed to the Tribunal that he had not anticipated having to deal with the issue; and then suggested that an amount of damages equivalent to three years' back-pay and other benefits would suffice. Counsel for the company, on the other hand, contended that the absence of evidence from the employee made it impossible for the Tribunal to assess the damages. No *quantum* had been proved. The position was akin, so he said, to a civil ranting absolution from the instance. The remarks of the Deputy Chairman passed at the hearing give the few impression that he shared this latter view.

It may be that after reserving judgment the Deputy Chairman became persuaded by the other two members to award damages. Be that as it may, relying on certain allegations addressed in argument on behalf of the appellant, which the company had not been afforded the opportunity to counter, and for which proof was lacking, the Tribunal proceeded to relate the measure of damages to two years' back-pay without even specifying the amount as mandated by the proviso to s 112(1)(c) of the Act.

For these reasons, the award must be set aside, for to quantify damages, or indeed make any finding, on no evidence, is to err in law. See *R v Birmingham Compensation Appeal Tribunal*, Ex p *Road Haulage Executive* [1952] 2 All ER 100 (QB) at 101F; Wade *Administrative Law* 6 ed at p 320; de Smith *Judicial Review of Administrative Action* 4 ed at p 133.

It is now necessary to consider whether, with respect to the issue of damages, this court should exercise its power of remittal under s 20(1)(b)(iv) of the Supreme Court of Zimbabwe Act 1981. In essence, the decision turns on fairness to both sides. See *Livestock & Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349G.

Remittal to the Tribunal will inevitably be the quickest and least expensive manner of determining the measure of damages due to the employee. I do not

GUBBAY CJ

perceive any prejudice being caused the company by the adoption of that procedure. The issue of damages remains alive. It is not *res judicata*. Even if remittal is not ordered, the employee remains at liberty to institute a civil action for damages for wrongful dismissal in another forum.

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See Art *Corporation v Moyana* 1989 (1) ZLR 304 (S) at 313E-F.

Finally, in regard to costs, it seems to me that both parties have achieved equal success The employee has had the decision of the Tribunal that he had not agreed in writing to termination of the contract of employment upheld; and the company the award of damages against it set aside. In the circumstances, it is eminently equitable that neither should recover the costs of the appeal or cross-appeal.

In the result I would make the following order:

1. The appeal and cross-appeal against the decision of the Labour Relations Tribunal are dismissed, save to the extent that the issue of damages to be awarded to the employee is remitted for determination in the light of any evidence either he, or the company, is disposed to adduce before it.

2. No order as to the costs of the appeal or cross-appeal is made, but the order for costs in respect of the proceedings before the Tribunal is to stand.

Korsah JA: I agree.

Ebrahim JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

MUNHUWA v MHUKAHURU BUS SERVICES (PVT) LTD 1994 (2) ZLR 382 (HC)

Court **High Court, Harare**

Annotations Link to Case Annotations

Chatikobo J

Application for absolution

14-17 November & 7 December 1994

Flynote

Contract - depositum - nature of contract - arrangement whereby one person left his vehicle at another person's premises while he arranged for repairs to be done - no fee charged for the parking of the vehicle - not a contract of depositum - owner of premises not liable for safety of vehicle

Practice and procedure - absolution from instance - application - when should be granted - allegation by plaintiff that defendant removed parts from vehicle left at defendant's premises - no satisfactory proof of amount of damages - order of absolution granted

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Headnote

The plaintiff claimed damages in the sum of $233 731, being the value of spare parts which he claimed were wrongfully removed from his bus by the defendant's agents. He had left his bus, which was defective and could not be driven, at the defendant's premises while he looked for a mechanic to repair it. An employee of the defendant had shown him where to park the bus. The plaintiff was told that he was not expected to pay for parking his bus at the defendant's premises. He claimed that the arrangement constituted a contract of *depositum*, in terms of which the defendant was obliged to ensure that the bus was kept safe.

The plaintiff also claimed that while the bus was at the defendant's premises, a period of about two years, agents of the defendant removed various parts from the bus to use on the defendant's own fleet of buses. In proving the value of the parts which had been removed, the plaintiff led evidence of the value of new parts at least a year after the period in

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CHATIKOBO J

question, but admitted that some of the replacement parts he had bought were secondhand.

The defendant applied for absolution from the instance.

Held, that the essence of the contract of *depositum* involved the delivery of something to be kept, which denoted an undertaking by the depositary to retain and have charge of something, not merely an acquiescence that something may be left somewhere. In this case, there was no arrangement for payment nor could any term be implied into the arrangement that the defendant would ensure the safety of the plaintiff's bus. It was one thing to allow the plaintiff to park his bus there, but another for the defendant to ensure its safety.

Held, further, that the defendant was particularly well placed to answer the plaintiff's accusations that the defendant's servants removed parts from the plaintiff's bus. In normal circumstances this could be sufficient for the court to find for the plaintiff in the absence of an explanation. However, the evidence as to the value of the spares was confusing and not sufficient to ward off an application for absolution. Accordingly, absolution would be granted.

Cases cited:

Supreme Svc Sin (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd 1971 (1) RLR 1 (A)

DD Tpt (Pvt) Ltd v Abbot 1988 (2) ZLR 92 (S)

Adler v Elliot 1988 (2) ZLR 283 (S)

Min of Posts & Telegraphs v Daddy Bros & Anor 1965 (3) SA 394 (E)

Smith v Min of Lands & Natural Resources 1979 RLR 421 (G); 1980 (1) SA 565 (R)

Empire Car Park v Michael 1952 (3) SA 374 (T)

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T L Murigani for the plaintiff

G C Chikumbirike for the defendant

Judgment

Chatikobo J: This is an application for absolution from the instance. It is axiomatic H at an application for absolution from the instance stands much on the same footing as an application for the discharge of an accused at the end of the State case in a criminal trial. This much is clear from the judgment of BEADLE CJ in *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A). At p 5 of that judgment the learned CHIEF JUSTICE stated the test thus:

> "The test, therefore, boils down to this: Is there sufficient evidence on

> which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact and cannot tee defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make - a definition which helps not at all."

The plaintiff's claim is for the payment of the sum of $233 731,61, being the value of spare parts which he claims were wrongfully removed by the defendant's agents from his bus registration number 445-885G. His cause of action appears in paras 3, 4 & 5 of the declaration in which the following averments are made:

1. That the plaintiff and defendant concluded a verbal agreement in terms of which the plaintiff was allowed to park his bus on the defendant's premises.

2. That it was an implied term of the oral agreement that defendant would ensure that the plaintiff's bus was kept safe.

3. That in breach of that agreement, the defendant, through its agents, and without the plaintiff's consent, removed various parts from the bus.

In its plea the defendant admits that there was a verbal agreement in terms of which the plaintiff was allowed to leave his bus on its premises. It says the bus was defective and could not tee driven. It denies that the oral agreement contained an implied term as alleged by the plaintiff and states that the bus was left on its premises at plaintiff's risk.

At the end of the plaintiff's case, Mr *Chikumbirike*, who appeared for the defendant, applied to amend his plea by the insertion in para 2 of the plea of a clause that "Defendant denies that in entering into the admitted verbal agreement to park plaintiff's bus on its premises the said F F Manjengwa was its agent as stated or at all. F F Manjengwa acted in his personal capacity". I disallowed the application. It will be seen on a close examination of this amendment that it seeks to deny that Manjengwa acted on behalf of the defendant. In para 3 of the declaration, the averment is made in clear terms that it is the defendant who concluded the agreement with the plaintiff and that in doing so the defendant was represented by F F Manjengwa. Paragraph 2 of the plea, which constitutes the defendant's response to para 3 of the declaration, is a

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confession and avoidance. It admits the agreement as pleaded by the plaintiff but seeks to avoid its impact by giving a reason for

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concluding the agreement. To allow the defendant to amend its plea in the manner sought would have amounted to sanctioning the withdrawal of an admission. A pleader cannot be permitted to withdraw an admission without making a formal application for the purpose. At the very least an explanation must be given for the intended withdrawal of an admission. See *DD Transport (Pvt) Ltd v Abbot* 1988 (2) ZLR 92 (S) and *Adler v Elliot* 1988 (2) ZLR 283 (S).

It is for that reason that I turned down the application.

In order to determine if there is sufficient evidence upon which the court might make a reasonable mistake and find for the plaintiff, it is necessary to determine the nature of the legal relationship between the parties and the consequences flowing therefrom. The pleadings and the evidence led on behalf of the plaintiff suggest the existence of a contractual relationships in terms of which the plaintiff was permitted to park its bus on the defendant's premises. It is common cause that the plaintiff was under no obligation to pay a fee for parking his bus on the defendant's premises. Was the contract one of deposit? Lee and Honoré *The South African Law of Obligations* para 445, define a contract of deposit as "a contract whereby one person, termed the depositor, delivers to another, termed the depositee or depositary, a thing (normally a movable thing) **to be kept** by him gratuitously or for reward and returned on demand" (my emphasis).

It has been said that the phrase "to be kept" denotes "an undertaking to retain and have charge of something, not merely an acquiescence that something may be left somewhere": *per* VAN DER RIET J in *Minister of Posts & Telegraphs v Daddy Bros & Anor* 1965 (3) SA 394 (E) at 396D. In *Smith v Minister of Lands & Natural Resources* 1979 RLR 421 (G) 1980 (1) SA 565 (ZH), WADDINGTON J (as he then was) had to consider a contract claimed to be one of *depositum* in which a National Parks officer had merely shown the owner of a boat a place where he could moor his boat after sailing so that he could leave it at the dam. At p 428E of the report he said:

> "Bearing in mind that a contract of *depositum* involves the delivery of a thing 'to be kept', I do not think that it can be said that the circumstances in which plaintiffs boat was left at the dam constituted a delivery to the defendant for the purpose of being kept. At most, on the evidence led, what happened was that the third mooring bay was simply pointed out by an official at the Park as being a place where the plaintiff could moor his vessel. No evidence was led and it cannot, in my view, be inferred

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> from any of the surrounding circumstances that it was the intention of any official at the Park, acting on behalf of the defendant, to keep the vessel for the plaintiff."

The same conclusion was arrived at by RAMSBOTTOM J (as he then was) in *Empire Car Park*

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v Michael 1952 (3) SA 374 (T), a case in which members of the public were allowed to park their vehicles on ground owned by the defendant and leave their vehicles there for a fee. At p 380D the learned judge stated that:

> "... a person who allowed motor car owners to park their motor cars on his ground in return for a fee does not undertake any duty towards the persons who park their cars there. He is in no different position from that of the municipal council which allows members of the public to park their motor cars in the street."

What happened in this case is little more.

The plaintiff says that he asked Manjengwa if he could park his bus on the defendant's premises while he looked for a mechanic to repair it. The bus had an engine problem, in that it did not have a normal oil flow. He says Manjengwa consulted with his brother before showing him (the plaintiff) a place to park the bus. Thereafter the plaintiff left, after being told that he was not expected to pay for parking his bus on the defendant's premises. This, in my view, did not place upon the defendant an obligation to keep the plaintiff's bus. Nor can one imply into this arrangement a term that defendant would ensure the safety of the plaintiff's bus. In *Smith*'s case *supra* at 570H, WADDINGTON J said:

> "That the bystanders test is the standard test for discovering what was in the minds of the parties is clear from a multiplicity of decided cases which are conveniently collected in *Kerr Principles of the Law of Contract* 2 ed p 195. If an officious or simply imaginative bystander had asked the plaintiff and an employer of the defendant, after the conclusion of the agreement on 23 June 1974, what would be the position if the plaintiff's boat were to be stolen, it is extremely doubtful to my mind that both parties would have said, 'Of course, the government would be liable; we have not bothered to say so - it is too obvious'."

Similarly, it is one thing to allow the plaintiff to park his bus on the defendant's premises; it is another thing for the defendant to ensure the safety of the bus.

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This, however, is not the end of the matter. The plaintiff says it is the defendant who, through its agents, removed the spares from the plaintiff's bus. In his evidence, the plaintiff says that Manjengwa admitted removing the parts and undertook to replace them. He says Manjengwa says they used the parts on their fleet. He understood this to refer to the defendant's fleet. No evidence was led on what fleet the defendant owned. No allegation was made in the pleadings that, in removing the parts, Manjengwa acted in the course of and within the scope of his employment with the defendant, although this much is implicit in the plaintiff's evidence. However, in the *Supreme Service Station* case *supra* at 5H-I BEADLE CJ said that:

> "... rules of procedure are made to ensure that justice is done between the parties, and, so far as possible, courts should not allow rules of procedure to be used to cause an injustice. If the defence is something peculiarly within the knowledge of a defendant, and the plaintiff has made out some case to answer, the plaintiff should not lightly be deprived of his remedy without first hearing what defendant has to say. A defendant who might be afraid to go into the witness box should not be permitted to shelter behind the procedure of absolution from the instance."

The bus was on the defendant's premises. It is the defendant's servants who are accused of removing the parts. The defendant is therefore particularly well placed to answer the accusations and this would in normal circumstances be sufficient evidence upon which I could

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make a reasonable mistake and find for the plaintiff.

I am, however, disturbed greatly by the evidence put before me to prove the value of the spares. The plaintiff claims an amount which he considers to be the replacement cost of the spares. The spares were removed between 1989 and 1991. The evidence led on value is a quotation of new parts which was obtained from Dahmer on 24 April 1992. The evidence of a Dahmer's salesman, Davious Mutizira, is that the prices of spare parts is constantly changing and that the prices prevailing in April 1992 are not necessarily the same as those prevailing in 1989-91. He said the prices depend, among other things on demand, and on whether they have been locally procured or imported. The plaintiff, on the other hand, says he did not buy all the spares from Dahmer. He got some from Reg Harris Motors, some from Dahmer and others were secondhand. These different sets of spares could not have had the same market value. Mr *Muringani*, who appeared for the plaintiff, said that the plaintiff is entitled to the replacement value and that such value is the one in exhibit 3. I do not agree. It would have been a different thing if the

employees of Dahmer who gave evidence for the plaintiff had produced price lists for the relevant period. Visser and Potgieter, in their recent work, *Law of Damages*, at p 76-7 state the principle as follows:

> "According to current law, the date of the commission of a delict is generally the decisive moment for determining damage (and this includes prospective loss). There are exceptions to this principle, however. The date of the commission of a delict is the earliest date on which all the elements of a delict are present. As far as damage is concerned this does not imply that the full extent of the damage should have occured: if all the other requirements of a delict are present, the relevant date is the one on which the damage occurs (if there is a series of harmful results caused by the unlawful conduct). The most important practical limitations of this principle are discussed with reference to the 'once and for all' rule.
>
> In the case of breach of contract there are various possibilities regarding the time with reference to which damage is to be assessed, namely the time of breach of contract, the time of performance, the time of cancellation or even before cancellation."

So whether the claim is delictual or contractual the damages must be assessed as at the time of the wrong or breach. In any event Dahmer's price list is not necessarily co-extensive win market value in April 1992, let alone in the 1989-1991 period. There has therefore been no proof of damages sufficient to ward off an application for absolution.

In the circumstances I decree absolution from the instance with costs.

Gutu & Assocs, plaintiff's legal practitioners

Chikumbirike & Associates, defendant's legal practitioners

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BAT & ORS v COMMISSIONER OF TAXES 1994 (2) ZLR 389 (HC)

Court **High Court, Harare**

Smith J

Income tax application

22 September & 14 December 1994

Flynote

Revenue and public finance - income tax - non-resident shareholders' tax - deduction of such tax from dividends payable to foreign company - company national of United Kingdom - such tax not payable by local companies - whether requirement by foreign company to pay such tax is discriminatory in terms of art 24 of Double Taxation Agreement between Zimbabwe and United Kingdom

Interpretation of statutes - fiscal statute - interpretation - effect of double taxation agreement on interpretation of Income Tax Act

Enrichment - condictio indebiti - mistake of law - not in itself a bar to recovery of money unduly paid - money paid to Commissioner of Taxes due to mistake of law - money recoverable

Interest - mora - liability of fiscus to pay interest ex mora

Headnote

The applicants were all shareholders in an investment company which carried on business in Zimbabwe. They were all British companies, being incorporated in the United Kingdom. In the years ended 31 March 1990, 1991 and 1992, the investment company declared dividends in favour of the applicants. From these dividends, non-resident shareholders' tax was deducted and the balance was remitted to the applicants. This tax was deducted in terms of para 2(1)(c) of the Ninth Schedule to the Income Tax Act [*Chapter 181*], which provides that, where a company incorporated in Zimbabwe distributes a dividend to a foreign company,

non-resident shareholders' tax must be deducted. The applicants were all foreign companies as defined in para 1(1) of the Schedule.

The applicants applied to the respondent for a refund of the tax. They argued that the provisions of the Ninth Schedule discriminated against them vis-à-vis local companies and that this discrimination constituted a contravention of art 24(1) of the Double Taxation Agreement between Zimbabwe and the United Kingdom (SI 13/1983).

Article 24 of the Agreement provides that nationals of one country shall not be subjected in the other country to any taxation which is more burdensome than the taxation to which nationals in the former country in the same circumstances are or may be subjected. Article 3 defines the term "national", while art 4 defines the term "resident" and specifies how the status of a person who is resident in both countries is to be determined. Article 10 regulates the taxing of dividends derived from a company which is resident in one country by a resident of the other country or which is received by a resident in Zimbabwe from a company which is resident in the United

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Kingdom.

The respondent refused to refund the tax. His grounds for doing so were that the Income Tax Act authorised him to charge, levy and collect non-resident shareholders' tax. This tax applied to all non-residents, regardless of their nationality.

Held, that ordinarily the provisions of an inter-Governmental agreement cannot negate the specific provisions of an Act of Parliament. However, in terms of s 78 of the Income Tax Act, a double taxation agreement, when notified by proclamation in the *Gazette*, has effect "as if enacted" in the Act. The terms of the agreement were thus to be considered as any other statutory provision to determine the extent to which they conflict with the provisions of the statute and whether the provisions of the statute have been modified thereby.

Held, further, that the provision of the Act which allows for taxation of dividends must be interpreted so that the general power of the State to impose such tax is subject to the general provision that such tax may not be imposed in a way which discriminates against non-nationals. The sole criteria for the imposition of non-resident shareholders' tax on the applicants was their nationality, rather than their residence.

Held, further, that the applicants were entitled to be repaid under the *condictio indebiti*. Money paid under a mistake of law can be recovered, provided that the mistake was excusable in the circumstances. There was no legal policy which stood in the way of the abolition of the distinction between errors of law and errors of fact; on the contrary, legal policy would seem to demand rather than preclude the abolition of a principle

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which is manifestly unjust in the majority of cases.

Held, further, that the fiscus is not immune from liability to pay interest *ex mora*.

Cases cited:

Jansen v Driefontein Consol Mines Ltd [1902] AC 484 (HL)

Gasque v CIR [1940] 2 KB 80

Kuenigl v Donnersmarck & Anor [1955] 1 QB 515; [1955] 1 All ER 46

Egyptian Delta Land & Invstmt Co Ltd v Todd [1929] AC 1

De Beers Consol Mines Ltd v Howe [1906] AC 455 (HL)

American Thread Co v Joyce (1913) 6 TC 163 (HL)

Kotaki Para Rubber Ests Ltd v Federal CoT (1940) 64 CLR 15

North Australian Pastoral Co Ltd v Federal CoT (1946) 71 CLR 623

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ITC 1544 (1992) 54 SATC 456 (T)

Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & Anor 1992 (4) SA 202 (A); (1992) 54 SATC 427

Ellis NO v CoT 1994 (1) ZLR 423 (S)

CW v CoT 1988 (2) ZLR 27 (H)

Rooth v S (1888) 2 SAR 259

Benning v Union Govt (Min of Finance) 1914 AD 420

S v de Blom 1977 (3) SA 513

CoT v F Kristiansen (Pvt) Ltd 1994 (1) ZLR 412 (S)

A P de Bourbon SC for the applicants

M J Gillespie for the respondent

Judgment

Smith J: The four applicants applied to the respondent for a refund, in terms of para 7(a) of the Ninth Schedule to the Income Tax Act [*Chapter 181*] (hereinafter referred to as "Chapter 181"), of $110 819,33, which was withheld from them in respect of non-resident shareholders' tax. The respondent refused to authorize the refund requested. The applicants were dissatisfied with the decision of the respondent. However, as the decision of the respondent is not one referred to in s 51 of Chapter 181, the applicants are not entitled to appeal in terms of s 54 of Chapter 181. They have accordingly made a court application seeking an order directing the respondent to make the refund of $110 819,33.

The facts relevant to the application are as follows. The applicants are all shareholders of an investment company which carries on business in Zimbabwe. In the years ended 31 March 1990, 1991 and 1992 the investment company declared dividends in favour of the four applicants totalling

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$850 803. Non-resident shareholders' tax totalling $110 819,33 was deducted from the dividends and the balance was remitted to the applicants. The applicants are all nationals of the United Kingdom. In terms of para 2(1)(c) of the Ninth Schedule to Chapter 181, every company incorporated in Zimbabwe (hereinafter referred to as a "local company") which distributes a dividend to a foreign company is required to withhold from the foreign company a non-resident shareholders' tax equal to 5% or 20%, as the case may be, of the dividend declared. The applicants are foreign companies as defined in para 1(1) of the Ninth Schedule to Chapter 181. Chapter 181 does not require that a non-resident shareholders' tax or any other tax be withheld from a dividend which is distributed by a local company to another local company.

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The applicants submit that the provisions of the Ninth Schedule to Chapter 181 discriminate against them vis-à-vis local companies and therefore that constitutes a contravention of art 24(1) of the Double Taxation Agreement between Zimbabwe and the United Kingdom, published in SI 13 of 1983 (hereinafter referred to as "the UK Agreement"). They asked the respondent to refund the tax that was withheld but he refused.

The respondent denies that the provisions of the Ninth Schedule to Chapter 181 discriminate against foreign companies as compared with local companies. His submissions are as follows. Section 24 of Chapter 181, as read with the Ninth Schedule, gives the Commissioner of Taxes authority to charge, levy and collect non-resident shareholders tax. Article 10 of the UK Agreement specifically states how the tax is to be withheld from dividends distributed by both residents and non-residents in Zimbabwe and the United Kingdom. Non-resident shareholders' tax applies to all non-residents, regardless of their nationality, except in the highly unlikely case of a local company which has become resident outside Zimbabwe. In any case, local companies are involved in resident shareholders' tax, in that they withhold tax from dividends distributed to individual shareholders. Finally, the respondent submitted that art 25 of the UK Agreement provides for the most appropriate way of resolving the problem and accordingly this court has no jurisdiction to grant the application.

Mr *de Bourbon* submitted that art 25 of the UK Agreement did not, and could not, exclude this court's jurisdiction to consider the application. Article 25 is, he argued, permissive and clearly states that its provisions apply "irrespective of the remedies provided by the domestic law". Mr Gillespie, correctly in my view, said that he could not support the respondent's

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contentions regarding this court's jurisdiction. There is no doubt in my mind that this court has jurisdiction to consider the application.

With regard to the merits, Mr *de Bourbon* argued as follows. Withholding tax in respect of non-resident shareholders' dividends is applied solely to non-resident companies who are shareholders in local companies, and not to local companies. That constitutes discrimination as envisaged by art 24 of the UK Agreement. The nationality of a company is determined by the law of the country in which it is incorporated and from which it derives its corporate personality: *Janson v Driefontein Consol Mines Ltd* [1902] AC 484 (HL) at 505, *Gasque v CIR* [1940] 2 KB 80 at 84 and *Kuenigl v Donnersmarck & Anor* [1955] 1 QB 515 at 535. Article 10(4) of the UK Agreement applies only to a company that is a resident of the United Kingdom, rather than one that is also a national of that country. In *Egyptian Delta Land & Invstmt Co Ltd v Todd* [1929] AC 1 (HL) at 41-42, LORD WARRINGTON referred with approval to *De Beers Consol Mines Ltd v Howe* [1906] AC 455 (HL), where it was decided that, in the case of a company, the test of residence is:

> "where it really keeps house and does its real business and the real business is carried on where the central management and control actually abides."

See too *American Thread Co v Joyce* (1913) 6 TC 163 (HL) at 164, the *Egyptian Delta Land* case *supra* at 31, *Kotaki Para Rubber Ests Ltd v Federal CoT* (1940) 64 CLR 15 at 19 and

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North Australian Pastoral Co Ltd v Federal CoT (1946) 71 CLR 623 at 629. As submitted by the respondent, the UK Agreement was drafted with great care and the fact that art 10 thereof deals with the matter on the basis of residence, whereas art 25 deals with the matter on the basis of nationality, clearly indicates that the different approaches in the two articles were intended. Discrimination between foreign and local companies on the basis of nationality is prohibited, whereas discrimination on the basis of residence is not. The Transvaal Special Court, in *ITC 1544* (1992) 54 SATC 456 (T), held that the approach advocated by the applicants was the proper one and the decision in that case should be accepted as correct and followed. Mr *de Bourbon* concluded his argument by submitting that the manner in which the withholding of tax in respect of non-resident companies is administered under Chapter 181 contravenes the obligations assumed by Zimbabwe in terms of the UK Agreement. Therefore the applicants were entitled to the declaration sought in para 1 of the draft order. Consequently, they were entitled to be repaid the sums withheld as tax and paid to the respondent. Clearly, the sums were paid under a mistake of law and there was

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no suggestion of negligence disentitling the applicants to relief: *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & Anor* 1992 (4) SA 202 (A): (1992) 54 SATC 427. With regard to interest, since the payment was made under en unlawful demand, the principles enunciated in *Ellis NO v CoT* 1994 (1) ZLR 423 (S) were applicable and therefore the applicants were entitled to be paid interest.

Mr *Gillespie* argued as follows. Section 24 of Chapter 181 provides that a non-resident shareholders' tax shall be charged, levied and collected in accordance with the provisions of the Ninth Schedule. Local companies which issue dividends to individuals or partnerships not resident in Zimbabwe and to foreign companies are required to withhold tax due on those dividends. The President is authorised by s 78 of Chapter 181 to enter into double taxation agreements which have the same effect as if enacted in Chapter 181. The UK Agreement was executed on 19 October 1982. It was promulgated and came into force in this country on 11 February 1983. The UK Agreement applies to the non-resident shareholders' tax in Zimbabwe (art 2(1)(b)(iii)) and permits Zimbabwe to charge a tax on dividends paid by a local company to a resident of the United Kingdom (art 10(4)). Differentiation between different classes of persons is permissible in taxation matters regulated by a double taxation agreement as much as it is in any other taxation matter: *CW v CoT* 1988 (2) ZLR 27 (H) at 39. The non-resident shareholders' tax is specifically permitted in terms of the UK Agreement. The applicants fall in all respects within the four corners of the provisions of art 10 thereof and the question of their nationality is irrelevant. The apparent conflict between art 10 and art 24 of the UK Agreement must be resolved by holding that a tax which meets the requirements expressed in art 10 cannot fall foul of art 24. The provisions of art 24 would be applicable where, for instance, a tax was sought to be imposed on a United Kingdom company that was resident in Zimbabwe, but not on a local company resident in this country.

The relevant provisions of the UK Agreement are as follows. In art 3 the term "national" is defined. Article 4 defines what is meant by the term "resident" and how the status of a person

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who is resident in both counties is to be determined. Article 10 regulates the taxing of dividends derived from a company which is resident in one country by a resident of the other country or which is received by a resident of Zimbabwe from a company which is resident in the United Kingdom. Although that article does specify the circumstances in which dividends may be taxed in the two countries it also, in para 1(b) and para (4), specifies a maximum rate. Article 24(1) provides that nationals of one country shall not be subjected in the other country

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to any taxation which is more burdensome than the taxation to which nationals in the former country in the same circumstances are or may be subjected.

As has been mentioned earlier, s 24 of Chapter 181 specifically provides that there shall be charged, levied and collected throughout Zimbabwe a non resident shareholders' tax in accordance with the provisions of the Ninth Schedule to Chapter 181. It is not disputed that the respondent has acted in accordance with those statutory requirements in collecting the taxes which the applicants are seeking to have repaid. Ordinarily the provisions of an inter-Governmental agreement or statutory instrument cannot negate the specific provisions of an Act of Parliament. In this case, however, s 78 of Chapter 181, which empowers the President to enter into agreements to provide for relief from double taxation, provides in subs (4) that the terms of any agreement concluded in terms of that section shall be notified by proclamation in the *Gazette*, whereupon it shall have effect "as if enacted" in Chapter 181. The UK Agreement was concluded in terms of s 78 of Chapter 181 and published by proclamation in the *Gazette* and therefore has force and effect and must be interpreted as if it had been enacted in Chapter 181.

In *ITC 1544* (1992) 54 SATC 456 (T), the Special Court was faced with a claim which was based on almost identical legal principles. Sections 41 and 42 of the South African Act provide for the payment of a non-resident shareholders' tax, as does s 24 of Chapter 181. Section 108 of the South African Act provides for double taxation agreements which shall have effect "as if enacted" in that Act. The agreement entered into between the Governments of South Africa and the Netherlands contained provisions similar to those contained in the UK Agreement, including a provision that nationals of one of the States shall not be subject in the other State to any cation which is more burdensome than the taxation to which nationals of the former State are or may be subjected. After setting out the relevant facts the President of the Special Court, MELAMET J, said at 460:

> "The terms of a double tax Convention on which statutory status has been conferred are to be considered as any other statutory provisions to determine the extent to which these conflict with the provisions of another statute and whether such provisions have been modified thereby."

With respect, I concur with that statement. At 461 MELAMET J sets out the objectives of the double tax convention he was considering. He said:

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"As appears from its title the objective of the Convention is to avoid double taxation and prevent fiscal evasion with respect to taxes on income in both the Republic of South Africa and the Netherlands and stipulates that the Convention will apply to persons who are residents of one or both of the States.

This objective is achieved, according to the general scheme of the treaty, by permitting the country in which the taxpayer is resident to impose tax on that taxpayer, according to the law of that country, and by forbidding the other country (of which the taxpayer is not a resident) from imposing tax on the same income; (even if, according to the ordinary laws of that country, tax would otherwise have been payable by that person on that income). This principle, viz: that the income of a resident of one of the States is to be taxable only in that State, unless expressly provided otherwise is to be found in art 23 of the Convention:

> 'Items of income of a resident of one of the States which are not expressly mentioned in the foregoing Article of this Convention shall be taxable only in that State.'

However, this general scheme is subject to a number of exceptions; and the format of the Convention is to deal, in turn, with each specific type of income and, in respect of each category of income, to specify which country is permitted, and which country is not permitted, to impose tax on that type of income in the stipulated circumstances. In this way, most common forms of income are dealt with in specific articles in the Treaty and, in case any are left out, there is the provision in art 23 aforementioned.

In a category of cases the Convention allows tax to be imposed by a State on a resident of the other State, but a limit is imposed on the rate of tax that may be levied on the non-resident. Examples are taxation of income in the form of interest which is governed by art 11, and the tax on income in the form of dividends, which is governed by art 10, and which is directly relevant to the instant case."

The above description of the double tax Convention applies equally to the UK Agreement. The Convention also contains a provision prohibiting discrimination - art 25 - para 1 of which is virtually identical to art 24(1) of the UK Agreement. The conclusions of MELAMET J are set out at 462-3 as follows:

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"It is common cause that the appellant, as a company incorporated under law of the Netherlands, is a legal person deriving its status from the law in force from the Netherlands. It is also common cause that a company incorporated under the law of South Africa and therefore being a 'South African company' as defined in s 1 of the Act, is, by the same token, a 'national' of South Africa.

In terms of art 25(1) therefore, a company incorporated in the Netherlands may not be subjected in South Africa to any taxation which is more burdensome than the taxation to which a 'South African' company in the same circumstances may be subjected.

From the whole scheme of the Convention, it is clear that this special provision was intended to govern all forms of income accruing to nationals of the two States and specifically it was intended to govern all the prior permissive rules relating to the tax treatment of business profits, profits from property, interest and dividends. While the States were permitted, in respect of each of the specified categories of income to impose taxes on non-residents, they could not do so on a basis which discriminated against nationals of the other State.

In the result, therefore, whilst art 10 permits the imposition of a limited tax on dividends (NRST), this cannot be done in a manner which discriminated against nationals of the Netherlands (and *vice versa*). The same would apply, of course to business profits, profits from property, interest, capital gains and so on.

There is no conflict between art 25, the non-discrimination clause and all the other articles of the Convention

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referred to above, including art 10.

Article 10 permits the taxation of dividends paid to non-residents, and art 25 prohibits discrimination solely on the ground of nationality, and the two articles are capable of simple reconciliation. Article 10 falls to be interpreted on the basis that it permits a contracting State to impose a tax on dividends paid to a resident of the other State, but the power of the State to impose such tax is subject to the general provision that such tax may not be imposed in a manner which discriminates against non nationals.

The same conclusion can be reached by giving effect to the phrase 'and according to the law of the State' in the context of art 10(2) of the

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Convention. The law of South Africa includes s 108 of the Income Tax Act, which makes the Act itself subject to the Convention, and the Convention contains art 25 which prohibits discrimination solely on the grounds of nationality.

Article 25 of the Convention is a special provision appearing later in the Convention and in the event of conflict with previous articles of a general nature it should prevail: *Administrateur van Suidwes-Afrika v Pieters* 1973 Of SA 850 (A) at 863-4.

A comparison of the provisions of the Convention under consideration herein with the provisions of the Convention concluded with the United States of America and that concluded with the United Kingdom shows that, whereas discrimination in respect of the taxation of dividends was specifically permitted in art 23 of the latter Convention, such provision was not included in art 25 of the Convention with the Kingdom of the Netherlands which, in all other material respects, followed the prior convention. It is clear therefore that the provision permitting discrimination in relation to dividends to nationals of the contracting parties was deliberately omitted and this has been followed in subsequent conventions entered into on behalf of the Republic of South Africa. It would appear from the articles of the Convention that non-discrimination in the imposition of taxation must apply *inter alia* to dividends payable to non nationals of both States.

This would appear to be in keeping with international practice: Klaus Vogel on *Double Taxation Convention* p 1098, art 24.

The sole criteria for the imposition of non-residents shareholders' tax on the company in terms of s 42(1) of the Act is the nationality of the company, which manifests a discrimination against such company and is offensive in terms of art 25 of the Convention. This was the position as to the law and the Convention throughout the years of assessment in issue in this appeal."

It is interesting to note that the Convention concluded between the Governments of South Africa and the United Kingdom specifically permits discrimination in respect of the taxation of dividends. The UK Agreement does not. It is difficult to fault the reasoning of the learned judge. It is not disputed that the non-resident shareholders' tax imposed by s 24 of Chapter 181 is based on nationality and not on residence. Can the UK Agreement

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derogate from the specific provisions of s 24? It does. Article 10(4) thereof imposes a maximum percentage of tax which may be charged in Zimbabwe on dividends derived from a local company by a resident of the United Kingdom. If art 10 of the UK Agreement can modify the specific provisions of Chapter 181 I see no reason why art 24 of the UK Agreement cannot do

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the same. Article 10 specifically authorizes the taxing of dividends but such taxing must comply with the provisions of that article and also of art 24. Accordingly I concur with the views expressed by MELAMET J The applicants are entitled to the repayment of the amounts claimed.

I accept the submission of Mr *de Bourbon* that the applicants are entitled to be paid the sums withheld on the basis of the principles enunciated in *Willis Faber Enthoven supra*. In that case the Appellate Division held that the South African law was to be adapted in such a manner as to allow no distinction to be drawn in the application of the *condictio indebiti* between mistake of law (*error juris*) and mistake of fact (*error facti*) and therefore an *indebitum* paid as a result of a mistake of law could be recovered, provided that the mistake was found to be excusable in the circumstances of the particular case. Legal policy could not stand in the way of the abolition of the distinction between payments made in error of law and payments made in error of fact for the purposes of the *condictio indebiti*. On the contrary, legal policy would seem to demand, rather than preclude, the abolition of a principle that was manifestly unjust in the majority of cases. HEFER JA in his judgment referred to the dissension in the ranks of early jurists on the effect of an error of law and, *inter alia*, to the decisions in *Rooth v State* (1888) 2 SAR 259 and *Benning v Union Govt (Min of Finance)* 1914 AD 420, where it was held that an error of law was as a rule a bar to the *condictio indebiti*. At 220-1 (438 in SATC) the learned judge said:

> "What is immediately apparent is that there is no logic in the distinction between mistakes of fact and mistakes of law in the context of the *condictio indebiti*. This *condictio* has since Roman times always been regarded as a remedy *ex aequo et bono* to prevent one person being unjustifiably enriched at the expense of another. (Even those favouring the distinction concede that this is so.) 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 a payment is made in error, it matters not whether the error is one of fact or of law: in either case it remains the payment of an *indebitum* and, if not repaid, the receiver remains enriched. The nature of the error thus has no bearing either on the *indebitum* or on the enrichment. The same result

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> is achieved when the *condictio indebiti* is viewed (as it often is) as one of the *condictiones sine causa*. Again it matters not whether the error is one of fact or law for in both cases the payment is made *sine causa* (of J C van der Walt '*Die Condictio Indebiti* as Verrykingsaksie' (1966) 29 *THRHR* 220 at 227).
>
> 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. It is not inappropriate to quote again from INNES CJ's judgment in *Blower v van Noorden (supra* at 900) where he indicated that
>
> > 'we should be slow to perpetuate a form of legal remedy which may work hardship, if it can be modified so as to do away with that possibility'."

At 223 (441 in SATC) he continued:

> "Bearing in mind that, since this court's decision in *S v de Blom* 1977 (3) SA 513, ignorance of the law may even provide an excuse for otherwise criminal behaviour, we have to ask ourselves whether there is any reason for retaining the age-old distinction between errors of law and fact in claims for the repayment of money unduly paid in error. I can conceive of none. In the sixth (1951) edition of Gardiner and Lansdown's *South African Criminal Law and Procedure* vol 1 at 60 it is stated that I?

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> ' if ignorance of law were generally admitted as a valid ground of excuse for unlawful conduct, the administration of law would become impracticable'.
>
> But the administration of law suffered no ill effects as a result of the decision in de *Blom*'s case; and it cannot seriously be suggested that it would if the distinction between errors of law and fact were to be abolished for purposes of the *condictio indebiti*, which affects no one but the payer and the payee. Nor can legal policy stand in the way of its abolition; on the contrary, legal policy would seem to demand rather than preclude the abolition of a principle That is manifestly unjust in the majority of cases. Taking account further of the complexities of

SMITH J

> contemporary legal and commercial practices which differ *toto caelo* from those followed in earlier times, I would accordingly rule that the fact that money was unduly paid in error of law is not by itself a bar to its recovery by way of the *condictio indebiti*."

In my view the reasoning of the learned judge cannot be faulted and the conclusion must tee accepted as being applicable in this country as well as in South Africa. The conclusions were quoted with approval by GUBBAY CJ in *Ellis NO v CoT* 1994 (1) ZLR 423 (S).

The final matter to be considered is whether or not interest is payable by the respondent. In Co*T v F Kristiansen (Pvt) Ltd* 1994 (1) ZLR 412 (S) and *Ellis NO v CoT supra* the Supreme Court held that under the common law the *fiscus* is not immune from the payment of interest *ex mora*. In the latter case it was held that the *fiscus* was obliged to pay interest as the monies had been paid "following upon an ultra vires and illegal demand". In my view the circumstances of this case are analogous. Therefore the applicant is entitled to be paid interest.

Since the applicants have been successful they are entitled to their costs.

It is ordered that -

1. The provisions of the Ninth Schedule to the Income Tax Act [*Chapter 181*], insofar as they are applied to the applicants, are in conflict with Article 24 of the Double Taxation Agreement between Zimbabwe and the United Kingdom, published in SI 13 of 1983.

2. The respondent is directed to refund to the applicants the sum of $110 819,33.

3. The respondent is directed to pay interest at die prescribed rate on the said sum of $110 819,33 win effect from 30 April 1993, to date of payment;

4. The respondent is directed to pay the applicants' costs.

Gill, Godlonton & Gerrans, applicants' legal practitioners

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

S v TACHIONA & ANOR 1994 (2) ZLR 402 (HC)

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Court **High Court, Harare**

Annotations Link to Case Annotations

Chatikobo J

Criminal review

14 December 1994

Flynote

Criminal law - common law crimes - assault with intent to do grievous bodily harm - essential elements - sufficient to show that accused committed act knowing that it was likely to do grievous bodily harm and in circumstances which showed that he was reckless and careless as to whether harm resulted

Criminal procedure - plea - guilty - to assault with intent to do grievous bodily harm - explanation of elements - explanation of concept of recklessness or dolus eventualis

Criminal procedure (sentence) - community service - hours of community service to be performed - guidelines set by National Committee on Community Service - departure from - court's discretion to depart from guidelines - reasons for doing so should be recorded

Headnote

Where a person is facing a charge of assault with intent to do grievous bodily harm, he must be made to understand that the harm allegedly intended was of such a serious nature as to interfere with health. As to intent, it is sufficient for the prosecution to show that the accused did the act knowing that it was likely to cause grievous bodily harm and that he did it in circumstances which showed that he was reckless and careless as to whether or not such harm resulted. Both requirements must be fulfilled; they are not alternatives to one another. Recklessness alone cannot constitute intent; a person can only be reckless about something which he foresees as a possibility and when he persists with the conduct in question, despite such foresight.

1994 (2) ZLR p403

CHATIKOBO J

Where the accused pleads guilty to a charge in the magistrates court, the court must inquire from the accused whether he understands the essential elements of the offence and whether his plea is an admission of those elements. On a charge of assault with intent to do grievous bodily harm, if he denies foreseeing that serious bodily harm would result, it is not enough to press on and ask if he was reckless as to the consequences. If the magistrate thinks that the accused's denial of foresight might tee the result of a lack of appreciation of the import of the question, he should probe further. There is no exhaustive list of questions, nor any limit to the ways in which the questions should be put.

The National Committee on Community Service has laid down guidelines as to the number of hours of community service which should be ordered. These guidelines seek to equate a particular number of hours of community service with a specific period of imprisonment. They are, however, guidelines only and are not intended to supplant the discretion of the court.

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Nevertheless, where the court has reason to depart from the guidelines the facts warranting a departure should be established and placed on record, otherwise the court's exercise of discretion would cease to be a judicial one.

Cases cited:

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

R v Edwards 1957 R & N 107 (SR)

S v de Bruyn & Anor 1968 (4) SA 498 (A)

S v Dzorora HH-255-93

S v Zulu HH-254-93

S v Musiyiwa HH-10-94

S v Nyamadzawo HH-13-94

S v Sabawo HH-189-94

Judgment

Chatikobo J: The two accused were convicted on their own pleas of guilty of the crime of assault with intent to cause grievous bodily harm. Consequent upon their conviction, they were each sentenced to undergo imprisonment with labour for 7 months. In the case of each accused, 3 months' imprisonment with labour was suspended on conditions of good behaviour and the remaining 4 months was suspended on condition the accused performs 180 hours of community service.

This is how the magistrate put the essential elements of the offence to the accused in purported compliance with s 255(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*] (the Act):

CHATIKOBO J

"1. On 31 August 1994 did you assault the complainant by striking him on the mouth with a plank and, using your clenched fists as read to you?

Accused 1. I headbutted the complainant and assaulted him on his body with clenched fists.

Accused 2. I assaulted complainant by striking him with a plank on the mouth.

2. Why did you assault the complainant?

Accused 1. Complainant had fought accused two and when I tried to stop the fight complainant was not co-operative and I decided to assault him so that he could stop fighting with accused two.

Accused 2. I assaulted complainant with a plank after he had overpowered me in a fight.

3. Was complainant armed?

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A. No (I assume this answer relates to both accused).

4. **Did you therefore realise that by assaulting the complainant in the manner you did this would seriously interfere with his hearth end comfort?**

Accused 1. **No**

Accused 2. **No**

5. **So you were careless or reckless as to whether injuries occurred on the complainant or not?**

Accused 1. **Yes.**

Accused 2. **Yes.**

6. Any lawful right?

Accused 1. No

Accused 2. No

7. Any defence to offer?

Accused 1. No

Accused 2. No"

(The numbering is mine, so is the emphasis).

CHATIKOBO J

It is apparent from this question and answer exchange that the magistrate did not "inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor", as required by s 255(2)(b)(ii) of the Act. It is necessary that this question be put in each case. This, however, is not the pith of my concern.

When the matter first came before me I asked the magistrate if he thought that the accused admitted acting with the specific intent to cause grievous bodily harm when they said they did not realise that their conduct would seriously interfere with the health and comfort of the complainant. His response is that, although the accused stated that they did not realise that their conduct would seriously interfere with the health and comfort of the complainant, they nevertheless admitted being reckless or careless. In this regard he has referred me to a passage in the decision of DUMBUTSHENA AJP (as he then was) in *S v Mutadza* 1983 (1) ZLR 123 (H) at 127A-B where the learned ACTING JUDGE PRESIDENT stated that:

> "It is clear from what is said above that for an accused person to understand the nature of the allegation he is facing he must be made to understand that the harm allegedly intended was of such a serious nature as to interfere with health. It is important that the accused should be made to understand what is meant by intent to do grievous bodily harm. It might, in cases of this nature, be advisable for the court to ask questions along these lines:

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(a) Mid you intend to inflict harm of such a nature as might seriously interfere with complainant's health?

(b) If you did not actually intend such harm, were you reckless or careless as to whether such harm resulted?

(c) Do you understand that you are pleading guilty not just to common assault but to the more serious offence of assault with intent to commit grievous bodily harm?

It is my opinion that questions along these lines would make an accused person understand the elements of the offence being put to him."

In making this pronouncement, DUMBUTSHENA AJP relied in part on the

CHATIKOBO J

headnote to Me decision of BEADLE J (as he then was) in *R v Edwards* 1957 R & N 107 (SR), the *locus classicus* on the question of proof of an intent to do grievous bodily harm. The headnote is in these terms:

"To establish the offence of assault with intent to do grievous bodily harm, it is sufficient to prove that the accused committed the assault either knowing that what he did was likely to cause grievous bodily harm or being reckless and careless as to whether or not such harm resulted. In this relation, grievous bodily harm means such bodily harm as seriously interferes with health" (my emphasis).

This headnote does not, in my view, accurately reflect the judge's enunciation of the legal position. In particular, the use of the disjunctive "or" gives the impression that intent to cause grievous bodily harm can be proved either by showing that the accused subjectively foresaw the possibility that grievous bodily harm may result or by showing that the accused was reckless and careless as to whether or not such harm occurred. This is not what BEADLE J said. At p 112 of the report the learned judge stated the principle thus:

"I therefore come to the conclusion that so far as assault with intent to do grievous bodily harm is concerned, it is sufficient to prove that the accused committed the crime knowing that his act was likely to cause grievous bodily harm and that he committed it in circumstances which show that he was reckless and careless as to whether or not such harm resulted. If that was his state of mind, then I think the Crown has proved all the intent required to establish this crime" (the emphasis is again mine).

The learned judge used the conjunctive "and" to make it clear that the element of foreseeability should be coupled with recklessness. Foreseeability and recklessness are two limbs of the same test. They are not two separate and distinct tests of legal intention. Indeed, Hunt *South African Criminal Law & Procedure* vol I 1 ed (the second edition is not immediately available to me) at p 119 defines legal intention as consisting of "foresight on the part of the accused that the consequence may possibly occur coupled with recklessness as to whether it does or not". Recklessness on its own cannot constitute legal intention. A person can only be reckless about something which he foresees as a possibility. Unless he can foresee something as likely to occur he cannot be reckless about whether or not it occurs. Recklessness has been defined as "persistence in such conduct, despite such foresight": *per* HOLMES JA in *S v de Bruyn & Anor* 1968 (4) SA 498 (A) at 511G-H. It connotes a deliberate

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omission to take heed when one is aware of the likelihood of something occurring.

It is clear that in suggesting how the question of an intent to cause grievous bodily harm should be put to the accused so as to enable him to understand what is meant by such an intent, DUMBUTSHENA AJP elevated the question of recklessness to the status of a separate and distinct test of intention when he said,

> "If you did not actually intend such harm, were you reckless or careless as to whether such harm resulted?."

While this is in conformity with the headnote in *R v Edwards supra*, that headnote is clearly misleading as I have attempted to show. This formulation also has the effect of confusing Roman-Dutch law with English Law. C R Snyman *Criminal Law* 2 ed at p 200 says:

> "By reckless' is meant that C consciously accepts a risk. It would however be erroneous to equate *dolus eventualis* with the form of *mens rea* of English law known as recklessness'. In English law recklessness may (depending upon the definition of the crime or the intention of the legislature) be a third possible form of *mens rea* in addition to intention and negligence; unlike *dolus eventualis* in South Africa, it is only a requirement in certain crimes and not in all crimes for which intention is required. *Dolus eventualis* is a concept foreign to English law; our law has taken it over from Continental legal systems."

It follows from what I have said so far that where an accused person says he did not realise or foresee that serious injury would result from his conduct, it is no answer that he nevertheless admits being reckless because recklessness must be preceded by foresight of the consequence in order for there to be proof of *dolus eventualis*. So, once the accused said "no" to the question "Did you therefore realise that by assaulting the complainant in the manner you did this would seriously interfere with his health and comfort?", the next question, "so you were careless or reckless as to whether injuries occurred on the complainant or not", did not amount to an alternative way of putting the same question. It relates to and must only be put in order to get an accused person to admit the second limb of the test for *dolus eventualis*. If the magistrate thought that the accused's denial of an intention to cause grievous bodily harm may have been the result of a lack of appreciation of the import of the question on their part, he should have probed further by putting the

same question in a different way. The following are some of the questions that could have been put to the accused in order to elucidate their denial.

(a) Did you know or realise that your actions were likely to cause serious bodily harm to the complainant; or

(b) Did you realise that you were using a lethal weapon to assault the complainant and that such a weapon could cause serious bodily harm?

There can never be an exhaustive list of the sort of questions that can be put, nor can there be a limited number of ways in which the questions should be put. What is important is to bear in mind at all times that the object of the exercise is to ascertain if the accused intended to cause

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grievous bodily harm to the complainant. I am therefore not satisfied that the accused admitted the essential elements of the crime.

In fact, their denial that they intended to cause grievous bodily harm is fully borne out by the explanations they gave to the magistrate. When asked why he assaulted the complainant, the first accused said that he tried unsuccessfully to stop a fight between the second accused and the complainant. Seeing that the complainant was being obstinate, first accused headbutted him in order to subdue him. The second accused's explanation was that he fought with the complainant. He was overpowered and as a result he resorted to the use of a weapon - a plank - with which he assaulted the complainant on the mouth. Now, quite obviously, it cannot be said that the first accused intended to cause grievous bodily harm to the complainant. He merely wanted to subdue him in order to stop the fight. The second accused was losing the fight to the complainant. He decided to use a weapon in order to gain the upper hand in the fight. His resort to the weapon might in his case be indicative of an intent to cause grievous bodily harm. That, however, is a far cry from saying such an intent can be imputed to the first accused, who acted differently, apparently on his own and purely out of different and, I may say, laudable motives. There is nothing upon which to base an inference that the two acted with a common purpose. They did not conspire to assault the complainant. It is no wonder then that they denied having harboured an intention to seriously interfere with the health and comfort of the complainant. For these reasons I do not think that the conviction is sound.

Although I will have to set aside the conviction, I intend to briefly say something about the sentence. I did ask the magistrate why he ordered 180 hours of community service instead of the 120 hours which is in line with the guidelines laid down by the National Committee on Community Service.

1994 (2) ZLR p409

CHATIKOBO J

The magistrate is of the view that what he did was proper end in this case he has referred me to a number of review decisions of my brethren in this court in which 4 months' imprisonment was suspended on condition accused performs 180 hours of community service instead of 120 hours. See *S v Dzorora* HH-255-93; *S v Zulu* HH-254-93; *S v Musiyiwa* HH-10-94; *S v Nyamadzawo* HH-13-94.

The magistrate is undoubtedly correct in this regard. I never meant to suggest that a court must slavishly adhere to the guidelines, as indeed guidelines are not intended to supplant the discretion of a sentencing court. The root of my concern is best captured in what I had to say in similar vein in *S v Sabawo* HH-189-94 at pp 2-3 of the cyclostyled judgment. I there said:

> "There is no hard and fast rule about these guidelines. A court is free to depart from them in an appropriate case but that does not mean to say such court is free to set such hours of community service arbitrarily. There must be a basis for doing so. For example, it is not inconceivable that the centre at which the community service is to be performed does not have work of a sufficiently demanding nature to amount to an effective punishment. In such a case, it would be quite appropriate to increase the number of hours in order to compensate for the lightness of the work. But, before departing from the set guidelines, the facts warranting such departure must be established and placed on record; otherwise the sentencing court's exercise of discretion would cease to be a judicial one."

Here the accused assaulted their brother. The victim off that assault was himself not free from

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blame as he behaved in a stubborn manner. To an extent he invited the assault. In my view, these are additional factors of mitigation which would have justified the imposition of a lesser period of community service.

My original intention was to set aside the conviction and sentence, alter the accused's pleas to not guilty and to remit the matter to the magistrate to hold a full trial. However, no purpose would be served by adopting that course, as the accused will have completed their community service by now.

In the premises, the conviction is set aside and the sentence is quashed. In the event that any of the accused has breached the conditions of suspension and has been lodged in gaol, then in that event his immediate release is ordered.

Bartlett J agrees.

S v MLAMBO 1994 (2) ZLR 410 (SC)

Court **Supreme Court, Bulawayo**

Gubbay CJ, Korsah JA & Muchechetere JA

Criminal appeal

5 & 20 December 1994

Flynote

Criminal law - culpable homicide - duty of care - farmer electrifying fence around vegetable garden as protection against wild animals - precautions necessary to prevent employees and others from being electrocuted

Headnote

The appellant, a farmer in the Nyamandhlovu area, was plagued by wild animals which were destroying his vegetables and maize. To prevent these depredations, he engaged an electrician to connect a 380-volt power cable from the farm's power supply to the fence surrounding the piece of land where the vegetables were grown. The switch controlling the supply of power to the fence was on the same switchboard as a switch regulating power to the wafer pumps on the fawn. Danger notices were at first displayed but with the passing of years were no longer displayed. The employees were warned not to enter the area in question between 17:30 and 05:30, as the power would then be on. One employee was tasked with turning the power on and off.

On 5 February 1993, around midday, a young employee, who had gone to water the crops, was found dead. He had been electrocuted. The evidence indicated that after the power had been switched off in the morning, it had been switched on again either by a third person or by the deceased, who did not realise that he was electrifying the fence. The appellant was convicted of

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culpable homicide and appealed against his conviction.

Held, dismissing the appeal, that the fundamental question was whether the appellant had taken reasonable precautions to protect the deceased and other employees against the foreseeable danger of electrocution. It did

GUBBAY CJ

not matter whether the current was switched on mistakenly by the deceased or by some other person. By introducing an extreme hazard on his farm, it became the appellant's duty to take every reasonable precaution against injury to his employees. The steps he had taken were not reasonable. He should have ensured that there was no free access to the power house where the switches were located or at least to the switches themselves. He should have ensured that the current was only strong enough to shock and that it was not lethal. He should have installed a suitable device, such as a red light, to warn that the fence was electrified. Finally, in the knowledge that fairly easy access to the switch was afforded to all, safety clothing, consisting of insulated boots and gloves, was advisable. The omission by the appellant to take effective precautions to prevent a foreseeable fatal consequence constituted negligence.

Cases cited:

S v Chipinge Rural Council 1988 (2) ZLR 275 (S)

Msorwa v Munyuki 1994 (2) ZLR 261 (S)

R v Puttock 1967 RLR 186 (A)

S Ndlovu for the appellant

K Hodzi for the respondent

Judgment

Gubbay CJ: The appellant is the owner of Crosby Farm upon which he grows green vegetables and other crops for sale. Nyamandhlovu Commercial Fanning Area, where the farm is situated, is frequented by a variety of marauding wild animals. They posed a grave problem for the appellant. He found that his vegetables and maize were being devoured, or partially destroyed, in quantities large enough to affect his livelihood. The prime culprits were wild pigs.

Desperation caused the appellant to go on the offensive. He believed that the only adequate method of protecting his crops was to electrify the wire fence around that extent of land which was the persistent and remorseless subject of these unwelcome visitations. To do so, he engaged the services of an electrician.

In the performance of his mandate, the electrician connected an insulated cable from the main distribution board in the power house on the farm, to the wire fence a few metres away. The flow of power was controlled by a switch installed on the distribution board. A pre-existing

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switch on the same board

GUBBAY CJ

regulated the power to the water pumps on the farm. The source of electricity to the farm was derived from a Zimbabwe Electricity Supply Authority sub-station.

When the wire fence was first electrified, danger notices were affixed to it. But with the passing of the years, and certainly at the date of the fatal occurrence, such notices were no longer displayed.

A precaution adopted by the appellant was to warn all employees not to enter this area of the lands between 5.30 pm and 5.30 am, the hours during which the wire fence was electrified. Another was the hiring of an overseer, one Enock Ndlovu, to switch the current to the fence on and off at the prescribed times. He was to be in charge of the power house.

At midday on 5 February 1993, a 19-year-old employee, who had gone to water the crops, was found lying on the ground, win his legs underneath the wire fence. He was dead. There were burn marks on his hands, legs and neck. The police, who were summoned, requested an electrical engineer to attend the scene of the tragedy.

The inspection carried out by the engineer revealed that the deceased had been electrocuted. He had touched the wire fence at a stage when it was still electrified. The power supplied to the fence was 380 volts. It was controlled by a 30 ampere circuit breaker.

Inevitably, the prosecution of the appellant followed on a charge of culpable homicide. The defence raised at the trial was that the appellant had delegated the responsibility of switching the current to the fence on and off to his employee, Ndlovu; and, further, that the deceased should have ascertained whether the electricity was off before entering the area enclosed by the wire fence. The presiding magistrate was unconvinced that the appellant was free of negligence. He convicted him and imposed a fine of $1 200 or, in default of payment, two months' imprisonment with labour.

Much reliance was placed by the appellant on the evidence of the State witness Ndlovu. It was his testimony that on the fateful day he had switched off the electricity to the fence at 5.30 am. During the course of the morning, however, the deceased bad informed him that he proposed to operate the switch regulating the flow of power to the water pumps in order to irrigate the crops. He protested, to no avail, that to do so was forbidden by the appellant. A little later, the deceased advised him that the power to drive the water pumps was inadequate. He responded that additional power was required.

GUBBAY CJ

Ndlovu went on to say that, after a while, he began to suspect that some harm had befallen the deceased, who was nowhere to be seen. He entered the power house and noticed that the

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switch controlling the flow of electricity to the fence was on. He put it off and immediately proceeded in search of the deceased. He was the first to find him.

The presiding magistrate expressed some reservation with regard to Ndlovu's reliability as a witness. He was alive to the real possibility that Ndlovu may have forgotten to switch off the power to the fence, and so had concocted a story to distance himself from blame. Nonetheless he was not prepared to reject the evidence as false.

The assessment of the credibility of a witness is *par excellence* the province of the trial court and ought not to be disregarded by an appellate court unless satisfied that it defies reason and common sense. A careful reading of Ndlovu's evidence, to which no accompanying adverse demeanour finding was made, does not persuade me that the magistrate's assessment was erroneous.

It follows, upon an acceptance of Ndlovu's evidence, that after he had switched off the power early that morning, it was switched on again either by a third party or by the deceased himself, who did not appreciate that by so doing he was electrifying the fence.

I discount completely the contention, now advanced on the appellant's behalf, that the deceased touched the wire fence, in the knowledge that it was electrified, for the purpose of ending his life. Such a hypothesis seems to me to border on the absurd. If the deceased had wished to commit suicide by electrocuting himself, he would have done so during the hours of darkness, when nobody was about. In any event, he would hardly have been aware that the current flowing through the wire was sufficiently lethal to kill him. Moreover, the deceased must have known that the fence was not electrified during working hours; and that to switch the power on, he would have to give Ndlovu a false reason so as to gain access to the power house. Such duplicity was totally unnecessary to achieve death.

The fundamental question, then, is whether the appellant had taken reasonable precautions to protect the deceased and other employees against the foreseeable danger of electrocution created by him. See *S v Chipinge Rural Council* 1988 (2) ZLR 275 (S) at 278B-H; *Msorwa v Munyuki* 1994 (2) ZLR 261 (S). Put otherwise, were the measures taken by the appellant an adequate safeguard

GUBBAY CJ

against the possibility of the fence being electrified during working hours? It matters not whether the current was switched on mistakenly by the deceased, as is most probable, or by some other employee.

Each case of this sort, as was pointed out in the somewhat similar one of *R v Puttock* 1967 RLR 186 (A) at 190E, must be decided in the light of its own particular circumstances. No general rules can be laid down. The court has to decide whether on the proved facts the appellant was guilty of negligence.

Like *Puttock*, the appellant introduced an extreme hazard onto his farm and it was his corresponding duty to take every reasonable precaution against any injury to his employees. In

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my view, the appellant failed to fulfil that duty. The steps taken by him to prevent the foreseeable harm occurring were not reasonable.

In the first place, the appellant ought to have ensured that there was no free access to the power house where the switches were located. It should have been locked at all times with the keys in the custody of himself and Ndlovu. No one else should have been permitted to enter and switch on the electricity to either the fence or the water pumps. At very least, the switch regulating the power to the fence should have been housed in a lockable box only to be opened by himself or Ndlovu at the prescribed hours.

Second, the appellant ought to have made certain that the electricity carried to the fence was merely of sufficient strength to shock the encroaching animals, and that it was non-lethal to humans. He could easily have reduced its lethality, without compromising its effect on animals, by the installation of a step-down transformer.

Third, the appellant failed to install a suitable and satisfactory device, like a red light, which would have warned that the fence was electrified; and thus guarded against the risk of forgetfulness.

Fourth, in the knowledge that fairly easy access to the switch was afforded to all, the provision of safety clothing, consisting of insulated boots and gloves, to those employees who tended to the crops, was advisable.

I am left in no doubt that the omission by the appellant to take effective precautions to prevent a fatal consequence, that was reasonably foreseeable, constituted negligence.

GUBBAY CJ

Wisely, the appeal noted against sentence was not pursuer If it erred at all, it did so in the direction of leniency rather than severity.

I would accordingly dismiss the appeal in its entirety.

Korsah JA: I agree.

Muchechetere JA: I agree.

Coghlan & Welsh, appellant's legal practitioners

JESSE v ATTORNEY-GENERAL & ORS 1994 (2) ZLR 416 (HC)

Court **High Court, Harare**

Malaba J

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Opposed application

15 & 21 December 1994

Flynote

Criminal procedure - blood tests - taking of tests from arrested person - requirements before blood test may be taken - resistance to taking of test - reasonable force may be used if suspect resists testing - attempt by suspect to impose condition that sample be tested elsewhere than in Zimbabwe - not competent - Criminal Procedure and Evidence Act [Chapter 59] - s 45(3)

Headnote

The applicant had been arrested on an allegation of murder but released on bail after a fortnight. Several months after his release, the investigating police officer wrote to the applicant's legal practitioner, requesting that the applicant submit to a blood test in order to ascertain some fact material to the investigation. The letter did not specify exactly what the sample was required for, nor who was to take it, nor who would test it. The police did not respond when these matters were queried. The next communication to the applicant's lawyer was from the Attorney-General's Office, in which it was said that if the applicant did not submit himself to the taking of a sample, the investigating officer would take a sample without further consultation. The applicant did not specifically refuse to comply, but wrote to say that he would give a sample on certain conditions, one of which was that it would be tested by a recognized DNA profiling laboratory in South Africa. He then brought an application for an interdict, inter alia restraining the police from obtaining a blood sample from him and from coming within 200 metres of him. He also sought an order to the effect that a blood sample could only be obtained if the head of the ZRP forensic science laboratory stated in writing that such a sample was necessary.

1994 (2) ZLR p417

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Held, there could be no doubt that blood samples were valuable aids to criminal investigation.

Held, further, however, that in terms of s 45(3) of the Criminal Procedure and Evidence Act [*Chapter 59*], the process of extracting a blood sample can only be instituted by the submission, by a police officer of or above the rank of superintendent, of a written request to a medical practitioner. The test had to be performed by a medical practitioner; the police were expressly excluded from doing so.

Held, further, that the suspect had the right to be informed of who was to take the sample, where and when it was to be done and the purpose for which it was required.

Held, further, that where the taking of a blood sample was lawful, then reasonable force could be used to obtain it. The police could thus use reasonable force to compel a suspect to submit to the taking.

Held, further, that only the officials mentioned in s 45(3) were authorised to take blood sample, although they could delegate their duties to other persons. The applicant could therefore not

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insist that other persons take the sample.

Cases cited:

W v Official Solicitor [1972] AC 24

Grove v Eastern Gas Bd [1952] 1 KB 77 (CA)

Applicant in person

A V M Chikumira for the respondents

Judgment

Malaba J: This is an opposed court application for an order against the respondents couched in the following terms:

> "(i) That the Attorney-General or his agents and the Police/Criminal - Investigation Department, more especially Superintendent Chisadza, Detective Inspector Musemwa, Detective Sergeant Mahumbi and Detective Assistant Inspector Zviropa and the Concession Police but more especially Assistant Inspector Hewitt and Assistant Inspector Marapa, are interdicted and prohibited from further interfering with DAVID ISRAEL BEN JESSE or coming within 200 metres of DAVID ISRAEL BEN JESSE without probable cause and reasonable suspicion that a crime has been committed.
>
> (ii) All of the Police [and] CID but more especially those aforementioned are expressly interdicted and prohibited from using force or forcefully

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> extracting a blood or sputum sample from Dr DAVID JESSE and are instructed to come to an agreement between applicant, investigators and forensics only when and if Mr Nari - head of forensics ZRP - so demands in writing that the sample is necessary and thereafter only under strictly controlled conditions acceptable to the applicant and the State with extreme safeguards and controls which would entirely eliminate any false incrimination."

The events leading to the application are these. At 11.30 pm on 25 April 1994 the dead body of Fiona Spencer was found in the middle of Harare-Mazowe Road at the 31 km peg. The body had bruises on the face and a deep cut above the right eye. It was later established that she had been sexually assaulted before her death. The motor vehicle she had been driving was found abandoned near her parents' house in Maryvale. The applicant was arrested as a suspect in the murder of Fiona Spencer on 26 April 1994. He was placed on remand by Bindura Magistrates Court but released on bail on 9 May 1994.

Investigations continued. Another man was arrested also in connection with Miss Spencer's death on 28 April 1994. It was later found that a blood stain found on his jean trousers matched the deceased's blood. He was re-arrested and remanded on the charge of murder by Bindura Magistrate's Court on 12 September 1994. He was released on bail on 13 September 1994.

In the course of the investigations, the police became desirous to have a blood sample extracted from the applicant. On 10 November 1994 the officer-in charge CID Bindura, Detective Inspector Musemwa, wrote to the applicant's lawyer, Mr Roy Harvey, requesting the applicant "to submit to a blood test in order to ascertain some fact material to the

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investigations". On 14 November 1994 the applicant replied to DI Musemwa's letter and asked these questions:

> "1. Who will conduct the test? Will the writer be entitled to a full copy of the test report and will the writer be entitled to have the test monitored by an expert of his choice?
>
> 2. Exactly what test is envisaged and for what purposes?"

On the same day the applicant's legal practitioner wrote to DI Musemwa. The letter reads in part:

> "We note your letter is vague in that it does not stipulate exactly what the blood test requested by is for and the exact purpose.

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> Nor have you indicated who the sample will be taken by, who will conduct the tests and what controls there will be with regard to the investigation.
>
> Nor have you specified how the defence can monitor the taking and testing and if they will be given results and comparable samples.
>
> ... Upon receipt of a proper notice with full particulars from you we shall reply officially, upon confirmation with counsel."

Surprisingly, there was no response to these important questions of procedural justice. The next communication between the respondents and the applicant was by letter dated 6 December 1994 from the Attorney-General's Office. It was addressed to the applicant's legal practitioner and reads as follows:

> "Your client is on remand on a charge of murder. It is alleged that your client murdered Ms Fiona Spencer. When the body of the deceased was found it was established by Forensic Scientists that she had been sexually interfered with. The Police have so far failed to obtain your client's blood samples. We are sure that you appreciate that it is in the interests of justice that your client voluntarily submits to a blood test. Convinced as you are of his innocence this is the opportunity of having your client cleared once and for all. It may also lead to the completion of the murder investigations that are going on at the moment.
>
> Accordingly, if your client does not present himself to the Investigating Officers within the next 7 days the latter shall obtain a sample from your client without consulting you. You will obviously appreciate that a vicious murder has been committed and it is the duty of the Police to investigate such a serious crime. We hope you appreciate the position and that you in turn will advise your client to co-operate. It is extremely sinister that your client does not wish to submit to a blood test."

Without saying it in so many words the applicant refused to comply with the instructions from the Attorney-General's representative and set down his conditions for submitting to a blood test in a letter dated 7 December 1994. In the last paragraph of the letter he said:

> "The writer insists that he give blood to a recognized DNA profiling laboratory in South Africa in the presence of his attorneys and an expert of his choice whereupon the white blood cells necessary for the DNA Profiling will be extracted and delivered directly to the Department of

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> Forensics DNA profiling Department of the South Africa Police in Pretoria. These are the only conditions under which the writer is prepared to give blood since there are no facilities for DNA profiling in Zimbabwe and especially in the light of the emerging conspiracy to entrap the writer for a crime he did not commit."

There was an impasse. Realising that the 7 days after which the Attorney-General's representative threatened to set the police on him were coming to an end, the applicant brought an urgent chamber application for a provisional order interdicting the respondents from forcing him to submit to a blood test. He had nonetheless served on the respondents a notice of the chamber application. The respondents notified the intention to oppose the application. Holding the view that the matter involved the liberty of an individual, I agreed to hear the matter as an urgent opposed court application.

In his founding affidavit, the applicant repeated his condition that he would only give blood for analysis in a laboratory of his own choice. He said the police wanted to entrap him so that he was convicted of an offence he did not commit. This was because he had commenced action against the police in which he claimed $425 million for unlawful arrest and malicious prosecution. He was afraid the police would take his blood and plant it somewhere else to incriminate him. The applicant's former employee, Cecil Marais, deposed to an affidavit in which he said members of the CID persuaded him to incriminate the applicant in the murder charge but he refused. There were affidavits by other people who either gave hearsay evidence or said how innocent they believed the applicant to be. On the whole, the matters deposed to were not directly relevant to the resolution of the issues.

For the respondent, Supt Steven Chisadza swore to the opposing affidavit. He denied the allegations by the applicant of the existence of a conspiracy to falsely incriminate him in the murder charge. He said police had a duty to investigate the allegations against the applicant. He also denied any dealings win Cecil Marais. He referred to the allegations of persuading witnesses to incriminate the applicant in the murder charge as "false, fictitious and malicious". He said the police asked for the blood sample to be taken from the applicant. They should not be excluded from the place where the blood sample would be extracted from him. As long as the applicant remained a suspect in the murder charge, the police had the right to come within 200 metres of his residence to investigate him. On the applicant's demand that it should be for Mr Nhari to say whether a blood sample is required from him, he said:

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> "Mr Nhari is not an investigator and the suggestion by the applicant that a blood test be obtained at Mr Nhari's say so is ridiculous."

Mr J Musakwa of the Attorney-General's Office deposed to an affidavit in which he denied the allegations in Cecil Marais' affidavit that he and the police visited his house to persuade him to attend a meeting where a strategy to incriminate the applicant in the murder charge was to be held.

In his address to the court, the applicant attacked the opposing and supporting affidavits filed by the respondents as being inadequate. He said the respondents had not answered allegations of

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conspiracy to incriminate him raised in his affidavit. Mr *Chikumira* submitted that the allegations were irrelevant to the issues before the court to deserve the attention of the respondents. I agree with Mr *Chikumira's* submission. The applicant raised, through the founding affidavit and supporting affidavits, matters that were either hearsay or irrelevant to the issues to be resolved.

The onus is on the applicant to establish on a preponderance of probabilities the grounds on which he seeks to interdict the respondents from having a blood sample taken from him and from coming within 200 metres of his person. This case also raises the important question of the rights and duties of the police on the one hand and the accused on the other in the process of extraction of blood samples and their tests. There is also the question of the security of the blood sample once extracted.

In my view, the value of the results of blood tests to criminal investigation is beyond question. In *W v Official Solicitor* [1972] AC 24 at 41C LORD REID said:

> "Blood tests have now been used extensively for many years in many countries and it is now generally recognised that if a test is properly carried out by a competent serologist its results are fully reliable."

His Lordship went on to state the common law to the effect that:

> "a person of full age and capacity cannot be ordered to undergo a blood test against his will. The reason for the common law rule is not that the person ought not to be required to furnish evidence which may tell against him. By discovery of documents and in other ways the law often does this. The real reason is that English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty" (at p 430D-F).

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In Zimbabwe the common law position has been altered by the provisions of s 45(3) as read with s 72(5) of the Criminal Procedure and Evidence Act [*Chapter 59*].

Section 45(3) reads as follows:

> "Any peace officer may take or cause to be taken the finger-prints, footprints and photographs of any person arrested upon any charge, and the medical officer of any prison or any medical officer of the Ministry of Health or any peace officer may take or cause to be taken such steps, including (except in the case of a peace officer) any blood test as he may deem necessary in order to ascertain whether or not the body of any such person bears any mark, characteristic, or distinguishing feature or shows any conditions or appearance:
>
> Provided that a blood test shall only be made at the request in writing of a police officer of or above the rank of superintendent and in order to ascertain some fact which is material to the investigations of the charge upon which such person has been arrested."

Section 72(5) provides that the evidence of a blood test shall not be rendered inadmissible by the fact that the characteristic or feature "was discovered otherwise than in terms of this Act or against the wish or will of the accused."

In determining the issues I have considered matters relating to the second part of the order applied for by Dr David Israel Ben Jesse first.

It is clear from the wording of s 45(3) that the process of extraction of a blood sample from the applicant could only have been instituted by the preparation of a written request to a medical

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practitioner by a police officer of a rank of or above superintendent. The police are expressly excluded from performing the physical act of extracting a blood sample. The learned authors of *Commentary on the Criminal Procedure Act* 1 ed at p 3-2 considered the police powers under s 37(1)(c) as read with s 225(2) (similar to our s 45(3) as read with s 72(5), of the South African Criminal Procedure Act 51 of 1977 and concluded by saying:

> "It is for example, extremely doubtful whether our Courts would admit the results of a blood sample taken by a police official in breach of the proviso to s 37(1)(c). Such an approach would militate against public policy, even though apparently provided for in s 225(2)."

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It seems to me that s 45(3) of the Criminal Procedure and Evidence Act confers on the person from whom a blood sample is to be extracted the right to be informed of the person who is to take the blood sample, the place where that is to be done, the time and the facts sought to be established by the blood test. It would be pointless to require his consent to the extraction of the blood sample without granting him the right to the relevant information on which to make that consent. It follows that the accused should be given a copy of the written request for a blood sample sent to the medical practitioners. The letter of 10 November 1994 was vague. It was not in compliance with the requirements of s 45(3), in that it was not a written request addressed to a medical practitioner by a police of officer of a rank of or above superintendent. It was written by a detective inspector. The applicant had the right to ignore it.

Under s 45(3), the police have no right to take a blood sample from an accused. It would have been unlawful for the police to take a blood sample from the applicant. The law clearly places the duty to extract a blood sample on a medical practitioner at the request of a police officer of the rank of superintendent or above. The Attorney-General's representative fell into the error of assuming that the police had the right to take the applicant's blood sample. Until they had complied with the procedure set out under s 45(3) of the Criminal Codes it was improper to threaten the applicant with the use of force against him to have a blood sample taken. Until they had sent to the applicant notice of a written request addressed to a named medical practitioner and advising therein where, when and for what purpose the blood sample was to be extracted, the respondents had no right to threaten the use of force on him. He had after all not refused to comply with lawfully issued requests for a blood sample.

It also must follow from this analysis that Mr Nhari has no power to issue the instruction to the police that a blood sample was required. Only a police officer of the rank of superintendent and above can issue the written request for a blood sample to be taken from an accused. Mr Nhari is a chief forensic scientist and not a police officer.

I come now to the question of consent by the applicant to subject himself to the extraction of the blood sample by a medical practitioner. I note from the papers that the applicant's position is that his consent to the blood sample being extracted from him is central to the whole process taking place and that if his conditions are not met no blood sample can be taken. He is mistaken in holding that view. Once the police have followed the correct procedure set out in s 45(3), the presumption is that they can use reasonable force to compel

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MALABA J

the person to submit to the extraction of the blood sample by the medical practitioner. Section 45(3) gives the police the power to take all steps to ensure that a blood sample is taken. They cannot themselves take the blood sample.

It is trite that a statutory provision that grants to one person a right to perform an act whose execution depends on the consent of another gives him a right to use reasonable force to compel the necessary consent if it is unreasonably withheld. In this case it would be pointless to grant the right to extract a blood sample from an accused only when he is willing to submit to its extraction. This principle was stated by SOMERVELL LJ in *Grove v Eastern Gas Bd* [1952] 1 KB 77 (CA). His Lordship considered a section of the statute that gave inspectors of the Gas Board the right to enter houses to inspect gas meters. The section did not expressly confer on the inspectors the power to use force to enter the houses. His Lordship reasoned that the power was nonetheless provided by the statute and said at p 82:

> "In the context of this paragraph of the Schedule and perhaps broadly speaking a power of entry conferred by a statute is *prima facie* at any rate a power of forcible entry if necessary. There would be no need for statutory authorization if all that the representative of the gas board were allowed to do was to enter and read the meter if the consumer was willing to admit them to the place where the meter was so that they could read it".

The learned authors of *Commentary on the Criminal Procedure Act* 1 ed p 3-13 share the same view that reasonable force can be used to compel an accused to submit to the extraction of a blood sample. They say:

> "It is submitted that a police official may assist a registered medical practitioner or registered nurse to draw a blood sample of an 'unwilling' person in circumstances where the police official requested the doctor or nurse to take the sample and the person concerned is someone referred to in s 37(1)(a)(i) or 37(1)(a)(ii). Reasonable force would presumably be permissible if a person falling within ss 37(1)(a)(i) and 37(1)(a)(ii) should refuse to have a blood sample taken or behave in such a manner as to make it clear that he does not want to co-operate."

It also follows from the construction of s 45(3) that only those officials mentioned therein can take the blood sample and conduct the blood test. Police are again excluded from participating in the process of blood testing.

MALABA J

The officials mentioned can of course decide to delegate their duties to some other persons. The applicant cannot therefore bypass the officials mentioned in s 45(3) and have his blood sample taken and tested in South Africa. It is up to the officials mentioned in s 45(3) to decide whether the blood sample would best be tested in South Africa.

On the security of the blood sample, the applicant has failed to discharge the onus placed on him. The grounds on which he fears that the police would plant the blood somewhere else to incriminate him in the murder charge were not established on the papers. He seems to have grounded his fear on hypothetical and speculative conjecture. There is still the possibility that

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the police may not think the way the applicant suggests.

Coming now to the first part of the order prayed for, it is clear that the applicant is seeking through a court order to terminate investigations by preventing the police from arriving within 200 metres of him. It would appear that the prayer was based on the desire to prevent a blood sample being extracted from him by the police. The applicant has failed to establish on a balance of probabilities the need for such a drastic order which would amount to prohibiting the police from carrying out their public duty to investigate crime. The applicant is in effect seeking to prevent the due process of law itself from taking its proper course. That he cannot do.

In cases other than those involving drunken driving, the police have a right under s 45(3) of the Criminal Procedure and Evidence Act to cause a blood sample to be taken from a person under arrest or on remand and to use reasonable force to compel him to submit to the extraction of the blood sample by the officials mentioned in that section. The police must, however, comply with the mandatory procedure set out in s 43(3) otherwise their actions would be unlawful. The application must therefore fail. The conduct of the respondents caused the applicant to bring the application to court. Had they followed the correct procedure the application would not have been made.

Although unsuccessful, it would not tee proper to mulct the applicant with all the costs of the application.

The application is dismissed. The parties are each to pay their costs.

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

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Endnotes

1 (Popup - Popup)

Meyerowitz 6 ed para 23.27 says:

"A trustee in respect of the execution of his official duties is entitled to such remuneration as the trust intruments provides. Where the trust deed makes no such provision, the trustee is entitled to a reasonable renumberation which, in the event of dispute, shall be fixed by the Master."

He cites s 22 of the Trust Property Control Act 57 of 1988 - *Editor*

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