S v MUSAKWA 1995 (1) ZLR 1 (SC)

Court **Supreme Court, Harare**

McNally JA (in Chambers in terms of s 9A of the Supreme Court of Zimbabwe Act)

Criminal appeal

6 January 1995 Judgment No S-1-95

Flynote

Appeal - notice of appeal - magistrate - duties - what magistrate should comment upon in reply

Evidence - identification - of persons - need for caution - cannot dismiss alibi on basis of comparative demeanour

Headnote

In replying to a notice of appeal a magistrate should confine himself to factual observations and should not speculate on possible motives behind the appeal.

Mistakes often happen with identification evidence. Where a person identified claims he was elsewhere at the time of the crime, the police should check his alibi, as the onus will be on the State to disprove his alibi. The court should not dismiss an alibi on the basis of comparative credibility of the complainant and the accused.

Cases cited:

S v Makoni S-67-89

S v Ndhlovu & Ors 1985 (2) ZLR 261 (S)

R v Biya 1952 (4) SA 514 (A)

S v Khumalo & Ors 1991 (4) SA 310 (A)

Judgment

McNally JA: This case is an example of inadequate investigation by the police and of a failure in the trial court to appreciate the nature of the defence put up by the accused. Having read the papers, we agreed with the concession

McNALLY JA

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by Miss *Hammond*, for the State, that the conviction is not supportable. Accordingly, in terms of s 9A of the Supreme Court of Zimbabwe Act, and with the agreement of my brothers KORSAH and MUCHECHETERE, I set aside the conviction and sentence in Chambers on 6 January 1995 and indicated that my reasons would follow.

The charge was theft by false pretences. The facts were these. The complainant was window-shopping. She was thinking of buying a pair of shoes, priced at $99,95. Two young men approached her. They said they worked for a shoe company. They could get her those very shoes for $70. She gave $70 to the one. He went into the shop. She remained chatting with the other. After some time she asked what had happened to the first man. The second man went to look for him. She waited some ten minutes. Then she went into the shop. Neither was there. She realised she had been the victim of a confidence trick. She came out again. She saw a man there. It was the appellant. She asked him where her shoes were. He denied all knowledge. She was satisfied that he was the one who had approached her and had stayed with her while the other went into the shop with her money. She caused him to be arrested.

The appellant's defence right from the beginning was that he had just arrived there when the complainant accused him. He had come from work. He had left work at 4.30 pm. He gave the name of his employer.

The magistrate decided that the complainant could be relied on. She had spoken to the man concerned for over ten minutes. She could not be mistaken. So he convicted.

What no-one seems to have realised is that the defence raised was that of an alibi. The appellant was saying that he had only just arrived when he was accused. So he was not there when the confidence trick was set in motion.

The appellant said so right from the beginning. So why did the police not check whether he was being truthful when he said he worked for "Heat and Systems" who make pressure pipes? Why did they not check his story that he left there at 4.30 pm? Why did they not check how long it takes to walk from there to the spot where the offence was committed? Why did they not ask the complainant what time it was when the two young men approached her?

The court should have been alive to the importance of these matters. It was not simply a matter of the reliability of the young woman's powers of

recognition. (*S v Makoni* S-67-89; *S v Ndhlovu & Ors* 1985 (2) ZLR 261 (S) at 263G). She was, although not an accomplice, certainly a suspect witness. It is hard to accept that she was merely gullible. She must have realised that the young men were, at best, planning to deprive the shopkeeper of his mark-up. And she was no doubt desperate to get her $70 back. After all, why would a young man in employment do a thing like this? And why would a young man who has succeeded in stealing $70 wait around to be recognised?

I have spoken often enough of the "boxing ring" approach to criminal trials. It is not good enough simply to throw the complainant and the accused into the ring and decide the matter on

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credibility. I suspect the contest is sometimes unfair from the start because the magistrate makes the unconscious assumption (at least I hope it is unconscious) that the accused would not be there if the police did not think he was guilty. So he is predisposed to believe the complainant. This is a fundamentally wrong approach.

The alibi defence is referred to in s 158 of the Criminal Procedure and Evidence Act and in Hoffmann and Zeffertt *South African Law of Evidence* 4 ed at p 619. The onus is on the State to disprove the alibi: *R v Biya* 1952 (4) SA 514 (A); *S v Khumalo & Ors* 1991 (4) SA 310 (A) at 327H.

The State made no effort to disprove the alibi in this case. Mistakes in identification can happen. The police should know this. They should have checked.

It should also be mentioned that magistrates should confine themselves as far as possible to factual observations when commenting on grounds of appeal. It can only be embarrassing when, as in this case, the comment is made:"I consider this notice of appeal as time-buying".

S v McGOWN 1995 (1) ZLR 4 (HC)

Court **High Court, Harare**

Garwe J & Assessors

Criminal trial

4-8, 11-15, 18-22 and 25-29 July; 1-5 August 1994; CAV

Postea (9-10 January 1995) Judgment No HH-4-95

Flynote

Criminal law (common law offences) - culpable homicide - negligence - medical practitioner - anaesthetist- standard of care required - use of new techniques - whether patient's consent required - whether practitioner should notify professional body of use of new technique - morphine administered epidurally - post-operative care required - on whom duty of ensuring that such care available and exercised - failure to ensure that such care available and exercised

Headnote

The accused was an anaesthetist of many years' standing and considerable experience. He was accepted as an expert in his field.

He was charged with 5 counts of culpable homicide arising out the deaths of patients to whom he had administered anaesthetics before surgery. On counts 1, 2 and 5 he was acquitted. On count 3, the allegation was that on 13 July 1988, having administered an excessive dose of morphine to a child who had been admitted for routine circumcision, the accused, after the operation, negligently discharged the child into the care of his parents and did not ensure that adequate post-operative care was given, thereby causing the child's death. On count 4, it was alleged that on 9 August 1990, having administered various drugs, including morphine, to a

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10-year-old girl who was admitted for an appendectomy, he failed to prescribe adequate post-operative surveillance, as a result of which the child collapsed, unnoticed by the nursing staff, and died.

In 1979 the use of morphine in epidurals was described in a leading medical journal and the accused, like many other anaesthetists, began using

morphine in that procedure. Others preferred not to, because of the side effects, such as vomiting and respiratory depression, and because the administration of morphine epidurally is a technique requiring considerable skill and strict protocols. There is no set dose for morphine or any other anaesthetic drug; the anaesthetist should take account of the experience of others and of his own experience. The higher the dose, though, the greater the side effects that can be expected. The effects of a dose of morphine can last for 8 to 24 hours, with the peak at 6-12 hours after administration.

The medical literature urged caution in the use of morphine on children. When morphine is used, proper post-operative care is required. The opinion of the expert witnesses was that there should be adequate nursing care and good resuscitative facilities. The anaesthetist should not assume that there will be competence right down the line. Most witnesses considered that the patient should be discharged into a high-care or intensive-care unit, though a general ward could be used if the staff there were properly trained. This would include specific instructions to the nurses on such matters as checking sedation, respiratory rate, pulse, blood pressure and emergency procedures. Basic resuscitative equipment should also be available.

The relationship between surgeon and anaesthetist is not one of principal and agent. Neither is subservient to the other, nor, generally, is one liable for the negligence of the other. The responsibility for the administration of anaesthetic drugs and the recovery of the patient is that of the anaesthetist.

As to the relationship between doctor and nurse, it is generally accepted that doctors are entitled to rely on nurses; doctors cannot be around patients all the time. But where epidural morphine is administered, the anaesthetist must satisfy himself that the nurses into whose care he is discharging his patient will be able to cope and that the responsibility imposed on them properly relates to their ability. While most nurses are taught about such things during their training, they would not have a chance to actually do it. Most, without specific training, would be unable to deal with the emergency caused when a patient stopped breathing.

With regard to whether the patient's consent is necessary, the opinion of the experts was that in broad terms the patient should be informed of the nature of the procedure and the risks involved. On the subject of whether an anaesthetist who applied a new technique reported in the literature, the evidence was that there was no requirement for him to notify his professional body; he is only required to report where he is conducting clinical trials or is experimenting.

The post-mortem report in respect of the deceased child in count 3 showed

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that death was due to possible asphyxia and aspiration of vomit. The morphine would have depressed the child's respiration, and this would have led to vomiting. Because of the depressed state of respiration, the vomiting would have prevented the child from breathing.

On count 4, the evidence was that the accused used morphine for a patient undergoing an appendectomy. The dose of morphine given was described by experts as high. After the operation, the deceased was discharged into a general ward, rather than into the hospital's high-care unit. The deceased was one of 10 children under the care of a single nurse. The post-mortem report showed that the deceased died of respiratory depression and cerebrospinal oedema.

Held, that it was wrong for the accused to administer epidural morphine, with its known risk of respiratory depression, without explaining to the patient broadly what the technique is all about and what the risks are.

Held, further, that for a person to be held guilty of culpable homicide, it is necessary only to show that a reasonable person in his position would have foreseen the possibility that his conduct might have caused the death of the deceased or a person in the deceased's position. It is the general possibility of death that must be foreseen, not its specific manner and nature. The slightest deviation from the norm of a reasonable man will suffice to create liability. In addition, it must be shown that there is a *nexus* between the accused's negligence and the deceased's death. There must not be a *novus actus interveniens.*

Held, further, that a professional person, such as a medical practitioner, must exercise reasonable skill and care determined by reference to members of his profession. The standard required is a degree of skill that is reasonable having regard to the general level of skill and diligence possessed and exercised at the time by members of the profession to which the practitioner belongs. The standard of skill required should not be affected by the place where the practitioner happens to reside. Not every slip or mistake imports negligence; only if he falls short of the standard of a reasonably skilful medical man. In this case, the standard of expertise against which the accused should be judged is that of the reasonably skilful anaesthetist.

Held, further, that the general rule is that if a medical practitioner departs from the general and approved practice for no good cause, and damage results, he is likely to be held negligent. Such deviation, though, is not necessarily evidence of negligence. It is in the public interest that new forms of treatment should be developed; any principle of law which stifles such development is unsatisfactory. It would have to be shown that the course the practitioner took was one which no professional

person of ordinary skills would have taken if he had been acting with ordinary care.

Held, further, with regard to the training and instructions the nursing staff should have had, that it would be insufficient for the anaesthetist to put instructions to nurses on a notice board.

Held, further, with regard to count 3, if the accused was going to use morphine he should have put in place post-operative facilities to match the technique. The dose used was above that which would be used by other practitioners. The risks attached to the use of morphine, including

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that of respiratory depression, were known to the accused. In spite of those facts, the accused, instead of keeping the child in hospital, discharged him into the care of his parents. This was an act of gross negligence.

Held, further, that it was irrelevant whether death was due to vomiting or whether the vomiting was due to the fact that the child had stopped breathing. The average anaesthetist would have foreseen complications arising from the administration of a high dose of morphine and the discharge of the patient into the care of his parents. The possibility of death was foreseeable and should have been guarded against.

Held, with regard to count 4, that the accused should have established what the staffing conditions were before discharging the patient into the ward. It would have been very difficult for one nurse to have maintained the vigilance required for a case of this nature. The accused had given instructions, but these were inadequate. Even if the nurse was negligent in not closely monitoring the child, the negligence was the result of the accused's inadequate instructions and so did not amount to a *novus actus interveniens.*

Per curiam: it is improper that the Health Professions Council should not be aware of new procedures and practices.

Cases cited:

S v Kramer & Anor 1987 (1) SA 887 (W)

van Wyk v Lewis 1924 AD 438

Castell v de Greef 1994 (1) SA 408 (C)

Rogers v Whitaker (1993) 67 ALR 47 (High Ct of Australia)

Hunter v Hanley 1955 SC 500

Landam v Werner (1961) 105 SJ 257

Sidaway v Governors of Bethlehem Royal Hospital [1985] 2 WLR 480 (HL)

S v Chipinge Rural Council 1988 (2) ZLR 275 (S)

Bolam v Friern Hospital Mgmt Cttee [1957] 1 WLR 582; [1957] 2 All ER 118 (QB)

GARWE J

Mahong v *Osborne* [1939] 1 All ER 535 (CA)

Lanphier v Phipos (1838) 8 C & P 475

R v Bateman (1925) 94 LJ KB 791

Hatcher v Black (1954) *The Times*, 2 July

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P A Chinamasa, Attorney-General, with him *R Goba, Acting DPP*, for the State

J C Andersen SC, with him *A J Dyke*, for the accused

Judgment

Garwe J: This case is really about the practice of anaesthetics, or anaesthesiology as the Americans would call it. The evidence deals with the responsibilities and professional expertise expected of anaesthetists before, during and after an operation and the circumstances in which an anaesthetist could be said to be guilty of professional negligence.

The accused in this case is an anaesthetist of several years standing. He is facing five counts of culpable homicide arising out of his practice as an anaesthetist. The broad allegation in all five counts is that as a result of his negligence, five patients met their deaths. The accused pleaded not guilty to all five counts.

The events giving rise to these allegations are in the main common cause or at least not seriously disputed.

On count 1, the deceased, Mrs Papatheocarus, was admitted into the Avenues Clinic on Sunday 11 May 1986. She was to undergo surgery the next day for cholcystectomy and appendicectomy. The surgeon was Mr Minas Moschos whilst the anaesthetist was the accused.

The operation itself was without incident. It started at 8.00 am and was completed at about 10.45 am. The accused inserted an epidural cannula (or catheter) into her spine at the T8 + T9 interspace. The cannula was to facilitate the administration of morphine if it became necessary.

At about 17.30 hours, the deceased complained of pain and the nurse on duty injected 3 mg of morphine through the epidural cannula. The patient collapsed a few minutes thereafter. The crash-cart team was called and external cardiac massage given. Oxygen was administered and she was intubated. She died the following morning at about 8.00 am.

A post-mortem examination conducted on 14 May 1986 revealed that the tip of the cannula had entered the subarachnoid space at the level of the T6

vertebra. Death occurred as a result of the administration of morphine directly into the subarachnoid space which resulted in respiratory depression.

The issue is whether the accused negligently inserted the cannula into the subarachnoid or whether the cannula subsequently migrated on its own after correct initial placement.

On count 2, it is common cause that Tsitsi Chidodo was 4 years and 8 months at the time of her death.

She had developed holes in her teeth. An attempt by the dentist, Dr O'Brien, to fill in the holes failed as the child did not co-operate. It therefore became necessary for the procedure to be

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undertaken whilst the child was under anaesthesia. The procedure was carried out on 7 January 1988 by Dr O'Brien and was uneventful. The accused was the anaesthetist. After the procedure, the child was then taken by the accused into recovery where a recovery room nurse was to manage the child until it regained consciousness.

The child suddenly stopped breathing but was resuscitated. She again collapsed and was taken to the Avenues Clinic where a neuro-surgeon confirmed the following morning at about 8.45 am that the child was brain-dead.

The cause of death was given by Dr Da Costa as being due to bilateral broncho-pneumonia and cerebral oedema. All the experts are, however, agreed that death was due to cerebral oedema due to cardio-respiratory arrest following general anaesthesia.

The allegation in this count is that the accused failed to make proper post-operative observations and monitoring of the child during recovery and further that he failed to put in place adequate facilities to deal with any emergency.

On count 3 the deceased was a 20-month old baby boy who was taken to the Avenues Clinic for a routine circumcision. The child was in good health. The circumcision was requested on purely religious grounds. The surgeon was Mr Minas Moschos, whilst the anaesthetist was the accused. The accused administered premedication and for post-operative pain administered 1,25 mg of morphine.

The circumcision itself was without incident. After surgery the child was

handed back to his parents who took him home. At home the child started vomiting and was rushed back to the Avenues Clinic. Shortly thereafter the parents were advised that the child had passed away.

The cause of death is given as (a) possible asphyxia and (b) aspiration.

The allegation on this count is that having administered an excessive dose of 1,25 mg of morphine, the accused negligently discharged the child from hospital and did not ensure that the child received adequate post-operative observation after the administration of morphine and that consequently the child died.

On count 4, Lavender Kaminwa, born on 28 October 1980, was taken to the Avenues Clinic on 9 August 1990 for an appendectomy. The surgeon was Dr John Alexander Gordon, whilst the accused was the anaesthetist. The surgery was carried out on 10 August 1990. For post-operative pain, the accused administered 4 mg of morphine. The child collapsed the same day at about 9.00 pm. The crash-cart was called and resuscitative measures taken. The child was certified dead at 21.45 hours.

The cause of death is given as shock and in-cerebrospinal oedema.

The allegation on this count is that, having administered lignocaine, adrenalin and morphine, the

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accused failed to prescribe appropriate post-operative surveillance as result of which the child collapsed unnoticed and died. In the further particulars supplied, the State alleges that the dose of morphine was excessive.

On count 5, Mrs Osazuwa, aged 62 years old, was admitted to Parirenyatwa Hospital on 24 March 1992 for anterior and posterior colporraphy. The surgeon was Dr Mohamed, whilst the anaesthetist was the accused.

The surgery itself was without incident. The accused administered 9 mg of morphine epidurally for post-operative pain.

A few hours later, she stopped breathing. The crash-cart team was called. Attempts to resuscitate her were in vain.

No post-mortem examination was carried out. The accused completed a medical certificate of cause of death in which he certified the cause of death - cardio-respiratory arrest due to cardiac failure - as being due to natural

GARWE J

causes. It is common cause that the certificate was completed at the instance of the deceased's relatives who wanted to make arrangements for the body to be transported to Nigeria for burial.

The allegation on this count is that the accused was advised that the deceased was allergic to morphine but he nevertheless administered 9 mg of morphine and thereafter failed to provide adequate post-operative observation and monitoring as a result of which she died.

The purpose of anaesthesia and the types of anaesthetic drugs used are dealt with in the accused's defence outline and various medical publications which were tendered as exhibits.

The use of morphine in epidurals commenced in 1979 following publication of an article in *The Lancet* medical journal. Epidurals with other drugs had been used before that date. Morphine had also been used for years. The combination of the two was a major discovery. The summary of the journal (which is Article 27 in Exhibit 25) reads:

> "Epidural injections of 2 mg morphine were given to 10 patients with severe acute or acute pain. All cases had considerable amelioration of pain, which commenced within 2-3 minutes, reached a peak in 10-15 minutes, and was effective for 6-24 hours. It is suggested that the morphine reached the subarachnoid space and produced its effect by direct action on the specific opiate receptors in the substantia gelatinosa of the posterior horn cells of the spinal cord."

It was following publication of this article that epidural morphine came to be administered by anaesthetists, including the accused.

THE EVIDENCE

To appreciate the issues involved in this case, it will be necessary to set out in detail the evidence given by the various witnesses, both for the prosecution and the defence. I now

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proceed to give a summary of the evidence of each of these witnesses in the order in which they were called.

[The learned Judge then considered the evidence and continued:]

Before dealing with the individual counts, it is necessary in my view, to deal with a few aspects that arose during the course of the trial.

GARWE J

(A) MIGRATION OF CATHETER

In a 1986 article entitled "Can epidural catheters penetrate the dura mater? An anatomical study" by Hardy (Exhibit 6) the author notes that the dura is a substantial structure varying in thickness from 2,5 mm at cervical levels, to 0,5 mm in the lumbar region. It is composed of both fibrous and elastic tissue and is moderately compliant. The author reaches the conclusion that the intact dura could not be penetrated by the epidural catheters tested and that subaranchnoid placement of epidural catheters occurs as a result of initial subdural needle placement.

In another article by Phillips and others entitled "Epidural catheter migration during labour" (Exhibit 7) the authors report on a study involving 100 patients who had had epidural analgesia for pain relief in labour. The authors found that over 50% of the catheters migrated from the original position at siting.

Article 10 also suggests that movement of a patient may encourage inward migration of the catheter causing the dural puncture. The article suggests there may have been a small nick in the dura at time of placement.

In his evidence, Dr Cahi accepted that catheter migration across the dura mater is a known phenomenon but says no-one can explain exactly how it takes place.

Professor Rosen also accepted that catheter migration is a constant concern to anaesthetists. He also accepted that migration across the dura is possible and that for this reason it is always necessary to aspirate to test correct catheter placement. He was however unable to find literature which specifically confirms this. He also could not say whether the phenomenon was known before 1986.

Dr Hutchinson also says it is possible for a catheter to pierce the dura mater. She says that in fact it has happened once in her career when a plastic catheter, which is much firmer, was used. She was not sure how exactly it happened but believes this was at time of insertion. In general, however, she accepts catheter migration across the dura is possible, although she says it is "an extreme rarity".

Ready, in his 1991 article (article 9), reports that four cases of catheter migration into either the subaranchnoid space or epidural veins were detected through the aspiration test.

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GARWE J

Two things emerge from the views of these experts. First, migration within the **epidural** space after correct placement at time of insertion is a very real possibility. Second, migration of the catheter across the dura mater, though rare, is possible. However, it is not always possible to explain how this happens.

(B) DOSES GENERALLY

From all the evidence given during this trial, it did emerge that the manufacturer usually indicates the recommended dosages.

From the anaesthetics point of view, however, the dose is for the anaesthetist to determine. There is no such thing as a set dose or a standard dose. There are no laid down limitations. There are only informal limitations. In exercising his judgment, the anaesthetist should take into account primarily the experience of others and then his own.

All the experts are agreed that there can be differences of opinion on the dose and that a recommended dose can be exceeded. However, the same experts are also agreed that where an anaesthetist exceeds the recommended dose, he must take full responsibility for such action and ensure proper post-operative care to match such a dose.

This is because an increase in the dose will be accompanied by increased side effects necessitating more intensive post-operative observation for pulse, respiratory rate, blood pressure, rousability, etc.

(C) MORPHINE EPIDURALS

Whilst it is possible for smaller amounts of morphine to be administered directly into the subaranchnoid space, all the experts are agreed that this is not common practice and that the general tendency is to administer morphine epidurally. This court will therefore concern itself with epidural morphine as intrathecal administration of morphine is usually unintended and a complication of an epidural.

From the literature and all the evidence given, there is no doubt that morphine is perhaps the most effective analgesic for post-operative pain and that it is very beneficial in terms of pain control.

However, an epidural with morphine is a technique requiring considerable skill and strict protocols.

GARWE J

This is because of the risk of accidental perforation of the dura, resulting in unintended intrathecal administration and, more importantly, because of the ever-present risk of respiratory

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depression.

Morphine has been used for more than a hundred years. It has side effects which have been known for a long time. These include vomiting, respiratory depression, pruritis, nausea, and urinary retention. These risks are always present whenever morphine is used. But the real risk is that of respiratory depression, which can be fatal.

Anaesthetists are divided on whether morphine should or should not be used. Some have not used it at all, believing that its disadvantages outweigh its advantages. Others have used it for a while and have then switched to newer and safer drugs. Others continue to use it even to this day.

Because of the risk of respiratory depression in particular, the experts are, however, agreed that patients receiving this form of analgesia require proper post-operative care. Where such care cannot be guaranteed, then other techniques or analgesics, probably not as effective, should be utilized. Dr Hutchinson, for example, uses morphine but ensures that invariably the patients go to intensive care. This is because at Government hospitals staffing is a problem and proper care cannot be guaranteed in an ordinary ward. The need for observation is therefore an important part of the technique.

We have already noted that there is no such thing as a set dose. This also applies to epidural morphine. Where a higher dosage is given, more side effects should be anticipated and this means the anaesthetist must ensure proper post-operative facilities. The complications of morphine, like those of other drugs, are dose related.

Whilst the duration of the effects of morphine cannot be measured with any degree of certainty, the experts are agreed that the effect of morphine can last for 8 up to 24 hours, although the peak is between 6-12 hours after administration.

The Lancet article (which is article 27 in exhibit 25) and the 1980 article by Bromage (article 20 of exhibit 25) both warned of unexpected or delayed respiratory depression following epidural and intrathecal administration of narcotics and urged a cautious and vigilant approach.

The 1991 article by Ready restates what we believe was well known, namely,

that patients react differently to drugs and that each case must be considered individually.

The 1983 and 1987 Swedish surveys were large surveys. The 1987 study is contained in article 12 of exhibit 25. These studies confirmed the possibility of side effects. Article 12 suggests that a dose of more than 4 mg of morphine in an adult may be responsible for delayed respiratory depression.

On children, the experts and the literature urge caution in using morphine on children. The basic reason is that the respiratory centre in the brain is not well developed and is therefore more sensitive to the effects of morphine. Dr Cahi says he has not used epidural morphine on children less than fourteen because he is wary, from the medical literature, of the risks of

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morphine on children.

In article 15 of exhibit 25, published by Jensen in 1981, the author concludes by saying since the risk of respiratory depression after epidurally administered morphine is now known, no child should be permitted to leave hospital within 24 hours of a caudal block with morphine. The same warning is repeated by Krane in his 1988 article (article 5) and also in the 1984 article by Glenski (article 17).

On dosages in children the 1989 article by Krane (article 6 of exhibit 25) which recommends an initial dose of 0,033 mg per kg body weight appears to reflect current thinking on the subject. But the landmark paper which currently governs the practice of anaesthetics involving opiates is the 1991 article (article 9) by Ready.

(D) ADRENALINE

It appears that the accused does not accept that adrenaline can prolong the effect of morphine. This much is clear from the questions put to the various expert witnesses called and from p 10 of the accused's heads of argument.

It is true that articles 13 (1982), 14 (1986), 20 (1980) and 21 (1991) suggest that the addition of adrenaline (epinephrine as the Americans would call it) to local anaesthetics does not prolong the incidence of side effects or the analgesic effect from epidurally administered morphine.

Professor Venter and Professor Chinyanga say it does delay absorption and thereafter prolongs the effects of morphine.

GARWE J

Professor Rosen said much the same thing and indicated that articles which suggest otherwise are misleading and that most of those articles were written before more definitive studies had been undertaken. He says the effect might be felt in some patients but not in others and that the basic rule is that the effect of adrenaline on morphine is a factor to which regard must be had by any anaesthetist. He refers to the 1983 article by Bromage which suggests that adrenaline reduces vascular absorption of epidural morphine and intensifies all the manifestations of cord and brain-stem uptake.

In fact on p 3 of his defence outline, the accused accepts that adrenaline in concentrations of 1:200 000 prolongs the duration of action of analgesic drugs such as lignocaine by slowing down the rate of absorption.

We accept Professor Rosen's position as being correct.

(E) PREMEDICATION

Vallergen is a central nervous system depressant and can potentiate the effects of morphine.

Professor Rosen's evidence was that the effect of premedication, particularly in day cases,

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should always be considered. Dr Zwana said much the same thing.

Dr Cahi says vallergan can depress the central nervous system and the respiratory system.

The experts do not say it is improper to use it. They merely say it means more caution should be taken as such premedication can potentiate the effects of morphine and one should expect a longer recovery period.

We accept that premedication can have the effect described.

(F) POST-OPERATIVE CARE

The care referred to relates specifically to patients receiving epidural (or caudal) morphine.

All the experts and the literature presented to us confirm that proper post-operative facilities are part of the technique. In other words, where proper facilities cannot be guaranteed, then the technique should not be utilized. Instead other techniques, perhaps less effective, should be used.

GARWE J

I propose to deal with this matter under three subheads. These are (i) responsibility of anaesthetists (ii) type of ward and facilities (iii) training of nurses for post-operative care.

(i) Responsibility of anaesthetists

All the experts are agreed that the technique is at the discretion of the anaesthetist, who is an expert in his own right. The anaesthetist is not subservient to a surgeon and a surgeon would not ordinarily tell an anaesthetist how to carry out his duties or what premedication to administer. The decision is entirely that of the anaesthetist.

On the relationship between surgeon and anaesthetist VAN DER MERWE J remarked in *S v Kramer & Anor* 1987 (1) SA 887 (W) at 895:

> "I am of the opinion that, in general, neither the surgeon nor the anaesthetist is liable for the other's negligence. This general rule will, however, be subject to exceptions, for example, where the surgeon knew the anaesthetist was incompetent or not in a fit condition to perform his duties .... They are not agents of one another. They are not employed and controlled by one another. Each one performs a specific specialized function as part of a team consisting of surgeon, anaesthetist and nursing staff".

Like other professionals, anaesthetists need to keep abreast of developments within the anaesthetic field. For this purpose, most anaesthetists continuously read medical journals from other countries.

In choosing a particular technique, it is incumbent upon an anaesthetist to take into account the post-operative facilities available. Where such facilities are not adequate, then epidural morphine should not be used unless specific arrangements are made by the anaesthetist to match the care needed.

The responsibility for the administration of the drug and the recovery of the patient is that of the

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anaesthetist. In other instances, he can delegate such duty to trained nursing staff either in the ward or high-care or intensive-care units.

The dose, as we have already noted, is also at the discretion of the anaesthetist. But, as we noted earlier, if an increased dose is used, then the post-operative facilities must match any increased side effects anticipated.

GARWE J

We have also noted that morphine has a number of side effects which increase with the dose. The position is now clear that, primarily because of the risk of respiration depression, most anaesthetists would not use epidural morphine unless proper post-operative care was guaranteed, ie adequate nursing care and good resuscitative facilities. If not, other techniques which do not involve morphine or opiates generally should be used. As indicated by Dr Moschos, the procedure should be used only if there is a strict protocol in place and an anaesthetist should not assume that there will be competence right down the line.

Post-operatively, the anaesthetist must ensure that the patient has sufficiently recovered before discharge either to recovery or ward or high care or intensive care. Having been responsible for the anaesthesia, it makes a great of sense that the anaesthetist should be responsible for the recovery and care of the patient. Clearly the duty cannot be placed on anyone else.

(ii) Discharge into ward

As Krane indicates in his 1991 article (article 9), the use of epidural morphine outside of intensive care remains controversial. Most of the expert witnesses who gave evidence suggested either high care or intensive care. All experts are agreed that it is the safety factor which must be underlined.

Professor Rosen, Professor Chinyanga and Dr Zwana are agreed that a general ward can, in appropriate cases, be used after the discharge of a patient from recovery. All are agreed that, whilst high-care or intensive-care facilities are more desirable, a general ward could be used, but only if the staff in the ward are properly trained to take care of the patient. In other words, the responsibility in such a case is that of the anaesthetist to ensure that proper nursing care is in place. High care and intensive care are more appropriate because nurses there are taught the technique of cardio-pulmonary resuscitation. But, of course, the intensive-care unit has a limited number of beds which should be reserved for really deserving cases.

There should also be specific instructions given to the nurses on checking sedation, respiratory rate, pulse, blood pressure and what to do in cases of emergency.

The experts are also agreed that in addition to trained personnel basic resuscitative equipment should be available - such as oxygen, reversal drugs, crash-cart, ventilation machine, etc.

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(iii) Training of nurses

Most nurses would receive some theoretical training on post-operative care during their general training as nurses.

They may know what they are required to check. It would also not take them long to learn what they are required to do.

The experts who gave evidence, which evidence we accept, is that general training does not sufficiently equip a nurse to handle patients to whom epidural morphine has been administered.

That doctors are entitled to rely on nurses is now generally accepted. Doctors cannot be around patients all the time. They have to rely on nurses. This much is common sense. In *van Wyk v Lewis* 1924 AD 438 at 460 WESSELS JA (as he then was) stated:

> "In determining whether a surgeon ... is entitled to place reliance on the counting of swabs by a qualified and competent hospital sister and whether by so doing he has exercised a reasonable degree of skill, care and judgment, we must consider the prevailing practice of the profession and all the circumstances surrounding the operation ... In determining whether such a practice is reasonable or not, the court must take into consideration the advance of medical science and modern practice. Thus in the present aseptic treatment of patients, it is difficult for the surgeon to do all the work alone ... if the doctor were required to do all these things personally it would not be for the benefit of patients generally but to their detriment ... We must therefore admit that in operations some team-work, as it has been called by several witnesses, is essential. The work has become specialised so as to enable the surgeon to devote all his energy and attention to the highly skilled and difficult work of isolation, dissection and purification. To what extent a doctor should or should not rely upon the team work of the hospital assistants depends entirely on the nature of the particular case."

But where epidural morphine is utilized, there is need in our view, for the anaesthetist to satisfy himself that the nurses into whose care he is discharging his patient will be able to cope and that the responsibility properly relates to their ability.

The nurses must be properly instructed in the complications of epidural

morphine. They must know how to monitor, detect abnormalities, what action to take immediately before assistance comes, resuscitation technique and ventilation. There must be adequate staffing to enable such care to be given.

Dr Hutchinson, who has wide experience at Government hospitals, told the court it would not take a trained nurse long to acquaint herself with the risks of morphine and the observations to be made and the resuscitative measures to be taken. She says most nurses are taught these things during their training but would not have had a chance to actually do it. She specifically says that, whilst most nurses know how to administer oxygen, the problem arises when a patient stops breathing. This in our view is common sense and is true of most professions.

Dr Zwana, who has been medical superintendent at Parirenyatwa Hospital, Bulawayo Central Hospital and was a specialist anaesthetist at Mpilo Hospital, also says much the same thing. He

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says, unlike nurses assigned to the crash-cart or intensive care, nurses who have received general training would not have practised what they learnt during general training and when faced with an emergency, they are not able to deal with it properly.

We agree that nurses who are expected to manage such patients should receive some training in order to familiarise themselves with the risks and the appropriate action that has to be taken in any given situation.

We accept what Dr Hutchinson said, namely, that it should not take a trained nurse long to acquaint herself. But there has to be some sort of training, whether by the anaesthetist himself or by the hospital authorities.

Against this background, therefore, we find that the posting of instructions on a notice board by an anaesthetist is not sufficient, unless the nurses who are to read the instructions have previously had some training in the care and management of such patients.

Article 9 by Ready governs contemporary practice in opiates. This article was published in 1991 and therefore it would be unfair to use it as a yardstick against which the present case is to adjudged. But much of what is stated in the article was known previously. The article stresses education and training of nurses, careful medical supervision, appropriate protocols for dosing, monitoring and the treatment of side effects.

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(G) PATIENT'S CONSENT

This issue came up during the trial but had not been specifically put in issue at the beginning of the trial. Consequently the matter was not fully canvassed by either the prosecution or the accused. It is, however, the view of this court that, since the matter did come up, it is necessary to briefly comment on it.

Dr Cahi expressed the view that where a clinical trial is being conducted, then the informed consent of the patient would be necessary.

Dr Zwana was of the view that where epidural morphine is used, the nature of the procedure and the side effects should be explained to the patient.

Dr Moschos says that, from the surgeon's point of view, it is incumbent upon an anaesthetist to advise the patient of the procedure.

Mr *Andersen* in his address accepts that, where there are material risks, then the patient should be advised.

The accused admitted under cross-examination that he did not get the consent of the patients to apply epidural morphine, except when a catheter was used. Because of the nature of the technique, he found it necessary to explain what would happen when a catheter was used.

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It appears to us that there is need for the patient to be informed in broad terms of the nature of the procedure and the risks before the patient is asked to consent.

Jackson and Powell in their book *Professional Negligence* 2 ed say at para 6.83 (p 334):

> "The fundamental principle, that a patient should be informed of the treatment which is proposed and warned of any risks which are inherent in that treatment, has long been recognised."

In the recent South African decision in *Castell v de Greef* 1994 (4) SA 408 (C) at 426, ACKERMANN J accepted the conclusion of the High Court of Australia in *Rogers v Whitaker* (1993) 67 ALR 47 that:

> "The law should recognise that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in

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> the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it. This duty is subject to therapeutic privilege."

It seems to us wrong that epidural morphine, with its notable risk of respiratory depression, could be administered by an anaesthetist without explaining to the patient broadly what the technique is all about and what the risks are.

(H) WHETHER THERE IS EVIDENCE OF CLINICAL TRAILS

This matter, like the issue of consent, came up during the trial but was not in issue at the commencement of the trial.

The accused was cross-examined on it.

Mr *Andersen* asked the court to dismiss the allegation since the matter had not been properly canvassed.

It is true that the matter was not in issue and that it came up during the evidence. It is also true that the issue was not fully canvassed by either side. What amounts to a clinical trial was never clearly defined, although Dr Cahi says this is where one is exploring a new field. The accused says epidurals were known and so was morphine. It was only the combination of the two in children which was unknown.

Dr Cahi seemed to suggest that what the accused did, did not amount to clinical trials.

In the absence of further evidence or information, I leave the question open whether the accused conducted clinical trials. But what is clear is that, when he started administering epidural morphine to children, there was no precedent. There were no recommended doses and the effects or risks were unknown. We agree with the *Attorney-General*'s statement that the accused set sail on uncharted waters without knowing what was to come of this technique. Whether this amounted to a clinical trial or experimentation is a matter that cannot be

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determined in the absence of further evidence.

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(I) NEW TECHNIQUES

The general rule is that if a medical practitioner departs from the general and approved practice for no good cause, and damage results, he is likely to be held negligent. But such deviation is not necessarily evidence of negligence. As stated by LORD CLYDE in *Hunter v Hanley* 1955 SC 500:

> "It would be disastrous if this were so, for all inducement to progress in medical science would then be destroyed. Even a substantial deviation from normal practise may be warranted by the particular circumstances. To establish liability by a doctor where there is deviation from normal practice three facts require to be established. First of all it must be proved that there is a usual and normal practise; secondly it must be proved that the defender has not adopted that practise; and thirdly (and this is of crucial importance) it must be established that the course the doctor adopted is one which no professional man of ordinary skills would have taken if he had been acting with ordinary care."

In *Landam v Werner* (1961) 105 SJ 257, BARRY J held that the defendant, although acting in good faith, had been negligent. He remarked:

> "The doctor might not be negligent if he tried a new technique but if he did he must justify it before the court. If his novel or exceptional treatment had failed disastrously he could not complain if it was held that he went beyond the bounds of due care and skill as recognized generally."

Despite the above remarks, it is generally recognised that it is in the public interest that new forms of treatment should be developed and that any principle of law which stifles such development altogether is unsatisfactory. It would be a sad day for the medical profession if it were said no doctor or surgeon ought to depart one inch from that which he saw written in the textbooks. This was stated by LORD DIPLOCK in *Sidaway v Governors of Bethlehem Royal Hospital* [1985] 2 WLR 480 (HL) at 498 when he remarked:

> "Those members of the public who seek medical or surgical aid would be badly served by the adoption of any legal principle that would confine the doctor to some long-established, well-tried method of treatment only, although its past record of success might be small, if he wanted to be confident that he would not run the risk of being held liable in negligence simply because he tried more modern treatment, and by some

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> unavoidable mischance it failed to heal but did some harm to the patient."

There can be no doubt, therefore, that the law clearly tries to strike a balance between the safety of the patient on the one hand and the development of medical science on the other.

Medicine is a moving science and new techniques are being developed all the time. Within the field of anaesthetics in particular new techniques are usually picked up from medical journals

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and other literature.

It is up to the anaesthetist to apply any new technique that is reported in the journals.

When an anaesthetist applies a new technique described in a medical journal, the present practise is that he does not have to notify anybody that he is applying such a technique. He is not answerable to the Health Professions Council unless, as happened in the present matter, something goes wrong. He is only required to report where he is conducting clinical trials or is experimenting.

It appears that the situation is no different in the United Kingdom. Professor Rosen told this court that each anaesthetist practices independently but has to take into account the experiences of others. The anaesthetist does not have to report to anyone that he is using a new technique.

We appreciate that the field of anaesthetics is a highly professional and skilled one. It takes several years to train an anaesthetist.

The difference between medicine and other disciplines such as law is that medicine usually deals with issues of life or death. The negligent application of a new technique could result in death in circumstances where such death would have been avoided had another, perhaps established, technique been used.

The Health Professions Council in this country is usually presented with a *fait accompli* and only then when there is an identifiable problem.

Whilst appreciating the expertise of anaesthetists, it seems to us that the time may have come for anaesthetists, as well as other specialists in the medical field, to be more accountable to the Health Professions Council.

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Certainly where a new technique which involves possible risk to life is employed, it is our view that the Council should be made aware of the use of such a technique and whether the facilities in place are adequate for such a technique. Perhaps regular reports on the success or otherwise of the new technique should be filed.

It is, in our view, improper that the highest body in the medical field, the Health Professions Council, should not be aware of the practise and in particular the techniques being utilized by members who are supposed to be answerable to it. This is a matter which the relevant Ministry is asked to consider. There is also need for the relevant Ministry to re-state the need for patients to be properly informed of the technique and possible risks before being asked to give their consent.

(J) TABLE DEATHS

This issue came up during the trial following the certification of the cause of death of Mrs

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Osazuwa by the accused.

It did appear that there is confusion as to the legal position regarding table deaths. Some experts merely expressed the view that what the accused did was improper unless he was certain as to the cause of death.

Dr Zwana, who has been medical superintendent at two Government Central Hospitals, told the court that in his experience all table deaths were subject to a post-mortem. The surgeon and anaesthetist would be required to compile reports which would be forwarded to the medical superintendent. The medical superintendent would then forward all the papers to the Provincial Magistrate.

Perusal of the medical certificate of cause of death, such as exhibit 48, shows that it is completed where death is certified as being due to natural causes. The certificate, however, has a *caveat* at the bottom which says that if a doctor is unable to certify that the cause of death was due to natural causes, then he must complete another report on the reverse of the certificate.

The expression "table deaths" includes (a) all deaths occurring on the operating table in the operating theatre and within 24 hours of the patient leaving the theatre; (b) all deaths occurring at any time after the operation where the patient fails to regain consciousness prior to death; and (c) all deaths occurring after any surgical or medical procedure which may be

considered to be implicated in the unnatural death or to have contributed to the unnatural death.

The procedure relating to table deaths is based on the requirements of two Acts. These are s 7 of the Burial and Cremations Act [*Chapter 31*], which provides:

> "If a medical practitioner who attended a deceased person during his last illness is not satisfied that death was the result of natural causes, he shall immediately report the fact to the nearest magistrate"

and ss 3, 5, 6 and 7 of the Inquests Act [*Chapter 16*]. Section 3 of the Inquest Act provides that a police officer shall investigate any sudden death for purposes of ascertaining the cause of death. Section 5 provides that the dead body shall be examined by a duly registered medical practitioner. Section 6 provides that the police officer shall make a full report to the magistrate, who will decide what steps to take to ascertain the cause of death or to bring to justice such person as appear to have unlawfully caused such death. Section 7 of the Act gives the magistrate, on receipt of the report from the police, powers to instruct that a post-mortem report be held or to hold an inquest for the purpose of ascertaining the cause of death.

All table deaths must, therefore, be regarded as due to unnatural causes and as such they are "unnatural deaths" for purposes of the Inquests Act [*Chapter 16*].

In practice, the duty of reporting these deaths is that of (a) the medical superintendent in charge of the hospital where death occurred; (b) the person in charge of the nursing home where death

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occurred as defined in the Nursing Homes Registration Act [*Chapter 325*]; and (c) the medical practitioner in attendance where death occurred neither in a hospital nor in a nursing home.

In compiling his report, the medical superintendent of the hospital is required to obtain and forward to the police for inclusion in the sudden death docket for passing to the magistrate reports from (a) the surgeon, (b) the anaesthetist, (c) the medical practitioner in attendance, and (d) any other persons such as hospital staff who attended to the patient.

Post-mortems are usually performed with the consent of the relatives of the deceased. Where such consent is not forthcoming, an order must be obtained

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from a magistrate in terms of s 8 of the Anatomical Donations and Post-Moslem Examinations Act 34 of 1976.

The above is an attempt to highlight the procedure relative to table deaths.

The propriety or otherwise of the certification of the cause of death on count 5 by the accused will be considered shortly when the court deals with the individual counts.

CULPABLE HOMICIDE - GENERAL PRINCIPLES

(A) CULPABLE HOMICIDE IS DEFINED AS THE UNLAWFUL NEGLIGENT KILLING OF ANOTHER PERSON.

A person acts negligently and therefore unlawfully where it is proved: first, that a reasonable man in X's position would have foreseen the possibility that his conduct might cause the death of Y or a person in Y's position; second, that a reasonable man would have guarded against that possibility; and, third, that X failed to take reasonable steps to guard against it: P M A Hunt *South African Criminal Law & Procedure* Vol II 2 ed p 404.

It is also important to note that it is the general possibility of death which must be reasonably foreseeable, and not the specific manner and nature thereof. The facets of vulnerability of the human body are legion and death may come to mortals through a variety of corporeal hurts and derangements. If a hunter ought reasonably to foresee that his bullet may miss its target and kill Y whose hut is behind it, it does not matter that Y actually dies from a slight flesh wound because he is a haemophiliac: *South African Criminal Law & Procedure supra* at p 405.

In our law, it is also important to note that the slightest deviation from the norm of the reasonable man will suffice. Unlike English Law, a serious deviation is not required, for gross negligence is not essential: *op cit* p 407.

The criterion of liability for *culpa* in both civil and criminal cases is reasonable foreseeability. In a case of culpable homicide, the question is whether a *diligens paterfamilias* in the position of the accused would have foreseen the possibility of death resulting from his conduct: *S v Chipinge Rural Council* 1988 (2) ZLR 275 (S) at 278C-E.

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GARWE J

Causation

The general principle is that X must both be the factual and legal cause of Y's death. He is the factual cause of death if, but for his negligence, the deceased would not have died when he did. In other words, he must have accelerated the death. He is the legal cause of Y's death if in addition it can be said there was no *novus actus interveniens* which broke the chain of causation or, put another way, if he is the proximate cause of the death: Hunt *op cit* pp 409 & 410.

It is also important to note that in determining whether X is the factual cause, only causative negligence gives rise to liability. In other words, it must be proved not only that X was negligent but also that but for his negligence the deceased would not have died when he did.

Medical profession - standard of skill and care expected

A medical doctor must exercise reasonable skill and care, determined by reference to members of the profession concerned, rather than to the *diligens paterfamilias*.

As stated by Boberg *The Law of Delict* Vol 1 at p 346:

> "Obviously the ordinary reasonable man test of negligence cannot be applied to an activity calling for expertise that the ordinary man does not possess. One cannot judge a surgeon's conduct by asking how a *diligens paterfamilias* would have operated for either he would not have operated at all (which is most likely) or if he would have operated (in some rare emergency), he would no doubt have done worse than even the most barbarous surgeon. And so there emerges the reasonable expert - a practitioner like the actor, both possessing no especial flare or frailty; the reasonable doctor, the reasonable auditor, the reasonable mechanic. It is he who looks over the actor's shoulder to see if he attains the standard of his peers, for if he does not, he is negligent. That standard, it has been held, is not the highest level of competence; it is a degree of skill that is reasonable having regard to the general level of skill and diligence possessed and exercised at the time by members of the branch of the profession to which the practitioner belongs..."

The same remarks were made by McNAIR J in *Bolam v Friern Hospital Mgmt Cttee* [1957] 1 WLR 582 (QB) at 586 when he stated:

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> "The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well-established law that it is sufficient if he exercises the skill of an ordinary competent man exercising that particular act."

What has caused problems is the question whether the requisite standard is that which members of the particular profession do in fact achieve ordinarily or whether the standard is that which in the opinion of the court members of the profession ought to achieve.

The general rule is that a medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ

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reasonable skill and care and he is liable for the consequences if he is not.

On the requisite standard expected, INNES CJ remarked in *van Wyk v Lewis* 1924 AD 438 at 444:

> "It was pointed out by this court, in *Mitchell v Dixon* 1914 AD at 525 that 'a medical practitioner is not expected to bring to bear upon the case entrusted to him with the highest degree of professional skill, but he is bound to employ reasonable skill and care'. And in deciding what is reasonable the court will have regard to the general level of skill and diligence possessed and exercised at the time by members of the branch of the profession to which the practitioner belongs. The evidence of qualified surgeons or physicians is of the greatest assistance in estimating that general level and their evidence may well be influenced by local experience; but I desire to guard myself from assenting to the principle approved in some American decisions that the standard of skill which should be exacted is that which prevails in a particular locality where the practitioner happens to reside. The ordinary medical practitioner should, as it seems to me, exercise the same degree of skill and care, whether he carries on his work in the town or country, in one place or another. **The fact that several incompetent or careless practitioners happen to settle at the same place cannot affect the standard of diligence and skill which local patients have a right to expect."** (The emphasis is mine.)

These remarks were cited with approval in the recent South African decision in *Castel v de Greef* 1994 (4) SA 408 (C) at 416.

The same principles are applied in English Law. Rupert M Jackson and John

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GARWE J

L Powell in their book *Professional Negligence* 2 ed p 17 suggest that the standard of skill and care which a professional man is required to exercise may be defined as -

> "that degree of skill and care which is *ordinarily* exercised by reasonably competent members of the profession, who have the same rank and profess the same specialization (if any) as the defendant."

In *Mahon v Osborne* [1939] 1 All ER 535 (CA) 548A-C the court remarked of a professional person:

> "If he possesses an art he must be reasonably skilled in it ... He must also be careful, but the standard of care which the law requires is not insurance against accidental slips. It is such a degree of care as a normal skilful member of the profession may reasonably be expected to exercise in the actual circumstances of the case in question. It is not every slip or mistake which imports negligence and, in applying the duty of care to the case of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention."

The same view was expressed in *Lanphier v Phipps* (1838) 8 C & P 475 cited by Jackson and Powell in their text. It was stated in that case that -

> " Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, not does a surgeon undertake that he will perform a cure; not does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has but he undertakes to bring a fair, reasonable and competent degree of skill and you will say whether in this case, the injury was occasioned by want of such skill in the defendant."

In *R v Bateman* (1925) 94 LJ KB 791 LORD HEWART CJ remarked at p 794:

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> "The jury should not exact the highest, or a very high standard, nor should they be content with a very low standard. The law requires a fair and reasonable standard of care and competence."

In *Hatcher v Black* (1954) *The Times,* 2 July, in directing the jury, DENNING LJ remarked:

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> "You must not, therefore, find him negligent simply because something happened to go wrong ... You should only find him guilty of negligence when he falls short of the standard of a reasonable skilful medical man, in short, when he is deserving of censure - for negligence in a medical man is deserving of censure."

This is part of the summing-up set out by LORD DENNING in the *Discipline of Law* (Butterworths, 1979) pp 242-244.

The same remarks were made by ACKERMANN J in *Castel v de Greef supra* at 4l6C-H.

In *Sidaway v Governors of Bethlehem Royal Hospital supra* at p 487G LORD SCARMAN stated:

> "... a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by the responsible body of medical opinion, even though other doctors adopt a different approach."

In this case the standard of expertise against which the accused should be judged is that of the reasonably skilful anaesthetist.

I now turn to deal with the individual counts.

[The learned Judge then acquitted the accused on counts 1 and 2, and continued:]

III. COUNT 3

(A) ALLEGATION AGAINST ACCUSED

The allegation on this count is that, having administered 1,25 mg of morphine together with lignocaine and adrenalin to a two-year-old boy, the accused wrongfully, unlawfully and negligently discharged the child to the custody of his parents instead of having him placed under observation for at least 12 hours and that, as a result of the absence of proper post-operative observation, the child died.

(B) TECHNIQUE

1,25 mg of morphine was administered caudally following a circumcision.

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A circumcision is usually a day case. That being the case, it was unwise for the accused to use morphine in a day case. Having decided to use it, however, then he was required to ensure

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proper care and observation post-operatively.

Professor Rosen said it was not proper to use morphine in a day case unless the intention was to have the child detained in hospital.

Dr Moschos says other anaesthetists used other agents, and not morphine.

Professor Chinyanga says he would not have used morphine for a circumcision. He would have used a local anaesthetic.

Dr Cahi says he uses lignocaine and narcan for circumcision and not morphine because this is a day case.

The experts are agreed that whilst one cannot say it was wrong for the accused to use morphine in a circumcision, by using morphine it meant he had to put in place post-operative facilities to match the technique.

(C) DOSE

1,25 mg of morphine was administered, together with lignocaine and adrenalin.

Professor Rosen says 1,25 mg is a big dose, equivalent to 10 mg in an adult given intramuscularly. The premedication of hyoscine, vallergan and adrenalin was also an additional factor to be taken into account, as vallergan can potentiate the effects of morphine and adrenalin can prolong the duration of morphine. Professor Rosen says the dose given in this case is two-and-a-half times that recommended in article 12 - the Swedish article of 1987 - as being safe for **adults**.

Professor Chinyanga says the child should have been given a maximum of 0,54 mg of morphine, taking into account the effect of adrenalin. He describes the 1,25 mg as an "overdose".

The accused admits that the dose was "higher" than recommended or that it is "at the upper end of the doses used by other anaesthetists".

Article 5 of 1988 suggests a dose of 1,5 mg for a two-and-a-half year-old boy as "rather large".

GARWE J

The conclusion we reach is that the dose of 1,25 mg administered to the child is a heavy one and above the dose that would be used by other anaesthetists, especially when regard is had to the premedication and the adrenalin which was administered.

(D) KNOWN RISKS

It has been known for about 100 years that morphine causes respiratory depression, vomiting, nausea, pruritis, and urinary retention.

As we have already noted, the higher the dose, the greater the risks or complications and the

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greater the burden on the anaesthetist to put in place proper facilities to match the anticipated risks.

Article 15 by Jensen, written in 1981, reported several cases of unexpected or delayed respiratory depression after intrathecal and epidural administration of narcotics.

Article 17 by Glenski, written in 1984, warned of the seriousness of delayed insidious respiratory depression after epidural administration of narcotics and recommended more controlled studies before routine use of epidural narcotics in children.

The accused himself admits that he was aware, since 1982, of the risks of epidural morphine and the fact that children would have the same side-effects. In fact, the accused admits he had had two cases of respiratory depression. Exhibit 62, which he produced, is a list of cases of respiratory depression before the case of Kalpesh Nagindas.

The possibility of these complications occurring was clearly foreseeable in this case.

Since a higher dose than is recommended was used, it means there was a greater chance of bigger risks. This is because the risks in epidural morphine are dose related.

(E) WHETHER PATIENT DISCHARGED HOME

All the facts before this court show that the accused discharged the child home straight from theatre.

GARWE J

We believe Mr Mansukh Nagindas who told the court that the accused told them they could take the child home and that he would not be interested in food.

In his defence outline, the accused admits discharging the patient. He says on p 26 that he had not experienced a case of an adverse reaction in children of such an age which would entail any risk in releasing the child to his parents.

We would wish to note that the above statement by the accused was not true, in view of his admission that he had had cases of respiratory depression involving children.

In his confirmed statement, exhibit 33, he says the release from hospital was at his instance because he thought it would be safe to do so.

The accused's story that the child was released by mistake is in our view an afterthought. He says he thought the surgeon would discharge the child from the ward. Yet it is common cause that post-operative care after the administration of morphine is the responsibility of the anaesthetist - not the surgeon. In fact, Dr Moschos said he was not even aware that morphine had been administered.

The accused did not issue any post-operative instructions. The relevant portion on p 5 of the hospital notes - exhibit 14 - is blank. Had the accused intended to discharge the child to the

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ward, he would have issued instructions for his care in the ward pending discharge. He did not do so. The accused's story that this was in error is, in our view, highly improbable.

It is our view that the evidence clearly establishes that the accused, almost immediately after the child left theatre, handed over the child to its parents.

(F) PROPREITY OF RELEASE OF CHILD TO PARENTS

All the experts are agreed that it is improper to release home a patient who has received epidural morphine primarily because of the risk of delayed respiratory depression.

Dr Cahi says he would not release such a patient. Professor Venter says the need for caution in administering narcotics to children has been appreciated for some time. This is because their respiratory centre is less developed than in adults and is more sensitive to morphine.

GARWE J

Article 15 by Jensen, to which reference has already been made, recommended in 1981 that a child should not leave hospital within 24 hours of caudal morphine. Article 5 by Krane, written in 1988, also recommends a precautionary interval of 24 hours after the last dose of epidural morphine.

Professor Chinyanga says post-operative observation is an important part of the technique of epidural morphine.

The notes show that the child was in recovery for 2 minutes. No meaningful observations could have been made in that period. It means the child merely passed through recovery before the accused handed him over to his parents.

Professor Rosen told the court that, after epidural or caudal morphine, a patient should be referred to recovery. He should remain in recovery until he is conscious and stable, after which he can then be referred to a high-care ward or other suitable place.

The accused did not ensure that the patient was properly observed in recovery before releasing him to his parents. He failed to discharge the patient into an environment in which good post-operative care was guaranteed.

There can be no doubt that the release of the child to its parents was an act of negligence. Moreover, the accused was aware, after the death of Mrs Papatheocarus, that sudden complications can occur and that for this reason a high care unit would be more suitable. Such a unit came into existence in 1987.

Professor Rosen is correct, in our view, when he says that there is no school of thought justifying what the accused did in this case. He described the accused's conduct as "unacceptable" and that this case is "bizarre and unique". He has not heard of any other anaesthetist behaving in the manner the accused did.

We agree with those remarks entirely. The release of the child to its parents was an

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unforgivable act of professional negligence. In our view, the accused was not just negligent. His negligence was gross.

(G) CAUSE OF DEATH

This was a healthy baby boy, 20 months old, who had no allergies and who received caudal morphine preparatory to a circumcision.

GARWE J

Dr Mhlanga, who performed the post mortem, reached the conclusion that death was due to possible asphyxia and aspiration. He noted that the tracheal aspiration must have been during the dying stages. Dr Mhlanga had not been advised that the child had received caudal morphine. He says perhaps this may have assisted.

Dr Cahi says it is clear the child did not inhale vomit. In his view, the child must have stopped breathing and then vomited.

Mr Mansukh Nagindas, the child's father, says the child was confused and did not look "too good" at the time of discharge from hospital. He says that at home the child was still confused and restless. He moved from one parent to the other. After the news at about 8.50 pm he then found a yellowish fluid coming out of the mouth of the child. The child was not retching or thrashing out. He says at one stage he saw the child's eyes open and the child even breathed.

Professor Chinyanga says it appears the child was depressed and was either passively or actively vomiting. He told the court that a child who is depressed would normally retch or regurgitate. He also says the fact that the child was breathing and his eyes were seen to be open after leaving home means he was still alive. It was his view that the child was depressed and that the vomiting, which must have been part of the terminal process, must have prevented the child from breathing. The morphine would have depressed his cough reflexes, which help eject foreign objects from the airway.

Professor Chinyanga says that, in his view, the circumstances suggest respiratory depression, nausea and vomiting, all of which are known symptoms of morphine. The child did not cry out and this suggests depression. The child aspirated and was not able to control the airway.

Dr Moschos also told the court that if the child had died of vomiting only, one would have expected the child to have cried out or thrashed around before dying. He concluded that the breathing mechanism had been depressed.

We reach the conclusion that this child must have been depressed following the morphine. That he started vomiting and because he was depressed was not able to retch or cry out or thrash around to eject the vomit. We are also convinced that the tracheal aspiration was part of the terminal stages.

The defence raised the issue whether death was due to vomiting or whether the vomiting was due to death.

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GARWE J

The *Attorney-General* submitted that this is irrelevant, as both vomiting and respiratory depression are known side effects of morphine.

We agree with this submission. This is not an ordinary case of a child dying because of vomiting *simpliciter*. The circumstances clearly suggest depression followed by vomit which the child was not able to eject because his reflexes were depressed by the morphine. In any event, vomiting is itself a known side effect of morphine.

(H) CONCLUSION

Mr *Andersen* submitted that the risk of death arising from morphine was not foreseeable and was not one which the accused was required to guard against. He even asked Professor Rosen whether he could put his finger on any reported case where a person died of vomiting after morphine. The Professor said he could not immediately put his finger on such an authority and agreed that death from vomiting is something that is unexpected.

As we have already noted, this is not an ordinary case of vomiting. The child must have been depressed by the morphine. He then vomited but, because his reflexes were also depressed, he was not able to eject the vomit from the airway. That resulted in death.

It is important to note that it is the general possibility of death which must be reasonably foreseeable and not the specific nature and manner thereof: *South African Criminal Law & Procedure* p 405.

The average anaesthetist, using reasonable skills and diligence, would have foreseen complications arising from the administration of a high-dose of caudal morphine to a 20-month old baby and the discharge of such a patient home to his parents who knew nothing about post-operative management. Such complications included respiratory depression, depression of the reflexes, vomiting and nausea.

The complications that arose in this case and the possibility of death arising from such complications were foreseeable and should have been guarded against.

The vomiting was observed at 8.50 pm, ie almost five-and-a-half hours after discharge from hospital. No observations were made during that period. Had the child remained in hospital, his blood pressure, pulse, respiratory rate,

GARWE J

rousability, etc would have been monitored at least hourly. The complication would have been picked up, the airway would have been kept open after the vomiting was first detected and ventilation would have been available. The evidence shows the child did not die immediately after he started vomiting. He was seen to breathe. This child, in our view, should not have died.

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The evidence against the accused is overwhelming and shows very clearly that, but for his professional negligence, which was gross, the child would not have died. The accused has no defence at all to offer to this charge.

IV. COUNT 4

(A) ALLEGATION AGAINST THE ACCUSED

The allegation on this count is simply that having administered 4 mg of morphine together with lignocaine and adrenaline to a 10-year-old child, the accused failed to prescribe appropriate post-operative surveillance, as a result of which the child died.

(B) TECHNIQUE

Four mg of morphine was administered to a 10-year-old girl who had undergone surgery for an appendicectomy. This was on 10 August 1990.

Dr Zwana says he would use morphine in major operations and not circumcision or appendicectomy. He admitted, though, that opinions differ and some anaesthetists might use morphine in an appendicectomy. Dr Cahi says he does not consider an appendicectomy a major procedure for which he would use morphine. Professor Chinyanga says much the same thing. Professor Venter says he would not use morphine for an appendicectomy. He would rather use safer drugs like fentinyl, sufentinyl and alfentinyl.

The experts are agreed that the technique can not be described as wrong, although some anaesthetists would use other drugs instead of morphine.

(C) DOSE

The dose of 4 mg given by the accused is described as high by the experts who gave evidence.

Professor Venter says he would have given no more than 2,mg.

GARWE J

Dr Cahi described the dose as being on the high side.

Professor Rosen says 4 mg is a high dose for a child of 10 years, especially considering that the absorption of the morphine could have been delayed by the adrenalin. He says the dose is above the upper end of the limit - an overdose.

Professor Rosen says he does not understand the doses given by accused. The accused prescribed 3 mg to Mrs Papatheocarus, who was an adult weighing 62 kg. Yet he administered 4 mg to a 10-year-old child weighing 35 kg. Prof Rosen says the explanation by the accused - that in Mrs Papatheocarus' case he had taken into account the distance from the brain-stem - cannot justify such an increase.

We agree with the Professor. It is strange that the accused should prescribe a once-off dose of

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4 mg to a child and 3 mg to an adult, even though the later dose was to be administered "PRN".

Professor Chinyanga says he would have administered 1,8 mg of morphine. He describes the 4 mg administered as being "an adult dose".

Dr Zwana says 4 mg of morphine was too high. He would have used not more than 2 mg, especially considering that the child received vallergan and adrenalin.

Article 12 in exhibit 25 says a dose of more than 4 mg may be responsible for delayed respiratory depression in adults.

The accused admits that the dose was high or at the upper end of the doses recommended.

In our view and taking into account the views of the experts, this was a very high dose for a ten-year-old child. The dose was, to use Professor Rosen's words, "above the upper end of the limit".

(D) CAUSE OF DEATH

This is given as shock and in-cerebrospinal oedema.

Dr Potgieter in his report, marked exhibit 27, says the shock and in-cerebrospinal oedema is in keeping with an anaesthetic-related death. In his

GARWE J

view, death was due to respiratory suppression and cerebro-spinal oedema after combined spinal and general anaesthesia.

There is no doubt that this child died of respiratory depression following combined spinal and general anaesthesia.

(E) KNOWN RISKS

The remarks made in count 3 also apply here.

Respiratory depression was known to be a risk of morphine administered epidurally. There is need for caution in administering morphine to children.

The accused had had cases of respiratory depression after administration of epidural morphine. Exhibit 62 is a list of cases of respiratory depression before that of Kalpesh Nagindas and exhibit 65 is a list of the cases after Nagindas.

The accused admitted under cross-examination that, where an anaesthetist administers high doses of morphine, he must put in place facilities for post-operative care to cope with any complications. Because of the increased dose, there was an increased chance of bigger risks as the complications are dose-related.

(F) PROPRIETY OF DISCHARGE INTO GENERAL WARD

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Following the death of Mrs Papatheocarus in 1986, the need for a high-care unit was realized. Such a unit was introduced at the Avenues Clinic after the death of Mrs Papatheocarus. The accused says the high-care unit came into existence in 1987.

A high-care ward was, therefore, in existence at this time.

Because of the fact that morphine had been used and the dose was high, or above the upper limit, there was need for increased surveillance. Dr Hutchinson says a bigger dose means the anaesthetist must put in place facilities to match the post-operative care necessary. She says the anaesthetist should ascertain the facilities and, if they are deficient, then the anaesthetist should look for another technique involving the use of other drugs.

Professor Chinyanga says the need for observation is an important part of

using epidural morphine. He says a patient can be sent to a general ward, provided the nursing staff are specially trained to make meaningful observations and there is appropriate equipment to deal with any complications. He also says that patients who require very close supervision to the extent that ward staff cannot manage should be referred to a special care unit.

Dr Zwana says that, if a child receives 4 mg of morphine and is released to a general ward, the anaesthetist must ensure that proper nursing care is in place before discharging the patient into the general ward.

We agree that the responsibility is that of the anaesthetist to ensure that the patient is discharged into an appropriate atmosphere for post-operative care.

We have already accepted that a patient who has received epidural morphine must, as a general rule, be referred to a high care area or even intensive care. However, there is nothing wrong with a general ward, provided there is adequate resuscitative equipment and the nursing staff is properly trained and not overstretched to ensure proper post operative care.

(G) STATE OF THE CHILDREN'S WARD

Lavender was one of ten patients under the care of a single nurse that night. She was sharing a ward with five other children. The other five children were in a separate room, but were to be monitored by the same nurse.

The nurse had to take one of the patients to theatre and came back at about 9.00 pm to find that the patient's respiratory rate was 10. She says the accused had been operating at the Avenues Clinic for years and would have been aware that there would be a single nurse at night.

The accused was unable to explain how he could have discharged Lavender into such an atmosphere.

His story that he believed the staff situation to be adequate is not acceptable. An anaesthetist

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cannot be allowed to make such an assumption. He must establish the conditions before undertaking such a technique and before releasing a patient into such an atmosphere.

His claim that the hospital should have warned him about the staffing situation at night in the ward is also not acceptable. That is not the responsibility of the hospital. It is the responsibility of the anaesthetist.

GARWE J

All the experts are agreed that, before even considering using epidural morphine, the anaesthetist should consider the post-operative facilities available and that, if the facilities are inadequate, another technique using other drugs should be used. Professor Rosen says the technique should not be used if proper post operative care and observation cannot be guaranteed. The accused cannot seek to push the blame onto the hospital. It was his duty, as an anaesthetist, to find out the conditions into which he was discharging the child.

Professor Rosen considered the release of Lavender into a ward where there were nine other children and only one nurse to be unacceptable. He says, and we agree, that it would be difficult for one nurse to maintain the vigilance required in a case of this nature.

Professor Chinyanga says he would not discharge such a child into a general ward with only one nurse who comes to observe after 30 minutes whilst attending to 9 other patients. He says doing so would be "unfair" to the nurse.

Dr Zwana says the general ward was not appropriate because the nursing complement was inadequate. In his view, Lavender should have been discharged into intensive care.

An added factor is the fact that Sister Chirara was not properly trained to manage such cases. She had received only general training. Without such specialized training she would not have been able to properly appreciate the significance of the symptoms or to deal with complications.

Dr Zwana and Dr Hutchinson both say that not every nurse knows how to care for patients receiving epidural morphine. All they know is the theory they would have been taught during general training. When confronted with a sudden emergency they do not know what to do.

Moreover, the inadequacy of the accused's instructions must have further aggravated the inadequacy of the post-operative facilities.

He instructed that if the respiratory rate fell below 12 then narcan should be administered.

Dr Cahi says that that was too low. One should get worried when the rate goes below 16.

GARWE J

The accused himself admits that the rate of 12 he put down was too low and lower than what he had recommended at the Lisbon Conference. He admitted under cross-examination that the

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earlier a problem is diagnosed, the better the chances of rectifying it.

Moreover, the instructions on rousability were too strict. The instructions on rousability were to test for heavy sedation. The accused admits that, with hindsight, he should have taken a more superficial level of rousability such as responding to questions, or to shaking.

The inadequacy of the accused's instructions would obviously have affected the vigilance of the nurse. As long as the respiratory rate was 16, there would have been no cause of concern. If the patient could respond to the squeezing of earlobes, it means the patient was rousable. Clearly the instructions were inadequate and an ordinary nurse expected to comply with such instructions would not necessarily realize that if respiratory rate is 16 then it means something is wrong.

The instructions given by the accused were inadequate in yet another respect. He instructed that if the respiratory rate fell below 12, narcan should be given intramuscularly. All the experts are agreed that the narcan should have been given intravenously, because it would take just one minute to work, whereas it can take up to five minutes if administered intramuscularly.

Sister Chirara admitted that she could have called for assistance but had no cause to do so since she was following the accused's instructions to the letter. She also told the court that, had there been another nurse to assist, she could have carried out more observations. She also accepted that, if a patient's circumstances suddenly changed, a nurse would be expected to give more attention to that patient.

The evidence shows that had Sister Chirara been trained in the care of patients receiving epidural morphine and had she been more vigilant, then she should have been able to detect that there was something wrong.

The evidence before us shows that she complied with the accused's instructions, which as we have already noted, were inadequate in a number of respects. Whilst a properly trained nurse would have detected possible respiratory depression earlier, there was no sudden change in the patient's condition necessitating the kind of attention suggested by the defence.

GARWE J

(H) CONCLUSION

In our view, Lavender was simply discharged into the wrong ward where proper post-operative facilities were not available.

If Sister Chirara was negligent in not closely monitoring the child, such negligence was the result of the inadequate instructions given and was also because she was not properly trained and was manning a general ward with 10 patients. Such negligence by an overburdened nurse in a general ward with 10 patients housed in two separate sections would have been clearly foreseeable.

A reasonable anaesthetist would not have discharged Lavender into such an atmosphere. A high care unit was now available at the Avenues Clinic. In fact, it appears the accused did not

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even ascertain what the facilities were in the general ward. His claim that he believed the conditions to be adequate is unacceptable. He was under an obligation to ascertain. His failure to do so is indicative of negligence on his part.

Sister Chirara's conduct was part and parcel of the accused's own negligent conduct. If she was negligent, and we do not believe that she was, her conduct does not amount to a *novus actus interveniens*. Nor can it be said she was grossly negligent in failing to call for help. The accused had had cases of respiratory depression. A high-care unit was established after the death of Mrs Papatheocarus. A reasonable anaesthetist would not have considered a general ward appropriate.

In the opinion of this court, the evidence shows clearly that, having decided to apply the technique and having decided on a high dosage of epidural morphine, the accused failed to ensure proper post operative facilities to match that technique. Because of such deficiency the child experienced respiratory depression unnoticed from which she died.

The evidence shows clearly that but for the accused's negligent conduct, this child would not have died.

[The learned judge then considered the evidence relating to count 5, and concluded:]

GARWE J

IN THE RESULT

In respect of count 1, the accused is found not guilty and he is acquitted.

In respect of count 2, the accused is also found not guilty and he is acquitted.

In respect of count 3, the accused is found guilty as charged.

In respect of count 4, the accused is found guilty as charged.

In respect of count 5, the accused is found not guilty and he is acquitted.

Winterton, Holmes & Hill, accused's legal practitioners

S v DONALDSON & ANOR 1995 (1) ZLR 46 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Criminal appeal

16 & 19 January 1995 Judgment No S-5-95

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Flynote

Criminal procedure - joinder of parties - joint trial of persons separately charged with different offences - not permissible even if parties consent to it - trial void ab initio even if no prejudice occurred

Headnote

The two appellants were jointly tried on a charge under the Customs and Excise Act [*Chapter 177*]. Separate charge sheets were drawn against each, alleging that each of them had, on the same date and at the same place, tendered a false declaration in respect of goods each was importing into Zimbabwe. On appeal against conviction and sentence, the question was raised as to whether the trial court enjoyed the jurisdiction to try the appellants jointly.

Held, that the proceedings were a nullity. There was no provision in the Criminal Procedure and Evidence Act [*Chapter 59*] allowing for the joint trial of persons separately charged with different offences, even if there were some common features. The Act allows for the joint trial of any number of participants in the same offence, although committed at different times. It also allows for the joint trial of persons who have committed separate offences, provided that the accused are jointly charged and that the prosecutor informs the court that, in his opinion, evidence at the trial of one accused would be admissible as evidence at the trial of the other. Neither requirement was met in this case.

Held, further, that even if there had been no objection by the appellants' legal practitioner to the joint trial, this would not have given the trial court jurisdiction, for criminal jurisdiction cannot be conferred by consent. That being so, it would not avail the State to show that there had been no prejudice to the appellants.

1995 (1) ZLR p47

GUBBAY CJ

Cases cited:

S v Kondoni 1982 (1) ZLR 76 (S)

S v Machona & Ors 1982 (1) ZLR 87 (S)

S v Makganje 1993 (2) SACR 621 (B)

R v Dennis; *R v Parker* [1924] 1 KB 867 (CCA)

R v Juda; R v Magaya 1962 R & N 573; 1962 (3) SA 937 (SR)

D P Carter for the appellants

T Chitapi for the respondent

Judgment

Gubbay CJ: The two appellants were convicted in a joint trial held before a magistrate, but upon separate charge sheets, of contravening s 157(1)(d) of the Customs and Excise Act

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[*Chapter 177*].

The charge sheet framed against each appellant alleged that on 13 October 1993, and at Beitbridge border post, he had unlawfully tendered a false declaration pertaining to the goods he was importing into Zimbabwe. In the case of the first appellant, the goods specified consisted of a Mase generator and two air conditioners, the purchase price of which had been undervalued by R33 429. Three outboard motors were the subject of the second appellant's declaration. Their purchase price had been undervalued by R15 219,72.

The first appellant was sentenced to a fine of $20 000 or, in default of payment, four months' imprisonment with labour; and the second appellant to a fine of $13 000 or, in default of payment, three months' imprisonment with labour. All the goods were ordered to be forfeited to the State.

A single notice of appeal was lodged against the individual convictions and sentences. The grounds particularised all dealt with the merits, as did the heads of argument subsequently submitted by both counsel. Before the appeal was heard, however, this court invited argument on the question of whether the trial court entertained jurisdiction to conduct the trial in the manner it did; that is, whether, obvious convenience apart, the holding of a joint trial was permissible, since the appellants had been charged separately with the making of different declarations relating to the importation of different goods.

At the inception of the appeal, counsel intimated their agreement that the procedure followed at the trial lacked any sound jurisdictional basis. They contended that in consequence the proceedings were, in effect, a nullity. Reliance for the proposition advanced was placed on the decisions of this

GUBBAY CJ

court in *S v Kondoni* 1982 (1) ZLR 76 (S) at 79C-D, and *S v Machona & Ors* 1982 (1) ZLR 87 (S) at 92E; *and on that of the Bophuthatswana General Division in S v Makganje* 1993 (2) SACR 621 (B) at 624i-j.

There is no provision in the Criminal Procedure and Evidence Act [*Chapter 59*] for the joint trial of persons separately charged with different offences, even if there are certain common features. Neither s 145 nor s 145A sanctions this course. The former provides for the joint trial of any number of participants in the same offence, although committed at different times. The latter provides for the joint trial of persons who have committed separate offences, but subject to the fulfilment of two conditions precedent. The first is that both accused persons must be jointly indicted, summoned or charged. The second is that the prosecutor must have informed the court that, in his opinion, evidence at the trial of the one accused would be admissible as evidence at the trial of the other.

In casu, neither requirement was met. The trial court simply did not enjoy the necessary jurisdiction to try the appellants together. It matters not that the legal practitioner who defended the appellants either consented, or failed to object, to the way in which it was proposed to conduct the trial. As correctly observed by AVORY J in *R v Dennis*; *R v Parker* [1924] 1 KB 867

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(CCA) at 869, and approved of in *R v Juda*; *R v Magaya* 1962 R & N 573 (SR) at 575F-G:

> "... consent cannot give jurisdiction in a criminal court, if indeed it can in any court, where no jurisdiction exists. As was said during the argument in the House of Lords in *Crane v Director of Public Prosecutions* [1921] 2 AC 299; 15 Cr App R 183, 190: 'An irregularity can be waived by consent, but jurisdiction in criminal matters cannot be conferred by consent'. This appears to us a question of jurisdiction and not a question of regularity or irregularity. No criminal court has jurisdiction to try two separate indictments at one and the same time, and therefore the consent given to such a trial cannot give jurisdiction."

Section 11(2) of the Supreme Court of Zimbabwe Act 1981 enjoins this court, where it is of the opinion that any point raised might be decided in favour of the appellant, to dismiss an appeal against conviction or sentence, unless it appears that a substantial miscarriage of justice has in fact resulted. Even if it could be argued that the appellants were not prejudiced by the holding of the joint trial and that no substantial miscarriage of justice actually occurred (issues on which I offer no opinion), this provision is of no avail to the State.

GUBBAY CJ

The trial court had no jurisdiction *ab initio*. The proceedings were null and void. Questions of prejudice, irregularity, or substantial miscarriage of justice, are irrelevant. See *R v Juda; R v Magaya , supra*, at 575H-I; *S v Makganje supra* at 623c-d.

In accordance with the request of State counsel, I shall not direct that the cases be remitted for trial *de novo* before different magistrates. It is left to the Attorney-General to decide whether to institute fresh proceedings and, if so, whether Build Elect (Pvt) Ltd, and/or the appellants in their personal capacities, should be prosecuted. For it is apparent from the documents produced at the trial that all the goods in question had been purchased in South Africa, not by the appellants, but by their employer, Build Elect (Pvt) Ltd.

The appeals are allowed. The conviction and sentence imposed on each appellant are set aside.

Korsah JA: I agree.

Ebrahim JA: I agree.

Ben Baron & Partners, appellants' legal practitioners

S v MAMBO 1995 (1) ZLR 50 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Criminal appeal

23 & 31 January 1995 Judgment No S-14-95

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Flynote

Criminal law - Serious Offences (Confiscation of Profits) Act, 1990 - s 63(1)(b) - money laundering - proceeds can be proceeds of crime committed by the money launderer or of crime committed by someone else

Criminal procedure (sentence) - lengthy prison sentence - whether purpose served by suspending part of sentence on condition of repayment of proceeds of crime

Headnote

The appellant and his companies were convicted of money-laundering under the Serious Offences (Confiscation of Profits) Act 12 of 1990. A large amount was misappropriated from the State by stealing and completing blank cheques. The appellant negotiated these cheques through his company bank accounts, knowing that they were stolen. The cheques were then intercepted and destroyed. The appellant may or may not have masterminded the fraud.

Held, that the offence of money laundering in contravention of s 63(1)(b) of the Serious Offences (Confiscation of Profits) Act is widely stated. Where a person launders the proceeds of a fraud, he is guilty of the offence of money laundering even where it is possible that he was also involved in the original fraud. The offence is not confined to cases where a person launders the proceeds of a crime committed by someone else.

Held, further, as regards sentence, that although there is no purpose in suspending part of a very long prison sentence on conditions of good behaviour, it may be appropriate to suspend part of such a sentence on

McNALLY JA

condition that the convicted person repays ill-gotten gains. This suspension of part of the sentence may be imposed even when the person convicted claims that he has no money to make repayment. The suspension of sentence will be an inducement to repay and if the inducement fails, the person convicted is no worse off than he would otherwise be.

Cases cited:

S v Nkosi 1965 (2) SA 414 (C)

S v Tawodzera S-103-85

S v Kanhukamwe 1987 (1) ZLR 158 (S)

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

R v Lamb 1969 RLR 193 (A)

S v Magkise 1973 (2) SA 493 (O)

S v Zumbika 1978 RLR 192 (G)

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A-G v Lino & Anor S-107-84

R v Zindoga 1980 RLR 86 (A)

S v Mpofu 1985 (1) ZLR 285 (H)

S v Hapaguti S-142-87

S v Marimba S-58-90

S v Mvula S-69-92

D P Carter for the appellant

T Chitapi for the respondent

Judgment

McNally JA: The appellant and three companies with which he was associated were convicted on 1 February 1993 on four counts of contravening s 63(1)(b) of the Serious Offences (Confiscation of Profits) Act 12 of 1990. The convicted companies were fined a total of $1 735 000, which was approximately the amount involved.

The appellant was sentenced to six years' imprisonment with labour each on the first two counts and to seven years' imprisonment with labour on each of the second two counts, a total of 26 years. The sentences on counts 1 and 2 were ordered to run concurrently with those on counts 3 and 4, leaving an effective sentence of fourteen years' imprisonment with labour. In judgment S-104-93 I granted leave to the appellant to appeal against sentence only, and refused leave to the companies to appeal either against conviction or sentence.

The appellant has persisted in his appeal against conviction on points of law only, as he is entitled to do in terms of s 44(2)(a) of the High Court of

McNALLY JA

Zimbabwe Act 29 of 1981. I therefore deal first with that aspect of the appeal.

The first point was that the trial court erred in law in believing the accomplices. Accepting (with some hesitation) that that is a point of law, I consider that it does not matter whether the accomplices were lying or not. Many people were involved at various levels of this offence. There were those who mislaid the blank cheque forms in the Central Payments Office in the first place; those who picked them up; those who placed the false numbers on them and put the authorised signature stamp on them; those who wrote in the false payees; those who negotiated them; those who made sure that the paid cheques were intercepted on the way back from the paying bank; and those who then presumably destroyed them.

They are all dishonest people. The ones who gave evidence helped to clarify how the offence was committed. But it would be naïve to think that they may not have shaded the truth in their

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own interests.

The learned trial judge was fully aware of that. He found, as a fact, that the three witnesses who were accomplices were basically telling the truth. But really, it seems to me, the question is whether the explanation given by the appellant for his admitted conduct in paying the cheques into his companies' bank accounts can possibly be believed. The learned trial judge found his explanation to be "ridiculous". It seems to me that that was a fair assessment.

So that point of law, if it is a point of law, fails.

The next point of law is whether the conduct found proved amounted to a contravention of the section.

Mr *Carter* argued that the section requires the involvement of a third party. It is not an offence, he argues, to launder your own dirty money. You would have to launder someone else's. Otherwise, a pickpocket who steals money, puts it in his POSB account, and then withdraws it to buy food, is guilty of money-laundering.

I cannot accept this interpretation. It is true that the section is very widely stated. It is true that in many, if not most, cases charged under the section, the accused person might be equally successfully charged with theft or (as was the case here, in the alternative) with fraud. But that is no reason to limit the ambit of the plain meaning of the words used. There is no ambiguity. A

McNALLY JA

pickpocket could be charged under the section for possessing the cash proceeds of his theft. It would be pointless to do so, because you would first have to prove that he had picked the pocket. So it is simpler to charge him with theft.

The present case is a good example of a situation where the general picture is clear but the details are unclear, principally because the paid cheques have been destroyed. The appellant clearly masterminded the laundering. He may or may not have masterminded the fraud. The State may have felt it had a problem in proving misrepresentation. Accordingly it proceeded on the basis that he was guilty of laundering the proceeds of crime, whether that crime was his or someone else's, or a joint effort.

As long as it could prove that he knew "or ought to have reasonably known that the money or other property was derived or realised, directly or indirectly, from the commission of an offence", it would succeed. Whether the main offence was his or someone else's was immaterial. The court found, with respect, correctly, that he knew the cheques were stolen.

I see no merit in the appeal against conviction.

I gave leave to appeal against sentence for two reasons. One was that this was the first case under this section. The second was that there might be room for a suspension on condition of repayment.

As far as the first point is concerned, I can find no fault with the learned judge's approach to

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sentence. He took into account all the factors of age, health and family commitments. He treated the appellant's moral blameworthiness as "similar to that of a thief or a person who receives stolen property knowing the same to have been stolen". It seems to me that that was absolutely correct. I am unconvinced that an effective sentence of 14 years for stealing $1,735 million from the State is disturbingly excessive. Nor do the cases cited - *S v Nkosi* 1965 (2) SA 414 (C) at 415H; and *S v Tawodzera* S-103-85 - support that proposition.

However, the second point merits consideration. It has been said in this court, and I do not wish to dissent from the view, that there is no purpose in suspending part of a very long sentence. See *S v Kanhukamwe* 1987 (1) ZLR 158; and *A-G v Paweni Trade Corp (Pvt) Ltd & Ors* 1990 (1) ZLR 24 (S).

But quite clearly those remarks refer to a suspension on conditions of good

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behaviour. As far as concerns suspension on condition of repayment, there have been two opposing approaches.

The one approach is that, unless there is a reasonable prospect of repayment, no part of the sentence should be suspended. The reasoning is that the offender, if he does not pay, will have to serve the suspended portion, not because of his wickedness, but because of his poverty. And this is unjust. In support of this reasoning are such cases as *R v Lamb* 1969 RLR 193 (A); *S v Magkise* 1973 (2) SA 493 (O); *S v Zumbika* 1978 RLR 192 (G) at 194; and *A-G v Lino & Anor* S-107-84 obiter.

The second approach is that there is no harm, no prejudice, in offering an inducement to repay, and the inducement may well be effective in persuading relatives or accomplices (who might well not be traceable or legally compellable) to disgorge some or all of the ill-gotten gains. It seems to me that it is also in the Zimbabwean tradition that compensation, restitution and restoration are at the heart of criminal justice, rather than mere punishment which benefits the victim not at all. In this line of thought we find *R v Zindoga* 980 RLR 86 (A) at 88F; *S v Mpofu* 1985 (1) ZLR 285 (H) at 294 et seq; *S v Hapaguti* S-142-87 at 3; *S v Marimba* S-58-90; and *S v Mvula* S-69-92 at 8.

It would be instructive if someone were to carry out a survey of cases where imprisonment is suspended on condition of restitution. The courts have no means of knowing whether such suspensions are effective or not.

The facts of the present case are as follows. The three convicted companies have all been liquidated and have proved unable to pay the fines imposed on them. Those fines, which roughly equalled the amount lost by the State, were really intended to compensate the State for its loss. The liquidation of the companies and the subsequent non-payment of the fines has to that extent frustrated the purpose of the sentence.

The appellant says, through his counsel, that he has no money. That may be true, or it may not. Or it may be true to the extent that others may now be the owners or possessors of all or some

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of that money. At least it may be taken to mean that civil proceedings against him would be fruitless. Whatever the position, the fact is that in present circumstances this court is not prepared to interfere with the sentence.

But the court would take a very different view if $1,735 million were to be paid back to the State. In that case the State would be very substantially

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compensated, although of course there would still be an enormous loss of interest on the capital sum.

Bearing in mind, therefore, that the companies have proved unable to refund the money, and that civil proceedings against the appellant will almost certainly be fruitless, there remains only one way in which the money may possibly be recovered. That way is by the offering of an inducement to the appellant. If the inducement fails, the appellant is no worse off than he would otherwise be. If it succeeds, then both he and the complainant will be better off. I may say that Mr *Chitapi*, who appeared for the State, indicated that he would have no objection to such an order.

A substantial inducement must be offered - compare *Marimba supra*. In the present case we consider that a suspension of eight years would be appropriate. I propose to use the figure of $1,735 million for convenience, although I am aware it is not the exact figure. And, of course, any lesser payment will result in a *pro rata* reduction in the effective sentence in terms of s 337(2)(d) of the Criminal Procedure and Evidence Act [*Chapter 59*]. See *S v Zindoga* 1988 (2) ZLR 86 (S) at 91C-D.

Accordingly, the following order is made:

1. The appeal against conviction is dismissed;

2. The appeal against sentence is allowed, but only to the following extent -

> "Of the effective sentence of fourteen years' imprisonment with labour, eight years is suspended on condition that, on or before 31 December 1995, the sum of $1,735 million (one million seven hundred and thirty-five thousand Zimbabwe dollars) is paid to the Registrar of the High Court, Harare, for onward transmission to the complainant in this case."

Ebrahim JA: I agree.

Muchechetere JA: I agree.

V S Nyangulu & Assocs, appellant's legal practitioners

TSELENTIS HOUSE (PVT) LTD v SOUTHERN AFRICAN PRINTING AND PUBLISHING HOUSE (PVT) LTD 1995 (1) ZLR 56 (HC)

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Court **High Court, Harare**

Malaba J

Civil action

8 December 1994 & 1 February 1995 Judgment No HH-8-95

Flynote

Costs - agreement to pay legal practitioner and client costs - whether court should enforce agreement - collection commission on uncontested trade debt paid before judgment - whether collection commission claimable

Practice and procedure - debt or liquidated demand - collection commission - whether competent to claim collection commission as well as sum claimed and costs - payment made after issue of summons and before judgment

Headnote

After initially entering an appearance to defend a claim, the defendant had paid the principal sum and interest before judgment was granted, and was only disputing its liability to pay legal practitioner and client costs and collection commission. It had agreed to pay legal practitioner and client costs.

Held, that the court should generally give effect to an agreement to pay legal practitioner and client costs. The defendant was unable to advance any argument why it should not do so in this case and the court ordered the payment of those costs.

Held, further, that where the principal sum has been collected by a legal practitioner and the costs of collection are incurred before judgment, collection charges are claimable from the debtor regardless of service of summons. It is the judgment and not service of summons that is the determinant factor in such a case. The *dictum* in *SEDCO v Guvheya* 1994

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(2) ZLR 311 (H) on collection commission could not have been intended to have laid down that collection commission was not payable after service of summons and before judgment unless the debtor has agreed subsequent to the service of the summons to pay collection charges. All the cases where the courts have held that collection charges are not claimable involved situations where the principal sum had not been collected at the time of judgment and the applicant would be seeking the assistance of the court through judgment to collect the debt. In the present case the debt had been collected by the legal practitioner and the collection commission was clearly payable.

Cases cited:

Claude Neon Lights (SA) Ltd v Schlemmer 1974 (1) SA 143 (N)

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Western Bank Ltd v Honeywill & Anor 1974 (4) SA 148 (D)

Western Bank Ltd v Meyer 1973 (4) SA 697 (T)

Claude Neon Lights (SA) v Peroglou 1977 (1) SA 575 (C)

Santam Bank Bpk v Kellerman 1978 (1) SA 1159 (C)

SEDCO v Guvheya 1994 (2) ZLR 311 (H)

D & DH Fraser Ltd v Waller 1916 AD 494

van Rensburg & Anor v van Rensburg 1962 (3) SA 646 (O)

von Zahn v Credit Corp of SA Ltd 1963 (3) SA 554 (T)

Dan Perkins & Co (Pvt) Ltd v Mather 1968 (1) RLR 60 (G)

udc Rhodesia Ltd v Ushewokunze 1972 (2) RLR 97 (G)

Falconer v Behr & Co (1894) 4 CTR 69

Steytler v Smuts (1833) 1 Menz 40

Blaikie-Johnstone v D Nell Developments (Pvt) Ltd & Anor 1978 (4) SA 883 (N)

M J Gillespie for the applicant

A J Dyke for the respondent

Judgment

Malaba J: This is an application for summary judgment for costs on the legal practitioner and client scale and collection commission claimed in an action commenced by the applicant against the respondent on 12 January 1994 for the recovery of $108 675 in rent arrears. The respondent paid the principal sum and interest before the application for summary judgment in the main action had been heard, but refused to pay that part of the claim relating to costs and collection commission.

On 7 May 1991 the parties entered into a written agreement of lease through which the respondent leased from the applicant Shop A Tselentis House for

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35 months from 1 May 1991 to 31 March 1994. The monthly rental agreed upon by the parties was $9 000 from 1 May 1991 to 31 March 1992; $10 350 from 1 April 1992 to 31 March 1993 and $11 902,50 from 1 April 1993 to 31 March 1994.

In clause 27 of the agreement of lease the respondent bound itself to pay costs on the legal practitioner and client scale and collection commission incurred by the applicant to recover the

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rent in the event of default of payment by it. The penalty clause reads as follows:

> "If, as a result of the Lessee's default in paying rent or any other monies due in terms of this Agreement or of the non compliance with any of the provisions thereof the Lessor instructs its Attorney to make demand and/ or institute legal proceedings against the Lessee the latter shall in either of such events be responsible for and shall on demand pay for all legal costs and disbursements so incurred including particularly collection charges and costs as between attorney and client."

In 1992 the parties entered into negotiations with a view to having the respondent acquire the ownership of the leased property by purchasing shares in the applicant. It was envisaged that once the respondent had paid the purchase price for the shares the rent would accrue to it. The negotiations failed to yield positive results. Meanwhile the respondent had stopped paying rent to the applicant and on 16 December 1993 owed to it $96 772 in rent arrears. The applicant's estate agent instructed the applicant's legal practitioners on 16 December 1993 to make demand for the money. A letter of demand was sent to the respondent on 17 December 1993 but no response came from it. A reminder letter was sent to the respondent on 21 December 1993 and again no response from it was received.

Summons commencing action was issued on 12 January 1994. On 24 January 1994 the respondent entered an appearance to defend the action but the applicant threatened to apply for summary judgment. On 25 February 1994 the respondent paid $104 000 of the total sum of $132 721,31 it now owed in the form of rent arrears and interest. The respondent did not pay the costs on the legal practitioner and client scale and collection charges on the $104 000. It vacated the premises on 31 March 1994 without having paid the rent for the month of March. On the 20 April 1994 the respondent paid $28 721,31 which was the balance of $132 721,31. It did not pay costs and collection commission on the $28 721,31. The total amount respondent owed to the applicant in costs on the legal practitioner and client scale and collection commission was

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about $17 805,15. A letter of demand was sent to the respondent on 26 April 1994 but it refused to pay the money, necessitating the institution of these proceedings.

Mr *Dyke*, for the respondent, was unable to advance any argument against the respondent's liability for the payment of costs on the legal practitioner and client scale. The respondent agreed and bound itself in clause 27 to pay costs on the higher scale. The conditions that had to be present to give rise to the liability to pay costs on the legal practitioner and client scale in terms of clause 27 were present. The general rule is that a court should give effect to an agreement to pay attorney and client costs: *Claude Neon Lights (SA) Ltd v Schlemmer* 1974 (1) SA 143 (N) at 150H. In *Western Bank Ltd v Honeywill & Anor* 1974 (4) SA 148 (D) at 151D-F LEON J said it is common place for a court to award such costs against a defendant where he has agreed to pay them. The learned judge went on to say:

> "Where there has been such an agreement the court's power to disallow such costs is very limited. In *Western Bank Ltd v Meyer* 1973 (4) SA 697 (T), the Full Bench of the Transvaal Provincial Division (BEKKER, GALGUT and IRVING STEYN JJ) in dealing with this question, expressed the following view:

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> ' ... The agreements before us all contain clauses to the effect that if due to any breach of contract by the lessee the lessor has to institute action the lessee will be liable for costs on the attorney and client scale. It has been suggested that, in as much as the award of costs is a matter in the discretion of the court, the provision in the contract cannot deprive the court of such discretion. In this regard it must be remembered that this discretion must be exercised judicially. Hence it follows unless the lessor has been guilty of some conduct which in the opinion of the court entitles the court, to deprive the lessor of its costs, the court is bound to award costs to the lessor. Moreover, for the same reason it is bound to award such costs on the agreed basis. Only if the court finds that there is conduct which justifies it in depriving the lessor of its costs can it disallow such costs. Failing such conduct it is clear that the court must award costs on the agreed basis. Clauses of this type are frequently found in contracts and if the parties have seen fit to bind themselves to pay such costs the court must give effect to the contract'."

See also: *Claude Neon Lights (SA) Ltd v Peroglou* 1977 (1) SA 575 (C) and *Santam Bank Bpk v Kellerman* 1978 (1) SA 1159 (C).

MALABA J

Mr *Dyke* argued for the respondent being made to pay costs on the legal practitioner and client scale in respect of the main action and not these proceedings. He asked the court to find that the institution of these proceedings was unnecessary. I disagree. By the letter of demand of 26 April 1994 the respondent was given an opportunity to pay the costs on the agreed basis, but it refused to pay them. The applicant was compelled to institute these proceedings to recover the costs from the respondent on the agreed basis. The applicant is therefore not guilty of any conduct entitling the court to deprive it of the costs on the agreed basis of legal practitioner and client scale.

I now turn to consider the collection charges. Two defences, one legal and the other factual, were raised by the respondent against the applicant's claim for collection charges. Mr *Dyke's* argument is that collection commission is not claimable once summons has been issued and the debtor has not agreed after summons to pay it. He referred to the ultimate paragraph of a judgment by SMITH J in *SEDCO v Guvheya* 1994 (2) ZLR 311 (H). Faced with the question whether collection commission was claimable on a debt that had not been paid at the time of judgment and having examined previous decisions in the area the learned judge then said at p 316:

> "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."

Mr *Gillespie* for the applicant said the statement by SMITH J in the ultimate paragraph of his judgment to the effect that collection commission is not claimable after service of summons unless the debtor has agreed subsequent to the service of summons to pay it is an *obiter dictum* because it is not consistent with the principle stated by the learned judge in the penultimate paragraph of the judgment.

In as much as the ultimate paragraph of the judgment in *SEDCO v Guvheya supra* summarises the principles of law stated and applied in decided cases cited by SMITH J and correctly summarised by him in the penultimate paragraph of the judgment, I do not think it means that

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collection commission is not claimable on a debt collected by a legal practitioner after the service of summons and before judgment, if subsequent to the service of summons the debtor has not agreed to pay collection commission on the debt. Such a construction on the statement would make nonsense of the last sentence in the

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ultimate paragraph which declares that "Collection commission can only be charged on moneys actually collected by the legal practitioner".

The view that the decision in *SEDCO v Guvheya* is not authority for a proposition that collection commission is not claimable on a debt collected by the legal practitioner after service of summons but before judgment is consistent with the principles of law gleaned from the decided cases on the subject. These are:

(a) That stipulations for collection charges in contracts constitute conventional penalties.

D & D H Fraser Ltd v Waller 1916 AD 494

van Rensburg & Anor v van Rensburg 1962 (3) SA 646 (O)

van Zahn v Credit Corp of S A Ltd 1963 (3) SA 554 (T)

*Claude Neon Lights (SA) Ltd v Schlemmer 1*974 (1) SA 143 (N) at 152B

Western Bank Ltd v Honeywill & Anor 1974 (4) SA 148 (D) at 152D-E.

SEDCO v Guvheya 1994 (2) ZLR 311 (H).

In *D & D H Fraser Ltd v Waller supra* INNES CJ said at 499:

> "Where there has been no collection there can be no collection costs. Now a stipulation for the payment of a percentage commission to cover costs of collection in case of default is, in my opinion, a penal stipulation. It is in essence a penalty imposed to ensure the timeous performance of the principal obligation. And its object being to compensate the creditor not for the absolute non-performance of the principal obligation, but for delay in performance it constitutes an exception to the general rule that the creditor cannot exact both the principal obligation and the penalty. (Pothier, *Oblig*, para 344). Stipulations of this nature have been treated as of a penal character by South African Courts for more than 80 years."

(b) That courts will interpret penalty clauses strictly and allow collection charges where there is evidence that the principal sum has been collected by the legal practitioner or agent and the collection charges incurred by the creditor.

In *D & D H Fraser Ltd v Waller supra* INNES CJ went on to say at 499-500:

> "And in regard to them the well-known principle of our law has been invoked that the courts will only award under a penalty clause such loss or damage as the plaintiff has actually sustained (Voet 45.1.13)."

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(c) That where the principal sum has been collected by the legal practitioner and the costs of collection incurred before judgment, collection charges are claimable from the debtor regardless of service of summons. It is the judgment and not service of summons that is the determinant factor:

D & D H Fraser Ltd v Waller supra at 501

Dan Perkins & Co (Pvt) Ltd v Mather 1968 (1) RLR 60 (G)

udc Rhodesia Ltd v Ushewokunze 1972 (2) RLR 97 (G) at 100-1

Santam Bank Bpk v Kellerman 1978 (1) SA 1159 (C).

In *D & D H Fraser Ltd v Waller supra* at 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."

In *udc Rhodesia Ltd v Ushewokunze supra* DAVIES J stated the same principle at p 100-1 and said:

> "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."

The cases that have decided that collection charges are not claimable have involved situations where the principal sum has not been collected at the time of judgment. In such cases the applicant would be seeking the assistance of the court through judgment to collect the debt.

D & D H Fraser Ltd v Waller supra: Application to recover £20 15s collection commission on a debt recovered through a provisional sentence.

von Zhan v Credit Corporation of SA Ltd supra: Application to recover R6,50 on a debt of R130 that had not been recovered and in respect of which summary judgment was applied for.

Dan Perkins & Co (Pvt) Ltd v Mather supra: Application for collection

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commission on a debt amounting to £598 3s 6d in respect of which a default judgment was being applied for.

SEDCO v Guvheya supra: Application for collection commission on a debt amount to $60 119 in respect of which summary judgment was being applied for.

The case of *Falconer v Behr & Co* (1894) 4 CTR 69 referred to by SOLOMON JA in *D & D H*

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Fraser v Waller supra at pp 507-508 is apposite authority here. In that case the debtor tendered payment of the purchase price to the plaintiff's agent but refused to pay the collection commission. Contrary to the general rule stated in *Steytler v Smuts* (1833) 1 Menz 40, it was held in that case that the clause on which the plaintiff relied to claim the collection commission was not a penalty but reasonable compensation for the seller's risk in employing an agent. The court still held that the plaintiff could recover the collection charges. Referring to that case, SOLOMON JA said:

> "The circumstances of that case are somewhat peculiar, as the purchaser who was in default, tendered to the agent, who had been employed by the auctioneer to collect the debt, the purchase price but refused to pay the 5 percent charge for collection. The case, therefore, it seems to me might very well have been decided in favour of the plaintiff even if the stipulation had been held to be a penal one, so that there was no necessity for running counter to all the previous decisions and holding that it was not a penalty."

It must follow from the reasoning of SOLOMON JA on the decision in *Falconer v Behr & Co* that collection charges incurred in this case are recoverable from the respondent. The facts of this case are distinguishable from the facts in *SEDCO v Guvheya , supra*, and the other decided cases where the debt would not have been collected by the legal practitioner at the time of judgment.

I do not have to decide the question of collection charges after judgment, save to mention that the authorities are divided on the issue. On the one hand, there are decisions of the Cape Provincial Division followed by our courts to the effect that collection commission is not claimable on a judgment debt:

D & D H Fraser Ltd v Waller supra

von Zahn v Credit Corp of SA Ltd supra

Dan Perkins & Co (Pvt) Ltd v Mather supra

udc Rhodesia Ltd v Ushewokunze supra

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Santam Bank Bpk v Kellerman supra

SEDCO v Guvheya supra

On the other hand are decisions of the Natal Provincial Division that say collection commission is claimable on a judgment debt, depending on the wording of the clause under which it is claimed and the provisions of the particular Law Society's By-Laws:

Claude Neon Lights (SA) Ltd v Schlemmer supra

Western Bank Ltd v Honeywill & Anor supra

Blaikie-Johnstone v D Nell Developments (Pvt) Ltd & Anor 1978 (4) SA 883 (N).

Finally I consider the second part of the respondent's defence to the applicant's claim. Two

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schedules of calculation of the rent arrears, interest thereon and collection commission were prepared by the applicant and sent to the respondent. The first schedule prepared for the purposes of prosecuting the main action ended on 25 February 1994. On the basis of this incomplete schedule of calculation of the extent of the respondent's liability there is a credit balance of $6 673,75 after the payment of $28 721,31. The respondent's defence is that it has overpaid the applicant. The credit balance is, however, fictitious when regard is had to the second schedule that contains calculations of the respondent's indebtedness to 20 April 1994 when it paid the $28 721,31. The second schedule takes into account the rents for the months of February and March omitted from the first schedule.

On the basis of the second schedule of calculations there is a clear debit balance of $17 805,15. I did not understand Mr *Dyke*'s submission to amount to a denial of the respondent's liability for the payment of the sum of $17 805,15 if it was shown on the basis of the second schedule of calculations to be correct. He had sought to limit the respondent's extent of liability by confining its indebtedness to the first schedule of calculations. I am however satisfied that that position is untenable.

Judgment is granted to the applicant.

It is ordered that summary judgment in case HC 195-94 be and is granted to the applicant against the respondent for the payment of the collection commission and legal practitioner and client costs incurred by the applicant in regard to both that matter and this application.

Surgey, Pittman & Kerswell, applicant's legal practitioners

Gollop & Blank, respondent's legal practitioners

JOHNSEN v AGRICULTURAL FINANCE CORP 1995 (1) ZLR 65 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Appeal against refusal to grant declaratory order

19 January & 9 February 1995 Judgment No S-17-95

Flynote

Practice and procedure - declaratory order - when may be granted - not necessary that order should finally dispose of entire litigation - competent to issue order on one part of dispute only - availability of other remedy such as interdict not a bar to relief - requirement for court to consider merits of applicant's case - where construction of contract is in issue, court under duty to consider meaning of contract

Appeal - Supreme Court - power to substitute its discretion for that of trial court - permissible where trial court has wrongly exercised discretion - where trial court exercises no discretion, remittal appropriate

Headnote

The appellant was a farmer. Along with many other farmers, he had applied in 1990 to the

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respondent (the AFC) for a loan for the purchase of capital equipment for his farm. In the appellant's case, the application was for the purchase of a truck, the value of which in 1990 was $177 526. He signed an agreement with the AFC in July 1991, in terms of which he paid 25% of the purchase price of the truck and the balance was loaned to him, on condition (a) that he repay the loan over a five-year period beginning on 1 January 1993 and (b) that the truck remained the property of the AFC until the loan was repaid in full.

In November 1992, eight months after taking delivery of the truck, the appellant received from the AFC an invoice which stated that due, among other things, to the devaluation of the Zimbabwe dollar, the price had escalated by some $76 000. The AFC demanded that the appellant pay the excess in cash or debit it to his loan, with the repayment instalments being increased proportionately. He disputed the requirement

to pay the excess but the AFC was adamant. The appellant feared that refusal to pay might jeopardise his prospects of obtaining further loans from the AFC and that the AFC might attempt to enter upon his farm and take possession of the truck. He offered to pay immediately whatever was outstanding of the original loan amount, plus interest. On his own behalf and on behalf of several other similarly affected farmers, he sought an order from the High Court, declaring that the AFC was not entitled -

(i) to recover any amount allegedly due in respect of an escalation of expense; or

(ii) to use the threat of withholding other finance to cause him to acknowledge indebtedness.

The High Court (CHIDYAUSIKU J) dismissed the application *(1) on the grounds that -

(a) essentially what was being sought was a legal opinion from the court as to which of the parties' interpretation of the agreement of loan was correct;

(b) the relief, if granted, would not bring the litigation to finality; and

(c) there was an alternative remedy available by way of interdict.

It was not in dispute that the appellant was an "interested person", as required by s 14 of the High Court of Zimbabwe Act 1981. It was argued for the appellant, however, that the judge *a quo* had misdirected itself in certain respects and thus failed to exercise a judicial discretion. In the first place, it was argued that by failing to consider the merits of the substantive dispute between the parties arising from the agreement of loan, that is, by failing to construe the document, the court had deprived itself of the ability to assess the strength of the appellant's case against the AFC and consequently of the opportunity to weigh this factor against any others which might tend against the grant of a declaratory order. For the AFC, it was argued that the court was only constrained to consider the merits of the dispute after being satisfied that the case was a proper one for the grant of a declaratory order. Even if the court *a quo* should have granted a declaratory order, the matter should be remitted to that court, rather than the Supreme Court issuing the order.

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Held, that it is only in exceptional circumstances that a decision to refuse a declaratory order may be taken without having any regard to the merits of a dispute arising under a document. This might occur where, even if the applicant's contentions in respect of the dispute were sound, an order so declaring would secure no practical advantage or relief and would not

finalise or shorten any material aspect of the litigation. Generally, though, the merits constitute one of the circumstances of the matter to which regard must be paid. The construction of contracts is one of the primary uses of the declaratory procedure. In this case, the AFC enjoyed no cause of action founded on the contract.

Held, further, that the court *a quo* was not faced with a purely abstract question, the answer to which was incapable of affecting any existing or future legal right of the appellant. There was a genuine dispute between the parties under the agreement of loan which had arisen in a real live situation. The omission of the court to have regard to the loan agreement, a true construction of which favoured the appellant, was a misdirection. If the court had construed the contract, it would have reached the opinion that the AFC was not entitled thereunder to unilaterally increase the specified amounts, and so could not resort to foreclosure for non-payment of the increase.

Held, further, that a declaratory order may be granted on part of a dispute only, even if that will not finally dispose of the litigation between the parties. If the issue is separate from the rest, even though its resolution will solve only part of the dispute, a declaratory order should be granted. In this case, the issue of an order would have achieved finality on the applicability of the summary execution procedures and prevented a multiplicity of urgent individual applications for interdicts in the event of the AFC attempting to foreclose on the farmers' capital equipment.

Held, further, that the availability of a remedy by way of interdict was not in itself reason to refuse declaratory relief. It is but one factor to be taken into account by the court in the exercise of its discretion whether or not to grant a declaratory order.

Held, further, that where the court *a quo* failed to exercise a discretion at all, it is preferable for an appeal court to remit the matter to the lower court. Where, however, the lower court exercised a discretion wrongly, it is open to the appeal court to set aside the original discretion, examine anew the relevant facts and circumstances and exercise its own discretion. In the light of all the facts of this case, it was appropriate to issue a declaratory order as prayed.

Cases cited:

Ex p *Chief Immigration Officer* 1993 (1) ZLR 122 (S); 1994 (1) SA 370 (ZS)

Munn Publishing (Pvt) Ltd v ZBC 1994 (1) ZLR 337 (S)

Reinecke v Inc Gen Insurances Ltd 1974 (2) SA 84 (A)

Dyson v A-G [1911] 1 KB 410 (CA)

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GUBBAY CJ

Burghes v A-G [1911] 2 Ch 139

Adbro Invtm Co Ltd v Min of Interior & Ors 1961 (3) SA 283 (T)

S v Mohamed 1977 (2) SA 531 (A)

SA Mutual Life Assurance Soc v Anglo - Tvl Collieries Ltd 1977 (3) SA 642 (A)

Lewis v Green [1905] 2 Ch 340

Goldreich v Janks & Janks 1937 WLD 138

Bryne v Herbert & Anor [1965] 3 All ER 705 (QBD)

Safari Reservations (Pty) Ltd & Anor v Zululand Safaris (Pty) Ltd 1966 (4) SA 165 (D)

Standard Bank of SA Ltd v Trust Bank of Africa Ltd 1968 (1) SA 102 (T)

Gelcon Invtms (Pvt) Ltd v Adair Properties (Pvt) Ltd 1969 (2) RLR 120 (G); 1969 (3) SA 142 (R)

Davidson v Honey 1953 (1) SA 300 (A)

Re *J (an infant)* 1981 (2) SA 330 (Z)

M J Gillespie for the appellant

A P de Bourbon SC for the respondent

Judgment

Gubbay CJ: This appeal raises a question which is always embarrassing to an appellate court - namely, whether it should interfere with an order made by a judge on a matter of discretion.

During March 1990, the Agricultural Finance Corporation (AFC) advised, through the press, the various Farmers' Unions and its own network, that it had received a large loan from the World Bank, granted for the purpose of expanding the agricultural infrastructure in Zimbabwe. The loan was to be utilised for the benefit of farmers who needed to purchase capital equipment for the servicing of their lands, such as, trucks, tractors, bulldozers, harvesters, and the like. Those who intended to avail themselves of the facility were to apply individually to the AFC.

The appellant, a tobacco farmer in the Karoi district, was one of the very many farmers who applied. On 26 March 1990, he informed an official of the Chinhoyi Branch of the AFC that he wished to purchase a seven tonne truck. He was told that the price of the vehicle would be something in excess of $176 000; and that he could pay either twenty-five per cent in cash and borrow the balance from the AFC, or the full purchase price, to which would be added a ten per cent charge. The appellant chose the first option. He signed the application for loan form handed to him.

On 5 June 1991, the AFC advised the appellant in writing that it had decided

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to offer him a loan on the conditions set out in an enclosed agreement of loan document.

The appellant signed the agreement of loan on 3 July 1991. He paid the AFC the sum of $44 382, which was twenty-five per cent of the purchase price of a CP B12 Nissan, eight tonne truck, in respect of which a loan of $133 145 was being advanced. It was stipulated that the loan was to be repaid over a period of five years by equal annual instalments of $41 830, commencing on 1 January 1993; the truck to remain the property of the AFC until the loan was repaid in full. The appellant also supplied the title deeds of his farm, "Nyamambizi", to the AFC, in order that a note of hand, which it required as security for the loan, could be registered.

On 20 March 1992, the appellant took delivery of the truck. Some eight months later he received a pro forma invoice headed Final Invoice AFC/WORLD BANK LOAN NO. 91134833. It stated that the depreciation of the Zimbabwe dollar against major currencies had raised the CIF value of the Nissan truck, resulting in increased customs duty, rates, tax and local charges, payable thereon. Consequently, the original cost of the vehicle, being $177 526, had escalated by $76 380. It was further mentioned that the AFC had no choice but to charge the additional amount, which was beyond its control, to the appellant, and had accepted it on his behalf. The appellant was to pay the sum of $76 380 in cash or authorise the AFC to debit it to the agreement of loan, with the annual instalments being increased proportionately.

The appellant disputed liability to pay the $76 380, but to no end. For its part, the AFC was adamant that it was entitled to debit the additional cost to the appellant under the provisions of the agreement of loan, as it had acted on his behalf. And it did so.

The attitude of the AFC to the dispute is expressed in the letter of 7 May 1993, the relevant portion of which reads:

> "Had the Corporation known the full impact of any possible devaluation of the Zimbabwean dollar, on the foreign exchange rate and further had such devaluation been anticipated in the form that it came ('Viz, drastic and deliberate measures by the Government of Zimbabwe'), it would have been included in the loan agreement with the farmer a clause that the quoted prices would be subject to change to the extent of the increases caused by such devaluation.

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> In the circumstance, the mistaken belief by the Corporation was nothing else but reasonable.
>
> Accordingly, the position to withhold acceptance of the additional costs by your client would be considered as grossly unreasonable in terms of clause 16 of the loan agreement.
>
> However, it is worth noting that in terms of clause 1 of the loan agreement, the borrower expressly renounced all the benefits from the legal exceptions *errores calculi* and revision of accounts. Furthermore, in our law for the defence of unilateral mistake to succeed in enabling the mistaken part(y) to resile from a contract or to hold the other to the contract, the mistake (error) would have to be reasonable.
>
> In view of the substantial differences between the initial cost of the item and the final price at the time of delivery

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which was after the devaluation, it is more likely that if the case is taken to court it will be held that the mistake was certainly so fundamental that it could be held with justification that the contract was *void ab initio*. If this position is taken we will then be looking at the question of unjust enrichment and the damages that flow therefrom.

In the premises, we are convinced that there is justification in debiting you with the additional charges and accordingly, we reserve our rights to proceed against your client in terms of section 40 of the AFC Act [*Chapter 101*] in the event that you default in paying the additional costs."

The predicament facing the appellant was shared by many other farmers who had concluded the same standard type agreement of loan. The President of the Commercial Farmers' Union received 88 complaints concerning the AFC's insistence that they, too, were obliged to pay the substantial increase in the cost of the capital equipment purchased. The total additional amount claimed from these 88 farmers was $5,9 million.

In a letter of 7 April 1993, the President of the Commercial Farmers' Union sought an assurance from the AFC that it would not declare any farmer ineligible for a short-term seasonal loan unless he agreed to be responsible for the additional amount claimed in respect of the capital equipment purchased under the World Bank scheme. No such assurance was forthcoming.

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The appellant became apprehensive that the AFC might decline to grant him further loans because of his refusal to accept liability for the additional charge. He also feared that it might seek to exercise its powers under clause 13 of the agreement of loan, as read with s 50 of the Agricultural Finance Corporation Act [*Chapter 101*] - namely, to enter upon his farm and take possession of the truck. He indicated a willingness to pay the AFC, with immediate effect, whatever amount of the loan of $133 145, inclusive of interest, remained outstanding.

The appellant and other farmers similarly placed decided to resort to litigation. In this they had the support of the Commercial Farmers' Union. So, on 27 May 1993, the appellant, on his own behalf and on behalf of certain other named farmers, applied to the High Court for the grant of an order, declaring that the AFC was not entitled: (i) " ... under the agreement of loan with (him) and similar agreements of loan with other interested parties, to recover any amount claimed to be due in respect of an escalation of expense, howsoever caused, of the equipment for the purchase of which the loans were granted"; and (ii) to use the threat of withholding of other finance in order to cause (him) or other interested parties to acknowledge indebtedness to (it) in any amount claimed in respect of an escalation in price, howsoever caused, of equipment for the purchase of which the loans aforesaid were granted".

In the appellant's founding and the other affidavits, together with the annexures thereto, the whole story, as I have hitherto recounted it, was set forth.

The application was, of course, resisted. The affidavit deposed to by the corporate secretary of the AFC was long and had many documents attached to it. It is not necessary to refer to it in any detail. In substance, it put in issue the contention that it was not permissible under its agreement of loan for the AFC to debit the appellant and other farmers with the increase in the cost of the capital equipment purchased. The affidavit reiterated the propriety of its actions, as

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stated in the letter of 7 May 1993. It added that:

> "The omission of a provision for escalation in costs was a mistake on the part of the (AFC) and perhaps the applicant but the belief was based on past experience whereby in normal circumstances, normal fluctuations in currency did not cause a sufficient change in prices both by way of decrease or increase. The mistake was reasonable ... The applicant and others were allowed to collect the trucks or machinery and equipment prior to the compilation of the final price figures ... Suffice it to say at

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> this stage that the (AFC's) actions were done with the utmost good faith."

It was indicated further by the deponent that the AFC would not exercise the powers of seizure available to it under the Act unless the applicant or the similarly affected farmers were in default.

The application was heard by CHIDYAUSIKU J, who dismissed it with costs. He held that it was not a proper matter for the grant of a declaratory order, because:

(i) essentially what was sought was a legal opinion from the court as to which of the parties' interpretation of the agreement of loan was correct;

(ii) such relief, if granted, would not bring litigation between the parties to finality; and

(iii) there was available an alternative remedy by way of interdict.

The learned judge expressed the view, for the reasons given, that it was unnecessary to consider the merits of the dispute between the parties by undertaking an examination and interpretation of the standard form agreement of loan.

The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an "interested person", in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a prerequisite to the exercise of jurisdiction. See Ex p *Chief Immigration Officer* 1993 (1) ZLR 122 (S) at 129F-G; 1994 (1) SA 370 (ZS) at 376G-H; *Munn Publishing (Pvt) Ltd v ZBC* 1994 (1) ZLR 337 (S) and the cases cited.

It was rightly not in contention before the court *a quo* that the appellant was an interested person. Accordingly, the first stage in the determination of whether it was competent to grant a *declarator* was met.

At the second stage of the enquiry, the court is obliged to decide whether the case before it is a proper one for the exercise of its discretion under s 14 of the Act. It must take account of all the circumstances of the matter. See *Reinecke v Inc Gen Insurances Ltd* 1974 (2) SA 84 (A) at 95C; *Dyson v A-G*

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[1911] 1 KB 410 (CA) at 417; *Burghes v A-G* [1911] 2 Ch 139 at 156. What, in the end, constitutes a proper case is where some tangible and justifiable advantage to the applicant is shown to exist. See *Adbro Invtm Co Ltd v Min of Interior & Ors* 1961 (3) SA 283 (T) at 285B-C; *Reinecke v Inc Gen Insurances Ltd supra* at 93D-E.

Mr *Gillespie*, who appeared for the appellant, readily accepted that it was not permissible for this court to interfere with the discretionary power vested in the court *a quo* to decline the issue of a *declarator*, unless it could be shown that it had committed such an irregularity or misdirection, or exercised its discretion so unreasonably or improperly, as to vitiate its decision. This is plainly so. See *S v Mohamed* 1977 (2) SA 531 (A) at 541H; *SA Mutual Life Assurance Soc v Anglo - Tvl Collieries Ltd* 1977 (3) SA 642 (A) at 658F. It was, however, submitted that the court a quo had misdirected itself in certain material respects and thus had failed to exercise a judicial discretion.

The first misdirection contended for was that by omitting to consider the merits of the substantive dispute between the parties arising under the agreement of loan, that is, by not construing the document, the court *a quo* had deprived itself of the ability to assess the strength of the appellant's case against that of the AFC; and of the consequent opportunity of weighing this factor against any others that might tend against the grant of the *declarator*.

At the hearing before the learned judge, counsel then acting for the AFC did not seek to support any of the grounds advanced in the correspondence and affidavit of the corporate secretary, as entitling the AFC to levy the additional amounts demanded of the appellant and other farmers under the terms of their agreements of loan. His argument in opposition to the application was founded solely on the discretionary nature of the relief claimed.

Mr *de Bourbon*, likewise, did not address on the merits of the dispute. He submitted that a court of first instance is only constrained to investigate the merits of a dispute - *in casu* to construe the agreement of loan-upon being satisfied that the case is one proper for the grant of a *declarator*. If of opinion that such an order is inappropriate, *cadit quaestio*.

For this somewhat startling proposition counsel prayed in aid the decision in *Lewis v Green* [1905] 2 Ch 340. In that case the applicant had issued an originating summons under Order LIV A Rule 1 of the Supreme Court Rules. The particular rule allowed a person, claiming to be entitled under a deed, to apply for the determination of any question of construction arising under it

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and for a declaration of the rights of the persons interested. What was sought was a declaration that, according to the true construction of a deed to which the applicant was a party, the benefit of a guarantee relating to the income of certain securities had been assigned to and vested in him. The applicant also claimed against the respondent the provision of an account. Rule 4,

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however, provided that the court was not bound to determine any such question if, in its opinion, it ought not to be determined on originating summons. The respondent objected that the procedure adopted was inappropriate as, even if the deed were to be construed favour of the applicant, there were other intermingled issues of fact which could only be resolved at the trial. And, furthermore, that the account asked for could not be directed on the originating summons. WARRINGTON J upheld the objection. In the first place, he pointed out that the mode of procedure was wrong. Under Order LIV A the court could not order the account to be taken, being confined to deciding questions of construction. The second reason given by the learned judge for refusing to construe the deed, was expressed in these words at 344:

> "There are other points which have to be decided. They can only be decided by bringing an action, and in that action it may turn out that, notwithstanding the applicant is right on the questions of construction, he is ultimately found to be wrong. The respondent will have had to pay all the expense of the litigation on the question of construction, which will be utterly useless. It seems to me that, where one finds circumstances such as I find here, the procedure under Order LIV A is improper. It is only intended to enable the court to decide questions of construction where the decision of those questions, whichever way it may go, will settle the litigation between the parties."

I certainly do not understand the judgment as laying down, as a matter of principle, that whenever declaratory relief is sought, the construction of a document, embodying a dispute between the parties to it, must only be undertaken if the court is of the opinion that the grant of a declarator is appropriate.

I think it is only in an exceptional situation that the decision to refuse a *declarator* may be taken without having any regard to the merits of a dispute arising under a document - where, even assuming the applicant's contention in respect of the dispute to be sound, an order so declaring would secure him no practical advantage or relief, and would not finalise or shorten any material aspect of the litigation in which he was engaged. In general, I regard the merits of the dispute as constituting one of "the circumstances of the

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matter" to which regard must be paid. I would say that the construction of contracts is one of the primary uses of the declaratory procedure. See Young *Declaratory Orders* para 1404.

I do not propose to deal with the five grounds raised by the AFC in support of its stand that it was entitled to debit the applicant and other farmers, under their respective agreements of loan, with the additional cost of the capital equipment purchased. It suffices to state that I am unpersuaded by the cogency of any of them. Each is completely demolished in the heads of argument prepared by Mr *Gillespie*. In short, I agree with him that an examination of the agreement of loan reveals, as unassailable, the applicant's submission that the AFC enjoys no cause of action founded thereon.

Whatever possible basis there may be for the AFC to strive to enforce against the appellant and the other farmers its claims for payment of the additional cost of the capital equipment - and none has been clearly identified - such increases are not due under the agreements of loan. The AFC's reliance thereon was misconceived.

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With respect to the court *a quo*, I do not think it was faced with a purely abstract question, the answer to which was incapable of affecting any existing or future legal right of the appellant and the other farmers. There was a genuine dispute between the parties under the agreement of loan which had arisen, not in hypothetical circumstances, but in a real live situation, in which the AFC claimed to be entitled to have recourse to summary remedies in the event of non-payment of the monies in contention.

It follows that the omission of the court *a quo* to have regard to the terms of the agreement of loan, a true construction of which unquestionably favours the appellant, as a factor to be weighed in the exercise of its judicial discretion, constituted a misdirection.

If the court *a quo* had proceeded to construe the terms of the agreement of loan, the overwhelming probability is that it would have reached the conclusion that the AFC was not permitted thereunder to unilaterally increase the specified amounts of the loans granted to the farmers. In other words, that the agreement of loan did not provide a cause of action enabling the AFC to levy the additional charges against the farmers. In consequence, it would have appreciated that the drastic remedy of summary foreclosure on account of the non-payment of the additional cost of the capital equipment, was not available to the AFC. And, to be borne in mind, was the fact that the

appellant, as well as the other two deponent farmers, had voiced concern that the AFC, in the belief that default in payment of the additional amount was a breach of the agreement of loan, might resort to the extraordinary remedy of summary foreclosure. As already mentioned, the AFC gave no assurance to the contrary.

It is beyond doubt that a court may grant a declaratory order on one part of a dispute only, even though to do so will not finally dispose of the entire litigation between the parties. If the issue is separate from the rest then, notwithstanding that its resolution will only solve part of the dispute, I consider the court ought to grant a declarator. In *Goldreich v Janks & Janks* 1937 WLD 138 SOLOMON J said at 139:

> "Mr *Millin's* argument has satisfied me that no declaration on the subject of restitution (prayer (b)) can be made save in an action, as the facts are in dispute. But the question of the validity or nullity of the contract (prayer (a)) is a matter of construction involving 'the existing rights or obligations' of the parties and has been brought before the court by an 'interested person', the applicant, so that this issue lies within s 102. Moreover it goes to the root of the dispute. If it is determined that the contract is valid, the determination will end the litigation; if otherwise, then matters of account will arise which the parties will either settle by negotiation, or bring into court for settlement without uncertainty about their contractual relationship. But my power to determine prayer (a) while refusing to determine prayer (b) does not depend upon what determination I make under prayer (a). A determination under prayer (a) against the applicant will, subject to appeal, end this litigation: a determination in his favour, may or may not lead to further litigation. The opinion I have formed is that, no matter how I decide, s 102 allows me to determine prayer (a) while dismissing prayer (b)."

That reasoning, which I respectfully endorse, is patently apposite to the present matter. See also *Bryne v Herbert & Anor* [1965] 3 All ER 705 (QB) at 706G-H; Young *op cit para* 814.

In my view, the failure by the court *a quo* to construe the agreement of loan caused it to

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overlook that a *declarator*, though not necessarily ending all litigation over the issue of liability between these parties, nonetheless would have achieved finality on the applicability of the summary execution procedures. Its grant would prevent a multiplicity of individual urgent applications for interdicts in the event of the AFC attempting to foreclose on

the farmers' capital equipment in order to obtain payment from them for the additional cost thereof. In sum, the court a quo also misdirected itself on the point of lack of finality.

Nor does it seem to me that the availability, in the same court, of a remedy by way of interdict was of itself reason to refuse declaratory relief. Standing alone, it will seldom be sufficient to induce a court to decline jurisdiction. It is but one factor to be taken into account by the court in the exercise of its discretion whether or not to make a declaration of rights. See *Safari Reservations (Pty) Ltd & Anor v Zululand Safaris (Pty) Ltd* 1966 (4) SA 165 (D) at 171F-G; *Standard Bank of SA Ltd v Trust Bank of Africa Ltd* 1968 (1) SA 102 (T) at 105G-106A; *Gelcon Invtms (Pvt) Ltd v Adair Properties (Pvt) Ltd* 1969 (2) RLR 120 (G) at 128A-B; 1969 (3) SA 142 (R) at 144D-F.

In the result, I am satisfied that the court *a quo* failed to exercise a judicial discretion in its refusal of a *declarator*.

Anticipating the possibility of the conclusion now reached, Mr *de Bourbon* proceeded to argue that it was incumbent upon this court not to issue the declaratory order itself, but to remit the matter to the lower court. Reliance was placed on the directive made in *Davidson v Honey* 1953 (1) SA 300 (A).

In that case an application was brought before DE VILLIERS J for ejectment or, alternatively, for certain declaratory orders. The learned judge granted an order for ejectment on the ground that the lease, which stipulated for rent in excess of that determined by a Rent Board, was invalid. He did not deal with the alternative claims. In an appeal, the Full Bench of the Transvaal Provincial Division, considering the lease valid, set the decision aside and ordered the case to go to trial. In a further appeal, the Appellate Division held that the Full Bench had rightly decided that the grounds on which the order of ejectment had been granted were unfounded. It was not, however, entitled to substitute its discretion for that of the judge of first instance and adjudicate, as it did, on the issue of a declaratory order. It was only permitted to interfere if satisfied that the judge had not exercised a judicial discretion (see at 309A). GREENBERG JA, who delivered the judgment, went on to say at 309G:

> "I see no ground ... for an exercise, **in this case by this court**, of a discretion conferred on the court of first instance ...
>
> I think therefore, that, instead of the matter being referred back for trial as was done by the court *a quo*, it should be referred back to the court of

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> first instance for hearing, it being left to that court to decide what form the proceedings before it should take, eg whether evidence will be heard or not; and what ultimate order it will make" (my emphasis).

I have no quarrel with the judgment. In my opinion, it does not sustain counsel's injunction as to the duty of this court. Clearly a distinction was drawn between the position of an appellate court where, on the one hand, the court of first instance had not exercised a judicial discretion at all, and, on the other, where it had exercised the discretion, but wrongly. In the latter occurrence, the appellate court is not inhibited from setting aside the original discretion. It must examine anew the relevant facts and circumstances in order to exercise a discretion itself by way of review, which may uphold, reverse or vary, the order made by the court below. In re *J* (*an infant*) 1981 (2) SA 330 (Z) at 335D-E, I ventured to state the principle, as I understood it, thus:

> "If the (primary) court erred in the exercise of its discretion, and as all the facts relevant thereto are undisputed, this Court is now free to exercise its own discretion ... If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it makes mistakes of fact, if it does not take into account some material consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for doing so."

To the extent that the passage, cited by Mr *de Bourbon,* at p A1-34 of *Superior Court Practice* by Erasmus *et al,* (which reproduces exactly what was stated in the two earlier editions of the same work by Nathan, Barnett and Brink) formulates the rationale in *Davidson v Honey supra* any differently, I must disagree with it.

This court has before it the same materials as were before the court *a quo*. It suffers no disadvantage. It must now exercise a judicial discretion according to both common sense and justice.

Most of the factors, which firmly persuade me that the grant of a *declarator* is warranted, have been mentioned in the course of this judgment, though in another context. They are these:

(1) The agreement of loan, properly construed, does not empower the AFC to debit the additional cost of the capital equipment to the borrower and,

upon default in payment, take the drastic summary measures permitted it under Part V of the Agricultural Finance Corporation Act to secure its position.

(2) There is no assurance that the AFC will not summarily foreclose on the capital equipment; and that it will not declare a farmer, who has refused to pay the additional amount claimed, ineligible for future short term seasonal loans. The appellant and other farmers fear that they may be subjected to both such measures.

(3) A *declarator* will bring finality on the question of the applicability of the summary execution procedures. It will prevent a multiplicity of urgent applications for an interdict should the AFC attempt to foreclose on the capital equipment of the appellant and other farmers.

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(4) The appellant is anxious to repay in full the balance of the loan of $133 145, together with accrued interest, and so discharge his liability under the agreement of loan. A *declarator* in the terms sought would enable him to do so.

Mr *Gillespie* acknowledged that it was unnecessary to include the content of para 2 of the draft order within the terms of the *declarator*.

Accordingly, I would allow the appeal with costs and alter the judgment of the lower court to read:

> "An order is to issue in terms of paras 1 and 3 of the draft order to the Court Application."

Korsah JA: I agree.

Ebrahim JA: I agree.

Atherstone & Cook, appellant's legal practitioners

Chinamasa, Mudimu & Chinogwenya, respondent's legal practitioners

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BATER & ANOR v MUCHENGETI 1995 (1) ZLR 80 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

6 & 16 February 1995 Judgment No S-23-95

Flynote

Contract - breach - penalty - Contractual Penalties Act 13 of 1992 - application to transactions before date of commencement of Act

Interpretation of statutes - presumptions - against retrospective operation - strong presumption against retrospectivity

Headnote

There is a strong presumption that an enactment does not operate retrospectively to remove or in any way impair existing rights or obligations, unless such a construction appears clearly from the language used or by necessary implication.

Sections 8 and 9 of the Contractual Penalties Act 13 of 1992 relate only to actions taken by a seller after the date of commencement of the Act, namely 23 October 1992. Any cancellation in terms of the contract before then is valid although 30 days' notice has not been given. However, the purchaser can seek relief under s 10 of the Act to reduce the penalty suffered.

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Cases cited:

Gurure v Rusike 1992 (2) ZLR 334 (H)

Agere v Nyambuya 1985 (2) ZLR 336 (S)

Nkomo & Anor v A-G & Ors 1993 (2) ZLR 422 (S)

R v Inhabitants of St Mary, Whitechaple (1848) 12 QB 120

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

Sonia (Pty) Ltd v Wheeler 1958 (1) SA 555 (A)

Parker v W G B Kinsey & Co (Pvt) Ltd 1987 (1) ZLR 188 (S)

GUBBAY CJ

R Harvey for the appellants

T Biti for the respondent

Judgment

Gubbay CJ: On 29 July 1982 the appellants, as joint sellers, entered into a written instalment sale of land agreement with the respondent, as purchaser, in respect of the property known as Lot 3 of Lot 74, Marlborough Township. The purchase price of $26 000 was payable by an immediate deposit of $3 900, together with four amounts of $775 payable on 31 January and 31 July over the years 1983 and 1984. The outstanding balance of the purchase price was payable by monthly instalments of $236 due on the first day of each month.

Clause 9 of the agreement provided, in relevant part, that:

> "Notwithstanding anything aforesaid or any extension of time or other indulgence or concession by the seller(s) to the purchaser
>
> (a) Should the purchaser fail to pay any instalments or sum due by him within twenty-one (21) days of due date,
>
> (b) ... then the seller(s) shall be entitled to treat the full balance of the purchase price and interest as immediately due and payable or summarily cancel this agreement in which event -
>
> (i) the purchaser shall forthwith vacate the property and the seller(s) shall be entitled to regain possession;
>
> (ii) the seller(s) shall be entitled to retain all amounts paid to date of cancellation aforesaid as *rouwkoop*."

On 20 September 1989 the appellants served upon the respondent written notice of cancellation on the ground that he was in arrear with the payment of the monthly instalments to the extent of at least $552. The respondent was instructed to vacate the property by the end of

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that month.

The right of the appellants to cancel the agreement was disputed. The respondent claimed that he was not in arrear with his payments. In the event, on 9 May 1991 the appellants instituted proceedings in the High Court by way of notice of motion, in which was sought an order that -

(i) cancellation of the agreement of sale between them and the respondent be confirmed;

GUBBAY CJ

(ii) the respondent give vacant possession of the property; and

(iii) all instalments paid in terms of the agreement of sale prior to cancellation be declared forfeit.

The affidavits filed by the parties revealed an irresolvable dispute of fact. Accordingly, on 1 October 1991, the learned judge presiding ordered that the matter be referred to trial with the costs to be cost in the cause of the action.

At the inception of the trial, on 25 May 1994, counsel for the respondent proceeded to raise, without objection, a point *in limine*. It was that, accepting that the cancellation was procedurally regular in terms of the instalment sale of land agreement and justifiable on the facts, as clause 9 constituted a "penalty stipulation", notice of cancellation had not been given by the appellants in compliance with the requirements of s 8(2) of the Contractual Penalties Act 1992.

After hearing argument, the learned judge reserved his decision until the next morning, when he upheld the point *in limine* and dismissed the action with costs. It is regrettable that neither counsel referred the learned judge to the case of *Gurure v Rusike* 1992 (2) ZLR 334 (H). If he had been, he may very well have reached a contrary conclusion. Certainly he would have taken more time to consider the issue.

The Contractual Penalties Act was brought into operation on 23 October 1992 (GN 626 of 1992) and repealed the Conventional Penalties Act [*Chapter 42*]. It is divided into four parts. Part I is headed "Preliminary", Part II "Penalty Stipulations", Part III "Instalment Sales of Land", and Part IV "General".

Section 3(1) of the Act, which falls under Part I, reads:

> "This Act shall apply in respect of -
>
> (a) all penalty stipulations; and
>
> (b) all instalment sales of land;
>
> entered into on or after the 9th November 1973."

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The date is significant, being that upon which the Conventional Penalties Act passed into law. The subsection simply locates or identifies the type of

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agreements, entered into on or after the date, to which the Act applies. Like its precursor, the Act does not apply to any penalty stipulation or instalment sale of land agreement if entered into before 9 November 1973. The purpose of s 3(1) is to ensure continuity with what was provided under the Conventional Penalties Act. In short, it is neither prospective nor retrospective.

Sections 4 to 6, which come within Part II of the Act, repeat, if not always in identical wording then to similar effect, the provisions of ss 3 to 6 of the repealed Conventional Penalties Act.

Sections 7 to 10, in Part III, are new. They deal comprehensively with the aspect of instalment sales of land and afford the purchaser additional protection by the court. In particular, ss 8(1) and (2), around the construction of which this appeal turns, read:

> "(1) No seller under an instalment sale of land may, on account of any breach of contract by the purchaser -
>
> (a) enforce a penalty stipulation or a provision for the accelerated payment of the purchase price; or
>
> (b) terminate the contract; or
>
> (c) institute any proceedings for damages;
>
> unless he has given notice in terms of subsection (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued, as the case may be.
>
> (2) Notice for the purposes of subsection (1) shall -
>
> (a) be given in writing to the purchaser; and
>
> (b) advise the purchaser of the breach concerned; and
>
> (c) call upon the purchaser to remedy, rectify or desist from continuing, as the case may be, the breach concerned within a reasonable period specified in the notice, which period shall not be less than -
>
> (i) the period fixed for the purpose in the instalment sale of the land concerned; or
>
> (ii) thirty days;
>
> whichever is the longer period."

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The prescribed form of notice is required to be given where the purchaser is in breach and the seller wishes to have recourse to any of the activities specified in subs (1). It is with respect to each of them that s 8 operates or relates to, subject, of course, to their inclusion as terms of the instalment sale of land agreement entered into on or after 7 November 1973.

The question is whether it was the intention of the lawmaker that a seller be obliged to comply

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with the laid down notice requirements, before being permitted to enforce a penalty stipulation, terminate the contract or institute proceedings for damages, only on or after the coming into force of the Act on 23 October 1992, that is, prospectively; or whether the notice requirements applied to all instalment sale of land agreements entered into on or after 7 November 1973.

In *Gurure v Rusike supra* Smith J at 337E-G observed:

> "I would point out that had Part III of the Contractual Penalties Act 1992 been in operation in July 1987 the cancellation of the agreement by the defendant would not have been lawful because the notice given to the plaintiff by the defendant's lawyers would not have met the requirements of s 8 of that Act. Clause 9 of the agreement of sale provides that if the purchaser fails to pay any instalment within 21 days of due date the seller is entitled to cancel the agreement summarily. However, s 8 provides that no seller under an instalment sale of land may terminate a contract on account of any breach of contract by the purchaser unless he has given the purchaser a reasonable period of not less than 30 days to remedy the breach."

What the learned judge was saying was that because the seller's act of cancelling the instalment sale of land agreement preceded 23 October 1992, the notice of cancellation given to the purchaser did not have to comply with the thirty-day period of grace or the other requirements laid down in s 8(2).

The correctness of that view of the matter is underscored when account is taken of the fundamental rule of construction in our law, dating probably from *Codex* 1:14:7, that there is a strong presumption that retrospective operation is not to be given to an enactment so as to remove or in any way impair existing rights or obligations, unless such a construction appears clearly from the language used or arises by necessary implication. The supposition is that the lawmaker intends to deal only with future events and circumstances. See *Agere v Nyambuya* 1985 (2) ZLR 336 (S) at 338H-339A;

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Nkomo & Anor v A-G & Ors 1993 (2) ZLR 422 (S) at 428H-429B; 1994 (3) SA 34 (ZS) at 38G-I.

Section 8 is not to be regarded as retrospective merely because it concerns instalment sale of land agreements entered into in the past. That this is so is made plain by LORD DENMAN in *R v Inhabitants of St Mary, Whitechapel* (1848) 12 QB 120 where at 127 it was said:

> "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 part of the requisites for its action is drawn from time antecedent to its passing ... (so) here ... one might incline to the view that the sections in question are prospective in character, though part of the requisites for their action are drawn from time antecedent to their passing."

See also, *A-G of SR v Thornton's Transportation Rhodesia (Pvt) Ltd* 1964 RLR 150 (G) at 153E; *Devenish Interpretation of Statutes* at p 194.

Moreover, to hold that s 8 has retrospective effect would be to create situations that the lawmaker could never have intended. Suppose, for instance, that in 1985 a purchaser breaches an instalment sale of land agreement entered into in 1975, which provided for summary cancellation and forfeiture of instalments paid. He acknowledges the breach, vacates the property and accepts retention by the seller of the monies paid. Thereafter the seller transfers

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the property to a third party. In November 1993 the original purchaser comes across the Contractual Penalties Act. He brings action for an order that the cancellation be adjudged invalid with the consequent right to re-occupy the property and recover the monies forfeited. He would surely be met with the answer that, as the cancellation and forfeiture occurred before 23 October 1992, s 8 afforded him no relief.

On the accepted facts of this case, notice of cancellation for breach was given to the respondent on 20 September 1989. Proceedings were instituted against him on 9 May 1991 and the factual dispute between the parties was referred to trial on 1 October 1991. All well before the Act came into operation. Subsequent to 23 October 1992, the appellants were not seeking, as the learned judge appears to have thought, the authority of the court to cancel. They were merely claiming confirmation that the cancellation of 20 September 1989 was lawful; that the status of the agreement be not left in doubt. See *Sonia (Pty) Ltd v Wheeler* 1958 (1) SA 555 (A) at 560 *in fine*-561A; *Parker*

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v W G B Kinsey & Co (Pvt) Ltd 1987 (1) ZLR 188 (S) at 194E-F; 1988 (1) SA 42 (ZS) at 47I-J; Christie *Law of Contract in South Africa* 2 ed at p 635.

For these reasons it follows that the appellants did not contravene s 8 of the Contractual Penalties Act. The point *in limine* should not have been decided in favour of the respondent.

It is open to the respondent, if upon the resumption of the trial he is held to be in breach, to seek the relief available under Part II of the Act (see s 10). For the sake of clarity I would add, however, that the relief given in s 9 is inapplicable to him, since that provision, like s 8, is prospective in form. It only operates or relates to action taken by a seller on or after the date of commencement of the Act.

In the result, the appeal succeeds with costs. The order of the court *a quo* is altered to read:

> "The point *in limine* is dismissed with costs."

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Granger & Harvey, appellants' legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

WALKER v INDUSTRIAL EQUITY LTD 1995 (1) ZLR 87 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

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Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

9 & 28 February 1995 Judgment No S-24-95

Flynote

Practice and procedure - absolution - when should be granted - effect of multiple or alternative causes of action

Conflict of laws - foreign law - applicability of - defendant sued in Zimbabwe on transaction which took place in England - onus on defendant to show that English law different from that of the lex fori

Company - shares - share certificate - error in share certificate showing that shareholder was proprietor of more shares than was actually the case - when shareholder is entitled to rely on representation in certificate

Enrichment - general action for - whether exists in Roman-Dutch law

Headnote

The respondent (plaintiff in the court below) sued the appellant (defendant) for damages in the sum of Australian $574 065, or the equivalent in Zimbabwean currency, in an action based on fraud or negligence. In the alternative, it claimed payment in the sum of £266 855.30 on the grounds of unjust enrichment. The defendant applied for absolution from the instance at the close of the plaintiff's case, but the application was refused. The defendant appealed against that refusal.

The evidence led for the plaintiff showed that the plaintiff was a company incorporated in the State of Victoria, Australia. It employed an agent to manage its share register, issue share certificates and record the transfer and transmission of shares. The defendant, a resident of Zimbabwe, was

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a shareholder in the plaintiff, holding, in November 1984, shares then worth A$1000. He elected to accept ordinary shares instead of dividends. In 1984, the plaintiff announced a rights issue of ordinary shares in the proportion of one for three and a bonus issue of one for two. Although the defendant declined to take up the rights issue, 52 shares were erroneously issued to him by the plaintiff's agent. The agent subsequently issued a share certificate, number 76620, for bonus shares based on the total number of shares the agent erroneously believed the defendant held. The error was detected and the certificate withdrawn. The defendant was only entitled to receive an allotment of 78 fully paid up shares. When the replacement certificate was issued, it reflected 76620 as the number of shares. This was actually the number of the share certificate previously issued. Because of a number of errors and omissions, this second erroneous certificate was sent to the defendant, who shortly afterwards instructed his bank in Britain to sell the shares for his benefit. The amount realised from the sale was £266 855,30.

An Australian stockbroker, who was responsible under Australian law to indemnify the

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transferees of the shares, called on the plaintiff to transfer 76542 of its shares (being 76620 less 78 shares). The plaintiff initially refused to do so, and the stockbroker indemnified the transferees in the sum of A$574 065, which sum, plus costs, the plaintiff later paid to the stockbroker. The plaintiff then claimed reimbursement from its agent of the total sum paid out, which sum was paid. Under the law of New South Wales, the plaintiff then became obliged to sue the defendant.

Held, that an application for absolution from the instance is akin to and stands on much the same footing as an application for the discharge of the accused at the end of the State case. In that situation, he is entitled to his discharge on any separate or alternative charge on which there is insufficient evidence to justify his being put on his defence. Similarly, in a civil action, if the court is satisfied that there is no evidence on which a reasonable judicial officer could or might find for the plaintiff upon some of the separate claims or on the main or alternative cause of action, there is no impediment to it ordering absolution upon them and refusing it in respect of the remainder.

Held, further, that the trial court was not bound to take account of any system of law other than the *lex fori*. The court could not take judicial notice of the content of English law and in the absence of evidence to the contrary the English law must be presumed to be identical to the *lex fori*. If the defendant wished to assert that English law applied and that it was, in this respect, different from ours, the onus was on him to prove it.

Held, further, that a shareholder is entitled to take as true and correct a

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representation in a share certificate that he is the proprietor of the shares numbered therein, where the certificate is signed by officers of the company, and the company would be estopped from denying the truth if the shareholder, by reason of belief in the representation, acted on it to his prejudice. Where, however, the shareholder actually knew that the representation was false, or consciously and wilfully abstained from doing that which as a matter of business he would do, because he was afraid of discovering the truth, he would be prevented from setting up an estoppel. While in civil proceedings fraud is not lightly to be inferred, it is applicable in relation to an alternative likely innocent explanation proffered by the litigant against whom the allegation is made and the inferential evidence led. In this case, the trial judge correctly took into account the fact that the state of the defendant's mind was a fact peculiarly within his own knowledge. As the original allottee of the 76 620 shares, it was for the defendant to rebut the presumption of knowledge of the circumstances in which the shares were allotted. The cumulative effect of the evidence led for the plaintiff warranted evidence from the defendant that he had been innocently misled by the negligence of the plaintiff's agent and that he had acted to his tangible detriment.

Held, further, on the question of whether there is a general enrichment action in Roman- Dutch law, that although older South African authorities were to the effect that the law did not yet recognise the existence of such an action, there was nothing in principle to prevent the courts from doing so. The restrictive approach has attracted trenchant criticism from leading academic

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and recent decisions of the courts in South Africa indicated a move towards acceptance of a general enrichment action. Consequently, there was, at the end of the plaintiff's case, an arguable contention of law in relation to the alternative cause of action, and for this reason, too, the trial judge had been correct in dismissing the application for absolution. The time for full argument on the point of law, however, would be after the defendant had given such explanation as he may wish in justification of his enrichment.

Cases cited:

United Air Carriers (Pvt) Ltd v Jarman 1994 (2) ZLR 341 (S)

Ntombela v Min of Police 1985 (3) SA 571 (O)

Supreme Svc Stn (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd 1971 (1) RLR 1 (A)

R v Dzingayi & Ors 1965 RLR 171 (G)

A-G v Mzizi 1991 (2) ZLR 321 (S)

Schapiro v Schapiro 1904 TS 673

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Hairman v Crawley 1918 OPD 16

Bank of Lisbon v Optichem Kunsmis (Edms) Bpk 1970 (1) SA 447 (W)

Holland v Holland 1973 (1) SA 897 (T)

Ex p *van Dam* 1973 (2) SA 182 (W)

Balkis Consol Co Ltd v Tomkinson [1893] AC 396 (HL)

Hartogh v National Bank Ltd 1907 TH 207

Albatross Fishing Corp (Pty) Ltd v Ramsay 1968 (2) SA 217 (C)

Parbury's Case [1895] 1 Ch 100

Bondi & Anor v Wood NO A-74-75

Gates v Gates 1939 AD 150

Gilbey Distillers & Vintners (Pty) Ltd & Ors v Morris NO & Anor 1990 (2) SA 217 (SEC)

Marine & Trade Ins Co Ltd v van der Schyff 1972 (1) SA 26 (A)

du Toit v Vermeulen 1972 (3) SA 848 (A)

Union Govt (Min of Rlys) v Sykes 1913 AD 156

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Goosen v Stevenson 1932 TPD 223

Gandy v Makhanya 1974 (4) SA 853 (N)

Ardecor (Pty) Ltd v Quality Caterers (Pty) Ltd & Ors 1978 (3) SA 1073 (N)

In re *Contributories of the Rosemount GM Synd (in liq)* 1905 TH 169

Standard Bank of SA Ltd & Anor v Ocean Commodities Inc & Ors 1983 (1) SA 276 (A)

Nortje en 'n Ander v Pool NO 1966 (3) SA 96 (A)

Polwarth & Co (Pvt) Ltd v Zanombairi & Ors 1972 (1) RLR 112 (G)

Skywork (Pvt) Ltd v Peter Scales (Pvt) Ltd 1978 RLR 416 (G)

Kommisaris van Binnelandse Inkomste en 'n Ander v Willers en Andere 1994 (3) SA 283 (A)

Blower v van Noorden 1909 TS 890

Zimnat Ins Co Ltd v Chawanda 1990 (2) ZLR 143 (S)

da Costa v Bank of Ceylon (1970) New Law Reports (Ceylon) 457

Gafoor v Unie Versekeringsadviseurs (Edms) Bpk 1961 (1) SA 335 (A)

A P de Bourbon SC for the appellant

M J Gillespie for the respondent

Judgment

Gubbay CJ: The respondent company, to which I shall refer as "the plaintiff", sued the appellant, henceforth "the defendant", in the High Court for damages in the sum of 574 065 Australian dollars or the equivalent thereof in Zimbabwe dollars at the date of judgment, upon a main cause of action based on fraud or negligence; and, alternatively, for payment of the sum of £266 855,30 (sterling) or the equivalent in Zimbabwe dollars at the

date of judgment, on the ground of unjust enrichment. Interest at an annual rate of ten *per centum* from the date of judgment and costs of suit were also claimed.

In his plea the defendant denied that he had acted fraudulently or negligently, and that he had been unjustly enriched or the plaintiff impoverished. In addition, he raised the specific defences of estoppel to the main claim and prescription to the alternative.

The trial was presided over by the late MR JUSTICE CHINENGUNDU. At the close of the plaintiff's case, counsel for the defendant applied for absolution from the instance in respect of both the main and alternative claims. The application was refused with costs. Against that order

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the defendant, with leave granted by the learned judge, now appeals.

The facts established by the evidence adduced on behalf of the plaintiff, were these:

(1) The plaintiff is a public company incorporated with limited liability according to the laws of the State of Victoria, Australia, with its registered office in Melbourne. It employed an agent, Registry Managers (Australia) (Pty) Ltd ("Registry Managers"), of Sydney, New South Wales, to manage its share register, issue share certificates, and record the transfer and transmission of shares.

(2) The defendant, a resident of Harare, was a shareholder in the plaintiff. Prior to 18 May 1984, he held 156 fully paid up ordinary shares at a par value of A50 cents each. On 18 November 1984, a single bonus share was allotted to him. The value of these 157 fully paid up ordinary shares was A$1 000.

(3) On 27 June 1984, the defendant signed a notice of election pursuant to which he accepted additional ordinary shares in lieu of dividends paid to its shareholders by the plaintiff.

(4) In its annual report for the year 1984, despatched to shareholders, the plaintiff announced a rights issue of ordinary shares in the proportion of one for three, and a bonus issue in the proportion of one for two.

(5) The defendant declined to take up the rights issue for a further 52 ordinary shares. Nonetheless, on 9 January 1985, that number of shares was allotted to him in error by Registry Managers.

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(6) On 11 January 1985, share certificate 76620 was printed by Registry Managers reflecting the issue to the defendant of 104 bonus shares calculated on a holding of 209 ordinary shares. This share certificate bore the seal of the plaintiff and was signed by a director and secretary. It had endorsed upon it "1:2 Bonus Entitlement. 11.1.85". The error was, however, detected and the share certificate cancelled. Instructions were given to issue a new certificate. The defendant was only entitled to receive an allotment of 78 fully paid up ordinary shares valued at approximately A$500.

(7) On 18 March 1985, Registry Managers printed, in the name of the defendant, replacement share certificate 77945. The number of shares erroneously recorded upon it was 76 620 fully paid up ordinary shares of A50 cents each, being the serial number of the cancelled share certificate for the 104 shares. This share certificate should have reflected the number of shares issued to the defendant as 78.

(8) The error was discovered during the course of preparation of share certificate 77945. However, the clerk of Registry Managers who entered the corrections into the computer

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system could not abort the printing of that share certificate. And he omitted to recover and cancel it. The auditors of Registry Managers later failed to detect the error in the number of the shares, and so share certificate 77945 was dispatched to the defendant. It bore on its face, not only the common seal of the plaintiff and the signatures of a director and secretary, but a stamp that it had been audited as correct. It was not endorsed, as share certificate 76620 had been, with the words "1:2 Bonus Entitlement".

(9) The number of shares erroneously recorded on share certificate 77945 was a little less than one thousand times greater than the defendant's legitimate entitlement.

(10) The practice of Registry Managers was to enclose with the bonus share certificate sent to shareholders a covering letter identifying it as the one for two bonus issue.

(11) The defendant received share certificate 77945 in Harare and shortly before 3 June 1985, instructed his bankers, in England, to sell all the ordinary shares reflected thereon for his benefit.

(12) On 3 June 1985, the shares were sold by a firm of stockbrokers in

London. The amount realised was £266 855,30 or about £3,48 per share. Payment was made to the defendant.

(13) On 13 September 1985, the plaintiff was called upon by the Australian stockbroker, Patersons Securities Ltd ("Patersons") of Perth, to register the transfer of 76542 of its ordinary shares (being 76620 less 78). Initially it refused to do so on the ground that share certificate 77945 had been invalidly issued.

(14) Patersons was responsible under Australian law to indemnify the transferees of these shares for loss. Accordingly, on 16 September 1985, it made good the indemnity by the purchase on the open market of 76542 ordinary shares in the plaintiff at a cost of A$574 065, thereby satisfying the demands of all the transferees.

(15) Thereupon the plaintiff became liable under the common law of Australia to indemnify Patersons for the loss it sustained in consequence of the misrepresentation on share certificate 77945. On 17 September 1985, it paid Patersons the sum of A$574 065 by way of damages and A$5 401,50 for costs, in exchange for an assignment of any rights the latter had against third parties.

(16) On the date aforementioned the plaintiff wrote to Registry Managers claiming reimbursement of the total amount of of A$579 466,50 for the loss suffered as a result of its negligence in issuing the erroneous share certificate to the defendant. Registry Managers acknowledged and discharged its liability in return for an assignment by the plaintiff of any

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> rights of action it may have against either the defendant or any of the stockbrokers employed by him in the course of the transaction. A formal deed of assignment, dated 12 March 1987, to the above effect was signed on behalf of the plaintiff but not by Registry Managers.

Mr Michael Christie, a member of the Bar of New South Wales and an expert in the fields of commercial law and equity, was called to testify as to the plaintiff's legal obligation to sue the defendant. He said that the deed of assignment, though lacking formal legal validity, constituted an equitable assignment according to the law of New South Wales. He explained further that, even in the absence of an equitable assignment, the principle of subrogation applied. In order to exercise its rights against the defendant, Registry Managers, as the indemnifier of the loss suffered by the plaintiff, was entitled to compel the plaintiff to render its name to any proceedings

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brought by subrogation; that the date of the institution of such litigation was irrelevant; and that the fruits thereof would belong to the indemnifier, Registry Managers, or its insurer. Mr Christie also proffered the opinion that if, for some technical reason, there was no right of subrogation, an Australian court would not permit the plaintiff t retain for itself the fruits of the litigation awarded against the defendant. For to do so would be to unjustly enrich the plaintiff at the expense of its indemnifier, Registry Managers. On this basis, as well, the plaintiff was under an obligation to sue the defendant.

The test to be applied in deciding an application for absolution from the instance is well settled in this jurisdiction. It was reiterated recently by this court in *United Air Carriers (Pvt) Ltd v Jarman* 1994 (2) ZLR 341 (S) in these terms:

> "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 to) find for him."

A trial court may be faced with an application for absolution from the instance in respect of two or more entirely unrelated claims, or where the liability of the defendant is based on an alternative and distinct cause of action. Where that occurs, I can perceive of no valid impediment to a court, if satisfied there is no evidence on which a reasonable judicial officer could or might find for the plaintiff upon some of the separate claims or on the main or alternative cause of action, ordering absolution from the instance upon them, and refusing it in respect of the remainder. That was the procedure adopted in *Ntombela v Min of Police* 1985 (3) SA 571 (O) at 573G-H and 574I-J. Its legitimacy is supported, so it seems to me, by the remarks of BEADLE CJ in *Supreme Svc Stn (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at 4C-D, that an application for absolution from the instance is akin to and stands on much the same footing as an application for the discharge of an accused at the close of the case for the prosecution. In that situation, an accused is entitled to his discharge upon any separate or alternative charge on which there is insufficient evidence to justify that he be put upon his defence. This practice is not to be confused with the impermissibility of acquitting an accused on the main charge where there is evidence upon which he might be convicted of a lesser

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offence which is a competent verdict in terms of ss 195 to 211 of the Criminal Procedure and Evidence Act [*Chapter 59*]. See *R v Dzingayi & Ors* 1965 RLR 171 (G) at 172D; *A-G v Mzizi* 1991 (2) ZLR 321 (S) at 323E-F.

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In the present matter the learned judge dismissed the application in its entirety. He gave his reasons for so doing insofar as the application concerned the defendant's liability founded on fraud and on what he wrongly thought to be the *condictio indebiti*. He made no mention of whether there was sufficient evidence upon which a reasonable court could or might find that the loss sustained was caused by the defendant's negligence; and he omitted to consider the concept of general enrichment, which was the true basis of the alternative cause of action.

In this court, Mr *Gillespie*, on behalf of the plaintiff, disavowed reliance on the *condictio indebiti*, notwithstanding the favourable ruling of the learned judge. He was right to do so. He also abandoned the allegation in the amended declaration that the plaintiff's loss was caused by the *negligence* of the defendant in selling the shares.

The first issue to be determined, therefore, is whether, in refusing to grant the application in respect of the main cause of action, it can be held that no reasonable court on the evidence before the learned judge could or might draw the inference: (i) that the defendant, in the actual knowledge that he had no right to 76 542 of the 76 620 shares issued to him under certificate 77945, nevertheless caused the shares to be sold for his benefit, by pretending that he was the true holder thereof, well knowing that to do so would result in loss; or (ii) that the defendant, without any reasonable expectation of any right to the aforesaid number of shares, recklessly caused them to be sold for his benefit without regard to the loss which would be suffered thereby.

I did not understand Mr *de Bourbon*, who appeared for the defendant, to contend that it was incumbent upon the trial court to take account of any system of law other than that of the *lex fori* in determining the sufficiency of the evidence of fraud. Certainly, the applicability of foreign law was not raised in the plea. See *Beck's Theory and Principles of Pleading in Civil Actions* 5 ed paras 140 and 147. But lest I do counsel's argument an injustice, I would point out that the onus was on the defendant, if he wished to assert that the law of a foreign country pertained, presumably that of England, to prove before the court *a quo* what the law of that country is, and wherein it differs from our law of fraud. Courts are bound to assume that the law which obtains to a matter before it is its own domestic law, until it is shown that a different law applies. See *Schapiro v Schapiro* 1904 TS 673 at 677 and 679; *Hairman v Crawley* 1918 OPD 16 at 21 and 22; *Bank of Lisbon v Optichem Kunsmis (Edms) Bpk* 1970 (1) SA 447 (W) t 450E; *Holland v Holland* 1973 (1) SA 897 (T) at 899 C-E; Ex p *van Dam* 1973 (2) SA 182 (W) at 183A-B;

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Forsythe *Private International Law* 2 ed at 91-92; Dicey and Morris *The Conflict of Laws* 11 ed Vol 1 at 227-228. In the absence, then, of any admission as to the law of fraud in England, or

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elsewhere, at the stage when the plaintiff's case closed, the defendant had not yet discharged the onus of proving the applicability of the law of such foreign country.

I agree with the submission advanced by Mr *de Bourbon* (save for the qualification to be mentioned shortly) that a shareholder is entitled to take as true and correct the representation in a share certificate that he is the proprietor of the shares numbered therein, where the certificate has been signed by officers of the company and bears on its face a stamp that it has been audited. The company is estopped from denying the truth and raising a want of title in the shareholder whom it certified as owner provided that, by reason of such belief, the shareholder acted upon it to his prejudice. See *Balkis Consol Co Ltd v Tomkinson*[1893] AC 396 (HL) at 404 and 411. Thus, in the words of BRISTOWE J in *Hartogh v National Bank Ltd* 1907 TH 207 at 212:

> "... if a man tells another a lie, he cannot complain if the other man believes it, nor does it lie in his mouth to say: 'If you had been more careful you might have found out that I was not speaking the truth'."

It is obvious that a person who has deceived another cannot shelter behind an argument of this sort. See, also, *Albatross Fishing Corp (Pty) Ltd v Ramsay* 1968 (2) SA 217 (C) at 220E-221A.

If it can be shown, however, that the shareholder actually knew that the representation contained in the share certificate was false, or consciously and wilfully abstained from doing that which as a matter of business he would do, being afraid of discovering the truth, he would be prevented from setting up an estoppel. See *Parbury's* case [1895] 1 Ch 100 at 106; *Bondi & Anor v Wood NO* A-74-75 (not reported).

The principle that in civil proceedings fraud is not lightly to be inferred is well established and unquestionably correct. See *Gates v Gates* 1939 AD 150 at 155; *Gilbey Distillers & Vintners (Pty) Ltd & Ors v Morris NO & Anor* 1990 (2) SA 217 (SEC) at 225J-226A. It is applicable, however, in relation to an alternative likely innocent explanation proffered by the litigant against whom the allegation was made and the inferential evidence led. It is at that stage that the explanation is to be balanced against the evidence and caution exercised.

I reiterate that what has to be determined is whether, on the evidence adduced

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in this case, no reasonable court could or might draw the inference of fraud on the defendant's part. It need not be the only inference or indeed the readiest inference. The court is not required to weigh up different possible inferences, but merely to determine whether one of the reasonable inferences is in favour of the plaintiff. See *Marine & Trade Ins Co Ltd v van der Schyff* 1972 (1) SA 26 (A) at 38H; *du Toit v Vermeulen* 1972 (3) SA 848 (A) at 855D.

In his consideration of the issue, the learned judge correctly took into account that the state of the defendant's mind - whether innocent or otherwise - in disposing of the shares was a fact essentially or peculiarly within his own knowledge. Consequently, he accepted that less evidence was needed from the plaintiff in order to create a case for the defendant to answer. See *Union Govt (Min of Rlys) v Sykes* 1913 AD 156 at 173; *Goosen v Stevenson* 1932 TPD 223

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at 228; *Supreme Svc Stn* (1969) *(Pvt) Ltd v Fox & Goodridge (Pvt) Ltd , supra*, at 5H-6A; *Gandy v Makhanya* 1974 (4) SA 853 (N) at 859A-B; *Ardecor (Pty) Ltd v Quality Caterers (Pty) Ltd & Ors* 1978 (3) SA 1073 (N) at 1075E. The rationale being that assistance should not be withheld from a disadvantaged party where justice most requires it.

Moreover I would add that as the original allottee of the 76 620 shares it was for the defendant to rebut the presumption of knowledge of the circumstances under which the shares were allotted. See *Parbury*'s case *supra*, at 106; In re *Contributories of the Rosemount GM Synd (in liq)* 1905 TH 169 at 204 in fine; *Albatross Fishing Corp (Pty) Ltd v Ramsay , supra*, at 220H.

The plaintiff's evidence revealed that the value of the defendant's original holding of 157 fully paid up ordinary shares was approximately A$1 000; that his true entitlement on the bonus issue of one for two would have been in the region of A$500; that the value of the 76 620 shares erroneously recorded on the share certificate sent him was slightly less than one thousand times greater than his entitlement, being A$574 065 or £266 855,30 - an enormous windfall; that there is some likelihood that, either in advance of the share certificate or before the date he instructed his banker to sell the shares, the defendant received the plaintiff's 1984 annual report giving notice of the forthcoming one for two bonus issue; and, that the practice of Registry Managers was to attach to the share certificate a memorandum identifying the shares as the one for two bonus issue.

In the context of the principles referred to, it is my opinion that the cumulative effect of these facts and probabilities warranted evidence from the defendant that he had been innocently misled by the negligence of Registry Managers;

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that he had placed faith upon the audit stamp on share certificate 77945; and that in the belief that the representation contained in the share certificate was true he had acted to his tangible detriment. See *Albatross Fishing Corp (Pty) Ltd v Ramsay supra* at 221G.

In sum, I am satisfied that there was sufficient evidence on which a reasonable court could or might infer that the defendant knew that the representation in share certificate 77945 was false or, at the very least, that he wilfully refrained from knowing. The decision of the learned judge to refuse absolution is beyond reproach.

The learned judge did not purport to exercise his discretion insofar as the application for absolution involved the alternative cause of action based on the concept of general enrichment, that is, irrespective of any negligence legally attributable to the plaintiff. His regrettable demise makes it impossible now to remit the issue for him to do so. In the circumstances, this court is left with no option but to consider that part of the application at first instance, as it were, and exercise the discretionary power itself.

Mr *de Bourbon* made two submissions: First, that the claim was to be adjudicated in conformity with the law of England and the plaintiff had failed to lead evidence as to what that law is. Second, that Zimbabwean law, like that of South Africa, knows no general enrichment action.

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I have already cited a respectable body of authority to show that the onus to prove the applicability of a law other than the *lex fori* lay with the defendant. No expert testimony was before the learned judge as to the content of the English law of unjust enrichment - that there was any difference of substance to the defendant's case between the law of England and our law. And, by virtue of s 24(1) of the Civil Evidence Act 1992, judicial notice may not be taken thereof. See *Standard Bank of South Africa Ltd & Anor v Ocean Commodities Inc & Ors* 1983 (1) SA 276 (A) at 294G-H. Thus, at the stage of closure of the plaintiff's case, it must be presumed, until evidence to the contrary is presented by the defendant, that the English law of unjust enrichment is identical to the *lex fori* and the *lex fori* is to be applied. Even if, therefore, Mr *de Bourbon* was right to urge that the enrichment occurred in England where the shares were sold for the defendant's benefit, that fact does not prove the applicability of English law to the plaintiff's claim, or that such system differs from the *lex fori*.

In *Nortje en 'n Ander v Pool NO* 1966 (3) SA 96 (A), the majority judgment

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of the Appellate Division of South Africa held that Roman-Dutch law does not yet recognise the existence of a general enrichment action. The principal reason given was that such an action would open the floodgates for judicial intervention whenever the distribution of property does not seem to be in consonance with equity. The correctness of that view was approved of by MACAULAY J in *Polwarth & Co (Pvt) Ltd v Zanombairi & Ors* 1972 (1) RLR 112 (G) at 117 E-F, and referred to by BECK J (as he then was) somewhat less enthusiastically in *Skywork (Pvt) Ltd v Peter Scales (Pvt) Ltd* 1978 RLR 416 (G) at 419G. Those are the only local decisions, so far as I have been able to ascertain, in which the concept has been mentioned.

The present restrictive approach to the law of unjust enrichment has attracted trenchant criticism from leading academics. See Scholtens 1966 *SALJ* 391 *et seq; van der Walt* (1966) 29 *THRHR* 374 *et seq;* van Zyl 1992 *Acta Juridica* at 115-130; De Vos *Verrykingsaanspreeklikheid in Suid-Afrikaanse Reg* 3 ed at 311 *et seq*; Zimmerman *The Law of Obligations* at 886-887 and (1985) 18 *CILSA* 1 *et seq;* Eiselen and Pienaar *Unjustified Enrichment - A Casebook* at 22-23.

In *Nortje's* case *, supra*, BOTHA JA at 139E was of the opinion that the time may come when South African law will be ripe to accept and integrate a general enrichment action. Very recently his namesake, who delivered the unanimous judgment in *Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere* 1994 (3) SA 283 (A), said at 333C-F that the court was not precluded from accepting liability for enrichment in a particular case merely because liability has not been recognised previously in the same or even similar circumstances. The learned JUDGE OF APPEAL went on to point out that in such a case consideration will have to be given to the question whether the extension or new development is necessary or desirable, as well as to existing precedents and the contributions of academic writers who had devised proposals of general criteria for the establishment and limitation of liability.

Almost ninety years ago, in *Blower v van Noorden* 1909 TS 890 at 905, INNES CJ aptly observed that -

"There come times in the growth of every living system of law when old practice and ancient formulae must be

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> modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to

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> be effected by judicial decision, and when they are so important or so radical that they should be left to the legislature."

Much the same sentiment was expressed by this court in *Zimnat Ins Co Ltd v Chawanda* 1990 (2) ZLR 143 (S) at 154C-F.

It seems to me that the learned judge, if he had turned his mind to it, would not have felt obliged to dismiss summarily the submission as to the availability in our law of an action based on general enrichment. There was no relevant decision of the Appeal Court in this jurisdiction binding upon him, and that in *Nortje v Pool NO supra* was of persuasive value only. The dictum of MACAULAY J in *Polwarth's* case *supra* took no account of the more expansive approach to unjust enrichment favoured, even at that time, in the writings of Professors Scholtens, van der Walt and De Vos. And the judgment of WEERAMANTRY J in *da Costa v Bank of Ceylon* (1970) New Law Reports (Ceylon) 457 at 539 (referred to in Zimmerman op cit at 887) strongly criticised the reasoning of the majority in *Nortje v Pool NO , supra*, and, as far as Ceylon was concerned, came to the opposite conclusion. What was suggested to the court *a quo,* and to this court, was that the scope of the law of enrichment should be developed to conform with realistic and modern conditions; that the *ad hoc* extensions that have been made to the existing *condictiones* were inadequate.

I think I have said enough to show that there was raised at the end of the plaintiff's case an arguable contention of law in relation to the alternative cause of action.

In *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340B-C SCHREINER JA said:

> "Where the plaintiff's evidence consists of the production of a document on which he sues and the sole question is the proper interpretation of the document, the distinction between the interpretation that a reasonable man might give to the document and the interpretation that he ought to give to it tends to disappear. Nevertheless, **even in such cases the trial court should normally refuse absolution unless the proper interpretation appears to be beyond question**" (my emphasis).

The position in *casu appears* to me somewhat akin to that considered by SCHREINER JA.

If I am wrong in drawing the analogy, I would agree with Mr *Gillespie* that

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the time for full argument upon this controversial point is after the defendant has given such explanation as he may wish in justification of his enrichment. The existence or not of an action for general enrichment is more properly and justly determined in the knowledge of all the

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pertinent facts.

It follows that in the exercise of this court's discretion the application for absolution from the instance on the plaintiff's alternative cause of action likewise must be refused.

The appeal is accordingly dismissed with costs.

Korsah JA: I agree.

Ebrahim JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

HOKONYA & ANOR v CHINYANI & ORS 1995 (1) ZLR 102 (HC)

Editor's Note:(2)

Court **High Court, Harare**

Bartlett J

Civil trial

28, 29 & 30 November, Judgment No HH-17-95

1 December 1994 & 1 March 1995

Flynote

Delict - vicarious liability - course of employment - whether employer businessman or company - whether employee on a frolic of his own

Damages - amount - personal injury - young boy reduced to permanent vegetative state - extent of damages.

Insurance - motor - policy - exclusion clause - covering personal or business use and not use of vehicle for hire or reward - whether injured third party still entitled to claim against insurance company despite use of vehicle for hire or reward

Headnote

The plaintiffs and their young son boarded a car which had a logo on it indicating that it was a taxi. The driver drove negligently and there was an accident. The mother was seriously hurt, while their 4-year-old son was reduced to a human cabbage.

The car involved was owned by a businessman, who also insured it and had a certificate of fitness and a road service permit for it. The driver was paid by the businessman's taxi company, whose logo was painted on the car's side. The insurance policy covering the vehicle was for

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private or business purposes only, not for use for hire or reward.

In defence to the claim, the businessman pleaded that he was not the driver's employer and that the car was supposed to be used only as a courtesy and delivery car and not as a taxi, and the driver was on a frolic of his own. The insurers sought to escape liability because the car was not insured for use for hire or reward.

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Held, that there was sufficient credible evidence that the car was used as a taxi, so the driver of this vehicle was not on a frolic of his own but was acting in the course of his employment for the company or its owner in transporting the passengers. Although the driver was on the books of the company which was now defunct, the court was satisfied that he had acted as an employee of its owner.

Held, further, that the plaintiffs were also entitled to claim directly from the insurer of the vehicle in terms of the Road Traffic Act. Although the vehicle was insured for personal or business use and not for use for hire or reward, ss 25(2) and 26 of the Road Traffic Act make any condition restricting such cover void against any third party claim. Thus the limitation of the policy did not stop the third party from claiming directly from the insurer. The condition only entitled the insurer to recover from the insured any amount paid to a third party. The insurer could have escaped liability if it had pleaded and proved that it had properly exercised its common-law right to avoid the policy because of a misrepresentation or non-disclosure of a material fact at the time the policy was taken out. However, the insurer had at no time suggested that it had elected to avoid the policy on this basis, nor had it proved the facts necessary to have entitled it to do so

Held, further, as regards the damages for the injuries to the young boy, that the injuries to the young boy had resulted in him being in a permanent vegetative state in which he could not communicate with the world. He would forever remain mentally and physically helpless and the daily demands of caring for him were overwhelming. Although the victim's unawareness of his condition is relevant to assessing pain and suffering, the young boy was entitled to some damages for pain and suffering as there was some indication that he suffered pain if helpers tried to exercise his limbs. The victim's unawareness of his condition was not relevant as regards loss of amenities or general health. Loss of expectation of life damages are awarded not as compensation for loss of days but for loss of happiness, and the figure must be reduced for very young children because of the uncertainty of their prospects for happiness.

Cases cited:

Stumbles v New Zealand Ins Co Ltd 1963 R & N 77 (SR); 1963 (2) SA 44 (SR)

van Biljon v Guardian Royal Exchange Assurance Rhodesia Ltd 1979 RLR 385 (G)

Felton & Anor v Lewis & Ors 1960 R & N 97 (SR)

R v Graham 1965 RLR 41 (G)

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Lawn v Rhodesian Eagle Ins Co Ltd 1977 (1) RLR 201 (G)

Guardian Royal Exchange Assurance Group & Anor v Commercial Union Assurance Co of Rhodesia (Pvt) Ltd & Anor 1976 (1) RLR 381 (G)

Guardian Royal Exchange Assurance Group & Anor v Petzer 1967 RLR 239 (A)

McCormick & Auly v National Motor & Accident Ins Union Ltd (1934) 49 LR 361

Jones v Birch Brothers [1933] 2 KB 597

Old Mutual Fire & General Ins Co of Rhodesia (Pvt) Ltd v Springer 1963 R & N 90 (SR); 1963 (2) SA 324 (SR)

Resisto Dairy (Pty) Ltd v Auto Protection Ins Co Ltd 1963 (1) SA 632 (A)

Admin Gen SWA & Ors v Kriel 1988 (3) SA 275 (A)

Chaza v Ramajan HH-459-88

Koen v Keates 1989 (3) ZLR 9 (H)

Min of Defence & Anor v Jackson 1990 (2) ZLR 1 (S)

Makudzo v Min of Home Affairs HB-104-92

Union Govt v Warneke 1911 AD 657

Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194

Sigournay v Gillbanks 1960 (2) SA 552 (A)

Southern Ins Assn Ltd v Bailey NO 1984 (1) SA 98 (A)

Ngwenya v Mafuka S-8-89

Radebe v Hough 1949 (1) SA 380 (A)

Sadomba v Unity Ins Co Ltd & Anor 1978 RLR 262 (G);1978 (3) SA 1094 (R)

Min of Home Affairs v Allan 1986 (1) ZLR 263 (S)

Bay Passenger Tpt Ltd v Franzen 1975 (1) SA 269 (A)

Oliver & Ors v Ashman & Anor [1962] 2 QB 210

Roberts v Northern Assurance Co Ltd 1964 (4) SA 531 (D)

Benham v Gambling [1941] AC 157; [1941] 1 All ER 7

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J Sayce for the plaintiffs

W T Manase for the second and third defendants

D P Carter for the fourth defendant

Judgment

Bartlett J: The first plaintiff in this matter is Killian Hokonya, suing in his capacity as the father and natural guardian of David Hokonya, a minor child. The second plaintiff is Maria Hokonya, the wife of the first plaintiff. They are suing for damages under various heads, resulting from a vehicle accident on 27 July 1990, in which the first plaintiff's minor son suffered

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various serious injuries and the second plaintiff relatively minor injuries. The first defendant is Boniface Chinyanyi, who was the driver of the Renault R4 vehicle in which the accident occurred. The second defendant was amended at the start of trial to be Nyahondo Mini-Cabs (Pvt) Ltd The third defendant is Stedman Nyahondo, the Managing Director of the second defendant and the owner of the vehicle involved in the accident. The third defendant also obtained the insurance policy in respect of the vehicle involved in the accident. The fourth defendant is Zimnat Insurance Co Ltd which is the statutory insurer of the vehicle involved in the accident.

FINDINGS OF FACT ON A BALANCE OF PROBABILITIES

Assessing the matter overall, I am satisfied that I can clearly make the following findings on a balance of probabilities that:

(i) The Renault R4 vehicle in question driven by the first defendant crashed at the intersection of Samora Machel Avenue and Enterprise Road in Harare;

(ii) The crash was caused by the negligent manner in which the first defendant drove the R4, which negligence involved travelling at a speed which was excessive in the circumstances and failing to keep the vehicle under proper control when an accident or collision seemed imminent;

(iii) The Renault R4 had been hired on a fare-paying basis along Enterprise Road outside the Harare Central Prison by Killian Hokonya;

(iv) The Renault R4 had a taxi meter next to the driver's steering wheel and radio communication enabling it to contact other taxis or its depot;

(v) The fare meter was switched on when the Hokonya family entered the vehicle and it had reached approximately $3,00 when the collision occurred;

(vi) The vehicle was decked out in Harare Mini-Cabs livery emblazoned with the Harare Mini-Cabs logo on the side doors;

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(vii) The first defendant was acting within the scope of his employment driving the Renault R4 as a taxi with the logo of the second defendant, which vehicle was owned by the third defendant.

For the purposes of clarity I specifically indicate that I reject as completely improbable and unconvincing the third defendant's evidence that the vehicle in question was solely used as a courtesy car for the second defendant. I also reject the third defendant's contention that the first defendant was acting outside the scope of his authority and employment on a frolic of his own. I am quite satisfied that on a balance of probabilities the first defendant was clearly acting in the scope of his employment either with the second or third defendant.

WHO WAS THE EMPLOYER OF THE FIRST DEFENDANT?

The question of whether the first defendant was acting on behalf of or under the instructions of the second defendant or the third defendant at the time of the accident is a question which is by no means a simple one. From the evidence before the court, it is apparent from the wages book that the first defendant seemed to be employed by the second defendant as a driver. Furthermore, at the time of the accident he was driving a R4 taxi emblazoned in the livery of the second defendant and with the logo of the second defendant on the side doors. The vehicle he was driving, however, belonged to the third defendant and was insured by the third defendant. It also had a certificate of fitness attaching to it in the name of the third defendant and all the Road Service Permits related to the third defendant. There was also the third defendant's specific evidence that the vehicle did not come under the company and indeed was not reflected in the company's balance sheet statements and statement of account.

There are accordingly a number of competing factors, some of which indicate that the first defendant was acting under the employment of the second defendant at the time of the accident whilst other factors indicate that he was in all probability acting under the employment of the third defendant. The reason for this confusion is because the third defendant seems to have maintained a very elastic distinction between himself and the company of which he was managing director. He seemed to have used assets without clearly demarcating their ownership as between himself and the company. That is perhaps not unusual for a small family-run company.

Mr *Sayce*, after pointing out all the factors, submitted that on the probabilities

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the first defendant was driving the vehicle with the knowledge, and on the instructions, of the third defendant, for the third defendant's benefit and subject to his right of control. It was accordingly Mr *Sayce's* submission that it is the third defendant who should be held vicariously liable for the negligence of the first defendant.

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I agree with Mr *Sayce*. The Renault R4 belonged to the third defendant, it was insured by him, a Road Service Permit which would cover its operations as a taxi was issued in his name and a certificate of fitness which would allow it to be used as a taxi was obtained in his name. In addition, the vehicle, on my findings, was clearly being used as a taxi. The third defendant insisted that the vehicle did not attach to the second defendant and is not reflected on the second defendant's balance sheet and schedule of assets. The earnings which, on my findings, would have derived from the use of the vehicle as a taxi would accordingly not have been for the benefit of the second defendant. I am satisfied on the probabilities that they would have accrued to the benefit of the third defendant. The third defendant, whose evidence I have analysed in detail, was, as I have indicated, a poor witness and I have no doubt in finding on the probabilities that the first defendant was operating the Renault R4 in question with the knowledge, and on the instructions, of the third defendant, for the third defendant's benefit and subject to his right of control. Admittedly the first defendant was on the second defendant's wage book but I am satisfied that that factor does not outweigh all the other considerations I have referred to. The first defendant may have been on the books of the second defendant but I am quite satisfied that when he was driving the Renault R4 in question he was in the employment of the third defendant. The operations of the second defendant were, as Mr *Sayce* pointed out, unclear and there is substance in Mr *Sayce's* contention that the second defendant operated as no more than an arm of the third defendant.

A major factor in my findings on the probabilities is the unsatisfactory evidence of the third defendant. The third defendant did not take the court into his confidence and was not truthful with the court on many aspects. He accordingly should not be surprised if the findings on the probabilities go against him.

Accordingly, on the basis of my findings of fact and after assessing the credibility of the respective witnesses, the first and third defendants must be held to be jointly and severally liable in respect of the damages suffered by the plaintiffs. The first defendant was also clearly wholly to blame for the accident. He accelerated on approaching an intersection where the traffic

light was changing against him and by travelling at an excessive speed managed to overturn the Renault R4 in the intersection causing the injuries to the plaintiffs.

LIABILITY OF THE FOURTH DEFENDANT

I must now turn to decide whether any liability attaches to the fourth defendant who was the insurer of the vehicle owned by the third defendant and driven by the first defendant. It is admitted by the fourth defendant that the policy of insurance in question contained the usual authorised driver's clause - extending cover to any person driving the vehicle named in the cover on the insured's order or with his permission. On my findings of fact the first defendant clearly fell into that category. The insurance policy with the fourth defendant taken out by the third defendant, however, related only to the use of the vehicle for private and business purposes and not for use for hire and reward. The question of the use of the vehicle is the basis

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of the fourth defendant's dispute as to liability.

The fourth defendant had, before the trial, filed an application for directions in regard to the claiming of an indemnity against the first, second and third defendants. In consequence of the order granted in respect of this application for directions the fourth defendant had (also before the trial) filed a claim against the first, second and third defendants under Order 14 Rule 98 of the High Court Rules.

The basis of this claim was to specify that the fourth defendant's position was as the insurer of the third defendant's vehicle while being used for private or business purposes but not for hire or reward in terms of a statutory policy of insurance for purposes of Part III of the Road Traffic Act 48 of 1976. The claim also raised the possibility that liability might nevertheless attach to the fourth defendant, even if the vehicle was not being used for the purposes insured, because of the provisions of s 25(2) of the Road Traffic Act. The fourth defendant, accordingly, after referring to s 25(2) and 25(4) of the Road Traffic Act, claimed an indemnity against the first, second and third defendants in respect of it being held liable to the plaintiffs in respect of any amount.

The first, second and third defendants failed to respond to the claim in terms of the directions given in a court order granted by myself and were duly barred by the fourth defendant. At the trial, Mr *Manase*, for the second and third defendants, accepted that the bar had been properly entered and that

the fourth defendant properly had an indemnity against the first, second and third defendants in respect of any amounts for which it might be held liable to the plaintiffs.

SECTIONS 23, 25(2) AND 26 OF THE TRAFFIC ACT 48 OF 1976

The question as to the liability or otherwise of the fourth defendant turns on the interpretation of and applicability of ss 23, 25(2) and 26 of the Road Traffic Act 48 of 1976 ("the Act"). These are the sections in Part III of the Act which provide for compulsory insurance against third party risks arising out of the use of motor vehicles. Section 23 deals with the requirements and extent of cover provided by statutory policies of insurance. Section 25 covers the right of injured parties to proceed directly against insurers and s 26 deals with the restriction of the applicability of certain conditions in statutory policies.

These sections have been the attention of substantial amendment and revision over the years. The sections are worth recording in full as their interpretation is by no means free from difficulty. Section 23 reads as follows:

> "(1) A statutory policy -
>
> (a) shall -
>
> (i) be issued by a person who is approved by the Minister as an insurer for the purposes of this Part; and

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(ii) subject to the provisions of subsection (2), insure such persons or classes of persons as may be specified in the statutory policy in respect of any liability which may be incurred by them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the motor vehicle or trailer concerned on a road;

and

(b) shall not be required to cover -

(i) any liability in respect of the death of, or bodily injury to, a person in the employ of any person insured by the statutory policy if such death or bodily injury arises out of and in the course of his employment; or

(ii) in the case of a motor vehicle or trailer in which passengers

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are carried for hire or reward or by reason of or in pursuance of a contract of employment, any liability in respect of the death of, or bodily injury to, persons being carried in or on or entering or getting on to or alighting from such motor vehicle or trailer at the time of the occurrence of the event out of which the claims arise to an amount exceeding -

A. twenty thousand dollars in respect of any one such person killed or injured;

or

B. two hundred thousand dollars in respect of any one accident or series of accident due to or arising out of the occurrence of any one such event;

or

(iii) except in the case of a motor vehicle or trailer referred to in subparagraph (ii), liability in respect of the death of, or bodily injury to, persons being carried in or on or entering or getting on to or alighting from the motor vehicle or trailer concerned at the time of the occurrence of the event out of which the claims arise; or

(iv) any contractual liability.

(2) A person issuing a statutory policy shall -

(a) notwithstanding anything contained in any law, be liable to indemnify the persons or classes of persons specified in the statutory policy in respect of any liability which the statutory policy purports to cover in the case of such persons or classes of persons; and

(b) issue in respect of statutory policy a certificate on the prescribed form."

Section 25(2) provides as follows:

"Any condition in a statutory policy purporting to restrict -

(a) the insurance of the persons insured thereby; or

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(b) the indemnification of the persons indemnified thereunder;

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shall not, subject to the provisions of subsection (3) and (4), be of any force or effect".

The limitations provided by subs (3) and (4) are not of relevance to the issues in this matter.

Section 26 reads as follows:

"If, under a statutory policy, any liability in regard to which the statutory policy was issued arises, any condition in the statutory policy purporting to restrict such liability in any way and for any reason whatsoever shall not, in connection with any claim referred to in section *twenty-three,* be of any force or effect."

There is then a proviso which is not of relevance to the issues in this matter.

Verbal argument as to the meaning and interpretation of these sections was addressed to the court immediately after the conclusion of evidence on 1 December. I realised, however, shortly thereafter that the interpretation of these sections is by no means free from difficulty - and is of course also a matter of considerable importance in view of their everyday applicability to countless thousands of road users across the length and breadth of Zimbabwe. I accordingly felt it appropriate to give the relevant counsel the opportunity to submit full written argument as to the interpretation of the sections - should they wish to do so. Mr *Sayce* on behalf of the plaintiffs submitted written submissions on 16 December and Mr *Carter* for the fourth defendant responded on 23 December, though his submissions were only filed at court on 5 January. I also felt it appropriate that a copy of the relevant insurance policy, which had been referred to but which had not been produced during the trial, should be provided. Mr *Carter's* instructing legal practitioner kindly provided a copy of the standard Zimnat Private Motor Policy applicable to this matter.

I am grateful for the written submissions provided by counsel, but must say that they do not go substantially further than the oral submissions already made.

The question in issue is whether the limitation in the policy to use for private or business purposes precludes any liability on the part of the fourth defendant, since the vehicle was being used for hire or reward when the accident occurred, or whether ss 25(2) and 26 nevertheless subscribe liability

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despite the usage outside the terms of the cover. Mr *Sayce's* argument is that assuming the carriage for hire or reward was lawful ss 25(2) and 26 result in liability attaching to the fourth defendant despite the terms of the policy. Mr *Carter*'s argument on this aspect is that, for the purposes of and in accordance with the requirements of s 23(2), the policy indemnified the insured only in respect of the liability which it purported to cover, that is to say, liability arising

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out of the use of the vehicle for personal or business purposes. It was Mr *Carter's* submission that the policy did not fall foul of s 25(2) in that there is no restriction of any liability which the policy purports to cover in terms of s 232) - namely for personal or business purposes. These arguments need to be considered in detail, but, before they are, a preliminary argument raised by Mr *Carter* must be considered.

THE FOURTH DEFENDANT'S COMMON-LAW RIGHT TO AVOID THE POLICY *AB INITIO* ON THE GROUNDS OF MISREPRESENTATION OR NON-DISCLOSURE OF A MATERIAL FACT BY THE INSURED

Mr *Carter* argued that the insurance policy was issued to cover the use of the vehicle for the business or private purposes of the accused and for any liability arising out of such use. He accordingly submitted that when it is accepted that the policy was not one referred to in s 23(1)(b)(ii) of the Road Traffic Act then it must follow that any use for hire or reward constitutes a misrepresentation or non-disclosure of a material fact by the insured and enables the insurer to rely on his common law right to avoid the policy. As authority for the contention Mr *Carter* referred to *Stumbles v New Zealand Ins Co Ltd* 1963 R & N 77 (SR); 1963 (2) SA 44 (SR) and *Van Biljon v Guardian Royal Exchange Assurance Rhodesia Ltd* 1979 RLR 385 (G).

This point had been initially raised by Mr *Carter* in oral argument at the end of the trial and Mr *Sayce's* response had been that the evidence did not establish the misrepresentation or non-disclosure on which avoidance could have been based. Mr *Sayce's* further response was that, even if the fourth defendant had been entitled to avoid the policy, it clearly had not done so. Specifically it was argued that there was no reference to avoidance in either the plea or the indemnity application papers - and without the pleading of avoidance it was not open for the fourth defendant to take the point in argument at the conclusion of the trial.

Mr *Carter* argued in his written submissions that the evidence established misrepresentation and non-disclosure and that the same had also been

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pleaded by the fourth defendant. Mr *Carter* did not, however, in his written submissions (or indeed his oral submissions indicate where in the pleadings the fourth defendant had alleged that there had been misrepresentation or non-disclosure of a material fact and that accordingly the fourth defendant had in the exercise of his common law rights avoided the policy. I, like Mr *Sayce*, have looked in vain through the pleadings for such an allegation.

A further factor is that no evidence at all was in fact led by the fourth defendant. Nobody was called by the fourth defendant to say that the policy had been avoided because of misrepresentation and non-disclosure. No-one from the fourth defendant produced any letter or document informing the third defendant of the policy having been avoided because of misrepresentation and non-disclosure. Nor was the third defendant cross-examined on the point. It was not put to him that he had made misrepresentations and not disclosed the aspects alleged. It was not put to him that the fourth defendant had avoided the policy. The avoidance would seem to be an afterthought by the fourth defendant in view of the potential pitfall created

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by s 25(2) of the Road Traffic Act.

Apart from the question of the pleadings raised by Mr *Sayce,* I do not see how the question of misrepresentation and non-disclosure can be seriously raised without any documentary basis having been established and without any evidence having been led. Because the policy specifies that the usage is only for private or business purposes when taken out in October 1989, and the vehicle was being driven for hire or reward in July 1990 when the accident occurred, does not necessarily mean that, at the time the policy application documents were completed, there was misrepresentation or non-disclosure.

The third defendant may have intended to use the vehicle for private or business purposes at the time he took out the policy and completed the policy documents. It may have been that business exigencies dictated a change in the use of the vehicle and he failed to inform his insurer. It may well be that the probabilities would militate against such a position, particularly in view of the poor impression made by the third defendant in the witness box. But to expect a court to find that there was misrepresentation and non-disclosure *ab initio* when it is not pleaded, not alleged by the fourth defendant in evidence led, and not put to the party against whom it is being alleged, is to my mind asking too much. I am accordingly satisfied that the submission made by Mr *Carter* cannot on the pleadings and the evidence be sustained.

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WHETHER THE STATUTORY POLICY COVERS USE FOR HIRE OR REWARD WHEN THE COVER PROVIDED BY THE POLICY IS LIMITED TO BUSINESS OR PRIVATE USE

Having dealt with the preliminary point raised by Mr *Carter,* I now turn to deal with the question of whether the fact that the vehicle in question was being used for hire or reward precludes coverage by the statutory policy when the policy was limited to use for private or business purposes.

In view of the clear terms of the policy, Mr *Sayce* relied on s 25(2) and s 26 of the Road Traffic Act 48 of 1976.

Christie's *Business Law in Zimbabwe* provides an instructive indication as to the interpretation of statutory policies. At p 256 the learned author states as follows:

> "In outline, the perils against which a statutory policy is required by s 23 to provide cover are claims by third parties arising out of death or bodily injury caused by or rising out of the use of the motor vehicle or trailer concerned on a road; but claims in respect of employees of the insured killed or injured in the course of their employment, claims based on contract and claims in respect of passengers in the vehicle concerned are not required to be covered. That is the general picture, but looking at it in more detail claims in respect of passengers carried in the vehicle by reason of or in pursuance of a contract of employment (eg employees in the firm's bus, a commercial traveller's assistant) or passengers carried in the vehicle for hire or reward must be covered up to $20 000 each but not exceeding $200 000 in respect of any one accident". (The emphasis is mine and I have altered the figures since the Statute was amended after the publication of Professor Christie's book.)

Christie (at p 257) states the following:

> "Further to smooth the path of the third party, ss 25(2) and 26 provide that, in connexion with a third party's claim

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against the insurer direct, no condition in a statutory policy which restricts the insurer's liability shall be of any force or effect .... To interpret these provisions narrowly, as applying only to conditions described as such in the policy and not to warranties or limitations of the risk, would be to defeat the intention of the legislature to protect innocent third parties, and the courts have made it clear that, on the contrary, the word 'condition' in these two sections

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is to be given the widest meaning so as to include restrictive terms of whatever type. Thus an insurer, when sued by a third party direct under s 25, cannot rely on a warranty that the insured's answers in the proposal form are correct (*Felton & Anor v Lewis & Ors* 1960 R & N 97 (SR); *Stumbles v New Zealand Ins Co Ltd* 1963 R & N 77 (SR)) nor on an exclusion from the risk of an unlicensed driver (*R v Graham* 1965 RLR 41 (G)), or an authorised driver covered by another policy (*Lawn v Rhodesian Eagle Ins Co Ltd* 1977 (1) RLR 201 (G))."

Mr *Sayce* relied heavily on Professor Christie's comments and the authorities referred to by Professor Christie. Mr *Carter* for his part stoically (and without reference to authority) argued that, for the purposes of and in accordance with the requirements of s 23(2) of the Act, the policy indemnified the insured only in respect of the liability which it purported to cover, that is to say, liability arising out of the use of the vehicle for the business and private purposes of the insured. Such cover did not, argued Mr *Carter,* extend to the use as described in s 23(1)(b)(ii) of the Act. Accordingly, Mr *Carter* argued that the policy did not restrict the insurance of the persons insured thereby or the indemnification of the persons indemnified thereunder and did not run foul of s 25(2) of the Act, in that there is no restriction of liability which the policy purported to cover in terms of s 23(2). Mr *Carter's* submissions were similar in regard to s 26.

R v Graham supra is of particular interest. In that matter the accused was charged with driving a motor vehicle without insurance. The accused had taken out a motor vehicle policy to cover the requirements of the Road Traffic Act. But one of the terms of the policy covered under the Head "General Exceptions of the Policy" in the policy document, precluded liability of the insurer if the driver of the vehicle did not hold a driver's licence. The accused had the insurance policy but no driving licence when he was caught driving. He was charged with driving without insurance on the basis that he was not covered by the policy.

FIELDSEND J (as he then was) referred to s 210 of the Road Traffic Act [*Chapter 289*] (the equivalent of the present s 26) and stated the following at 43D-F:

"Section 210 of our Act is perfectly clear in nullifying any condition in the policy purporting to restrict in any way or for any reasons whatsoever liability for injuries to third parties, and a reading of the policy in conjunction with this section which indeed is specifically referred to in

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the policy shows that the insurer has recognised this. Further, it has protected itself so far as it can by retaining its right to recourse against the insured, as envisaged in the proviso to s 210. The condition that the driver of the vehicle should be licensed, is just such a condition as the section nullifies.

It is clear, therefore, that the accused, though not a licensed driver, did have such a policy of insurance in respect to third party risks as to comply with the Act in relation to his use of the vehicle on a road and should not have

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been convicted."

FIELDSEND J was dealing, as I have indicated, with one of the general exceptions of the policy. The requirement that drivers be licensed would be basic to the operation of the policy. To cover an unlicensed driver (apart from being unlawful) would add a new dimension to the risk, as an unlicensed and incapable driver would be much more likely to be involved in an accident (or series of accidents). In *Guardian Royal Exchange v Commercial Union Assurance Company of Rhodesia (Pvt) Ltd & Anor* 1976 (1) RLR 381 (G) at 381, BECK J (as he then was), while referring to an overlapping and tautology in the drafting of the equivalents of ss 25(2) and 26, accepted them as covering conditions relating to the failure to give written notice of an accident, failure to notify of an impending prosecution in respect of an accident, failing to furnish process served, and failure to maintain the vehicle in an efficient condition. FIELDSEND J goes further in *Graham's* case.

By analogy the situation in *Graham's* case is not dissimilar from that in the present case. In *Graham* it is an unlicensed driver driving when the insurance policy covers only licensed drivers. In the present matter, it is the vehicle being used for hire or reward when it should only be used for business or private purposes. Both contraventions of the policy are likely to make claims against the insurance company much more likely. What would FIELDSEND J's view have been if *Graham* was licensed but using the car for hire or reward when he should only have been using it for business or private purposes? Would he have said he was not insured and should accordingly have been convicted of driving without insurance? From the reasoning process adopted by FIELDSEND J in *Graham's* case I doubt that he would have said that. To my mind he would have found the equivalents of ss 25(2) and 26 applicable.

It could, of course, be pointed out that *Graham's* case was a criminal review judgment, that the insurance company was not a party to the proceedings, and that FIELDSEND J did not have the benefit of argument on the matter. Mr

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Carter did not, however, tender any criticism of *Graham's* case in either his oral submissions or written submissions, but maintained the argument that for the purposes of and in accordance with the requirements of s 23(2) the policy indemnified the insured only in respect of the liability which it purported to cover.

Mr *Carter*'s argument needs to be carefully considered. It is based on a reading of s 23(1)(a)(ii) as read with s 23(2) of the Act.

Section 23(1)(a)(ii) provides for the statutory policy **subject to the provisions of subs (2)** to cover any liability which may be incurred in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the motor vehicle concerned on a road (the emphasis is mine). Section 23(2) provides that notwithstanding anything contained in any law, a statutory policy shall be liable to indemnify the **persons or classes of persons** specified in the statutory policy **in respect of any liability which the statutory policy purports to cover** (again, my emphasis).

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Mr *Carter* relies heavily on the parts of the sections I have emphasised as the basis of his argument. In simple terms, if the insurer insures for use for business or private purposes, then that is the statutory policy cover (according to Mr *Carter*). Any other use is not a liability which the statutory policy purports to cover - and ss 25(2) and 26 would only apply in respect of liability which the statutory policy purported to cover. Otherwise the insurer would be expected to shoulder the liability for risks not covered in the policy (and not contemplated in the premium).

Mr *Carter* referred to *Guardian Royal Exchange Assurance v Petzer* 1967 RLR 239 (A) which provides analagous support for his argument - in particular at 244A-C where MACDONALD JA stated as follows:

> "I agree in the main with the views expressed by the learned judge but would emphasize that an insurer is concerned, in issuing the policy, not with the present or past use of the vehicle but solely with its intended use during the currency of the policy. The risk of loss is greatly increased when a vehicle is used as 'a public service vehicle', not only because liability extends to passengers 'for reward or hire' but also because greater use is normally made of such a vehicle. The legislature must be taken to have known in enacting s 207 (the equivalent of the present s 23) that premiums are, of necessity, fixed in advance and that in consequence it is essential from a business point of view for insurance companies to

> know of the intended use of a vehicle at the time of the proposal for insurance. In the light of this important practical consideration the words 'a vehicle in which passengers are carried for hire or reward' are to be understood as meaning at least 'a vehicle in which passengers are lawfully carried for hire or reward'."

It is important to appreciate, however, that MACDONALD JA was applying his mind in this matter to the importance of the conveying for hire and reward to be lawful - which is an aspect I will deal with later - and not particularly to the interpretation of what is covered by a statutory policy. It is also important to note that the equivalent of s 23(2) on which Mr *Carter* relies was only introduced by s 33 of the Roads and Road Traffic Amendment Act 9 of 1966 as the then s 207(2). Section 207, as dealt with in *Royal Exchange v Petzer,* is the section as it was before the amendment - see p 241A.

Further support could be found for Mr *Carter's* contention (though he did not refer to them) in a line of English authorities dealing with the English equivalents of s 23(1)(a)(ii) and s 23(2), which are for practical purposes identical to their Zimbabwean counterparts - see s 36(1)(b) and s 36(4) of the English Road Traffic Act 1930 and the interpretation of these sections in Shawcross *The Law of Motor Insurance* 1935 ed at pp 189-196 and 209-216 and *MacGillivray and Parkington on Insurance Law* 8 ed at pp 923-4.

I do not, however, consider that the authorities referred to in these texts are relevant to the situation in Zimbabwe. This is because, as far as I am able to ascertain, the position under the English Road Traffic Act 1930, the Road Traffic Act 1934 and the Third Parties (Rights Against Insurers Act) 1930 (and it is difficult to get a clear picture of these Acts as a whole from looking at the sections analysed in the texts to which I have referred, which is the only access I have), there was nothing like a precise equivalent of our ss 25(2) and 26 in the English Legislation. The related sections were s 38 of the Road Traffic Act 1930, s 12 of the Road Traffic Act 1934 and s 1 of the Third Parties (Rights Against Insurers Act) 1930 and these sections are

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substantially different from s 25(2) and 26 of the Zimbabwean Act - see Shawcross *, supra*, at pp 116-136, 222-227, and 338-49. The provisions of s 154 and 155 of the Zimbabwean Road Traffic Act 50 of 1953 were similar to the English Legislation - see, for example, s 154(3), which was virtually identical to s 12 of the English Road Traffic Act 1934 and which limited the restrictions under which liability to the third party could be avoided, but significantly did not include in the detailed list of restrictions which could not be used to avoid liability, restrictions as to the use of the vehicle (which is one of the

reasons why I do not consider the cases on the English legislation as being of assistance). Section 154 was repealed by the Road Traffic Further Amendment Act 20 of 1959, which included for the first time the precursor of the present s 25(2), and which, of course, substantially altered the law.

Accordingly, my overall view is that in the absence of precise equivalents of s 25(2) and s 26, the similarity of the English legislation to s 23(1)(a)(ii) and s 23(2) is, to my mind, of no relevance to the matter at hand.

As I have indicated, the interpretation of s 23(1)(a)(ii) and s 23(2), which are the sections on which Mr *Carter* relies, is not free from difficulty - which is why I looked at the similar English sections in the hope of finding assistance in their interpretation. I am fortified (or made to feel less inadequate) in my view of the difficulty of interpretation by the words of SCRUTTON LJ in *McCormick & Auly v National Motor & Accident Ins Union Ltd* (1934) 49 LR 361 at 366 where he stated in reference to the English equivalent of s 23(2):

> "That subsection is not easy to understand. I have ventured to say in a previous case (*Jones v Birch Brothers* [1933] 2 KB 596 at 608) that I had read it several times and did not understand it. I am comforted that Mr Justice SWIFT takes the same view, because he says he had read it and could not understand it."

Mr *Carter's* argument as regards the interpretation of s 23(2) - namely, that for the purposes of and in accordance with the requirements of s 23(2), the policy indemnified the insured only in respect of the liability in which it purported to cover - is contradicted by BECK J's (as he then was) very specific comments as to the limits of s 23(2) in *van Biljon v Guardian Royal Exchange Assurance Rhodesia Ltd supra* at 386F-387D:

> "...There can be no doubt that the enactment of the subsection was the result of another judgment of LEWIS, J, namely that in the case of *Old Mutual Fire & General Ins Co of Rhodesia (Pvt) Ltd v Springer* 1963 R & N 90 (SR); 1963 (2) SA 324 (SR). At 97E-I (330E-H of the South African report) the learned judge pointed out that the English counterpart of the subsection was introduced into the English Act 'especially to get over the difficulty of the lack of contractual obligation between the insurer and the authorized drivers, notwithstanding the fact that they might have been included in the policy as a class of persons which the policy insures by virtue of subsection (1)(b) of the section'. Since there

> was, in 1963, no such provision in the Southern Rhodesia Act it was held that the extension clause of a policy

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issued for the purposes of the then Roads and Road Traffic Act amounted to no more than 'an honour policy' having no binding effect as regards authorized drivers. The learned judge went on to say that the Legislature may well feel that it would be desirable to amend the law in order to ensure greater protection for the public'. This the Legislature did in 1966 when subs (3) of s 79 of Chapter 263 was introduced, the wording of which is identical with the corresponding English section (namely, s 36(4) of the Road Traffic Act 1930) save only that the Rhodesian subsection used the word 'law' instead of the narrower word 'enactment' in the opening phrase 'Notwithstanding anything contained in any law'. The common-law requirement of contractual privity was thereby negatived and a legal liability was created, despite the lack of contractual privity, binding the insurer to indemnify all drivers whom the policy purports to cover.

The subsection cannot properly be construed as going any further than this. It leaves unaffected the voidability of policies on the grounds of fraudulent material misrepresentations and/or non-disclosures".

In other words, s 23(2) was enacted to enable the third party to proceed against the insurer directly - not to allow any restrictions as to what a statutory policy was required to cover.

Mr *Carter's* interpretation of s 23(1)(a)(ii) and s 23(2) would severely curtail the effectiveness of statutory policies in offering protection to third parties. A logical extension of Mr *Carter's* argument in reference to any liability "which the policy purports to cover" is that limitations of that liability in the policy could virtually eliminate any protection to third parties. For example, if a pedestrian was knocked down and injured by a motor vehicle while the driver was on his way to do his personal shopping but whose policy only covered the use of the vehicle for business purposes - on the basis of Mr *Carter*'s argument the pedestrian would be left without an action against the insurance company (and on Mr *Carter's* argument s 25(2) and s 26 would not help as there would be no restriction of any liability which the policy purported to cover). If that were the correct position I am sure that third parties and pedestrians would feel alarm and not consider a statutory policy worth the paper it was written on. I am sure they would also be of the view that s 25(2) and s 26 provided worthless protection against restrictions in liability.

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If Mr *Carter's* interpretation of s 23(2) is correct, then BECK J's (as then was) observations in *van Biljon v Guardian Royal Exchange Assurance supra* as to how the section should be construed are incorrect. On Mr *Carter's* approach, BECK J should have said that s 23(2) in addition enabled an insurer to limit the cover offered by a statutory policy to what the policy purported to cover, and that s 25(2) and s 26 offered no protection to third parties if there were no restrictions in the policy on the liability the policy purported to cover. BECK J, on Mr *Carter's* approach, should additionally have said that s 23(2) made very substantial inroads into the protection offered by a statutory policy. I do not think he should have.

I disagree with Mr *Carter's* interpretation of the limits of a statutory policy. I am satisfied that such a limited interpretation, while it might be within the parochial financial interests of insurance companies, is not the proper interpretation of s 23(1) and s 23(2). It is my view that the learned author Professor Christie is correct in his summation at p 256 of *Business Law in Zimbabwe* of what a statutory policy is required to cover. I have already quoted with approval that extract in full in my judgment.

To interpret the section otherwise would defeat the object of the insurance provisions of the

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Road Traffic Act - which is to provide compulsory cover to all third parties with some exceptions (not all third parties subject to any and all exceptions which the insurer might decide to include in its policy, which is the end result of Mr *Carter's* argument).

If the insurer then asks what is the worth of restrictive provisions in the contract, for example as to use, the answer to my mind is that they fix the scope of the contract between the insurer and the insured forming the basis for premiums - obviously the insurer would charge less for a business and private policy only than one covering use for hire and reward. If the insurer has to pay out compensation, because of the Act, to persons he would not have had to pay under the policy, he can recover from the insured. This not only follows from the fixed scope of the policy as between insurer and insured, but also from s 25(4) and the proviso to s 26 of the Act. There is thus a considerable incentive on the insured to abide by the scope of his policy. If insurers find themselves having to pay out substantially and regularly because of the provisions of the Act when they would not have to do so in terms of the policy, then they would have a basis for requiring that the premiums payable in respect of statutory policies be markedly increased.

I am also satisfied that Professor Christie's observations on the interpretation

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of s 25(2) and s 26 are entirely correct. I reiterate his words on p 257 of *Business Law in Zimbabwe*:

> "To interpret these provisions narrowly, as applying only to conditions described as such in the policy and not to warranties or limitations of the risk, would be to defeat the intention of the Legislature to protect innocent third parties, and the courts have made it clear, that, on the contrary, the word 'condition' in these two sections is to be given the widest meaning so as to include restrictive terms of whatever type."

I am quite satisfied that, even if Mr *Carter*'s limited interpretation of subs 23(1) and (2) were to be regarded as correct, his argument would be upset by the very wide wording in particular of s 25(2). See, for example, the observations of LEWIS J (as he then was) in *Stumbles NO v New Zealand Ins Co Ltd supra* where, after analysing the law, he stated at 52F in regard to the precursor of s 25(2) of the Act:

> "That in my view, therefore, the proper interpretation of section 154(2) is that an insurer cannot rely on any express condition in the policy purporting to restrict the insurance, but the section does not preclude him from falling back on his ordinary common law rights."

(It is perhaps worth pointing out that the report of the same case in 1963 R & N 77 (SR) contains a misprint in respect of this quotation at page 87F where the word "insured" is used instead of "insurer".)

I would make one further observation in regard to the use of the word "condition" in s 25(2) and s 26 of the Act. I would refer to the comments in Gordon and Getz The South African Law of Insurance 4 ed at p 202-4 in regard to the difficulties of terminology which abound in the law of insurance in particular. The learned authors point out the simple and clear distinction in Roman-Dutch Law between the terms of a contract and conditions. They then state:

> "These simple distinctions were obliterated in South Africa by the importation of English terminology. In the

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English law of contract, generally, a vital term of the contract is known as a condition, while a subsidiary term is known as a warranty.

The terminology of English insurance law, in particular, increases the confusion, for, in this branch of the law, a condition precedent is not a

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qualification suspending the operation of the contract, nor is a warranty a subsidiary term of the contract. The phrase 'conditions precedent' and the word 'warranties' are both used to denote vital terms of the contract.

It is because the nomenclature of the English draftsmen and courts has been extensively used in South Africa that HOEXTER JA found it necessary in *Resisto Dairy (Pvt) Ltd v Auto Protection Ins Co Ltd* 1963 (1) SA 632 to point out that 'the so-called conditions of the policy are not conditions as understood in our law : they are undertakings by the insured and therefore terms of the contract'."

It seems to me that the use of English terminology very likely strayed into the drafting of ss 25(2) and 26 which, if I am correct, is something the draftsmen might consider correcting - as well perhaps as making s 23 as a whole more easily understandable!

WAS THE CARRIAGE LAWFUL?

In order for any liability to attach to the insurer in terms of the provisions of the Act the carriage for hire and reward would need to be lawful - see *Guardian Royal Exchange Assurance v Petzer supra*. As Mr *Carter* submitted, an illegal agreement to pay for the journey would not assist the passenger in coming within the provisions of the Act for the purposes of the insurer's liability.

It was Mr *Carter's* further submission that, on the facts of this case, any carriage for hire or reward was illegal as there was no insurance for such carriage. He also referred to the need for a road service permit and certificate of fitness to be affixed to the vehicle.

In *Guardian Royal Exchange Assurance v Petzer supra* the illegality was clear. The vehicle being used for hire or reward was an Austin Healy sports car; and as MACDONALD JA (as he then was) pointed out at p 242C-D:

"Bearing in mind the requirements of the Act there is no possibility at all that the Road Service Board would issue a road service permit in respect of an Austin Healy Sports car ... and it is not suggested that the use of the sports car for the conveyance of passengers for reward was covered by a permit."

The facts of the present matter (according to my findings on the probabilities)

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are completely different from those pertaining in *Petzer's* case. A major factor is that there was a valid road service permit in the name of the third defendant which would cover the operations of the taxi and a valid certificate of fitness in terms of the Road Motor Transport Regulations in respect of the Renault R4 in question. These aspects might well be regarded as amounting to *cadit quaestio* (in regard to the question of the lawfulness of the carriage). But in addition the Renault R4 was emblazoned with the livery and logo of "Harare Mini-Cabs", it was a vehicle

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customarily used as a taxi (unlike an Austin Healey), and there was a taxi-meter in it which was switched on when the passengers entered. There was, however, only an insurance policy relating to the use of the vehicle for business or private purposes.

Does that make the carriage for hire or reward unlawful? I am sure a reasonable man hiring a taxi (I won't say the man on the Matambanadzo Omnibus, as he wouldn't be hiring a taxi), would be dismayed to be told the vehicle which looked like a taxi, had the name and livery of a taxi company emblazoned on it, had a taxi-meter in it, and in respect of which there was a valid road service permit and certificate of fitness, was in fact not a lawful taxi - and that any injury he suffered whilst a paying passenger in it would not be covered by a statutory insurance policy. To my mind, the principle of *R v Graham supra* would apply - a case with which as I have indicated Mr *Carter* has not sought to disagree. If the first defendant had been charged with driving without insurance, the precise line of argument used in *Graham's* case would have applied. Because of the relevant provisions of the Act , although the insurance policy did not cover vehicles used for hire or reward, in the words of FIELDSEND J (as he then was), s 26 "nullified any condition in the policy purporting to restrict in any way for any reason whatsoever liability for injury to third parties". That is, the answer to an allegation of having no insurance would be that the statutory policy did provide that cover.

Mr *Carter's* suggestion that the carriage should be regarded as unlawful because there was no road service permit and no certificate of fitness actually carried in the vehicle at the time is to my mind grasping at the thinnest of straws. Failure to have the road service permit or certificate of fitness in the vehicle may constitute criminal offences committed by the driver or operator. But I am satisfied they do not make the carriage unlawful and obviate any statutory insurance cover for the passenger.

Having analysed all the relevant factors, I am accordingly satisfied that the fourth defendant is liable to the plaintiffs in terms of the statutory policy - subject to the financial limitations as specified in s 23(1) of the Act (which

limitations are of course reflected in the amounts claimed by the plaintiffs from the fourth defendant). I note also of course that the fourth defendant has sought (and it is conceded) has obtained an indemnity against the first and third defendant in respect of any liability attaching to the fourth defendant.

I must now turn to assess the appropriate quantum of damages.

THE QUANTUM OF DAMAGES

As I have indicated the quantum of damages has largely been agreed between the counsel for the plaintiffs and the second and third defendants. The fourth defendant's counsel indicated that the fourth defendant would abide by any agreements as to quantum made by the second and third defendants' counsel.

In view of the agreements reached, the quantum of general damages in respect of the first

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plaintiff's son is the only aspect on which I need to make a ruling.

The injuries suffered by David Hokonya, the first plaintiff's son, are a tragic reflection of the human suffering caused by careless driving on Zimbabwe's roads.

The injuries suffered by David Hokonya and their consequences are common cause. David Hokonya was aged just over 4 1/2 years at the time of the accident on 27 July 1990 - he is now just over 9 years old. The injuries he suffered are best summarised in the report submitted by the specialist neurological surgeon. On admission to hospital immediately after the accident David Hokonya was suffering from (1) a depressed conscious level from a head injury; (2) bleeding from the ears; (3) leaking cerebro-spinal fluid from both ears; (4) numerous facial lacerations and abrasions; (5) difficulty in breathing from reduced air entry into the right lung.

Further investigations of David Hokonya's condition established from a skull X-ray that there was a linear fracture of the skull's tempo-parietal bone. Chest X-rays showed a right-sided haemopneumothorax and fractured ribs. Complications which developed were as follows - chest infections; epilepsy; malnutrition; bed sores; chronic anaemia; tracheomalacia; contractions of all the limbs; blindness with bilateral squint eyes.

The prognosis made by the specialist neurologist was that the brain injury would be permanent and that David Hokonya would be left in what is called

a vegetative state in which he would have no communication with the world. He would need care in every aspect of his life such as feeding, bathing, dressing and personal hygiene. In a later report, the same neuro-surgeon confirmed that David Hokonya could be literally described as a cabbage. He stated that this meant that the child could not live an independent life without parental or other support. He emphasised that his material needs were inclusive of anything from feeding, personal hygiene, dressing, turning, sitting up, etc. He added that the child would now be completely wheelchair bound and had "developed several limb contractures and assumes odd postures which give him the physical disability". A report by an occupational therapist underlined the complete mental and physical helplessness of David Hokonya and the overwhelming daily demands of caring for him.

Mr *Sayce* for the plaintiffs submitted that the amount of $100 000 claimed for general damages was appropriate - while Mr *Manase* for the second and third defendants suggested that an amount of $50 000 would be appropriate. Mr *Sayce* referred to *Admin General SWA & Ors v Kriel* 1988 (3) SA 275 (A), *Chaza v Ramajan* HH-459-88; *Koen v Keates* 1989 (3) ZLR 9 (H), *Min of Defence & Anor v Jackson* 1990 (2) ZLR 1 (S) and *Makudzo v Min of Home Affairs* HB-104-92. Mr *Manase* made no reference to authority in regard to the quantum of damages and neither did Mr *Carter.*

A brief analysis of the authorities referred to is necessary before considering the principles to be applied in assessing the general quantum of damages.

Admin Gen SWA v Kriel supra involved a young girl who suffered severe paraplegia from a skull

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injury caused by a bullet wound and the amount awarded was R110 000. In *Koen v Keates supra* the plaintiff, who was 16 years at the time of the accident, suffered a broken spine as a result of a traffic accident which resulted in paralysis of her lower body. She, however, made partial recovery and was eventually able to walk with the assistance of a caliper on one leg. She was awarded $40 000 as general damages (before reduction taking into account contributory negligence). In *Min of Defence & Anor v Jackson* the plaintiff, who was 25 years old at the time of the traffic accident in question, suffered a one-inch shortening of one leg, a total loss of his sense of smell, double vision, considerable loss in the retention of memory, laboured speech, and became extremely labile emotionally. The amount of general damages awarded was $35 000. In *Makudzo v Min of Home Affairs supra* the details of the injury were somewhat sparely described, but the plaintiff as a result of a gunshot wound became a paraplegic, needing a wheelchair and needing to be bathed, fed and nursed.

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The amount of general damages awarded was $100 000 (before taking into account a reduction for contributory negligence). In *Chaza v Ramajan supra* the 25-year-old plaintiff suffered paralysis from the waist down when her spinal cord was severed by a bullet. The amount of general damages awarded was $50 000.

The basic principles I must follow in assessing the appropriate amount for general damages for pain, suffering, loss of amenities, disfigurement and loss of expectation of life are as laid down by GUBBAY JA (as he then was) in *Min of Defence & Anor v Jackson supra* as follows at 7G to 8G:

> "It must be recognised that translating personal injuries into money is equating the incommensurable; money cannot replace a physical frame that has been permanently injured. The task therefore of assessing damages for personal injury is one of the most perplexing a court has to discharge. This notwithstanding, certain broad principles have been laid down which govern the obligation. These are:
>
> (1) General damages are not a penalty but compensation. The award is designed to compensate the victim and not to punish the wrongdoer.
>
> (2) Compensation must be so assessed as to place the injured party, as far as possible, in the position he would have occupied if the wrongful act causing him the injury had not been committed. See *Union Government v Warneke* 1911 AD 657 at 665.
>
> (3) Since no scales exist by which pain and suffering can be measured, the quantum of compensation to be awarded can only be determined by the broadest general considerations. See *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199.
>
> (4) The court is entitled, and it has the duty, to heed the effect its decision may have upon the course of awards in the future. See *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 555H.
>
> (5) The fall in the value of money is a factor which should be taken into account in terms of purchasing power, 'but not with such an adherence to mathematics as may lead to an unreasonable result: per SCHREINER JA in *Sigournay's* case *supra* at 556C. See also *Southern Ins Assn Ltd v Bailey NO* 1984 (1) SA 98(A) at 116B-D; *Ngwenya v Mafuka* S-18-89 (not reported) at p 8 of the cyclostyled copy.

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BARTLETT J

(6) No regard is to be had to the subjective value of money to the injured person, for the award of damages for pain and suffering cannot depend upon, or vary, according to whether he be a millionaire or a pauper. See *Radebe v Hough* 1949 (1) SA 380 (A) at 386.

(7) Awards must reflect the state of economic development and current economic conditions of the country: *Sadomba v Unity Ins Co Ltd & Anor* 1978 RLR 262 (G) at 270F; 1978 (3) SA 1094 (R) at 1097C; *Min of Home Affairs v Allan* 1986 (1) ZLR 263 (S) at 272B.

They should tend towards conservatism lest some injustice be done to the defendant. See *Bay passenger Tpt Ltd v Franzen* 1975 (1) SA 269 (A) at 274H.

(8) For that reason, reference to awards made by the English and South African Courts may be an inappropriate guide, since conditions in those jurisdictions, both political and economic, are so different."

In my view points (5), (7) and (8) are of particular relevance. As conditions currently are in Zimbabwe, the effect of inflation would be to push damages awards up, while the current economic conditions would have the reverse effect.

A factor, which was not, however, raised by either Mr *Sayce* or Mr *Manase* but which needs to be considered, is the question of what effect needs to be given to David Hokonya's lack of awareness of the losses he has suffered. David Hokonya is, as the medical reports establish, in a vegetative state with his brain so damaged that mentally he is unable to communicate. He was, as the further particulars for trial indicate, in a coma for a year after the accident, and it would seem that his vegetative state was an immediate result of the accident.

An English case which was quoted with approval in Corbett, Buchanan and Gauntlett *The Quantum Of Damages in Bodily and Fatal Injury Cases* (3 ed) at p 43 dealt with a factual situation not dissimilar from that pertaining in the present case. This authority is *Oliver & Ors v Ashman & Anor* [1962] 2 QB 210. At 241 PEARSON LJ summed up the facts of the case:

"This is a terrible case, in which injuries caused by the defendants' negligence have reduced the infant plaintiff, previously a normal child, to the state of a low-grade mental defective, incapable of speech and incapable of looking after himself and not expected to recover."

BARTLETT J

The injuries suffered are accordingly similar (and were also incurred in a road accident). The only difference of any substance is that the infant in *Oliver's* case was aged 20 months at the time of the accident, whereas David Hokonya was aged 4 years.

In dealing with the difficulties in awarding an appropriate amount of damages PEARCE LJ had this to say at 231-2:

"The unusual features are these. There has been a complete and painless destruction of all the higher attributes of man. There is no consciousness of what is lost, no anguish of remembered happiness. ... Large sums have been awarded in cases where physical havoc is tragic and widespread. But in such cases there have been pain and the knowledge of what is lost, ... Here these features are absent, and their absence destroys comparison. Any

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> compensation for the child's painless loss of humanity must be artificial. No sum can compensate or make an appreciable difference. But one must award such a sum as represents artificially the gravity of the loss. It is hard to give cogent reasons for this figure or for that. One can merely assert."

WILLMER LJ made similar observations at page 236:

> "He has never known what are the joys and sorrows of ordinary adult human life, and he cannot ever know what he has been deprived of. I think it must be obvious that where a man has known these pleasures of ordinary life, the award of damages must be greater than in the case of one who has never known them and who never will. This plaintiff, in so far as that matter is concerned, is (most unhappily) in the same position substantially as if he had actually been killed in the accident."

The above comments are to my mind of general relevance to the facts of the instant case. There are, however, some distinctions. Reference is made in the quotations to which I have referred of the painless destruction of all the higher attributes of man. To my mind there must have been some initial pain and suffering in the *Oliver* case as there certainly must have been in the instant case. Furthermore it is specified in the particulars of trial, which are not contested, that David Hokonya cries out in pain when helpers try to exercise his limbs.

Corbett, Buchanan and Gauntlett *supra* in dealing with the problem of awareness observed at 43 as follows:

BARTLETT J

> "The problem is whether the plaintiff's unawareness of his condition, whether complete or partial, should affect the quantum of damages to be awarded to him. It is submitted that this depends upon whether the particular loss, or facet of the plaintiff's loss for which compensation is to be assessed depends for its existence upon an awareness thereof in the plaintiff ...
>
> Unawareness is thus relevant in the assessment of damages for pain and suffering, shock, mental anguish and anxiety and, depending upon the extent of such unawareness, it eliminates or reduces in importance these heads of damage (*Marine & Trade Insurance Co Ltd v Katz* 1979 (4) SA 961(A)) but in regard to the assessment of compensation for the loss of amenities of life, loss of general health and for the various heads of patrimonial damage, the plaintiff's unawareness of his condition is irrelevant (*Roberts v Northern Ass Co Ltd* 1964 (4) SA 531 at 542)."

I respectfully associate myself with the views of the learned authors and the authorities to which they refer.

Accordingly, to my mind the assessment of damages in respect of David Hokonya under the head of pain and suffering needs to be reduced from the level it might otherwise have reached in view of the substantial lack of awareness on the part of the young plaintiff. I reiterate, however, that on the facts as I have related them there is an indication of some appreciation of pain and suffering by David Hokonya.

In regard to the damages claimed for loss of expectation of life I would in this regard again refer to Corbett, Buchanan and Gauntlett *supra* at p 57 where the following is stated:

> "In England the leading case on this topic is still the decision of the House of Lords in *Benham v Gambling* [1941] AC 157. In his speech in this case Lord Simon emphasized at p 166 that in assessing damages for loss of expectation of life:

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> '... the other thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life ... The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness'.

It is, therefore, necessary for the court to examine the circumstances of

BARTLETT J

> the individual life and ascertain whether the shortening thereof would lead to deprivation of a positive measure of happiness ... The appropriate figure should also be reduced in the case of a very young child since there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made."

I once again associate myself with the views of the learned authors and the quantum of damages in respect of expectation of life must be reduced in view of those factors.

I do take general regard of the authorities referred to by Mr *Sayce,* but in my view they are of no particular assistance in this case, since the injuries are substantially different and the question of awareness was not a factor in those matters.

As GUBBAY JA (as he then was) stated in *Min of Defence & Anor v Jackson , supra*, the task of assessing damages for personal injury is one of the most perplexing a court has to discharge. PEARCE LJ in *Oliver v Ashman supra* at p 232 observed that -

> "To say in Shelley's words, 'I cannot argue I can only feel' may be permitted in a juryman but it is rarely a sound foundation for a judgment."

I have endeavoured to balance all the relevant factors, the tragic crippling injuries reducing a vibrant young child to a vegetable, the question of his awareness of his terrible plight, the pain he has suffered and will continue to suffer, and all the factors referred to by GUBBAY JA (as he then was) in *Min of Defence v Jackson & Anor supra*. Balancing all those factors, to my mind an award of $65 000 as general damages for pain and suffering, loss of amenities, disfigurement and loss of expectation of life is appropriate. I am also satisfied that it is appropriate that the interest on that award should run as claimed at the prescribed rate from the date of the accident.

The other heads of both general and special damages are agreed and I will order those amounts as agreed. I would point that there had been a dispute as to the provision for nursing care, but Mr *Sayce's* revised and amended figure of $74 296,50 was very graciously accepted by Mr *Manase* on behalf of the second and third defendants once he had been shown the basis of the calculations.

I am satisfied that it is appropriate that interest on all the other heads of

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general and special damages should run from the date of judgment. The reason for this is obvious in respect of the loss of earnings, future medication, future fees on medical attention,

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and transport for future medical care. It is possible that if the provision for nursing care had been broken down into past and future figures there could have been a differentiation as to the dates interest should run from. This would also apply in regard to special foods, and clothing - but there has been no differentiation as to whether these items related to future or past expenditures. In regard to the special damages for past medical treatment and medication, I would have awarded interest from the date the expenditure was incurred if I had been given evidence of what those dates were.

In regard to the second plaintiff damages will be awarded as claimed as the amount is agreed.

It will also be necessary to dismiss the plaintiff's claims against the second defendant. But in view of the overall circumstances I do not propose to award any order of costs to the second defendant. Finally, it will also be necessary to grant the indemnity as sought by the fourth defendant against the first and third defendants.

ORDER

(1) Judgment is entered for the first plaintiff against the fourth defendant in the sum of $20 000 with interest thereon at the prescribed rate from 27 July 1990 to the date of payment.

(2) Judgment is entered for the first plaintiff against the first and third defendants jointly and severally, the one paying the other to be absolved, in the following sums:

(a) $45 000 in respect of general damages for pain and suffering, loss of amenities, disfigurement and loss of expectation of life with interest thereon at the prescribed rate from 27 July 1990 to the date of payment, or in the event of the first plaintiff's judgment against the fourth defendant not being paid out, in the sum of $65 000, with interest thereon at the prescribed rate from 27 July 1990 to date of payment;

(b) $34 784 in respect of loss of future earnings, with interest thereon at the prescribed rate from 1 March 1995 to the date of payment;

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(c) $74 296,50 in respect of nursing care, with interest thereon at the prescribed rate from 1 March 1995 to the date of payment;

(d) $3 000 in respect of replacement wheelchairs, with interest thereon at the prescribed rate from 1 March 1995 to the date of payment;

(e) $15 000 for future medication, with interest thereon at the prescribed rate from 1 March 1995 to the date of payment;

(f) $5 000 in respect of future fees on medical attention, together with interest thereon at the prescribed rate from 1 March 1995 to the date of payment;

(g) $500 in respect of transport for future medical care, together with interest thereon at

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the prescribed rate from 1 March 1995 to the date of payment;

(h) $2 500 in respect of special foods, together with interest thereon at the prescribed rate from 1 March 1995 to date of payment;

(i) $1 000 in respect of clothing, together with interest thereon at the prescribed rate from 1 March 1995 to the date of payment;

(j) $2 500 in respect of special damages for past medical treatment, together with interest thereon at the prescribed rate from 1 March 1995 to the date of payment;

(k) $1 000 in respect of medications, together with interest thereon at the prescribed rate from 1 March 1995 to the date of payment.

(3) Judgment is entered for the second plaintiff against the fourth defendant in the sum of $3 000, with interest thereon at the prescribed rate from 27 July 1990 to the date of payment, and in the event of the second plaintiff's judgment against the fourth defendant not being paid, judgment is entered for the second plaintiff against the first and third defendants jointly and severally, the one paying the other to be absolved, in the sum of $3 000, together with interest thereon at the prescribed rate from 27 July 1990 to the date of payment.

(4) Costs are awarded against the first, third and fourth defendants jointly and severally, the one paying the other to be absolved.

BARTLETT J

(5) The plaintiffs' claims against the second defendant are dismissed, but in view of the overall circumstances the second defendant is not awarded costs.

(6) An indemnity as claimed by the fourth defendant is granted against the first and third defendants.

Honey & Blanckenberg, plaintiffs' legal practitioners

Manase & Assocs, second and third defendants' legal practitioners

Atherstone & Cook, fourth defendant's legal practitioners

BENDEZI SUGAR FARM (PVT) LTD v MLEME ESTATES (PVT) LTD 1995 (1) ZLR 135 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

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Civil appeal

20 February & 2 March 1995 Judgment No S-25-95

Flynote

Contract - building and construction contracts - engineer's certificate - interim certificate - validity of - when certificate may be questioned

Headnote

The two parties farmed adjoining sugar estates in the Chiredzi area. The Mleme River runs through the appellant's farm, then through the respondent's. The respondent decided to build a dam on its farm. The dam would cause part of both farms to be inundated. It was agreed between the parties that they would share the cost of the dam and the water retained by the dam in the proportions 65-35, the respondent being the larger partner.

The contract, in terms of which the parties agreed to share the costs of construction, provided that the respondent would, as soon as possible after the signing of the agreement, advise the appellant in writing of the cost of construction to date, the cost to be certified by a consulting engineer. The appellant was to pay 35% of the costs within 30 days of the date of being so advised. Thereafter, the progressive costs of construction were to be notified at 3-monthly intervals, again certified by the consulting engineer. The appellant again had to pay 35% of the costs within 30 days of the date of being so advised. A similar arrangement was made in respect of maintenance costs. The contract also provided that any payment due by the appellant to the respondent should be made within the stipulated period, even if there was a query about the payment. Any dispute had to be referred to a named person whose decision would be final and binding on both parties.

1995 (1) ZLR p136

McNALLY JA

In January 1993, the respondent submitted an account of the "cost of construction to date", although the account was actually only in respect of construction up to 30 September 1991. The account was certified by the consulting engineer as being "a proper and accurate account of the cost ... as abstracted from [the respondent's] records". The appellant, when the respondent applied in the High Court for summary judgment for the amount stated in the account, disputed the account on the grounds that the engineer's certificate was not really a certificate at all. This contention was rejected by the High Court on the ground that under the contract the appellant's obligation was to pay first and take the matter to arbitration afterwards. On appeal, it was argued that the certificate should be set aside as being based on entirely wrong assumptions.

Held, that a court can set aside a certificate based on wrong assumptions, even if there is no fraud or malice involved. It can also correct a manifestly unjust determination. However, an engineer's or architect's certificate is perfectly valid, even if based on measurements taken by another person.

Held, further, that in this instance the certificate was analogous to an interim certificate only, so the accuracy of the calculation is not, within reasonable limits, of prime importance. Progress

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certificates are intended to give only an approximate value of the work done and are not intended to be conclusive in favour of either party.

Held, further, that the allegations against the engineer - that he had no records to substantiate the figure in his certificate - were vague and unsubstantiated. An engineer does not have to have personal knowledge of all the facts in his certificate, particularly when it is in the nature of an interim certificate. He is entitled, in a proper case, to rely on his experience and knowledge as to what is reasonable.

Held, further, that equity did not demand interference. There was no reason to bring into play the court's ultimate discretionary power when the contract made provision for resolving the dispute. The provision in the contract was a common and well-established one and not contrary to public policy.

Cases cited:

Rossing Stone Crushers (Pty) Ltd v Commercial Bank of Namibia & Anor 1994 (2) SA 622 (Nm)

Hurwitz & Ors NNO v Table Bay Eng (Pty) Ltd & Anor 1994 (3) SA 449 (C)

Rudland & Son v Gwelo Municipality 1933 SR 119

Smith v Mouton 1977 (3) SA 9 (W)

Mouton v Smith 1977 (3) SA 1 (A)

McNALLY JA

Thomas Const (Pty) Ltd (in liq) v Grafton Furniture 1988 (2) SA 546 (A)

Ocean Diners (Pty) Ltd v Golden Hill Const CC 1993 (3) SA 331 (A)

Dunbar & Co v Escombe Avenue Nursing Home 1921 WLD 45

Farmers' Co-op Ltd v Borden Synd (Pvt) Ltd 1961 R & N 28 (FS)

Beval Trading (Pvt) Ltd v Voest-Alpine Intertrading GmbH S-149-94

A J Dyke for the appellant

D P Carter for the respondent

Judgment

McNally JA: The two parties farm adjoining sugar plantations in the Chiredzi area. I will refer both to the parties and to the plantations as Bendezi and Mleme respectively. The Mlemi river runs through Bendezi and then through Mleme. Mleme has started to build a dam on the river which will cause the stored water to inundate part of Mleme and a lesser part of Bendezi. The parties decided to share the cost of the dam and to share the water in the proportions 65:35,

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with Mleme being the larger partner.

A situation has now arisen in which there is a financial dispute which hinges on the interpretation of the agreement signed in 1991. The relevant section of the agreement is clause 4. I set it out hereunder:

> "4.1 Mleme Estates shall, as soon as is feasible after the signing of this Agreement, advise Bendezi Sugar Farm in writing of the cost of construction to date, duly certified as a proper and accurate account of the said cost by the duly appointed consulting engineer and Bendezi Sugar Farm shall pay to Mleme Estates 35% of such cost within 30 (thirty) days of the date of such written notice.
>
> 4.2 Thereafter, Mleme Estates shall advise Bendezi Sugar Farm in writing of the progressive cost of construction, duly certified as a proper and accurate account of the said cost by the duly appointed consulting engineer, at intervals of three months or such lesser period as is appropriate and Bendezi Sugar Farm shall pay to Mleme Estates 35% of such cost within 30 (thirty) days of the day of such written notice.
>
> 4.3 As soon as it is feasible after the performance of any maintenance work required in terms of this Agreement, Mleme Estates shall advise Bendezi Sugar Farm of the cost of such maintenance work, duly certified as a proper and accurate account of the said cost by the duly appointed consulting engineer, and Bendezi Sugar Farm shall pay to Mleme Estates

McNALLY JA

> 35% of such cost within 30 (thirty) days of the date of such written notice PROVIDED THAT an account of the said cost of such maintenance work shall first have been submitted to and certified as accurate by the duly appointed consulting engineer.
>
> 4.4 Any payment due by Bendezi Sugar Farm to Mleme Estates shall be made within the 30 (thirty) day period provided above despite any query raised by Bendezi Sugar Farm regarding such payment, which query shall be made in writing to Mleme Estates and consulting engineer. Any dispute between the parties which may result from such a query shall be resolved as provided in paragraph 4.5 below.
>
> 4.5 Notwithstanding anything to the contrary contained in this Agreement, any decision required to be made concerning steps to be taken with a view to constructing the Dam and completing it with all works necessary to convert the Storage Right from provisional form to final form shall be made by Mleme Estates (whether or not it may involve the estimated cost of construction of the Dam being exceeded) and any dispute between the parties shall be referred to the senior partner for the time being of Stewart Scott NCL, Consulting Engineers, who shall act as a referee and whose decision shall be final and binding on the parties. The fees and disbursements charged by the Referee shall be paid by the party against whom the Referee rules."

On 12 January 1993, after some now irrelevant argument as to whether this had been done earlier, Mleme submitted an account of the "cost of construction to date" which was actually the cost of construction to 30 September 1991. It was certified and signed by the "duly appointed consulting engineer", one Mr Lotter. The account came to $676 202,94, of which 35% was $236 671,02. This amount, says Mleme, should have been paid by Bendezi within thirty days. But it was not.

Bendezi's contention is simply that the document admittedly signed by Mr Lotter, who is admittedly the duly appointed consulting engineer, is not "a valid properly certified account".

This statement is made on the basis of an allegation that Mr Lotter has admitted (privately, and not in the proceedings) that he has no records to substantiate the entries contained in his

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certified account. Moreover, despite request, he has not been able to obtain the records from Mleme. Thus, it is claimed, his certificate is not really a certificate at all.

McNALLY JA

The certificate with which we are concerned is to be found at the foot of a page of figures and calculations, and reads:

> "Certified that the above is a proper and accurate account of the cost of the Mleme Estates dam as abstracted from Mleme Estates records."

It is signed by Mr Lotter.

Mleme's argument found favour with the learned judge in the court below. Mleme was granted summary judgment. The argument was this. Suppose, for the sake of argument, that Bendezi is right, and that the certificate is wrong. It makes no difference. Bendezi's obligation under the contract is to pay first and take the matter to arbitration. That is exactly what clause 4.4 means.

The learned judge granted summary judgment and the matter is now before us on appeal. It may be mentioned in passing that there are two aspects of the judgment which seem to me to be clearly wrong. Neither was mentioned in the notice of appeal and neither relates to the main issue.

The first aspect is that the claim was for $276 943,19 whereas the amount certified was $236 671,02. The difference represents, apparently, an amount of interest which Mleme had to pay in order to borrow the money it used to pay for the dam. I do not believe that interest is properly claimable in terms of the agreement. It may be claimable on some other basis. But it should not have been claimed or awarded in this action.

Secondly, the learned judge *a quo* found that the duly certified account was presented for payment on 12 January 1993. If that was so, Bendezi had thirty days within which to pay. Interest should have run only from 11 February 1993.

However, since neither of these points was raised in the notice of appeal, I do not propose to do more than remark upon them.

The real issue is the matter of impugning the certificate.

In argument before us Mr *Dyke,* for the appellant, referred only to two cases on this aspect of the dispute. The first is *Rossing Stone Crushers (Pty) Ltd v Commercial Bank of Namibia & Anor* 1994 (2) SA 622 (Nm). This was a decision of Mr Acting Justice MULLER. It was there decided that a court could

McNALLY JA

set aside a valuation of machinery by an appraiser where it was based on entirely wrong assumptions, even though there was no fraud, collusion or capriciousness involved. I do not

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disagree with that decision.

The second case relied on was *Hurwitz & Ors NO v Table Bay Eng (Pty) Ltd & Anor* 1994 (3) SA 449, a decision of Mr Justice MARAIS in the Cape Provincial Division. This was a dispute over rent which was to be fixed by a nominated third party. Again I have no quarrel with the principle behind that decision. I would state that principle as follows, and I do so by summarising part of the headnote:

> "Where parties to a contract nominate a specific person to quantify the performance of one of them, and such third party makes a manifestly unjust determination ... the court has a general power to correct such a determination."

But there is a great deal of legal learning which is more specifically about engineers' and architects' certificates in building contracts. I would have thought we might have been referred to cases such as *Rudland & Son v Gwelo Municipality* 1933 SR 119 at 133; *Smith v Mouton* 1977 (3) SA 9 (W); the appeal from that decision, which is reported as *Mouton v Smith* 1977 (3) SA 1 (A); *Thomas Const (Pty) Ltd (in liquidation) v Grafton Furniture* 1988 (2) SA 546 (A) at 562I-J; and *Ocean Diners (Pty) Ltd v Golden Hill Const CC* 1993 (3) SA 331 (A). There is useful information also in McKenzie *Law of Building and Engineering Contracts and Arbitration* 4 ed, chapter 16, and in *Loots Engineering and Construction Law* at pp 288, 290 and 306. The relevant point is made in Loots at 290 that "an architect's or engineer's certificate is perfectly valid even if based on measurements taken by another person", a proposition from the decision in *Dunbar & Co v Escombe Avenue Nursing Home* 1921 WLD 45.

To my mind, there are features of this case which strongly indicate, as a matter of law, that the court should not go behind the engineer's certificate.

1. The certificate is analogous to an interim certificate;

2. The allegation against the certifying engineer is shadowy and unsubstantiated;

3. Equity does not demand interference.

I will deal with them in turn.

McNALLY JA

1. THE CERTIFICATE IS ANAGLOGOUS TO AN INTERIM CERTIFICATE

The payment required in terms of this certificate was only the first in a series of payments to be made. It was what is usually called a progress payment or an interim payment. The object of such a provision is to share the burden of the outlay as the construction progresses. Therefore the accuracy of the calculation is not, within of course, reasonable limits, of prime importance. As McKenzie (*op cit*) puts it at p 137,

> "Progress certificates give and are intended to give only an approximate value of work done and materials delivered, and are not, in the absence of agreement, intended to be conclusive in favour of either party."

2. THE ALLEGATION AGAINST THE CERTIFYING ENGINEER IS SHADOWY AND

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UNSUBSTANTIAL

It is certainly not alleged that he was fraudulent or that he acted in collusion with Mleme - compare *Smith v Mouton supra* at 13A-D. No affidavit by the engineer was filed; he has not been invited to withdraw his certificate; all that is alleged is that the managing director of Bendezi has approached him for his records or the records of Mleme to substantiate the entries contained in his certified account. In reply he is **alleged** to have said "he has no such records and despite his request the applicant (Mleme) has not produced any records to substantiate the figures contained in his certificate which were provided to him by the applicant". But an engineer does not have to have personal knowledge of all the facts in his certificate, more particularly when it is not in the nature of a final certificate - see the *Dunbar* case *supra* at 48 and 49. He is entitled, in a proper case, to rely on his experience and knowledge as to what is reasonable. He may well have done so in this case. There is no allegation to the contrary.

Without a specific allegation of *mala fides* I do not think that Bendezi has established a basis in law for going behind the certificate. Compare the comments of HUDSON J (as he then was) in *Rudland supra* at 133.

3. EQUITY DOES NOT DEMAND INTERFERENCE

It may be true, and I accept it for the purpose of this case, that in the modern law it is possible to go behind an engineer's final certificate even though it is neither fraudulent nor collusive. But there is no reason to bring into play

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the court's ultimate discretionary authority to prevent injustice when the contract itself makes such a provision. See the remarks of MCEWAN J in *Smith v Mouton supra* at 13 and 14. The contract in this case plainly requires Bendezi to pay first and argue afterwards. Such a provision is common and well-established and is not contrary to public policy - see the remarks of SMALBERGER JA at 342-3 of the *Ocean Diners* case *supra*. What he says about final certificates applies, a fortiori, to what is in effect an interim or progress certificate.

In fact, in this case, the equities lean in the other direction. We are informed that, in pursuance of a court order, Bendezi has paid $220 000 to Mleme in discharge of its obligations under the judgment of the court *a quo.* Meanwhile construction has gone on, and no further payments have been made. *Prima facie,* therefore, Bendezi will have to pay further sums which will, at least partially, and probably more than wholly offset any overpayment in respect of the disputed certificate.

At the hearing Bendezi applied to introduce further evidence, without notice either to the court or to the respondent. This evidence consisted of another affidavit by the managing director of Bendezi enclosing a letter from the engineer, Mr Lotter, which in turn enclosed revised figures.

The principles upon which this court allows the adduction of further evidence were set out in *Farmers Co-op Ltd v Borden Syndicate (Pvt) Ltd* 1961 R & N 28 (FS). They have been applied many times since, most recently in *Beval Trading (Pvt) Ltd v Voest-Alpine Intertrading GmbH*

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S-149-94 (not reported).

There are four criteria:

1. The evidence must not with reasonable diligence have been obtainable for use at the trial;
2. The evidence must be such as is presumably to be believed or is apparently credible;
3. The evidence must be such as would probably have an important influence on the result of the case, although it need not be decisive;
4. Conditions since the trial must not have so changed that the fresh evidence will prejudice the opposite party.

McNALLY JA

I need to consider only the third criterion. The evidence, as I understand it, far from supporting Bendezi's case, in fact undermines it. It will be recalled that in his original and disputed certificate Mr Lotter said that the cost of the dam up to 30 September 1991 was $676 202,94, of which the 35% payable by Bendezi was $236 671,02.

Now, in this new document which Bendezi wants to produce, he says the total cost of the dam to 30 September 1991 was $911 031,37 of which the 35% payable by Bendezi would, on my calculation, be $318 860,97 - far greater than the amount they are disputing as excessive. He divides the total of $911 031,37 into three sections, as follows:

$ 111 538,77 - supported by invoices

$ 743 693,76 - direct labour and own plant

$ 55 798,84 - unsupported section.

He is querying only the third part, which is the smallest. Even if that is deducted, the total is greater than the disputed total. Obviously there would not be invoices for "direct labour and own plant". There is no suggestion by him that these figures are unreasonable. The reverse is true. The final page of his document shows that they erred in favour of Bendezi, in other words that the second figure above of $743 693,76 was originally shown by Mleme as $535 670,64.

So, in effect, having checked the time books he has found that Mleme was undercharging. The minor "unsupported" section, is of course, not necessarily wrong. It is merely unsupported. But even if it is 100% wrong, the picture is not changed. He is saying that if the certificate erred, it erred in favour of Bendezi.

The application and the appeal are dismissed with costs.

Gubbay CJ: I agree

Muchechetere JA: I agree

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Coghlan, Welsh & Guest, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

Ex p MASIMBIREMBWA NO 1995 (1) ZLR 144 (HC)

Court **High Court, Harare**

Chatikobo J

Civil trial

21, 23 & 25 November 1994 Judgment No HH-22-95

& 8 March 1995

Flynote

Practice and procedure - parties - death of party - claim for division of matrimonial assets - whether claim transmissible to estate if litis contestatio occurred prior to death of claimant

Family law - husband and wife - property rights - matrimonial property - action for redistribution of matrimonial assets - claimant dying after litis contestatio - whether action tranmissible to executor - whether nature of claim such that it is extinguished by claimant's death

Headnote

A community court had dissolved a marriage contracted under the African Marriages Act [*Chapter 238*]. The proprietary rights of the spouses were not determined by that court because the court had not been asked to do so by the parties. Some time later the former wife had applied to the High Court for division of matrimonial assets in terms of s 7 of the Matrimonial Causes Act 33 of 1985. The action had reached the stage of *litis contestatio* when the woman died as the pleadings had been closed. The executor in her estate then applied to be substituted for the deceased as plaintiff in order to prosecute the deceased's claim on behalf of the estate.

Held, that although it seems that the former spouse does not have to bring a subsequent action for division of matrimonial assets before the same court that granted the divorce, the practice of applying to one court for divorce and then applying later to another court for a determination of the property rights of the parties was an undesirable one that should be avoided wherever possible as it can lead to forum shopping. Normally

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the parties should apply to the court granting the divorce for a determination of the property rights of the parties.

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Held, further, that real rights are transmissible but personal rights die with the holder of those rights, except where the stage of litis contestatio has been reached prior to the death of the holder. Where the holder of personal rights dies after *litis contestatio,* the claim in respect of personal rights is transmitted to the executor or heir.

Held, further, that all that *litis contestatio* does, however, is to vest in the executor or heir of a person who dies after it has been reached the right to have the merits of the claim which is pending before before the court at the time of his death adjudicated upon, in spite of the fact that he is no longer alive and available to prosecute it. In adjudicating upon the claim, the court is entitled to examine the law which governs the particular cause of action and to decide upon a full consideration of such law, as well as the facts, if such cause of action has been extinguished by the claimant's death.

Held, further, that in a situation like the present one the only property which vested in the deceased's estate was that which belonged to her during her life time. The share in the matrionial property to which she may have become entitled to on the dissolution of the marriage was to enable her to lead a life comparable to that which she led during her lifetime. When the claimant spouse is dead, the purpose for adjustment of the matrimonial assets can no longer be served, and thus it was not appropriate to allow the executor to pursue the claim.

Held, further, that in dealing with a claim for redistribution of the joint matrimonial assets in terms of s 7 of the Matrimonial Causes Act, the court must take into account past and present features affecting the parties and engage in a complex balancing process to arrive at a position where the needs of the applicant spouse and her future welfare are provided for. It is not possible to engage in this balancing process after the death of one of the spouses.

Held, further, that in the present case it was not appropriate to make an order in terms of s 7 of the Matrimonial Causes Act. The major asset in dispute was a house. The surviving spouse did not have the financial capacity to pay from his meagre salary the value of an appropriate share in the matrimonial assets. An order for the sale of the matrimonial house would simply swell the inheritance of the deceased wife's successors at the expense of the surviving spouse, who would be rendered homeless.

Cases cited:

Chebaro v Chebaro [1986] 2 All ER 897

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Ex p *Meyer NO* In re *Meyer v Meyer* 1962 (2) SA 688 (D)

Ex p *Boshoff NO* In re *Boshoff v Boshoff* 1953 (3) SA 237 (W)

Takafuma v Takafuma 1994 (2) ZLR 103 (S)

Hoffa NO v SA Mutual Fire & Gen Ins Co Ltd 1965 (2) SA 944 (C)

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Jankowiak & Anor v Parity Ins Co (Pty) Ltd 1963 (2) SA 286 (W)

Kritzinger v Kritzinger 1987 (4) SA 85 (C)

Kritzinger v Kritzinger 1989 (1) SA 67 (A)

G Musariri for the plaintiff

C Mantsebo for the defendant

Judgment

Chatikobo J: Georgina Chipembere married the defendant in terms of the African Marriages Act [*Chapter 238*] on 20 July 1973. The marriage was dissolved by the community court on 20 October 1989.

At the time of dissolution of the marriage the community court was not asked to, and hence did not, deal with the parties' proprietary rights.

On 3 May 1990, Georgina issued summons against the defendant claiming a division of the parties' matrimonial assets in terms of s 7 of the Matrimonial Causes Act 33 of 1985 (the Act). Georgina died on 29 April 1992. At the time of her death pleadings had been closed. After her death, the executor in her estate, Godwills Masimirembwa, her legal practitioner of record in her life time, applied to be substituted as the plaintiff and that order was granted on 13 November 1992. The executor in his capacity as plaintiff, gave evidence before me and stated that he is desirous of prosecuting the claim on behalf of the estate of the late Georgina Chipembere to finality. He contends that, since Georgina died after litis *contestatio*, her action has, by virtue of having reached that stage before her death, become transmissible to her estate and heirs

Before dealing further with the facts and the interesting question of the transmissibility of Georgina's claim against the defendant, it is necessary to tidy up the legal basis upon which the right to claim a division of assets after divorce in this court is based. A division of matrimonial assets is claimable in terms of s 7(1) of the Act. It is in these terms:

> "Subject to the provisions of this section, in granting a decree of divorce, judicial separation or nullity of marriage, **or at any time thereafter,** the court may make an order with regard to -
>
> (a) the division, apportionment or distribution of the assets of the

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> spouses including an order that any asset be transferred from one spouse to the other;
>
> (b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage." (my emphasis)

The first point to note is that the community court which dissolved the marriage in 1989 had the power to make an order of redistribution of the parties' assets because that court is an appropriate court for the purposes of a marriage contracted in terms of customary law (s 2). Had that court been asked at the time of divorce to deal with the issue of the parties' proprietary

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rights, it would no doubt have done so. No reason has been advanced before me as to why that was not done or why the present action was not pursued in the same court which granted the divorce. As the High Court has the jurisdiction to deal with a claim of this nature in relation to any marriage, it is not necessary for me to delve into the propriety of pursuing the issue of divorce in one court and leaving the issue of the proprietary consequences of the marriage in another court. I merely point out in parenthesis that such a course is undesirable and must be avoided whenever possible. It may in other cases lead to the undesirable practice of litigants resorting to forum shopping if they think they are likely to get justice in one court on one issue and not on the other. There is nothing before me to suggest that this is so. There may be good reasons why this was done.

The second point is that the Act gives to the court, either at the time of granting a divorce, "or at any time thereafter", the power to make an order of redistribution of matrimonial assets. The phrase "or at any time thereafter" is precise and unambiguous. It means precisely what it says, that is, a party can return to court at any time after divorce to seek an order of redistribution of the matrimonial assets. Compare *Chebaro v Chebaro* [1986] 2 All ER 897.

But does this mean to say a party who claims a redistribution order in separate proceedings after divorce must proceed in the same court that granted the decree of divorce? I doubt that this was the intention of the legislature for, if it were so, problems would arise in those situations where a litigant returns to court several years after divorce when it may no longer be possible to reconstitute the court that granted the divorce. The situation may be different where the order of redistribution is claimed in the same action as the decree of divorce. If the court grants a decree of divorce and postpones the proprietary claims for determination at a later date, there may be room for arguing that the court granting the decree of divorce is seized with the matter.

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However, the matter was not raised before me and I express no firm opinion on the matter. I assume that the matter is properly before me. In fact, both parties proceeded on the basis that I can deal with the matter.

However, before I deal with the facts put before me and apply the law to those facts it is, I consider, necessary to deal with a submission made by Mr *Mantsebo,* who appeared for the defendant. It is this. Section 7 of the Act envisages a situation where both spouses or former spouses are alive and is intended to ensure that, during their time after divorce, they live a life comparable to the standard of life they enjoyed during the subsistence of the marriage. Put in a different way, is a spouse who has a claim for a redistribution order in terms of s 7 of the Act, the holder of rights of a nature which forms part of his or her estate upon death?

If the deceased spouse's rights in terms of the Act are not transmissible to his or her heirs after death, then no order of redistribution can be made. If the converse is true, then an order can be made in terms of the Act.

It would appear that the transmissibility of rights or actions depends on whether they are rights

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or actions *in rem* or *in personam.* Real rights are transmissible, even where the holder dies before *litis contestatio,* whereas personal rights die with the holder. The situation appears different where the holder of personal rights dies after *litis contestatio*.

This submission was not thoroughly debated before me and no authorities were quoted to me in its support. The limited research I have been able to carry out seems to show that the heir to a deceased spouse inherits only those rights and duties which are transmissible and that some rights and duties, such as those of a husband in relation to his wife, are not transmissible.

In this regard, Hahlo, in his work *The South African Law of Husband and Wife 5 ed at p 419, says:*

> "A divorce suit is essentially a personal action. It comes automatically to an end if one of the spouses dies before a decree of divorce is pronounced. When one of the spouses dies after a decree of divorce has been granted and while an appeal against the decree is pending, the appeal falls away and the decree stands, **but it is submitted that the surviving spouse or the executors of the deceased spouse may continue the appeal if this is necessary in order to have the property rights of the spouses and their heirs (or, possibly, the liability as to costs) determined."** (my emphasis)

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Cf: Ex p *Meyer NO* In re *Meyer v Meyer* 1962 (2) SA 688 (D).

Only one of the authorities upon which the learned author relies for the proposition I have underlined is available to me. It is the decision of CLAYDEN J (as he then was), in Ex p *Boshoff NO* In re *Boshoff v Boshoff* 1953 (3) SA 237 (W). In that case the husband sued his wife, claiming restitution of conjugal rights based upon the wife's malicious desertion and for the forfeiture of the benefits arising out of the marriage in community. The husband died before the pleadings were closed (*litis contestatio*). The executor to his estate applied to have himself substituted as plaintiff in order to pursue the claim for a forfeiture of the benefits of the marriage. The learned judge there held that the application by the executor could not succeed because the issue of forfeiture of benefits could only arise after the deserting wife had been given an opportunity on the trial (return) date to restore conjugal rights, but since the husband died before that stage no decree of divorce could be granted and consequently an order for the forfeiture of benefits would not succeed. It seems to me that this case is not authority for the proposition that a spouse's proprietary rights, especially those rooted in one spouse's duties towards the other, are transmissible to the heirs.

One thing is clear to me, however. That is that an examination of s 7(3) of the Act, which lists the factors which a court must take into account in making an order in terms of s 7(1) of the Act, shows that a spouse who claims for an order of redistribution is not claiming what belongs to her, but is, in essence, asking the court to make a property adjustment order so as to strike a balance between his or her assets and those of the other spouse.

That self-evident proposition derives strong support from the recent decision of MCNALLY JA in *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) at 106B-E where His Lordship observed thus:

> "The duty of a court in terms of s 7 of the Matrimonial Causes Act involves the exercise of a considerable

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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 an appropriate share of the items marked 'theirs'. And the same to the wife. That is the first stage.

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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, would the court consider taking away from one or the other of the spouses something which is actually 'his' or hers'."

In a case such as the present where one spouse (the wife) is deceased, it would follow, in my view, that the lot marked "hers" would vest into her estate at the time of her death. That which is marked "his" would remain the property of the surviving spouse. That which is marked "theirs" would be available for distribution following the criteria laid down in terms of s 7(3) of the Act. From this it will be apparent that a claim to a portion of the property marked "theirs" is a personal one and so is a claim to that which is marked "his" if the claimant is the wife. That being so, such a claim dies with the claimant.

I consider that it is helpful to draw some guidance from the principles which apply to delictual claims for pain and suffering which, in my view, apply with equal force to matrimonial proceedings of this nature. In the case of *Hoffa NO v SA Mutual Fire & Gen Ins Co Ltd* 1965 (2) SA 944 (C), where the action for damages for pain and suffering was commenced by the executrix testamentary in her deceased husband's estate, the sole issue for determination in that case was whether a claim for pain and suffering and loss of the amenities of life passes to the estate of the deceased upon his death.

At p 955B-D VAN WINSEN J stated the principle thus:

"It is true that a person who lives for some time after he has sustained the injury may suffer pain and loss of amenities during the remaining period of his life, yet once he dies no award of damage can achieve the object for which such awards are made. It would seem to follow, therefore, that the right to claim this damage must die with the individual injured. Were it not so, the award could only serve the purpose of swelling the inheritance accruing to the heirs of the injured party ... For the reasons set out above, I conclude that, in our law, the claim by the injured party in respect of pain and suffering and the loss of amenities of life (of which the effects of a physical disability are, in my view, but one aspect) does not pass to the injured party's estate. It is, in the circumstances of this

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case, unnecessary for me to deal with the question as to whether the position would be different if *litis contestatio* had taken place."

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In the present case, however, the proceedings had reached *litis contestatio.* I turn then to deal with the effect of *litis contestatio* upon the plaintiff's claim.

In *Jankowiak & Anor v Parity Ins Co (Pty) Ltd* 1963 (2) SA 286 (W), KUPER J was faced with a claim for general damages arising out of injuries sustained in a motor collision. The plaintiff died after *litis contestatio* and, at the trial, the executor to his estate was substituted in his stead. It was contended for the defendant that, while the claim for special damages could succeed, the claim for general damages had abated with the death of the plaintiff. In other words, it was the contention of the defendant that *litis contestatio* did not confer nor preserve any rights of action. After reviewing the authorities, the learned judge came to the conclusion that *litis contestatio* having taken place before the death of the plaintiff, the claim for general damages was transmitted to the estate of the deceased. The learned judge did point out that litis contestatio has no effect upon the issue of liability for it does not affect the cause of action but merely transmits the claim or the liability to the estate of he who dies after that stage has been reached. I will return to this point later on in this judgment.

It has since been held repeatedly after the decision in *Jankowiak's* case *supra* that a claim for pain, suffering and loss of amenities of life is transmissible to the estate of the deceased where the latter dies after *litis contestatio* has been reached. On this score, I therefore hold that the claim of Georgina has been transmitted to her estate since she died after *litis contestatio.*

I now have to grapple with the most difficult aspect of this case. Does the fact that Georgina died after the proceedings had reached *litis contestatio* mean that, if I am satisfied on the evidence that she was entitled to a property adjustment order, I should proceed to make such an order as if she was still alive? If so, how do I satisfy the criteria laid down in s 7(3) of the Act, which enjoins me to "endeavour as far as is reasonable and practicable and having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses?" Georgina is not alive to be placed in that situation.

In *Milne's* case *supra,* KUPER J said *litis contestatio* has no effect on the cause

of action or liability, but that it merely transmits the claim or liability to the estate of him who dies after it has been reached. To my mind, this means that all that *litis contestatio* does is to vest in the executor or heir of a person who dies after it has been reached, the right to have the merits of the claim which is pending before the court at the time of his death adjudicated upon, in spite of the fact that he is no longer alive and available to prosecute it. In adjudicating upon the claim, the court is perfectly entitled to examine the law which governs the particular cause of action and to decide upon a full consideration of such law, as well as the facts, if such cause of action has been extinguished by the claimant's death. No problem would arise in a delictual claim for pain and suffering. But numerous examples come to mind where, although by virtue of *litis contestatio* a claim is transmitted to the estate of the plaintiff, relief would still be denied after a consideration of the merits.

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Take the example of a person, A, an artist who sues another, B, for specific performance of a contract in terms of which A was to perform at B's theatre for a year. If A dies after the proceedings have reached *litis contestatio,* his executor or heirs could not possibly persist with the action because the personality of A is of the essence to the performance of the contract. So although *litis contestatio* may have had the effect of freezing the rights of A and B in the contract, those rights could only be enforced if both parties are alive. By a parity of reasoning, if that is the nature of the rights which Georgina had against the defendant at the time of *litis contestatio,* it is open to this court to find that the rights embodied in the claim which has been transmitted to the executor by *litis contestatio* cannot be transferred to the executor or the heirs. To discover whether that is so in this case, I need to examine the provisions of the Act.

The Act provides in s 7(3) that -

> "In making an order in terms of subsection (1) the court shall have regard to all the circumstances of the case, including the following -
>
> (a) the income, earning capacity, assets and other financial resources which each spouse ... has or is likely to have in the foreseeable future ;
>
> (b) the financial needs, obligations and responsibilities which each spouse ... has or is likely to have in the foreseeable future;
>
> (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;

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> (d) the age and physical and mental condition of each spouse and child;
>
> (e) the direct and indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties;
>
> (f) the value to either of the spouses or to any child of any benefit, including a pension and gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;
>
> (g) the duration of the marriage;
>
> and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal relationship continued between the spouses."

A close analysis of these factors reveals that the court is required to take account of the past and present, so as to avoid making an order in terms of s 7(1) which will have the effect of subjecting either spouse to a life after divorce which is less pleasant and a less comfortable than the life they led during the subsistence of the marriage. The court will do so by taking into account, not only the parties' material acquisitions before divorce, but their future potential for enhancing their respective resources. Once one of the spouses has died, it is no longer possible to carry out the complex balancing act contemplated by the Act. The deceased spouse is no longer faced with the needs which face the surviving spouse. In particular, apart from any assets which may vest in the estate of the deceased spouse, he or she no longer has any income or earning capacity. Whatever assets vest in the estate of the deceased spouse are no

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longer available to be put into the common pool if need be, because after the death of the owner they become subject to the complex rules of succession. If the deceased spouse had made a will, the assets will have devolved upon the beneficiaries to that will. It is not possible after the death of one spouse to place such spouse in the position in which he or she would have been in if a normal marriage relationship had continued, not only because he or she is no longer with the living, but also because the assets belonging to such spouse, which would have contributed towards placing her in that pre-divorce position, are no longer available as they have devolved upon the deceased spouse's estate. The imponderables which militate against the making of a property adjustment order are myriad and defy any attempt to tabulate them. But, just to add another example: the reference in s 7(3)(d) to the age and physical and mental condition of the

spouse who claims an order of redistribution of property must have been intended to ensure that a spouse who suffers from infirmities brought about by age or disease and who as a consequence has a reduced capacity to look after himself or herself shall get an award which takes the infirmities into consideration.

It is apparent from what I have said so far that, although an order in terms of s 7(1)(a) is not one for maintenance *simpliciter*, it is one aimed at ensuring the welfare of a spouse in the life after divorce. It is not an order for the dissolution of a partnership. As BERMAN J said in *Kritzinger v Kritzinger* 1987 (4) SA 85 (C) at 94H-J:

> "The court is not here faced with a business partnership, a 9 am to 5 pm, five-days-a-week commercial enterprise geared to profit making and with terms of dissolution agreed either expressly or impliedly, but instead with a union effected on an 'until death do us part' basis where the accumulation of assets, ie profit making, is not the primary aim of the parties, and where human feelings, passions, emotions and sensibilities are much involved."

This case went on appeal and the appeal judgment was delivered by MILNE JA. It is reported as *Kritzinger v Kritzinger* 1989 (1) SA 67 (A). At p 77B-D of the report, the learned JUDGE OF APPEAL echoed the sentiments of BERMAN J when he said :

> "It is true, furthermore, that every marriage is a partnership in one sense of the word. The spouses spouses live together and contribute (one hopes) to each other's physical and mental well-being. They may, furthermore, agree that they will pool their resources. Such an arrangement, unless it has the requisites of a legal partnership (as was the case in *Fink v Fink* 1945 WLD 226), is not irrevocable, and may be resiled from at any time. Only if the requisites of a partnership are present and it is intended by the parties that there will be a universal partnership could it be said that, in a sense, although parties were married *de jure* out of community of property they were *de facto* married in community - although even in these circumstances this would be an imprecise description."

These passages underscore the fact that an order of redistribution of matrimonial property in terms of s 7 of the Act is not in any way akin to the dissolution of a partnership where the partners are entitled to a proportional

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share of the residue of the assets of the partnership on dissolution. If it were such a partnership, then, in the event of a termination of the partnership by the death of one of the partners, the deceased partner's share would vest in his estate.

In a situation like the present, the only property which vests in the deceased spouse's estate is that which belonged to him or her in their lifetime. That to which they may have become entitled on the dissolution of the marriage to enable them to lead a life comparable to that which they led in their life time is not necessarily claimable in terms of s 7 of the Act after death.

I now turn to deal with the evidence led in this case. I hasten to remark that I place no reliance on the bulk of the evidence led on behalf of the plaintiff from Mary Mbarame, Georgina's sister and Thandiwe Chipembere, the alleged daughter of the parties in this matter, that is, Georgina and the defendant. I say "alleged daughter" because defendant denies that his marriage to Georgina was blessed with children. As both children alleged to have been born of this union are now adults, the question of their paternity plays no significant part in the issue of a redistribution order.

Mary Chipembere does not have any personal knowledge of the financial contributions of Georgina and the defendant to the matrimonial estate. She largely testified to what she claims to have heard from Georgina during her life time. Similarly, Thandiwe does not know of the financial contributions of the parties to the matrimonial estate, because she was a young girl at the material time. Although Georgina used to give her money to go and pay rent, she is unable to say whether the source of the money was Georgina or the defendant.

The major asset which is at the heart of this dispute is a house in the high-density suburb of Tafara in Harare. It is stand number 4183 Nyere Crescent, New Tafara. It is valued at $40 000. The house was purchased by the defendant from the City of Harare on a deed of sale for the sum of $695 (Exhibit 2) and the final instalment was paid on 1 December 1989 (Exhibit 3). In addition there are a few household goods which are still in the house in Tafara. I will deal with these in due course.

On the pleadings the plaintiff claimed that the defendant deserted Georgina in 1976 and that the latter was making payments on the deed of sale since that time until the issue of summons in May 1990. It is, however, apparent from the deed of sale agreement (Exhibit 2) that the agreement was entered into on

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23 September 1986 and it was deemed to have come into effect on 1 January 1981. It was, however, common cause that the parties had been living in the house as tenants long before 1981. In evidence before me, it was claimed on behalf of the plaintiff that Georgina became responsible for the payments when defendant deserted her in 1986.

On the other hand, the defendant pleaded that he made the payments towards the deed of sale agreement until the divorce in 1989. Thereafter he paid the sum of $523,56 reflected in Exhibit 3. The defendant maintained this stance in his evidence. Although in evidence he said that he never stopped paying, in apparent contradiction to his plea, I consider the contradiction to be

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more the result of his legal practitioner's ineptness in drafting the plea. I say so because if the amount to be paid after September 1986 was the sum of $695 (Exhibit 2), then it must follow that between September 1986 and the divorce in 1989 he paid the sum of $171,44, which is the difference between the selling price of $695 and the sum of $523,56 which he paid on 1 December 1989 (Exhibit 3).

The defendant, who in my view was a fair witness, conceded, without much prompting, that his late wife did make some of these payments during those months when he was financially hard up. His evidence in this regard was that at the end of the month he would give his wife $200 to $250 to finance the month's expenditure, which included payments for rent or the purchase of the house. In some months, if he had other commitments to meet, the wife would pay the rent on the purchase price. He maintained, however, that the house was his.

To my way of thinking, the fact that the defendant's late wife made payments towards the house is a factor that one would have to take into account in making an order in terms of s 7. It does not confer any real rights on Georgina.

As far as the movables are concerned the defendant says his late wife purchased with her own money and for herself a bed, sideboard and a wardrobe. These would naturally vest in her estate as they form part of that lot which should be marked "hers" (*Takafuma's* case *supra*).

When asked if he repaid his late wife the amounts she made towards the house, defendant said they pooled their wages together and she budgeted the expenses and the rent or purchase price would come out of these amounts. Be that as it may, I do not consider it necessary to deal with the effect which the amounts paid by Georgina had on the defendant's estate, since I have come

to the conclusion that this is not an appropriate case in which to make an order in terms of s 7 of the Act. In my view, it would not be an equitable exercise of discretion to make an order in favour of the plaintiff in this matter. The defendant is employed as a messenger at a monthly salary of $500. If I were to order that the defendant's late wife is entitled to a share in the matrimonial estate, which I would estimate at no less than 30%, the defendant would be unable to pay 30% of $40 000 from his salary. The only way he can pay out such a share would be by selling the house. And if the house were to be sold, not only might it fetch ess than $40 000 due to the known vagaries of the property market, but the defendant would be unlikely to secure another house. It is not a judicial exercise of discretion to order the sale of a matrimonial house to comply with s 7(3) of the Act in circumstances where one spouse is deceased and her share will go to swell the inheritance of her successors, while the surviving spouse will be rendered homeless.

In the circumstances, I decline the invitation to make an order in terms of s 7(1) of the Act. I think, however, that as the defendant has by virtue of this conclusion, retained the house which would in all probability have been sold if his late wife was alive, he should bear the costs of this trial. It would not be fair to impoverish the estate of his late wife by burdening it with an order for

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costs.

In the circumstances it is ordered as follows:

1. The relief claimed in paras 1 and 2 of the prayer to the declaration is refused.

2. It is directed that the plaintiff is entitled to take the wardrobe, bed and sideboard and include them in the estate of the late Georgina Chipembere.

3. The defendant is to pay the costs of this action, which costs shall exclude those ordered by ADAM J and CHIDYAUSIKU J on 17 July 1990 and 6 November 1990 respectively.

Musariri & Co, plaintiff's legal practitioners

Surgey, Pittman & Kerswell, defendant's legal practitioners

SMITH & ANOR v ACTING SHERIFF OF ZIMBABWE & ANOR 1995 (1) ZLR 158 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

McNally JA, Korsah JA & Ebrahim JA

Civil appeal

27 February & 9 March 1995 Judgment No S-30-95

Flynote

Practice and procedure - execution - sale - immovable property - confirmation

Headnote

The appellants made the highest bid for a house at a sale in execution. After the sale commissioner had certified the sale, the appellants were declared the purchasers. The Sheriff declined to confirm the sale when the judgment debtor objected. The purchasers applied to the High Court unsuccessfully for confirmation. In an appeal against the refusal to confirm the sale,

Held, that in the present case the trial court had, for good reason, found that the property was not adequately described in the advertisements and that the auctioneer's report was inadequate, so the appellants should never have been declared the purchasers. It had therefore properly exercised its discretion not to issue a *mandamus* and declined to order the Sheriff the confirm the sale.

Held, further, *obiter,* that in respect of the public concern over the fate of people who lose their houses because of economic misfortune, there is a clash between the stricter Western legal mentality and the gentler, more compromising customary law outlook. There was an on-going process of indigenisation and evolution of the Roman-Dutch law in the spirit of our customary law. Whilst not drifting into excessive sympathy for hard-luck stories and thereby undermining

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the efficient and effective mechanisms by which housing is funded, the courts can take into account the low prices paid and that the interests of judgment debtors are perhaps ranked too low in these sales.

McNALLY JA

Cases cited:

Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers (Edms) Bpk 1972 (1) SA 773 (A)

Mynhardt v Mynhardt 1986 (1) SA 456 (T)

Munette Invstms v Admin, Cape Province 1973 (4) SA 491 (C)

Naran v Midland Chemical Industries (Pvt) Ltd S-220-91

Lalla v Bhura 1973 (2) RLR 280 (G)

Zvirawa v Makoni & Anor 1988 (2) ZLR 15 (S)

D P Carter for the appellants

No appearance for the first respondent

Second respondent in person

Judgment

McNally JA: Mr and Mrs Smith bought Mr Chibanda's partially completed house at a sheriff's sale in execution. The Acting Sheriff declined to confirm the sale. The Smiths contend that he had no authority to decline to confirm it and they brought an application to compel him to do so. They lost in front of BARTLETT J in the High Court and now appeal.

The procedure whereby property is sold in execution of a judgment is laid down in Order 40 of the High Court Rules. In this case the property was advertised, the sale was attended by forty-eight people, the bidding opened at $25 000, and the property was eventually sold to the Smiths for $46 000. They then obtained a cheque from their building society and gave it to the Acting Sheriff. The sale was properly certified by the commissioner appointed in terms of rule 355, and the Smiths were declared in terms of rule 356 by the Acting Sheriff's representative to be the purchasers, subject to confirmation as prescribed in rule 360.

Meanwhile, Mr Chibanda, the judgment debtor and owner of the property, was belatedly taking steps to save his property. He apparently made arrangements with the Beverley Building Society and with Zimbabwe Banking Corporation Limited ("Zimbank") which satisfied those two creditors. It was at Zimbank's instance that the sale took place, so if he had done all this earlier, the sale would have been cancelled.

The sale took place on Friday 22 October 1993. The Acting Sheriff declared the Smiths to be the purchasers on Thursday 28 October 1993. He stated he would confirm the sale if no

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objections were received within seven days. Rule 360 states that he "shall confirm the sale" if no objection is made to the court within that period. No objection was made to the court within that

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period. On Friday 5 November 1993 Mr Chibanda wrote to the Acting Sheriff. He said he had made arrangements with Zimbank, no other creditor was pressing, the price realised was inadequate, and the description in the advertisement had been inadequate. He asked that the sale be not confirmed.

On Monday 8 November 1993 the Smiths called at the Acting Sheriff's office to receive confirmation of the sale and to start arranging transfer into their names. It was then that they were told that Mr Chibanda had objected. So his letter must by then have arrived. The sale was not confirmed.

Reckoning time in accordance with the rules, seven days from Thursday 28 October 1993 would expire at the end of office hours on Monday 8 November 1993. So Mr Chibanda's objection was lodged within seven days, but it was lodged with the Acting Sheriff and not with the court. It is somewhat ironical that in order to lodge an objection with the court one has to lodge it with the registrar of the court. At that time the Acting Registrar and the Acting Sheriff were one and the same person.

So we are dealing with a procedural error which could and should have been rectified by the Acting Sheriff. He should have advised Mr Chibanda to lodge his objection with the court in the form of a court application. Any consequent delay could have been the subject of an application for condonation which would have been hard to refuse in the circumstances.

It must be made clear that the Acting Sheriff did not set aside the sale. He simply did not confirm it. Where he went wrong was in making that decision himself. He did not have the power to do so. Rules 359 and 360 make that clear. They read as follows:

> "359. Any person having an interest in the sale may make a court application to have it set aside on the ground that the sale was improperly conducted or the property was sold for an unreasonably low sum or any other good ground. Any such person shall give due notice to the sheriff of the application stating the grounds of his objection to confirmation of the sale. On the hearing of the application the court may make such order as it deems just.
>
> 360. If no objection is made to the court within seven days from the date that the sheriff declares the highest bidder to be the purchaser in terms of Rule 356 ... the sheriff shall confirm the sale."

As a result of the Sheriff's refusal to confirm the sale, the Smiths made an

McNALLY JA

application to the High Court. So in the end, and by the use of the wrong procedure, the matter was decided, as the rules require, by the High Court. The learned judge decided the matter in

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favour of Mr Chibanda.

Two points must be made. First, as it has often been said, the rules are made for the court, not the court for the rules - see *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 783A-B and *Mynhardt v Mynhardt* 1986 (1) SA 456 (T). And see generally Harms *Civil Procedure in the Supreme Court* paras A5 and 6. In this case, the error by Mr Chibanda was compounded by the Acting Sheriff who should have referred the matter at once to his *alter ego*, the Acting Registrar. And in the end the proper authority, the High Court, has considered the matter. "The court has inherent jurisdiction to grant relief where insistence upon exact compliance with the rules of Court would result in substantial injustice to one of the parties": *per* CORBETT J (as he then was) in *Munette Invstms v Admin, Cape Province* 1973 (4) SA 491 (C) at 493F-G, citing Herbstein and van Winsen *Superior Court Practice* 2 ed p 20 with approval. This inherent jurisdiction in our courts is reinforced by the provisions of rule 4C.

In effect, in this case the objector followed the wrong route (the Acting Sheriff instead of the Acting Registrar) to the right destination (the High Court), although in the circumstances it was not he but the Smiths who approached the court.

The second consideration is a general one. The evolution of the Roman-Dutch law in the spirit of our customary law is an on-going process - a process of indigenisation. Current public concern over the fate of people who lose their houses because of economic misfortune is a good example of the clash between the stricter Western legal mentality and the gentler, more compromising, customary-law outlook. We must be careful not to drift into maudlin sentimentality and excessive sympathy for the hard-luck stories. If we do, we undermine the very efficient and effective mechanisms by which housing is funded. But there is no reason why the courts should not take account of the fact that forced sales generally realise a lower price than ordinary sales, and that the judgment debtors' interests rank low in the scale of priorities in these sales. Perhaps too low.

The trial judge, in a carefully considered judgment, noted that Mr Chibanda had followed the wrong procedure. But since the application before him was not brought by Mr Chibanda, but by the Smiths, the question of condonation did not directly arise.

McNALLY JA

The learned judge considered the judgment of this court in *Naran v Midlands Chemical Industries (Pvt) Ltd* S-220-91. He concluded for good reason that in the present case the property had not been adequately described in the advertisement. He went on to conclude that the auctioneer's report to the Acting Sheriff after the sale was inadequate to enable the sheriff to make a decision in terms of rule 356. He called for further affidavits, which in the event took the matter no further for the Smiths but assisted the case of Mr Chibanda.

In the result, he decided that the Acting Sheriff should not have accepted or acted on the auctioneer's report. He declined to order the Acting Sheriff to confirm the sale and marked his disapproval of Mr Chibanda's procedural error by making no order as to costs.

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The learned judge based his decision, therefore, on the inaccuracy of the advertisement and the inadequacy of the auctioneer's report. He concluded that the Acting Sheriff should not in the circumstances have made the declaration in terms of rule 356 that the highest bidder was the purchaser. In so doing, he distinguished the facts of the case from *Lalla v Bhura* 1973 (2) RLR 280 (G) and *Zvirawa v Makoni & Anor* 1988 (2) ZLR 15 (S).

It seems to me that the learned judge exercised his discretion properly and did not misdirect himself. Mr Chibanda argued his case before us in person but he may have incurred some costs and he is entitled to recover them.

Accordingly the appeal is dismissed with costs.

Korsah JA: I agree.

Ebrahim JA: I agree.

Rainor Robinson, appellants' legal practitioner

S v GUMBO 1995 (1) ZLR 163 (HC)

Court **High Court, Harare**

Bartlett J

Criminal review

15 March 1995 Judgment No HH-24-95

Flynote

Criminal procedure (sentence) - general principles - community service - purpose of - criteria to be applied when deciding whether to impose community service - number of hours to be imposed - assistance available to courts

Headnote

It is particularly important, now that community service is provided as an option for punishment, that magistrates give active consideration to the concept. The object is to enable the community to benefit by non-serious offenders - that is, those who would otherwise have been sentenced to 12 months' imprisonment or less - being given the opportunity to keep out of prison by doing useful work for the benefit of the community. The fiscus benefits by not having to bear the cost of keeping the offender in prison. Magistrates should, though, err on the side of caution and not give inappropriate persons the option of community service, as this would do the image of community service no good.

Guidance has been provided in a number of cases as to the criteria that should be considered and as to the factual situations where community service sentences are appropriate. There has also been judicial guidance as to the number of hours of community service which it is

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appropriate to order. A guideline, approved by the Chief Justice and all the judges of the High Court, suggested a maximum period of 360 hours.

There have been some very positive practical developments recently to facilitate the effective implementation of a community service sentencing system. A limited number of probation officers have been made available at main centres around the country to assist magistrates in the provision of pre-sentencing reports. The National Committee on Community

BARTLETT J

Service has been able to appoint a national co-ordinator and 12 regional assistants based at main centres around the country. These persons can help magistrates decide whether a particular person is suitable for community service and what opportunities there are for community service to be carried out within their area.

It is also important for magistrates to establish whether the accused has a fixed address and how far he lives from the place where the community service is to be carried out. There may be practical problems like transport which would make it impossible for the accused to properly carry out community service, so where possible the community service should be carried out at a place within a reasonable distance of the accused's home. Where the person is employed, the community service can be carried out over weekends or after working hours.

Cases cited:

S v Kashiri HH-174-94

R v Murechera A-151-68

S v Kunaka HH-159-94

S v Dube HB-79-94

S v Tigere HH-225-93

S v Nyamadzawo HH-13-94

S v Mumvuri HH-106-94

S v Chikomo HH-107-94

S v Myamukapa HH-108-94

S v Tiriboyi HH-166-94

S v Chitima HH-157-94

S v Bandera HH-170-94

S v Maindu & Anor HH-207-94

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S v Dullabh 1994 (2) ZLR 129 (H)

S v Musiyiwa HH-10-94

S v Santana HH-110-94

S v Chosa HH-117-94

S v Wilson HH-125-94

S v Ndlovu 1994 (1) ZLR 290 (S)

S v Murtagh S-100-94

S v Sabawo HH-189-94

S v Kunesu & Ors 1993 (2) ZLR 253 (H)

Judgment

Bartlett J: The accused was convicted of theft and sentenced to 12 months' imprisonment with labour, of which 6 months' imprisonment with labour was conditionally suspended.

BARTLETT J

The facts of the matter are unusual in that the complainant's vehicle had broken down and the complainant had asked the accused to help him push the vehicle. The accused had done this. The vehicle obviously would not start and the complainant instructed the accused to guard the vehicle while he went to a nearby shopping centre to collect fuel. While the complainant was away the accused stole a radio valued at $400. There is no suggestion that he forced open the car in order to remove the radio.

The accused's blame worthiness is high, but he had been introduced into the picture by the complainant and had initially assisted the complainant and was placed in a position of temptation when left in the custody of the car while the complainant went away. The radio has also been recovered.

The accused is a young first offender, aged 18 years. To my mind, it would have been appropriate to have imposed a sentence which gave him the opportunity to keep out of prison. Magistrates are again reminded that prison is a rigorous sentence which should always be the last alternative, as opposed to the first alternative. The most recent reference to this basic principle (a principle which regrettably is often more noted in the breach than the observance) are the observations of ZIYAMBI J, with which CHIDYAUSIKU J concurred in *S v Kashiri* HH-174-94 at p 4 of the cyclostyled judgment.

A further factor is that it is also an important basic principle to keep young first offenders out of prison whenever possible. This approach has long been fundamental to the assessment of sentence in Zimbabwean courts. See, for example, the words of QUÈNET JP in *R v Murechera* A-151-68 at pp 1-2, where over a quarter of a century ago and also referring to an 18-year-old,

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the learned JUDGE PRESIDENT observed:

> "I am in complete agreement with his counsel that if it is possible one should not impose a prison sentence upon a young man, the reason being that the hope of reformation is strong in the case of young people who have not previously been convicted, and it is undesirable they should find themselves in the company of recidivists ... it is the policy of the criminal law to keep persons as young as the appellant out of gaol if that is at all possible. It is a policy which the courts administering criminal justice endeavour to implement in every proper case."

The wisdom of those words has echoed down the years, the most recent affirmation of them being by MTAMBANENGWE J in *S v Kunaka* HH-159-94 at p 3 of the cyclostyled judgment. See also the observations of MANYARARA

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AJ in *S v Dube* HB-79-94 at p 2 in regard to the immaturity of 18- and 19-year-old offenders.

To my mind, this would have been an appropriate matter for the magistrate to have considered the imposition of community service. There is nothing in the magistrate's reasons for sentence to indicate that the option of community service was considered. It would seem that the magistrate saw the case as one of theft from a motor vehicle and thereby automatically involving an effective term of imprisonment. While the magistrate would ordinarily be correct in the view that theft from a motor vehicle often involves the imposition of effective prison sentences, it is important to remember that each case depends on its particular facts, and the facts of this case to my mind clearly warranted a different approach.

It is particularly important that magistrates give active consideration to the new concept of community service. The whole object of community service is to enable the community to benefit by non-serious offenders (those who would otherwise have been sentenced to 12 months' imprisonment with labour or less) being given the opportunity to keep out of prison by doing useful work for the benefit of the community. This is one of the most important reforms to Zimbabwe's criminal sentencing system over the past several decades - see *S v Tigere* HH-225-93. It is accordingly of substantial importance that this new sentencing option is successfully implemented.

In a series of review judgments handed down last year, I indicated the importance of magistrates carefully selecting appropriate offenders to send on community service. I emphasised that, out of the large number of offenders appearing before them who would fall into the category of being otherwise sentenced to 12 months' imprisonment with labour or less, magistrates should carefully select those appropriate for community service. I pointed out that it would do the image of community service no good if inappropriate offenders were selected - those who did not attend community service requiring warrants of arrest to be issued, or who committed further offences while undertaking community service. I accordingly suggested that magistrates should err on the side of caution in imposing community service and endeavoured to suggest the criteria they should consider in deciding whether to impose community of service. See *S v Tigere supra*; *S v Nyamadzawo* HH-13-94; *S v Mumvuri* HH-106-94; *S v Chikomo* HH-107-94; *S v Nyamukapa* HH-108-94; *S v Tiriboyi* HH-166-94. See also the judgments of CHATIKOBO J in *S v Chitima* HH-157-94 and *S v Bandera* HH-170-94 and SMITH J in *S v*

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Msindu & Anor HH-207-94. See also the judgment

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of ZIYAMBI J, with which GARWE J concurred, in *S v Dullabh* 1994 (2) ZLR 129 (H).

I also endeavoured to indicated factual situations where community service sentences were clearly appropriate. See *S v Musiyiwa* HH-10-94; *S v Santana* HH-110-94; *S v Chosa* HH-117-94 and *S v Wilson* HH-125-94. See also *S v Ndlovu* 1994 (1) ZLR 290 (S); *S v Murtagh* S-100-94 and *S v Sabawo* HH-189-94 as to the appropriateness of community service sentences. See also *S v Kunesu & Ors* 1993 (2) ZLR 253 (H) at 257B-D.

Guidance has also been provided in regard to the number of hours of community service which it is appropriate to order. A guideline approved by the Chief Justice and all the judges of the High Court specifying the number of hours of community service ordinarily appropriate against the length of the suspended period of imprisonment was circularised to all magistrates at the end of 1993. The suggested maximum period of community service in that guideline is 360 hours. It is, perhaps, interesting to observe that the maximum period of community service allowable in the United Kingdom is 240 hours. In regard to the operation of the guideline, see *S v Musiyiwa supra*; *S v Nyamadzawo supra* and, in particular, the observations of CHATIKOBO J in *S v Sabawo supra*.

There have, however, been a number of very positive developments over the last six months to facilitate the effective imposition of a community service sentencing system. Arrangements by the National Committee on Community Service, with the co-operation of the Ministry of Social Welfare, have made available a limited number of probation officers at main centres around the country to assist magistrates in the provision of pre-sentencing reports, if required. This will assist magistrates in deciding whether an accused person is an appropriate candidate for community service. There is such a probation officer available to the Mutare Provincial Magistrates Court, where the accused in this case was convicted.

But of particular significance is the fact that the National Committee on Community Service, working in close conjunction with Penal Reform International, and through the considerable generosity of the European Union, has been able to appoint a National Co-Ordinator for Community Service and 12 regional assistants based at main centres throughout the country. The office of the National Co-Ordinator and the regional assistants coming under his control enable a reasonably effective control system to be implemented in regard to the imposition of community service. For example,

BARTLETT J

in the Mutare area, which is the relevant area to this matter, there is a regional assistant based. The trial magistrate could have obtained the assistance of the regional assistant or the probation officer delegated by the Department of Social Welfare to assist him to decide whether the accused in this matter was an appropriate person for community service. It is, to my mind,

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unfortunate that the magistrate did not decide to take advantage of either of these options.

While community service sentences will still need to be approached with caution in order to ensure that public confidence in the system is not eroded by inappropriate offenders being sentenced to community service, it is also necessary for magistrates to actively take advantage of the new system wherever possible.

In considering whether to impose community service, it is also important (as I have emphasised in previous review judgments) for magistrates to establish whether the accused has a fixed address and how far his place of residence is from the place where community service is intended to be carried out. If the accused is unemployed, it will, unless he can be placed at an institution within reasonable walking distance from his place of residence, be practically impossible for him to properly carry out community service. The recurrent bus fare for an unemployed person would be crippling. These investigations should appear on the record so that the reviewing court is able to assess whether community service has properly been considered and imposed.

It is important for magistrates to be innovative and, where a person is in employment, to allow community service to be carried out over weekends or after working hours, by arrangement with the institution concerned. Once again, unless the accused is of substantial means, the court should also ensure that the community service is carried out within a reasonable distance of the accused's place of residence, particularly if community service is carried out after hours or over weekends.

It is of particular importance for magistrates at the various centres where regional assistants are based to utilize the regional assistants to ensure that community service is given the proper impetus and put into meaningful effect. Regional assistants will also be able to identify available institutions where community service can be carried out. These regional assistants will be based at courts around the country for the next two years while the funding from the European Union, controlled by the National Committee on Community Service and Penal Reform International, is in place. It is hoped that after that period the Ministry of Justice will be able to take over the

community service supervision function. It would, however, be extremely unfortunate if the period during which regional assistants are available to assist in community service is not properly and fully utilized by magistrates.

If there are problems in the imposition of community service - for example, if offenders do not attend for community service or commit offences at the institutions where they are working - it will now be possible, through the active use of regional assistants, for these problems to be identified and resolved at an early stage. I emphasise that it will be a combination of the magistrate's common sense deriving from experience, together with the utilization of the assistance which can be provided by probation officers and the regional assistants, which will ensure the selection of the correct offenders for the carrying out of community service.

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It is important for magistrates and the community to realise - as is emphasised in all the relevant judgments - that the category of offenders involved in carrying out community service is not offenders who have committed serious offences. The offenders who will be considered for community service are those, I reiterate, who would otherwise have served prison sentences of 12 months or less. The offender accordingly gets the opportunity to keep out of prison, the community benefits by useful work being done for the benefit of schools, clinics, children's homes, etc, and the fiscus benefits by not having to bear the substantial cost of keeping the offender in prison. Since the offenders being kept out of prison would have otherwise served short effective terms of imprisonment, the fact that they are able to avoid the corrupting effect of prison, which often results in them becoming re-offenders, is a further positive factor. It is, of course, important to realise that community service is imposed as a condition for suspending a prison sentence and if the accused does not carry out the community service he is arrested and required to serve the term of imprisonment.

In all the circumstances, it is regrettable that the trial magistrate in this matter did not consider imposing community service. I unfortunately do not consider that it is appropriate to consider community service at this late stage, as the accused has already been in custody for over a month. I am, however, of the view that the sentence imposed is manifestly excessive and that, considered at the proper time, community service might well have been appropriate.

In all the circumstances the sentence imposed is set aside and replaced as follows - 6 months' imprisonment with labour, of which 4 months'

BARTLETT J

imprisonment with labour is suspended for 5 years on condition the accused is not convicted of having committed within that period any offence of which dishonesty is an element and for which he is sentenced to imprisonment without the option of a fine.

Garwe J: agrees.

LINDSAY v LINDSAY (1) 1995 (1) ZLR 171 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Civil appeal

9 & 16 March 1995 Judgment No S-34-95

Flynote

Family law - maintenance - order - enforcement - husband trying to circumvent order to pay maintenance by seeking to surrender his estate as insolvent

Insolvency - sequestration - application for - Insolvency Act [Chapter 303] - s 4(1) - requirement that

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sequestration of debtor's estate be to the advantage of creditors - matrimonial dispute - maintenance order granted against husband - husband seeking to evade order by having estate surrendered as insolvent - former wife the only creditor - sequestration to her detriment

Headnote

In a previous case before the Supreme Court, the respondent had been ordered by the court to pay a large sum of maintenance to his wife from whom he was separated. The court found that, despite protestations to the contrary, he had access to funds or assets to pay this maintenance. Subsequently, the respondent had applied successfully to the High Court for the provisional acceptance of the surrender of his estate as insolvent in terms of s 3(1) of the Insolvency Act, claiming that his estate was insolvent as he did not have sufficient assets to pay the maintenance to his wife that he had been ordered to pay. The wife appealed against the decision of the High Court.

Held, that in granting the application for provisional acceptance of the surrender of his estate, the High Court had gone against the finding of the Supreme Court that the respondent had the funds or assets to pay the maintenance.

Held, further, that the application was not a bona fide one as it was clearly a

GUBBAY CJ

stratagem to avoid paying maintenance and the potential consequences of his refusal to pay.

Held, further, that in deciding whether to grant an application for the provisional acceptance of the voluntary surrender of an estate in terms of s 4(1) of the Insolvency Act, a very important factor that the court will take into account is whether the relief sought will be to the advantage of the creditors. The onus is on the applicant to satisfy the court that this relief would be to the advantage of the creditors. Here, the sole creditor, the wife, maintained that the provisional surrender of the estate would be to her detriment.

Held, therefore, that the appeal must be allowed.

Cases cited:

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

Patrikios v Patrikios 1953 (3) SA 252 (SR)

Kanis v Kanis 1974 (1) RLR 129 (A)

S v Rahman 1974 (1) RLR 159 (A)

Ex p *van den Berg* 1950 (1) SA 815 (W)

Ex p *Marais* 1921 CPD 665

Ex p *Stirling; Lansberg v Stirling* (1922) 43 NLR 466

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Ex p *Armstrong* 1937 CPD 352

Hubert Davies & Co v Purnell: Ex p *Purnell* 1935 SR 100

G S Wernberg for the appellant

A P de Bourbon SC for the respondent

Judgment

Gubbay CJ: On 18 May 1993, the respondent lodged an application under s 3(1) of the Insolvency Act [*Chapter 303*], for the provisional acceptance of the surrender of his estate as insolvent, the grant of an order of provisional sequestration of that estate, and the issue of a rule *nisi* calling upon interested persons to show cause why his estate should not be sequestrated finally.

In his founding affidavit the respondent averred that his estate was insolvent. He was indebted to the appellant, his wife from whom he was separated, in the sum of $88 000, in respect of maintenance *pendente lite,* and a contribution towards costs. This indebtedness was consequent upon the judgment of this court, now reported as *Lindsay v Lindsay* 1993 (1) ZLR 195 (S). His assets, on the other hand, amounted to a mere $5 750. He did not have the money or assets, or access to either, to meet that obligation. He had divested himself of his entire wealth for the purpose of avoiding the payment of estate duty in the event of death. It was stated, further, that it would be in the interests of the

GUBBAY CJ

appellant if an independent trustee were appointed to investigate and scrutinise the respondent's financial affairs in order to ensure that the appellant receive whatever was found available in the estate in reduction of the debt.

The appellant was singularly unimpressed by the *bona fides* of the application and strongly resisted it. She pointed out in her replying affidavit that, in the light of the judgment in *Lindsay v Lindsay supra* it did not lie in the respondent's mouth to deny that he had access to the funds or assets he had divested himself of. She maintained that, in reality, the respondent was challenging the previous finding of this court of his ability to support her, and was seeking to employ the machinery of the Insolvency Act as a device to delay or defeat compliance with the judgment she had obtained against him. She disputed, as well, that it was to her advantage that the surrender be accepted, even provisionally.

In granting the application, the learned judge *a quo* was of the view that the issue of whether the respondent was, as a matter of fact, able to pay maintenance was best dealt with on the return day, at which stage a full investigation of his affairs would have been undertaken and reported upon by the provisional trustee.

It seems to me, with respect, that by adopting the approach he did the learned judge was effectively departing from the specific finding of this court in *Lindsay v Lindsay , supra*,, that the respondent was both able and legally obliged to support the appellant. I need only refer to the

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passage at 202C-D of the report, where it was said:

> "Mindful of the considerable assets that the appellant alleges to have divested himself of, without disclosing, the manner of the divestment, any control by him over such assets divested and any income derived from those assets, one can only infer that he is still a very wealthy man, capable, from his elusive resources, of furnishing his wife with maintenance of $6 000 per month, which is the sum I deem adequate to place the spouses in the position they would have been in had a normal marriage relationship continued between them."

So far as the parties are concerned, the finding of the respondent's ability to support the appellant at the stipulated rate, is *res judicata.* Until the judgment is discharged or varied by order of court the respondent is bound by it. See *Patrikios v Patrikios* 1953 (3) SA 252 (SR) at 256A; *Kanis v Kanis* 1974 (1) RLR 129 (A) at 136A; *S v Rahman* 1974 (1) RLR 159 (A) at 166 *in fine* 167A.

GUBBAY CJ

In the particular circumstances, therefore, the rendering of a *nulla bona* return by the deputy sheriff was of no significance as proof of his avowed penury.

I am in agreement with the appellant that, coming, as it did, within six weeks of the judgment in *Lindsay v Lindsay supra* the application for voluntary surrender was clearly a stratagem by the respondent to avoid this court's determination as to his liability and the potential consequence of failing to comply with the order. It was lacking in *bona fides*.

An analogous situation arose in Ex p *van den Berg* 1950 (1) SA 816 (W). In that case the applicant had made an agreement with his then wife that if she were to bring matrimonial proceedings against him and obtain a decree of divorce, he would maintain her in an amount of £12 per month and pay, as well, £200 towards her costs of the action. The divorce was duly granted with the agreement being made an order of court. Just two months later, the applicant gave notice of an intention to surrender his estate. Notwithstanding that his liabilities exceeded his assets, RAMSBOTTOM J refused to accept the voluntary surrender. He held at p 818 that the only inference he could draw was that the application was intended to relieve its maker of an obligation to maintain his former wife. See also Ex p *Marais* 1921 CPD 665 at 666; Ex p *Stirling; Lansberg v Stirling* (1922) 43 NLR 466 at 468; Mars *The Law of Insolvency* 8 ed at p 56.

There is yet another consideration that persuades me that the learned judge exercised his discretion erroneously.

Section 15 of the Insolvency Act requires the court to be satisfied that, *prima facie,* the sequestration of the debtor's estate will be to the advantage of creditors, before granting a provisional order. The same requirement is not expressed in s 4(1) of the Act in relation to an application for the provisional acceptance of the voluntary surrender of an estate. Nonetheless, since the court is clearly vested with a discretion under that provision to accept or refuse the surrender, a very important factor in its exercise is whether the relief sought would be to the advantage of creditors. The onus of satisfying the court of this rests with the applicant. See Ex p *Armstrong* 1937 CPD 352 at 353.

In casu the appellant was the sole creditor. She disputed that the provisional surrender would

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secure any advantage to her. To the contrary, she stated that at the very least it would delay the enforcement of her rights under the

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judgment. Her attitude was deserving of much weight. See Ex p *Stirling supra* at 468; Ex p *Marais supra* at 666.

Counsel for the respondent urged that the advantage to the appellant lay in the independent trustee appointed by the court *a quo* having to examine the whole issue of the divestment in order to determine to what extent, if at all, he is able to claim monies due to the respondent. And were he to succeed in the recovery of funds, an advantage would be obtained for the appellant which she does not enjoy at the present time.

I am unable to accept this submission. For, in effect, the trustee would be investigating the factual evidence previously considered by this court and upon which it concluded that the respondent has access to funds or assets. See *Hubert Davies & Co v Purnell:* Ex p *Purnell* 1935 SR 100 at 103.

In the result, therefore, I would allow the appeal with costs and alter the order of the court *a quo* to read:

> "The application is refused with costs."

Korsah JA: I agree.

Muchechetere JA: I agree.

V H Fitzpatrick & Co, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

EBRAHIM v PITTMAN NO 1995 (1) ZLR 176 (HC)

Court **High Court, Harare**

Bartlett J

Civil trial

14, 15 & 17 March 1995 Judgment No HH-38-95

Flynote

> Evidence - inferences - circumstantial evidence - court in civil case may balance probabilities and select conclusion which seems most acceptable - not necessary that inference drawn should be the only reasonable

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inference - motor accident - no eye-witnesses - evidence consisting only of marks found at scene and plans

Damages - assessment - pecuniary damage - nature of evidence required to substantiate claim - claim for cost of repairs to vehicle damaged in accident - degree of precision required

Headnote

The plaintiff claimed damages from the estate of the deceased (represented by the defendant as executor) resulting from an accident in which the plaintiff's vehicle, a mechanical horse towing two trailers loaded with 40 tonnes of grain, was involved in a collision with the deceased's car. The deceased was killed in the accident. The plaintiff's claim was under several heads: the cost of repairs to the mechanical horse; the cost of replacing the tri-axle and independent trailers; recovery expenses; and loss of profits caused by the inability of the plaintiff to carry on part of his business due to the unavailability of the vehicle.

There was no oral evidence as to how the accident occurred. The deceased was killed in the accident and the driver of the plaintiff's vehicle died before the trial. The only evidence as to how the accident occurred consisted of the physical debris at the scene and the tyre and skid marks of the vehicles involved. Evidence in regard to these matters was given by the plaintiff and by a policeman, who had drawn up a plan based on his observations at the scene and on indications made to him by the driver

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of the plaintiff's vehicle. A tachograph recording was produced which showed that the plaintiff's vehicle was travelling at about 70 km/h just before the accident.

On the question of damages, the plaintiff had the vehicle and trailers repaired at his own workshops, though he had obtained quotes from two panel beaters. No job cards or other documentary evidence were produced and the plaintiff's oral evidence was vague as to the cost to him of carrying out the repairs. Although the plaintiff claimed that the trailers were no longer able to carry the weights they could before, certificates of fitness had subsequently been obtained. The defendant called an insurance assessor, who gave his opinion as to the diminution in value of the plaintiff's vehicle and trailers as a result of the accident. On the question of loss of profit, the parties reached a compromise agreement.

Held, on the question of how the accident occurred, that in a civil case, where the court seeks to draw inferences from the facts, it may, by balancing probabilities, select a conclusion which seems to be the more natural or plausible (in the sense of credible) conclusion from among several conceivable ones, even though that conclusion is not the only reasonable one. In this case, the physical evidence indicated that the accident was not caused by any fault on the part of the plaintiff's driver. He had been travelling on his correct side of the road at a reasonable speed. The possibility existed that some outside factor, such as a bursting tyre, had caused the plaintiff's vehicle to swerve onto its incorrect side of the road, but there was no objective evidence to support it. Consequently, on a balance of probabilities, it was shown that the accident was caused by the deceased's vehicle straying into the path of the plaintiff's and was

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thus 100% caused by the negligence of the deceased.

Held, further, that where damages are claimed, the plaintiff must lead adequate evidence to enable the court to quantify his damages. Where the damages can be assessed exactly, the plaintiff is expected to lead enough evidence. Where he cannot produce such evidence, there must be at least enough evidence for the court, even with difficulty, to make a fair approximation of the plaintiff's mathematically unquantifiable loss. If such evidence is not produced, the defendant is entitled to absolution. The plaintiff's evidence in this case was vague and unsubstantiated by documentary evidence. The evidence of the insurance assessor called by the defendant accordingly would be accepted.

Cases cited:

Maritime & General Ins Co Ltd v Sky Unit Eng (Pty) Ltd 1989 (1) SA 867 (T)

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Ocean Accident & Guarantee Corp Ltd v Koch 1963 (4) SA 147 (A)

AA Onderlinge Assuransie-Assosiasie Bpk v de Beer 1982 (2) SA 603 (A)

Govan v Skidmore 1952 (1) SA 732 (N)

Aaron's Whale Rock Trust v Murray & Roberts Ltd & Anor 1992 (1) SA 652 (C)

Malamba & Anor v Matambanadzo S-3-94

Heath v Le Grange 1974 (2) SA 262 (C)

M J Gillespie for the plaintiff

D P Carter for the defendant

Judgment

Bartlett J: In this matter the plaintiff claims $288 608,94 in respect of damages resulting from an accident in which a vehicle owned by the plaintiff was involved. The first defendant in this matter was originally Shield of Zimbabwe Insurance Co Ltd, but the action was withdrawn against the first defendant and the plaintiff proceeded against the second defendant, William Adrian Pittman, in his capacity as the executor testamentary of the estate of the late R H A Potterton.

The subject of this case is the accident in which the late R H A Potterton met his death. The matter concerns an accident on the Mvurwi/Mazowe Road between a mechanical horse owned by the plaintiff pulling two trailers and carrying a 40-tonne load of grain from the Grain Marketing Board, and a vehicle driven by the deceased Mr Potterton.

The basis of the plaintiff's claims are for damages relating to the repairs to the mechanical horse and the cost of replacing the triaxle and independent trailers and recovery damages relating to

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the accident. There is also a claim for loss of profit resulting from the accident. The basis of the loss of profits claim is that the horse and trailers were so severely damaged that the plaintiff was unable to service the route in question in terms of his Grain Marketing Board contract and accordingly suffered a loss of profit.

The evidential basis of this matter is unusual in that there is no *viva voce* evidence by any witnesses as regards how the collision between the vehicles occurred. The driver of one vehicle was, as I have indicated, killed in the accident. The driver of the other vehicle, the plaintiff's driver, survived but died about a year after the accident. There were no other eye-witnesses to the accident. Accordingly, the only evidence as to how the collision occurred is the physical evidence of the debris at the scene and the tyre and skid marks of the vehicles involved.

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THE PLAINTIFF'S EVIDENCE

The evidence led by the plaintiff consisted of the evidence of Mr Basheer Ebrahim, the proprietor of the plaintiff organisation, and of the policeman who attended the scene the day after the accident. There was also a bundle of documents handed in by agreement between the respective counsel which contained various documents relating to the accident and the consequences thereof.

Mr Ebrahim produced a plan which he had made after his visit to the scene of the accident the morning after the accident occurred. This plan recorded brake marks or tyre marks caused by the plaintiff's mechanical horse and trailer which were well on the left side of the road - that is, well on the plaintiff's vehicle's correct side of the road.

Mr Ebrahim also observed gouge marks in the road which he was of the view were caused by the impact between the vehicles. These gouge marks he observed also on the horse's correct side of the road. There are, then, tyre marks as the horse and trailer swerved after impact and went through a ditch and ended up in farm land. The vehicle of the late Mr Potterton was observed on the other side of the road also off the road. It is not clear from the evidence where that vehicle ended up after the impact. That is, it is not clear whether it was moved off the road by police officers to avoid it blocking the road or whether it ended up off the road as a result of the collision.

The evidence of Mr Ebrahim suggested that the mechanical horse had suffered a tyre burst as a result of the impact which resulted in it losing control. Also part of Mr Ebrahim's evidence and of some relevance is the fact that the horse in question had a tachometer attached to it. This is an instrument which records the passage of travel of the vehicle in question; it records the time the vehicle is in motion, records the speed of the vehicle and is able to record anything abnormal in regard to the vehicle's journey. The findings of the tachometer are recorded on a graph and the graph was interpreted by Mr Ebrahim. A document was also produced from the TA Tachograph Centre which interpreted the graph produced. This indicated that the mechanical horse had been travelling at a speed of some 70 km/h immediately prior to the collision. It also recorded

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that it had travelled at an average speed of between 50 and 60 km/h prior to the collision. That is, it had travelled 11 km in the 14 minutes it had been in motion prior to the collision.

It was Mr Epigrams view from his examination of the scene that the collision

had clearly occurred on his mechanical horse and trailer's correct side of the road. That is, the collision had been caused by the deceased, Mr Poltroons vehicle, apparently straying onto its incorrect side of the road, and colliding with the juggernaut which was the horse and trailers with their 40-tonne load.

Mr Ebrahim also produced various documents relating to the damages and cost of repairs incurred in respect of the horse and trailers. He also produced documents in relation to the loss of profit he suffered as a result of the accident. I do not propose to summarise that evidence as this stage, but will deal with it in making findings on those aspects.

The other important document in the bundle of documents was the police plan which was produced through the evidence of the police officer who had attended the scene. The police plan, which is at p 4 in the bundle of documents, also records the brake marks or skid marks of the horse and trailers in a straight line well on the plaintiff's vehicle correct side of the road. It records the vehicle swerving off across the road apparently after impact. The police officer recorded the point of impact as marked "E" on his plan, also on the late Mr Potterton's incorrect side of the road. The police officer, who was a constable at the time but is now an assistant inspector, stated that he arrived at the point of impact from the indications of the driver of the horse and trailers and from his observations at the scene. The police plan records gouge marks going from the centre line onto the late Mr Potterton's correct side of the road and shows accident debris in the form of "X" marks. The evidence of the police officer ws that he was of the view that the impact was on the deceased's incorrect side of the road, as I have stated, from the indications made by the driver and from his own observations.

Under cross-examination, the police officer indicated that the driver of the horse had told him that the deceased's vehicle had strayed onto its incorrect side of the road and kept on driving towards the horse and trailers. The driver of the horse had accordingly braked to slow down, but the collision nevertheless occurred and resulted in the right tyre of the horse bursting, causing the horse to lose control and veer across the road. That hearsay evidence was elicited under cross-examination and is to my mind *prima facie* admissible in terms of the Civil Evidence Act. I should also note that the tachograph indicated the horse and trailer slowing down from 70 to 60 km/h just prior to impact.

THE DEFENDANT'S CASE

The defendant called just one witness, a Mr Cundy, an insurance assessor,

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who had prepared a report in respect of the damage suffered by the horse and trailers. His evidence will also be analysed in relation to those aspects at a later stage in this judgment.

THE CAUSE OF THE ACCIDENT

The first issue which needs to be decided is the issue of liability and obviously, if that is not found in favour of the plaintiff, then that is the end of the matter. There is no question of contributory negligence having been pleaded. It is the plaintiff's contention that the accident was solely the result of the negligence of the late Mr Potterton.

The matter is, of course, a difficult one and an unusual one. It needs to be assessed on the physical evidence and the observations made by third parties at the scene of the accident, together with some assistance from the evidence in relation to the tachograph and the hearsay evidence of the driver of the horse.

I turn now to make the assessment of the evidence before the court. It is difficult in assessing such matters where there is no *viva voce* evidence. There are, however, several critical factors which I think are of particular relevance in assessing the cause of the accident in this matter.

The first of those is, to my mind, the brake marks or skid marks of the plaintiff's vehicle as observed by Mr Ebrahim and the police officer from the two plans. These brake or skid marks prior to the apparent impact are clearly in a precise straight line well on the plaintiff's vehicle's correct side of the road. No precise measurement of their distance from the left-hand side of the road was made but the plans quite clearly indicate that they were well on the left-hand side. The left-hand side of the road is 3,4 metres wide and the width of the plaintiff's vehicle was 2,4 metres.

A further factor is the tachograph evidence from the recordings from the tachometer, which were not in any way challenged on behalf of the defendant, indicated that the travel of the horse immediately prior to the collision was entirely unexceptional - that is, it appeared to be travelling at a speed which would be an entirely reasonable speed in the circumstances.

The next factor is that the objective evidence from both plans indicates immediately after the skid marks for 20 metres, there was a major impact with accident debris on the road, the slewing of the horse and trailers across onto

the incorrect side of the road, and then back across a ditch into the bush. A complicating factor, however, is that there was, as pointed out by Mr *Carter,* a difference between the two plans as to the position of gouge marks on the road. The plan made by Mr Ebrahim indicates two gouge marks on the plaintiff's vehicle's correct side of the road- one just across the centre line and one further on. The police plan indicates a single gouge mark starting from the centre lime and moving onto the deceased's, Mr Potterton's, correct side of the road.

Mr *Gillespie,* for the plaintiff, argued that there was no difference of any consequence between

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the two plans. My view is that, looking at the two plans, there clearly is the difference to which I have referred. I do not, however, consider that the evidence as to the gouge marks is of any particular assistance in assessing the matter. It is, to my mind, a matter of conjecture and speculation as to precisely how the gouge marks may have occurred. It would have depended upon the exact nature of the impact and the effect of that impact on both vehicles: for example, whether the passenger vehicle had been thrown up by the impact and landed causing the gouge marks, or whether the gouge marks had been caused by the passenger vehicle being pushed into the tarmac at the impact, or by the horse's tyre bursting. It is, to my mind, speculative to try and assess exactly how the gouge marks might have occurred. I do not think that it can be stated with any precision that the gouge marks precisely indicated the pint of impact.

Where the two plans differ, my view is that it is appropriate to rely on the plan put forward by the police officer, who was entirely independent. His plan is a more detailed plan involving more measurements. Mr Ebrahim's plan is a less detailed plan. Mr Ebrahim, of course, is also a party with an interest in the matter, whereas the police officer was simply recording the scene of the accident without having an interest in the matter one way or the other. I would, however, emphasise that although there are the differences in the two plans relating to the gouge marks, I do not consider that the gouge marks are of particular significance in making a finding on the matter.

The aspects which are, to my mind, significant are the skid marks as observed on both plans, together with the evidence of the passage of the mechanical horse as revealed by the tachograph.

The significance of the skid marks are that they indicate the plaintiff's vehicle was well on its correct side of the road and the tachograph indicates that it was travelling at a safe speed in the seconds before the collision. It must also be

borne in mind that the plaintiff's vehicle was, as described in evidence, a juggernaut hauling a 40-tonne load. It was not the sort of vehicle which could quickly or easily change direction - and the physical evidence on the road indicates that it was travelling at a reasonable speed in a straight line well on its correct side of the road immediately prior to the collision. There are then the skid marks ending, the indication of the trauma of the impact, and the vehicle slewing across the road. To my mind, that physical evidence clearly indicates that the plaintiff's vehicle had been travelling properly on its correct side of the road at a safe speed when it braked just prior to the collision. It is, to my mind, most unlikely that it would have veered onto its in correct side of the road - and indeed the straight skid marks prior to the impact quite clearly indicate that it did not. The very size of the vehicle would make such movement very substantially unlikely. Accordingly, the physical evidence, as I have described it, indicates an accident which was not caused by any fault on the part of the plaintiff's vehicle. When one looks at that against the admittedly hearsay, untested, observations of the driver they do, nevertheless, provide support for that conclusion. The driver had said to the policeman that the deceased's vehicle came onto its incorrect side of the road and continued to do so, that he braked, that a collision

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then occurred, and that he then veered across the road as his tyre burst. The hard evidence on the road substantially supports those hearsay observations as made by the now deceased driver of the plaintiff's vehicle.

I am, however, satisfied that the physical indications on the road clearly indicate that there was no fault on the part of the plaintiff's vehicle, even without considering the observations made by the driver.

I need to consider whether there are any other conclusions which could be drawn from the physical evidence. For example, could there have been some interference which caused the deceased's vehicle to go onto the incorrect side of the road; or could the plaintiff's vehicle tyre have burst, causing the driver to brake and then swerve onto the incorrect side of the road? There is nothing in the physical observations of the scene as made by the police officer or by Mr Ebrahim which would seem to indicate such occurrences. Indeed it was not suggested under cross-examination to Mr Ebrahim or the police officer that there was any suggestion of a tyre having burst prior to impact. And the question of there having been some outside factor interfering in the travel of the deceased's vehicle was put only vaguely.

That latter occurrence is one which is a possibility but on which there is no objective evidence. It is not referred to by the driver in his comments to the

police officer although, of course, the driver would have had his own interests to protect. My view is that the scene of the accident as I have described it, in particular the passage of the plaintiff's vehicle as recorded in the tachograph, and the skid marks immediately prior to the impact, indicate that the plaintiff's vehicle was travelling quite normally on its correct side of the road. Accordingly it seems to me, that, on the probabilities, the collision must have been caused by the deceased's vehicle straying into the path of the juggernaut.

I need, however, to look at the law as to how evidence in these matters should be assessed. As I have indicated, the situation is an unusual one in that the evidence that is being relied on is circumstantial and there is no direct *viva voce* evidence of the cause of the accident.

THE LEGAL APPROACH IN ASSESSING CIRCUMSTANTIAL EVIDENCE

The approach which should be adopted by a court in matters of this nature is clearly laid down in a number of authorities referred to by plaintiff's counsel, Mr *Gillespie,* and I shall refer to those authorities in some detail. The first of these is the case of *Maritime & General Ins Co Ltd v Sky Unit Eng (Pvt) Ltd* 1989 (1) SA 867 (T). This was a decision of the full bench of the Transvaal Provincial Division and at 887B-I the following is stated:

> "Since our treatment of the circumstantial evidence in this case involves the sort of reasoning which was discussed in *R v Blom* 1939 AD 158 at 202 and 203, it is appropriate to say a few words on the approach to be adopted. We need do little more than to quote what was said by SELKE J in *Govan v Skidmore* 1952 (1) SA 732 at 733H to 734B:
>
> > 'I ought perhaps to mention now a submission made by Mr *Harcourt in the course of his argument, to the*

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effect that the principles, enunciated in R v Blom 1939 AD 158 at 203, govern the making of inferences in every case, whether criminal or civil. Mr *Harcourt* no fault with the learned judge's appro relied particularly here on the second principle, namely that "the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn", and he invited me to apply this principle generally in the making of all inferences in the present case, and submitted that, on that footing, the court could not find that the plaintiff had proved the case of fraudulent misrepresentation which he set out to make. Now it is trite law that, in general, in finding facts and making inferences in a civil case, the court may go upon a mere

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preponderance of probability, even although its so doing does not exclude every reasonable doubt. In a criminal case, however, as I understand it, every act material to establish the guilt of the accused must, unless it is admitted, be established by proof beyond reasonable doubt, and inferences from facts must, in order to be permissible, be such as to leave no reasonable doubt of their propriety and correctness. That is a difference between the proof requisite in civil and criminal proceedings. *R v Blom supra* was a criminal case, and, in my opinion, it is a fallacy to suppose that the second principle in *Blom*'s case represents the minimum degree of proof required in a civil case, for, in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on *Evidence* 3 ed para 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one'."

It was then pointed out that this approach was approved by HOLMES JA in *Ocean Accident & Guarantee Corp Ltd v Koch* 1963 (4) SA 147 (A) at 159C D and by VILJOEN JA in *AA Onderlinge Assuransie - Assosiasie Bpk v de Beer* 1982 (2) SA 603 (A) at 614G-615B.

It was also pointed out that, in the *Ocean Accident* case *supra*, HOLMES JA commented as follows on the use of the word "plausible" by SELKE J in the *Govan* case *supra* by stating:

"I need hardly add that 'plausible' is not here used in its bad sense of 'specious', but in the connotation which is conveyed by words such as acceptable, credible, suitable (*Oxford Dictionary and Webster's International Dictionary*)."

I should also point out that in another case referred to by Mr *Gillespie, AA Onderlinge Assuransie-Associasie Bpk v de Beer supra* which is referred to in the quotation I have already made, it was again emphasised that it is not necessary for a plaintiff invoking circumstantial evidence in a civil case to prove the inference which he asked the court to make as the only reasonable inference. He will discharge the onus which rests on him when he has convinced the court that inference he advocates is the most readily apparent and acceptable inference from a number of possible inferences.

I am quite satisfied that the physical evidence in this case to which I have referred, the skid marks, the tachograph evidence, the evidence of the impact,

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and the conclusions I have drawn therefrom, are to my mind clearly the more natural, plausible conclusion - and the other conceivable ones to which I have referred are to my mind clearly not the more natural or plausible conclusions. In fact, it seems to me quite clear on the probabilities

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that the inference that the plaintiff's vehicle was travelling well on its correct side of the road before braking immediately prior to the collision is inescapable. Accordingly, I am satisfied that applying the approach laid down in the authorities to which I have referred, that it has been quite clearly established by the plaintiff on a balance of probabilities, that the collision must have occurred by the deceased's vehicle straying onto its incorrect side of the road. In those circumstances, I am satisfied that plaintiff is correct that the accident would have been entirely the fault of the deceased's vehicle. There is very little that a horse hauling two fully loaded trailers carrying 40 tonnes of maize can do if it is travelling at a safe speed properly on its correct side of the road when another vehicle decides to stray into its path.

A further factor I should make reference to is the evidence of the police officer as to the point of impact. There is a reference made in *AA Onderlinge Assuransie-Assosiasie Bpk v de Beer supra* as regards the approach a court should adopt in assessing the evidence of a police officer in matters like this. It is stated in the headnote that in collision cases the bare opinion of an experienced policeman as to the point of collision is usually allowed in our courts as *prima facie* proof which naturally becomes conclusive proof if it is not challenged. If the point of collision is placed in issue, however, the police officer, who is really but a layman in this field, is obliged to the best of his ability to explain why he fixed the point of collision there. Usually it also appears to be more correct to refer to an area of collision and not a point of collision and then only approximately because it is difficult to determine which part of one vehicle has made contact with which part of the other vehicle.

These latter comments substantiate the observations I made about the difficulty of stating that the gouge marks were precisely the point of impact. To my mind, the policeman indicated that the point of impact was as indicated by the driver and also from his overall observations at the scene. My view is that his evidence on that aspect can be regarded as generally reliable and acceptable and it clearly would seem to be in accord with the probabilities of the matter.

I am, accordingly, satisfied that the plaintiff has established on a balance of probabilities that the collision was 100% caused by the negligence of the late

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Mr Potterton. I must accordingly now, having made that finding, proceed to assess the question of the damages as claimed by the plaintiff.

APPROACH IN ASSESSING DAMAGES

In regard to the approach to assessing damages I have been referred to a number of authorities by Mr *Carter* and Mr *Gillespie.* Mr *Gillespie* referred to the matter of *Aaron's Whale Rock Trust v Murray & Roberts Ltd & Anor* 1992 (1) SA 652 (C) where BERMAN J stated at 655H-656F:

> "Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the court to quantify his damages to make an appropriate award in his favour. The court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the court enough evidence from which it can, albeit with

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difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss. That this is so appears from the well-known passage from the judge of STRATFORD J in *Hersman v Shapiro & Co* 1926 TPD at 367 to 379, quoted with approval by DIEMONT JA in *Esson Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 970E, viz:

> 'Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the court must use it and arrive at a conclusion based upon it.'

There must of course be sufficient evidence before the court for it to be in a position to make a proper assessment of damages, for

> '... it is not competent for a court to embark upon conjecture in

> assessing damages where there is no factual basis in evidence, or an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could have been made':

per ROSE INNES AJ in *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 118E. See also *Mkwananzi v van der Merwe & Anor* 1970 (1) SA 609 (A) at 630.

Thus where evidence is available to a plaintiff to place before the court to assist it in quantifying damages, and this is not produced, so that it is impossible for the court to do so, or there is no, or quite insufficient, evidence which can be produced by an unfortunate plaintiff, he must fail and the defendant must be absolved from the instance. See *Odendaalsrust Gold General Invtms & Extensions Ltd v Naude NO* 1958 (1) SA 381 (T) at 384E-F; see also *Enslin v Meyer* 1960 (4) SA 520 (T) at 523-4; *Lazarus v Rand Steam Laundries* (1946) (Pty) Ltd 1952 (3) SA 49 (T) at 51."

Mr *Carter,* for his part, referred to *Malamba & Anor v Matambanadzo* S-3-94 where GUBBAY CJ stated at p 2-3 of the cyclostyled judgment that -

> "The defendant deposed that he had expended $5 000 upon repairs for the differential, $2 800 on the gearbox, $560 on the ejector pump, and $700 on the half-shafts. No confirming invoices were tendered in support of these amounts. Nor did the defendant call someone who was qualified as an expert in the trade to testify that the cost of repairing these four items was reasonable at that time. It was essential to do so."

See also *Heath v Le Grange* 1974 (2) SA 262 (C) at 263B-264B.

I propose to apply the law as laid down in these various authorities in assessing damages in respect of this matter.

PLAINTIFF'S EVIDENCE AS TO DAMAGES

It is necessary at this stage to summarise the evidence of Mr Ebrahim as to the damages suffered. I deal first of all with the damage to the horse and trailers. The effect of Mr Ebrahim's evidence was that the horse had in fact been repaired by his organisation in its own workshop,

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as Tecs Haulage had a workshop able to carry out major repairs. He estimated that the cost of repairing the horse had been at least $79 500, but was unable to produce any job cards relating to labour or relating to the cost of

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repairing the horse had been at least $ 79 500, but was unable to produce any job cards relating to labour or relating to the cost of spare parts. He indicated that it had not been his firm's practice to do that at the time because it was not then a limited company. Why not being a limited company should allow such laxity is difficult to understand.

The nub of the matter, however, is that there is only Mr Ebrahim's say so as to the costs incurred in actually repairing the horse. It should have been a simple matter to have produced job cards relating to labour and relating to spare parts and work done. The organisation which Mr Ebrahim was running was a very substantial organisation involving, as he said in his evidence, some 40 vehicles. Mr Ebrahim also described himself as a very experienced diesel mechanic. It is very surprising that no documentary evidence of the actual repairs was produced. This is particularly so since the matter was referred to Mr Ebrahim's lawyers at an early stage. The summons was issued as early as 6 months after the collision - when repairs had just been completed in respect of the horse and were still being undergone in respect of the trailers. It is accordingly surprising that Mr Ebrahim was apparently not advised by his legal practitioners, at the time they issued summons, that it would be necessary to have clearly established documentary proof of the repairs done and being done to the vehicles.

In order to strengthen his case, Mr Ebrahim produced two quotes from panel beaters which were included as part of the bundle of documents produced. There were documents from Leyland, who were the suppliers of the horse, and from Pro Panel Beaters. The Leyland quote was in excess of $90 000 and the Pro Panel Beaters quote in excess of $81 000. The effect of Mr Ebrahim's evidence was that he was in fact claiming less than the persons he could have sent the vehicle to, to have it repaired - and that in fact those quotes related only to visible damage. Mr Ebrahim indicated there was substantial and serious damage apart from the visible damage. He referred in particular to the damage to the cab and to the chassis. Accordingly, it was his evidence that once the panel beaters got going they too would have found extra work needed to be done. But once again all of this was *viva voce* evidence from Mr Ebrahim without the support of job cards and without the support of independent experts who might have examined the horse at the time it was being repaired.

Mr Ebrahim endeavoured under re-examination to list the time taken in repairing the vehicle. But here again his evidence was vague. He listed work done by a total of four persons - a journeyman, an assistant mechanic, a

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panel beater and an assistant panel beater - over 12 weeks at a specified rate per hour. But he indicated that in fact the work would have taken much longer than that and he was just claiming

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for 12 weeks of work. This, of course, is again speculation and conjecture.

I am quite satisfied that the authorities referred to by Mr *Gillespie* and Mr *Carter* indicate the need for a greater degree of precision in regard to the calculation of damages. Accordingly I do not propose to accept or rely on Mr Ebrahim's evidence as regards the cost of repairing the horse. I rather propose to accept, as Mr *Carter* suggested I should accept, the evidence of his witness Mr Cundy. This evidence related to an assessment as to the dimunition in value of the horse as involving an amount of $60 000.

I would add that there was a third assessment in the form of a quote from Val's Panel Beaters - which was obtained through the insurance assessors. This was for a much lower amount of $43 000. It was heavily attacked by Mr *Gillespie* through Mr Ebrahim. It is perhaps unfortunate that none of the panel beaters were called to support or defend their particular quotations. The quotations as put forward by Leyland and Pro Panel Beaters were not subjected to any attack in cross-examination by Mr *Carter.* Mr *Gillespie* spent a considerable time with Mr Ebrahim attacking the Val's Panel Beaters quotation.

However, I am satisfied that I should do what Mr *Carter* asked and, in assessing liability for damages in regard to the horse, rely on Mr Cundy's evidence. This effectively establishes that there was a diminution of value of $60 000. That is an amount which is substantially less than the two quotations put forward by the plaintiff, substantially less than Mr Ebrahim own estimate, but somewhat more than the Val's Panel Beaters estimate. In matters of this nature, as indicated in the authorites, there is always some degree of speculation and uncertainty. It seems to me that it is quite appropriate that I rely on Mr *Carter*'s submission in this regard and accept Mr Cundy's evidence.

I also propose to do this in regard to the trailers. The evidence on the trailers is as vague and unconvincing as it was for the horse. The effect of Mr Ebrahim's evidence in regard to the trailers was that he obtained quotations for repairs but that he repaired the trailers himself. Once again there were no work cards and no job sheets in relation to the trailers - although the repairs of at least one of the trailers were completed a number of months after summons had been issued. It is surprising, as I have indicated, that having

taken legal advice Mr Ebrahim did not carefully tabulate the damages that he was going to claim.

Mr Ebrahim's evidence confuses the matter further in that he says that, although repaired, the trailers were nevertheless not properly serviceable. They could only be used for low-weight trips around Harare. That is contradicted by the evidence of the panel beaters' estimates, which indicated that the vehicles could be repaired and there was no indication in their estimates that the vehicles would be less than roadworthy when repaired. Certificates of fitness were also obtained in respect of the trailers so that they were apparently roadworthy when repaired. Once again, I am satisfied that it is appropriate, as I have indicated, to accept the evidence of Mr Cundy, as Mr *Carter* suggested, in regard to the damages suffered in regard to the trailers. This

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is a diminution of $20 000 in respect of the semi-trailer and $10 000 in respect of the independent trailer.

AMOUNT OF DAMAGES FOR HORSE AND TRAILERS

Accordingly, I am satisfied that it is appropriate in respect of the damages to the mechanical horse and trailers to accept Mr *Gillespie*'s second alternative submission and Mr *Carter*'s main submission. The amount of damages established under this head is therefore a total of $90 000. The recovery costs of $4 594,38 are admitted.

DAMAGES FOR LOSS OF PROFIT

I must now turn to the assessment of damages in respect of the loss of profit. Here the evidence of Mr Ebrahim was that he had a very lucrative grain transport contract which was effectively upended when his horse and trailer were upended on the Mvurwi/Mazowe Road. It was Mr Ebrahim's evidence that he suffered at least 12 weeks' loss of profit, in that he was unable to secure a replacement vehicle and that the rest of his 40 vehicle fleet was fully committed. Mr Ebrahim accordingly claimed an amount of just in excess of $108 000 for his loss of profits over the 12 weeks on that single route - which is one of four routes on which he was carrying out a Grain Marketing Board contract (which contract was part of the bundle of documents produced).

Mr Ebrahim was subjected to substantial cross-examination in regard to the loss of profits claimed. It was suggested by Mr *Carter* that he should have diverted a vehicle from one of the less profitable Grain Marketing Board contract routes. Mr *Gillespie* countered saying that it was not reasonable to expect mitigation of damages on this basis - and that at any rate there would

be no significant alteration, in that more journeys would be done on the shorter less profitable routes.

On this aspect, however, there was ultimately a compromise to which I will refer shortly. I would, however, note that the question of the quantum of damages was dealt with in argument by Mr *Carter* and his suggestion was that the appropriate quantum of loss of profit if liability was found would be an amount of 50% of that claimed. Accordingly, I would point out that the plaintiff's evidence as to his inability to use any other vehicles on the route concerned and inability to hire any vehicles was not put in issue. I would observe that I was somewhat surprised that parts of Mr Ebrahim's evidence in that regard were not contested. I can easily understand the difficulty of obtaining replacement vehicles in 1989. It is, however, perhaps surprising that Mr Ebrahim's bald contention that all the other 39 vehicles were in full time use and unable to be diverted to this route was not put in issue. It was, however, not put in issue and because of that and because of the suggestion by Mr *Carter* quite clearly there must be an award for loss of profits. As I have indicated, counsel at the end produced a document to which Mr *Carter* appended his agreement relating to the appropriate amount to be awarded in respect of loss of profit. This is a compromise calculation based on three loads and amounts to $75 651,84, as opposed to the

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amount claimed in excess of $108 000.

It seems to me that that compromise reached on agreement by counsel is an appropriate compromise. I am satisfied that some mitigation of loss by adjusting of loads and routes would have been appropriate. The compromise on the basis of three loads as suggested by Mr *Gillespie* and agreed by Mr *Carter* is appropriate.

I would point out that the basis of that compromise is the figures produced by the plaintiff. These refer to an amount of $1 100 claimable for each trip against a cost of all overheads (including wear and tear) of $277,92. I think it not inappropriate to make some observations on that. Mr Ebrahim made several comments in his own evidence on profit margins. For example, in regard to the replacement cost of trailers, he said he would hope that the mark up on new trailers would be no more than 15 to 20%. In regard to the mark up charged by panel beaters, he thought it should be no more than 20%. But the margin of profit Mr Ebrahim was making on each of the journeys on the contract in question was just under 400% - that is the difference between $1 100 as the amount earned for each trip and the $277,92 as the overheads for each trip.

1995 (1) ZLR p193

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The contract in question appears to be a standard Grain Marketing Board contract. It is not clear from the contract whether the dollar amount per ton on which costing is based is a "take it or leave it" figure suggested by the Grain Marketing Board, or whether it is a figure negotiated between the Grain Market Board and the transporter. One would tend to think that it would be the latter as opposed to the former, though that is not clear from the papers. If it is a "take it or leave it" figure provided by the Grain Marketing Board, I am sure it would be of concern to members of the public that a public body like the Grain Marketing Board would grant such a generous profit percentage to transporters. One would always hope that there would be a reasonable profit for transporters for transporting Zimbabwe's grain. But a profit margins of some 395% per trip would hardly seem to fall into that category. Similarly, if the figure is negotiated between the transporter and the Grain Marketing Board, one would hope that the Grain Marketing Board officials would be more aware of the costs of transporting loads than to allow such a substantial profit margins. I would point out that for this one route Mr Ebrahim was anticipating the making of a profit in excess of $100 000 in just 12 weeks. I reiterate that I would hope that the Grain Marketing Board would carefully ensure that its contracts for transporting grain are carefully costed and that reasonable profit margins are ensured for transporters - as opposed to profit margins, which on the facts of this matter, seem not to fall anywhere near the definition of reasonable.

I am satisfied that liability has been established on a balance of probabilities and that damages in the amounts I have referred to, have been established. I am accordingly satisfied that the counterclaim put forward by the defendant must be dismissed.

In regard to the date of interest in relation to the amounts awarded, as Mr *Carter* concedes, the court has a discretion, in view of the recent legislation, to decide at any time what is the appropriate date from which interest should run. It seems to me that, in terms of fairness and

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equity, interest should run in basic terms from when the loss was incurred. However, on the facts of this case, I am satisfied that overall it is fair and appropriate to allow the interest to run from the date the summons was issued, which is 23 November 1989. The profit would have been earned before 23 November 1989 but it is not easy to subscribe a specific date. The cost in respect of the horse and trailer would have been incurred once the repair costs had been incurred. But the dates in that regard are not clear, because there is no documentary evidence. However, it seems that the horse was back on the road with its certificate of fitness on the 8 November 1989 and the trailers somewhat later.

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I propose, in respect of the damages to the horse, the recovery costs, and the loss of profit, to order that interest run from the date of issue of the summons. In respect of the trailers, I propose to order that interest run from 15 March 1990 - which is when the certificate of fitness in respect of one of the trailers was obtained. It was not clear when the other trailer obtained a certificate of fitness.

Accordingly the plaintiff has succeeded in its claim and damages are awarded as follows:

(a) $60 000 in respect of the mechanical horse, with interest to run at the prescribed rate from 23 November 1989 to the date of payment;

(b) $30 000 in respect of the semi-trailer and the independent trailer, with interest at the prescribed rate from 15 March 1990 to the date of payment;

(c) Recovery costs are awarded in the amount of $4 594,38, with interest at the prescribed rate to run from 23 November 1989 to the date of payment;

(d) $75 651,84 in respect of loss of profits, with interest at the prescribed rate from 23 November 1989 to the date of payment.

The total amount of damages awarded to the plaintiff is $170 246,22, with interest to run from the dates as I have specified. The plaintiff is also entitled to costs of suit and is awarded costs. The defendant's counterclaim is dismissed with costs.

Ali Ebrahim, plaintiff's legal practitioners

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

Surgey, Pittman & Kerswell, second defendant's legal practitioners

S v DZORA & ANOR 1995 (1) ZLR 195 (SC)

Court **Supreme Court, Harare (sitting as Court Martial Appeal Court**

McNally JA, Korsah JA & Ebrahim JA

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Appeal from a general court martial

2 & 21 March 1995 Judgment No S-35-95

Flynote

Military law - courts martial - procedure to be followed - statement recorded before court martial by officer taking summary of evidence - admissible at court martial in same circumstances as would be evidence given at a preparatory examination

Military law - Defence Act [Chapter 94] - First Schedule, para 36 - scandalous conduct by officer - sexual liaison with wife of another officer - covered by the paragraph

Criminal procedure - joint trial - when more than one person may be tried jointly for separate offences - Criminal Procedure and Evidence Act [Chapter 59] - s 145A - failure by prosecutor to inform court that evidence against one accused would be admissible against other - whether a fatal irregularity

Criminal procedure - preparatory examination - statement of witness taken at preparatory examination - witness unable to be found to give evidence at trial - court's discretion to allow statement to be admitted - Criminal Procedure and Evidence Act [Chapter 59]-s 241

Evidence - adultery - nature of evidence required - only necessary to establish facts from which a reasonable mind could infer that sexual relations had taken place - confession of adultery - when may be admitted

Headnote

The appellants were both army officers. They had been tried by a general court martial on a charge of behaving in a scandalous manner unbecoming the character of an officer and a gentleman, it being alleged that each had

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had a sexual affair with the wife of another army officer. They had been convicted and sentenced to be cashiered.

The appellants had been jointly charged. It was clear from the outline of the prosecution case that each appellant was alleged to have committed an offence separate from the other, although there were many common factual elements. The prosecutor had failed to inform the court martial that, in his opinion, evidence at the trial of one accused would be admissible at the trial of the other. During the trial, the Judge Advocate had admitted in evidence a statement made by one of the wives involved. This statement had been recorded in terms of s 27 of the Defence Forces (Discipline) Regulations (RGN 259/78) at a preparatory hearing conducted by an officer, at which the summaries and records of the evidence were taken down on oath, in writing, in the presence of the accused. The accused were given an opportunity to cross-examine all the witnesses. The Judge Advocate had so acted on the grounds that this course was permitted under s 241 of the Criminal Procedure and Evidence Act [*Chapter 59*], because, after a diligent search, the woman had not been located by the time of the trial.

On appeal, the question arose whether the failure by the prosecutor to inform the court martial that, in his opinion, evidence at the trial of one accused would be admissible at the trial of the

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other, as required by s 145A of the Criminal Procedure and Evidence Act, was fatal to the proceedings. It was also argued for the appellants that, insofar as the State had alleged that the appellants had had sexual relations with the respective wives of the two complainants, it was incumbent on the State to prove this; and this the State had failed to do. It was also argued that the Judge Advocate should not have admitted the statement of the missing witness.

Held, that it was clear beyond controversy that admissible evidence at the trial of one of the appellants would have been admissible at the trial of the other, and in the circumstances the failure by the prosecutor to apprise the court of this did not result in any substantial miscarriage of justice.

Held, further, that the deposition of the missing witness was taken on oath in the presence of the accused and the accused had been given the opportunity to cross-examine her. The procedure was analogous to a preparatory examination and any distinction between that procedure and a preparatory examination was more cosmetic than real. Under s 64(d) of the Defence Act [*Chapter 94*], any matter of procedure at a court martial shall be the law in force in criminal proceedings in the civil courts. Consequently, it was appropriate to invoke s 241 of the Criminal Procedure and Evidence Act.

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Held, further, that in terms of s 241(3) of the Criminal Procedure and Evidence Act, where a witness who gave evidence on oath at a preparatory examination before a magistrate, and the witness cannot be found after diligent search or cannot be compelled to attend the subsequent trial, the court may, in its discretion, allow the deposition of the witness to be read as evidence at the trial. This is subject to the condition that it appears from the record or is proved to the satisfaction of the court that the accused or his legal representative had a full opportunity of cross-examining the witness. It is not necessary, before s 241(3) may be invoked, for evidence to be given on oath that the witness could not be found. Nor is it necessary to show that the witness is dead or incapable of giving evidence or that he is too ill to attend or that he is being kept away by the contrivance of the accused, as required before s 241(1) may be invoked, but if any of those situations are proved, the court must admit the evidence; it has no discretion in the matter. In this case, the Judge Advocate had a discretion and there were no grounds for interfering with it.

Held, further, that it was not necessary for the prosecution to prove that adultery actually took place. It was enough to establish facts from which a reasonable man could infer that sexual intercourse had occurred. The admission by one of the wives that adultery had taken place could also be taken into account, as it was corroborated by other evidence.

Held, further, that in any case the offence charged was not adultery, but scandalous conduct unbecoming the character of an officer and a gentleman. An extra-marital affair might be serious enough to be brought within the ambit of the offence charged. If the court martial was of the view that picking up the wives of brother officers who are out of town and spending all night with the wives in the house of one of the appellants was conduct or behaviour unbecoming the character of an officer and gentleman, that was the end of the matter; no specific act of adultery

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need be proved. Appeal dismissed.

Cases cited:

S v Donaldson & Anor 1995 (1) ZLR 46 (S)

Gates v Gates 1939 AD 150

Richardson v Richardson 1923 AD 1

S v Mugoni 1994 (2) ZLR 184 (S)

R v Andrews 1920 AD 290

R v Stoltz 1925 WLD 38

R v Stoffels 1948 (2) SA 809 (C)

S v Chibanda 1991 (1) ZLR 172 (S)

KORSAH JA

R v Ngubane 1961 (4) SA 377 (N)

S v Steele 1972 (2) RLR 377 (A)

T Biti for the appellants

D Tarukwana for the respondent

Judgment

Korsah JA: Under the Defence Act [*Chapter 94*], s 64(d) requires that, save as provided by the Act, any matter of procedure shall be the law in force in criminal proceedings in the civil courts.

Matters of procedure in criminal proceedings in the civil courts are governed by the Criminal Procedure and Evidence Act [*Chapter 59*], "the Code". By s 145A:

> "Whenever it is alleged in an indictment, summons or charge that two or more persons have committed separate offences at the same time and place or at the same place and about the same time **and the prosecutor informs the court** that any evidence which is, in his opinion, admissible at the trial of those persons is, in his opinion, also admissible at the trial of the other person or persons, such persons may be tried jointly for those offences on that indictment, summons or charge" (my emphasis).

The two appellants were convicted at the conclusion of a joint trial before a court martial. They were jointly charged, on one charge sheet, of contravening para 36 of the First Schedule to the Defence Act in that each of them had behaved "in a scandalous manner unbecoming of the character of an officer and a gentleman".

As against the appellants the charge sheet alleged that they had:

> "... at or near Guinea Fowl during the period between 1 June 1990 and 3 January 1991 and once or on several

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occasions seduced and had sexual intercourse with Irene Rameki Magomo and Christina Matamba the wives of Major Magomo and Lieutenant Matamba knowing them to be the wives of Major A Magomo and Lieutenant Matamba respectively, both members of the Zimbabwe Defence Forces and as such the accused persons' workmates, knowing them to be the wives of Major Magomo and Lieutenant Matamba respectively."

In separate outlines of the State's case against the appellants, it was alleged against the first appellant, ie Major Dzora, that:

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"5. Some time during the month of June 1990 the accused proposed love to Irene Magomo whom he knew to be the wife of Major Magomo.

6. During the period between the month of June 1990 and including 3rd January 1991 the accused had sexual intercourse with Irene Rameki Magomo."

As against the second appellant, Major Khosa, the State outline reads:

"5. Some time after the complainant had introduced his wife to the accused but prior to the 3rd January the accused fell in love with Christina Matamba.

6. On or about 3rd January 1991 the accused, in the company of Major Dzora and Irene Magomo and Christina Matamba proceeded to the accused (Major Khosa) person's residence at Guinea Fowl.

7. The accused person (Major Khosa) there slept and had intercourse with Christina Matamba despite knowing that the said Christina Matamba was married to another member of the Zimbabwe Defence Forces ..."

It is clear from the above outlines of the State case that each appellant was alleged to have committed an offence separate from the other. Even if each of them had had sexual intercourse with the same woman, the offence which each would have committed would have been separate from that of the other.

As GUBBAY CJ observed in *S v Donaldson & Anor* 1995 (1) ZLR 46 (S) *(3), s 145A sanctions the joint trial of persons who have committed separate offences -

"Subject to the fulfilment of two conditions precedent. The first is that both accused persons must be jointly indicted, summoned or charged. The second is that the prosecutor must have informed the court that, in his opinion, evidence at the trial of one accused would be admissible at the trial of the other."

In the instant case, the first condition was met, because it was alleged in the same charge that the two appellants had committed separate offences at the

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same place and at about the same time. What the prosecutor omitted to do was to comply with the second condition by informing the court that, in his opinion, evidence at the trial of one would be admissible as evidence at the trial of the other. The question is: was failure to comply with the second condition fatal to the proceedings? Could it be said, after a perusal of the record, that this omission on the part of the prosecutor resulted in a substantial miscarriage of justice in terms of s 11(2) of the Supreme Court of Zimbabwe Act? The answer to this will

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evolve after a consideration of the proceedings.

It was contended by counsel for the appellants that, insofar as the charge and the State outline allege that the appellants had sexual intercourse with the respective wives of the complainants, it was incumbent upon the State to prove that sexual intercourse did take place on any occasion as alleged. In other words, not only must it be proved that adultery might have taken place, but that it actually did take place. And this the State failed to do.

I do not think that such proof is demanded by the law. As is stated by WATERMEYER JA (as he then was) in *Gates v Gates* 1939 AD 150 at 155, "The requirement is ... proof sufficient to carry conviction to a reasonable mind", and not actual proof of sexual intercourse. In any case, with all due respect to counsel, the gravamen of the charge was that each of the appellants had behaved in a scandalous manner unbecoming the character of an officer and a gentleman with the wives of the named brother officers. What, therefore, had to be established was not that sexual intercourse had actually taken place, but facts from which a reasonable mind could infer that sexual intercourse had occurred; or, as WATERMEYER JA expressed it: "testimony such as carries conviction to the reasonable mind".

Accordingly, the testimonies of Major Magomo, Lieutenant Matamba, Christina Matamba, Major Zinyemba and Constable Masurima, insofar as they bear on the association between the appellants and the complainants' wives are not irrelevant to the enquiry, except to the extent that such testimonies infringe the rule against hearsay.

In brief, both complainants, Majors Magomo and Matamba, testified that at one time or the other they had introduced their wives to the appellants. Major Magomo testified that on the early morning of 3 January 1991, he cut short a visit to Harare and returned, unexpectedly, to his home in Gweru. He discovered that his wife Irene was not at home and all indications were that she had not slept at home that night. He went to inquire from Mrs Christina Matamba, who is a friend to Irene, whether she had knowledge of where Irene

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might be. He derived no satisfaction from his effort because Christina also happened to be out. As he was waiting outside his house a military vehicle stopped somewhere along the road and shortly thereafter Irene appeared.

Major Magomo, naturally, asked his wife where she had been all night. After giving explanations which were proved to be false, she eventually told her husband where she had spent the night. Acting on what Irene had told him Major Magomo took his wife to see Major Zinyemba, who was the President of the Mess Committee, to make a report against Major Khosa and demanded to see Major Khosa.

As a result of that report Major Zinyemba, at the request of Major Magomo, accompanied Major Magomo and Irene to Major Khosa's official residence. Major Khosa was not at home and so they decided to wait outside. While they were thus waiting, Irene, at the instance of Major Magomo, described the furniture and items in a room at Major Khosa's residence where she alleged she had spent the night. Not long thereafter, they saw a vehicle approaching the house

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and Irene obeyed her husband's instruction to hide.

The driver of the vehicle turned out to be Major Khosa. After exchanging greetings, with Irene still out of sight, but in the presence of Major Zinyemba, Major Magomo said he asked Major Khosa whether he (Major Khosa) had brought two women from town to his residence the previous night and offered a room to one of them while he (Major Khosa) slept with the other.

According to Major Magomo, Major Khosa initially denied the allegations. Whereupon Major Magomo called Irene from her hiding place and asked Major Khosa whether he knew her. Again Major Khosa, despite the fact that Major Magomo had personally, on a previous occasion, introduced Irene to him as his wife, denied that he knew Irene. Major Magomo explained to Major Khosa that Irene had described the furniture, items and layout of a room in Major Khosa's residence where she alleged she spent the night of 2-3 January and that he (Major Magomo) and Major Zinyemba wanted to enter the house to verify the truth of Irene's allegations. It was then that Major Khosa admitted that he had offered Irene a room in his house while he slept in the other room. Major Khosa opened the door of his residence and they all entered and found the furniture and items in the room in which Irene said she spent the night exactly as she had described them.

Major Magomo inquired of Major Khosa whether he knew the man with whom Irene had spent that night. Major Khosa insisted that Irene had spent

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that night alone in the spare room. Then, acting on information he had received, Major Magomo asked Major Khosa whether he knew that the women he (Major Khosa) had spent the night with was the wife of Lieutenant Matamba. Major Khosa's response was that he did not now that the woman was Lieutenant Matamba's wife.

The above is factual evidence to which both Majors Magomo and Zinyemba attested and which is relevant to the determination of the issue whether or not there had been scandalous behaviour on the part of both appellants as charged.

It is a general rule of the law of evidence that admissions and confessions by a person, while they are admissible as evidence against the party admitting or confessing, are not admissible as evidence against the person or persons with whom an act or an offence is alleged to have been committed, unless the confessor gives evidence on oath to the same effect and he or she is believed. So it is with the admission or confession of a party to an adulterous relationship. See *Rutherford v Richardson* 1923 AD 1 at 6. And the courts will not, as a rule, act on the uncorroborated evidence of a party admitting or confessing to adultery. But we are advised by Scoble *The Law of Evidence* 3 ed at p 230 and 231 that:

> "The rule is not altogether an absolute one, for courts have, on occasion, granted relief where they have been perfectly satisfied that the confession or admission of adultery is quite genuine. (*Thomas v Thomas* 1936 (1) PH B5 (SR); *Husband v Wife* 1931 NLR 300 ... The genuineness of the admission can usually be inferred from the nature of the confession and the circumstances generally surrounding the occasion when it was made. (*Dipple v Dipple* 1927 WLD 285; *Koopman v Koopman* 1927 CPD 388; *Mauser-Henry v Mauser-Henry* 1927 WLD 28) ... If therefore the court is fully satisfied with the genuineness of a confession it may act upon it although it is not

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corroborated."

In any case, as I have already observed above, the offence charged was not adultery, but scandalous conduct unbecoming the character of an officer and a gentleman, for which even an extra-marital affair between the parties may be serious enough to bring the appellants' conduct within the ambit of para 36: *S v Mugoni* 1994 (2) ZLR 184 (S).

Further evidence, which was the subject of controversy between the prosecutor and defence counsel, was admitted in evidence by the Judge Advocate. This

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was a preparatory statement taken from Irene Magomo, in terms of s 27 of the Defence Forces (Discipline) Regulations (RGN 259/1978) (the Regulations). Under that section, prior to an officer being arraigned before a court martial, there is a preparatory hearing at which summaries and records of the evidence of the witnesses are taken down on oath, in writing, in the presence of the accused. The accused persons are given the opportunity to cross-examine all such witnesses and such cross-examination is also taken down in writing. The evidence of such witness is read over to him by the recording officer and signed by the witness and subscribed to by both the accused and the recording officer.

Irene Magomo could not be located after a diligent search at the time of the trial of the appellants. Leave was sought and granted to have the record of her evidence taken at the preparation of summaries and records of evidence tendered in evidence in terms of s 241(3) of the Code as an exhibit (exhibit 2).

The argument in support of its admissibility was that the summary of evidence in terms of s 27 of the Regulations, before a recording officer, is analogous to the proceedings in a preparatory examination, before a magistrate, in terms of s 72 of the Code.

Both procedures, submitted counsel for the State, are identical and are held for the purpose of determining whether the accused has a case to answer. The only difference being, whereas a preparatory examination is held before a magistrate, the preparatory evidence is recorded by a recording officer. But this distinction is more cosmetic than real.

For the purposes of understanding the argument of counsel for the appellants, I shall paraphrase the relevant parts of ss 241(1) and (3) along the lines adopted in May *South African Cases and Statutes on Evidence* 4 ed at p 362:

> "241. (1) The evidence of any witness taken upon oath before any magistrate at a preparatory examination ... in the presence of any person who has been brought before such magistrate on a charge of having committed an offence (s 72) or the evidence of a witness taken ... in the absence of the accused when he has absconded etc (s 99) shall be admissible in evidence on the trial of the person:

Provided that -

(i) **it is proved on oath to the satisfaction of the court that the witness is dead or is incapable of giving evidence, or**

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that he is too ill to attend, or that he is kept away from the trial by the means and contrivance of the accused and that the evidence is the same which was given at the preparatory examination without any alteration;

(ii) it appears on the record or it is proved to the satisfaction of the court that the accused, by himself, his counsel or attorney, **had a full opportunity of cross-examining** the witness.

(2) ...

(3) Where the witness cannot be found after diligent search, or cannot be compelled to attend, the court may, in its discretion, allow his depositions to be read as evidence at the trial, **subject to the conditions herein before mentioned"** (my emphasis).

It was the contention of counsel for the appellants that the admission in evidence of Irene's summary of evidence was wrong in law and constitutes the admission of inadmissible evidence because of non-compliance with the conditions imposed under s 241(1).

That the depositions under consideration were contained in a summary of evidence duly taken upon oath in terms of the Regulations is not in question. It is its admissibility under s 241(3) that is disputed. In *R v Andrews* 1920 AD 290 at 293 INNES CJ had this to say about the admissibility of such evidence under ss (3) of s 241. He said:

"... only two questions arise. Did the subsection come into operation, and if so, can we interfere with the ruling of the learned Judge under it? The first of these depends upon the existence of either of two circumstances; and it is for the Crown to establish one or other of them. To show that the witness could not be found after diligent search, or that he could not be compelled to attend. Proof under either head would bring the subsection into play."

As there was proof that Irene could not be found after diligent search the State was, under the circumstances, in a position to invoke the operations of subs (3) of s 241. We are advised by INNES CJ later in the judgment at 293-4 that -

"Only one enquiry remains - can we interfere with the result? That is disposed of by the words of the section. The admissibility of the

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deposition is left **'in the discretion'** of the presiding Judge - that is, in his entire discretion. The policy of the clause is to leave the decision in his hands. He is able to satisfy himself there and then whether any prejudice will result to the accused by the admission of the evidence, and his ruling is to be final. We cannot in view of the language used interfere with his order by the exercise of our own discretion. The responsibility thus thrown upon the Judge is heavy, and it is his duty to guard against all possibility of prejudice. But it is a duty the discharge of which is at his unfettered discretion."

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Finally, on the issue of admissibility, Mr *Biti* made the point that one of the "conditions hereinbefore mentioned" was the condition set out in proviso (1) to subs (1). It had not been proved, he argued, that the witness was "dead or incapable of giving evidence, or too ill to attend, or kept away from the trial by the means and contrivance of the accused".

While I must say that I find the wording of the section as a whole unsatisfactory, the way around the problem raised by Mr *Biti* was set out by INNES CJ in the case cited. He pointed out that under subs (1) the evidence was **mandatorily** admissible. The words are "shall be admissible". Under subs (3) the court "may, in its discretion" allow the deposition to be read as evidence. In other words, where the witness is dead, incapable, too ill, or kept away, his or her evidence at the preparatory examination **shall** be admissible, subject to the conditions stated. Where he or she simply cannot be found, his or her evidence **may** be admissible, subject to the same conditions. Thus proviso (1) is not one of the relevant conditions.

As INNES CJ put it at p 294:

> "The earlier portion of the clause renders certain depositions admissible as of course. Where the witness is dead, for instance, the judge has no power to exclude his deposition duly taken. Where he cannot be compelled to attend the judge has a discretion to admit it; but the exercise of that discretion is final."

Caution regarding the admissibility of preparatory examination evidence under the said section was sounded by DE WAAL J in *R v Stoltz* 1925 WLD 38; cited with approval in *R v Stoffels* 1948 (2) SA 809 (C) at 810 to the effect that -

> "The court should look at the nature of the evidence sought to be put in.

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> If, for instance, it conflicts with other evidence in the case, if from cross-examination the evidence as recorded would seem to leave a doubt, and generally where from the nature of the evidence much would depend on the credibility of the witness, so that a jury should have an opportunity of judging for themselves thereon from the appearance and demeanour of a witness, the court should be very slow in admitting the evidence under the section."

Before the summary of Irene's evidence, recorded in compliance with s 27 of the Regulations, was introduced, Christina Matamba had already testified that in January 1991 she and Irene spent the night at Major Khosa's official residence at Guinea Fowl. Christina said she spent the night together with Major Khosa "in his blankets" while Irene spent the night with Major Dzora in the adjacent room.

Mr *Biti* contended that failure by the Judge Advocate to comment on the credibility of Christina amounted to misdirection by non-direction. What happened was that at the proceedings before a court martial, whose findings were quashed by the High Court, Christina testified, contrary to the summary of her evidence taken in terms of s 27 of the Regulations, that she had never been to Major Khosa's residence at Guinea Fowl and had not slept with him. That testimony was impeached and she was treated as a hostile witness. Before the reconstituted court martial Christina admitted that she went with Irene to the residence of Major Khosa at Guinea Fowl on 3 January 1991 and indulged in sexual intercourse with him. She explained that she made the

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previous inconsistent statement at the aborted court martial because she wanted to save her marriage.

The Judge Advocate in his summing up took care to direct the panel on how to approach the oral testimonies of the witnesses, which included the testimony of Christina. He said:

> "You and your members saw and heard what the witnesses said while they were in the witness box and that fact is essential in the evaluation of their testimony ... A good witness will give his evidence in a clear and straightforward manner. He is not unnecessarily uneasy and intimidated and unnerved in this witness box. He is not evasive in his answers and does not come unstuck with his answers to questions. He is able to reconcile satisfactorily apparent inconsistencies in his story and always sticks to the same story throughout. And most importantly, Mr President, his evidence must have a distinct ring of truth, and this is a question of

> value judgment. It is on that basis that, Mr President, you are going to analyse the evidence before you including the evidence of the two accused persons when they stood in the witness box."

This was a general direction embracing the testimonies of all the witnesses, inclusive of the evidence of Christina. There was thus no misdirection by omission in regard to Christina's testimony as contended by Mr Biti. The panel was properly directed and it apparently believed Christina's testimony and returned a verdict of guilty against Major Khosa: *S v Chibanda* 1991 (1) ZLR 172 (S) at 173E-F.

Looking at the evidence above recited, the nature of the evidence contained in Irene's summary of evidence, far from being in conflict with that evidence, is in accord and dovetails with what all the other witnesses, including Christina, say occurred on 3 January 1991. The evidence recorded from Irene does not allow of doubt that she is a witness of truth. She grudgingly told her husband the truth and put her marriage at risk when she realised it was futile to persist with the lies she had originally told. Major Zinyemba was present when Irene described the layout and items of furniture in Major Khosa's lounge where she had spent the night with Major Dzora, before Major Khosa let them in. Her description turned out to be accurate. Major Khosa was alleged to have acknowledged the fact to Majors Magomo and Zinyemba that Irene spent the night there, though he lied that Irene spent the night alone. Christina confirmed that Irene was closeted with Major Dzora at Major Khosa's residence while she, Christina, was sleeping with Major Khosa "in his blankets".

Under these circumstances, I am of the opinion that the learned Judge Advocate did not err in the exercise of his unfettered discretion to admit the summary of evidence taken down from Irene in terms of s 27 of the Regulations. If any doubt is entertained on whether evidence on oath ought to have been led as to the inaccessibility of Irene, in *R v Ngubane* 1961 (4) SA 377 (N) it was held that it was not necessary to establish under oath that a witness cannot be found before his evidence can be read in terms of s 24 (3) of the Code.

In so far as the summing up of the learned Judge Advocate was attacked on the ground that it gave consideration to the summary of evidence of Irene, since that summary of evidence was quite properly admissible in evidence, comment thereon was not out of place. It was, in any

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case, an exhibit available for scrutiny by members of the panel.

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The learned Judge Advocate directed the panel that it is only if it finds that the appellants committed adultery with the two women knowing that they were the wives of brother officers that they must go on to consider whether their conduct was scandalous and unbecoming of the character of an officer and a gentleman.

This direction was an overstatement which errs in favour of the appellants for, in the first place, adultery does not have to be strictly proved in such cases. It has only to be inferred from the circumstances. Why should two married women, knowing that their husbands are out of town, go to sleep with two men all night long in the house of one of the men? Secondly, as stated earlier, the gravamen of the offence charged is not adultery, but conduct unbecoming the character of an officer and a gentleman. If the panel is of the view that picking up the wives of brother officers, who are out of town, to go and spend all night with the wives in the house of one of the appellants is conduct or behaviour unbecoming the character of an officer and a gentleman then that is the end of the matter - no specific act of adultery need be proved: *S v Mugoni supra*.

The learned Judge Advocate was also careful to indicate that the onus lay with the State to prove the guilt of the appellants beyond a reasonable doubt and not on the appellants to establish their innocence. All in all, there is no warrant for the criticism levelled at the summing up of the Judge Advocate, and the verdict of the panel, being neither ambiguous nor wrong in law, must stand.

As regards the sentence imposed, it was conceded that being cashiered from the Army is not necessarily the only sentence that may be considered but rather the severest punishment that may be imposed. However, the hands of this court are tied by the provisions of s 90 which do not permit of any interference with the sentence imposed, unless the conviction by the court martial is altered on appeal: *S v Steele* 1972 (2) RLR 377 (A), cited with approval in *S v Chibanda supra*. See *S v Mugoni supra* and, by way of analogy, s 320 of the Criminal Procedure and Evidence Act [*Chapter 59*].

It is clear beyond controversy that admissible evidence at the trial of one of the appellants would have been admissible at the trial of the other, particularly the testimonies of Irene, Christina and Zinyemba. In the circumstances, I am of the opinion that the omission by the prosecutor to apprise the court of this in terms of s 145A of the Code did not result in any substantial miscarriage of justice.

KORSAH JA

Accordingly the appeal is dismissed in its entirety.

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McNally JA: I agree

Ebrahim JA: I agree

Honey & Blanckenberg, appellants' legal practitioners

CHIVIYA v CHIVIYA 1995 (1) ZLR 210 (HC)

Court **High Court, Harare**

Robinson J

Divorce action

21 March 1995 Judgment No HH-40-95

Flynote

Family law - divorce - division of assets following divorce - may not be dealt with separately from divorce action unless both parties so request and the court is prepared to sanction such a course or for good cause recognised by the court - grant of divorce - court's discretion to refuse even in case of irretrievable breakdown of marriage

Family law - husband and wife - matrimonial action - action for divorce - necessary to allege that court has jurisdiction

Practice and procedure - application - interlocutory application on "fast track" court roll - not appropriate method of dealing with application for divorce

Headnote

In October 1993, the applicant instituted proceedings for divorce and ancillary relief against the respondent, his wife of over 20 years. On receiving the summons, the respondent entered appearance to defend and in due course filed a plea and a claim in reconvention for divorce. In her claim in reconvention, the respondent agreed that the marriage had broken down irretrievably primarily because of the applicant's adulterous relationship with a Kenyan woman, the relationship being such that the applicant treated the other woman as though she was his wife. The respondent also claimed an apportionment of the matrimonial property, custody of the minor children of the marriage and maintenance for herself and the minor children. She later claimed an order for a contribution towards the costs of defending the action and for maintenance *pendente lite* and for an order that the applicant continue to pay school fees and other expenses for the minor children.

The applicant then applied by way of an interlocutory application set down for hearing on the "fast track" court roll for an order that the divorce be granted without delay and that what he termed the "ancillary matters" be held over for trial. The respondent did not oppose the divorce,

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but argued that it would not be just and equitable to proceed in this way. She argued that it would be prejudicial to her prospects of obtaining a satisfactory settlement, particularly as full disclosure had not been made of all the applicant's property and bank accounts. It did not take much imagination to envisage the many ways in which her claim could be jeopardised if a divorce was granted thus, ranging from the death of the applicant after divorce but before a settlement to insolvency, a subsequent divorce, and the complications which might ensue as a result.

Held, that as the applicant had not alleged in his declaration that the court had jurisdiction by virtue of his domicile in Zimbabwe, he should have applied to amend his declaration and not simply aver domicile in his affidavit.

Held, further, that as the divorce was contested unless the respondent with-drew her claim in reconvention, it was necessary, before the case could be set down for trial, for the respondent's claim in reconvention to be served on the woman with whom the applicant was alleged to have committed adultery.

Held, further, the grant of a divorce, even if the court is satisfied that the marriage has broken down irretrievably, is in the discretion of the court and in appropriate cases might be refused. It might refuse to grant a divorce, for example, where the divorce and remarriage of a dying man without assets would leave his former aged wife penniless because this would deprive her of her widow's pension rights. In the instant case, the divorce would not be granted for the following reasons:

(a) The divorce would put paid to the application of the respondent as a spouse to maintenance *pendente lite* and to a contribution towards costs.

(b) There would be considerable prejudice to the respondent if her ancillary claims were held over for determination at some date in the future. The applicant could remarry, which would mean that the court would have to take into account his responsibilities to his new wife. If he remarried, he might wish to divorce his new wife, in which event the court could be faced with having to resolve the fate of assets overlapping both marriages. If he remarried and then predeceased the respondent, the respondent could be met with competing claims by the successor wife.

(c) It was not the intention of the legislature, in enacting ss 5 and 7 of

the Matrimonial Causes Act 33 of 1985, to allow the main claim for a divorce to be hived off from the ancillary claims if one spouse was opposed to such a course.

Cases cited:

Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)

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Williams v Tunstall 1949 (3) SA 835 (T)

A B C Chinake for the applicant

M E Lofty for the respondent

Judgment

Robinson J: Surprises certainly abound for one on the Bench. Never did I believe that I would see the day when, in a contested divorce action, the one party would, against the wishes of the other party, behead the main claim for a decree of divorce from the body of the ancillary claims in issue between the parties, by asking, if not insisting, that the court grant the claim for a divorce by way of an interlocutory application set down for hearing on the fast track roll. And if that was not surprise enough, I was even more surprised when, after having no hesitation in dismissing the application with costs for what I thought were unanswerable reasons, the legal practitioners for the applicant then requested that I provide a written judgment recording my full reasons so that the applicant could apply to me for leave to appeal against my decision.

Before I give my full reasons for dismissing the application with costs, I consider it helpful to give the background to the application.

[The learned judge then analysed the facts of the case, as outlined in the headnote above, and continued:]

Before I turn to give my full reasons for dismissing the application with costs, there are two points which I wish to raise *in limine.*

As pointed out earlier, there is no allegation in the applicant's declaration as to the basis upon which this court has jurisdiction to entertain the applicant's action for divorce - a vital allegation on which the whole of the applicant's action hinges.

While it is true that the applicant has dealt with the issue of his domicile in para 4 of his affidavit of evidence and that in para 3 of her opposing affidavit

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the respondent has admitted that paragraph "by and large", the position is, nevertheless, that on the declaration as it presently stands, the applicant has not alleged that this court has jurisdiction by virtue of his being domiciled in Zimbabwe at the time he instituted his action. Accordingly, before setting down his application for a decree of divorce, the applicant should have attended to amend his declaration in this respect since it is not competent to lead evidence on a material matter which has not been pleaded.

Secondly, if I am correct in the view that I take that the applicant's action for divorce remains a contested one unless and until the respondent withdraws her plea and claim in reconvention, then the case cannot be set down for trial without service of the respondent's claim in reconvention being effected on the woman named therein as being the person with whom the applicant has allegedly committed adultery, as required by rule 273(2) of the Rules of Court,

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unless the court is satisfied "that for good and sufficient reason compliance" with the rule "is impracticable".

Leaving aside for the moment the procedural aspect, I turn now to address the substance of the application made by the applicant.

At the outset, it is crucial to highlight that the grant of a divorce under the Matrimonial Causes Act 33 of 1985 lies entirely within the discretion of the appropriate court, as defined (hereinafter referred to as "the court "). If one examines s 5(1) of the Act, it will be noted that the subsection provides that the court **may** (not **shall**) grant a decree of divorce on the grounds of irretrievable break-down of the marriage if it is satisfied that the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect of the restoration of a normal marriage relationship between them. This means that even if the court is satisfied that a marriage has broken down irretrievably and is beyond redemption, it may still, in the exercise of its judicial discretion, refuse to grant a divorce.

An example where I think the court could justifiably refuse to grant a divorce, although it was clear to the court that the marriage had broken down beyond any hope of repair, is the following one. Suppose the husband of a marriage which has subsisted for over forty years, who has deserted his aged wife for a young woman with whom he has been living as husband and wife for a number of years, institutes an action against his wife for a decree of divorce at a time when he is terminally ill but his wife, while admitting that the marriage has broken down irretrievably beyond any hope of reconciliation, opposes the grant of a divorce for the following reasons -

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(a) that her husband has nothing by way of assets apart from the substantial pension which will accrue to him upon his intended early retirement from his employment in a month's time;

(b) that if a divorce is granted and the husband marries the other woman, as he openly says he intends to do, and then dies of his terminal illness, before his former wife, his pension will all go to his new young wife in terms of the Rules of the Pension Scheme.

Faced with these facts, could the court be faulted if, in the exercise of its discretion, it refused to grant the husband a decree of divorce? Certainly, there can be no question, under the Matrimonial Causes Act, of a husband coming to the court, as the applicant appears to have done in this case, and insisting that, because it is common cause that the marriage between the parties has broken down beyond redemption, the court grant him a decree of divorce. The decision whether to grant a divorce is clearly and entirely within the discretion of the court and provided that the court exercises its discretion judicially in that regard, no court of appeal will interfere with the manner in which the court *a quo* has exercised its discretion.

Accordingly, let me now spell out the reasons why, in the exercise of my judicial discretion, I dismissed the applicant's application for a decree of divorce.

1. Firstly, if the court were to have granted the applicant a decree of divorce separate from

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the ancillary matters in issue between the parties (for the purposes of convenience I shall refer to such a divorce as "a separable divorce"), this would have put paid to the respondent's application for maintenance *pendente lite* and a contribution towards the costs of her defence since, in terms of rule 274(1) of the Rules of the High Court, it is only a **spouse** who may make such an application. The basis of the rule derives from the common law duty of support which spouses owe each other, a duty which is, of course, terminated upon the dissolution of the marriage. See Hahlo *The South African Law of Husband and Wife* 5 ed pp 424 and 432.

Likewise, if the applicant were to have been granted a divorce, it would no longer be open to the court to make an order for the payment by the applicant of his share of arrear maintenance in conjunction with the respondent's application for maintenance *pendente lite* having regard to the wording of s 11(2) of the Matrimonial Causes Act.

So much for the contention of the applicant's legal practitioners that the

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respondent would suffer no prejudice if the applicant were granted a separable divorce.

As already observed, the applicant has not attempted to disclose the actual prejudice he says he will suffer if a separable divorce is not granted, leading one to surmise that his underlying fear is that if he is not free in the immediate future to marry the woman with whom he has allegedly been committing adultery, he may lose her altogether, hardly something the court can be expected to take into account when assessing the prejudice which the applicant claims he will suffer if a separable divorce is not granted.

2. If a separable divorce were granted, it is not difficult to envisage the further prejudice which the respondent might suffer as a result of her ancillary claims being held over for determination at some future date.

Quite apart from the uncertainty which would overhang the fate of her ancillary claims, let me give just three examples of situations where the respondent's interests could be adversely affected by the grant of a separable divorce.

(a) Once released from his marriage to the respondent, the applicant could immediately make the other woman his lawful wife, in which event, when the issue of the respondent's claim for maintenance is eventually dealt with, the applicant could require the court to take into account his financial responsibility towards his successor wife.

(b) Should the applicant run into marital problems with his successor wife and should there be pending divorce proceedings between them before the respondent's ancillary claims against the applicant had been determined, the court could be faced with the complication of resolving the fate of matrimonial assets which overlapped both marriages.

(c) If, after marrying his successor wife, the applicant were to predecease the respondent, the respondent would find herself in the unhappy position of being unable to pursue

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her claim for a division of the matrimonial assets since it is a *sine qua non* of the exercise of the court's power to make an order of division, apportionment or distribution of the matrimonial assets in terms of s 7 of the Matrimonial Causes Act, that the spouses concerned are both alive at the material time, so that the applicant's successor wife, as the surviving wife, could then be in a much more favourable position *vis-à-vis* the respondent where there are conflicting

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claims between them to assets deriving from the former marriage between the applicant and the respondent."

3. I cannot agree with the submission of the applicant's legal practitioners that the provisions of ss 5 and 7 of the Matrimonial Causes Act were intended to empower the court "to grant a decree of divorce and refer the ancillary issues to trial or determination at a later date".

In my view, it was certainly not the intention of the Legislature, in introducing the Matrimonial Causes Act 1985, to allow the main claim for a divorce to be hived off from the ancillary claims if the one spouse is opposed to such a course. And even if the one spouse is not opposed to such a course, it still lies within the discretion of the court as to whether to grant a separable divorce.

On the contrary, I believe the Matrimonial Causes Act was amended in the way it was -

(a) to permit a spouse who might not have been able to justify a claim for maintenance for herself or himself at the time of the divorce to return to court at some later date if she or he could then establish the need for maintenance for herself or himself;

(b) to allow the division of the matrimonial assets to be dealt with after the divorce if *both* parties so requested and if the court, in its discretion, were prepared to sanction such a course or for good cause recognised by the court.

Never, in my view, was it the object of the Matrimonial Causes Act to let a spouse like the applicant have his cake and eat it, by allowing that spouse to gain his marital freedom, by way of a separable divorce, so that he could immediately re-marry, thereby creating potential problems for the other spouse insofar as the resolution of her claims for ancillary relief was concerned.

The contention of the applicant's legal practitioners that the fact that a separable divorce has been granted may accelerate the process of negotiation and settlement of ancillary issues is more fanciful than realistic. If anything, once the husband has secured his divorce, he is more likely to drag his heels over the resolution of his wife's ancillary claims.

4. On the procedural side, in *Room Hire Co (Pty) Ltd v Jeppe Street*

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Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1161, MURRAY AJP referred to DOWLING J (in *Williams v Tunstall* 1949 (3) SA (T) 835 at 839) as citing matrimonial causes as an instance where motion proceedings are not permissible. The Matrimonial Causes Act and the Rules of the High Court both refer throughout to actions for divorce. Speaking for myself, however, I can see no objection on any other ground to a party, where a divorce is uncontested, approaching the court by way of a court application in which, in his or her founding affidavit, the party -

(a) sets out all the necessary particulars pleaded in a declaration; and,

(b) as the party is permitted to do in an undefended action for divorce, incorporates the evidence on which he or she relies for obtaining a decree of divorce and the ancillary relief claimed by him or her; and attaches to his or her affidavit any relevant documents such as the marriage certificate, the so-called affidavit of waiver by the other spouse and the consent paper signed by the parties. However, obviously there can be no question of a spouse resorting to the procedure of a court application where he or she knows that the divorce proceedings will be contested.

In the present case, what the applicant seeks to do is to convert the main part of his action, that is to say, the claim for a decree of divorce, into an interlocutory application notwithstanding the fact that his wife, the respondent, is opposed to such a course. Is it competent for him to do this procedurally? In my opinion, the answer is a loud and clear no.

If rule 53 of the Rules of the High Court prohibits a defendant from consenting to the grant of a divorce after the service of summons, it surely follows, *a fortiori,* that a divorce should not be granted where the one spouse refuses to consent, as the respondent does in this case, to a divorce being granted independently of and in isolation from the ancillary matters in issue between the parties. The ancillary matters are hitched to the claim for a divorce and, in the case of some, the court's jurisdiction to deal with them is dependent upon the court's jurisdiction to entertain the claim for a divorce. For example, if after the court has granted a divorce without dealing with the issue of the custody of the minor children of the marriage, the one party were to remove the minor children from Zimbabwe, the court here will, in my view, have forfeited its jurisdiction to deal with the issue of custody.

If, in a contested divorce action, the courts were, against the wishes of the one party, to allow the claim for divorce to be truncated from the claims for

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ancillary relief simply on the basis that it was common cause that the marriage had broken down irretrievably beyond any hope of reconciliation, it would not be long before the fast track motion roll was bombarded with a plethora of applications by spouses who were anxious to sever the marital tie and who had nothing to lose by having the ancillary matters held over for

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determination at a later stage.

However, it is entirely a different kettle of fish if both parties wish the divorce to be disposed of separately from the ancillary matters. In that event there would be nothing to stop the parties from approaching the court with their request. This can be done by the one party's setting down the case for hearing on the roll for unopposed matters or, if on the continuous roll, by the parties making the request to the presiding judge, provided that it is always remembered that, in such an event, the court still retains the discretion as to whether to grant a separable divorce.

It was for the aforegoing reasons that I decided, in my discretion, to dismiss the application with costs.

On the question of costs, I would mention that in their heads of argument the respondent's legal practitioners submitted that since the present application was ill-founded and misconceived, as indeed it was, the court should award the respondent costs on the higher scale. However, as a brother judge had seen fit to refer this matter for hearing on the fast track motion roll and to order the respondent to file opposing papers, I was not prepared to consider awarding costs against the applicant on a legal practitioner and client scale.

Kantor & Immerman, applicant's legal practitioners

D W Aitken & Co, respondent's legal practitioners

MASHINGAIDZE v MASHINGAIDZE 1995 (1) ZLR 219 (HC)

Court **High Court, Harare**

Robinson J

Civil application

21 March 1995 Judgment No HH-65-95

Flynote

Family law - marriage - customary law - unregistered customary law union - termination - general law concept of tacit universal partnership cannot be applied where there is no basis laid for applying general law instead of customary law

Customary law - marriage - property rights - application of general law to determination of - whether general law concept of tacit universal partnership applicable

Partnership - universal partnership - applicability to customary law marriage

Practice and procedure - application - dispute of fact - need for courts to curb practice of bringing application proceedings where there are real disputes of fact

Headnote

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On the termination of an unregistered customary law union, the applicant applied for an order, on the basis of a tacit universal partnership, awarding her a one-half share of all the assets, movable and immovable, which she and the respondent had acquired during the subsistence of their union.

The application was dismissed as being ill-founded. Without attempting to lay any foundation for applying general law to the facts of this case, instead of the customary law (in accordance with the choice of law rules prescribed by s 3 of Customary Law and Primary Courts Act 1981), the applicant had sought to apply the general law concept of tacit universal

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partnership to an unregistered customary law union, which had come to an end.

The court pointed out that if the applicant, however, is able to establish that during the union she contributed financially or otherwise, particularly in relation to immovable property, in regard to which general law and not customary law applies, she may be able to recover a share of, or a share in the value of, the assets towards the acquisition or improvement of which she has contributed financially or otherwise during the union.

It is necessary for the courts to discourage the too often recurring practice whereby applicants, who know or should know that real and substantial disputes of fact will arise or are likely to arise on the papers, nevertheless resort to application proceedings on the basis that, at worst, they can count on the court to stand the matter over for trial. Unless this practice is curbed, applicants will continue to believe that they have nothing to lose and, indeed, everything to gain tactically by embarking upon application proceedings, notwithstanding their knowledge or belief at the time of doing so that the respondent will be able to show that genuine and serious disputes of fact exist on the papers.

Cases cited:

Masukusa v National Foods Ltd & Anor 1983 (1) ZLR 232 (H)

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

Magwaza v Magwaza & Ors HH-227-89

Adbro Invstm Co Ltd v Min of the Interior 1956 (3) SA 345 (A)

Chiromo v Kadsidzira 1981 ZLR 418 (A)

Verster v Verster 1964 (4) SA 310 (T)

Masimbe v Mungofa HH-96-94

Fink v Fink & Anor 1945 WLD 226

Isaacs v Isaacs 1949 (1) SA 952 (C)

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V (also known as L) v de Wet NO 1953 (1) SA 612 (O)

Muhlmann v Muhlmann 1981 (4) SA 632 (W)

Ally v Dinath 1984 (2) SA 451 (T)

Kritzinger v Kritzinger 1989 (1) SA 67 (A)

Komo & Leboho v Holmes NO 1935 SR 86

Vela v Mandinika & Anor 1936 SR 171

Dokotera v Master of the High Court & Ors 1957 R & N 697 (SR)

Gwebu v Gwebu 1961 R & N 694 (SR)

Jirira v Jirira & Anor 1976 (1) RLR 7 (G)

Katsidzira v Chiromo 1981 ZLR 87 (G)

Jenah v Nyemba 1986 (1) ZLR 138 (S)

Zimnat Ins Co Ltd v Chawanda 1990 (2) ZLR 143 (S)

ROBINSON J

Walker v Industrial Equity Ltd 1995 (1) ZLR 87 (S)

Blower v van Noorden 1909 TS 890

Smith & Anor v Acting Sheriff of Zimbabwe 1995 (1) ZLR 158 (S)

Miss *L Shaba* for the applicant

M Mhishi for the respondent

Judgment

Robinson J: In this matter the applicant, whose marriage to the respondent by way of an unregistered customary law union was terminated when the respondent caused the applicant to move out of the matrimonial home in 1994, sought an order, on the basis of a tacit universal partnership, awarding her a one-half share of all the assets, movable and immovable, which she and the respondent had acquired during the subsistence of their union.

The respondent filed a notice of opposition together with an opposing affidavit, which the parties failed to appreciate had been filed out of time. In his affidavit, the respondent asked for the application to be dismissed with costs on the ground, firstly, that there were real and substantial disputes of fact which the applicant should have known could not be resolved on the papers and, secondly, that, on the merits, the application was ill-founded.

The only issue which fell for my determination was whether I should order that the matter be

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stood over for trial in terms of rule 159(b) of the Rules of the High Court. I say this in view of the following concession made by the applicant in her answering affidavit, when addressing para 1(b) of the respondent's opposing affidavit:

> "... I concede now that there is a serious dispute of fact and accordingly humbly apologise to this Honourable Court for its wasted time and pray for directions that the matter be referred to trial with the papers filed standing as pleadings."

While it would have been an easy way out simply to refer this matter to trial, I saw fit, in the exercise of my discretion, to dismiss the application with no order as to costs for the following reasons.

1. It is necessary to discourage the too-oft recurring practice whereby applicants who know or should know, as was the case with the applicant in this matter, that real and substantial disputes of fact will or are likely to arise on the papers, nevertheless resort to application proceedings on the basis that, at the worst, they can count on the court to stand over the matter for trial.

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Unless this practice is seen to be curbed, applicants will continue to believe that they have nothing to lose and, indeed, everything to gain tactically by embarking upon application proceedings notwithstanding their knowledge or belief at the time of doing so that the respondent will be able to show that genuine and serious disputes of fact exist on the papers.

In this respect, it is relevant to quote the following extract from the judgment of MCNALLY J (as he then was) in *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 (H) at 234D-F:

> "The applicant's legal adviser however wrote back disputing this claim. By insisting on proceeding he brings himself within the scope of the *dictum* of MILLER JA *in Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 430G-H where the learned Judge of Appeal says:
>
> > 'A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed, he chooses that procedural form at his peril, for the court in the exercise of its discretion, might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application.'"

In that case McNALLY J, in the exercise of his discretion, declined to refer the matter to trial and, accordingly, dismissed the application with costs.

In *Magwaza v Magwaza & Ors* HH-227-89 (not reported), a case in which SMITH J also dismissed an application with costs, chiefly because the applicant should have realised that a serious dispute of fact between himself and the first respondent was bound to develop, the learned judge quoted the following statement by CENTLIVRES CJ in *Adbro Investment Co Ltd v Minister of the Interior* 1956 (3) SA 345 (A) at 350A:

> "... where the facts are in dispute a court has a discretion as to the future course of the proceedings. It may dismiss the application with costs or order the parties to go to trial or order oral evidence in terms of any rule of court. The first course may be adopted when the applicant should have realised when launching his application

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that a serious dispute of fact was bound to develop."

2. On the merits, the application is ill-founded in that it seeks to apply a general law concept, namely, the concept of a tacit universal partnership, to an unregistered customary law union which has come to an end, without

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attempting to lay any foundation for applying general law to the facts of this case in lieu of the application of customary law, in accordance with the choice of law rules prescribed by s 3 of Part 1 (which still stands - see s 1(1) as read with s 31 of the Customary Law and Local Courts Act 2 of 1990, as amended by s 18 of Act No 22 of 1992, as read with S I 127A of 1993) of the Customary Law and Primary Courts Act 6 of 1981. No doubt the applicant grasped at the straw of a tacit universal partnership in the light of her knowledge that the court was empowered to make an order with regard to the division, apportionment or distribution of matrimonial assets in terms of s 7 of the Matrimonial Causes Act 33 of 1985 only in the case of a marriage duly solemnized under the Marriage Act [*Chapter 3*] or the African Marriages Act [*Chapter 238*].

Too many legal practitioners tend to labour under the simplistic belief that the concept of a tacit universal partnership is their client's salvation where there appears to be no other solution open to them. However, they should be cautioned that in *Chiromo v Katsidzira* 1981 ZLR 418 (A) at 421D FIELDSEND CJ referred to the South African case of *Verster v Verster* 1964 (4) SA 310 (T) (the judgment is in Afrikaans) as demonstrating the difficulties in the way of establishing a claim of this nature. As it is, the closest to which I have come in finding a case in our jurisdiction where the concept of a tacit universal partnership has been applied is the case of *Masimbe v Mungofa* HH-96-94 (not reported), in which the applicant, a medical doctor, and the respondent, a nursing sister, had lived together as man and wife for a number of years before their relationship broke up. For cases in South Africa where the concept of a tacit universal partnership have been applied, see *Fink v Fink & Anor* 1945 WLD 226, *Isaacs v Isaacs* 1949 (1) SA 952 (C), V *(also known as L)* v *De Wet NO* 1953 (1) SA 612 (O) and *Muhlmann v Muhlmann* 1981 (4) SA 632 (W). (In the last mentioned case at 634F-635E MCCREATH J summarised the principles which the court will apply where in divorce proceedings a spouse married out of community of property claims that a universal partnership had existed between them and claims an order in respect thereof and a division of the assets of such partnership.) See also *Ally v Dinath* 1984 (2) SA 451 (T) and *Kritzinger v Kritzinger* 1989 (1) SA 67 (A).

However, from my remarks I do not wish it to be thought that the applicant, for whose position I have much sympathy, does not have good grounds for recovering a share of, or a share in the value of the assets towards the acquisition or improvement of which she can establish that she has contributed financially or otherwise during her union with the respondent, particularly so in the case of the immovable properties in regard to which general law and

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not customary law applies. See *Komo & Leboho v Holmes NO* 1935 SR 86 at 94-95, *Vela v*

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Mandinika & Anor 1936 SR 171 at 174, *Dokotera v Master of the High Court & Ors* 1957 R&N 697 (SR) at 701E, *Gwebu v Gwebu* 1961 R&N 694 (SR) at 699 E-F, *Jirira v Jirira & Anor* 1976 (1) RLR 7 (G) at 15G, *Katsidzira v Chiromo* 1981 ZLR 87 (G) at 95H, *Jenah v Nyemba* 1986 (1) ZLR 138 (S) at 141F and Ncube *Family Law in Zimbabwe* p 166 para 10.2.1.

To the extent that the respondent seeks to defeat the applicant's claim for relief on the ground that it does not accord with the dictates of customary law, I believe that it is pertinent to refer to the following comments of GUBBAY ACJ (as he then was) in *Zimnat Insurance Co Ltd v Chawanda* 1990 (2) ZLR 143 (S) at 153E-154F, a case in which the Supreme Court, in having regard to the notion of justice and the interests of the litigants balanced against the community as a whole, held that it was desirable to extend the dependant's action to a widow of an unregistered customary law union in respect of whom the duty of support arises by virtue of legislation:

> "Even if confirmation of the appellant's liability to the respondent should meet with disapproval as being an encroachment upon the discretion reposed in the law-giver to change the law, we would strongly defend the judiciary's right to do so. Law in a developing country cannot afford to remain static. It must undoubtedly be stable, for otherwise reliance upon it would be rendered impossible. But at the same time if the law is to be a living force it must be dynamic and accommodating to change. It must adapt itself to fluid economic and social norms and values and to altering views of justice. If it fails to respond to these needs and is not based on human necessities and experience of the actual affairs of men rather than on philosophical notions, it will one day be cast off by the people because it will cease to serve any useful purpose. Therefore the law must be constantly on the move, vigilant and flexible to current economic and social conditions. As that celebrated American jurist, Oliver Wendell Holmes, wrote on the opening page of his famous work, *The Common Law:*
>
> > 'The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which we should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.'

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Today the expectations amongst people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital role to play in moulding and developing the process of social change. The judiciary can and must operate the law so as to fulfil the necessary role of effecting such development.

It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the judiciary than by the legislature. This is because judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that judges do not merely discover the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of the judicial process.

The opportunity to play a meaningful and constructive role in developing and moulding the law to make it accord with the interests of the country may present itself where a judge is concerned with the application of the common law, even though there is a spate of judicial precedents which obstructs the taking of such a course. If judges hold to their precedents too closely, they may well sacrifice the fundamental principles of justice and fairness for which they stand. In a famous passage LORD ATKIN, referring to judicial precedents, said:

> 'When these ghosts of the past stand in the path of justice clanking their medieval chains the proper

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course is for the judge to pass through them undeterred.'"

Again, in *Walker v Industrial Equity Ltd* 1995 (1) ZLR 87 (S) GUBBAY CJ had occasion to refer to the following apt observation by INNES CJ in *Blower v van Noorden* 1909 TS 890 at 905:

> "There comes a time in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the legislature."

Yet again, in *Smith & Anor v Acting Sheriff of Zimbabwe & Anor* 1995 (1) ZLR 158 (S), McNALLY JA stated that the "evolution of the Roman Dutch

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Law in the spirit of our customary law is an on-going process - a process of indigenisation".*(4)

The applicant may indeed be able to put forward her claim for relief on alternate grounds when re-commencing proceedings by way of action, a procedure which lends itself more appropriately, both from a pleading and from an evidence point of view, to a resolution of the issues in this matter. In this connection, I would refer again to *Masukusa's* case *supra*, in which, in giving a more general reason as his third reason for dismissing the application, MCNALLY J (as he then was) stated at 236F-237A:

> "Procedure by way of notice of motion, though often convenient, is far less disciplined than procedure by action. A good novelist can write a series of exciting affidavits and at the end claim large sums of money. It takes a lawyer to draw a declaration.
>
> To draw a declaration it is necessary to analyse your claim and decide exactly what you have to prove."

These remarks are equally apposite to this case.

3. There has been no prejudice to the applicant financially by my having dismissed her application because, being a person who is being assisted as a pauper by a legal practitioner from the Harare Legal Projects Centre, she has not incurred any costs, nor has she been ordered to pay the respondent's costs, from the payment of which I was able to save her by virtue of the respondent's notice of opposition and opposing affidavit having been filed when the respondent was barred from filing such documents.

In the result I confirm that it was for the aforegoing reasons that, in the exercise of my discretion, I dismissed the application with no order as to costs.

I have produced this judgment because the applicant has requested that I reduce my reasons to writing so that she can consider the question of noting an appeal out of time.

Harare Legal Projects Centre, applicant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

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RUWODO NO v MINISTER OF HOME AFFAIRS & ORS 1995 (1) ZLR 227 (SC)

Court **Supreme Court, Harare**

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

Constitutional application

24 March 1995 Judgment No S-42-95

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 22(1) - right of citizen to reside in any part of Zimbabwe and freedom from expulsion from Zimbabwe - citizen an infant - mother an alien - when mother entitled to rely on child's rights as citizen in order to remain in Zimbabwe

Headnote

The applicant, Michael Wong, was, at the time of this application, a child of 3 years of age. He was born out of wedlock. His mother, Mrs Ruwodo, a citizen of the United States, had had three children born to her out of wedlock in that country before she became pregnant by Mr Ruwodo, a citizen of Zimbabwe who was then living in the United States. While pregnant, she married Mr Ruwodo in North Dakota. Mr Ruwodo soon afterwards left for Zimbabwe. A few months later Mrs Ruwodo and her three children came to Zimbabwe where she set up home with Mr Ruwodo. The child she was carrying was born in Zimbabwe soon after that. The union did not last long and Mrs Ruwodo and her four children left the matrimonial home. For some time she lived with another man in Bulawayo, by whom she became pregnant with the applicant. The applicant was born in Bulawayo and was a citizen of Zimbabwe by birth, Mrs Ruwodo then residing in Zimbabwe without being in contravention of the provisions of any law.

When she first came to Zimbabwe, Mrs Ruwodo was granted a permanent residence permit by virtue of her marriage to Mr Ruwodo. This was withdrawn when the marriage broke down and for a long time she remained in Zimbabwe on visitor's permits. Eventually, the Minister of

Home Affairs declined to grant her permanent residence on the grounds that she was an undesirable person and she was told that she would have to leave the country.

Mrs Ruwodo applied to the Supreme Court, in her capacity as guardian and representative of Michael Wong, for an order declaring that her deportation would contravene Michael's fundamental and unqualified right under s 22(1) of the Constitution to reside in Zimbabwe.

Held, that the rights of a citizen child under s 22(1) are not absolute but are subject, like other rights of children, to the qualification of parental authority. A custodian parent has the right and duty to regulate the life of the child, which includes the right to choose and establish its residence. Any decision by the parent that the child is to live with her in another country

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effectively overrides his constitutional right to remain in Zimbabwe. The applicant, as an infant, was not *sui juris*, was devoid of understanding and could exercise no volition. He could not live separately from his mother and independently enjoy his rights under the Constitution. It was extremely doubtful whether the decision of a custodian parent to take a minor child to live outside Zimbabwe could be overturned in consequence of an application by the guardian parent to enforce its rights as a citizen to live here.

Held, further, that Mrs Ruwodo as guardian had the right to assert Michael's right to reside in Zimbabwe, but that right has to be exercised in good faith. It attached to Michael and not to her. Much depends on the special circumstances of the citizen child as to whether the protection and enforcement of its rights would require the alien mother to remain in Zimbabwe. In this case, there was no evidence as to why it was in Michael's best interests to remain here rather than go to the United States. Mrs Ruwodo herself was a liability on the State and an undesirable person in Zimbabwe. She was making use of Michael's rights as a tool to achieve her own ends - to avoid her being returned to the United States

Held, accordingly, that the application should be dismissed.

Cases cited:

Rattigan & Ors v Chief Immigration Officer & Ors 1994 (2) ZLR 54 (S); 1995 (1) BCLR 1 (ZS)

Salem v Chief Immigration Officer & Anor 1994 (2) ZLR 287 (S); 1995 (1) BCLR 78 (ZS)

Landman v Mienie 1944 OPD 59

M v A 1981 ZLR 306 (G); 1981 (4) SA 637 (Z)

R v Rasool 1924 AD 44

GUBBAY CJ

In re *Wood & Hansard* 1994 (2) ZLR 155 (S); 1995 (1) BCLR 43 (ZS)

Sun v The Queen [1961] SCR 70

Denis v The Queen [1976] 1 FC 499 (CA)

A P de Bourbon SC for the applicant

A V M Chikumira for the respondents

Judgment

Gubbay CJ: This application was instituted by the minor child Michael Antony Jacob Wong, hereinafter referred to as "Michael", assisted by his guardian and natural mother, Mary Lou Ruwodo. At the inception of the hearing, it was pointed out to counsel that Michael, being an *infans,* that is, under the age of seven years, has no active legal capacity, and so cannot litigate with the assistance of his guardian. See Voet 2.4.4; Boberg *The Law of Persons and the Family*

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p 682; Harms *Civil Procedure in the Supreme Court* para C2 at p 55. Hence his guardian ought to have brought the proceedings in a representative capacity on his behalf. Mr *de Bourbon*, who appeared in support of the application, then sought to amend the papers by substituting the name of the guardian as the representative of Michael. On behalf of the respondents, Mr *Chikumira* raised no opposition and the amendment was duly granted.

The application comes before this court pursuant to the right to obtain enforcement of the protective provisions of the Declaration of Rights granted to any person in terms of s 24(1) of the Constitution of Zimbabwe. The substantive contention is that implementation by the second respondent, the Chief Immigration Officer, of his decision to deport Mrs Ruwodo from Zimbabwe, will contravene the fundamental and unqualified right of Michael, accorded under s 22(1), to reside in any part of Zimbabwe.

Mrs Ruwodo was born in the United States of America and is a citizen of that country. While residing there, three children were born to her out of wedlock; the first on 23 May 1982, the second on 26 March 1984, and the third on 17 December 1985. The two eldest bear the surname of their father; the youngest, Mrs Ruwodo's maiden name. All three are citizens of the United States of America.

On 30 November 1987, Mrs Ruwodo married Tendai Ben Ruwodo in the State of North Dakota. She was at that time pregnant with his child. Within a week of the marriage, Mr Ruwodo returned to live in Zimbabwe. Mrs Ruwodo and her three children arrived here on 13 April 1988. There is no indication that they were expected or welcomed by Mr Ruwodo. However

that may be, a matrimonial home was established in Bulawayo where Christine Latoya Ruwodo was born on 7 May 1988. This child is a citizen of Zimbabwe by virtue of s 5(1)(a) of the Constitution.

Soon after the birth of their child, Mr and Mrs Ruwodo began to experience marital problems and ultimately, in early April 1989, Mrs Ruwodo and the four children left the matrimonial home for good. On 12 April 1989, Mr Ruwodo commenced proceedings for a decree of divorce. That action is still pending before the High Court.

Prior to the separation, Mrs Ruwodo was in possession of an alien's permit issued to her, in terms of s 38 of the Immigration Regulations 1979 (RGN 373 of 1979), on account of her marriage to a citizen of Zimbabwe and upon the presumption that she would continue to live with her husband in Zimbabwe. When the marriage broke up the permit was cancelled. Mrs Ruwodo was then deemed to be a visitor in terms of s 31(1)(a) of the Immigration Act, 1979, and was put on notice as a visitor. Thereafter, permission for her to remain in the country as a visitor was renewed from time to time.

During the period April 1991 to September 1993, Mrs Ruwodo lived with one Antony Wong in Bulawayo. He is the father of Michael, who was born in that city on 9 April 1992. At that time Mrs Ruwodo was residing in Zimbabwe without being in contravention of the provisions of any

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law. Accordingly, Michael is a citizen of Zimbabwe by virtue of s 5(1)(c) of the Constitution.

Subsequent to the termination of her relationship with Mr Wong, Mrs Ruwodo and the five children have been supported by one Rabbi Isaacson and the Union of Jewish Women. The school fees of the four children are being met by the Department of Social Welfare. Mr Wong shows no interest whatsoever in Michael and provides no maintenance for him.

In a letter dated 24 May 1994, Mrs Ruwodo was informed by the first respondent, the Minister of Home Affairs, that her application for a temporary employment/residence permit was refused and that she should make preparations to leave the country. She was later notified that the visitor's entry certificate granting her permission to remain in Zimbabwe up to 9 June 1994, had been cancelled and that she was to depart forthwith.

Mrs Ruwodo declined to comply. On 6 July 1994, she obtained from the High Court a provisional order interdicting both the Minister of Home Affairs and the Chief Immigration Officer from deporting her and the children, pending the determination of the present application.

GUBBAY CJ

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, is entitled, by reason of the protection of freedom of movement under s 22(1) of the Constitution, 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 right of the wife, as a citizen and a member of a family unit, to live here. Then, in *Salem v Chief Immigration Officer & Anor* 1994 (2) ZLR 287 (S), the principle was extended to embrace within the citizen wife's own mobility rights, that of the alien husband to lawfully engage in employment or other gainful activity in Zimbabwe. The rationale was that to prohibit the husband from so doing would require the wife, if unable through her own resources to support him and any children born to them, to forego her right to reside permanently in Zimbabwe and compel her to accompany the husband to a land where he is allowed to earn a livelihood.

Placing reliance on these decisions, Mr *de Bourbon* proceeded to argue that in order both to avoid impairing, if not destroying, the family bond between Michael and his mother, and to preserve and not circumscribe Michael's freedom of movement under s 22(1), it is essential that Mrs Ruwodo and the four other children remain living with Michael in Zimbabwe.

The rights of a citizen child under s 22(1) are not absolute. Like the rights protected under s 19 (freedom of conscience and religion), s 20 (freedom of expression), and s 21 (freedom of assembly and association), there is built into the right of freedom of movement the qualification of parental authority.

A custodian parent has the right and duty to regulate the life of the child, which includes the right to choose and establish its residence. See *Landman v Mienie* 1944 OPD 39 at 65; *M* v *A* 1981 ZLR 306 (G) at 310A-E, 1981 (4) SA 637 (Z) at 640D-F. Mrs Ruwodo is both the custodian and guardian of Michael. Any decision that he is to live with her in another country effectively

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overrides his constitutional right to reside in Zimbabwe. Michael is an *infans. He is not sui juris.* He is devoid of understanding and can exercise no volition. See *R v Rasool* 1924 AD 44 at 47. He cannot determine whether to reside in one country or another. He suffers from the disability that his mother exercises physical control over him. He has no ability to live separately from her and cannot independently enjoy his rights under s 22(1) of the Constitution.

It seems to me doubtful in the extreme that the decision of the custodian of

a minor child to leave Zimbabwe and settle with such child in another country could be overturned in consequence of an application brought by the child's guardian to enforce its right as a citizen to reside in Zimbabwe. The application would have to be founded, not upon an infringement of the constitutional rights of the child, but on the fact that its interests are better served in this country; or upon the impact of the child's removal from the jurisdiction on the ability of the guardian and non-custodian parent to enjoy access to it.

It was not in dispute that if the deportation of Mrs Ruwodo is to take effect, she will not leave Michael behind in this country. He will go with her and his half brothers and sisters to the United States of America. If there were any prospect of the authorities of that country refusing entry to Michael, it would have been alluded to by Mrs Ruwodo. It was not. In short, the family unit is not under threat of split up by the decision taken by the Chief Immigration Officer. It will be relocated intact in the United States of America.

It is Mrs Ruwodo in her capacity as guardian who has the authority to assert Michael's right to reside in Zimbabwe. But she may only exercise that right in good faith, for it attaches to Michael and not to her. She will not be permitted to further her personal interests under the guise of seeking to enforce the mobility rights of Michael. The point was made in In re *Wood & Hansard* 1994 (2) ZLR 155 (S); 1995 (1) BCLR 43 (ZS) where I said at 159F (46J):

> "... Mrs Wood is seeking to 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."

If Mrs Wood had challenged her deportation order by bringing an application in her representative capacity as the guardian of Martin, a citizen by birth, she would have failed. For in truth the protection she was seeking from the court related to her interests. Martin's rights under s 22(1) were being used as the tool to achieve her own ends.

In similar fashion, Mrs Ruwodo, to my mind, is endeavouring to make use of Michael's rights to avoid being returned, with the children, to the United States of America. Not one word is spoken about why it is in Michael's best interests to remain living in Zimbabwe. He has no formative ties here, having been cast aside by the Wong family. Moreover, Mrs Ruwodo is an undesirable

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person in Zimbabwe. She has had five children from four different fathers, four of them born out of wedlock. It is probable that the marriage to Mr Ruwodo was one of convenience, motivated by a desire on Mr Ruwodo's part to legitimise Christine. Certainly the assertion by the Chief Immigration Officer that the marriage was not genuinely entered into with the intention of establishing a lasting relationship has not been refuted adequately by Mrs Ruwodo. She is a woman who possesses no skills and no means to look after herself and the children. She is wholly dependent upon support from the State and other persons. She is a liability.

Mr *Chikumira* referred in argument to two Canadian decisions. In the first, *Sun v The Queen* [1961] SCR 70, the appellant, a married woman and a resident of Hong Kong where her husband was employed, entered Canada on a non-immigrant visa. While staying in Ottawa with her father and brother, she gave birth to a son, a child of the marriage. When the permission she had received to enter the country had expired, a deportation order was made against her. This she endeavoured to resist on the ground that the child, being a natural-born citizen, had a right to live in Canada, which was far better for him than Hong Kong. She, so it was argued, was required to remain in Canada in order to provide him with the motherly love, care and attention he was entitled to. KERWIN CJC disagreed. He said at 71:

> "If the appellant chooses to take the child with her, the material indicates that the Hong Kong authorities are willing to receive her and the child. If, on the other hand, she chooses to leave the child here, he is entitled to remain in Canada."

In *Denis v The Queen* [1976] 1 FC 499 (CA), the appellant, aged thirty months, was a citizen of Canada. Her natural mother had been served with a deportation order. The contention advanced was that to deport the mother would oblige her to take the appellant with her, thus exiling the appellant contrary to s 2(b) of the Canadian Bill of Rights. The appeal failed. The court pronounced that the decision lay with the mother to take the appellant with her or leave her in Canada. Accordingly, the deportation order could not be said to result in the arbitrary exile of the appellant (see at 501j-502a).

With due deference, I consider it unrealistic to have held that the mothers of these two children had a choice. To leave the infant child behind in a foreign country was not a viable option to either of them.

I have preferred, therefore, to approach the issue in the manner I have done

GUBBAY CJ

rather than adopt the reasoning of the Canadian decisions. Much depends, in my view, on the special circumstances of the citizen child as to whether the protection and enforcement of its rights under s 22(1) of the Constitution will require the alien mother to reside with it in Zimbabwe.

Initially, Mr *Chikumira* sought an award of costs *de bonis propriis* on the basis that in bringing the application Mrs Ruwodo had acted, at the very least, unreasonably. See Harms *op cit* at para C2 at p 56. However, her undoubted indigency and the fact that the application had been

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funded by a third party persuaded counsel to withdraw his request.

It was essentially for the reasons aforegoing that at the conclusion of argument the application was dismissed.

McNally JA: I agree.

Korsah JA: I agree.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Bulawayo Legal Projects Centre, applicant's legal practitioners

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

IN RE CHIKWECHE 1995 (1) ZLR 235 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Constitutional application

13 & 27 March 1995 Judgment No S-38-95

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 19 - freedom of conscience and belief - scope of section - Rastafarianism - whether a religion or belief - right of lawyer to manifest beliefs by wearing hair in dreadlocks

Legal practitioner - admission - qualification - fit and proper person for admission - scope of requirement that applicant be fit and proper - whether appearance has any bearing upon whether person is a fit and proper person for admission to legal practice - Legal Practitioners Act 15 of 1981 - s 5(1)(f)

Headnote

The applicant applied to the High Court for registration as a legal practitioner. At the time of the application he was wearing his hair in "dreadlocks". The judge hearing the application considered his dreadlocks made him unkempt and not properly dressed, and declined to allow him to proceed. It was not clear whether her reason was based on his not appearing to be a fit and proper person as required by the Legal Practitioners Act, or on the rule of practice that lawyers should be formally dressed, tidy and well groomed when appearing in court. There were no other impediments to his admission as a legal practitioner. The applicant's counsel submitted that the refusal was an infringement of ss 19, 20 and 23 of the Constitution. The matter was referred by the judge to the Supreme Court for determination.

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Held, that s 19(1) of the Constitution protects both freedom of conscience and religion. This protection is not just intended to protect systems of belief centred on a deity or religion, but extends to those founded on personal

GUBBAY CJ

morality and other conscientiously held beliefs.

Held, further, that a religion is essentially a matter of personal faith and belief. The court is not concerned with the validity or attraction of the faith or belief, but only with the sincerity of them, and men may believe what they cannot prove. The protection also extends to the right to manifest and propagate a religion or belief. The essence of this freedom is the right to hold and declare such beliefs as a person chooses without fear of hindrance or reprisal, provided his manifestations do not injure others or their parallel rights to their own opinions.

Held, further, (*per* GUBBAY CJ and EBRAHIM JA) that Rastafarianism is a religion, and the applicant is sincere in his belief in it and is entitled to express his belief through the wearing of dreadlocks or other overt acts.

Held, per MCNALLY JA, that, although Rastafarianism may not be a religion, it is clearly a genuine philosophical and cultural belief and as such protected by s 19 of the Constitution.

Held, further, that if the basis of refusing him admission to legal practice was that the rule of practice that a legal practitioner should be tidy in appearance when in court, this practice could not be used to justify an interference with freedom of religion and belief as it did not fall under the limitations to this freedom in s 19(5). The limitation had to be contained in or done under a law and the rule of practice was not done under or contained in a law. The interference with the expression of a religious or cultural belief on this basis did not fall within any of the limitations to s 19 set out in s 19(5) of the Constitution.

Held, further, that if the court had decided that the applicant's wearing of dreadlocks meant that he was not a fit and proper person to be registered as required by s 5(1)(f) of the Legal Practitioners Act 1981, this was a wrong approach. The requirement that the person be a fit and proper person alludes to his personal qualities, not to his physical characteristics. It requires that the person must be honest and reliable and appearance has no rational connection with the object of maintaining the integrity and honour of the profession. The applicant could not be refused registration under the section because of his dreadlocks. The question of whether an applicant is a fit and proper person is a question of fact and not simply left to the discretion of the court.

Held, further, that, as there had been an infringement of the applicant's constitutional rights under s 19, there was no need to consider applicant's rights under ss 20 or 23 of the Constitution.

Held, therefore, that the High Court had wrongly refused the applicant admission to legal practice and it was ordered to allow the applicant to take the oaths of office.

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GUBBAY CJ

Cases cited:

Kaplan v Inc Law Soc, Tvl 1981 (2) SA 762 (T)

Reed v Faulkner 842 F2d 960 (7th Cir 1988)

People v Lewis 510 NYS 2d 73 (1986)

Crown Suppliers (Property Svcs Agency) v Dawkins [1993] 1 CR 517 (CA)

US v Ballard 322 US 78 (1944)

R v Big M Drug Mart Ltd (1985) 13 CRR 64

Morgentaler & Ors v R (1988) 31 CRR 1

Torcaso v Watkins 367 US 488 (1961)

S v Mkhise & Ors 1988 (2) SA 868 (A)

Law Soc, Tvl v Behrman 1981 (4) SA 538 (A)

Ex p *Aarons (Law Soc, Tvl intervening)* 1985 (3) SA 286 (T)

T Biti for the applicant

E T Binali for the Attorney-General

Judgment

Gubbay CJ: The applicant is a citizen of Zimbabwe and a devout follower of the Rastafari movement. On 17 November 1992, he lodged an application in the High Court for registration as a legal practitioner, notary public and conveyancer. He possessed the necessary qualifications prescribed in the Legal Practitioners (General) Regulations 1983, as read with the Legal Practitioners (Council for Legal Education) (Transitional Provisions) (No. 2) Rules 1992, and satisfied the additional requirements laid down in s 5(1) of the Legal Practitioners Act 1981. Accompanying the application was the affidavit of a Mr Joel Zowa, a registered legal practitioner and lecturer in the Faculty of Law at the University of Zimbabwe. It stated that the applicant was known personally to him and considered to be a fit and proper person to be registered. The Law Society also notified that it did not oppose the application. That body is recognised as the guardian of "the prestige, status and dignity of the profession". See *Kaplan v Inc aw Soc, Tvl* 1981 (2) SA 762 (T) at 781C. On the face of it, there was no impediment to the applicant's admission as a legal practitioner, notary public and conveyancer.

However, when the applicant appeared in person before the High Court on 29 July 1993, the learned judge presiding considered him to be "unkempt" and not properly "dressed". The deep-felt objection concerned the applicant's hair which, as a Rastafarian, he wore habitually in

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the style commonly known as "dreadlocks". In consequence the learned judge declined to permit the applicant to take the oath of loyalty and of office, in terms of s 63 of the Legal Practitioners Act, as a preliminary to registration. It is not certain from the cursory judgment delivered whether such refusal was based on the failure of

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the applicant to show that he was "a fit and proper person" as required by s 5(1)(f) of the Legal Practitioners Act, or upon the long-standing rule of practice adopted and enforced by the courts of this country that members of the legal profession who appear to present cases must be formally dressed, tidy and well groomed. It seems to me that it was this practice that the learned judge had in mind, for no reference was made, as I would expect it to have been, to a non-acceptance of Mr Zowa's assessment of the applicant as a fit and proper person.

Dismayed at the attitude of the learned judge, counsel who appeared immediately submitted that the refusal to grant the applicant registration, by reason only of his chosen hairstyle, infringed his right under the Constitution of Zimbabwe to:

(a) freedom of conscience (s 19(1));

(b) freedom of expression (s 20(1)); and

(c) protection from discriminatory treatment (s 23(1)(b)).

Thereupon, the learned judge complied with the request that the matter be referred to the Supreme Court for determination in accordance with s 24(2) of the Constitution.

The applicant has deposed that the wearing of dreadlocks is a symbolic expression of his religious and philosophical world outlook which is inspired by Rastafarianism. His sincerity is beyond doubt. In order then to determine whether the action taken by the learned judge infringed any of his constitutional rights, it is necessary to have regard to the history and tenets of Rastafarianism.

This court was furnished with the affidavit of Professor Horace Campbell, a Rastafarian scholar and author of several books and articles on the Rastafari movement. One of his books, *Rasta and Resistance: From Marcus Garvey to Walter Rodney,* was also made available. It repays study.

Professor Campbell maintains that the wearing of dreadlocks is a symbolic expression of the Rastafari movement, which embraces the cultural, philosophical and religious aspirations of the African peoples in general and, in particular, the African peoples of the diaspora. He explains that the movement was an expression of resentment against British colonial overrule and the complicity of the Christian Church in the colonial enterprise. It emerged in the context of colonialism in Jamaica where the African presence always had to find a new mode of expression and self-proclamation. The brutality of slavery and colonial racism led the African majority to seek

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cultural and religious outlets. When, in 1930, Haile Selassie was crowned Emperor of Ethiopia, the rural Jamaican African population accepted him as their king and later came to venerate him as God. Ethiopia, with its political and religious autonomy and independence in the period of colonialism, was seen as an expression of the freedom and redemption of the African continent and the African peoples.

According to Professor Campbell, the wearing of dreadlocks developed as an act of defiance to the colonial conception of beauty and good grooming. It commenced in the 1950s when the Rastafari saw pictures of the African freedom fighters from Kenya (Mau Mau), which ignited the feelings of solidarity among the Africans in Jamaica. The photographs of Dedan Kimathi, General China and Jomo Kenyatta were taken as positive symbols of African expression and the Rasta carried their hair in dreadlocks as a protest against the then current fashion of close-cut hair. The Biblical justification for dreadlocks came from the Book of Numbers, Chapter 6, Verse 5. This holds that when the children of Israel became holy:

> "All the time of his separation no razor shall pass over his head, until the day be fulfilled of his consecration to the Lord. He shall be holy, and shall let the hair of his head grow."

Professor Campbell proceeds to recount that in time the wearing of locks gave rise to the idea of dreadlocks. This was an affirmation that the hair of the African was as good as any other hair. The concept of "Natty Dread" became part of the vocabulary of resistance. He says:

> "The symbol of dreadlocks became a lasting sign of black pride. It was a symbol which was to gain international significance after reggae artists took on the physical appearance of the Dreads and exposed the culture of the hills to the saloons of London, Frankfurt and Amsterdam, to the big musical centres of Los Angeles and New York, and ultimately to the Independence Celebration in Zimbabwe."

And goes on:

> "This explosion of the symbols of the Rastafari has met with opposition from the establishment all over the world. It requires a lot of confidence for African persons to wear their hair in locks because there is so much persecution of the Rastafari and dreadlocks, especially among the professional classes."

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What little judicial authority exists fully justifies the claim that the wearing of dreadlocks is a symbolic expression of the religious beliefs of the Rastafari.

The leading case in the United States of America is *Reed v Faulkner* 842 F2d 960 (7th Cir 1988). POSNER, Circuit Judge, who delivered the unanimous opinion of the court, entertained no doubt that Rastafarianism is a form of religion. After referring with commendation to an article in (1984) 72 *Georgetown LJ* 1605, entitled "Soul Rebels: The Rastafarians and the Free Exercise Clause", the learned judge said at 962:

> "The Rastafarians are a religious sect that originated among black people in Jamaica but that has adherents among American blacks as well. Its tenets ..., most of which are derived by interpretation of passages in the

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> Bible, are that Haile Selassie, the deposed emperor of Ethiopia who died in 1975, is God and that Marcus Garvey (the Pan - African leader of Jamaican extraction) is his Prophet; that Ethiopia is heaven, and Jamaica hell; that the Rastafarians are the reincarnation of the ancient Israelites, and are the chosen people; that men should not shave, cut, or comb their hair (hence the 'dreadlocks', which apparently are the natural result of letting one's hair grow wild); that black people are superior to white people and are destined eventually to rule the earth; that marijuana is a holy herb; and that meat should not be eaten. This assemblage of beliefs will strike most Americans as bizarre, but then most Americans are not Rastafarians, and religious beliefs often strike the non-believer as bizarre. (Ambrose Bierce's aptly named *Devil's Dictionary* defines 'impiety' as 'your irreverence toward my deity'). The district judge assumed that the Rastafarian faith is a *bona fide* religion for purposes of the First Amendment, and there is no reason to doubt that this is a proper assumption."

In *People v Lewis* 510 NYS 2d 73 (Court of Appeals of New York, 1986), the plaintiff, a convicted felon, challenged as a violation of his rights under the Federal Constitution's First Amendment, the application to him of a prison regulation. It required that male inmates receive an initial haircut and shave for reasons of health and sanitation, as well as to permit the taking of an identification photograph. As an avowed Rastafarian the plaintiff wore his hair in dreadlocks. It was not disputed that he did so because of his genuine religious beliefs. The Full Court held that the regulation infringed on the plaintiff's beliefs, and that the same result could be achieved if the plaintiff were to pull his hair back for the photograph instead of being compelled to cut off his dreadlocks.

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The only reported case in England in which Rastafarianism has been debated, is that of *Crown Suppliers (Property Svcs Agency) v Dawkins* [1993] 1 CR 517 (CA). The facts were that Dawkins responded to a newspaper advertisement placed by Crown Suppliers for an experienced driver. He was invited for an interview, in the course of which he was informed that all drivers were expected to have short hair. Dawkins, who was a Rastafarian, wore his hair in dreadlocks. He informed the interviewer that he was unwilling to cut his hair and hence the interview was concluded. Dawkins later appealed to the industrial tribunal for a determination as to whether he had been discriminated against contrary to the Race Relations Act 1976. He succeeded before the tribunal but lost in a subsequent appeal to the Employment Appeal Tribunal (see [1991] 1 CR 583). That decision was confirmed by the court of appeal on the ground that Rastafarians did not constitute a separate social group, defined by reference to their ethnic origins. It as held that Rastafarians are a religious sect and no more, having a strong cultural tradition and adopting a distinctive form of hairstyle by wearing dreadlocks.

Furthermore, it is of some significance that in British prisons Rastafarians are respected as a religious sect and are permitted to keep their dreadlocks. See Home Office Circular Instruction No. 2 of 1983; and generally, *Directory and Guide on Religious Practices in Her Majesty's Prison Service, 1988; Discrimination: The Limits of Law,* ed by Hepple and Szyszczak, at p 183.

I should also mention that the Attorney-General's representative, who was entitled to be heard in these proceedings in terms of s 24(6) of the Constitution, readily accepted that "the applicant's appearance is an expression of his religious tenets".

This court is not concerned with the validity or attraction of the Rastafarian faith or beliefs; only

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with their sincerity. In the words of JUSTICE DOUGLAS in *United States v Ballard* 322 US 78 (1944) at 86-87:

> "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they be beyond the ken of mortals does not mean that they can be made suspect before the law."

Much the same definition of freedom of religion was expressed by DICKSON CJ in the Canadian case of *R v Big M Drug Mart Ltd* (1985) 13 CRR 64 at 97:

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> "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal ..."

And at 105:

> " ... Every individual (is) free to hold whatever religious beliefs his or her conscience dictates, provided, *inter alia,* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own."

In an examination of the effect of art 25(1) of the Constitution of India, which guarantees the freedom of conscience and religion, Dr J N Pandey, in his work *Constitutional Law of India,* comments at p 197:

> "Religion is a matter of faith with individuals or communities and it is not necessarily theistic. A religion has its basis in 'a system of beliefs or doctrines which are regarded by those who profess that religion as conclusive to their spiritual well being'; but it will not be correct to say that religion is nothing else but a doctrine of belief. A religion may only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and those forms and observances might extend even to matters of food and dress. Religion is thus essentially a matter of personal faith and belief. Every person has the right not only to entertain such religious belief and ideas as may be approved by his judgment or conscience but also to exhibit his belief and ideas by such overt acts which are sanctioned by his religion."

Accepting the status of Rastafarianism as a religion in the wide and non-technical sense referred to, I am satisfied that the applicant's manifestation of his religion by the wearing of dreadlocks falls within the protection afforded by s 19(1) of the Constitution which, in material part, reads:

> "... no person shall be hindered in the enjoyment of his freedom of conscience, that is to say, freedom of thought and of religion ... and ... to manifest and propagate his religion or belief through worship, teaching, practice and observance."

In any event, I am of the view that the reference in s 19(1) to freedom of conscience is intended to encompass and protect systems of belief which are

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not centred on a deity or religiously motivated, but are founded on personal morality. The point

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was made forcefully by WILSON J in the Canadian case of *Morgentaler & Ors v R* (1988) 31 CRR 1 at 91, in these terms:

> "It seems to me, therefore, that in a free and democratic society 'freedom of conscience and religion' should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or secular morality. Indeed, as a matter of statutory interpretation, 'conscience' and 'religion' should not be treated as tautologous if capable of independent, although, related, meaning."

See also Hogg *Constitutional Law of Canada* 3 ed at p 947.

It is obvious to me that the refusal by the learned judge to entertain the application placed the applicant in a dilemma. Its effect was to force him to choose between adhering to the precepts of his religion and thereby foregoing the right to practise his profession and appear before the courts of this country, or sacrifice an important edict of his religion in order to achieve that end. A somewhat analogous situation came before the United States Supreme Court in *Torcaso v Watkins* 367 US 488 (1961). A notary public in Maryland was denied a commission to serve because he would not declare his belief in God as required by a provision of the Constitution of the State of Maryland. The court held that the provision imposed an invalid test for public office which was violative of freedom of belief and religion.

The conclusion I have reached makes it unnecessary for me to deal with the submissions relating to potential breaches of ss 20(1) and 23(1)(a) of the Declaration of Rights.

The question that remains is whether the ruling of the learned judge is saved from being held to be a contravention of s 19(1) by the provisions of s 19(5), which reads:

> "Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) or (3) to the extent that the law in question makes provision -
>
> (a) in the interests of defence, public safety, public order, public morality or public health;
>
> (b) for the purposes of protecting the rights and freedoms of other persons, including the right to observe and practise any religion or belief without the unsolicited intervention of persons professing any other religion or

> belief without the unsolicited intervention of persons professing any other religion or belief; or
>
> (c) with respect to standards or qualifications to be required in relation to places of education, including any instruction not being religious instruction, given at such places;

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

I have mentioned my impression that the refusal of the application was based on the rule of practice concerning the propriety of a practitioner's dress and appearance. If I am correct in so inferring, then what was done was not "contained in" or "under the authority of" any law, thereby making the expressed limitations inapplicable.

I am prepared to accept the possibility, however, that the learned judge considered that the wearing of dreadlocks revealed that the applicant was not "a fit and proper person" to be

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registered, as required by s 5(1)(f) of the Legal Practitioners Act.

Construed in context, the words "a fit and proper person" allude, in my view, to the personal qualities of an applicant - that he is a person of honesty and reliability. See *S v Mkhise & Ors* 1988 (2) SA 868 (A) at 875D. I am not persuaded that the lawmaker intended by use of the phrase to embrace the physical characteristics of an applicant. For appearance bears no rational connection with the object of maintaining the integrity and honour of the profession.

The Appellate Division of South Africa has held that whether an applicant is "a fit and proper person" for admission as an attorney, is a question of fact and is not left to the discretion of the court hearing the application. See *Law Soc, Tvl v Behrman* 1981 (4) SA 538 (A) at 555E-557A (overruling, on the point, *Kaplan v Inc Law Soc, Tvl supra*); Ex p *Aarons (Law Soc, Tvl intervening)* 1985 (3) SA 286 (T) at 290A-D. As s 15(1)(a) of the South African Attorneys Act 1979 (prior to the 1984 amendment) was worded identically to s 5(1)(f) of the Legal Practitioners Act, there is no reason, to my mind, to depart from the interpretation given the provision in the cases cited.

In the light of this judgment, the finding of the learned judge, that the applicant was not a fit and proper person, was factually incorrect. It

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GUBBAY CJ

necessarily follows that the act of refusing to permit the applicant to take the requisite oaths could not be done under the authority of s 5(1)(f) of the Legal Practitioners Act. The authority of that provision was misconceived. It did not allow of what was done.

Even if it could be contended that the ruling was validly made under the authority of s 5(1)(f), it is clear beyond question that neither the subsection nor the Act as a whole makes provision for any of the matters specified in paras (a), (b) or (c) to s 19(5) of the Constitution.

In the result, and by virtue of the powers vested in the Supreme Court by s 24(4) of the Constitution, I would order as follows:

> "In terms of s 63 of the Legal Practitioners Act 1981, the High Court is directed to permit Enock Munyaradzi Chikweche to take the oaths of loyalty and of office specified in Schedule 1 of the Constitution."

McNally JA: I agree, and would add only this: I have reservations about the classification of Rastafarianism as a religion. But I have no doubt that it is a genuine philosophical and cultural belief, and as such falls under the protection of s 19(1) of the Constitution.

Ebrahim JA: I agree with the views expressed by the learned CHIEF JUSTICE. There is ample authority which has been cited by him in his judgment in support of the view that Rastafarianism is a religion, and I see no sound reason to hold otherwise. In the result, I agree with the judgment of the CHIEF JUSTICE *in toto.*

Honey & Blanckenberg, for the applicant

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Civil Division of the Attorney-General's Office, for the Attorney-General

UNITED BOTTLERS (PVT) LTD v MURWISI 1995 (1) ZLR 246 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

McNally JA, Korsah JA & Muchechetere JA

Appeal from Labour Relations Tribunal

23 & 30 March 1995 Judgment No S-41-95

Flynote

Employment - employee - suspension - pending application to dismiss employee - powers of labour relations officer - limited to ordering termination of contract or reinstatement - not competent to order payment of damages

Headnote

The appellant employed the respondent as a driver. As a result of an alleged breach of discipline, the appellant suspended the respondent without pay and applied to a labour relations officer for authority to dismiss him. The labour relations officer granted the order and his decision was upheld on appeal to the regional hearing officer. However, the Labour Relations Tribunal ruled in favour of the respondent and ordered his reinstatement. The appellant appealed to the Supreme Court, not against the finding of the Tribunal, but against the relief granted. It asked that it be allowed instead to pay damages or compensation for wrongful dismissal.

Held, that the Supreme Court could not, in the absence of a clear provision to that effect, grant relief which could not have been granted by the body appealed from. The application to dismiss the respondent had been made in terms of s 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985). In terms of this section, the labour relations officer had only two choices, depending on his findings of fact: to authorise the dismissal of the employee or to order his reinstatement. No other course was open to him or to the Tribunal on appeal. The Tribunal in this situation did not have the wide powers it has under Part XIII of the Labour Relations Act 1985 and could not treat the matter as though it was one of wrongful dismissal. Nor, in consequence, could the Supreme Court.

McNALLY JA

Appeal dismissed.

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Cases cited:

Art Corp v Moyana 1989 (1) ZLR 304 (S)

Commercial Careers College (1980) *(Pvt) Ltd v Jarvis* 1989 (1) ZLR 344 (S)

Masiyiwa v TM Supermarket 1990 (1) ZLR 166 (S)

Zimbabwe Mining & Smelting Co Ltd v Mafuku S-246-92

Wholesale Centre (Pvt) Ltd v Mehlo & Ors 1992 (1) ZLR 376 (H)

Kadoma Magnesite (Pvt) Ltd v Acting Regional Hearing Officer & Anor 1991 (1) ZLR 283 (H)

Caltex Oil (Zimbabwe) (Pvt) Ltd v Mutsvanga S-95-93

Ruturi v Heritage Clothing (Pvt) Ltd 1994 (2) ZLR 374 (S)

G Mamvura for the appellant

A Thompson for the respondent

Judgment

Mcnally JA: This is an appeal from the Labour Relations Tribunal ("the Tribunal") in a labour dispute between the parties, to whom I shall refer as "the company" and "the driver". The facts in brief are these.

The company accused the driver of selling empty bottles to a café owner. He was specifically prohibited by his terms of employment from doing so. He was suspended without pay on 13 June 1988, and application was made to a labour relations officer ("LRO") for authority to dismiss him, as provided for in SI 371/85, the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985. I shall refer to these as "the Regulations".

The LRO upheld the company's contention on 22 August 1988 and authorised the driver's dismissal. This was confirmed on appeal to the regional hearing officer on 8 October 1991.

There was a further appeal to the Labour Relations Board. However, the Labour Relations Amendment Act 12 of 1992, came into effect on 1 January 1993 and under that Act the Board was abolished. The appeal was then deemed to be pending before the Tribunal.

On 9 August 1994 the Tribunal ruled in favour of the driver, essentially on the ground that the evidence against him was unsupported hearsay. It ordered his reinstatement with effect from the date of his suspension without any loss of benefits.

McNALLY JA

Since 1 January 1993, an appeal from the Tribunal to this court is permissible only on a question of law. The amendment, which is unfortunately tucked away obscurely in a schedule of

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"minor amendments" at the end of Act 12 of 92, is sometimes overlooked. But in this case the company has not appealed against the factual findings of the Tribunal. It has accepted that the suspension was not justified. It asks only that the relief be altered. It asks that instead of being ordered to reinstate the driver, it be allowed the alternative opportunity of paying damages or compensation for wrongful dismissal. It alleges that the Tribunal erred in law by holding that reinstatement was the only remedy.

In making this submission on behalf of the company Mr *Mamvura* relied heavily on two decisions of this court, namely *Art Corp Ltd v Moyana* 1989 (1) ZLR 304 (S) and *Commercial Careers College* (1980) *(Pvt) Ltd v Jarvis* 1989 (1) ZLR 344 (S).

Mr *Mamvura* also stressed the new (since 1 January 1993) s 107(1) of the Labour Relations Act, which reads:

> "In determining an appeal in terms of this part, the Tribunal may confirm, vary, or set aside the determination appealed against, or substitute its own determination for the one appealed against, and may make any order as to costs."

It is suggested that this provision is wider than the wording of the section prior to the amendment, when the Tribunal was authorised to -

> "... confirm, vary or set aside the decision appealed against and make an order accordingly, and may include in such order any order as to costs that it thinks fit."

Before I deal with the case law, I should refer to the wording of the Regulations. The relevant section is s 3(2). In s 3(1) an employer who has good cause to believe that an employee is guilty of one or more of a list of offences is authorised to suspend him without pay and other benefits and forthwith to apply to a LRO for an order or determination terminating the contract of employment. This is what the company did. Subsection (2) then comes into operation, and it reads:

> "Upon application being made in terms of subsection (1), the [LRO] shall investigate the matter and may according to the circumstances of the case -

McNALLY JA

(a) serve a determination or order on the employee concerned terminating his contract of employment if the grounds for his suspension are proved to the satisfaction of the [LRO]; or

(b) serve a determination or order on the employer concerned to remove the suspension of the employee concerned and to reinstate such employee if the grounds for his suspension are not proved to the satisfaction of the [LRO]."

Now, I have previously stated in *Masiyiwa v TM Supermarket* 1990 (1) ZLR 166 (S) at 170B *et seq,* that the word "may" in that subsection effectively means "shall". I said at 170H-171A:

> "Thus in the case of s 3(2) the LRO has to determine whether the grounds of suspension are proved or not proved. If they are proved he must proceed in terms of subpara (a); if they are not proved he must proceed in terms of subpara (b). To put it another way, he has a choice, but that choice is governed, not by his discretion, but by his finding ..."

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That interpretation, although strictly obiter, has found favour in a number of subsequent cases. See *Zimbabwe Mining & Smelting Co Ltd v Mafuku* S-246-92; *Wholesale Centre (Pvt) Ltd v Mehlo & Ors* 1992 (1) ZLR 376 (H); *Kadoma Magnesite (Pvt) Ltd v Acting Regional Hearing Officer & Anor* 1991 (1) ZLR 283 (H)*; and Caltex Oil (Zimbabwe) (Pvt) Ltd v Mutsvangwa* S-95-93.

It will be apparent that the procedure under s 3 of the Regulations arises when the employer has suspended the employee without pay. He has not dismissed the employee. So no question of wrongful dismissal arises. The application by the employer to the LRO is an application for an order terminating the contract of employment. It is logical that, if that application fails, the contract of employment is not terminated. The employee's suspension is found to have been unjustified. He is reinstated. There is no provision for any other treatment. The employee is regarded as never having been suspended, because the grounds for suspension were the same as the grounds for dismissal. If the grounds were insufficient to justify dismissal, they were, by the same token, insufficient for suspension.

On the face of it, therefore, a finding that the suspension was not warranted leads to action under subs (2)(b), that is, "to remove the suspension of the employee concerned and to reinstate such employee".

McNALLY JA

Do the cases contradict this *prima facie* obvious conclusion? I shall examine them in turn.

In the *Art Corporation* case *supra* it was the company that was appealing. The matter was not one under the Regulations. The employee had been dismissed, not suspended. The Labour Relations Board became involved under s 109(2)(d) of the Act, where the powers of the Board, and indeed the powers of the LRO, are much wider than the powers of the LRO under the Regulations. The Board ordered the employee to be paid his salary up to the date of their decision, but also ordered that the contract should be terminated as from that date.

The employer appealed against certain aspects of this decision to the Tribunal. It is important to note that the employee did not appeal or cross-appeal. So the employee was prepared to accept the termination of his contract. The Tribunal, nonetheless, ordered his reinstatement. It was this that led to the appeal to the Supreme Court.

It will be observed at once that there are three major distinguishing features between the *Art Corporation* case and the present one:

1. The *Art Corporation* matter was dealt with under Part XIII of the Act, which gave wide powers of conciliation and mediation, quite unlike the powers under the Regulations.

2. The reason why the appeal succeeded was that the Tribunal had granted relief which it had not been asked to grant. There had been no appeal before it from the employee.

3. The case was about wrongful dismissal. This case is about an application to dismiss.

Any comments I made in the course of that judgment must be read therefore in the light of the

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fact that the powers of the LRO/Board/Tribunal under Part XIII of the Act were wide enough to allow either reinstatement or some other remedy. But it certainly does not follow that the powers of the LRO/Board/ Tribunal under the Regulations are equally wide. They are not.

The *Commercial Careers College* ("CCC") case *supra* is similarly entirely distinguishable. In the first place, it was a High Court matter, dealt with under the common law. The employee sued her employer for wrongful dismissal and claimed reinstatement. She succeeded. The CCC then appealed. It was

McNALLY JA

in that context that the present CHIEF JUSTICE raised the question whether, under the common law, the more appropriate redress for wrongful dismissal was not damages rather than reinstatement. In the result, however, he held that the order to reinstate was proper. So again there are two features which distinguish the *CCC* case from the present:

1. It was an action under the common law and not either in terms of the Act or in terms of the Regulations. Under the common law the redress is usually damages, but in a proper case may be reinstatement.

2. The cause of action was wrongful dismissal. In the present case there was no dismissal, whether wrongful or otherwise. There was a suspension without pay in terms of the Regulations, followed by an application in terms of the Regulations.

Another and more recent case where reinstatement was no more than an optional relief was *Ruturi v Heritage Clothing (Pvt) Ltd* 1994 (2) ZLR 374 (S). That case again is not on all fours with the present one because it did not arise under s 3 of the Regulations. There was no suspension without pay. The employee was simply (and wrongfully) dismissed. The matter was dealt with under Part XIII of the Act.

It is, I think, quite clear, that none of these three cases have any bearing on the present case, because none of them involved an application to dismiss under s 3 of the Regulations.

For the same reason I see no relevance in the fact that the Tribunal has wide powers under s 107, as read with s 112 of the Act. It is trite law that an appellate body cannot (unless of course there is clear provision) grant relief on appeal which relief could not have been granted by the body appealed from. If the LRO was limited to two choices - dismissal or reinstatement - then the Tribunal, and for that matter this court, was equally limited.

It is true that the Tribunal has wide powers under ss 107 and 112 of the Act, but those powers are necessary because of the wide powers granted under Part XIII to the LRO. It may "substitute its own determination for the one appealed against", but that is only "in determining an appeal in terms of this part", ie Part XIII of the Act. It does not have such wide powers in dealing with an appeal under s 3 of the Regulations.

I am satisfied, therefore, that in an application under s 3 of the Regulations

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McNALLY JA

the LRO has only two choices: dismiss or reinstate. Neither the Tribunal nor this court can do any more than reverse, in a proper case, the decision of the LRO. We can either substitute an order for reinstatement with an order for dismissal, or vice versa. There is simply no room for an order for damages.

Accordingly, the appeal is dismissed with costs.

Korsah JA: I agree.

Muchechetere JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

A J A Peck, respondent's legal practitioner

S v NOTTINGHAM ESTATES (PVT) LTD 1995 (1) ZLR 253 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Criminal appeal

27 March & 10 April 1995 Judgment No S-51-95

Flynote

Criminal law - statutory offences - Parks and Wild Life Act 14 of 1975 - s 53(1)(a) - conducting a safari for reward without holding a hunter's licence - whether offence committed where owner of land sells hunting rights and leaves purchaser to hunt on his own

Headnote

There is nothing in the Parks and Wildlife Act or the regulations under the Act that prohibits a person from selling hunting rights over the property owned and leaving the purchaser to hunt on his own. In the present case the appellant had not conducted a safari for reward without a hunter's licence in contravention of the Act. "Conduct" means "manage, direct or be in charge of". The appellant had not conducted a safari. It had sold hunting rights and allowed the buyer of those rights to hunt on his own.

Cases cited:

Fouriesburg Hotels (Pty) Ltd v van Rensburg 1981 (1) SA 517 (O)

The Mickleham [1918] P 166 (CA)

Pride of Derby & Derbyshire Angling Assn Ltd & Anor v British Celanese Ltd & Ors [1953] 1 All

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ER 179 (CA)

Ebrahim v Min of the Interior 1977 (1) SA 665 (A)

Birch v Klein Karoo Agricultural Co-op Ltd 1993 (3) SA 403 (A)

J C Andersen SC for the appellant

Miss *B Hammond* for the respondent

Judgment

Gubbay CJ: The appellant company, represented by its managing director

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GUBBAY CJ

in terms of s 357 (1) of the Criminal Procedure and Evidence Act [*Chapter 59*], was tried on three counts of contravening s 53(1)(a) of the Parks and Wild Life Act 1975, and on a further three counts of contravening s 59(4) of the Parks and Wild Life (General) Regulations 1990 (SI 362 of 1990).

The State alleged in counts one to three that from 14 May 1992 to 26 June 1992, and at its farm known as Greater Kuduland, the appellant conducted for reward three hunting safaris, without being the holder of a professional hunter's licence, learner professional hunter's licence or professional guide's licence, authorising such conduct. Counts four to six particularised that during the period aforementioned and at the same place the appellant, for reward, conducted three persons not ordinarily resident in Zimbabwe on a hunting safari, without being in possession of the written authority given by the Director of Parks and Wild Life Management.

Despite its pleas of not guilty, the appellant was convicted by the presiding magistrate on all counts. A fine of $400 was imposed, the offences being taken as one for the purpose of sentence.

Dissatisfied with the outcome of the trial, the appellant now challenges the propriety of the convictions before this court. There is no appeal against sentence.

The facts which gave rise to the prosecution of the appellant were not in dispute. The contention advanced, both before the court *a quo* and in support of this appeal, was that the evidence fell short of establishing that upon any of the three occasions relied upon by the State, the appellant **conducted** a hunting safari within the proper meaning of the word.

The farm Greater Kuduland is situated on the banks of the Limpopo river some fifty kilometres from Beitbridge. It has been owned by the appellant since 1954. For many years the appellant raised cattle and grew crops there, but severe drought conditions ultimately caused it to diversify the operation to game ranching.

In early 1992, the appellant commenced to sell by public auction the right to hunt animals on the farm. The highest bidder was deemed to be the purchaser. This enabled him to hunt over

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the whole area of the farm, save around water points, for a specified period of ten days. He was permitted to hunt the type and number of animals listed in the prospectus handed to each bidder, such as one eland bull, five male impala, five baboon, etc. In addition, he was

GUBBAY CJ

entitled to bid to hunt extra animals during the period of ten days. These included hyena, bushbuck and zebra. All animals were to be paid for at the conclusion of the sale. Leopard and elephant were also auctioned. If won, they were not paid for by the successful bidder unless shot.

Gordon Mace, Frederick Burger and Karel Bodenstein, all South African residents, were the purchasers of the three hunts in question. They paid in advance for the hunts. The appellant was not the holder of any one of the licences prescribed in s 53(1)(a) of the Act. Nor did it employ a person holding a requisite licence. Furthermore, it did not possess the written authority of the Director as mandated by s 59(4)(a) of the Regulations.

For the duration of each hunt the individual purchaser and his party were provided with residential accommodation, linen, crockery and cutlery, but no food or drink. The accommodation was serviced by the appellant's staff, who were available to cook for the party if asked to do so. The purchaser utilised his own motor vehicles and firearms. Each motor vehicle had to be accompanied by a guide or tracker in the employ of the appellant. His presence was to ensure that the purchaser did not stray beyond the boundaries of the farm. He was further required to notify management in the event of an animal being wounded in the course of a hunt, so that it could be followed and killed.

As I understood the arguments of counsel, it was common cause, and rightly so, that there is nothing in the Act or Regulations to prohibit a person from selling hunting rights over the property owned, and nothing to prohibit the purchaser of such rights from being left to hunt on his own. The basic distinction drawn in this legislation is between hunting, on the one hand, and the conduct of a hunting safari, on the other. Compare ss 47 and 48 with ss 53 and 54 of the Act; and ss 17 to 27 and 52 to 54 with ss 55 to 60 of the Regulations.

I am in agreement, therefore, that the sole point to determine is whether the three purchasers engaged in a hunt on their own, or whether the appellant conducted the purchasers on a hunting safari.

Black's Law Dictionary, Abridged 5 ed (1983) at p 155, gives to the verb "conduct" the meaning:

> "To manage, direct, lead, have direction, regulate."

See also *Chambers 20th Century Dictionary* (1983) at p 263.

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In *Fouriesburg Hotels (Pty) Ltd v van Rensburg* 1981 (1) SA 517 (O) at 521F-G, it was said that

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in the sense used in the subject section the word "conduct" means to "direct, manage, (business etc)"; while "control" means to "dominate, command; exert control over".

Much the same concept of management or direction was attributed to the word by PICKFORD LJ in *The Mickleham* [1918] P 166 (CA). He held at 169 that a regulation which provided that a vessel must be conducted by pilots licensed by the London Trinity House, meant:

> "conducted by a pilot who is compulsorily in charge and not merely navigated under his advice" (my emphasis).

Again, in *Pride of Derby and Derbyshire Angling Assn Ltd & Anor v British Celanese Ltd & Ors* [1953] 1 All ER 179 (CA) LORD EVERSHED MR remarked at 189E-F, "The word 'conduct' seems to me to mean 'manage' or 'operate'." I accept these authorities as reflecting the plain and ordinary meaning of the word.

The primary rule of interpretation is, of course, to endeavour to ascertain the intention of the lawmaker from an examination of the provision under consideration, placed in proper context. A court will commence its enquiry by giving the word its grammatical signification, unless it is clear that the literal sense, when so applied, defeats the legislative intendment. In such event, a deviation from the ordinary meaning is justified, provided always that the word is sufficiently flexible to admit of another meaning by which such intention can be better effected. See *Ebrahim v Min of the Interior* 1977 (1) SA 665 (A) at 678A-C; *Birch v Klein Karoo Agricultural Co-operative Ltd* 1993 (3) SA 403 (A) at 411E-G.

Viewed in the setting of ss 53(1)(a) and 54(1)(a) of the Act, and of ss 57A, 57B(2)(b), 58(1) and 59(1) of the Regulations, there is, in my view, no indication that the lawmaker intended to give to the word "conduct" any meaning dissimilar from "manage", "direct", "be in charge of".

It follows that the question is simply this: Was it the appellant or the purchasers who managed, directed or were in charge of, these hunts?

It was the purchasers who, each day, chose the time to commence and terminate the hunt. It was they who determined the precise area of the farm upon which to carry out the hunt. The order in which the animals on quota,

or any additional animals won at the auction, were to be hunted, was at the sole discretion of the purchasers. The method of hunting, that is, whether to track the animals by motor vehicle or by foot, was dependent upon the decision of the purchasers. The type of firearms and ammunition to be used was not dictated to the purchasers.

The respondent's counsel laid emphasis on the mandatory presence of a guide or tracker. Certainly such presence is a relevant factor. But one must ascertain the predominant reason for it being insisted upon. It was to ensure that the purchasers adhered to the conditions of the hunt sold to them; that they hunted only the quota animals or any additional ones purchased; that they did not stray beyond the confines of Greater Kuduland; and so that any animal wounded by the purchasers could be found later and destroyed. The guide or tracker would offer advice

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to the purchasers only when asked. They would not volunteer advice. They were not in control. In sum, it seems to me that the guide or tracker was there to monitor the hunt rather than to manage or direct the activities of the purchaser in carrying it out.

Nor do I consider that much assistance is afforded the respondent's contention that the appellant conducted the hunts, by the content of the auction prospectus. This booklet sets out the conditions upon which the appellant was prepared to sell a hunt on its property. It specified the availability of ten separate hunts, the dates during which they were to be undertaken, and the type and number of the animals it was permissible to shoot. It indicated that each hunt catered only for two persons hunting, but that a maximum of twenty persons (family members, friends and workers) could be in the party. Wounded animals counted against the bag. Night hunting was prohibited except in the case of leopard. Finally, the purchaser was to report to management twenty-four hours before the date the hunt was to commence and vacate the farm within twenty-four hours of the hunt finishing.

A conspectus of all relevant factors, satisfies me that the State failed to prove that the appellant conducted a hunting safari on any of the three occasions charged.

The appeal is accordingly upheld and the convictions and sentence set aside.

Korsah JA: I agree

Ebrahim JA: I agree

Webb, Low & Barry, appellant's legal practitioners

CITY OF MUTARE v MAWOYO 1995 (1) ZLR 258 (HC)

Court **High Court, Harare**

Malaba J

Application to amend default judgment

10 December 1994 & 12 April 1995 Judgment No HH-44-95

Flynote

Practice and procedure - default judgment - evidence - fresh evidence emerging after granting of default judgment - correct procedure is to apply for rescission of the default judgment before seeking to introduce the new evidence

Court - jurisdiction - whether court has jurisdiction to set aside or vary substance of judgment of parallel court

Headnote

The respondent, a former employee of the applicant council, had obtained from a judge of the High Court a default judgment setting aside the council's decision to dismiss the respondent and

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ordering his reinstatement without loss of benefits. In the period between the granting of the default judgment and the respondent's reinstatement, the council discovered that the respondent had obtained alternative employment, a fact that had not been mentioned in the application for default judgment. The council applied to the High Court for an order amending the order previously granted in the default judgment.

Held, that a High Court judge does not have the jurisdiction to set aside or vary the substance of a final order of another High Court judge on the ground that there is fresh evidence that has been obtained subsequent to the judgment. A final judgment may only be set aside if it was obtained as a result of fraudulent misrepresentation. In a number of limited circumstances, a court granting the order may correct, alter or supplement its order. The present case did not fall within any of the recognised exceptions.

MALABA J

Held, further, that the applicant in the present case should have applied for the rescission of the default judgment before seeking to introduce the new evidence.

Cases cited:

Muzoriwa v Ngezi District Council HH-233-93

Boshoff v Union Govt 1932 AD 345

Blue Ribbon Foods Ltd v Dube NO & Anor 1993 (2) ZLR 146 (S)

Unifreight Ltd v Chidziva S-4-94

PB Merchandising (Pvt) Ltd v Dhliwayo S-178-94

Zimbabwe Sun Hotels (Pvt) Ltd v Lawn 1988 (1) ZLR 143 (S)

Randfontein Ests Ltd v Robinson 1921 AD 515

Brits & Ors v Engelbrecht & Ors 1907 TS 876

West Rand Ests Ltd v New Zealand Ins Co Ltd 1926 AD 173

Firestone SA (Pvt) Ltd v Genticuro AG 1977 (4) SA 298 (A)

Garlick, Ests v CIR 1934 AD 499

Marks v Kotze 1946 AD 29

Wessels & Co v De Beer 1919 AD 172

Rainbow Poultry Farm (Pvt) Ltd v Mediterranean Woollen Mills (Pvt) Ltd 1963 (3) SA 237 (N)

Parker v Parker & Ors 1985 (2) ZLR 79 (H)

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Kassim v Kassim 1989 (3) ZLR 234 (H)

Re *Barrell Entprs & Ors* [1972] 3 All ER 631 (CA)

G S Wernberg for the applicant

T Biti for the respondent

Judgment

Malaba J: The respondent was employed by the applicant as a housing officer before being suspended without pay on 21 April 1992, because of his arrest by police on allegations that he was corrupt in the disposal of municipal stands. The suspension of the respondent from duty remained effective until 21 October 1992, when the applicant served on him notice of its intention to discharge him from employment on 1 February 1993. The decision to dismiss the respondent had been taken at a special meeting of the council on 20 October 1992. The council had also decided at that meeting that the suspension of the respondent had been unlawful.

The respondent was paid his salary for the period he was on suspension and received the salary for the period between October 1992 and 31 January 1993, but refused to accept what was intended by the applicant to be pay in lieu of the three months' notice of the termination of his employment.

MALABA J

The respondent refused to accept the decision by the applicant to dismiss him from employment. On 15 January 1993 he lodged with this court an application on notice of motion proceedings for an order setting aside his dismissal and reinstating him in his position of housing officer.

On 6 October 1993 the respondent took up alternative employment with the Department of Social Services in the Ministry of Public Service, Labour and Social Welfare at Tongogara Refugee Camp as a Social Welfare Officer III Grade IV.

The application for an order setting aside the respondent's dismissal was brought before BARTLETT J who, on 28 June 1994, granted to the respondent a default judgment and made an order in the following terms:

"1. That the decision of the respondent to dismiss the applicant be and is hereby set aside.

2. That the respondent be and is hereby ordered to reinstate the applicant in his original position without loss of benefits.

3. That the respondent be and is hereby ordered to pay the costs of the application."

The respondent was not reinstated in his position soon after the order was made as he remained in the employment with the Department of Social Services until 31 July 1994. On 2 August 1994, he was reinstated in his position of housing officer, only to be suspended on 15

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August 1994; this time on allegations of misconduct said to have occurred in 1988. The second suspension was the last straw for the respondent and he could not fight the City of Mutare any more than he had done to retain his job. He threw in the towel and tendered his resignation from employment on 15 August 1994, citing harassment and frustration by the senior officers of the applicant.

In the period between the default judgment being granted and the actual reinstatement of the respondent in his position on 2 August 1994, the applicant discovered that the respondent had taken up alternative employment with the Department of Social Services on 6 October 1993. The fact of the respondent taking up alternative employment had not been mentioned in the founding or opposing affidavit filed in the application brought before BARTLETT J

Armed with the knowledge of the fact of the respondent taking up alternative

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employment, the applicant launched the present application to have the first and second paragraphs of the order granted by BARTLETT J deleted and in their places substituted the following declarations:

> "1. That the decision of the respondent to dismiss the applicant is declared wrongful.
>
> 2. (a) That the applicant's service with the respondent be and is hereby terminated with effect from 30 September 1993.
>
> (b) That the respondent effect payment to the applicant of his salary and terminal benefits less normal deductions for the period from his suspension to 30 September 1993;

Alternatively:

> 2. (i) That the respondent effect payment to the applicant of his salary and terminal benefits less normal deductions for the period from his suspension to 30 September 1993.
>
> (ii) And in addition the difference between the salary he was earning with the respondent and that paid by the Department of Social Welfare from 1 October 1993 to 31 July 1994."

Mr *Wernberg*, for the applicant, submitted that the object of the application is not to have the default judgment on which the order is based rescinded but is to have the order varied to take into account the fact of the respondent taking up alternative employment with the Department of Social Services. His argument was that it would be inequitable for the respondent to receive payment when he did not render any service to the applicant during the time he was employed by the Department of Social Services: *Muzoriwa v Ngezi District Council* HH-233-93.

Mr *Biti,* for the respondent, answered the argument by submitting that the matter is *res judicata* (*Boshoff v Union Govt* 1932 AD 345).

The fundamental question is therefore one of jurisdiction. Does this court have the power to set aside its final order without the default judgment on which it rests being rescinded? Before answering this question of jurisdiction I will consider the significance to the application of the respondent having taken alternative employment after his dismissal. It is on the status of the

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respondent after he took up alternative employment that the applicant bases the attempt to reduce its liability to him.

The authorities on the subject show that an employee who gets dismissed

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from employment has two options open to him, one of which he must elect. He may elect not to accept the repudiation of the contract of employment by the employer and enforce his contractual rights through the courts or under the Labour Relations Act. If he does not take up alternative employment after dismissal and the dismissal is found by the review or appeal tribunal to have been wrongful, he is entitled to reinstatement with full benefits, unless the court or tribunal finds special reasons for not ordering reinstatement.

If he takes up alternative employment after dismissal and the dismissal is adjudged to have been wrongful, the employee is not held to have accepted his discharge when he took up alternative employment, but will have waived the right to claim reinstatement.

The second option, which does not concern us in this case, is that the employee accepts the repudiation of the contract of employment by the employer and effectively terminates the contract. He is then entitled to damages, not back-pay. See: *Blue Ribbon Foods Ltd v Dube NO & Anor* 1993 (2) ZLR 146 (S) at 152D-F; *Unifreight Ltd v Chidziva* S-4-94 at 2-3; *PB Merchandising (Pvt) Ltd v Dhliwayo* S-178-94 at 2.

In *Dhliwayo*'s case *supra* the employee (Dhliwayo) had been suspended by his employer (PB Merchandising) pending authority from the Labour Relations Officer to dismiss him from employment. The Labour Relations Officer granted PB Merchandising the authority to dismiss Dhliwayo. After unsuccessfully appealing against the decision to the Regional Hearing Officer and thereafter to the Labour Relations Board respectively, Dhliwayo finally succeeded before the Labour Relations Tribunal. PB Merchandising appealed to the Supreme Court against the decision of the Labour Relations Tribunal.

Dhliwayo had taken up alternative employment two days before the case was determined by the Labour Relations Tribunal. It was argued before the Supreme Court that, by taking up alternative employment, Dhliwayo had accepted the repudiation by P G Merchandising of the contract of employment. It was also argued that Dhliwayo had no *locus standi* under the Labour Relations Act and that he should have applied to the civil courts for damages. Reference was made in support of the argument to the decision in *Zimbabwe Sun Hotels (Pvt) Ltd v Lawn* 1988 (1) ZLR 143 (S) at 151D-E. Dismissing the argument McNALLY JA said at p 2 of the cyclostyled judgment:

> "I am not convinced that the *dicta* in that passage with which I agree as I agreed at the time are in point. In that case Lawn was the plaintiff. In

MALABA J

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that context it was rightly said that he had to make a choice - either to insist on his contractual rights or to accept the repudiation and sue for damages.

In the present case Dhliwayo was the defendant. The employer was claiming the right to dismiss him. Dhliwayo was disputing that right. After seventeen months he was forced by the need for money to obtain other employment. But this did not mean that he was admitting that PB were after all right to dismiss him seventeen months earlier. It was merely, as I said in *Blue Ribbon Foods v Dube NO & Gonyora* S-133-93 a partial waiver of his right. In other words, if he could succeed in having his dismissal declared unlawful, he could no longer claim reinstatement but he would still be entitled to back-pay up to the date of his election to take other employment."

BARTLETT J had placed before him facts governed by the principle relating to the first option minus the fact that respondent took up alternative employment. The City of Mutare conceded that the dismissal of Mawoyo was unlawful. On those facts Mawoyo was entitled to reinstatement in his original position of housing officer with full benefits.

The City of Mutare is now asking for an order based on the principle governing the same option, but taking into account the fact that Mawoyo took up alternative employment. It is of course not up to me to speculate about what the decision of BARTLETT J would have been had the employment been brought to his attention via one of the affidavits.

The question now is whether or not I have jurisdiction to grant the order requested by the applicant. If I am powerless to grant the order the City of Mutare will remain bound by the order granted on 28 June 1994, notwithstanding the inequities resulting from its enforcement.

The question whether or not this court has jurisdiction to alter its final judgments or orders has been answered in previous decisions of courts in jurisdictions that follow the common law tradition. The general rule is that once a final judgment or order has been given, the judge who gave it or any other judge of parallel jurisdiction has no power to alter, rescind, vary or set it aside, except in the few instances recognised at common law or by the Rules of the High Court.

One of the exceptions recognised at common law is when the judgment or order has been obtained through fraudulent misrepresentation. The statutory

MALABA J

exceptions would in our case include Order 49 R 449(1) and Order 9 R 63(1) of the Rules of the High Court of Zimbabwe 1971.

In 1921 INNES CJ in *Randfontein Ests Ltd v Robinson* 1921 AD 515 considered the power of a court to amend its own final order and said at 418:

"Now the power of a court of justice to amend its own final order is limited. So far as the extent of that power is concerned it is sufficient for the purposes of this case to say that a judge may explain his order if ambiguous or may correct an error or add a supplementary detail so as to give effect to his true intention, but cannot alter an order once duly made and accurately drawn up (see *Brits & Ors v Engelbrecht & Ors* 1907 TS 876)."

Randfontein Ests Ltd v Robinson was followed in *West Rand Ests Ltd v New Zealand Ins Co Ltd* 1926 AD 173 where INNES CJ and KOTZE JA undertook comprehensive analyses of the Roman-Dutch authorities on the subject of the nature and extent of the power of a court to alter

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its final orders. INNES CJ said at p 176:

> "The general principle that a judge has no authority to amend his own order, duly pronounced, was well recognised by the civil law ...

No correction of a judgment once given was permissible for the simple reason that the *judex* had ceased to function."

The CHIEF JUSTICE went on to consider the exceptions to the general principle and stated at p 178 that -

> "The reason on which the general rule prohibiting the alteration of a judgment by the authority which pronounced it rested was that the judge who had once given a final order was *functus officio.* His jurisdiction having been fully exercised, his authority over the subject-matter ceased."

KOTZE JA echoed the same sentiments at p 187 where he said:

> "The reason given for the rule that a judge cannot alter or add to a definitive sentence pronounced by him is that, after the pronouncing of the sentence, his function as judge has come to an end, and the matter has passed *in rem judicatam.*
>
> The jurists therefore, maintain that, where the judge has made an error

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> in his sentence the proper mode of redressing or rectifying it is by way of appeal to a higher tribunal. Perez (Ad.Cod.7.50 n.4). While adhering to the rule of the Civil Law that a sentence once pronounced cannot be altered by the court in as much as it has become *res judicata* and *jus inter partes* the jurists nevertheless did not unduly extend it, but confined the rule within its legitimate compass and bounds."

In *Firestone SA (Pvt) Ltd v Genticuro* AG 1977 (4) SA 298 (A) at 306F-308A TROLLIP JA stated the general principle as stated in *West Rand Ests Ltd v New Zealand Ins Co Ltd , supra*, and explicitly set out the exceptions to it. It is important to quote TROLLIP JA *in extenso* to see whether the order requested by the applicant in this case falls under one of the exceptions to the general rule. He said:

> "The general principle, now well established in our law, is that once a court has duly pronounced a final judgment or order it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes *functus officio* :its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased. See *West Rand Ests Ltd v New Zealand Ins Co Ltd* 1926 AD 173 at 176, 178, 186-7 and 192; *Garlick, Est v CIR* 1934 AD 499 at 502".

There are, however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this court. Thus provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following cases:

(i) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant (see the *West Rand* case *supra*).

(ii) The court may clarify its judgment or order, if, on a proper interpretation, the meaning

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thereof remains obscure, ambiguous or otherwise uncertain so as to give effect to its true intention provided it does not thereby alter "the sense and substance" of the judgment or order (see the *West Rand* case *supra* at 176, 186-7; *Marks v Kotze* 1946 AD 29).

(iii) The court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention (see for example, *Wessels & Co v De Beer* 1919 AD 172; *Randfontein Ests Ltd v Robinson supra* at 520; the *West Rand* case *supra* at 186-7). This exception is

confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance.

(iv) Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits) but the court, in granting judgment also makes an order concerning the costs, it may, thereafter correct, alter or supplement that order (see *Garlick Est*'s case *supra* 1934 AD 499). The reason is (see pp 503-5) that in such a case the court is always regarded as having made its original order with the implied understanding

> "that it is open to the mulcted party (or perhaps any party 'aggrieved' by the order - see p 505) to be subsequently heard on the appropriate order as to costs. But, of course, if after having heard the parties on the question of costs either at the original hearing or at a subsequent hearing, the court makes a final order for the costs, there can then be no such 'implied understanding') and such an order is as immutable (subject to the preceding exceptions) as any other judgment or order".

See also *Rainbow Poultry Farm (Pvt) Ltd v Mediterranean Woollen Mills (Pvt) Ltd* 1963 (3) SA 237 (N) at 238H-239D; *Parker v Parker & Ors* 1985 (2) ZLR 79 (H); *Kassim v Kassim* 1989 (3) ZLR 234 (H) at 242C-243E.

In *Parker v Parker & Ors supra* SCOTT J was asked to alter an order by SANDURA JP directing that an exception in case HC-3196-84 and an application in case HC-1108-85, both cases involving the same parties, be heard together on the same occasion. Declining jurisdiction, SCOTT J said at 85B:

> "The whole thrust of the reasons advanced by Mr *O'Meara* seems to point to an assertion that in his view the order was wrongly made. As a judge of the High Court, it is not up to me to vary or alter an order of a judge of parallel jurisdiction, short of expanding on it."

Mr *Wernberg*'s argument was that the court has inherent powers to vary its orders. No authority was cited for this general proposition. Rule 449(1) of the Rules of the High Court of Zimbabwe 1971 does not cover variations of the orders in the manner suggested by the applicant in this case. The order by BARTLETT J was not erroneously applied for or erroneously granted. The variation applied for does not involve the correction of an error or omission in the order so that it accurately expresses the intention of the court.

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MALABA J

I am being asked to delete ss 1 and 2 of the original order and substitute in their places the declarations requested by the applicant, without it being said what is to happen to the default judgment on which the order sought to be mutilated now stands. Although called an amendment, what is being applied for is to all intents and purposes a complete substitution of the terms and content of one order with those of another order.

Can one set aside an order and substitute in its place a completely different matter without doing violence to the sense and substance of the judgment or the intention of the court that granted the order? The sense and substance of the original order will be changed, in that, instead of demanding that the respondent be paid back-pay up to 28 June 1994, the new order demands the payment of back-pay to 30 September 1993.

It is also clear that I am being asked to rely on the new evidence of the fact of the respondent having taken up alternative employment to set aside the order of this court and pretend that the substituted order still expresses the intention of the court that granted that order. Since the substance of the new order will not be what was intended by BARTLETT J, it follows that its substitution in the place of the original order effectively alters the basis of the judgment. Even if a default judgment was entered for the respondent, the issues were closed at the time and they can only be re-opened after the judgment has been rescinded.

For the new order to stand on valid grounds, there would have to be supplementary affidavits on the merits filed to include the fact that the respondent took up alternative employment after dismissal and waived his right to claim re-instatement. Is this the right forum in which to lead such evidence, particularly when the default judgment is not being rescinded?

The question of new evidence was considered in Re *Barrell Entprs & Ors* [1972] 3 All ER 631. In that case PENNYCUICK V-C granted an order against the appellant directing Miriam Barrell to hand to the Official Receiver certain documents pertaining to the compulsory winding up of a group of companies with which she had been much concerned as director and/or liquidator in their voluntary winding up. When she failed to obey the order the judge ordered that she be committed to prison for her contempt in failing to hand over the documents.

She then applied on notice of motion to BRIGHTMAN J to set aside the order by PENNYCUICK V-C on the ground that new evidence had come to light after

MALABA J

the original order was made. BRIGHTMAN J concluded that he had jurisdiction to set aside the order by PENNYCUICK V-C.

Holding that a High Court judge does not have jurisdiction to set aside an order of another High Court judge on the ground that fresh evidence has been obtained, RUSSEL LJ said at 637D:

> "The next question is whether BRIGHTMAN J had any jurisdiction to hear an application to set aside the order of PENNYCUICK V-C. We are reluctant to find carried forward into this century procedures which were devised for review or rehearing or new trial at a time when the court of appeal did not exist. We can accept without difficulty

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> the notion that if a judgment has been obtained by fraud an action can be brought to set it aside. But when it comes to setting aside a judgment on the ground that fresh evidence has been obtained it appears to us highly desirable that the court of appeal alone should have jurisdiction."

The thrust of the applicant's argument is not that the respondent obtained the order by fraudulently misrepresenting that he was not in employment at the time it was granted. The applicant ought therefore to have applied for the rescission of the default judgment before seeking to introduce the fact of the respondent taking up alternative employment. No application for rescission of judgment was made. Rule 63(1) confers on the court a discretion to rescind a default judgment on "good and sufficient cause" being shown. But the discretion can only be exercised on an application for rescission. The court has no power to *mero motu* rescind a default judgment.

It is clear that the applicant proceeded to advocate the setting aside of the order without applying for the rescission of the judgment on which the order rested, on the erroneous assumption that the court had inherent jurisdiction to set aside its final orders. The authorities clearly show that a variation which has the effect of mutilating the order to the extent of doing violence to the sense and substance of the judgment is beyond the court's jurisdiction, unless it falls within one of the recognised exceptions to the general rule.

This court has no power to grant the applicant its request. It has no jurisdiction to set aside the order by BARTLETT J The application must therefore fail.

Mr *Biti* has asked for costs on the legal practitioner and client scale should the respondent be successful. I do not think this is a case that warrants an award of costs on the higher scale. There was nothing dishonest or malicious

MALABA J

in the launching of the application. In light of the decisions of the Supreme Court on the effect of taking up of alternative employment on the right of a dismissed employee to claim reinstatement, the applicant had a genuine cause for the belief that it could limit its liability to the respondent under the varied order. The respondent was partly to blame for the institution of these proceedings. Had he been open and frank in his opposing affidavit and disclosed his employment with the Department of Social Services, the applicant would have dealt with this aspect of the case in the original application. The fact that the respondent's success is based upon a technical point means that it cannot possibly be said the applicant prosecuted a case it knew or ought to have known was hopeless *ab initio.* Costs on the ordinary scale are awarded to the respondent.

It is ordered that the application be and is hereby dismissed with costs.

Henning Lock Donagher & Winter, applicant's legal practitioners

Bere & Assocs, respondent's legal practitioners

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S v ZARANYIKA & ORS 1995 (1) ZLR 270 (HC)

Court **High Court, Harare**

Bartlett J

Criminal review

12 April 1995 Judgment HH-41-95

Flynote

Criminal procedure (sentence) - rape - appropriate sentence for rape committed by a minor

Headnote

Rape is an extremely serious offence, in respect of which deterrent sentences are imposed as a matter of course. It is also an offence which ordinary members of the public rightly regard with revulsion when the complainant is of tender years. There has also been an increase in the level of sentence imposed over the last decade. Whereas in the mid-1980s, the normal run of sentences was 3-5 years' imprisonment, it now is 7 years and over.

Against the appropriate increase in the severity of sentences imposed for the offence of rape needs to be balanced the consideration of the age of the offender. Youth is always, where the person does not act out of inherent wickedness, a strong mitigatory factor for all crimes. It would be wrong to impose on a youthful offender the same penalty as would be imposed on a mature one. The punishment on a youth must be geared principally towards correcting him, in the hope of preventing him from ruining his life. With regard to mature offenders, the sentence is directed more towards retribution and deterrence than any hope of correction.

There are, of course, degrees of maturity. No teenager has the maturity of an adult. Youthfulness denotes immaturity, lack of experience of life, thoughtlessness and a tendency to being influenced, especially by adults. A person of 18 or 19 is immature, even if he has left school and is working or at university.

Normally a juvenile should never be sent to prison unless the offence is so

serious that only a prison sentence can be justified. In prison he is bound to mix with the worst elements of society. It is a sad reflection on Zimbabwean society that the level of serious offences committed by persons in the 17-to 18-year age group is markedly increasing. Factors such as the high percentage of the population under the age of 18 and the dismal employment prospects are undoubtedly large causative factors.

Rapes committed by young offenders are regrettably becoming more and more commonplace. The prevalence and need for deterrence of such offences are relevant considerations but have their limitations. It is not possible to justify imposing more and more severe sentences on the grounds of prevalence; the intrinsic moral blameworthiness of the offence is the best guide as to the appropriate sentence. Indignation and passion must not be allowed to sway fairness and

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reason. There is reason to believe that the deterrent effect of sentence is not necessarily proportionate to its length; in this field it is likely that there operates a law of diminishing returns. Nor should it be assumed that retribution, and recognition of the indignation and fears of the community at large, will always demand a more severe sentence. The court should have regard not only to the nature of the crime committed and the interests of society, but also to the personality, age and circumstances of the offender. In the case of a juvenile offender, it is above all necessary for the court to consider whether the punishment would serve the interests of society as well as those of the offender. The interests of society cannot be served by disregarding the interests of the juvenile, because a mistaken form of punishment might easily result in a distorted (or more distorted) personality being returned to society. While Zimbabwe would not want to be a nation where young rapists are not treated with appropriate severity, it would also not want to be a nation where 17-and 18-year-olds are treated as fully mature adults and sent to prison for many years for offences such as rape.

> Usually a less severe sentence should be imposed than would be on an adult, coupled with a period suspended on appropriate conditions. Where there are aggravating features - such as a multiplicity of counts, the transmission of a disease, or the suffering by the victim of serious physical or psychological harm - a more severe sentence may be required. Conversely, mitigating features - such as clear evidence of minimal harm to the victim or a probationer officer's report recommending (on good grounds) a lesser punishment such as corporal punishment or committal to an institution - might dictate a more lenient approach.

1995 (1) ZLR p272

BARTLETT J

Cases cited:

S v Moyo 1992 (1) ZLR 158 (H)

S v Mutume 1985 (2) ZLR 94 (S)

S v Chuma 1994 (2) ZLR 284 (S)

S v Muguti & Anor S-218-92

S v Dube HB-79-94

S v Lehnberg & Anor 1976 (1) SA 214 (A)

S v Kuzhinginya HH-175-94

S v Green HB-177-87

S v Malanga HH-218-93

R v Makaza 1969 (1) RLR 97 (G)

S v Ngombe & Ors HH-504-87

S v Mutongi HH-348-86

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S v Mpofu 1985 (1) ZLR 285 (H)

S v Mupanduki 1985 (2) ZLR 169 (S)

S v Jansen & Anor 1975 (1) SA 425 (A)

S v Matanga S-242-91

S v Kasaira S-119-94

S v Ndhlovu S-135-85

S v J HH-33-93

Judgment

Bartlett J: I have decided to deal with these four cases together as a matter of convenience since three of them involve the same point: the question of the appropriate sentence for a 17-or 18-year-old convicted of rape.

In *Zaranyika's* case, the accused was aged 18 and raped the complainant, his 13-year-old next-door neighbour. He was sentenced to 6 years' imprisonment, of which one year was conditionally suspended. I suggested to the regional magistrate that, in view of the age of the accused, an effective prison sentence in the vicinity of no more than 3 years would have been appropriate. The regional magistrate is of the firm view that the sentence he imposed is appropriate.

In *S v Z* the accused, aged 15, raped a 5-year-old complainant twice. The regional magistrate imposed a sentence of 10 years' imprisonment, the whole of which was suspended for 5 years on the normal conditions. The regional magistrate is of the view that the sentence he imposed is entirely appropriate.

In *S v C* the accused, aged 17, raped a 5-year-old complainant. He was sentenced to 8 years' imprisonment with labour, of which 24 months were conditionally suspended. The regional magistrate making, in particular,

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reference to the case of *S v Moyo* 1992 (1) ZLR 158 (H), was of the view that his sentence was appropriate.

In *S v T* the accused, aged 17, was convicted of the rape of a 7-year-old complainant. The regional magistrate imposed a sentence of 8 years' imprisonment, of which 24 months were conditionally suspended. The accused in this case, unlike the other three cases, pleaded not guilty. I originally queried with the regional magistrate certain aspects relating to the conviction. I will deal with those aspects at a later stage, but I am satisfied that the conviction was appropriate. The appropriateness of the sentence needs to be considered in the same light as the other three cases.

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I turn now to consider the sentences imposed by the regional magistrates. It goes without saying that rape is an extremely serious offence and one in respect of which deterrent sentences are imposed as a matter of course by the courts. It is also an offence, as pointed out by one of the regional magistrates, which the ordinary members of the public rightly regard with particular revulsion when the complainant is of tender years.

It is also correct to observe that there has been a definite increase in the sentences imposed in respect of rape over the last decade. See, for example, *S v Mutume* 1985 (2) ZLR 94 (S) at 96 where it was observed that the normal run of sentences for rape cases was 3-5 years' imprisonment. As against this, see the observations by McNALLY J in *S v Chuma* 1994 (2) ZLR 284 (S) where the learned JUDGE OF APPEAL stated:

> "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."

Against the appropriate increase in the severity of sentences imposed for the offence of rape needs to be balanced the consideration of the age of the offender. In this regard, in dealing with rapists aged 18 and 17 years respectively, where the victims were aged 5 and 8 years respectively, KORSAH JA in *S v Muguti & Anor* S-218-92 stated at pp 2-3 of the cyclostyled judgment:

> "However, the effective sentence of seven years is the sentence usually imposed on more mature male culprits for this offence. Youth, the world over, has always been considered, where a person does not act out of

> inherent wickedness, as a strong mitigatory factor for all crimes. This is because youthfulness is associated with immaturity, thoughtlessness and a lack of experience of life. It is, therefore, odious to impose the same penalty as would be justified in the case of a mature offender on a youthful offender.
>
> While it may be for the benefit of a youthful offender that he be punished so as to reduce him to a sober frame of mind and make him appreciate the seriousness with which society views his conduct, such punishment must be geared principally towards the correction of the youth in the hope of preventing him from ruining his life. With regard to mature offenders, the sentencing principles are directed more towards retribution and deterrence rather than any hope of correction."

I would also refer to the comments of MANYARARA AJ in *S v Dube* HB-79-94, where he quoted with approval (at p 2 of the cyclostyled judgment) the following observations from *S v Lehnberg & Anor* 1976 (1) SA 214 (A) at 560:

> "There are of course degrees of maturity where teenagers are concerned, but naturally no teenager has the maturity of an adult. Youthfulness is immaturity, lack of experience of life, thoughtlessness and especially a mental condition prone to being influenced, especially by adults. And a person of 18 or 19 years is, in my opinion, immature, whether he is still at school or university or has already worked for a year or longer."

In *Dube's* case *supra* MANYARARA AJ was dealing with a 19-year-old who raped a 46-year-old widow.

S v Kuzhinginya HH-175-94 is also of relevance. In that case, GARWE J was dealing with a 15-year-old who raped a 5-year-old complainant. The learned judge, with MALABA J

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concurring, referred to KORSAH JA's comments in *Muguti's* case *supra* - which observation I have already quoted - and set aside an effective term of imprisonment, requiring the magistrate to arrange for the accused to be admitted to an institution. Also of relevance are the observations of MUCHECHETERE J (as he then was) in *S v Green* HB-177-87, where the learned judge, in dealing with a 17-year-old who had attempted to rape a 4-year-old, observed that ...

> "Although the offence he committed was brutal and degrading, it is usual for first offenders who are under the age of 18 years to be sentenced to a correction of cuts in rape cases unless there are aggravating factors."

BARTLETT J

CHIDYAUSIKU J's comments in *S v Malanga* HH-218-93, quoted with approval by *Garwe* J in *S v Kuzhinginya supra*, are also apposite (though they are related to another context):

> "In my view, a 16-year-old juvenile should never be sentenced to an effective prison term unless the offence is so serious that only such a sentence can be justified for the offence ... [To] send such an accused young offender to prison where he is bound to mix with the worst elements of our society is a gross error of judgment. Elementary commonsense and the need for rehabilitation demands a different approach ..."

It is a sad reflection of life in Zimbabwe today that effective prison sentences have to be considered as necessary for 18-year-old and particularly 17-year-old first offenders. But it is an unfortunate fact that the level of serious offences committed by persons in that age group is both disturbing and markedly increasing as opposed to abating. Demographic factors, with Zimbabwe having a high percentage of its population under the age of 18 years and depressingly dismal employment prospects, are undoubtedly large causative factors. For whatever reason, rapes committed by young offenders are, however, regrettably becoming more and more commonplace. That four such cases (and there are several others where I have not found it necessary to query the sentences) should over a short period cross my desk, as just one of ten judges in Harare dealing with review matters, provides unhappy testimony of the extent of the problem.

Regional magistrates who deal with rape cases on a daily basis all emphasise in their judgments the prevalence and need for deterrence in the sentencing process for offences of this nature. There is substance in these arguments, but prevalence and the need for deterrence have their limitations. A balance needs to be drawn.

In *R v Makaza* 1969 (1) RLR 97 (G) at p 100E, BEADLE CJ observed:

> "It is quite wrong for magistrates to assume that, if a severe sentence does not cause a falling off in the commission of the offence, they are justified in imposing more and more severe sentences. If such an approach were justified, the theft of a cycle would by now attract something like a life sentence. A halt must be called, and the intrinsic moral blameworthiness of the offence is the best guide in determining when that halt should be."

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These comments of BEADLE CJ were quoted with approval by REYNOLDS J and

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CHIDYAUSIKU J in *S v Ngombe & Ors* HH-504-87 and by MANYARARA AJ and CHEDA J in *S v Dube supra*.

I also refer to the observations of REYNOLDS J in *S v Mutongi* HH-348-86 at p 2 of the cyclostyled judgment:

> "The primary factor in assessing an appropriate punishment in most cases is the moral blameworthiness of the accused. The fact that the type of case under consideration is prevalent in the area may require the imposition of a penalty that is rather more severe than one which would otherwise be appropriate. This additional punishment is inflicted in an attempt to induce a reduction in the incidence of such crimes, but this should never be taken too far. Prevalence should never be regarded as a warrant to impose unduly harsh sentences."

See also the comments of REYNOLDS J in *S v Mpofu* 1985 (1) ZLR 285 (H) at 292-3; 1985 (4) SA (Z) 32 at 327J-328C, where the learned judge stated:

> "Turning finally to the interests of society ... it can be said in broad terms that the community requires the protection of the courts, as far as this may be possible, against the depredations of criminals. The public expects and requires that proper sentences are passed by the courts in individual cases which satisfy this need, and which also mollifies its sense of disapproval and reprobation engendered by the accused's criminal acts (*R v Karg* 1961 (1) SA 231 (A); *S v Mbingo* 1984 (1) SA 552 (A)). Society's denunciation of the offence and its 'demand for justice' becomes more vociferous when a particular crime has become prevalent in the area. The fact of prevalence is a relevant consideration in the assessment of sentence (*R v Boesigo* 1956 (1) SA 234 (A)). Matters of this nature, however, must be balanced against the moral blameworthiness of the particular offender, and indignation and passion must not be allowed to sway fairness and reason (*R v David & Ors* 1964 RLR 2)."

It is also appropriate to refer to the observations of BECK JA in *S v Mupanduki* 1985 (2) ZLR 169 (S) at 175-6 where the learned JUDGE OF APPEAL stated:

> "... In this connection I record my own respectful agreement with the following recent observations by NICHOLAS J in *S v Skenjana* no razor shall pass over h 1985 (3) SA 51 (A) at 54I to 55D - observations which I consider to be very

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> pertinent to the insidious temptation to judicial officers to resort to sentences of ever-increasing severity in a vain attempt to stem the tide of increasing lawlessness - a tide that requires many forms of endeavour other than just those that are offered by the powers of sentencing if it is to be contained, let alone reversed. The learned JUDGE OF APPEAL said:
>
> > 'My personal view is that the public interest is not necessarily best served by the imposition of very long sentences of imprisonment. So far as deterrence is concerned, there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length. Indeed, it would seem to be likely that in this field there operates a law of diminishing returns : a point is reached after which additions to the length of a sentence produce progressively smaller increases in deterrent effect ...
> >
> > Similarly in regard to the aspect of retribution. This has tended to yield ground to the aspects of deterrence and reformation, but it is not wrong that, in determining a proper sentence, the courts should give some recognition to the natural indignation and the fears and apprehensions of interested persons and the community at large ... In a case such as the present the court must give heed to the demand of the ordinary citizen for the condign punishment of robbers who invade the sanctity of the home to commit rapine and violent assault and worse. But that demand may well be satisfied by the imposition of less than

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> the most severe sentence ...
>
> Nor is it in the public interest that potentially valuable human material should be seriously damaged by long incarceration ... it is the experience of prison administrators that unduly prolonged imprisonment brings about the complete mental and physical deterioration of the prisoner. Wrongdoers must not be visited with punishments to the point of being broken.'"

I would finally make reference to the observations of BOTHA JA in *S v Jansen & Anor* 1975 (1) SA 425 (A) at p 427H-428A:

> "In determining the appropriate sentence to be imposed upon an accused person in any particular case, it is the duty of the court to have regard, not only to the nature of the crime committed and the interests of society, but also to the personality, age and circumstances of the offender (*S v Zinn* 1969 (2) SA 537 (A) at 540).

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> In the case of a juvenile offender it is above all necessary for the court to determine what appropriate form of punishment in the peculiar circumstances of the case would best serve the interests of society as well as the interests of the juvenile. The interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted or more distorted personality being eventually returned to society."

While Zimbabwe would not want to be a nation where rapists of the accuseds' age are not dealt with with appropriate severity, it would also not, to my mind, want to be a nation where 17- and 18-year-olds are treated as fully grown mature adults and sent to prison for many years for offences such as rape. As I have previously indicated, a balance needs to be drawn.

One of the regional magistrates made reference to *S v Moyo* 1992 (1) ZLR 158 (H) in support of the sentence he imposed. That case concerned the rape by a 50-year-old man of his 7-year-old stepdaughter. I accordingly emphasise that this judgment is concerned with the approach to sentence in respect of rapes committed by 17- and 18-year-olds (and, to a somewhat lesser extent, 19-year-olds).

I would also emphasise that the approach in *Moyo's* case *supra* has not been accepted by the Supreme Court. In *S v Chuma supra* MCNALLY JA (with GUBBAY CJ and KORSAH JA concurring) observed, in referring to *Moyo*'s case, that -

> "This court does not endorse the opinions somewhat acerbically expressed in that judgment."

I now turn to consider the individual cases. In considering those cases, it is my view that I should adopt the approach laid down by the Supreme Court in *S v Chuma* and *S v Muguti & Anor* S-218-92. I would point out that in *Chuma's* case a sentence of 7 years' imprisonment was imposed in respect of a 24-year-old who raped a 5-year-old - that is, an offence committed by a mature adult. In that case, MCNALLY JA referred to relevant recent authorities and then stated at p 3 of the cyclostyled judgment:

> "In our view, a severe sentence is appropriate within the range of present practice. We remain within that range by imposing a sentence of 7 years' imprisonment with labour. We mark our abhorrence of the conduct of the

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appellant by declining to suspend any part of that sentence, as has been done in the case of young offenders."

BARTLETT J

In *S I Muguti supra* KORSAH JA (with McNALLY JA concurring), in dealing with an 18-year-old who had raped a 5-year-old and a 17-year-old who had raped an 8-year-old, imposed sentences of 7 years' imprisonment of which 3 years were conditionally suspended in respect of both accused.

Against the background of these authorities I now consider the cases of the accused whose records I am presently reviewing.

In *Zaranyika*'s case, the accused, aged 18, raped a 13 year-old complainant, a next door neighbour and relative. He was sentenced to 6 years' imprisonment of which one year was conditionally suspended. The record of the case is brief and surprisingly it does not include the medical report. The magistrate set out his approach to sentence by saying that -

"I imposed on him a 6 year term of imprisonment with labour instead of the usual 10 year sentence ..."

The regional magistrate was effectively basing his approach on *Moyo*'s case *supra* which, as I have indicated, was specifically not endorsed by the Supreme Court in *Chuma*'s case *supra*. A further factor is that the accused, apart from being a young first offender, pleaded guilty. In this regard I refer to the observations by KORSAH JA in *S v Matanga* S-242-91 at p 17 of the cyclostyled judgment:

"Perhaps more so than any other cases, a plea of guilty to rape would normally result in a reduction in the sentence that would otherwise have been appropriate; for the victim is then spared the extra stress of reliving her harrowing experience by narrating it in public."

These observations of KORSAH JA were quoted with approval by MUCHECHETERE JA in *S v Kasaira* S-119-94 at p 8 of the cyclostyled judgment.

The record in this case, as I have indicated, is brief and there is no medical report. There is also no indication of the effect of the rape on the complainant - though it is fair to assume, particularly in view of her age, that she would be fully cognisant of and affected by the horrors of the offence. It is of course relevant to note that the complainant, at the age of 13, is substantially older than the complainants in the other three matters. I do not think that, in the overall circumstances, that should have any marked effect on the approach to sentence. The horror and seriousness of the offence of rape when inflicted

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on a 13-year-old is, to my mind, not dissimilar to the horror and seriousness when inflicted on a five-year-old. Both are especially horrible and serious offences - though for differing reasons taking account of the differences in emotional, mental and physical development of the complainants. I would, however, hasten to add that those are my observations as a layman and it would certainly e of considerable assistance (where possible) in matters of this nature to have

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the benefit of a psychologist's assessment of the effect of the offence on the complainant.

In all the circumstances and balancing all the various factors I have referred to, I am of the view that an appropriate sentence would be as follows: 5 years' imprisonment, of which 11/2 years is suspended for 5 years on condition the accused is not convicted of having committed within that period any offence of which rape is an element and for which he is sentenced to imprisonment without the option of a fine. The sentence imposed is accordingly set aside and replaced with the sentence as indicated.

In *S v Z* the accused, aged 15, raped the 5-year-old complainant twice. He was sentenced to 10 years' imprisonment which was wholly suspended. The regional magistrate discounted imposing corporal punishment because of the ill-health of the accused. He wanted to institutionalise the accused - presumably at Kadoma Training Institute - but was informed that there were no vacancies. The accused, although he pleaded guilty, had been held in remand for almost a year. From the probation officer's report it appears that the accused came from a broken home and institutionalisation would undoubtedly have been appropriate. The regional magistrate should have persisted in his requirement that a place in an appropriate institution be found and, if necessary, have contacted senior officials in the Department of Social Welfare to ensure that this was done. While I appreciate the regional magistrate's difficulty I cannot, with the greatest of respect, comprehend why he thought it appropriate to impose a 10-year suspended prison sentence on a 15-year-old. I reiterate that he should have ensured that institutionalisation was achieved even if it meant a further delay. Regrettably I cannot on review substitute such a sentence. But it would be inappropriate to allow the manifestly excessive 10-year suspended sentence to stand. I also reiterate that the accused spent about a year in custody before finalisation of the case. It is also important to note that he had pleaded guilty - see *S v Matanga supra*. I had in my query to the regional magistrate suggested a 5-year suspended sentence but even that is far too severe for a 15-year-old. Accordingly the sentence imposed is set aside and replaced as follows: 3 1/2 years' imprisonment, the whole of which is suspended for 5 years on

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BARTLETT J

condition the accused is not convicted of having committed within that period any offence of which rape is an element and for which he is sentenced to imprisonment without the option of a fine.

In *S v C* the accused, aged 17 at the time of the offence, raped a 5-year-old complainant. He was sentenced to 8 years' imprisonment of which 24 months were conditionally suspended. The regional magistrate relied on the approach to sentence in *Moyo*'s case *supra* which, as I have indicated, was specifically disavowed by the Supreme Court in *Chuma*'s case *supra*. The accused also pleaded guilty: see *S v Matanga supra*. The offence was committed in June 1993, but the accused, though pleading guilty, was only tried in December 1994. The record does not establish what the reason for the delay was or where the accused was in the interim period - something the regional magistrate should have clarified. It is likely that he spent a substantial part of that period in custody.

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In all the circumstances and endeavouring to balance all the factors I have referred to, the sentence imposed is set aside and replaced as follows: 5 years' imprisonment, of which 2 years are suspended for 5 years on condition the accused is not convicted of having committed within that period any offence of which rape is an element and for which he is sentenced to imprisonment without the option of a fine.

I now turn to consider the case of *S v T* In this case the accused, apparently aged 17, raped the complainant aged 7. I say the accused was apparently aged 17 as the record indicates he was treated as being aged 17 throughout the trial - but at the conclusion of the trial the prosecutor pointed out that the accused's registration certificate indicated that he was aged 19. The regional magistrate then stated that the accused looked older than 17 but that he would deal with him as if he was 17 to avoid further delays and prejudice to the accused. He then imposed a sentence of 8 years' imprisonment, of which 24 months were conditionally suspended.

The regional magistrate was obviously of the view that the 6-year effective sentence was appropriate for a 17-year-old - but he should have established what the correct age of the accused was. There was, for example, a letter in the record indicating that a dental examination had been asked for a full year previously, together with a probation officer's report. If these had been followed up it may have been possible to resolve the question without any substantial delay - if they had not been followed up it may well have been appropriate to ensure that a dental examination was done to establish the

correct age of the accused. I realise that the regional magistrate was on circuit at Masvingo - but I know from my own experience on the High Court Circuit at Masvingo that it is possible to obtain a dental report with expedition when the court requires one.

I had also queried certain aspects of the conviction with the regional magistrate. I pointed out that the complainant had been suggesting that she had been penetrated and that there were blood stains on her pants - stains to such a degree that she discarded the pants. I also pointed out that the medical report carried out less than 4 days after the commission of the offence specifically stated that there was no indication of bleeding. I further observed that the medical report also indicated that the complainant was suffering from labial dermatitis. I asked the regional magistrate if he did not think it would have been a good idea for the doctor to have been called to establish whether, if there had been bleeding 4 days prior to examination, he would have noticed signs of it - and whether labial dermatitis of the type he observed would have manifested itself within 4 days of the unlawful interference. The regional magistrate was not impressed with my observations and stated that they were in his view of acadeic interest only.

With the greatest of respect, I cannot agree with the regional magistrate. The contents of the medical reports are of considerable importance in assisting the court in dealing with the difficult questions of credibility which arise in contested rape matters. The complainant, though aged only 7 years, had very clearly and specifically, from the record, described an act of penetration

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and said that her pants were blood-stained and left at the scene. There was a delay in reporting the matter so the pants were never produced. In view of the complainant's evidence, the observations of the doctor on the aspects I have referred to would, to my mind, have been of substantial assistance to the magistrate in properly assessing the matter. It is important that magistrates carefully analyse medical reports and the contents thereof against the evidence of complainants in rape cases - and wherever there is any question of possible ambiguity it is appropriate to call the doctor (or if not available, another doctor) to comment on the contents of the report. The medical report should not be accepted with an unquestioning mind - unless it is clearly and conclusively supportive of the complainant's evidence. In the many review cases which come before me, I notice that it is very unusual for the doctor to be called to give evidence in rape cases. It is important that regional magistrates should carefully consider the contents of medical reports and, where appropriate, not be hesitant to ensure that medical evidence is called.

1995 (1) ZLR p283

BARTLETT J

If the doctor in this case had been called and he had stated that if there had been bleeding 4 days previously he would have expected to notice signs of it and that labial dermatitis took substantially more than 4 days to exhibit symptoms, then the effect on the complainant's credibility would have been substantially more than academic. See *S v Ndhlovu* S-135-85 at pp 3-4 of the cyclostyled judgment in regard to considering medical evidence.

In view of my concerns and the regional magistrate's somewhat less than academic approach to them, I have given careful consideration as to whether the conviction should stand. The regional magistrate, however, is of the view that the credibility of the complainant was very clear - and he is correct that her evidence as given reads well. There is also other evidence on the record in addition to the medical report corroborating the complainant. I am accordingly satisfied that it is appropriate to confirm the conviction as being in accordance with real and substantial justice.

In assessing sentence in this case, I am satisfied that the sentence imposed by the regional magistrate was manifestly excessive. In all the circumstances and balancing all the factors to which I have referred in respect of this and the other matters, the sentence imposed is set aside and replaced as follows: 6 years' imprisonment of which 21/2 years are suspended for 5 years on condition the accused is not convicted of having committed within that period any offence of which rape is an element and for which he is sentenced to imprisonment without the option of a fine.

I would finally emphasise that it is hoped that this judgment will provide a guideline to assist regional magistrates in the difficult task of assessing sentence in rape matters where the accused is aged 17 or 18 (and to a somewhat lesser extent where the accused is aged 19). It is not suggested or intended that the approach laid down should be regarded as being engraved in stone. There may well be cases where the aggravating features are such that a more severe sentence is required. Such aggravating features could, for example, be: a multiplicity of counts; the infection of the complainant with a sexually transmitted disease; or the suffering of serious physical and/or psychological harm. There may equally very well be cases where the mitigating factors are such that a much more lenient approach is required. Such mitigating factors could,

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for example, be: clear and verifiable indication of minimal physical or psychological harm or a probation officer's report which, for good reason, after a detailed assessment of the offence and the offenders' background, recommends a lesser punishment such as corporal punishment or committal to an institution.

BARTLETT J

The assessment of a proper sentence as always must involve the careful exercise of a discretion based upon as full as possible an assessment and consideration of all relevant factors - see *S v J* HH-33-93.

Garwe J agrees.

CITY OF HARARE v ZIMUCHA 1995 (1) ZLR 285 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Civil appeal

2 March, 6 & 13 April 1995 Judgment No S-32-95

Flynote

Enrichment - condictio indebiti - mistake in law - not a bar to relief - money paid recoverable unless equity suggests that a greater wrong would be done by ordering repayment than by declining to do so

Enrichment - condictio causa data causa non secuta - when exists

Enrichment - when exists - employee who was sick failing to submit sick leave forms - thereby disentitling himself to salary actually received but also disentitling himself to other benefits which would have accrued had he submitted form - not enriched

Headnote

The respondent worked for the City of Harare as a fitter and turner from January 1984 until 4 May 1988. From that date he was absent. He was sick. The Council knew he was sick and kept sending him medical forms to complete, which he never did. He was asked on a number of occasions to attend a medical board but never did. In spite of this the Council kept paying his salary until the end of February 1989, then stopped. On 29 May 1990 he was sent a letter advising him that, with the approval of the City Council, he had been summarily dismissed with effect from 4 May 1988. The Council then claimed the return of the salary paid from 4 May 1988, on the grounds that it was made in the erroneous belief that it was due and payable, whereas the respondent had been absent without authority because he did not apply for sick

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leave, did not attend a medical board and did not produce a medical certificate.

The respondent's conditions of service were governed by an industrial agreement, under which the Council was allowed to dismiss an employee

for misconduct. "Misconduct" included absence from duty without permission or valid reason. The leave conditions were in another industrial agreement. This provided that he was entitled to a maximum of 78 days' sick leave. Sick leave was granted conditional on the submission of a medical certificate within seven days from the first day of his absence. A medical board might examine an employee if it was considered that he was taking more sick leave than necessary or that he might have to be retired on medical grounds, or for other good reasons.

The Council was very considerate towards the respondent; they thought that when his position was regularised they would be able to recover payments from his terminal benefits.

In the court *a quo,* the judge held that because the respondent was admittedly sick, his absence was not misconduct; he had a "valid reason" for his absence. If the Council had paid the respondent by mistake, the mistake was one in law and the Council was not entitled to recover.

Held, that the respondent did not have a "valid reason" for his absence. If he was sick and wanted to go on being paid, he had to apply for sick leave. Without obtaining sick leave, he was absent without leave.

Held, further, that there is now no distinction in law between money paid in mistake of law and money paid in mistake of fact. Money paid in mistake of law or fact is recoverable under the *condictio indebiti,* unless equity suggests that a greater wrong would be done by ordering repayment than by declining to do so.

Held, further, that in this case there was not a *condictio indebiti* situation, because there was no mistake. The Council knew that the payments were not strictly due; they were relying on the respondent to regularise the situation by applying for sick leave and later, when he had run out of sick leave, to attend a medical board. Accordingly, the Council had waived its right to insist on the submission of an application for sick leave. This situation was one of *condictio causa data causa non secuta,* where the money is in the hands of the defendant without cause and the *condictio* lies to recover that which has been transferred on the assumption that a particular event will take place in the future. The event in this case was the submission of sick leave forms and later the attendance at medical boards. The respondent was paid on the understanding that he would do certain things which he was obliged to do and asked to do, and failed to meet his obligation.

Held, further, however, that it also had to be shown that the respondent was enriched by the payments. His failure to submit sick leave forms and attend the board meant that he was not entitled to draw a salary, but it also meant that he did not get the benefit of sick leave with pay and

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McNALLY JA

subsequently of either receiving a pension or returning to work. Taking a broad and equitable view of what amounts to enrichment, it was not possible to say that the respondent had in fact been enriched.

Cases cited:

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

Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & Anor 1992 (4) SA 202 (A)

Ellis NO v CoT 1994 (1) ZLR 423 (S)

Calder v SA Mutual Life Assurance Soc 1972 (2) RLR 46 (G); 1972 (4) SA 285 (R)

Govender v Standard Bank of SA Ltd 1984 (4) SA 392 (C)

Frame v Palmer 1950 (3) SA 340 (C)

Hosken Employee Benefits (Pty) Ltd v Slabe 1992 (4) SA 183 (W)

First National Bank of SA Ltd v B & H Eng 1993 (2) SA 41 (T)

Saambou Bank Ltd v Essa 1993 (4) SA 62 (N)

Kommisaris van Binnelandse Inkomste en 'n Ander v Willers 1994 (3) SA 283 (A)

T Biti for the appellant

T J Nyapadi for the respondent

Judgment

Mcnally JA: Mr Zimucha worked for the City of Harare ("the City") as a fitter and turner from 10 January 1984 until 4 May 1988. From that date he was absent. He was sick. The City knew he was sick. They kept asking him to fill in sick leave forms. Later they asked him three times to attend a medical board. But he never did. By a combination of misplaced generosity, and an assumption that he would eventually regularise his position by applying for sick leave, or by being pensioned on medical grounds, the City kept on paying him his monthly salary. He was paid up to the end of February 1989.

For that period of almost ten months Mr Zimucha was paid a total of $9 131,29. The City now wants it back. He declines to pay it back. He does not dispute that he was paid $9 131,29.

Although the City stopped paying him after February 1989, it was another fifteen months before he was sent a letter dated 29 May 1990 advising him that, with the approval of Council, he had been summarily dismissed with effect from 4 May 1988.

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In its original declaration the City alleged that, despite his having ceased to

be an employee after 4 May 1988, he continued to draw his salary until 28 February 1989. The weakness in that allegation is obvious. At no time while he drew his salary was he either dismissed or suspended. The letter advising him of his suspension was dated 9 May 1989. The letter of dismissal, as already indicated, was dated 29 May 1990. He was no longer being paid when these letters were written. But he was not either suspended or dismissed while he was being paid.

Conscious, no doubt, of this weakness, the Council gave notice in January 1991 of its intention to amend the declaration at the pre-trial conference. That amendment was tacitly accepted by Mr Zimucha's lawyers because they pleaded to it in May 1993. The pre-trial conference minute is silent about the amendment so I assume it was agreed.

The amendment put the City's case on a different footing. It alleged that after 4 May 1988 Mr Zimucha wrongfully and unlawfully failed to report for duty or to work. The City, *bona fide* and reasonably thinking that he was ill and would prove that illness or attend a medical board, continued to pay him. However, he remained absent without authority because -

a. he did not apply for sick leave;

b. he failed or refused to attend a medical board;

c. he failed or refused to produce a medical certificate.

In the premises, the City alleged, his absence constituted desertion and the payment was made in the erroneous belief that it was due and payable.

Mr Zimucha in reply -

a. admitted his employment;

b. denied it was terminated on 4 May 1988;

c. denied he had wrongfully failed to report for duty or work;

d. denied the City's alleged belief;

e. denied that his absence was unauthorised;

f. denied he was a deserter.

I should mention that it was pleaded and at one stage argued on behalf of Mr Zimucha that he had not been dismissed at all because the requirements of the Labour Relations Act had not been complied with. This is a matter which was referred to in *Gumbo v Norton- Selous Rural Council* 1992 (2) ZLR 403 (S) at 409F-H.

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However, it now appears to be accepted that Mr Zimucha's employment contract has been terminated, though from what date is not clear. Mr

McNALLY JA

Nyapadi, who appeared for him before us, addressed no submissions on the point. Indeed at the foot of p 2 of his heads of argument he said: "It is admitted that an employee can be dismissed for misconduct in terms of Clause 15(3) of SI 47 of 1981". We understand that the Ministerial approval required under s 90(9) of the Urban Councils Act [*Chapter 214*] has not been obtained. Nevertheless, it seems that Mr Zimucha has accepted his dismissal. Whether he accepted his dismissal as expressed by the City, ie, with effect from 4 May 1988, or from some later date, is far from clear.

Before going further, it is relevant to consider Mr Zimucha's conditions of service more particularly insofar as they govern sick leave.

The general conditions of service of employees of the City at that time were contained in SI 47 of 1981, under the industrial agreement between the City and its employees.

The relevant parts of that statutory instrument are s 15, which allows the City to dismiss an employee for misconduct, and s 16, which defines misconduct as, *inter alia,* "absence from duty ... without permission or valid reason".

The leave conditions were similarly contained in SI 747 of 1981. The relevant sections are s 18, which shows that persons like Mr Zimucha were entitled to a maximum of seventy-eight days sick leave; and s 19, which provides for the granting of sick leave conditional upon the submission of a certificate of sickness (generally called a medical certificate) within seven days from the first day of his absence.

There is also provision for the examination of employees by a medical board. This is undertaken when it is considered that the employee is taking more sick leave than necessary, or may have to be retired on medical grounds, or for other good reasons.

The evidence revealed that Mr Zimucha's superiors were very considerate. They went to his house and left sick leave forms for him to complete and return. He knew how to do this because he had done so at least once before. They spoke to him on that date, 27 June 1988. They asked him to return the forms on 29 or 30 June. He did not do so. On 11 July 1988 a Mr Nyagumbo, senior clerical officer, wrote to him warning him that his failure to submit sick leave forms amounted to unauthorised absence, which in turn amounted to misconduct. At that stage his employers knew he was ill, and Mr Nyagumbo said it would have been cruel to cut off his salary when all they needed was the form.

McNALLY JA

The letter of 11 July 1988 was posted. In September 1988 Mr Nyagumbo wrote again. That

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letter was hand delivered. In response to it, Mr Zimucha's brother came to report that he was critically ill and could not come in person.

It was at this stage that it was revealed that Mr Zimucha was visiting traditional healers. And at that time the City was not accepting certificates by such persons. He should have applied for ordinary annual leave for that purpose, insofar as he had any such leave due to him. Or he should have obtained a medical certificate from a registered medical practitioner while continuing to consult the *n'angas*.

In December 1988 they actually brought Mr Zimucha from his home to the office. He was so ill they decided to set up a medical board. He still had not brought a proper application for sick leave.

Subsequently Mr Zimucha was invited on a number of occasions to attend medical boards. He never attended. Mr Nyagumbo explained that they knew they would recover payments from his terminal benefits once everything was regularised. Moreover, if his salary stopped he would lose his medical aid benefits. But it appears his salary was eventually stopped because the medical board had been convened.

The purpose of a medical board, in his case, would have been to arrange for him to be retired on medical grounds. Medical boards were apparently convened for 12 January 1989, 20 March 1989 and 27 April 1989. Mr Zimucha attended none of them. It may be that he was away in the rural areas consulting *n'angas*. But the fact is, he did not attend, and he was personally advised at least of the first and third boards.

Before I go on to consider the general legal situation created by these facts, I should deal with one finding by the learned judge with which I respectfully disagree.

It was said that because Mr Zimucha was admittedly and undeniably sick, and the City knew he was sick, his absence from work was not "misconduct" because he was not "absent from duty without permission or valid reason". He had a valid reason. He was sick.

However attractive that reasoning may sound, it does not stand up to analysis. "Valid reason" means a reason which is lawful in terms of the contract.

McNALLY JA

Sickness *per se* does not entitle an employee to stay away from work **and continue to draw his salary.** It entitles him to apply for sick leave (or annual leave). If that is granted, he is then entitled - for a time - to be paid while not working. But if he does not apply for sick leave, and obtain it, he is simply absent without leave. Or, in the words of s 16 of SI 47 of 1981, he is "absent without permission".

So nobody is saying Mr Zimucha was not allowed to be sick. What I am saying is he was not entitled to draw his pay while absent from work because of illness unless he complied with the formalities. A "valid reason" for absence would be, for example, if he was kidnapped.

The problem throughout this case has been how to fit these facts into an appropriate legal

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category. The facts are simple. He was not entitled to payment. He was paid. Why should the City get its money back?

In fact, the more rational question might be: "Why shouldn't the City get its money back?".

The judgment in the court a quo turned on the question whether the City Council could reclaim its payments on the ground that the payments were made by mistake. The learned judge dealt with this complex issue as follows:

> "It seems to me that the plaintiff's mistake, if any, is one of law and not of fact, and (the) plaintiff is therefore not entitled to recover the payment to the defendant."

The law as to when money paid by mistake can be recovered by the condictio *indebiti* has been considered in a number of cases. It used to be said that money paid in mistake of law was not recoverable, whereas money paid in mistake of fact was recoverable. That distinction has been abandoned by the South African Appellate Division in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & Anor* 1992 (4) SA 202 (A), approved in *Ellis NO v CoT* 1994 (1) ZLR 423 (S). The reasoning of HEFER JA in the Appellate Division judgment is, to my mind, compelling, and I respectfully adopt it. He concludes that the real test for allowing recovery is whether the payer has been "inexcusably slack".

On this last point of whether or not the payer was "inexcusably slack", there was a dissent by VAN DEN HEEVER JA. And indeed the definition of "inexcusably slack" has caused problems. In our courts there is the judgment

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McNALLY JA

of GREENFIELD J in *Calder v SA Mutual Life Assurance Soc* 1972 (2) RLR 46; 1972 (4) SA 285 (G). In South Africa the varying views are summed up by ROSE-INNES J in *Govender v Standard Bank of SA Ltd* 1984 (2) SA 392 (C) at 401 *et seq*. Not all would go so far as saying that the negligence must be such as to evince an intention to waive the right of recovery. But it is generally accepted that not every degree of negligence on the part of the payer bars him from recovering. And it is probably fair to say that our law is tending more in the direction of the English law as applied in England, Australia and New Zealand, where negligence is irrelevant. After all, however negligent the payer is, the fact is that the recipient is unjustly enriched and the payer is unjustly impoverished.

Therefore it would seem right that the money should always be repayable unless equity suggests that a greater wrong would be done by ordering repayment than by declining to do so.

These thoughts on the *condictio indebiti* are, however, *obiter*, because it does not seem to me that we are dealing with a *condictio indebiti* situation at all. (When we reached this conclusion we invited counsel to make further submissions to us. We are grateful for their assistance in this regard.)

The *condictio indebiti* arises where the payer pays believing that the payment was due, but that belief, though reasonable, was mistaken. See the *Willis Faber Enthoven case supra* at 220H-I

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and 223I-J, and *Frame v Palmer* 1950 (3) SA 340 (C) at 346E-F.

I do not believe that there was a mistake in this case. The City, through its agents, knew perfectly well that the monthly salary payments were not strictly due. They were relying on Mr Zimucha to regularise the situation by applying for sick leave (or for annual leave, which was all he was entitled to apply for if he was consulting *n'angas* and did not proffer a certificate from a medical practitioner). Later, when he had run out of available sick leave, they were waiting for him to attend a medical board, relying on the fact that any overpayment could be set off against his terminal benefits and his pension.

Nor, of course, was Mr Zimucha under any misapprehension. He knew perfectly well, because he must be deemed to have known his own conditions of service, that he was not entitled to receive pay if he simply stayed away from work without completing a sick leave application or an annual leave application. The fact that he had, on a previous occasion, applied for and

received sick leave shows that he knew what was expected. And, in any event, he was reminded of his obligations orally on 27 June 1988 and in writing on 11 July 1988.

The real situation is that the City waived its right to insist on the submission of a sick leave application within seven days of his absenting himself. It continued to pay him in the expectation that he would regularise his situation. The only mistake they made was in being so generous (with the ratepayers' money, it may be noted) and in assuming that he would act reasonably.

What we have here is not the *condictio indebiti* but the *condictio sine causa* - see, for example, *Hosken Employee Benefits (Pty) Ltd v Slabe* 1992 (4) SA 183 (W) at 188G-189D. The *condictio sine causa* lies where the money is in the hands of the defendant without cause, whether or not due to a mistake of the plaintiff: *Hosken*'s case *, supra*, at 189B; *Govender*'s case *supra* at 400; *First National Bank of SA Ltd v B & H Engineering* 1993 (2) SA 41 (T) at 44H; *Saambou Bank Ltd v Essa* 1993 (4) SA 62 (N) at 63F-64C. This, it seems to me, is the position here. And I bear in mind that the South African Appellate Division has recently moved significantly away from the old view that there is no general enrichment action in Roman-Dutch law - see *Kommisaris van Binnelandse Inkomste en 'n Ander v Willers* 1994 (3) SA 283 (A). (I appreciate that that court has not specifically set out its new view.)

It may be even more accurate to categorise this claim as a claim under the *condictio causa data causa non secuta,* which in turn is a species of the genus *condictio sine causa generalis*. See Joubert *The Law of South Africa* Vol 9 pp 55-56 paras 73-76.

Joubert says this particular condictio lies -

> "... to recover that which has been transferred on the assumption that a particular event will take place in future, when that event does not take place."

To my mind, that describes precisely the situation in this case. The "event" was the completion

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of sick leave forms and later the attendance at the medical boards.

Hiemstra and Gonin in their trilingual dictionary (3 ed 1992) translate the Latin as "condiction resulting from the failure of the other party to meet his obligation (reclaiming property given for a consideration not realised)".

McNALLY JA

The money in issue in this case was paid to Mr Zimucha on the understanding that he would do certain things which he was obliged to do and was asked to do. His failure to do those things meant that the money was reclaimable. It lay in his power to provide the consideration. He failed to meet his obligation. The allegations necessary to found the *condictio* are, I am satisfied, adequately set out in the amended declaration which I have summarised earlier, namely:

1. The money was paid by the City to Mr Zimucha;

2. There was no *causa* for the payment - the *causa* was to be provided by action on the part of Mr Zimucha and he knowingly failed to provide it;

3. Mr Zimucha was enriched and the City was impoverished by the payment.

But there is a final and vital consideration: was Mr Zimucha unjustly enriched? As ROSE-INNES J points out in *Govender supra* at 404 *in fine*:

> "... the requirements of the *condictio* are both that the money should have come into the defendant's hand *sine causa* and that he should have been enriched thereby, which are disparate, not tautologous, requirements."

The failure of Mr Zimucha, first to complete the leave application forms and later to attend the medical boards, resulted simultaneously in two consequences:

1. he disentitled himself from receiving the salary which he was being paid;

2. he failed to obtain the benefits, whether of sick leave or vacation leave and subsequently of receiving a pension as a result of being medically boarded out of the service of the Council, or, alternatively, of returning to work.

The evidence clearly proves, at least on a balance of probabilities, that Mr Zimucha's illness was genuine. Thus he would undoubtedly have benefited either in the way of leave and subsequent re-engagement, or leave followed by a pension granted on medical grounds.

We enquired from Mr *Biti* why the City was pursuing this claim when it had never actually lawfully dismissed Mr Zimucha, and when it was in fact probably saving itself from having to pay a pension to Mr Zimucha by reason of the very same facts which founded its claim. He was unable to assist us.

McNALLY JA

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The City, I think, should have stopped paying Mr Zimucha much earlier. Had they done so, he might well have complied with their requests. If he had not, he could not have complained that his salary was not being paid. It is only because, with inappropriate generosity, the salary continued to be paid, that one has to look at the question whether he has been unjustly enriched.

With the question mark hanging over the issue of when, if ever, his employment was lawfully terminated, and particularly in view of the loss he brought upon himself by the very same failure to comply with the Regulations which led to his (unlawful?) dismissal, I find it not proved that he was unjustly enriched.

I do not think it inappropriate to take a broad and equitable rather than a technical view of what amounts to enrichment. In doing so, I find support in the words of Professor de Vos in a book which is neither available here nor wholly comprehensible to me, *Verrykingsaanspreeklikheid* in *die Suid - Afrikaanse Reg*. The relevant passage, quoted by ROSE-INNES J in *Govender supra* at 404E, reads (he is speaking of the sort of loss one brings into account in determining the true or actual enrichment):

> "It encompasses all disadvantages which are the cause or the consequence of the enriching occurrence, or which flow from the same cause which has led to the enriching occurrence". (The translation is my own.)

This seems to me precisely to describe the situation in this case.

I would hold therefore that the City has not proved that Mr Zimucha was unjustly enriched.

In the circumstances I would dismiss the appeal with costs.

Korsah JA: I agree.

Ebrahim JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Gutu & Assocs, respondent's legal practitioners

LINDSAY v LINDSAY (2) 1995 (1) ZLR 296 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Civil appeal

9 March & 13 April 1995 Judgment No S-58-95

Flynote

Court - contempt of - disobeying court order - committal - continued disobedience after release - further and

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indefinite committal permissible until contempt purged by obeying order - contempt of court distinguished from civil imprisonment

Civil imprisonment - contempt of court - distinction between civil imprisonment and committal for contempt

Headnote

During a bitter divorce action, the appellant husband was ordered to pay his wife substantial maintenance pendente lite from "his elusive resources". He defied the order and, despite age and ill-health, went to gaol for 21 days for his contempt. After his release he still would not pay, so his wife sought a second, indefinite committal order. She was granted one for 30 days. The husband appealed against the committal and she cross-appealed against the limited period of committal.

Held, that, whereas civil imprisonment can only be granted once and for a fixed period, the same rules do not apply to committal for contempt. Contempt continues until it is purged by compliance and further committal is possible and in this case was appropriate and warranted. A second committal for a fixed period was likely to be ineffective and this would force the wife to have to return to court again. The remedy lay in the appellant's hands: the court had already determined that he was able to pay, so that issue was *res judicata.* He was not able to rebut the presumption of wilfulness and, despite his poor health and age and the extreme suffering he would endure in prison, an indefinite order was

GUBBAY CJ

appropriate. He was given 30 days to pay, or he would be committed to Harare Remand Prison until such time as he paid.

Cases cited:

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

Lindsay v Lindsay HH-205-93

Haddow v Haddow 1974 (1) RLR 5 (G)

Gold v Gold 1975 (4) SA 237 (D)

Consol Fish Distributors (Pty) *Ltd v Zive & Ors* 1968 (2) SA 517 (C)

Weinberg v Weinberg 1958 (2) SA 618 (C)

Metropolitan Industrial Corp (Pty) Ltd v Hughes 1969 (1) SA 224 (T)

Ferreira v Bezuidenhout 1970 (1) SA 551 (O)

Hofmeyer v Fourie 1975 (2) SA 590 (C)

Ansah v Ansah [1977] 2 All ER 638 (CA)

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Church's Trustees v Hibbard [1902] 2 ChD 784

Longman v Longman 1908 TS 1054

S v Kelder 1980 ZLR 331 (G)

A P de Bourbon SC for the appellant

G S Wernberg for the respondent

Judgment

Gubbay CJ: In a judgment delivered on 29 April 1993, reported as *Lindsay v Lindsay* 1993 (1) ZLR 195 (S), this court ordered the appellant to maintain the respondent, his wife from whom he was separated, pendente lite at the rate of $6 000 per month with effect from 1 April 1992; and, in addition, to contribute an amount of $4 000 towards her costs of the action.

The appellant failed to comply. Consequently, on 18 May 1993, the respondent instituted proceedings for an order that he be committed to prison for an indefinite term until he paid or secured payment of the sum of $94 000 then outstanding. The relief sought was opposed. The appellant professed total inability to satisfy the order of this court. Upon the advice of his legal practitioner and accountant he had lodged an application for the provisional acceptance of the surrender of his estate as insolvent.

On 16 September 1993, the matter was argued before SMITH J Judgment was reserved until 6 October 1993. On that date, the learned judge issued an order that in the event of the appellant failing to pay the respondent, or to secure payment to her, of the sum of $94 000 within the next thirty days, he was to be imprisoned in the Harare Remand Prison for a period of twenty-one days. A proviso was added that should the appellant make payment while serving

such imprisonment, he would be entitled to an immediate release. (See judgment HH-205-93, not reported).

The appellant failed to make any payment and was committed to prison on 15 November 1993. At sixty-four years of age he suffered considerably from his incarceration. Within a few days of being admitted, he fell ill and had to be placed in the hospital unit of the prison under arduous conditions. There he remained until released on 6 December 1993.

After his discharge from prison, the appellant's non-compliance with the order of this court continued. His stance, of lack of means to maintain the respondent in any amount, persisted. Unconvinced that he was truly indigent, the respondent once more instituted proceedings for the indefinite committal of the appellant to prison until such time as she was paid the amount due in respect of maintenance and the contribution towards costs. Yet again the appellant filed an opposing affidavit. He reiterated that he was unable to honour the judgment as he possessed no funds or assets with which to do so.

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GARWE J, who presided on this latter occasion, considered that the situation which led to the previous committal of the appellant had not altered. He held that, since the appellant's contempt of the order continued, there was no legal impediment to committing him to prison for the second time. But, being of the view that an indefinite committal was undesirable, he limited the period to thirty days.

Both parties were dissatisfied with the order made. An appeal and cross-appeal were noted against it. The appellant contended, on various grounds, that he ought not to have been committed to prison at all; and the respondent, that the committal should have been for an indefinite term.

The appellant's plea of absolute impossibility to maintain the respondent was raised before this court and rejected in *Lindsay v Lindsay supra*. In that judgment it was said at 202C-D:

> "Mindful of the considerable assets that the appellant alleges to have divested himself of, without disclosing the manner of the divestment, any control by him over such assets divested, and any income derived from those assets, one can only infer that he is still a very wealthy man capable, from his elusive resources, of furnishing his wife with maintenance of $6 000 per month ..."

GUBBAY CJ

The finding was *res judicata.* In none of the subsequent proceedings was any new or different circumstances revealed; nor could they have been. I entertain no doubt that GARWE J was correct in concluding that the appellant remained bound by the order and had failed to comply with it.

Once it was shown that the order had not been met, which of course was common cause, wilfulness and *mala fides* on the part of the appellant was properly inferred, with the onus upon him to rebut the inference on a balance of probabilities. See *Haddow v Haddow* 1974 (1) RLR 5 (G) at 6A; *Gold v Gold* 1975 (4) SA 237 (D) at 239F-G. It may be, as indicated by BAKER AJ (as he then was) in *Consolidated Fish Distributors (Pty) Ltd v Zive & Ors* 1968 (2) SA 517 (C) at 521A-522A that wilfulness and *mala fides* are identical in direct contempt cases, whereas *mala fides* is an essential element in "constructive" contempt. However that may be, I agree with the learned judge that the appellant failed completely to discharge the requisite onus.

A maintenance order providing for periodical payments, under an obligation arising by operation of law, and an order to make a contribution towards the costs of a matrimonial action (being an incident of the duty of support between spouses) are each an order *ad factum praestandum*, that is, an order to do or abstain from doing a particular act. Failure to comply renders the defaulter liable to imprisonment for contempt. See *Weinberg v Weinberg* 1958 (2) SA 618 (C) at 621B-C; *Metropolitan Industrial Corp (Pty) Ltd v Hughes* 1969 (1) SA 224 (T) at 230B; *Ferreira v Bezuidenhout* 1970 (1) SA 551 (O) at 553 in fine 554A; *Hofmeyer v Fourie* 1975 (2) SA 590 (C) at 597E-F; *Spiro Law of Parent and Child* 4 ed at p 416.

The purpose of this criminal sanction is not punishment of the disobedience for punishment's sake, but rather to coerce the defaulter to comply with the order in the future. Understandably, it is a remedy of last resort, only to be employed when all endeavours to bring the situation under

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control have failed, or are almost certain to fail. See *Ansah v Ansah* [1977] 2 All ER 638 (CA) at 643c.

To my mind, the learned judge correctly appreciated that the real issues to be determined were (i) whether it was competent to recommit the appellant to prison for his continued contempt of the order; and, if so, (ii) whether the term of his committal should be fixed or indefinite.

Counsel for the appellant accepted that there is a difference both as to procedure and purpose between civil imprisonment and committal for

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contempt. He was right to do so. See *Hofmeyer v Fourie supra* at 599H-600B. Notwithstanding, the submission was advanced that, akin to the position that courts will not punish twice by imprisonment for the same failure to pay a civil debt, so the courts will not do so where the non-compliance relates to an order to pay maintenance.

The first part of the proposition may be sound depending on the wording of the particular enactment. See, for instance, s 32 of the Magistrates Court Act [*Chapter 18*]; *Church*'s *Trustee v Hibbard* [1902] 2 ChD 784 at 791 and 792; on the other hand, Order 41 of the Rules of the High Court contains no such restriction, express or implied.

With regard to the suggested corollary, I can perceive of no valid reason why there should not be a second committal to prison if the first order had no effect. This was the clear opinion of SOLOMON J in *Longman v Longman* 1908 TS 1054 at 1055, which I respectfully approve of.

The contempt of the order of this court continues until it is purged by compliance. It is not purged by the appellant serving a single period of committal to prison. To hold that there can only be one committal would result, inevitably, in the imposition of an indefinite committal in the first instance. For otherwise there would be little inducement to obey the order. The contemnor might well choose to undergo the hardship and humiliation of a short period of incarceration, content in the knowledge that no further criminal sanction could be visited upon him for his obduracy. Section 23(3) of the Maintenance Act [*Chapter 35*] appears to be consistent with this view. Under that provision, a person remains liable to prosecution for a failure to pay arrear maintenance, despite his previous convictions. See *S v Kelder* 1980 ZLR 331 (G) at 333B.

It follows that I am in entire agreement with the conclusion of the learned judge that a further order of committal was both appropriate and warranted.

The respondent's counsel argued that, in the circumstances pertaining, there was no rational basis for GARWE J to have committed the appellant to prison for anything less than an indefinite term. It would seem that the learned judge had little faith that a committal for thirty days was likely to achieve compliance with the order of this court. I am convinced it will prove to be ineffective. For this court to leave the period undisturbed will result in the respondent being forced to have recourse to yet further proceedings in pursuance of her rights.

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GUBBAY CJ

Daunting and distressing as it is to have to commit the appellant, an elderly and sick person, to prison for an indefinite term, it must not be overlooked for a moment that the remedy lies in his hands. Compliance with the order is all that is sought. The decision to terminate what unquestionably will be extreme suffering in prison, is his alone. I can only hope that wiser counsel than in the past prevails. To that end, I propose to allow the appellant, as did the learned judge, a period of thirty days from the date of this judgment, to purge his contempt, failing which the committal order is to be put into effect.

Accordingly, I would dismiss the appeal with costs and allow the cross-appeal with costs. Paragraph 3 of the order of the court a *quo* is amended to read:

> "In the event of Norman Stewart Lindsay failing to pay his wife Grace Millicent Lindsay or cause to be paid to her, within thirty days of 13 April 1995, all amounts due in respect of arrear maintenance and contribution towards costs in terms of Supreme Court judgment 61/93, he is to be committed to Harare Remand Prison for an indefinite term and will there remain until such payment is made."

Korsah JA: I agree.

Muchechetere JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

V H Fitzpatrick, respondent's legal practitioners

FINLAYSON v STANDARD CHARTERED PENSION FUND TRUSTEES 1995 (1) ZLR 302 (HC)

Court **High Court, Harare**

Malaba J

Civil trial

3 February and 3 May 1995 Judgment No HH-51-95

Flynote

> Pensions and compensation - pension fund - trustees of fund - how trustees must exercise their powers under a pension trust

Headnote

Trustees of a pension fund must act with impartiality and endeavour to avoid decisions that have the effect of conferring upon some of the beneficiaries more benefits than are received by others on the same level of entitlement, unless the trust expressly gives the trustees a

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discretion to differentiate between the parties.

When a trust instrument confers on the trustees of a pension fund an absolute and uncontrolled discretion, the beneficiaries cannot question the exercise, in good faith, of the discretion, unless it is shown that the trustees did not consider the material facts which an ordinary prudent person would have considered in the exercise of the discretion. In terms of the trust deed, the trustees of a pension fund had an "absolute and uncontrolled" discretion to determine the rates at which the sterling benefits payable were to be converted to local currencies for members resident in countries outside the sterling areas. They were not bound to adopt the prevailing rates of exchange. In converting the sterling benefits for pensioners, they were advised not to depart materially from the prevailing rate of exchange between the pound and the Zimbabwe dollar. This did not mean that they had to use the prevailing rate of exchange. In fact, they used rates close to, but not always the same as, the prevailing rate. The onus was on the applicant to show that, in exercising their discretion, the trustees were not motivated by considerations of honesty

or fairness or that they had shut their minds to some relevant facts. The applicant had not discharged this onus; in fact he had not suggested any *mala fides* on the part of the trustees.

Cases cited:

Rawsthorne v Rowley [1909] 1 Ch 409

Re *Brookes: Brookes v Taylor* [1914] 1 Ch 558

Tempest v Lord Camoys (1882) 21 Ch 571

Re *Beloved Wilke's Charity* (1851) 3 Mac & G 440

Dundee General Hospitals Bd of Mgmt v Walker & Anor [1952] 1 All ER 896 (HL)

A P de Bourbon SC for the plaintiff

J B Colegrave for the defendant

Judgment

Malaba J: On 21 August 1990 the plaintiff (Mr Finlayson) issued out of the High Court of Zimbabwe, by edictal citation an intendit against the defendant (the Trustees) resident in the United Kingdom and claimed the following:

"a. payment of the sum of $52 326,53;

b. interest at the prescribed rate on the sum of $52 326,53 from the lst April 1989 to the date of payment;

c. payment of the sum of $19 565,25;

d. interest at the prescribed rate on the sum of $19 565,25 from the lst May 1990 to the date of payment; and

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e. costs of suit."

At the commencement of the trial, Mr *de Bourbon* applied to amend the figure of $19 565,25 to read $29 097,79 in order to cover the period from January 1989 to March 1993. The total amount claimed by the plaintiff from the defendant is $81 424,32. The amendment was not opposed by Mr *Colegrave for the defendant.*

Mr *Colegrave* also moved, with the consent of Mr *de Bourbon*, for the amendment of the defendant's plea by deleting paragraphs 2 to 5 and substituting them with fresh averments.

The Trustees' defence to the claim is that Mr Finlayson has no legal

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entitlement to the money claimed and that what money was due to him has all been paid to him.

The following background facts will facilitate the understanding of the causes of the dispute between the parties. Mr Finlayson was employed by Standard Bank Ltd (now Standard Chartered Bank Ltd) (the Bank) from 1948 to his retirement on 17 November 1980. Standard Chartered Bank Ltd is a London-based finance company with subsidiaries in many countries, including Zimbabwe. At the time of his retirement Mr Finlayson worked for the Bank in Zimbabwe.

It so happened on 22 March 1972 that the Bank established, by a Trust Deed (the Deed), a pension fund which it vested in the Trustees to hold upon trust to apply for the benefit of present and future employees by providing them pensions on retirement.

The Trustees were to derive their powers from the Deed and the Standard Bank Limited Pension Fund Rules (the Rules). The provisions of the Deed and the Rules containing the powers of the Trustees relevant to the resolution of the issues in this case are set out hereunder.

The Trustees were empowered by s 5 of the Rules to determine the pension of an employee on retirement by taking his average salary for the twelve months preceding retirement; multiplying it by his length of service and dividing the product by the age of the employee at the time of retirement.

As it was a UK-based pension fund it was subject to Inland Revenue Regulations and the benefits had to be calculated by reference to the UK retail price index and expressed in sterling. If the pensioner was employed outside the United Kingdom (UK) at the time of retirement, his pension would be determined in local currency and converted to sterling at a predetermined rate which, in this case, was $1,50 to £1,00.

Clause 30(b) of the Deed requires the Trustees to review the pensions at least once a year. Before the Trustees fix the amount to be paid to members of the Fund, they are enjoined to obtain and consider the advice of the actuary; have the consent of the Bank; and consider the benefit limits set up by the HM Commissioners of Inland Revenue. They are also required under

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clause 30(b) of the Deed to have regard to the UK Retail Price Index and the financial position of the Fund.

Under the provisions of s 30(a) of the Rules the Trustees are obliged to pay

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the sterling pensions to members of the Fund resident in countries other than the UK in "such currencies as the Trustees may determine having regard to the country in which the member is resident or has been employed by the Employer and to any statutory requirements of such country of residence or employment".

Section 30(b) of the Rules provides that "benefits payable in currencies other than sterling shall be converted into such other currencies at such rates as may be determined from time to time by the Trustees".

Clause 18 of the Deed declares that "every discretion or power hereby conferred on the Trustees shall be an absolute and uncontrolled discretion or power ...". Clause 36 of the Deed provides that in any dispute between the Trustees and any member of the Fund over the entitlement to the Fund or the amount payable to the member, the decision of the Trustees shall be final and binding on all persons.

All the employees of the Bank in Zimbabwe automatically became members of the Pension fund at its inception in 1972. A local fund was, however, established on 1 April 1975 and from that day future employees of the Bank in Zimbabwe could no longer belong to the London Pension fund. Those in employment with the Bank in Zimbabwe on 1 April 1975 were given the option of remaining as members of the London Pension fund on retirement. Mr Finlayson elected to remain on the London Fund and was its member on retirement on 17 November 1980.

In 1976 the Trustees decided that the pension benefits for members of the Fund resident in Zimbabwe would be converted to Zimbabwe dollars at the fixed rate of $1,50 to £1,00, the dollar being able then to hold its own against the pound. At his retirement Mr Finlayson had a pension of $14 157 *per annum* which, when converted to sterling at the predetermined rate of 1.5:1, was £9 438 *per annum*.

The 1981 annual review of pensions by the Trustees saw Mr Finlayson receive the same increase to his pension at the same rate of 9% as his UK counterparts. In 1982 the Trustees decided to award, to members who were resident in Zimbabwe and had not emigrated, their own increases and had the pensions calculated in dollars with reference to the local cost of a living index. The dollar-based benefit was converted to sterling at the rate of 1,5 to create a sterling record for members who decided to emigrate. In 1982 and 1983 members of the Fund resident in Zimbabwe received increases of 8,50% and 4,0% respectively.

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Two systems of calculating pension benefits had developed: one for members resident in Zimbabwe, calculated with reference to the local cost of living index and expressed in dollars, and the other for UK pensioners, calculated with reference to the UK retail price index and expressed in sterling. The Trustees reverted to the UK system of calculating pensions for all members in 1984/85 but stopped the practice for the members resident in Zimbabwe in 1986, resorting once again to the dollar-based benefits. In other words, Mr Finlayson had a dollar pension calculated with reference to the local cost of living index and did not receive any sterling pension in 1982 and 1983.

The dollar had now depreciated in value against the pound and members of the Fund resident in Zimbabwe began to complain of being discriminated against and demanded that their pensions be calculated by reference to the UK retail price index and expressed in sterling. The Trustees suspended payments of benefits to members resident in Zimbabwe for 1986, 1987 and part of 1988 whilst they examined various alternatives to the method used to calculate pension for members of the Fund resident in Zimbabwe. Arrangements were made for the Bank to pay members resident in Zimbabwe allowances to redress the effects of inflation caused by the depreciation of the dollar. In December 1987 Mr Finlayson received a sum of $13 327,25 in the form of bank allowances back-dated to 1984. He was also to receive a bank allowance of $5 424 per annum. The allowances were paid by Standard Chartered Bank of Zimbabwe in local currency.

After a number of meetings and consultations with the authorities of the Inland Revenue Department and the Bank authorities, and having considered other recommended possible solutions to the problem of calculation of pensions for members of the Fund resident in Zimbabwe, the Trustees finally accepted the advice of their lawyers to the effect that pensions for all members of the Fund regardless of where they were resident should be calculated with reference to the UK retail price index and expressed in sterling. The lawyers also advised the Trustees that the discretionary powers they had in relation to the fixing of the exchange rates were not as wide as they had believed and that the Trustees should not depart materially from the prevailing rates.

At a meeting held on 17 November 1988, the Trustees adopted a revised method of calculating pensions for members resident in Zimbabwe. The revised method was to affect members differently, depending on their dates of retirement. The method, in so far as it affected Mr Finlayson was summarised in the minutes of the meeting as follows:

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> "RETIRED/RESIGNED prior to 1.1.1984
>
> (1) A pension based on the dollar pension as at retirement/resignation converted to Sterling at 1,5 with UK increase rates thereafter. The current Bank allowance if any to cease."

Pensioners who retired after 1 January 1984 but before 31 August 1987 had their pensions

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calculated by the use of a different method also set out in the minutes of the meeting.

On 14 December 1988 Sir Leslie Fletcher (a Trustee) wrote to Mr Finlayson and other members of the Fund affected by the different categories of the revised method. The letter advised the members of the decision of the Trustees and had attached to it a schedule showing the categories of the revised method and how the addressee was affected. The part of the Schedule relating to Mr Finlayson read as follows:

> "SCHEDULE DETAILING REVISED METHOD IN CALCULATING PENSION
>
> (1) Between 1976 and lst January 1984 the exchange rate of Zimbabwe dollars to Sterling was around 1.5. For those who left service before 1.1.1984 we will start by taking your dollar pension as at 1.4.76 (when the 1.5 rate was introduced) or later if you left service after this date and convert this dollar pension to sterling at 1.5. To that amount we will add increases at annual percentage rates which have since been awarded to UK pensioners from time to time.
>
> If you did not emigrate immediately upon retirement and you have at some time been accorded an increase or allowance based on Zimbabwe rates which has resulted in your total benefit (pension plus allowance) in payment today being higher than applicable on the revised UK basis, your current total benefit will remain frozen until the pension due to you on the above method catches up."

Following the interpretation he gave to Sir Leslie's letter and to the attached schedule, Mr Finlayson undertook the calculations of the amounts of money that make up his claim. It is important to set out at this stage of the judgment the part of Sir Leslie's letter that is in the centre of the dispute between the parties. It reads:

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> "I would like to stress that the revised method now being adopted, which includes the consolidation of Bank allowances with your pension, will not reduce your present benefit. Full details of how the changes will affect you personally are shown on the schedule attached. You will see from the schedule that, regardless of where you reside after retirement, you will have a sterling benefit. However, if you continue to reside in Zimbabwe after retirement your benefit will continue to be paid to you in Zimbabwe dollars in Zimbabwe, but calculated by taking your sterling benefit and converting it to Zimbabwe dollars at the prevailing rate applicable on the day of payment."

In the process of putting into effect the revised method, the Trustees decided to pay to pensioners a lump sum calculated by taking the sterling pension on the revised method for each year from 1984 to 1988 and converting it to Zimbabwe dollars at rates determined by them in terms of s 30(b) of the Rules and subtracting from the total amount the total benefit in payment to the pensioners by 31 December 1988. Mr Finlayson received a lump sum payment of $32 126 in January 1989.

The Trustees took the view that from 1 January 1989 the entitlement would be based on the revised method and expressed in sterling converted to Zimbabwe dollars at the prevailing rate of exchange. The bank allowance of $5 424 *per annum* paid to Mr Finlayson was to cease. To avoid the reduction of the total benefits accrued to Mr Finlayson the Trustees decided that, if the total benefit in payment to him on 1 January 1989 was higher than the applicable total benefit on the revised method, the former would be frozen until the latter caught up with it.

To the Trustees, the total benefit meant the dollar benefit being paid to Mr Finlayson on 14

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December 1988 following the increases on the percentage rates of 1982/83 plus the bank allowances. The total benefit in the eyes of the Trustees was $27 271,25 *per annum.* According to the approach adopted by the Trustees in calculating the total benefit in payment to Mr Finlayson the sum of $27 271,25 *per annum* was less than $45 979 yielded by converting the sterling benefit of £14 235 applicable on the revised method at the prevailing rate of 3.47 as at 1 January 1989. As the bank allowance of $5 424 had ceased by 1 January 1989, Mr Finlayson's entitlement in sterling on 1 January 1989 was £14 553 ($21 831) *per annum* or £1 212,83 ($1 819,25) per month. As only the sterling figure of £14 235 *per annum* could be converted to Zimbabwe dollars at the prevailing rate of 3.47 as the comparable sterling record figure of £14 553 was convertible at the rate of 1.5 only the sterling

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figure of £14 235 became the measure of Mr Finlayson's entitlement as at 1 January 1989.

Mr Finlayson took issue with the Trustees on four points:

1 He challenged their criterion of determining the entitlement. He argued that his entitlement for purposes of calculating the lump sum of $32 126 should have been the "sterling record".

2 He argued that the interpretation to be placed on Sir Leslie's letter and the attached schedule was that his entitlement was the sterling record plus the sterling content of bank allowance converted to Zimbabwe dollars at the prevailing rates of exchange from 1984 to 1988.

3 On the premise contained in (2) above, he said his entitlement as at 1 January 1989 was £1 514,16 ($2 271,25) per month, converted to Zimbabwe dollars at the prevailing rate of 3.47.

4 Finally, he argued that the Trustees were bound by the revised method to use the prevailing rates of exchange to calculate the lump sum payment for the period 1984 to 1988.

Taking his entitlement to be each of the sterling records (incorporating bank allowances) of what was paid to him in dollars in each year from 1984 and converting that figure to Zimbabwe dollars at the telegraphic rates of exchange and subtracting from the total amount what he received from the Trustees and the Bank during the same period, Mr Finlayson produced the figure of $52 326,53. Taking his sterling benefit entitlement as at 1 January 1989 to be £1 514,16 and converting it to Zimbabwe dollars at the prevailing rates of exchange from January 1989 to March 1993 and subtracting from the total amount what he received from the Trustees during the same period Mr Finlayson arrived at the figure of $29 097,79.

A chart was produced (Exhibit 4) whose accuracy was acknowledged by the parties. It depicted statistically the bases of the arguments advanced by the parties.

There are therefore two issues:

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(a) What was Mr Finlayson's entitlement for the period 1984 to 1 January 1989?

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(b) Did the Trustees use incorrect rates of exchange for calculating the lump sum of $32 126 for the period 1984 to 1988?

Mr Finlayson was the only witness on his side. His evidence was to the following effect. His pension was in sterling and he used the sterling record to calculate what he ought to have been paid by the Trustees between 1984 and 1988, because Sir Leslie Fletcher's letter said that was the measure of entitlement to be used. The letter also directed that he should take the sterling record and convert it to Zimbabwe dollars at the prevailing rates of exchange. He did not understand the letter to be saying the revised method was to take effect on 1 January 1989. The Trustees were now reneging from what Sir Leslie Fletcher advised in his letter. The total benefit in payment to him was £14 553. The Trustees were reducing his pension by seeking to pay him a pension of £14 235 on the revised method. On the authority of Sir Leslie Fletcher's letter, he took what he received in dollars including the allowances and converted the total amounts to sterling at the fixed rate of 1.5 before reconverting the quotients to Zimbabwe dollars at the prevailing rates of exchange for the period 1984 to 1988. He said by 1 January 1989 his sterling benefit was £1 514,16 per month converted to Zimbabwe dollars at the prevailing rate from January 1989 to March 1993. He denied being told that the bank allowances were *ex gratia* payments.

The defendant called two witnesses. The evidence of Mr Baillee was to the following effect. He has been associated with Standard Chartered Bank for many years and was its Executive Director at the time of retirement in 1987. In March 1987 he was appointed a trustee of the Pension fund. At the time of appointment he was aware that the Trustees were looking for solutions to the problem of calculation of pensions for members based in Zimbabwe. The matter received careful consideration from the Trustees. It took a long time to solve because of its complexity. Whilst the matter was being considered, the Bank agreed to pay the members based in Zimbabwe *ex gratia* allowances. The *ex gratia* payments were intended to redress the effects of inflation due to the depreciation of the Zimbabwe dollar. He attended the meeting of 17 November 1988 where the Trustees adopted the revised method to solve the problem of calculation of pensions for members resident in Zimbabwe.

The schedule attached to Sir Leslie Fletcher's letter correctly reflected the decision of the Trustees. Sir Leslie's letter was, however, unfelicitously worded. It was a *pro forma* letter sent to many pensioners affected by the different categories of the revised method. The letter had to be read together

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with the schedule. It was the intention of the Trustees that the revised method would take effect

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on 1 January 1989. It was not intended to be authority for back calculations of benefits by beneficiaries.

There was no pre-existing legal entitlement to the lump sum of $32 126 paid to Mr Finlayson. The Trustees had decided, on grounds of equity, that it was fair and reasonable to pay the money to the members resident in Zimbabwe. The rates of exchange used by the Trustees to convert the sterling benefits they took from the revised method for the period 1984 to 1988 were fixed by them following the advice of the lawyers. There was no authority in Sir Leslie's letter for Mr Finlayson to convert the sterling record figures to Zimbabwe dollars at the telegraphic rates of exchange or to convert bank allowances to sterling. If Mr Finlayson's method was correct he would be 24% better off than his UK counterparts and 40% richer than his Zimbabwean counterparts.

Mr Canningham's evidence was that he was an actuary in a firm that has handled the actuarial affairs of the Pension fund for over 20 years. He has himself been dealing with the Pension fund from 1990. The revised method of calculating pensions for members resident in Zimbabwe was intended to take effect on 1 January 1989. It was designed to put Mr Finlayson in the same position as the UK pensioners. The fixed rate of 1,5 was irrelevant to members resident in Zimbabwe because it was used to establish a "sterling record" benefit to be used by those members who emigrated from the country.

It was inappropriate for Mr Finlayson to take the "sterling record" benefit which he never received and use it as a measure of his entitlement. It was also inappropriate for Mr Finlayson to convert the bank allowances of $13 327,25 and $5 434 to sterling at the fixed rate of 1,5. The allowances had no sterling reference. They were based on the Zimbabwe cost of living index. They were *ex gratia* payments. The figure of £1 514,16 used by Mr Finlayson as his measure of entitlement included the bank allowances converted to sterling at the fixed rate of 1,5.

Mr Finlayson should not compare the "sterling record" on the revised method and claim that it represented his total benefit. The Schedule talks about "the total benefit in payment" and not "sterling records" benefits. According to the schedule, the total benefit in payment to Mr Finlayson in Zimbabwe dollars on 14 December 1988, when the letter was written by Sir Leslie Fletcher, was $27 255 *per annum*. This figure included the bank allowances. The figure was higher than £14 235 converted to Zimbabwe dollars at the rate

of 1.5 because of the increases awarded solely to members resident in Zimbabwe in 1982/83.

The current total benefit ($27 255) would have been frozen as from 1 January 1989 but for the fact that when converted to Zimbabwe dollars at the prevailing rate of 3,47 on 1 January 1989 the sterling benefit of £14 235 had a higher total benefit of $45 979 *per annum* than the total benefit produced by converting £14 553 at the fixed rate of 1,5. Mr Finlayson's sterling benefit on 1 January 1989 should have been £14 235 *per annum*.

That is all the evidence led and I now turn to analyse it to determine where lies the truth bearing in mind the credibility of the witnesses and the weight of the probabilities raised by the

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evidence.

1. ENTITLEMENT - January 1984 to March 1993

Trustees are creatures of the trust instrument. The golden rule is that they should exercise the powers or discretion conferred upon them by the trust instrument which in this case comprises the Trust Deed and the Rules. It was stated in *Rawsthorne v Rowley* [1909] 1 Ch 409 that "a trustee must strictly conform to and carry out the terms of the trust so far as they are for the time being in force". See also Re *Brookes*; *Brookes v Taylor* [1914] 1 Ch 558.

There are, of course, occasions when Trustees, in a bid to do the best they can for beneficiaries act honestly and yet when examined in light of the trust instrument their actions turn out to have been *ultra vires* the powers contained in the provisions of the trust instrument.

The answer to the question whether or not a decision taken by Trustees is in conformity with the powers or discretion conferred on them by the trust instrument will not necessarily lie in what the Trustees or the beneficiaries want the court to believe. The answer will lie in the provisions of the trust instrument itself.

The correctness of the computation of Mr Finlayson's pension on retirement on 17 November 1980 is not in dispute. The computation was in compliance with the provisions of s 5 of the Rules as read with the Special Staff Circular of 1976. It is not in dispute that the correct sterling benefit for Mr Finlayson on 17 November 1980 was £9 438 *per annum.*

In terms of the Trust Deed and the Rules the entitlement of Mr Finlayson thereafter was to be determined by the Trustees under clause 30(b) of the

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Deed. For a benefit to be a measure of entitlement capable of being used by any beneficiary to make a claim against the Trustees it must meet certain pre-requisites. It should have been arrived at by the Trustees in terms of the provisions of clause 30(b) as read with clause 27(1) of the Deed. It should, for example, have been calculated with reference to the UK Retail Price Index; and be expressed in sterling *ab initio*. Section 30(a) of the Rules clearly envisages a situation where the benefit is already calculated in the UK in terms of clauses 30(b) as read with 27(1) of the Deed and is then converted to local currency for payment to the members resident in non-sterling countries.

In 1982-83 the Trustees approved increases to the pensions of members resident in Zimbabwe on the basis of percentage rates determined with reference to the Zimbabwean cost of living index. The increases awarded were expressed in Zimbabwe dollars. There is no doubt that the Trustees acted honestly being motivated by the desire to do what they considered was in the best interests of the beneficiaries resident in Zimbabwe. What the Trustees did was, in my view, not in accordance with the power conferred on them by the Trust Deed and the Rules, in that the benefit was not calculated with reference to the UK Retail Price Index and expressed in sterling. It was calculated in Zimbabwe dollars and paid out in that currency. The conversion at the fixed rate of 1,5 from Zimbabwe dollars to sterling was for the purposes of creating a sterling

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record to be used by those members who emigrated from Zimbabwe.

To the extent that the benefit paid to members resident in Zimbabwe was different from the pension expressed in sterling and paid to UK pensioners it is not the benefit envisaged in clause 30(b) as read with clause 27(1). It does not qualify to be used as a measure of entitlement to the Fund.

The power to determine the entitlement includes the right to reverse the decision if it is discovered that the decision was not in compliance with the provisions of the trust instrument. When the error of judgment on their part was brought to the attention of the Trustees through legal advice, they acknowledged its existence and rectified it by adopting the revised method. It is inappropriate for Mr Finlayson to base his claim against the Trustees on a criterion of entitlement different from the one the trust instrument requires the Trustees to use.

If Mr Finlayson was mindful of the need to calculate what he thought was due to him by way of "arrear benefits" from the Pensions Fund for the period 1984

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to 1988 he should have used the sterling benefits awarded to UK pensioners during the period in question. The revised method contained the legitimate criterion for the calculation of his claim. Mr Finlayson however remained rooted in the partisan system of calculating benefits for members resident in Zimbabwe. His calculation of the amount of $52 326,53 claimed by him from the Trustees is defective for the reason that it was not based on the measure of entitlement defined by the trust instrument. The amount was arrived at by taking the sterling records of the pensions paid to him in Zimbabwe dollars and determined with reference to the Zimbabwean cost of living index and converted at the fixed rate of 1,5. For the years when he received bank allowances Mr Finlayson took the bank allowances and converted them to sterling at the fixed rate of 1,5 and used the conversion as part of the sterling records to determine his entitlement. He then converted these shadow sterling records figures into Zimbabwe dollars at the telegraphic rates of exchange to get the total of what he considered to be due to him before subtracting from it what he received in Zimbabwe dollars during the same period.

There is no foundation in the trust instrument for this method of calculating his claim. The sterling records had not been intended to be used by Mr Finlayson. They represented conversions of money not received by the UK pensioners and were shadow sterling records for those members who decided to emigrate from Zimbabwe. The fixed rate of 1,5 had no bearing on the determination of the entitlement to the Fund as defined in terms of clause 30(b) as read with clause 27(b) of the Trust Deed after the pension on retirement had been computed.

Mr Finlayson claimed authority for what he did from Sir Leslie Fletcher's letter. There is, however, no mention of the retrospective use of prevailing rates of exchange in the applications of the revised method of calculating entitlement to pensioners who retired before 1 January 1984. Mention of the retrospective use of the prevailing rates of exchange was made in respect of the determination of entitlement for pensioners who retired after 1 January 1984 but before 31 August 1987.

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In respect of this group of pensioners it was provided that their pensions calculated in Zimbabwe dollars as on 14 December 1988 would be converted to sterling at the fixed rate of 1,5 and the sterling equivalent of the cash sum taken by the pensioner on retirement deducted. It was then stated:

> "This will then be compared to a Shadow Sterling pension, achieved by calculating your original dollar pension converted to sterling **at the**

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> **prevailing rate at retirement** and adding increases based on those applicable in the UK to date."

Even for pensioners who retired on or after 1 September 1987 it was expressly stated that the original dollar pension would be converted to sterling "**at the rate prevailing at the time of retirement**" with increases based on those applicable in the UK to date added.

Mr Baillee's evidence was that Sir Leslie Fletcher's *pro forma* letter was written with many pensioners affected by the different categories of the revised method in the Schedule in mind. He was a credible witness who answered questions candidly, conceding the validity of propositions put to him during cross-examination when it appeared fair to do so. It was Mr Baillee's evidence that, although Sir Leslie Fletcher's letter could have been more felicitously worded, Mr Finlayson should have read it together with the Schedule.

The express mention of prevailing rates of exchange being used to calculate the pensions in the revised method for pensioners who retired on or after 1 January 1984 supports the view that Mr Finlayson took as authority for his calculations that part of the letter that was not intended for him who retired before 1 January 1984.

The court has to give effect to the intention of the Trustees. Mr Baillee's evidence was that it was not the intention of the Trustees that the revised method be applied retrospectively by beneficiaries to calculate what they perceived was due to them. The intention of the Trustees was to have the revised method take effect on 1 January 1989. The relevance of the Zimbabwean method of calculating pensions was to help them determine the total benefit in payment to Mr Finlayson on 14 December 1988 so that there was no reduction of benefits suffered by him as a result of the adoption of the revised method.

Mr Baillee's evidence was supported by Mr Canningham, who impressed me with the depth of the knowledge of the actuarial affairs of the Pensions Fund. Mr Canningham had the ability to explain the apparently complex system of calculating pensions for the members of the Fund in simple terms that created in one's mind a clear picture of the system. His evidence in chief exposed the fallacious premises of Mr Finlayson's calculation of the amount of $52 326,53. He earned himself a lengthy cross-examination that further confirmed him as an honest and truthful witness.

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The probabilities support the evidence that the intention of the Trustees was not to have the revised method used retrospectively in the manner in which it was used by Mr Finlayson. The effective date was either current or prospective. It would be illogical to talk about the freezing of current total benefits. The increases awarded to Mr Finlayson in 1982-83 were relevant to the revised method in so far as they explained why the total benefit in payment to him on 14 December 1988 was higher than that applicable on the revised method.

In terms of the Schedule Mr Finlayson's total benefit in payment to him on 1 January 1989 was $27 255,00. Because the bank allowance of $5 424 ceased on 31 December 1988 his current benefit in sterling was £14 553 convertible only at the rate of 1,5. His entitlement in sterling on the revised method would be £14 235 convertible to Zimbabwe dollars at the prevailing rate of 3,47 giving a total benefit of $45 979 *per annum*. There would be no need to freeze Mr Finlayson's current total benefit because it was then $45 979. His sterling benefit entitlement as on 1 January 1989 would be £14 235 *per annum.*

Pitted against the witnesses for the defendant, Mr Finlayson did not impress me as being honest and truthful. He told the court in his evidence in chief that he was not informed that the bank allowances were *ex gratia* payments. The cross-examination drove him to acknowledge receipt of a letter in which he was told by Mrs Callahan, the Group Pensions Manager, that the bank allowances were *ex gratia* payments. In her letter dated 14 October 1987 advising Mr Finlayson of the payment of $13 327,25 bank allowance, she ended by saying:

> "It is our intention to keep this *ex gratia* allowance under review."

In her letter dated 7 January 1988 Mrs Callahan again advised Mr Finlayson that the money was paid by the Bank and not by the Trustees.

By its nature an *ex gratia* payment would not create a basis for a legal claim as it is paid out of a feeling of moral obligation. But not withstanding the knowledge that the bank allowances were *ex gratia* payments conferring no right to claim them from the Trustees or the Bank Mr Finlayson converted them into sterling at the fixed rate of 1,5 and claimed them as part of $52 326,52 and $29 097,79. By the same token the figure of $1 514,16 taken as the measure of his entitlement from November 1987 to March 1993 incorporated the bank allowance of $5 424 converted into sterling at the rate of 1.5. It is clear from the evidence adduced in court that Mr Finlayson

converted the inconvertible to sterling to found the measure of his entitlement.

Trustees must act with impartiality and endeavour to avoid decisions that have the direct effect of conferring upon some of the beneficiaries more benefits than are received by others on the same level of entitlement unless the disparity is sanctioned by the trust instrument. This principle of common law is succinctly summarised in para 827 of *Halsbury's Laws of England* Vol 48 in these terms:

> "Except where the instrument creating the trust expressly gives him a discretion as to adopting a course which will

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> benefit one beneficiary at the expense of the others, it is the duty of a trustee to hold an even hand between the parties interested under the trust, and to look at the interests of all and not to those of any particular beneficiary or class of beneficiaries. He must not be a partisan of one of several beneficiaries."

The Trustees have sought, through the revised method, to act in accordance with the principle of impartiality and put Mr Finlayson in the same position as his UK counterparts who retired on 17 November 1980. On the other hand, Mr Finlayson is asking the court to endorse the partisan approach that gave him benefits that were not being given to UK pensioners. In such circumstances, it is the duty of the court not to intervene in the proper exercise of the power vested in the Trustees when the exercise of the power is in good faith and consistent with the provisions of the trust instrument.

The court would have been duty bound to intervene on the side of Mr Finlayson had the Trustees persisted with the manner of determining his entitlement on the Zimbabwe cost of living index and expressing the entitlement in dollars rather than in sterling as required by the trust instrument. For, as was said by JESSEL MR in *Tempest v Lord Camoys* (1882) 21 ChD 571 -

> "in all cases where there is a trust or duty coupled with power the court will then compel the trustees to carry it out in a proper manner and within a reasonable time."

In this case the Trustees discovered their own error of decision and rectified it without the intervention from the court. In my view, it is not the duty of the court now to go behind the proper exercise of power by the Trustees to rectify their own error of decision and say to them they should have adopted a method of determining entitlement to the Fund that promotes the interests of

a few beneficiaries in breach of the rule that prohibits them from treating beneficiaries with partiality.

I come now to rates of exchange.

2. RATES

In order to do what they considered was just and fair to the members resident in Zimbabwe the Trustees took the sterling entitlement based on the increases awarded to UK pensioners in each of the years from 1984 to 1988 and converted it to Zimbabwe dollars at the new rates of exchange they determined in terms of s 30(b) of the Rules. Subtracting from the total amount the money Mr Finlayson had received in Zimbabwe dollars during the same period the Trustees came up with the lump sum of $32 126, which they paid to Mr Finlayson.

It was suggested to Mr Canningham during cross-examination that the Trustees had no power to pay the lump sum and that they should have used the prevailing rates of exchange. Mr Finlayson used the telegraphic rates of exchange to convert to Zimbabwe dollars the sterling figures he took to be definitive of his entitlement. The question of whether or not the prevailing rates of exchange should have been used by the Trustees or Mr Finlayson has to be answered

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with reference to the discretion conferred on the Trustees by the Trust Deed and the Rules. I have already shown somewhere else in the judgment that reference to the use of prevailing rates of exchange to convert the sterling benefits calculated on the basis of the revised method was not intended to apply to Mr Finlayson.

It is also important to note that the decision to pay the lump sum lay within the absolute discretion of the Trustees to convert the already determined sterling benefit in the revised method to Zimbabwe dollars at the rate higher than the fixed rate of 1.5 to avoid any possible prejudice Mr Finlayson would have suffered had the fixed rate of 1,5 been used. Clause 18 of the Deed declares that every power or discretion to be exercised by the Trustees should be an absolute and uncontrolled power or discretion.

When a trust instrument confers on the Trustees an absolute and uncontrolled discretion the beneficiaries or the court cannot question the exercise in good faith of the discretion unless it is shown that the Trustees did not consider the material facts which an ordinary prudent man would have considered in the exercise of the discretion. The discretion is that of the Trustees and not of the beneficiary or the court.

1995 (1) ZLR p319

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In 1851 LORD TRURO LC stated the principle in Re *Beloved Wilke's Charity* (1851) 3 Mac & G 440 in these words:

> "Without occupying time going into a lengthened examination of the decisions the result of them appears to me so clear and reasonable that it will be sufficient to state my conclusion in point of law to be, that in such cases as I have mentioned it is to the discretion of the trustees that the execution of the trust is confided, that discretion being exercised with an entire absence of indirect motive with honesty of intention, and with a fair consideration of the subject. The duty of supervision on the part of this court will thus be confined to the question of the honesty, integrity and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases."

In *Dundee General Hospitals Bd of Mgmt v Walker & Anor* [1952] 1 All ER 896 at 904, LORD REID indicated the attitude of the court to the provisions of a trust instrument that conferred on the trustees "sole and absolute" discretion to decide whether the conditions the testator set down for the payment of a legacy of £10 000 to Dundee Royal Infirmary existed or not. His Lordship said:

> "In my opinion the only reasonable interpretation of the words used by the testator is that he intended his trustees to be the sole judges of all the matters which they had to consider in carrying out the duty which he put on them. That is the natural meaning of the clause, and even if it is capable of being otherwise construed. I can see nothing either in the context or in any other relevant circumstances to make one think that he had any other intention. If it were for the court to determine the meaning of control in this context then very little would be left for the trustees to determine and the words in their sole and absolute discretion would not be at all appropriate.
>
> I am satisfied that these words show that the testator did not intend that there should be anything in the nature of an appeal from the decision of his trustees. But by making his trustees the sole judges of a question a testator does not entirely exclude recourse to the court by persons aggrieved by the trustees' decision. If it can be shown that the trustees considered the wrong question or that although they purported to consider the right question they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act honestly or

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> in good faith, then there was no true decision and the court will intervene but nothing of that kind is alleged in this case."

See also *Halsbury's Laws of England* Vol 48 para 837 and the cases cited thereunder.

Section 30(b) of the Rules as read with Clause 18 of the Deed confers on the Trustees an "absolute and uncontrolled" discretion to determine the rates at which the sterling benefits are converted to local currencies for members resident in countries outside the sterling areas. The trustees are not bound to adopt the prevailing rates of exchange. They may do so in the exercise of their discretion.

The onus was on Mr Finlayson to show that in exercising their discretion the Trustees were not motivated by considerations of honesty and fairness or that they shut their minds to some relevant facts. Apart from saying the Trustees ought to have used the prevailing rates of exchange as he did, Mr Finlayson did not suggest any *mala fides* on the part of the Trustees in determining the exchange rates in the manner they did.

The Trustees were the sole judges of the question of what rates of exchange they were to use to convert the sterling benefits on the revised method to Zimbabwe dollars for the period 1984 to 1988. The legal advice given to them in the matter recognised their discretion, in that it was to the effect that, in the exercise of their discretion, they should not depart materially from the prevailing rate. That is not the same as saying the Trustees were bound to use the prevailing rate of exchange.

A comparison of the rates used by the Trustees with the prevailing rates used by Mr Finlayson over a period of six months of each year from 1984 to 1988 shows that the rates determined by the Trustees were not materially different from the prevailing rates of exchange.

The comparison shows that there were occasions when the Trustees used rates that were higher than the prevailing rates of exchange. If Mr Finlayson had any cause to calculate what he thought was due to him by the Trustees he should have used the rates determined by the Trustees in terms of s 30(b) of the Rules. Mr Finlayson's calculation of the amount of $52 326,53 he claims from the Trustees is based on wrong sterling benefits taken as the basis of entitlement. These figures were converted to Zimbabwe dollars at the incorrect rates of exchange. His calculation of the amount of $29 097,79 is

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based on the figure of £1 514,16 converted to Zimbabwe dollars at the prevailing rates of exchange from January 1989 to March 1993. Not only has it been proved that the figure of £1 514,16 was incorrectly calculated from bank allowances, but it has also been shown that Mr Finlayson's opening sterling figure on 1 January 1989 should have been £14 235 *per annum*.

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The claim must therefore fail in its entirety.

It is ordered that the claim be and is hereby dismissed with costs.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Coghlan, Welsh & Guest, defendant's legal practitioners

SANTO v GENERAL ACCIDENT INSURANCE CO (ZIMBABWE) LTD 1995 (1) ZLR 322 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

13 February & 3 May 1995 Judgment No S-66-95

Flynote

Interpretation of statutes - words - "may" - when to be construed as peremptory

Employment - employee - injuries sustained in course of employment - action to recover damages or compensation - whether employee required to notify General Manager of National Social Security Authority of intended action

Headnote

The appellant was, while driving during the course of his employment, injured in an accident between his own vehicle and one driven by a driver insured by the respondent. The injuries resulted in his disablement for employment. He did not, before instituting action against the respondent, notify the General Manager of the National Social Security Authority (NSSA) of his intention to bring the action, nor did he lodge a claim for compensation in terms of the NSSA (Accident Prevention and Workers' Compensation) Scheme (published in SI 68 of 1990).

The respondent filed a special plea, contending that the appellant's failure to give the notice required by s 10(2) of the Scheme barred him from commencing proceedings against the respondent. The section imposed the requirement on a "worker". In terms of s 4(5) of the Scheme, a person "may ... be regarded as a worker, notwithstanding that his monthly earnings exceed $2 500". As the appellant's earnings did exceed this sum, it was contended that he was not a worker and so did not have to comply with s 10(2) of the Scheme. The trial judge upheld the special plea.

Held, that the word "may" is ambiguous. It could be permissive or mandatory

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in its application, depending on the context. In the present situation, looking at the framework of the legislation, there was a systematic plan to stipulate a precise period when a person's earnings would bring him within the definition of worker. At no time had any discretion been conferred on any person to determine who is a worker. The legislation had always done so by stipulating the time from which a person earning a particular salary may and shall fall within the definition of worker. There was also no indication in the legislation, if the word "may" were to be regarded as discretionary, as to who should exercise the right to determine whether a person should be regarded as a worker, nor were any criteria set out. Accordingly, in this context, "may" had to be construed as "shall" and the special plea was correctly upheld.

Cases cited:

Pinner v Everett [1969] 3 All ER 257 (HL)

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

Custodians of Enemy Property v Brakpan Mines 1922 TPD 179

A Krahner for the appellant

E W W Morris for the respondent

Judgment

Korsah JA: The appellant is a motor mechanic. On or about 14 November 1990, a collision occurred between an Isuzu Pick-up registration number 194-019S belonging to and driven by the appellant and a Landrover registration number 504-003K driven by one Hillary Jackson.

On 9 November 1992, the appellant commenced proceedings in the High Court claiming from the respondent, as the insurers of Hillary Jackson's car, damages in excess of $211 000 sustained by him as a result of the accident.

It was common cause that the collision arose out of and in the course of the appellant's employment. It was not disputed that the injuries sustained by the appellant in the said collision resulted in his disablement for employment or permanent injury or disfigurement. It was conceded by the appellant that, before instituting action against the respondent, he did not:

(a) notify the General Manager of the National Social Security Authority of his intention to bring this action; and

(b) lodge a claim for compensation in terms of the scheme.

The respondent filed a special plea to the appellant's declaration in which it alleged that at all material times the appellant was a worker as defined in s 4

of the National Social Security Authority (Accident Prevention and Workers' Compensation) Scheme Notice 1990, ("the Scheme") published in SI 68 of 1990, which came into effect on 20

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April 1990.

It was contended that the failure by the appellant to give the requisite notice specified in s 10(2) of the Scheme barred the appellant from commencing proceedings against the respondent until the appellant had complied with the mandatory provisions of that section.

Section 10(1) reads:

> "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 party), to pay damages to the worker in respect thereof -
>
> (a) the worker may both claim compensation under this Scheme and take proceedings against the third party in a court of law to recover damages."

This section does no more than confer upon a worker a right to claim compensation under the Scheme, as well as a right to sue the third party for damages in a court of law. However, s 10(2) stipulates that:

> "A worker **shall**, before instituting proceedings under subsection (1), in writing notify the general manager or the employer individually liable, as the case may be, of his intention to do so and shall likewise notify the general manager or the employer if he decides to abandon such proceedings or to relinquish or settle his claim for damages, and shall in connection with any such notification furnish such particulars as the general manager may require. **No proceedings in a court of law to recover damages against any person referred to in subsection (1) may be taken by a worker until he has so notified the general manager of his intention to take such proceedings and unless he has lodged a claim for compensation"** (emphasis added).

It is clear from the above provisions that without notice to the general manager of the Scheme of an intention by a worker to commence proceedings in a court of law against a third party for damages, any such action so commenced is still-born.

The crisp issue, as submitted by Mr Morris, is whether the appellant is a

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worker as defined by s 4 of the Scheme. It seems it was common cause that the appellant's salary was in excess of $2 500 per month. Section 4(5) provides that:

> "From the date of commencement of this Scheme a person may, subject to this section, be regarded as a worker notwithstanding that his monthly earnings exceed $2 500."

It was contended on behalf of the appellant that in terms of s 4(4) the appellant, being in receipt of monthly emoluments in excess of $2 500 at the relevant time, ie before the commencement of the Scheme, should not be regarded for the purpose of the scheme as having been a worker during any of the stipulated periods; therefore he is not obliged to comply with s 10(2) of the Scheme.

This argument is founded on the proposition that s 4(f) provides that:

> "a person shall not be regarded for the purpose of this Scheme as having been a worker on or before the fifth appointed date but before the date of commencement of this Scheme whose earnings exceeded $2 500 per

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month."

The issue central to this debate is whether or not the use of the word "may" in s 4(5) is to be interpreted as peremptory or directory. If the word "may" in s 4(5) is interpreted as peremptory or mandatory then it would, in the instant case, override the provision of s 4(4)(f). Whereas if it is interpreted as permissive or directory the section does not necessarily override the provisions of s 4(4)(f), but affords an opportunity not to regard a person whose monthly income is in excess of $2 500 as a worker, and as such not amenable to the strictures of s 10(2).

"In determining the meaning of any word or phrase in a statute", said LORD REID in *Pinner v Everett* [1969] 3 All ER 257 (HL) at 258,

> "the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase."

It is only where, as in the instant case, some ambiguity, patent or latent lurks within the words or phrases used that one may ascertain the true intention of

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the law-giver in order to render intelligent what is otherwise obscure. In doing so, apparent inconsistencies in a statute must be reconciled to achieve the intention of the law-giver.

On the determination of whether a statutory requirement may be categorised as "peremptory" or "directory", TROLLIP JA cautioned in *Nkisimane & Ors v Santam Ins Co Ltd* 1978 (2) SA 430 (A) at 433H-434A, that -

> "Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the law-giver as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular."

Mr *Morris* submitted with validity that s 4(3) of the Scheme deals with exclusions from the definition of worker and nowhere in s 4(3) is there an indication of any sort of exclusion based upon earnings.

As the learned trial judge rightly pointed out:

> "Section 4(4) provides that a person shall not be regarded for the purposes of the Scheme as having been a worker during certain periods and then sets down six subparas (a), (b), (c), (d), (e) and (f), specifying such periods. These in fact provide an historical run through the operation of the Workmen's Compensation Regulations laying down the maximum salaries which are applicable at various times during the historical operation of the Workmen's Compensation Act prior to the promulgation of the National Social Security Authority Act and Regulations."

Section 4(4) deals with the periodic disqualifications in the definition of a worker linked to the fall in the value of money or, to put it another way, the periodic increases in monthly salaries due to devaluation of money. The amount of the earnings which disqualifies a person from being a worker increased period by period until the fifth appointed day, where the cut-off point was $2

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500.

Of particular interest is the fact that s4 (4) recites that -

> "A person shall not be regarded for the purposes of this Scheme as having been a worker during any period - "

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and all the sub-paragraphs from (a) to (e) commence with the phrase: "on and after" a specified date, when his earnings exceeded a stipulated amount, excepting (f) which is expressed in the following terms:

> "on or before the fifth appointed date but before the date of commencement of this Scheme whose earnings exceeded $2 500."

It is abundantly clear that para (f) is prescribing a period antecedent to the promulgation of the Scheme when a person, whose monthly earnings was in excess of $2 500, was not to be regarded as a worker and thus not subject to the Scheme.

Subsection 4(5), which immediately follows sub-para (f), provides that -

> "From the date of commencement of this Scheme a person may, subject to this section, be regarded as a worker notwithstanding that his monthly earnings exceed $2 500."

The following observations by WESSELS JP in *Custodians of Enemy Property v Brakpan Mines* 1922 TPD 179 at 188 are particularly helpful in the resolution of the meaning to be attributed to the word "may" in this context:

> "There is no doubt that the Legislature has in the past used, and will no doubt in the future use, the word 'may' for the purpose of conferring an enabling power on an official ... Sometimes the Legislature uses the formula 'may and shall'. At times it uses the term 'may' as an abbreviated form of 'may and shall', and then the officer enabled to do an act is in fact obliged to do the act if the required conditions are fulfilled. At other times the Legislature uses the formula 'may and it shall be useful' or simply 'may' with the intention that a power and discretion to exercise it should be conferred upon the official. It is only by considering the general provisions of the law in question and the purview of the whole legislation on the subject ... that we can tell whether 'may' confers a discretionary power or an obligatory duty. No definite rule can be laid down as to when 'may' confers a discretion and when a duty."

Looking at the framework of the sections of the legislation under consideration, one notices in general that there is a systematic plan to stipulate a precise period when the earnings of a person would bring him within the definition of worker. At no time has any discretion been conferred on any person to determine who is a worker. The statute has always done so by stipulating the

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time from when a person earning a particular salary may and shall fall within the meaning of worker. There simply is no choice in the matter. One is either a worker, or one is not.

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Secondly, as Mr *Morris* rightly points out, if a choice were to be inferred, the statute surely would have given some indication as to the person who was to exercise that right. Is it the general manager, the employee or the court? And upon what criterion may such a person depend to determine whether a person earning in excess of $2 500 a month is a worker or not? For there to be a choice as to whether a person whose monthly salary exceeds $2 500 is, or is not, a worker, would create uncertainty and lead inexorably to absurdity.

It is evident that "may" in subs 4(5) does not lend itself to being interpreted in any other way except as "shall".

The appeal is accordingly dismissed with costs.

Ebrahim JA: I agree

Muchechetere JA: I agree

Winterton, Holmes & Hill, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

S v ZHOU 1995 (1) ZLR 329 (HC)

Court **High Court, Bulawayo**

Chatikobo J

Criminal review

12 May 1995 Judgment No HB-66-95

Flynote

Criminal procedure (sentence) - common law offences - rape - not an offence for which community service should be imposed

Criminal procedure (sentence) - general principles - community service - offences for which community service appropriate

Criminal procedure (sentence) - youthful offender - accused a juvenile when offence committed but adult at time of passing of sentence - court not restricted to punishments which may be imposed on juveniles

Headnote

The success of the community service programme depends on its acceptance by the public. For this reason, guidelines have been issued about the offences for which and the circumstances under which an offender might benefit from community service. It should be restricted to petty offences. Rape is not such an offence, involving, as it does, the physical abuse of a non-consenting victim. It also brutalises her, traumatises her psychologically and physically and degrades female members of society morally. It erodes the dignity due to women. Where the

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victim is of tender age, the element of child abuse deepens the gravity of the offence. Normally such an offence attracts a sentence of ten years of more, though juvenile offenders might get whipped or committed to training institutes.

Where the accused was a juvenile at the time of the offence but has attained majority status by the time he is convicted, he should be sentenced as an adult. The court, though entitled to take into account the frailty and deficiencies of youth at the time of the offence, is not restricted by his former youth in settling on a punishment. If the circumstances so dictate,

CHATIKOBO J

the fact that he was a juvenile at the time of the offence should be no bar to incarceration.

Cases cited:

S v Chitiki 1986 (1) ZLR 60 (H)

S v Pledger 1975 (2) SA 244 (E)

S v Zaranyika & Ors 1995 (1) ZLR 270 (H)

Judgment

Chatikobo J: The accused was tried and convicted by a regional magistrate on a charge of rape. The conviction is in order and I confirm it.

Consequent upon his conviction the accused was sentenced to 20 months' imprisonment with labour, which was wholly suspended on two separate and distinct conditions. A period of 14 months was suspended on condition of future good behaviour. The remaining six months was suspended on condition the accused performs 180 hours of community service at the local clinic.

He ravished a four-year-old girl who had been left under his care by her mother. Although no serious injuries resulted, this was probably because the accused was disturbed in the course of the rape and not because of any precaution taken by him.

Several review judgments have been written in which magistrates have been entreated to consider carefully the nature of the offence and the circumstances surrounding its commission before ordering an offender to perform community service. Among these judgments are the following: *S v Mumvuri* HH-106-94; *S v Nyamukapa* HH-108-94; *S v Chikomo* HH-107-94; and *S v Chitima* HH-157-94.

The common thread which runs through these judgments and many others is that it is imperative for courts to instil confidence in the public about the community service sentencing concept because its success depends entirely on its acceptance by the public. In addition, the National Committee on Community Service has issued guidelines which spell out in broad outline the offences and circumstances under which an offender can benefit from orders of community service. Rape is not one such offence. Not only does the offence of rape involve the

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physical abuse of a non-consenting victim, it brutalises such victim, traumatises her psychologically and physically as well as degrading female members of society morally. It erodes the dignity which the human race accords to women. Where, as here, the victim is of tender age, the element of child abuse deepens the gravity of the offence.

CHATIKOBO J

Under normal circumstances, those who perpetrate such offence receive sentences of imprisonment of ten years or more. Juvenile offenders in appropriate circumstances are ordered to be whipped as a *quid pro quo* for the violence perpetrated on their victims or get committed to training institutes. Community service is restricted to petty offenders.

The regional magistrate, in ordering the accused to perform community service, was influenced by two things. The first was the recommendation of the probation officer which he found to reveal very highly mitigating factors. I have read through the probation officer's report and I confess to some difficulty in fathoming any mitigatory factors which are out of the norm. The only factor deserving serious consideration is that the accused spent a lot of time in remand prison. The period spent in remand prison is not given but if one assumes that he was in custody from the time of his arrest to the time of sentence then he was in custody for a period of 17 months. While this is a long period for anyone to spend in custody awaiting trial, it does not by itself, earn an offender who commits rape, a hundred per cent discount especially where, as here, a 10-year jail term would have been appropriate.

The second factor which influenced the magistrate to impose community service was the age of the accused. The probation officer's report indicates that the accused was born on 2 October 1976. Assuming this to be the accused's correct date of birth, he was 16 years and 10 months at the time of the commission of the offence. The accused himself said he was 17. At the time of sentence on 10 February 1995, he would have been 18 years one month and 10 days old.

In the record there is an affidavit sworn to by a Government dentist in which he says that he examined the accused on 1 March 1995, some three weeks after sentence, and found as follows:

"(a) Permanent Dentition

(b) Crown formation of 3rd molar

(c) Root formation of 3rd molar incomplete

(d) 3rd molar not fully erupted on left

(e) I am of the opinion that Zivaishe Tiritose Zhou is aged between 16 and 18 years."

There is no explanation as to why the examination was done after sentence or what use, if any, was made of this affidavit. Rather than clarify matters, it casts further confusion on the accused's age. From this regrettable labyrinth

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of facts, one can safely infer that at the time of commission of the offence the accused was a juvenile but at the time of his conviction he was above the age of 18. I pause to say that the date of conviction is not endorsed on the charge sheet as it should be, but the typed judgment is dated 10 February 1995, which is also reflected as the date of sentence.

It is apparent from the exchange which took place between the accused, the court and the prosecutor that, after conviction, the matter was remanded to 24 February 1995. The review cover was signed by the magistrate on 24 February 1995. Whatever the position may be, the question which poses itself is this. If the accused was a juvenile at the time of commission of the offence but was an adult at the time of conviction should he have been sentenced as a juvenile?

Section 329(1) (formerly s 330(1)) of the Criminal Procedure and Evidence Act [*Chapter 59*] (the Act) provides that -

> "Where a male person under the age of eighteen years is convicted of any offence, the court which imposes sentence upon him may -
>
> (a) in lieu of any other punishment; or
>
> (b) ...
>
> sentence him to receive moderate corporal punishment, not exceeding six strokes."

The precursor to s 329(1), namely s 330(1) of the Act, was dealt with in *S v Chitiki* 1986 (1) ZLR 60 (H) where GIBSON J, with the concurrence of REYNOLDS J, held that the effect of the provision is to make the operative date the date of conviction and not the date of commission of the offence. In other words, if the accused who commits an offence while he is a juvenile is convicted after the attainment of majority status he should be sentenced as an adult. I perceive this to mean that while the sentencing court is entitled to take into account the "frailty and deficiencies of youth at the time of commission of the offence" (*S v Pledger* 1975 (2) SA 244 (E) at 246H), it is not hidebound by the accused's bygone youth in settling upon an appropriate punishment. One of the reasons for distinguishing between juveniles and adults in sentencing is to ensure that young and immature offenders are not exposed to the harsh conditions which are attendant upon the fact of imprisonment. Where the offender has attained majority and is able to withstand the rigours of incarceration, the fact that he was a juvenile at the time of commission of the offence should be no bar to his incarceration if the circumstances so

dictate. In any event, s 329(1) of the Act does not prohibit the incarceration of juveniles. It merely gives the court a choice. It is a choice which, like any other form of discretion, should be exercised judicially.

In my view, it would not be an improper exercise of discretion for a court to send to jail an adult who committed a brutal rape on an infant of four years while he was a juvenile. This is one of

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those cases where the accused should have been sentenced in the normal way. The proper approach to sentence is dealt with by Bartlett J in a thorough review judgment in the case of *S v Zaranyika & Ors* 1995 (1) ZLR 270 (H). I would commend it to all magistrates. It is rewarding to read it and commit to memory the exhortations contained therein.

In the circumstances of this case, I find myself unable to correct the serious injustice which has occurred. I am somewhat askance that the Attorney-General has not appealed against the sentence imposed. All I can do now is to withhold my certificate as the proceedings are not in accordance with real and substantial justice.

S v SITHOLE 1995 (1) ZLR 334 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Criminal appeal

15 May 1995 Judgment No S-82-95

Flynote

Criminal procedure - charge - multiple counts - wrongful joining of murder charge with another charge for which sentence other than death may be imposed - effect of such wrongful joinder - Criminal Procedure and Evidence Act [Chapter 59] - s 131

Headnote

Section 131 of the Criminal Procedure and Evidence Act [*Chapter 59*] provides that a person may not be charged jointly with murder and a charge for which a sentence other than the death penalty may be imposed. The death penalty is not imposable for rape, attempted murder, robbery or attempted robber and thus none of these charges may be joined with a murder charge. The long established practice of joining such charges with a murder charge must be abandoned.

In the present case, the events and facts that gave rise to the charge of attempted murder, alternatively attempted robbery, and the charge of contravening s 5(2)(b)(i) of the Firearms Act [*Chapter 308*] were all part of the *res gestae* in the murder charge and evidence of those events and facts would have been admissible and relevant and necessary even had the murder charge stood alone. Therefore the wrongful conjoinder of these charges had not prejudiced the appellant in his appeal against the murder conviction and the sentence of death and there had been no substantial miscarriage of justice in relation to the matter under appeal, as envisaged in s 11(2) of the Supreme Court of Zimbabwe Act 28 of 1981.

Case cited:

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

FULL COURT

L M Kabote for the appellant

Mrs J Zindi for the respondent

Judgment

MaNally JA, Ebrahim JA & Muchechetere JA: The appellant was charged with three counts in the High Court, Harare. The first count was attempted murder, alternatively attempted robbery. The second was murder; and the third was contravening s 5(2)(b)(i) of the Firearms Act [*Chapter 308*]. He pleaded not guilty to all the counts but was found guilty of all three counts. He was, however, acquitted of the alternative count of attempted robbery.

On the first count he was sentenced to thirteen years' imprisonment with labour and on the third count he was sentenced to five years' imprisonment with labour. The sentences on the first and third counts were ordered to run concurrently. In connection with the second count, the appellant was sentenced to death after the court found no extenuating circumstances.

The appeal is only against the conviction and sentence on the second count, that is, the murder charge.

A very important procedural point must be made at this stage. Section 131 of the Criminal Procedure and Evidence Act [*Chapter 59*] ("the Act") contains a proviso which is frequently overlooked by the judiciary, the Attorney-General's Office, and defence counsel. It reads:

> "Provided that to a count in an indictment charging murder, no count charging any offence other than an offence for which sentence of death may be imposed shall be joined."

This provision has attained added significance since the coming into effect, on 8 May 1992, of the new ss 314 and 314A of the Act, by virtue of the provisions of Act 2 of 1992. Since that date, the only crimes for which the death sentence may be imposed are murder and treason. Attempted murder and rape no longer attract the death penalty. This means that a count of attempted murder or rape may not be conjoined with a murder charge. The long-established practice of doing so must be abandoned.

The present offence was committed on 6 November 1992. The applicable law would therefore require that the first and third charges should not have been conjoined with the murder charge which was count two.

What is the effect of this point which was not raised either at the trial or at the

FULL COURT

appeal? This question must be considered in two contexts: First, the validity of the convictions

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and sentences on those two counts. Second, the effect of the wrongful joinder on the conviction and sentence in the murder count.

The validity of the convictions and sentences on the first and third counts is not properly before this court. They may be dealt with by way of an application for leave to appeal out of time if counsel are so instructed.

As far as the murder count is concerned, it is of the utmost importance to note that the events and facts which gave rise to the first and third charges were all part of the *res gestae* in the second count. Evidence of those events and facts would have been admissible and relevant and necessary even had the second count stood alone. See, in this connection, *S v Nangani* 1982 (1) ZLR 150 (S) at 163B-C. It should be noted that in *Nangani* all the offences charged were (at that time) potential death penalty offences. Even in such cases, the CHIEF JUSTICE said, it was undesirable to conjoin counts unless they all arose out of one course of conduct.

Accordingly, and after anxious consideration, we conclude that wrongful conjoinder has not prejudiced the appellant in his appeal against the murder charge and the sentence of death. There has been no substantial miscarriage of justice in relation to the matter under appeal, as envisaged in s 11(2) of the Supreme Court of Zimbabwe Act 28 of 1981.

We will therefore proceed to consider the appeal on count two on its merits.

Briefly, the facts in the matter are that on the night of 6 November 1992 an armed gunman went to the hut of one Villa Chiumira ("Chiumira") at Betura village, Chief Musikavanhu, in the Chipinge district. As he was entering the hut Chiumira and her three children retreated from the main room to the bedroom. The gunman, however, entered the hut and demanded that Chiumira assist him to carry some property he had into the mountains. When he found that he could not force his way into the bedroom because Chiumira was pushing against the door he told her that he would shoot her.

The gunman thereafter went outside and fired a shot into the bedroom through the bedroom window. The bullet missed Chiumira by a few inches.

The gunman thereafter left and went to a nearby hut where three young girls were. They had heard the gunman approach Chiumira's hut and had also heard the shot. When he came to their hut they also pushed against the door

to try and keep him out. The gunman fired two shots through the door. The first shot missed the girls but the second hit one of them, Zodwa, in the chest. She died the following day from the injury caused by the bullet.

After the gunshots the gunman let the three girls leave the hut. He thereafter entered the hut and stole some property, amongst which were some clothes, a sewing machine and a portable radio. None of the survivors of the attack could, however, identify the gunman

The following night, 7 November 1992, the appellant was arrested by two security guards at

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farm 34, Middle Sabi. During the arrest a rifle was recovered from him. The appellant was later handed over to the police. He later led the police to a place outside Tongogara Refugee Camp where the property that had been stolen from Betura village was recovered.

In a subsequent warned and cautioned statement, the appellant confirmed that he was the gunman who had committed the above-mentioned acts at Betura village on the night of 6 November 1992. Although in court he denied certain contents of the statement, the court properly rejected his later explanation. The court believed the evidence of the guards and the police on the the matter. That the appellant was the gunman in question was also corroborated by the fact that the property stolen at Betura village was recovered through his own indications and also by the fact that a forensic specialist established that the rifle recovered from the appellant had been that used at Betura village.

On the murder, the court *a quo* found that the appellant's intention to kill was constructive.

We are of the view that the court's finding cannot be faulted. Mr *Kabote*, who appeared for the appellant, properly conceded that, but in his heads of argument submitted that the court ought not to have found that the appellant was the sole intruder who actually fired the firearm on the night in question.

The remote possibility that the appellant might not have been alone would not, in our view, alter the verdict in the circumstances. In this connection, we associate ourselves with the following words of the learned judge in the court *a quo*:

> " ... However, even if the accused is given the benefit of the slightest possible doubt whether he was alone and it is accepted that Phineas and

> Aaron were with him, the court cannot accept that he went along with Phineas not knowing that Phineas had a gun and not knowing that they were going to rob someone. If he went with two others, as he alleged, he must have known that Phineas had a gun and they must have planned to rob the inhabitants of the village as he said in his warned and cautioned statements.
>
> Therefore, if the accused himself fired the gun, he is responsible or if, as he alleges, Phineas fired the gun, then the accused is also responsible for the consequences of Phineas's actions. It seems to the court that there were (was) no actual intent to kill Zodwa. If Villa had been killed then the intent would have been actual because the accused before he went outside the window said that he was going to kill her. In both cases, the accused, or if his colleague Phineas used the gun then Phineas, was completely reckless as to whether anyone was killed when the shot was fired ...
>
> With regard to Zodwa, again the gunman was not sure exactly where the three girls were in the hut when he fired the two shots. He merely fired through the door. However, he knew that the girls inside the hut were pushing against the door trying to stop him entering. He deliberately fired at the door and must have known that the bullets would go right through."

On sentence, we also agree that the court *a quo*'s finding that there were no extenuating circumstances in this matter was proper. The firing through the door of the hut where the girls were was completely reckless as to whether or not death of any of the occupants was caused. The gunman, who must have been standing within one or two feet of the hut's door, knew that

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at least two or three people inside the hut were pushing against the door to keep him from entering. He chose to fire point-blank into the door at about waist or chest height instead of firing into the air or on the ground or at the roof to frighten the occupants. He fired two shots. Thereafter the appellant proceeded to steal property from the hut in spite of the fact that an occupant had been shot.

In the result, the appeal is dismissed in its entirety.

Ahmed & Ziyambi, appellant's legal practitioners

ENDEAVOUR FOUNDATION & ANOR v COMMISSIONER OF TAXES 1995 (1) ZLR 339 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

30 March & 29 May 1995 Judgment No S-73-95

Flynote

Revenue and public finance - income tax - exemptions - trust of a public character - what is - trust financed by donations from companies and devoting bulk of monies to payment of educational costs for children of employees nominated by donor companies - not a trust of a public character - Income Tax Act [Chapter 181] - Third Schedule para 2(1)

Revenue and public finance - income tax - gross income - allowances - payment for education of employee's children - part of employee's gross income - Income Tax Act - s 8(1)(f) and Third Schedule, para 4(1)

Revenue and public finance - income tax - recovery of tax - Commissioner of Taxes - tax due from employees - employer failing to withhold tax and pay amount of tax - whether Commissioner can appoint agent under s 47 of Act to collect amount from employer

Headnote

The appellant Foundation, represented by its trustees, and UDC Ltd brought an application in the High Court, seeking declaratory orders to the effect that -

(1) the Foundation was a trust of a public nature and therefore exempt from income tax; and

(2) the payment by the Foundation of the educational costs of an employee of UDC was not taxable in the hands of the employee; alternatively, the Commissioner of Taxes was not entitled to collect

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from UDC the amount of any income tax due by an employee, by the appointment of an agent to pay such tax on behalf of UDC.

The application was dismissed by MUBAKO J

The Foundation was established by trust deed in 1982, UDC being the proposed founder benefactor. The preamble to the trust deed recognised a need for the creation of a foundation to assist and benefit the public of Zimbabwe with educational, health, housing and other needs. The deed itself required the trustees to apply and utilise the capital and income thereof, at their discretion, in making donations to organisations, institutions or the public in Zimbabwe generally for the purposes set out in the preamble. They were also empowered to provide bursaries or scholarships for educational purposes to individuals. They were given various other administrative powers, including the investment of monies. The approval of benefactors was required for certain transactions, but only benefactors who gave more than $10 000 had a vote.

Benefactor companies were required to make an initial donation of $10 000 to $15 000, to be used as the trustees saw fit, with a further payment to be made, calculated by the benefactor as being that which it would have the Trustees disperse to an educational institution in respect of the educational costs of a child of its employee. A further 15% of this further payment had to be donated for use by the trustees for general purposes. The practice was that a benefactor company would choose certain employees to apply to the Foundation for payment to meet the educational costs of their children. Invariably these applications succeeded. In all, just over 88% of the monies received from benefactors was expended on the educational costs of children of the benefactors' employees. Some 11% of the Foundation's total receipts were used for more general purposes.

For its receipts and accruals to be exempt from income tax, the Foundation had to be a "trust of a public character".

UDC argued that the payment by the Foundation of the educational costs of children of employees did not constitute part of the employees' gross income. The question that had to be decided was whether such payments constituted an "allowance" received by the employees. Even if they did, UDC argued that the the amount accrued by way of a scholarship in the hands of the student, rather than in the hands of the parent/employee.

If the educational costs of the children of UDC's nominated employees were taxable in their hands, UDC would have been obliged to withhold the requisite amount of tax, which it failed to do. UDC thus would become liable to pay that tax plus a further 15%. The Commissioner threatened to make use of s 47 of the Income Tax Act [*Chapter 181*] to recover the

money, by declaring UDC's bank to be UDC's agent and requiring the bank to pay the sums claimed. UDC argued that under s 47 an agent could only be required to pay "any tax due", whereas the liability of UDC, as employer, was not to pay "tax due", but an amount equivalent thereto, plus 15%.

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Held, that for the trust to be of a public character, it had to be for the benefit of either the public generally or of a class or section of the community, but not for private individuals or a fluctuating body of private individuals. The question of whether the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot of itself be decisive of whether a trust is a charity. Much must depend on the purpose of the trust. It may well be appropriate to have regard to the manner in which a trust has been operated, as a persuasive factor in the determination of whether the dominant intention was to establish it as a trust of a public character, in spite of the express wording of the trust deed. If the terms of the trust deed were in any particular tax year abused by the disbursement of money to private benefaction, the Commissioner, would not be bound, in that year, to give effect to the trust as one of public character.

Held, further, that the trust deed revealed a clear intention to establish the Foundation as a trust of public character. Private benevolence was expressly excluded on a proper construction of the deed. But the trust deed should not be looked at independently of the background that motivated and gave rise to the establishment of the Foundation. It was envisaged at the outset that to a very large extent those who would benefit would be children of nominated employees of acceptable benefactors, a body of persons which could not be fairly described as a sufficiently substantial section or appreciably important class of the public. The extent to which the income of the Foundation would be devoted to the educational costs of the children of the benefactors' employees acted as an inducement for those companies to loosen their purse strings. The awards of bursaries were perquisites for the employees. The trust was, in practice, one for the private benefaction of the contributing companies and their employees.

Held, further, that giving the word "allowance" its ordinary meaning of a definite portion, sum or amount allotted or granted to meet any expenses or requirements, it was clear that the bursary or scholarship was an allowance granted to the employee or his child.

Held, further, that the exemption in respect of students was in respect of amounts accruing to the student, not in respect of amounts which accrue to the gross income of a parent.

Held, further, that the legislature intended that the payment from an employer should not fall within the provisions for the recovery of a tax. While there was an amount due from the employer, the legislation was, at best for the Commissioner, ambiguous about whether what the employer had to pay was a tax. Consequently, the Commissioner was not entitled to appoint an agent under s 47 to recover the sums from UDC.

Cases cited:

The Endeavour Foundation & UDC Ltd v CoT (1995) 57 SATC 43 (ZH)

Thorne & Anor NOv Receiver of Revenue 1976 (2) SA 50 (C)

Verge v Somerville[1924] AC 496 (HL)

ITC 69 (1927) 2 SATC 264

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ITC 59 (1926) 2 SATC 186

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

In re *Denton's Est* 1951 (4) SA 582 (N)

Standard Bank of SA Ltd NO v Betts Brown & Ors 1958 (3) SA 713 (N)

Ex p *Marriott NO* 1960 (1) SA 814 (D)

Ex p *Rattray* 1963 (1) SA 556 (D)

Oppenheim v Tobacco Securities Trust Co Ltd & Ors [1951] 1 All ER 31 (HL)

Re *Compton, Powell v Compton* [1945] 1 All ER 198 (CA)

Re *Trusts of Hoburn Aero Components Ltd's Air Raid Distress Fund, Ryan & Ors v Forrest & Ors* [1946] 1 All ER 501 (CA)

IRC v Educational Grants Assn Ltd [1967] 2 All ER 893 (CA)

Dingle v Turner & Ors [1972] 1 All ER 878 (HL)

Ex p *Bosman NO* 1916 TPD 399

Ex p *Exor Est Gluckman* 1946 WLD 182

Ex p *Jacobs* 1960 (1) SA 190 (O)

R v Special Comrs of Income Tax, ex p *Rank's Trustees* (1922) 8 TC 286

ITC 1216 (1974) 36 SATC 186

Wicks v Firth (Inspector of Taxes); Johnson v Firth (Inspector of Taxes) [1983] 1 All ER 151 (HL)

R v van Rooyen 1949 (3) SA 899 (O)

Stellenbosch Farmers' Winery Ltd v Distillers' Corp (SA) Ltd & Anor 1962 (1) SA 458 (A)

Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd 1984 (3) SA 834 (W)

S v Collop 1981 (1) SA 150 (A)

Est Reynolds & Ors v CIR 1937 AD 57

Israelsohn v CIR 1952 (3) SA 529 (A)

Sekretaris van Binnelandse Inkomste v Raubenheimer 1969 (4) SA 314 (A)

GUBBAY CJ

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A P de Bourbon SC for the appellants

M J Gillespie for the respondent

Judgment

Gubbay CJ:

INTRODUCTION

On 14 October 1993 the first appellants, the five Trustees of the Endeavour Foundation (shortly "the Trustees" and "the Foundation"), and the second appellant, UDC Limited ("the Company"), brought an application before the High Court in which they claimed against the respondent ("the Commissioner"), the grant, with costs, of separate declaratory orders.

The order prayed for by the Trustees was that the Foundation be declared a trust of a public character and, as such, exempt from income tax in terms of para 2(1) of the Third Schedule to the Income Tax Act [*Chapter 181*].

The Company effectively sought two declarations, the second only in the event of the first being refused. They were that -

1. The payment by the Foundation of the educational costs of a child of an employee of the Company is not taxable in the hands of the employee concerned;

2. The Commissioner is not entitled to collect from the Company the amount of any income tax due by an employee, by the appointment of an agent to pay such tax on behalf of the Company.

The matter was heard by MUBAKO J He declined to grant the declarations and dismissed the application with costs. The judgment has been reported as *The Endeavour Foundation & UDC Ltd v CoT* (1995) 57 SATC 43 (ZH).

The terms of the declaratory orders applied for denote the essential issues which arise in this appeal. It is to these that I now turn.

WHETHER THE FOUNDATION IS A TRUST OF A PUBLIC CHARACTER

(1) THE FACTS:

The Foundation was established pursuant to a written trust deed executed on 25 March 1982. Before the trust deed was finalised, various negotiations had

taken place between the Company, as the proposed founder benefactor, its representatives and the Commissioner. Certain amendments to the deed, then in draft form, were discussed and incorporated and, in his letter of 19 March 1982, the Commissioner confirmed that the

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amendments fulfilled his requirements. He added:

> "The Foundation is therefore exempt from income tax in terms of para 2(1) of the Third Schedule to the Income Tax Act [*Chapter 181*]."

The preamble to the trust deed states that:

> "There is a need in the community of Zimbabwe for the creation of a foundation to assist and benefit the public of Zimbabwe with their educational, health, housing, cultural, research, sporting, or social needs and thus to serve the common or community welfare."

"Benefactor or Benefactors" are defined to mean: "the founder, or other persons, companies, organisations or legal entities that donate or bequeath to or settle on the Foundation, as the case may be, assets, money, securities or investments".

It is indicated that the founder donated an initial sum of $100 to the Trustees to administer the Foundation according to the trust deed.

Clause 4 reads:

> "The Trustees shall hold and administer the Trust Fund UPON TRUST from time to time and at any time to apply and utilise the whole or part of the capital and income thereof at the sole and absolute discretion of the Trustees in making donations or grants to or for or towards organisations, institutions or the public generally in Zimbabwe to assist their educational, health, housing, cultural, research, sporting or social needs as the Trustees shall in their sole and absolute discretion determine to the intent that the Foundation shall be for the benefit of the public generally. Without prejudice to the generality of the foregoing the Trustees are specifically empowered to provide bursaries or scholarships for educational purposes to such persons in such amounts and on such terms as the Trustees may in their absolute discretion determine."

Vested in the Trustees under clause 6 are:

> "... full and plenary powers and authority to do all such things and to take

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GUBBAY CJ

> all such steps as may appear to be necessary or desirable to the Trustees to give effect to the objects and intentions of the Trust hereby constituted, or may be necessary or incidental to the aforesaid administration and control ..."

This clause further sets out a number of specific powers, one of which is:

> "... to accept such further sums as may from time to time be settled upon the Foundation and accepted by the Trustees on its behalf, and to designate such person or persons who settle such sums as a 'Benefactor or Benefactors'."

Other powers include: to invest monies; to realise investments and to reinvest the proceeds; to acquire stocks and shares; to borrow money; to receive and accept any assets whatsoever; and to institute and defend proceedings at law.

Clause 8 deals with the approval of benefactors and stipulates that such approval is only required from a benefactor who has donated to or settled on the Trust Fund at least $10 000. Such a benefactor is deemed to have one vote, and one more for every additional $10 000

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donated, and may vote in respect of any proposed alteration to the trust deed.

To enable the Foundation to function and to fulfil its avowed objects, the Trustees invited applications from commercial concerns to become benefactor companies. Thereafter the Trustees would decide whether or not to accept any commercial concern which applied. They were careful to ensure that the benefactor companies were not over large, especially with regard to the number of staff, which would make the administration of the Foundation too complicated. Some applicants were declined because the Trustees perceived that they were seeking to promote their own requirements rather than the advancement of the Foundation as a whole.

Upon acceptance, each benefactor company was required to make an initial donation of between $10 000 and $15 000 towards the general objectives of the Foundation, to be utilised by the Trustees in any manner thought fit. A further payment had to be made, calculated by the benefactor company as being that which it would wish to have the Trustees disperse to an educational institution in respect of the educational costs of a child of its employees. A minimum of fifteen *per centum* in excess of this second amount was also to be paid, which sum was not related to the educational costs of children of its employees. It was to be available to the Trustees to use in their discretion for general purposes.

GUBBAY CJ

The practice adopted was that a benefactor company would choose certain employees to apply to the Foundation for payment to be made to meet the direct educational costs of their children. Invariably the Trustees accepted these applications. Payment of such educational costs for the particular child would be made directly to the educational institution concerned.

A very large proportion of the amounts paid by the benefactor companies to the Foundation was devoted to meet the educational costs of the children of their employees. From 1982 to 1994 just over eighty-eight *per centum* of the total monies received was expended upon such costs. Apart from the two last years, the payments made by the Foundation in respect of educational costs increased annually.

Over the same period the Foundation made donations and grants, amounting to about eleven *per centum* of its receipts, to such public organisations as the Central Bursary Fund and the Association of Trust Schools. This was for the provision of a wider range of scholarships, and for professional training of Zimbabwean teachers at Rhodes University in South Africa. The assistance afforded to students thereby was not tied in any way to the benefactor companies.

(2) THE LAW

In order for its receipts and accruals to be exempt from income tax, the Foundation must meet the description given in s 14 of the Income Tax Act, as read with para 2(1) of the Third Schedule thereto, of being a trust of a public character. There is no definition within the Act of the word "trust" nor of the phrase "of a public character".

In *Thorne & Anor NOv Receiver of Revenue* 1976 (2) SA 50 (C) VAN WINSEN J (as he then

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was) said that the word "trust" must be accorded its ordinary meaning. He described a trust, correctly in my respectful view, as follows at 53F-54A:

> "It is, I think, to be deduced from the authorities that in general a trust is created by contract, very often by a contract of donation or in virtue of an antenuptial contract or by way of a will. It is created in respect of defined property transferred to a trustee, who is burdened with the obligation to administer the property for the benefit of a third person, the latter being accorded a right against the trustee to enforce the trustee's compliance with his obligations towards the beneficiary concerned.

GUBBAY CJ

> Generally trusts contemplate an extended continuation of the administration of the trust property in favour of the beneficiary until terminated on the happening of some specified future event. A trust can also, of course, be created by statute . . .
>
> They may vary in certain respects without detracting from the essential concept of a trust. But I think it is clear that a trust in the above sense does not, in proper parlance, have reference to the situation where, for example, a curator is administering the property of a mentally defective patient. Although it may well be regarded as creating a situation analogous to one consequent upon a trust, it is not a trust in the accepted sense of the word."

The phrase "of a public character" has been commented upon in many decisions. In *Verge v Somerville* [1924] AC 496, LORD WRENBURY said at 499:

> "To ascertain whether a gift constitutes a valid charitable trust ... a first enquiry must be whether it is public - whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot."

It would seem that this was one of the statements which MARITZ P had regard to in *ITC 69* (1927) 2 SATC 264, when observing at 269 that -

> "By a process of inductive reasoning from examples of cases where the meaning of 'public nature' or 'character' has been discussed, the following general conclusion might be drawn: The word "public" does not necessarily mean the general community; it includes sections of the public where the benefit to that section is universal, and not individual to certain members of that section'. In this case the testator has pointed out no particular individuals; his charity was directed to a class or section of the community, to wit, aged European ladies and gentlemen who could not provide for themselves."

See also *ITC 59* (1926) 2 SATC 186 at 189; Ex p *Hart* 1947 (4) SA 464 (W) at 479. This definition has not been called to account for almost seven decades. It is quoted with approval in leading textbooks. See Silke on *South*

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African Income Tax 10 ed at p 282; De Koker and Urquhart *Income Tax in South Africa* Vol I at p 9-9; Honoré's *South African Law of Trusts* 4 ed at pp 134-135. Far be it from me to query its propriety.

Accordingly, the necessary public character may be found to exist where the benefit is not a mere private or family benefaction, but belongs to the public at large, or a sufficiently substantial

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section of the public, or an appreciably important section or class of the community, and provided the benefit is universal and not individual to certain members of that section or class. Examples of such sections of the community that have been held broad enough to benefit are: whites in certain categories (see In re *Denton's Est* 1951 (4) SA 582 (N)); boys of the Jewish faith under twenty-five years (see *Standard Bank of SA Ltd NO v Betts Brown & Ors* 1958 (3) SA 713 (N)); aged ladies and gentlemen of white descent (see *ITC 69 , supra*,); South African soldiers who were incapacitated during the Second World War (see Ex p *Marriott NO* 1960 (1) SA 814 (D)); destitute children of British parentage (see Ex p *Rattray* 1963 (1) SA 556 (D)); descendants of the Mohammedan community resident in South Africa (see *ITC 59 supra*).

In *Oppenheim v Tobacco Securities Trust Co Ltd & Ors* [1951] 1 All ER 31 (HL) the majority of their Lordships approved the test laid down in Re *Compton, Powell v Compton* [1945] 1 All ER 198 (CA) and Re *Trusts of Hobourn Aero Components Ltd's Air Raid Distress Fund, Ryan & Ors v Forrest & Ors* [1946] 1 All ER 501 (CA). It was to the effect that in order to constitute a section of the public, the possible beneficiaries must not be numerically negligible, and the quality that distinguishes them from other members of the public, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual. It must be essentially impersonal and not personal. Applying this test, the House held that the potential beneficiaries of the trust established for the advancement of education, who were the children of employees and former employees of one or other group of companies, did not constitute a section of the public, notwithstanding that the number of employees was over 110 000. See the speech of LORD SIMONDS at 34A-E and 35A-B.

LORD MACDERMOTT was a lone dissenter. His views received strong support from LORD DENNING MR in *Inland Revenue Comrs v Educational Grants Assn Ltd* [1967] 2 All ER 893 (CA) at 896F-H, where it was said:

> "A long line of cases show that a trust is for the public benefit if it is for the benefit of the community or a section of the community. The

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> inhabitants of a named place are a section of the community for this purpose; but the employees of a particular company or companies are not. It follows that, if a man sets up a trust **for the children of the inhabitants of Bournville**, it will be held to be for the public benefit; but if he sets up a trust **for the children of those employed by Cadburys, Ltd** at Bournville, it will be held to be for private benefit. In each case the beneficiaries will probably be identical, but in point of law the one trust is charitable and the other is not. There is no logic in it. Lord Macdermott pointed that out in his dissenting speech in *Oppenheim v Tobacco Securities Trust Co Ltd*."

Then, LORD CROSS in *Dingle v Turner & Ors* [1972] 1 All ER 878 (HL) in whose remarks, on this aspect, all the learned Law Lords concurred, pronounced that the distinction between personal and impersonal relationships was unsatisfactory. He said at 889a-g:

> "For my part I would prefer to approach the problem on far broader lines. The phrase 'a section of the public' is in truth a vague phrase which may mean different things to different people. In the law of charity judges have sought to elucidate its meaning by contrasting it with another phrase 'a fluctuating body of private individuals'. But I get little help from the supposed contrast for, as I see it, one and the same aggregate of persons may well be describable both as a section of the public and as a fluctuating body of private individuals. The ratepayers in the Royal Borough of Kensington and Chelsea, for example, certainly constitute a section of the public; but would it be

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> a misuse of language to describe them as a 'fluctuating body of private individuals'? After all, every part of the public is composed of individuals and being susceptible of increase or decrease is fluctuating. So at the end of the day one is left where one started with the bare contrast between 'public' and 'private'. No doubt some classes are more naturally describable as sections of the public than as private classes while other classes are more naturally describable as private classes than as sections of the public. The blind, for example, can naturally be described as a section of the public; but what they have in common - their blindness - does not join them together in such a way that they could be called a private class. On the other hand, the descendants of Mr Gladstone might more reasonably be described as a 'private class' than as a section of the public, and in the field of common employment the same might well be said of the employees in some fairly small firm. But if one turns to large companies employing many thousands of men and women, most of whom are quite

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> unknown to one another and to the directors, the answer is by no means so clear. One might say that in such a case the distinction between a section of the public and a private class is not applicable at all or even that the employees in such concerns as ICI or GEC are just as much 'sections of the public' as the residents in some geographical area. In truth, the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust. It may well be that, on the one hand, a trust to promote some purpose, *prima facie* charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also *prima facie* charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public."

In my opinion, the approach enunciated by LORD CROSS is logically sound and to be preferred to that of the majority in the *Oppenheim* case *supra*. I would stress that whether or not a class of potential beneficiaries constitutes a section of the public is a question of degree, taking into account all the facts of the matter, and in particular the purpose of the trust.

It has been held in a number of South African decisions that an educational trust is a trust with charitable objectives and, thus, a trust which is public in nature. See Ex p *Bosman NO* 1916 TPD 399; Ex p *Exor Est Gluckman* 1946 WLD 182 at 188; In re *Denton's Est, supra* at 587A-B; Ex p *Jacobs* 1960 (1) SA 190 (O) at 192H; Ex p *Marriott NO supra* at 816H-817A.

It was submitted by Mr *de Bourbon*, who appeared for the Trustees, that the manner in which a trust is operated is totally irrelevant to the determination of whether it is a trust of a public character; that if a trust is administered in a way that violates the very purpose for which it had been established, then it could lead to the invocation by the Commissioner of s 81 of the Income Tax Act; but the character of the trust, as set out in the trust deed, would remain unchanged.

Per contra, Mr *Gillespie*, for the Commissioner, argued that even where a trust is by its written terms of a public character, if the benefits are bestowed under it in a private manner, or applied or are not bestowed in a public manner, the public nature of the trust is lost. For this proposition, reliance was placed by counsel on *R v Special Comrs of Income Tax,* Ex p *Rank's Trustees*

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(1922) 8 TC 286. The section of the Income Tax Act 1918, with which the Court of Appeal was concerned, provided for the grant of an exemption from tax if (i) the income by the deed of trust was applicable to charitable purposes only; and (ii) such income **in fact** was applied for charitable purposes only. In dealing with the first requirement, LORD STERNDALE MR said at 292 that -

> "... you have to look at this deed and see whether by the deed the income is applicable to charitable purposes only, and that the time you have to look at it is any time you can get the deed to look at it, and that it is wrong to say you have to wait until the income has actually been applied and then see if it has in fact been applied to charitable purposes, and, if it has, come to the conclusion that it is applicable only by the deed to such purposes. I think that is a fallacy."

I do not think this decision affords real support for the contention advanced on behalf of the Commissioner. The court was mandated by the section, first to examine the trust deed independently of the manner in which the income had been applied. If under the deed the income was not expressed to be for charitable purposes, *cadit quaestio*; no exemption from tax was claimable. Only if that requirement was satisfied did the manner in which the income had been applied call for determination.

Nor is *ITC 1216* (1974) 36 SATC 186, which was also cited, of assistance. In that matter the trustees were required under the trust deed to pay from the net income of the trust fund certain stipulated sums to relatives of the testator and the residue to Muslim charities in specified localities. In reality, over the two years of assessment in issue, the amounts disbursed by the trustees to Muslim charities represented the major share of the dispositions made by them. It was argued by the trustees that by virtue of this fact, the dominant purpose of the trust could be regarded as of a charitable nature and the whole income of the trust as falling within para 2(1) of the Third Schedule. WHITAKER P at 187 rejected the argument. He held that the test of the larger scale of payments, that is, the manner in which the income was disbursed, was not the correct basis for determining the dominant purpose of the trust, there being two objectives; that the terms of the trust had to be looked to, and as it was within the discretion of the trustees to apply the whole of the income to the testator's relatives and only the residue, if any, to charitable purposes, the dominant object of the trust was not one of a public character.

All this case decides is that where a trust deed makes provision for both public

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and private benefaction, the well-known test as to the dominant intention is to be applied to determine whether the trust is of a public character.

It is my view that, depending upon the particular circumstances, it may well be appropriate, in a matter such as this, to have regard to the manner in which a trust has been operated, as a persuasive factor in the determination of whether the dominant intention was to establish it as a trust of a public character, notwithstanding the express wording of the trust deed to that effect. On the other hand, evidence of the manner in which the trust was operated many years after it had been established, would be of little, if any, weight in determining the dominant intention at the time of its birth. If in any one of the later years the terms of a trust deed, which unequivocally

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confined the disposition of the income to the achievement of charitable public objectives, were abused by the disbursement of monies to private benefaction, the Commissioner would not be bound, in **that** year of assessment, to give effect to the trust as one of a public character.

(3) THE APPLICATION OF THE LAW TO THE FACTS

The learned judge *a quo* found that the Foundation, as constituted by the trust deed, was a trust of a public character. However, as it **operated** predominantly as a trust for private benefaction, probably because otherwise the benefactor companies would not have bestowed their financial support, it had undermined the noble objectives enshrined in the trust deed. He held, accordingly, that the Foundation's practice, or manner of operation, controverted its status as a trust of a public character. On that ground he refused the declaratory order.

I am in agreement that an examination of the terms of the trust deed, isolated from the matrix of facts, reveals the clear intention to establish the Foundation as a trust of a public character. Its objects, as set forth in clause 4, are couched in wide terms and express that benevolence is to be dispersed, at the sole discretion of the Trustees, to a variety of social needs, including education, health, culture and research. It comes to me as no surprise that when presented with the trust deed, as proposed to be amended, the Commissioner was satisfied that the Foundation would qualify as a trust of a public character.

It follows that I find no merit in the suggestion that because the wording of the trust deed enables the trustees to bestow benefits at their sole discretion, a discretion to bestow private benevolence is retained; and that on this basis

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the Foundation cannot be said to be of a public character. Private benevolence is implicitly excluded upon a proper construction of the deed itself.

This trust deed must not be looked at, however, totally independently from the factual background that motivated and gave rise to the creation of the Foundation. Obviously, it was envisaged at the outset that to a very large extent those to benefit from the Foundation were to be the children of nominated employees of the acceptable benefactor companies; that, from the funds donated by these benefactor companies, the educational costs of the child or children of some of those employees would be met. This identificatory evidence is to be read into the trust deed; as, indeed, under clause 6(a), must the nature of the payments required in order to gain acceptance as a benefactor company. Regard is to be had, as well, to the decision that part of the donations, a minimum of fifteen *per centum,* would be devoted to the advancement of public interests of Zimbabwean persons and institutions not in any way connected with the benefactor companies.

Of course, the major constituent of potential beneficiaries was always to be the children of selected employees of the various benefactor companies. It seems to me that this body of persons cannot fairly be described as a sufficiently substantial section or appreciably important class of the public.

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Be that as it may, there are other factors which firmly favour the opinions of the Commissioner and the learned judge that, although on paper the Foundation was a trust of a public character, in the real world it operated from inception mainly as a trust of private benefaction. The learned judge put the point aptly when he said at p 51:

> "It is common ground that a large proportion of the payments by the benefactors was for paying the school fees of their employees' children. There was, however, disagreement on whether the benefactor companies continued to control the manner in which the Trustees used the funds they paid to the Foundation after the funds were paid out. The Commissioner charged that the so-called absolute discretion of the Trustees was an illusion. The reality was, at any rate in respect of the school fees payments, that the benefactor companies indicated on whom and how much and in what manner the funds should be spent and the Trustees always followed. Although this was expressed as a wish, in reality the company's wish was a command for the Trustees. It was alleged without contradiction that over ten years the benefactor companies determined which of their employees' children would apply for the

> school fees bursaries and no such applicant was ever turned down despite the 'absolute discretion' of the Trustees. The Trustees could not thwart the expectations of the benefactors and continue to receive the millions of dollars they were accustomed to receive. In practice there was no discretion in this regard."

That from the outset the Foundation concerned itself primarily with the provision of funding for the school fees of the children of the employees of the benefactor companies, is amply borne out by its own evidence. In the year of its creation it expended $39 272 thereon, and donated a mere $500, or 1,27 *per centum*, to the Central Bursary Fund. In the next year, 1983, $47 886 went to the educational costs of the children and only $1 000, or 2,08 *per centum*, to the Central Bursary Fund. These figures speak loudly as to the dominant intention behind the formation of the Foundation.

There can be no doubt that the extent to which the income of the Foundation would be devoted to the educational costs of the children of the employees of the benefactor companies, acted as the inducement for those companies to loosen their purse strings. The awards of bursaries were perquisites for the employees, enabling the benefactor companies, as alluded to by the learned judge at p 52, "to claw back the benefits of most of the monies they paid". This was how it was intended the Foundation, when established, was to function and it fulfilled that purpose.

Thus I share the conclusion reached by the learned judge that, notwithstanding the terms of the trust deed, which theoretically established the Foundation as a trust of a public character, the dominant intention to be gathered from the backdrop against which it was formed and the manner in which its income was provided and disbursed, in practice reveals it as a trust for the private benefaction of the contributing companies and their employees. In short, the wording of the trust deed cannot save the Foundation, for the pith and substance of the facts belie its expressed objects as a trust of a public character.

In the result the appeal by the Trustees is dismissed with costs.

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WHETHER THE PAYMENT BY THE FOUNDATION OF THE EDUCATIONAL COSTS OF ANY CHILD OF AN EMPLOYEE OF THE COMPANY IS TAXABLE IN THE HANDS OF THE EMPLOYEE CONCERNED

(1) THE FACTS

Since the inception of the Foundation the Company, as a founder benefactor, has donated $1 963 784. Of that amount, $1 382 588, being 70,4 *per centum*, was utilised by the Trustees, in accordance with the wishes of the Company, to meet the educational costs of children of employees of the Company.

Although no employee of the Company enjoyed an absolute right to apply to the Foundation for the payment of the educational costs of a child, all were made aware that, if nominated by the Company, they were free to do so. Invariably, such an application was granted by the Trustees. Where an employee resigned, the practice adopted by the Company was to continue to make payments to the Foundation to cover the educational costs of the child to the end of the academic year; but where an employee retired the donations continued to the conclusion of the education of the child in question.

The Company has never regarded its donations to the Foundation as taxable deductions under s 15 of the Income Tax Act.

(2) THE LAW

The Company raised two arguments in support of the proposition that the Commissioner was not entitled to regard the payment by it to the Foundation of the educational costs of the child of an employee, as forming part of the gross income deemed to have been received by, or accrued to, or in favour of, that employee for the year in question. The first was that such payment is not caught by s 8(1)(f) of the Income Tax Act.

In terms of para (f) to s 8(1), the definition of "gross income" includes "an amount equal to the value of an advantage or benefit in respect of employment, service, office or other gainful occupation ...". "Advantage or benefit" is relevantly defined in subpara (v) as meaning:

> "An allowance; granted to an employee, his spouse or child by or on behalf of his employer insofar as it is not ... used or enjoyed, as the case may be, for the purpose of the business transactions of the employer and

> insofar as an amount is not paid by the employee, his spouse or child in respect of its grant."

The definition of "advantage or benefit" does not expressly mention an educational benefit. Hence the short point to decide is whether the benefit under consideration falls within the meaning of the word "allowance", which is also undefined in the legislation.

In reaching the conclusion that the school fees/bursary amounted to "an allowance" granted to an employee or child on behalf of the employer, the Company, by the Foundation, the learned

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judge *a quo* placed dependence on the case of *Wicks v Firth (Inspector of Taxes); Johnson v Firth* (*Inspector of Taxes*) [1983] 1 All ER 151 (HL). That decision, however, turned entirely on the wording of s 61(3) as read with s 72(3) of the Finance Act 1976. Their Lordships relied on these provisions to hold that the payments made to an educational trust for the award of scholarships to children of employees, had been "at the cost" of the employer and, as such, were deemed to be income in the hands of the employee (see at 157c-g). The wording in para (f) to s 8(1) is not, to my mind, *in pari materia* with the provisions examined by the House of Lords.

Nor do I consider helpful the definition adopted in *R v van Rooyen* 1949 (3) SA 899 (O) at 904. The case was concerned with the cost of a living allowance an employer was obliged to pay under certain war regulations. It was held that the term meant something additional to ordinary wages paid to an employee for the purpose of meeting some particular requirement connected with the service rendered by him. Read in its setting, the meaning attributed was obviously correct.

The general principle of interpretation is that the ordinary, plain, literal meaning of the word or expression, that is, as popularly understood, is to be adopted, unless that meaning is at variance with the intention of the Legislature as shown by the context or such other indicia as the court is justified in taking into account, or creates an anomaly or otherwise produces an irrational result. See *Stellenbosch Farmers' Winery Ltd v Distillers' Corp (SA) Ltd & Anor* 1962 (1) SA 458 (A) at 476E-F. The same notion was expressed in another way by MARGO J in *Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 846G-H:

> "Dictionary definitions of a particular word are very often of fundamental importance in the judicial interpretation of that word in a statute or in a

> contract or in a will. Nevertheless, the task of interpretation is not always fulfilled by recourse to a dictionary definition, for what must be ascertained is the meaning of that word in its particular context, in the enactment or contract or other document."

See also *S v Collop* 1981 (1) SA 150 (A) at 161E-F.

The meaning assigned to "allowance" in the *Shorter Oxford Dictionary* 3 ed, *senu* 7, is:

> "A definite portion, sum or amount, allotted or granted to meet any expenses or requirements."

Other dictionaries are to much the same effect. See *Chambers 20th Century Dictionary* New ed at p 32; *Wharton's Law Lexicon* 14 ed at p 55.

Once the ordinary meaning is given to the word, all the requirements of para (f) of s 8(1) are satisfied. The bursary or scholarship is an allowance. It is granted to (it does not have to be paid to) the employee or his child. It is paid on behalf of the employer, the Company, by the Foundation, which in awarding the bursary is guided by the wishes of the Company and in paying the amount adheres to school invoices for the child in question. It is not used or enjoyed for the purpose of business transactions of the Company, and the employee does not pay any

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amount in respect of its grant.

I agree with Mr *Gillespie* that the dominant, if not the sole, reason for the Trustees having paid the allowance, was that it had been funded by the Company to do so, and was guided by the wishes of the Company as to the identity of the child of the employee who was to benefit. And the dominant, if not the sole, reason for the Company to have furnished the monies, and identified the recommended recipient, was that it desired to grant a benefit to the parent of that recipient as its employee.

Even though I hold that the amount of the bursary or scholarship must be deemed to be part of the gross income of the employee, it may still be exempt from income tax in terms of s 14(1) of the Act, as read with para 4(1) of the Third Schedule thereto. That it is so exempt was the second contention advanced on the Company's behalf.

Paragraph 4(1) exempts -

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> "an amount accruing by way of -
>
> ...
>
> (1) a scholarship, bursary, payment in respect of tuition fees or other educational allowance to a student receiving instruction at a school, college or university, but not including an amount accruing to the student by way of remuneration for services rendered or to be rendered by the student or a near relative of the student."

The closing words "by the student or a near relative of the student" were inserted to have effect from the year of assessment commencing on 1 April 1993. Their impact, if any, does not fall for consideration in this matter.

The issue between the Company and the Commissioner was whether what is exempt is income in the hands of the student or income in the hands of the parent-employee.

Mr *de Bourbon* argued that what is exempt is not a payment to a student, but an amount accruing by way of "a scholarship, bursary, payment in respect of tuition fees or other educational allowance". The term "student", so he urged, qualified the words "receiving instruction at a school, college or university", and not the concept of the accrual by way of a scholarship, etcetera. Thus, any scholarship, etcetera, is exempt, provided it is in respect of a student receiving instruction at a school, college or university. What is excluded from the exemption is an amount accruing to the student by way of remuneration for services rendered or to be rendered. The student had to render no services in order to obtain the exemption.

Counsel sought to derive support for his interpretation of para 4(1) from the majority speeches in *Wicks v Firth; Johnson v Firth supra*. It appears to me, however, that there is a material difference in wording between s 375(1) of the Income and Corporation Taxes Act 1970, dealt with by the House of Lords, and para 4(1). The former section, prior to amendment, read "income arising from a scholarship". It is far less precise and more ambiguous than "an amount accruing by way of a scholarship ... to a student". I do not, therefore, find the interpretation of s

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375(1) a sound guide in determining the meaning of para 4(1).

I am unable to accept the construction of para 4(1) advanced by Mr *de Bourbon*. It is ungrammatical and involves importing other words into the provision, so as to read:

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> "An amount accruing **to any person** by way of -
>
> (1) scholarship ... **ultimately received** by a student receiving instruction ..."

In my view, Mr *Gillespie's* contrary submission is correct. It was to this effect: para 4(1) operates so as to exempt from income tax an "amount accruing" by way of a scholarship, etc, "to a student" at a specified place of learning. The dative case of the student referred to is unequivocally indicated. The preposition "to" that is placed in front of the designation "a student" and all that follows, would be meaningless except as qualifying the word "accrue". It does not describe the scholarship, etcetera. In plain parlance, the exemption is in respect of qualifying amounts accruing to a student, and not to amounts which accrue to the gross income of a parent of the student.

Moreover, I would point out that, as the closing words of para 4(1) refer to "an amount accruing to a student ... for services rendered ...", the strong inference is that the lawmaker intended the opening words to be read as conferring the exemption only upon the student.

The further proposition addressed on behalf of the Company, that income once exempt from taxation is exempt for all purposes, is without merit. While it is true to say that income exempt in the hands of one tax-payer cannot be taxed no matter what variety or breadth of provisions may serve to bring it within the gross income of that tax-payer, it does not follow that it cannot be brought to tax in the hands of another tax-payer. Mr *Gillespie* offered a graphic illustration of this. The entertainment allowance paid to a judge as part of the benefits of his appointment is exempt from income tax in his hands. See para 4(c1) of the Third Schedule, as read with Exemption from Income Tax (Judges) (Amendment) Notice, SI 341/91. But it is not thereby rendered exempt in the hands of the restauranteur who is patronised by the judge and the dignitary he entertains as his guest.

It follows that as the amount paid by the Company to the Foundation to meet the educational costs of a child of its employee is taxable - not as the student's income in the hands of the parent-employee but as part of the latter's own gross income - the exemption under para 4(1) cannot be claimed.

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WHETHER THE AMOUNT OF ANY INCOME TAX DUE FROM THE EMPLOYEES OF THE COMPANY MAY BE COLLECTED FROM THE COMPANY IN TERMS OF SECTION 47 (1) OF THE INCOME TAX ACT

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(1) THE BACKGROUND TO THE DISPUTE

Since the educational costs of the children of those nominated employees of the Company were taxable in their hands, the Company was obliged to withhold the requisite amount in respect of employees' tax in terms of para 3(1) of the Thirteenth Schedule to the Income Tax Act. This it failed to do. Accordingly, by virtue of para 10(1) of the Thirteenth Schedule, the Company became personally liable for the payment of the aforementioned amount of employees' tax to the Commissioner, together with a further amount equal to fifteen *per centum* of such employees' tax. Under para 10(2) of the Thirteenth Schedule, these amounts are termed "debts due by the employer to the State", and "may be sued for and recovered by action by the Commissioner in any court of competent jurisdiction".

The Commissioner has threatened to utilise the provisions of s 47 in order to collect from the Company all amounts which he claims those of its employees were required to pay by way of tax. The Company is apprehensive that he will make good his threat. Section 47 reads:

"(1) The Commissioner may, if he thinks it necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent of such other person for the purposes of this Act, and, notwithstanding anything to the contrary contained in any other law, may be required to pay any tax due from any moneys in any current account, deposit account, fixed deposit account or savings account or from any other moneys, including pensions, salary, wages or any other remuneration, which may be held by him for, or due by him to, the person whose agent he has been declared to be.

(2) For the purpose of subsection (1) -

'person' includes -

(a) a bank, building society or savings bank; and

(b) a partnership; and

(c) any officer in the Public Service;

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'tax' includes interest payable by virtue of the provisions of subsection (2) of section *sixty*."

(2) THE DETERMINATION

The question that falls to be decided is whether, upon a failure by an employer to withhold or pay an amount of employees' tax, the Commissioner has the right to apply the provisions of s 47 against the employer, or is restricted to proceed under para 10 of the Thirteenth Schedule.

Mr *de Bourbon* argued persuasively that the agent appointed by the Commissioner under s 47 can only be required to pay "any tax due", whereas the liability of the employer under para 10 is not to pay "any tax due", but an amount equivalent to the tax the employee ought to have paid, together with fifteen *per centum* thereof. In short, an ordinary civil debt.

Mr *Gillespie*, on the other hand, countered that s 47 imposes no limitation on the nature of the

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tax which the agent may be required to pay on behalf of the tax-payer whose agent he has been declared to be; and that the amount of "employees' tax", as well as the fifteen *per centum*, fall squarely within the term "any tax".

On this aspect, it is Mr *de Bourbon's* contention that must prevail. I say so for these reasons.

First, the amount which the employer becomes liable to pay the Commissioner under para 10 includes a penalty element. This is made clear, not only from the heading given to the following para 11, namely, "Remission of penalties for failure to withhold or to remit employee's tax", but by the power accorded the Commissioner to waive or remit the amount of fifteen *per centum* in whole or in part.

Second, the term "tax" is defined in s 2 of the Act to mean any tax leviable under the Act. Section 47(2) expands the definition to embrace interest on late payments. There is no inclusion of a penalty amount such as the additional fifteen *per centum* referred to in para 10(1) of the Thirteenth Schedule.

Third, s 66 of the Act deems any tax, when it becomes due or is payable, to be a debt due to the State, payable to the Commissioner, and recoverable by him in any court of competent jurisdiction. If the Legislature was minded to

treat the sum which an employer may become liable to pay under para 10(1) as being **a tax**, it would have been unnecessary to make provision for its recovery under para 10(2). In other words, the Legislature intended that the payment from an employer under para 10 should not fall within the provisions for the recovery of a tax set out in s 66. And that the additional power given under s 47 should be confined to **a tax** to which s 66 applies, but not embrace a payment due from an employer under para 10 of the Thirteenth Schedule.

Fourth, s 35(1)(a) provides that if a tax-payer makes default in rendering a return in respect of any year of assessment, he shall be required to pay, in addition to the tax chargeable, "an amount of **tax** equal to the tax chargeable". Paragraph 10(1), on the other hand, expresses the liability of the employer as "a **further amount** equal to fifteen *per centum*. It avoids the use of the word "tax".

To put it at its highest for the Commissioner, para 10 of the Thirteenth Schedule reveals a manifest ambiguity with regard to whether the amount for the payment of which the employer is liable is a "tax" or simply "an amount". Consequently, the *contra fiscum* principle must be applied and the provision interpreted so as to impose the smaller burden on the Company. For s 47 allows the Commissioner a summary remedy for the recovery of tax, whereas under para 10 he has to institute action in a court of competent jurisdiction. See *Est Reynolds & Ors v CIR* 1937 AD 57 at 70; *Israelsohn v CIR* 1952 (3) SA 529 (A) at 540 F-H; *Sekretaris van Binnelandse Inkomste v Raubenheimer* 1969 (4) SA 314 (A) at 322D.

I conclude, therefore, that the Commissioner is not empowered to resort to s 47 to collect from the Company the amount of employees' tax which it ought to have withheld from the employees

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in question.

(3) THE ORDER

To the extent indicated, the Company's appeal is allowed. The following *declarator* will issue:

> "The Commissioner of Taxes is not entitled to collect from UDC Limited the amount of any income tax due by an employee, by the appointment, under s 47 of the Income Tax Act [*Chapter 181*], of an agent to pay such tax on behalf of UDC Limited."

For the rest, the appeal is dismissed.

GUBBAY CJ

With regard to costs, of the three issues argued, each of which occupied almost the same length of time in this court, the Company has achieved success only in respect of the last. Such success, however, deserves appropriate recognition.

The Commissioner is awarded two-thirds of his costs in this court and in the court *a quo*.

Korsah JA: I agree.

Ebrahim JA: I agree.

Scanlen & Holderness, appellants' legal practitioners

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

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ZIMBABWE NEWSPAPERS (1980) LTD v ZIMUNYA 1995 (1) ZLR 364 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

13 February & 30 May 1995 Judgment No S-79-95

Flynote

Delict - actio injuriarum - defamation - animus injuriandi - photograph of plaintiff in humiliating position - publication negligent, not deliberate - lack of intention no defence

Headnote

The appellant newspaper published a photograph of the respondent that created the false

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impression that he was urinating in public. He sued the newspaper and was awarded damages for *injuria* (see *Zimunya v Zimbabwe Newspapers (1980) Ltd* 1994 (1) ZLR 35 (H)).

Dismissing an appeal against the award of damages,

Held, that as regards the issue of *animus injuriandi* there is no distinction between defamation and other forms of *injuria.* With both, the defence of absence of *animus injuriandi* does not apply if the defendant was negligent in publishing the injurious material.

Held, further, that it was not necessary for the court to decide whether newspapers should be held strictly liable.

Held, further, that the amount of damages awarded was not so excessive as to warrant interference, comparing, as it did, favourably with the awards made in other recent cases in Zimbabwe.

Cases cited:

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

Shamuyarira v Zimbabwe Newspapers (1980) *Ltd* 1994 (1) ZLR 445 (H)

Chinamasa v Jongwe P & P Co (Pvt) Ltd & Anor 1994 (1) ZLR 133 (H)

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

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

MUCHECHETERE JA

Tekere v Zimbabwe Newspapers & Anor (1980) *Ltd* 1986 (1) ZLR 275 (H)

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

Chinengundu v Modus Publications HH-135-92

T Biti for the appellant

J B Colegrave for the respondent

Judgment

Muchechetere JA: The respondent issued summons in the High Court, Harare, against the appellant claiming damages in an amount of $30 000 for *injuria* and damages in an amount of $15 000 for defamation, together with interest *a tempore morae* on the above amounts from the date of judgment, and costs of suit.

The claim for defamation arose from the publication by the appellant of an article entitled "Norton a rising star for business development" in the appellant's *The Herald* newspaper of 13 May 1992. And the claim for *injuria* arose from the publication next to the said article of a

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photograph of the respondent, purporting to depict the respondent in the act of urinating or otherwise indecently exposing himself.

In a judgment handed down on 12 January 1994 the learned trial judge (MUBAKO J) found in favour of the respondent on both claims and awarded the amounts of $16 000 in connection with the claim for injuria and $6 500 in connection with the claim for defamation, together with costs of suit to the respondent.

This appeal is only against the learned judge's finding in connection with the *injuria* and also against the *quantum* of damages awarded in connection with that claim.

The facts on which the judgment in the court *a quo* was based are not disputed. The only point of contention is whether the judgment is soundly based on law.

The learned judge in the court *a quo* held, on the facts, that the respondent was humiliated as a result of the said photograph. Although he took note of the appellant's allegation that it was innocent of deliberately inflicting hurt upon the respondent, because the impression created by the photograph went unnoticed, he nevertheless found it to have been negligent.

The finding of negligence by the appellant cannot be faulted. It is based on the observation that none of the six people who were supposed to have

MUCHECHETERE JA

studied the photograph carefully before it was published noticed the highly offensive nature of the photograph before it was published. It is also worthy of note that a Mr Gambanga, who gave evidence for the appellant and one of the six, admitted that he should have noticed the offensive nature of the film and also conceded that his colleagues should have also detected it before it was published. Further, the finding of negligence was not disputed by Mr *Biti*, for the appellant, either in his heads of argument or during his address.

Mr *Biti*, however, submitted that in a claim for *injuria*, such as in the instant case, for a plaintiff to succeed he must establish that the defendant deliberately published the offensive material (the photograph) intending to cause him (the plaintiff) humiliation and/or embarrassment. He argued that it was not enough that the defendant inadvertently published material about the plaintiff without realising that it might be humiliating to the plaintiff. He further argued that even if the defendant was negligent in failing to detect, before publishing the material, that it might cause humiliation to the plaintiff, he is still not liable because he had no *animus injuriandi.*

I am, however, in agreement with the learned judge's finding and the submission by Mr *Colegrave*, for the respondent, that the appellant in this case could not rely on the defence of lack of animus injuriandi because of its stated negligence. See *Hassen v Post Newspapers Ltd* 1965 (3) SA 562 (W); *Shamuyarira v Zimbabwe Newspapers* (1980) *Ltd* 1994 (1) ZLR 445 (H); and *Chinamasa v Jongwe P & P Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H).

I also agree with Mr *Colegrave*'s submission that there is no real need for drawing a distinction between defamation and other forms of *injuria,* because such a distinction would be artificial. An

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injuria which damages one's reputation is, in my view, on the same footing with an *injuria* which results in degradation and humiliation. As was pointed out by Mr *Colegrave*, such a distinction is not made in the leading case of *Smith NO v Wonesayi* 1972 (1) RLR 262 (A).

This court was urged to rule on the most interesting enquiry as to whether or not one should follow the South African Appellate Division and hold that the press should be made strictly liable when it injures the reputation or dignity of another. See *SAUK v O'Malley* 1977 (3) SA 394 (A); and *Pakendorf & Anor v de Flamingh* 1982 (3) SA 146 (A). I do not consider that this enquiry is relevant for a decision to be arrived at in this case. The learned judge in the court *a quo* did not decide on the matter and I am also of the view that that point can and should for the present be left open.

MUCHECHETERE JA

On the *quantum* of damages, my view is that the amount awarded is not so excessive as to warrant interference by this court. If consideration is taken of the fact that, apart from reducing the respondent, a public figure, to a laughing stock and making him the butt of most "off colour" jokes in the Norton area for weeks, the appellant did not see fit to apologise, then it becomes clear that the damages awarded are not excessive. I agree that the award compares favourably with those awarded in the cases of *Tekere v Zimbabwe Newspapers* 1986 (1) ZLR 275 (H); *Zvobgo v Kingstons Ltd* 1986 (2) ZLR 310 (H); and *Chinengundu v Modus Publications* HH-135-92.

In the result, the appeal is dismissed with costs.

Korsah JA: I agree.

Ebrahim JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

SIRDAR'S MANUFACTURERS (PVT) LTD v CHINYA 1995 (1) ZLR 368 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

16 & 30 May 1995 Judgment No S-75-95

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Flynote

Employment - appeals under Labour Relations Act and Regulations - hearing officer - appeal from - record of hearing - what should be in record

Headnote

The Supreme Court frequently experiences difficulty in resolving appeals in labour relations matters, the cause of that difficulty being the absence of any clear record of the facts. Evidence is not recorded; the official simply gives conclusions. If a decision from a regional hearing officer goes to the Labour Relations Tribunal, it is meant to be an appeal on the record, which means that there must be a proper hearing with a proper record. While it may not be practical to have such a hearing before a labour relations officer, there should be one before the regional hearing officer, who should produce a proper record containing -

(a) the names of the parties;

(b) the names of their lawyers (if any);

(c) a statement of the relief sought;

(d) a summary of any other issues between the parties as agreed by them;

(e) the names of the witnesses and a summary of their evidence;

(f) a record of questions and answers in cross-examination and re-examination;

(g) a record of documentary or other exhibits produced; and

(h) a judgment, that is, a conclusion on the evidence, accompanied by an explanation of how and why that conclusion was reached, which witnesses were disbelieved and which provisions of the law were found to be applicable.

1995 (1) ZLR p369

McNALLY JA

With such a record, the Tribunal's task will be easier and it will be able to come to a conclusion on a proper basis. It will also be easier for the Supreme Court, to which an appeal lies only on a question of law, to be satisfied that the question before it is indeed a question of law.

Cases cited:

du Preez v Hughes NO 1957 R & N 706 (SR)

Mvaami (Pvt) Ltd v Standard Finance Ltd 1976 (2) RLR 75 (G); 1977 (1) SA 861 (R)

Independence Mining (Pvt) Ltd v Soko S-188-93

Watchtower Bible & Tract Soc of Pennsylvania & Anor v Drum Invstms (Pvt) Ltd & Anor 1993

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(2) ZLR 67 (S)

D P Drury for the appellant Respondent in person

Judgment

McNally JA: On 9 August 1994 the Labour Relations Tribunal ("the Tribunal") dismissed an application by the appellant ("Sirdars") for reinstatement of its appeal.

The history of the matter is as follows:

1. Early in 1987 Mrs Chinya was suspended for allegedly refusing to obey a lawful order.
2. Application to dismiss her was made to a labour relations officer (LRO).
3. On 30 April 1987 the LRO approved her dismissal.
4. She appealed to the Regional Hearing Officer (RHO).
5. On 16 June 1987 her appeal was dismissed.
6. She appealed to the then Labour Relations Board.
7. On 21 July 1989 the Board heard the appeal and on 19 September 1989 it upheld her appeal and ordered her reinstatement.
8. Sirdars appealed to the Tribunal on 28 September 1989.
9. A notice of set down of the appeal was issued on 14 December 1993 for 3 February 1994 (ie over four years after the appeal was noted).
10. Sirdars failed to appear and their appeal was dismissed for want of prosecution on 3 February 1994.
11. In late February 1994 Sirdars' legal representatives were notified of the decision. By that time the practitioner involved had long since left the firm, the file had gone missing, and Sirdars had ceased to trade. Nobody in the firm knew anything about the case.
12. On 20 May 1994 an application for reinstatement was lodged.
13. On 9 August 1994 that application was dismissed with costs. The order

McNALLY JA

for reinstatement of Mrs Chinya was repeated despite the fact that Sirdars had said they were no longer trading (though still a registered company).

In dismissing the application the Tribunal noted that someone in Gollop & Blank (Sirdars' legal representatives) had signed for the registered notice of set down. It also noted that application

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for re-instatement of the appeal had only been made some two months after the order appealed against was made.

It is true that a signature is *prima facie* proof that a registered letter has been received. But in this case it is proof only that it was received by the receptionist of an agent of the party concerned. Gollop and Blank were simply unable to say what could have happened to the notice, or the file.

The affidavit placed the facts quite honestly before the Tribunal. Given the facts, and in particular the long delay, the explanation tendered was reasonable. There was no gross negligence. There was no indication of an intention to abandon the appeal. Indeed the point was made that a critical witness, the one who had given the disputed order, who had been away from Zimbabwe at the time of the Board hearing, was back and available. In the circumstances and given the principles governing reinstatement of appeals (*Du Preez v Hughes NO* 1957 R & N 706 (SR); *Mvaami (Pvt) Ltd v Standard Finance Ltd* 1976 (2) RLR 275 (G); *Independence Mining (Pvt) Ltd v Soko* S-188-93), I am satisfied that the Tribunal misdirected itself in law in dismissing the application.

In conclusion, I must remark that this court is experiencing considerable difficulty in resolving appeals in labour relations matters. The cause of that difficulty is the frequent absence of any clear record of the facts. In the hearings before the LRO and the RHO it is never, in my experience, stated who gave evidence and what they said. There does not appear to be any cross-examination. The official simply records conclusions. What those conclusions are based on, it is impossible to say.

The matter then comes to the Tribunal (now that there is no longer a Board) and the Tribunal treats the matter as "an appeal on the record". One is tempted to ask "what record?". The Tribunal seldom hears evidence, though it has the power to do so in terms of s 106(6) of the Act as amended.

In the case of *Watchtower Bible & Tract Society of Pennsylvania & Anor v Drum Investments (Pvt) Ltd & Anor* 1993 (2) ZLR 67 (S) at 75E, I attempted to sum up the categories of appeals from administrative bodies. If the appeal to the Tribunal is indeed an appeal on the record - and it seems it is intended

to be so - then there must be a proper hearing at some earlier stage, in order to produce a proper record.

It may not be practical for there to be such a hearing before the LRO. That officer can perhaps be expected to collect the allegations from the relevant witnesses on both sides, decide what the dispute is about, and come to a conclusion.

But if that is so, it means that the real hearing or trial should take place before the RHO. After all, the "H" stands for "Hearing". Therefore I think we (and the Tribunal) can expect from the

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RHO a proper record. That record should set out -

1. The names of the parties.
2. The names of their lawyers, if any.
3. A statement of the relief sought.
4. A summary of any other issues between the parties as agreed by them.
5. The names of the witnesses and a summary of their evidence.
6. A record of questions and answers in cross-examination and re-examination.
7. A record of documentary or other exhibits produced.
8. A judgment, ie a conclusion on the evidence accompanied by an explanation of how and why that conclusion was reached, which witnesses were disbelieved and which provisions of the law were found to be applicable.

(I do not intend this list to be definitive, but some standardised list of headings would be useful).

With such a record before it, the Tribunal's task will, I hope, be easier and it will be able to come to a conclusion on a proper basis. It will be easier also for this court, to which an appeal lies only on a question of law, to be satisfied that the question before it is indeed a question of law.

In the present matter the appeal is allowed with costs. The judgment in default of appearance handed down by the Labour Relations Tribunal on 3 February 1994 is set aside. The order of the Deputy Chairman of the Labour Relations Tribunal is altered to read "The application is allowed. The appeal is reinstated".

Ebrahim JA: I agree

Muchechetere JA: I agree

Gollop & Blank, appellant's legal practitioners

LAW SOCIETY OF ZIMBABWE v PATERSON 1995 (1) ZLR 372 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

22 & 30 May 1995 Judgment No S-76-95

Flynote

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Legal practitioner - discipline - application by Law Society that practitioner be suspended - Disciplinary Tribunal rejecting application and declining to hold an enquiry - no appeal permissible as appeal only lies after "due inquiry" - Legal Practitioners Act 15 of 1981 - s 28

Headnote

The Law Society lodged an application with the Legal Practitioners Disciplinary Tribunal for the respondent to be suspended from practice. The Tribunal rejected the application on the papers in terms of s 4(a) of the Legal Practitioners (Disciplinary Tribunal) Regulations 1981 (SI 580/81) without holding an inquiry. The Law Society appealed to the Supreme Court against the rejection of its application.

Held, that the Legal Practitioners Act only gives a right of appeal against a decision made under s 28, that is, a decision that is made "after due enquiry", that is, after a formal inquiry or hearing. A rejection of an application by the Disciplinary Tribunal under s 4(a) of the Regulations cannot be regarded as an order made in terms of s 28 after due inquiry, as no such inquiry is made by the Tribunal at the preliminary stage of its consideration under s 4(a). Consequently, no appeal lies from its decision to reject the application. Similarly, an acceptance of an application is not appealable.

B D Brighton for the appellant Respondent in person

Judgment

Gubbay CJ: On 30 November 1993, the Law Society of Zimbabwe lodged

GUBBAY CJ

an application with the Registrar of the High Court in which it sought an order, in terms of s 28(1)(ii) of the Legal Practitioners Act 1981, that one Lesley Paterson be suspended from practice as a legal practitioner, notary public and conveyancer. Annexed to the application was the summary of evidence upon which the Law Society relied, together with copies of supporting correspondence. Thereupon the Registrar, as he was obliged to do, forwarded the application to the Chairman of the Legal Practitioners Disciplinary Tribunal, the Honourable Mr Justice ADAM.

After consideration the Disciplinary Tribunal, acting pursuant to s 4(a) of the Legal Practitioners (Disciplinary Tribunal) Regulations 1981 (SI 580 of 1981), rejected the application and informed the Registrar accordingly. This it did on 4 August 1994.

On 2 September 1994, the Law Society filed a notice of appeal against the rejection of its application.

The point that falls immediately for determination by this court is whether a rejection of an application under s 4(a) of the Regulations is appealable.

Section 29(1) of the Legal Practitioners Act grants to any person who is aggrieved at the order or findings of, or penalty imposed by, the Disciplinary Tribunal in terms of s 28, a right of appeal

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within thirty days. Section 28 clearly expresses that the appeal lies "after due inquiry" has been held by the Disciplinary Tribunal.

The preceding s 27 points to the nature of the inquiry that the lawmaker intended. It is one in which it is open to the Disciplinary Tribunal to take evidence, to summon any person as a witness, to require such person to produce any book, record, document or thing, to examine the same, and to administer, through the Chairman, an oath to any person. It is one in which a person who gives evidence as a witness is entitled to the same privileges which attach to a witness testifying in civil proceedings in the High Court. Finally, it is an inquiry which carries with it criminal sanctions should any person: (i) who has been summoned to attend before the Disciplinary Tribunal, refuse or fail, without sufficient cause, to attend and give evidence; (ii) refuse to be sworn; (iii) refuse or fail, without sufficient cause, to produce that which he has been required to produce; (iv) refuse to answer fully and satisfactorily any question lawfully put to him as a witness; (v) give false evidence on oath.

It is plain to my mind that at the inquiry held by the Disciplinary Tribunal

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GUBBAY CJ

under s 27, a legal practitioner must appear before it to present the charge on behalf of the Law Society. The legal practitioner who is the subject of the charge has the right to appear in person or by counsel. The inquiry that follows takes the form of a hearing, attended with some degree of formality. See the proviso to s 29(2) of the Act.

This interpretation is wholly consistent with the provisions of Part I of the Regulations. Section 7 gives the Disciplinary Tribunal the right to decide whether or not **to hold an inquiry after** it has considered not only the application, but the counter-statement by the respondent and any reply thereto. Section 8 states that if the Disciplinary Tribunal decides **to hold an inquiry**, the Chairman shall set down a date, time and place, at which the inquiry is to be held. Section 9 deals with the calling of witnesses, s 19 with the right of appearance, and s 11 with the proceedings at the inquiry.

The provisions of the Act and Regulations, to which I have referred, persuade me that a rejection of an application by the Disciplinary Tribunal under s 4(a) of the Regulations is not to be regarded as an order of the Disciplinary Tribunal made in terms of s 28 of the Act, after "due inquiry". No "inquiry" within the contextual meaning of that word is held by the Disciplinary Tribunal at the preliminary stage of its consideration under s 4(a). Consequently, no appeal lies from its decision to reject an application. An acceptance of an application, similarly, is not appealable.

It follows that this court has no jurisdiction to entertain the appeal. It is to be struck from the roll. The Law Society is ordered to pay the costs of these abortive proceedings.

Korsah JA: I agree

Ebrahim JA: I agree

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Honey & Blanckenberg, appellant's legal practitioners

JANDA v JANDA 1995 (1) ZLR 375 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

1 & 12 June 1995 Judgment No S-87-95

Flynote

Succession - will - validity - formalities - signatures of witnesses - full signatures required, not merely initials - Wills Act 1987 - ss 8 and 13

Headnote

Under the Wills Act 13 of 1987, the legislature has prescribed certain formalities pertaining to a will which are necessary to be complied with. The purpose of these formalities is to eliminate, as far as possible, the perpetration of fraud and speculation, for when the validity of a will is challenged, the testator will be dead and so may be the witnesses. Section 8(1)(d) of the Act requires each witness either to sign each page of the will or acknowledge his signature on each page, in the presence of the testator and the other witness. A person will be held to have signed a will in due form if he has written on it in his own hand his surname or last name or a name by which he is ordinarily known. It is sufficient for a testator, but not for a witness, to sign by making his mark. In the case of a witness, using only his initials will not suffice, unless they happen to be the name by which the person is ordinarily known. If a will does not comply with these formalities, it is invalid, even if the effect of declaring it to be invalid is to defeat the real intention of the testator.

Cases cited:

Leprosy Mission & Ors v Master of the Supreme Court & Anor NO 1972 (4) SA 173 (C)

Melvill & Anor NO v The Master & Ors 1984 (3) SA 387 (C)

Harpur NO v Govindamall & Anor 1993 (4) SA 751 (A)

GUBBAY CJ

J R Devittie for the appellant

D Kanokanga for the respondent

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Judgment

Gubbay CJ: This is a distressing appeal.

In accordance with the recognised tendency to uphold a will rather than declare it invalid for want of execution, this court feels a strong inclination to sustain the validity of the will in dispute before it. It is a will to which there is not the least suspicion of any impropriety. It was made *bona fide* by the testator, as he believed, pursuant to law. But under the Wills Act 1987, the Legislature has prescribed certain formalities pertaining to the making of a will of this type which are necessary to be complied with. The manifest purpose behind these formalities is to eliminate, as far as possible, the perpetration of fraud and speculation; for, when the validity of his will is challenged, the testator will have died and the witnesses may no longer be alive to reveal what occurred when the will was executed. This legislative policy overrides the equities of any particular case. See *The Leprosy Mission & Ors v Master of the Supreme Court & Anor NO* 1972 (4) SA 173 (C) at 185A; *Mellvill & Anor NOv The Mastr & Ors* 1984 (3) SA 387 (C) at 395H-396B. It is not, therefore, for this court to strain the language of these peremptory formalities in order to accommodate what is believed to be a genuine case for relief.

The will of the late Sidney Janda, dated 5 December 1991, consists of three pages. The testamentary dispositions are to be found on the first and second pages, while the third and final page contains the attestation clause and the signatures of the testator and his two witnesses. At the foot of each preceding page, the testator and the witnesses affixed only their initials.

The respondent is Cornelius Janda. He was the major son of the testator by a first marriage. No provision was made for him in the will. It is he who applied to the High Court for an order declaring the will to be invalid for lack of compliance with s 8(1)(d), as read with s 13(1), of the Wills Act. The contention advanced, and upheld by the learned judge with costs, was that the two witnesses had omitted to "sign" each page of the will. Hence this appeal by Ivy Janda, the guardian of the main beneficiary, Zvaguma Janda.

The apposite sections of the Wills Act, to which it is necessary at this stage to refer, are ss 8(1)(d) and 13. The former, insofar as is relevant, provides as follows:

GUBBAY CJ

"... a will shall not be valid unless -

(a) it is in writing; and

...

(d) each competent witness either -

(i) signs each page of the will; or

(ii) acknowledges his signature on each page of the will;

in the presence of the testator and of the other witness."

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Section 13 reads:

> "(1) For the purposes of this Act, a person shall be held to have signed a will in due form if he has written thereon in his own hand his surname or last name or a name by which he is ordinarily known:
>
> Provided that it shall be sufficient for a testator to sign his will by making a mark thereon.
>
> (2) The fact that a signature on a will is illegible or partly formed or is misspelt shall not invalidate the signature for the purposes of the Act."

In the definition section, "making a mark" is stated to include, to make a cross or to write or stamp initials on a will; and "sign", has the meaning assigned to it in s 13.

It is apparent that the proviso to s 13(1) creates an exception in the case of a testator. He shall be held to have signed his will by making a mark thereon, that is, by making a cross or writing or stamping his initials thereon. Not so, however, with regard to any other person, such as a witness, who must sign by writing thereon, in his own hand, his surname or last name or a name by which he is ordinarily known. Subsection (2) is a further derogation. But it cannot sensibly be construed to mean that mere initials by a person, other than a testator, are to be classed as a "partly formed" signature.

In my opinion, the language of s 8(1)(d), taken in conjunction with s 13(1) and the definition of "sign", plainly and unambiguously requires that, in order for a will to be valid, each competent witness must affix, on every page, his surname, last name or name by which he is ordinarily known. Nothing less will meet the requirement.

GUBBAY CJ

The intendment of the lawmaker that it will not suffice for a witness to merely initial each page of a will, is underscored by the following features.

First, s 9 of the Act, which provides for amendments to wills, draws a clear distinction between the words "initials" and "signature". Subsection (1)(b) allows a competent witness to sign or initial an amendment to a will **before** it has been signed and witnessed in terms of s 8; yet **after** the will has been so signed and witnessed, subs (2)(c)(i) mandates that any amendment thereto must be identified by the witness signing (not initialling) each page on which such amendment appears. And subs (5)(b) specifies the conditions upon which a signature, initial or other mark, shall sufficiently identify an amendment to a will.
The only rare instance in which the initials of a witness may be taken as his signature would be where such initials connote the name by which he is ordinarily known. To give an illustration: in the popular American television series "Dallas", which was screened widely a few years ago, the lead character, John Robert Ewing, was invariably referred to by family, friends and acquaintances, as well as by viewers, simply as "JR". It was by that name that he was ordinarily known.

Second, s 2 of the repealed Wills and Attesting Witnesses Act [*Chapter 306*] made it a requirement for validity that-

> "... the witnesses shall sign their names upon at least one side of every leaf upon which the instrument was

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written."

If the legislature was minded, in enacting the Wills Act, to lessen the former requirement for validity by permitting a witness to initial the pages of a will, as opposed to writing his name, I consider it would have said so in express language.

I have not thought it necessary to deal with the line of South African decisions, culminating in the recent majority judgment of the Appellate Division in *Harpur NO v Govindamall & Anor* 1993 (4) SA 751 (A). This is because the meaning of "sign" in s 1 of the South African Wills Act 7 of 1953 (prior to amendment by Act 43 of 1992) differed materially from the definition in our Act. Even so, it was held in the above cited case that the provision that witnesses were "to sign" each page of the will implied that what was required was a signature and not initials; that mere initials did not constitute a signature.

GUBBAY CJ

The learned judge *a quo* expressed the further view that as the testator had initialled and not signed the first and second pages of the will, the making by him of such a mark was invalid for non-compliance with s 8(2)(b)(i) of the Act. This provision requires one of the designated officials, at any time before the testator's death, to certify on the will that he has satisfied himself as to the identity of the testator, and that it is the will of the testator. I would point out, however, that such additional omission was not necessarily fatal to the validity of this will. For s 8(2)(b)(ii) allows an appropriate court, as defined, upon being satisfied that the will is that of the testator and that it was made by the testator, to declare it to be valid ex post facto.

Be this as it may, for the reasons aforegoing, I am compelled to conclude that the testator's will was correctly declared to be invalid due to the witnesses having affixed their initials to the first and second pages. I do so with much regret because the effect of this judgment is to defeat the real intention of the testator. But intention is not the criterion. What had to be determined objectively was whether the formalities prescribed by the Act, in order to give legal and binding effect to that intention, had been complied with. They had not.

I would hope that this ruling persuades testators to examine their wills in order to ensure that each page has been signed by the witnesses. If a will bears the initials of a witness on any page, it should be replaced forthwith by one in proper form.

The appeal is dismissed with costs.

McNally JA: I agree.

Korsah JA: I agree.

Mufuka & Phiri, appellant's legal practitioners

Kanokanga & Partners, respondent's legal practitioners

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KEATES v KEATES 1995 (1) ZLR 380 (HC)

Court **High Court, Harare**

Robinson J

Civil application

13 June 1995 Judgment No HH-89-95

Flynote

Family law - maintenance - arrears - whether a wife can claim arrear maintenance for herself

Headnote

A wife who had left her husband applied for an order against her husband for maintenance *pendente lite,* for arrear maintenance for herself and for maintenance for the minor children. In refusing to grant an order for arrear maintenance:

Held, that Rule 274 of the High Court Rules is intended to cater for a spouse who requires current maintenance for himself or herself *pendente lite*; this Rule cannot be used in respect of a claim for arrear maintenance.

Held, further, that in any event, as the law stands at present a wife is not entitled to claim arrear maintenance for herself although she can claim arrear maintenance for her minor children.

Cases cited:

Oberholzer v Oberholzer 1947 (3) SA 294 (O)

Woodhead v Woodhead 1955 SR 70; 1955 (3) SA 138 (SR)

Africa v Africa 1985 (1) SA 792 (SWA)

Muzondo v Muzondo 1985 (2) ZLR 240 (S)

A P de Bourbon SC for the applicant

J C Andersen SC for the respondent

Judgment

Robinson J: This is an application by a wife ("the applicant") for an order against her husband ("the respondent") for maintenance *pendente lite* and for

a contribution towards the applicant's costs of suit in the divorce action instituted by her in this

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court at Bulawayo in case No. HC-3071-92. I pause here to say that there was little point in the applicant's begging leave to incorporate the pleadings in her divorce action in this matter when the case is a Bulawayo one.

After exchanges between me and counsel for the parties in relation to the heads of argument filed by them, I made the order set out at the end of this judgment. However, since the respondent has appealed against the whole of that order (in appealing against the whole of the order, counsel has lost sight of the fact that part of the order, namely, the dismissal of the applicant's claim for arrear maintenance for herself totalling $9 000 was in the respondent's favour) and since, this being an application which was dealt with on the Fast Track Roll, the reasons which, at the time, I gave for my order were of a perfunctory and summary nature, I now amplify the grounds on which my order was based.

At the outset I would point out that a great portion of the papers before the court are taken up with the background to the unfortunate matrimonial rift between the parties, culminating in the applicant having left the parties' matrimonial home in Bulawayo and having moved to Harare with the two minor children of the marriage, namely, Simon Redford Keates (born 10 April 1979) and Sarah Kathryn Keates (born 11 November 1981), to be near the man, one Malamis (hereinafter referred to as "M"), with whom the applicant and the minor children are now living in a house at Greystone Park which M is in the course of purchasing.

In view of the respondent's former love for the applicant and the children of their marriage and the high standard of living which he had generously provided for his family in Bulawayo, the respondent is understandably upset and bitter about the intimate relationship which the applicant has cemented with M and, the more so, about the applicant's having removed the children from his custody and taken them to live with her in Harare.

I turn now to address the applicant's claims, being for an order that the respondent:

(a) pay maintenance for each of the minor children in the sum of $2 500 per month *pendente lite*;

(b) pay arrear maintenance for the applicant totalling the sum of $9 000 for the months February to October 1993, inclusive;

ROBINSON J

(c) contribute the sum of $10 000 towards the applicant's costs of suit;

(d) pay the costs of this application.

I propose initially to deal with claim (b) - that the respondent pay arrear maintenance for the applicant totalling the sum of $9 000 for the months February to October 1993 inclusive - since this claim is easily disposed of on two grounds, namely:

(a) that rule 274 of the High Court Rules is intended to cater for a spouse who requires current maintenance for himself or herself *pendente lite*, as indicated by the reference in sub-rule (2) to a spouse's being without "sufficient means to support himself or

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herself *pendente lite*";

(b) that, further and in any event, as the law presently stands, it appears that the applicant's claim for arrear maintenance founders on a maxim deriving from Voet 2.15.15 - "*Non enim quisquam in praeteritum vivit aut alendus est*", meaning, according to Gane's translation, "a person does not live nor have to be maintained in arrear"; see Hahlo, *SA Law of Husband and Wife* 5 ed at 137 and the cases cited in footnote 67.

In *Oberholzer v Oberholzer* 1947 (3) SA 294 (O) at 298 VAN DEN HEEVER J (as he then was), in dismissing a wife's claim for arrear maintenance for herself, stated as follows at 298:

> "Her claim in respect of arrear maintenance cannot succeed. ... The petitioner does not allege that she incurred debts to subsist - even if she had they would, I take it, be recoverable direct from the husband. Somehow she has managed to subsist and it is trite law that *in praeteritum non vivitur*; in other words, claims in respect of past maintenance are not governed by the same principles as apply to present and future aliment."

In *Woodhead v Woodhead* 1955 SR 70 at 7; 1955 (3) SA 138 (R) at 139D, BEADLE J (as he then was) said:

> "It seems, therefore, that it is fair to regard it as settled law (especially in view of the decision in *Oberholzer's* case *supra*, with which I certainly would hesitate to disagree), that, so far as arrear maintenance for a wife herself is concerned, in the absence of any agreement or any court order, if she has succeeded in maintaining herself without incurring debts she has no claim to arrear maintenance from her husband."

Again, in *Africa v Africa* 1985 (1) SA 792 (SWA) at 794D, STRYDOM J said:

ROBINSON J

> "As far as the applicant's claims for arrear maintenance are concerned, she is barred by the principle *in praeteritum non vivitur* unless she can show that she has incurred debts to keep herself (*Vide* Boberg *The Law of Persons and the Family* at 252)."

Finally, see *Muzondo v Muzondo* 1985 (2) ZLR 240 (S) at 242G-H and 243A-C, in which McNALLY JA referred to the principle *in praeteritum non vivitur* as "a remarkably old-fashioned and unenlightened one". However, in this connection the learned judge went on to remark at 243D that fortunately "perhaps it is not necessary on this occasion to look afresh at the rights of wives in relation to arrear maintenance for themselves".

Accordingly, in view of the applicant's statement in para 4(j) of her answering affidavit that she was able to subsist during the period in question by having recourse to her savings and by receiving financial assistance from M, clearly her claim for arrear maintenance for herself in the sum of $9 000 is ill-founded and must therefore be dismissed.

I would mention in passing that the maxim *in praeteritum non vivitur* does not apply to a claim for arrear maintenance for a minor child. See *Woodhead's* case *supra* at 71-75; 139E-142A, Africa's case *supra* at 794D and *Muzondo's* case *supra* at 242F, 243D-H and 244A-G. See also s 11 of the Matrimonial Causes Act 33 of 1985.

[The remainder of this judgment is not relevant to the report - *Editor*.]

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Stumbles & Rowe, applicant's legal practitioners

Joel Pincus, Konson & Wolhuter, respondent's legal practitioners

MACFARLANE v SENGWENI NO & ANOR 1995 (1) ZLR 384 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA, Ebrahim JA

Civil application

19 & 27 June 1995 Judgment No S-99-95

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(2) - right to fair hearing - civil claim being brought against a person - potential criminal charge arising out of same facts though no charge yet brought - application for stay of civil proceedings pending outcome of criminal case - whether constitutional right to fair hearing would be violated unless civil proceedings were stayed - power of the court to use review powers in such a case

Headnote

At a civil trial in which the applicant was being sued for allegedly insulting and defaming the second respondent (plaintiff) by sending certain offensive material to her, the applicant asked for a stay pending the outcome of any criminal case that might be brought against him. It had emerged during the trial that the plaintiff had, on receipt of the offending materials, reported the matter to the police. The applicant claimed that, unless the proceedings were stayed, his constitutional right guaranteed by s 18(2) of the Constitution to a fair hearing in the criminal case would be adversely affected. He argued that this would happen if evidence were to be given in the civil trial prior to any criminal trial. The magistrate (first respondent) refused the stay but adjourned the trial to allow the applicant to apply to the Supreme Court. In refusing the application for a stay of the civil proceedings pending the holding of any criminal proceedings:

Held, that s 18(2) of the Constitution did not apply, as that section only applies when the applicant has already been charged with a criminal offence and he had not yet been charged with such an offence.

GUBBAY CJ

Held, further, that the Supreme Court could still use its power to review a magistrate's decision and consider whether the magistrate should have exercised his discretionary power under the common law to stay the proceedings. It is usual practice to grant a stay if civil proceedings are likely to prejudice the defendant in related criminal proceedings. Although this can be done where criminal proceedings have not begun, the defendant must show a probability of

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prejudice, otherwise the plaintiff is entitled to have his claims adjudicated on without undue delay. As the police had done nothing for some years in relation to this case, a prosecution was not probable. There was, therefore, no basis for interfering with the ruling by the magistrate.

Held, further, that the reason for the holding of the criminal proceedings before the civil case is that the defendant might be compelled to disclose information in the civil case which would incriminate him in the criminal case. However, the so-called right to silence in criminal cases had been significantly eroded in Zimbabwe, so any disclosure needed to defend a civil case is less likely to prejudice an accused person here, or affect his rights in any criminal case, than it would in England or South Africa.

Cases cited:

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

Whalley v Buchner 1910 CPD 223

Mhinga v Fouche NO en 'n Ander 1994 (3) SA 695 (T)

Gratus & Gratus (Prop) Ltd v Jackelow 1930 WLD 226

du Toit v van Rensburg 1967 (4) SA 433 (C)

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

Jefferson Ltd v Bhetcha [1977] 2 All ER 1108 (CA)

R v BBC; ex p *Lavelle* [1983] 1 All ER 241 (QBD)

Standard Bank v Johnson 1933 CPD 303

Donaldson v Veleris 1936 WLD 84

van Tonder v SA Rly Administration 1929 TPD 128

Wilrose Timbers (Pty) Ltd v C E Westergaard (Pty) Ltd & Ors 1980 (2) SA 287 (W)

Township Mgmt Consultants (Pty) Ltd v Simmons 1991 (3) SA 456 (W)

A Moyo for the applicant

No appearance for the first respondent

R Makarau for the second respondent

Judgment

Gubbay CJ: On 17 May 1993 the second respondent, Odelia Loura Parsell, instituted proceedings in the magistrate's court for the payment of damages

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by the applicant. Two separate causes of action were set out in the summons: In the first, it was alleged that in or about July 1991 the applicant, with intent to injure, had sent offensive written material to the second respondent, thereby impairing her person, dignity and reputation. With regard to the second cause, the allegation was that in or about November 1991, the applicant had published, to members of the apartment building in which the second respondent resided, a letter which was defamatory of her.

The action, which was defended by the applicant, came to trial on 4 October 1994 before magistrate Sengweni, who is the first respondent.

The first witness called by the second respondent was a document examiner. The effect of his evidence was that the written material relied upon as constituting the *injuria* was in the handwriting of the applicant. Thereafter, the second respondent proceeded to testify. During the course of her examination-in-chief she said that, upon receipt of the offensive material, she had reported the applicant to the police. Up to that moment the applicant was unaware that a complaint had been laid. The revelation prompted his legal practitioner to apply to the magistrate for a stay of proceedings, pending finalisation of a somewhat speculative criminal charge, based upon the allegation of the applicant having sent offensive material to the second respondent. It was contended that otherwise the applicant's right, enshrined in s 18(2) of the Constitution of Zimbabwe, to be afforded a fair hearing at the criminal trial, would be infringed. The specific prejudice urged was that the State would be in a position to learn in advance the applicant's defence to the criminal charge; in particular, the nature and content of the evidence of the handwriting expert, which the applicant intended to adduce in the civil suit, would be available to the prosecution prior to the criminal trial. This, so it was stated, would place the applicant at a disadvantage. His right to remain silent would be lost and the State would be able to use the evidence given in the civil proceedings to correct any aspect of its case for the purpose of obtaining a conviction.

The magistrate was singularly unimpressed with this argument and refused the application for a stay. Thereupon the applicant's legal practitioner sought an adjournment of the trial to enable him to approach the Supreme Court for redress. This the magistrate allowed.

The resumed hearing has been set down provisionally for 20 July 1995.

On 7 March 1995 there was lodged with this court an application, purporting

to be brought in terms of s 24(1) of the Constitution. The relief claimed is an order staying the civil proceedings between the parties, pending the outcome of the applicant's criminal trial or the grant by the Attorney-General of a certificate *nolle prosequi.*

I entertain no doubt that the application is misconceived, as indeed was that addressed to the magistrate. A breach, or a threatened breach, of the right protected under s 18(2) of the Constitution can only arise if the person concerned has been **charged** with a criminal offence.

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This was made clear in the case of In re *Mlambo* 1991 (2) ZLR 339 (S). It was there held at 346G-348C that the key word "charged", for the purpose of s 18(2), corresponds with the start of the impairment of the individual's interests in the liberty and security of his person; and, in general, is defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence". It is at that stage that the reasonable time enquiry starts to run; not before.

It was not suggested to the magistrate, nor is such an averment made in the applicant's founding affidavit, that any charge has been formulated. He has not been arrested. No summons citing the commission of an offence involving the second respondent has been issued and served upon him. All that the applicant deposes to is that he was questioned by a police officer in connection with the second respondent's complaint. He does not say that it was intimated to him by the police officer that he had committed an offence. In short, the applicant had not at the date of the application before the magistrate nor, indeed, to the present time, received an official notification of an allegation that he has committed an offence.

It is my view that the only feasible ground upon which the applicant's legal practitioner could have sought a stay of the civil trial, pending the conclusion of anticipated criminal proceedings arising from the same circumstances, was to have prayed in aid the discretionary power that vested in the magistrate to grant such an order in the interests of doing justice between the parties. See *Whalley v Buchner* 1910 CPD 223 at 229.

It is clear to my mind that, even if the application had been properly founded on the common law, the magistrate nonetheless would have refused to stay the civil proceedings. In which event the applicant's sole remedy would have been to take the decision on review to the High Court. See, for instance, *Mhinga v Fouche NO en 'n Ander* 1994 (3) SA 695 (T).

GUBBAY CJ

As the matter is now before this court, albeit brought wrongly under s 24(1) of the Constitution, I propose, somewhat generously, to have recourse to s 23(1) of the Supreme Court Act 1981. This provision gives to every judge of the Supreme Court the same power, jurisdiction and authority as are vested in the High Court and the judges of the High Court, to review proceedings of inferior courts, tribunals and administrative authorities.

Although there is no fixed rule of law in either South Africa or England, the usual practice of the courts in those countries is that if it is shown that the civil proceedings are likely to prejudice the defendant in related criminal proceedings, the court has a discretion to order a stay until the criminal proceedings have been concluded. See *Gratus & Gratus (Prop) Ltd v Jackelow* 1930 WLD 226 at 230; *du Toit v van Rensburg* 1967 (4) SA 433 (C) at 435H; *Irvin & Johnson Ltd v Basson* 1977 (3) SA 1067 (T) at 1072H; *Jefferson Ltd v Bhetcha* [1977] 2 All ER 1108 (CA) at 1113a-d; *R v British Broadcasting Corp*, ex p *Lavelle* [1983] 1 All ER 241 (QBD) at 253e-f and 255g-h; *The Supreme Court Practice* 1988 vol 2 at para 5222.

Standard Bank v Johnson 1933 CPD 303, *du Toit v van Rensburg , supra*, and *Jefferson Ltd v Bhetcha , supra*, were cases where civil proceedings were stayed. In each, the most persuasive

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factor was that criminal proceedings were actually pending. The defendants had been charged.

But, where there is no certainty that criminal proceedings will be instituted, the almost invariable practice is not to grant a stay of the civil suit. For prejudice must be established as a probability. See *Donaldson v Veleris* 1936 WLD 84 at 87. It is not sufficient that criminal proceedings are only feared; they must be pending against the party seeking the indulgence. See *van Tonder v SA Rly Administration* 1929 TPD 128 at 131 and 132; *Wilrose Timbers (Pty) Ltd v C E Westergaard (Pty) Ltd & Ors* 1980 (2) SA 287 (W) at 294H-295A.

In *Township Mgmt Consultants (Pty) Ltd v Simmons* 1991 (3) SA 456 (W), a more flexible approach was applied by SCHABORT J He was prepared to assume, without deciding, that it may be just and equitable in suitable circumstances to stay civil proceedings in anticipation of criminal proceedings that have not been instituted. On the particular facts of the matter, however, the learned judge refused a stay, explaining at 461A-B that:

> "It is uncertain, firstly, as I have indicated, whether criminal prosecution will be instituted against the respondent and if so when that will happen.

GUBBAY CJ

> It is not even possible with reference to the available information to answer these questions on a basis of established probabilities. There are important considerations from the applicant's point of view who has a right and interest to insist upon adjudication of its claims without any undue delay founded on speculative contingencies."

I can perceive of no cogent reason why the practice of the jurisdictions mentioned should not be followed. It is a practice that strikes me as eminently sensible, taking into account, as it does, that there is a real danger, and not merely a notional one, of a miscarriage of justice occurring in the criminal trial should the court fail to stay the civil proceedings.

The adoption of this approach satisfies me that the magistrate was correct in concluding that a stay of proceedings was not justified.

The complaint was laid by the second respondent as far back as 1991. Yet to the present time no steps have been taken to prosecute the applicant in connection therewith. It does not seem to me, therefore, that the applicant has established a real risk of prejudice being caused him consequent upon the resumption of the civil trial.

Moreover, it is important to note that the nature of the prejudice debated in the decisions where a stay has been ordered, is that arising from the possibility that the defendant might be compelled to disclose information in the civil proceedings directly affecting his so called right to silence in the criminal proceedings. See *Gratus & Gratus (Prop) Ltd v Jackelow supra* at 230; *du Toit v van Rensburg supra* at 435 *in fine* - 436A; *Jefferson Ltd v Bhetcha supra* at 1113e.

The right to silence carries less weight in this country than it does in South Africa and England. This is because it has been eroded to a significant extent by ss 163(4a), 163A(2), 188(6) and 188A(1) of the Criminal Procedure and Evidence Act [*Chapter 59*]. Under these provisions, an accused person must outline his defence to the charge and if he fails to mention any fact relating to such defence, the court may draw an adverse inference against him. Should he

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decline to give evidence, the prosecution and the court may nevertheless question him and a refusal to answer any question without just cause may lead the court to draw an adverse inference against him.

For these reasons I would dismiss the application with costs and order that the trial between the parties be resumed on 20 July 1995.

GUBBAY CJ

Korsah JA: I agree.

Ebrahim JA: I agree.

Coghlan, Welsh & Guest, applicant's legal practitioners

Makarau & Gowora, second respondent's legal practitioners

MADHIMBA v ZIMBABWE NEWSPAPERS (1980) LTD 1995 (1) ZLR 391 (HC)

Court **High Court, Harare**

Annotations Link to Case Annotations

Bartlett J

Civil trial

27 & 30 June 1995 Judgment No HH-77-95

Flynote

Delict - defamation - defamatory nature - letter from reader to news-paper criticising news bulletins on television and news readers - meaning to be given to words - meaning that would be understood by ordinary readers of newspaper in which words appeared - defamatory nature of words - test - right thinking members of society - when views of a section of society may be considered -

Delict - defamation - defences - fair comment - criticism in letter to newspaper of television news reader's demeanour - plaintiff - public personality - should expect criticism - nature of criticism permissible

Delict - injuria - allegation that newspaper article constituted injuria - test to be applied - defences applicable to defamation also applicable

Headnote

The plaintiff sued the defendant company for damages for defamation arising out of a letter to the editor published in *The Chronicle*, a newspaper published by the defendant. The letter was critical of news bulletins broadcast by Zimbabwe Television, both as to their content and in respect of the news readers. The section of the letter referring to the plaintiff commented on his

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demeanour as a news reader. The plaintiff alleged that the words used intended and were understood by ordinary readers of the newspaper to mean that the plaintiff lacked skill and ability, that his comportment was disgraceful and foolish, that he resembled gloom and death and was an unwitting tool of communist forces within the country. It was also alleged that the ordinary meaning of the words was defamatory of the plaintiff and was insulting, injurious and contumelious towards him and was intended to impair his dignity

and self-esteem. The plaintiff relied not only on the ordinary meaning of the words, but also on a meaning which went beyond the literal meaning but was inherent in them. When requested for particulars of the extended meaning, the plaintiff stated that there was an inherent suggestion that he had obtained his position other than through ability.

The defendant admitted publication, but denied that the letter bore the defamatory meanings alleged. The defendant pleaded fair comment, in that the facts on which the comment was based were true and that the matter was one of public interest. Alternatively, the defendant pleaded justification, in that the statement was true; alternatively, it pleaded qualified privilege.

The plaintiff's evidence was that he was a news reader with ZTV. He outlined the qualities which a news reader should have and accepted that he was of a quiet, phlegmatic and serious demeanour. That was the way he approached the reading of news bulletins, though he smiled when a smile was appropriate. The editor of *The Chronicle* indicated that he had the highest professional regard for the plaintiff, whom he regarded as a serious news reader, but he regarded the words complained of as fair criticism of the plaintiff as being too serious a news reader. Neither party produced a video tape containing an example of the plaintiff reading a news bulletin at the relevant period, October - November 1990. It was common cause that the plaintiff should be amenable to criticism, but what had to be determined was whether the boundary had been crossed from criticism to *injuria*.

Held, that the first question to be decided was whether the words complained of were capable of bearing the defamatory meaning attributed to them. This was a question of law, so evidence of how witnesses understood the words was inadmissible. Although the first sentence complained of could, at a considerable stretch, be understood in the way alleged, there was no difficulty in making such a finding in respect of the rest of the passage.

Held, further, that the next part of the enquiry was whether the meaning pleaded was the meaning which would probably be reasonably understood. This required the application of the "ordinary reader" test. In this enquiry, the court must eschew any intellectual analysis and must be careful not to attribute to an ordinary reader a tendency towards such an analysis. It should be careful not to substitute its own views for those of the ordinary reader of the newspaper concerned. The offending passage should also be looked at in its context. In this regard, the comment was part of a letter which criticised other news readers. Part of the comment was also about the contents of the bulletins, not the reading of them, and

the ordinary reader would not attribute to the plaintiff responsibility for the contents. The rest of

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the words, which were critical of the plaintiff, would be understood by the ordinary reader as a criticism that he was far too serious and grim in reading the news and should smile more often. The ordinary reader would not construe the words as meaning that the plaintiff was a communist tool, nor that he was incompetent, nor that he was revolting, disgraceful and foolish, nor that he resembled gloom and death.

Held, further, on the question of whether the meaning as identified is defamatory, that what had to be decided was whether the offending statement was calculated to bring the plaintiff into contempt or undue ridicule, or was calculated to diminish the willingness of others to associate with him, or was calculated to lower him in the estimation of "right thinking" members of society generally. Applying the "right thinking" test, it could not be said that the ordinary, reasonable reader, having regard to the offending statement, would think any more than that the plaintiff read the news in too grim or serious a fashion, and should smile more often. Although it was possible to apply the "right thinking" test to a section of the community, the section should be a substantial and respectable portion of the community. To apply a sectional test which would assist the plaintiff, the test would have to be of a very small section, possibly consisting of fellow journalists.

Held, further, that even if the statements could be regarded as defamatory, that in order to establish the defence of fair comment, the defendant needed go no further than establishing - which was common cause - that the plaintiff was a news reader and was of serious demeanour. The requirement that the comment be based on facts expressly stated or clearly indicated in the letter was established. With regard to whether the comment was "fair", the fact that the language complained of is violent, exaggerated or unjust will not render it unfair. Public performers may be freely criticised, and such criticism is not actionable as long as it is the honest expression of the critic's real views and not mere abuse or invective. The plaintiff, as a news reader, was in a similar situation and by the very nature of his situation must expect criticism. There is also a far greater latitude allowed in criticising the acts of public men that would be allowed in the case of private individuals, although no writer is allowed to go beyond the limits of fair comment and *bona fide* criticism. It is one thing to criticise, even severely, but another to assert misconduct or improper motives. In this case, even if the comments made about the plaintiff were exaggerated or prejudiced, they did not go beyond the bounds of legitimate criticism.

Held, further, that it was also relevant that the comments were in a letter from a reader and were not an editorial comment. An ordinary reader would have treated it accordingly.

Held, further, that although all people are able to be stung or hurt by criticism, the right to criticise is the lifeblood of a free land. Those who choose to appear in the public eye - be they politicians, sports personalities or news readers - should have the strength of character to disregard and forget that which is ill-informed or biased, and to accept and learn from that which is fair and correct. To say of a news reader that he is is too grim and serious and should smile more often is well within the bounds of the criticism and fair comment to be expected by a person in his position.

Held, further, as to whether *injuria* had been established, that the criteria of reasonableness

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should applied to decide whether the conduct complained of can be classified as wrongful. The defences applicable to defamation would also apply. The comments made of the plaintiff could not be regarded as insulting, injurious or contumelious.

Claim dismissed.

Cases cited:

Chinamasa v Jongwe P & P Co (Pvt) Ltd & Anor 1994 (1) ZLR 133 (H)

Sutter v Brown 1926 AD 155

Beesham v The Solidarity Party & Anor 1991 (3) SA 889 (N)

Johnson v Beckett 1992 (1) SA 762 (A)

Channing v SA Financial Gazette & Ors 1966 (3) SA 470 (W)

Die Spoorbond & Anor v SA Rlys 1946 AD 999

Morgan v Odhams Press Ltd & Anor [1971] 2 All ER 1156 (HL)

Demmers v Wyllie & Ors 1980 (1) SA 835 (A)

Dorfman v Afrikaanse Pers Publikasies (Edms) Bpk en Andere 1966 (1) PH J9 (A)

Ngcobo v Shembe & Ors 1983 (4) SA 66 (D)

Sim v Stretch [1936] 2 All ER 1237 (HL)

Velempini v Eng Svcs Dept Workers' Cttee for the City of Bulawayo & Ors 1988 (2) ZLR 173 (H)

Neethling v The Weekly Mail 1994 (1) SA 708 (A)

Marais v Richard en 'n Ander 1981 (1) SA 1157 (A)

Heard v Times Media Ltd & Anor 1993 (2) SA 472 (C)

Crawford v Albu 1917 AD 102

Kemsley v Foot & Ors [1952] 1 All ER 501 (HL)

Stokes v Sutherland [1924] HL Printed Cases 375

Walter v Powrie (1877) 7 Buch 35

Shepstone v Davis & Sons (1886) 11 AC 187

BARTLETT J

Min of Justice v SA Assoc Newspapers Ltd & Anor 1979 (3) SA 466 (C)

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Pelser v SA Assoc Newspapers Ltd & Anor 1975 (1) SA 34 (N)

Pienaar & Anor v Argus P & P Co Ltd 1956 (4) SA 310 (W)

de Lange v Costa 1989 (2) SA 857 (A)

Zimbabwe Newspapers (1980) Ltd v Zimunya 1995 (1) ZLR 364 (S)

J C Andersen SC for the plaintiff

T Biti for the defendant

Judgment

Bartlett J: This is an action for defamation and injuria. The plaintiff is suing for $20 000 damages in respect of the contents of a letter published in *The Chronicle*.

THE PLEADINGS

In para 5 of the plaintiff's declaration, it is alleged that on 2 November 1990 in the Friday issue of *The Chronicle*, the defendant maliciously published of and concerning the plaintiff the following words:

> "Joseph Madhimba who cut his teeth on those dated comments that used to disgrace the main news in our unrepentant red days sounds like a grim death's head. I saw him conducting an interview the other day. He smiled."

I should add that, as Mr *Andersen* pointed out in argument, there was what he politely called a typing error in the declaration and the words "looks and" should have been included before the words "sounds like a grim death's head". That this error existed emerges from the letter itself which was not annexed to the pleadings but which was produced during the trial. The plaintiff's declaration in para 6 as amended alleges that the said words in the context of the article are wrongful and defamatory of the plaintiff, in that they were intended and were understood by readers of the article to mean that:

"(a) the plaintiff lacks skills and ability to discharge the duties of his office;

(b) the plaintiff's comportment is revolting, disgraceful and foolish;

(c) the plaintiff resembles gloom and death; and

(d) the plaintiff is an unwitting tool of communist forces within the country."

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and that

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"In any event the ordinary meaning of the said words are *per se* defamatory of the plaintiff."

Paragraph 7 of the plaintiff's declaration alleged in alternative to para 6 that -

"and in any event the publication was insulting, injurious and contumelious towards the plaintiff and was intended by defendant to impair the plaintiff's dignity and self esteem."

In response to the declaration, a request for further particulars was filed asking whether in averring that the words in question were defamatory of the plaintiff, the plaintiff was relying on their "natural and ordinary meaning; or on a meaning of the words which goes beyond the literal meaning of the words or on a secondary meaning of them or a legal innuendo based on particular facts or matters". To this request, the plaintiff supplied further particulars, stating that the plaintiff was relying both on the "ordinary meaning and on a meaning of the words which goes beyond the literal meaning but which is inherent in them".

Then, having received this reply, the defendant requested further and better particulars, asking the plaintiff precisely what meaning it ascribed to "the words which go beyond their literal meaning". The plaintiff's further and better particulars stated that there was inherent in the words a tongue-in-cheek suggestion that the plaintiff had retained his job other than through ability. Accordingly, the innuendo (or *quasi*-innuendo) alleged in the declaration was considerably reduced in the subsequent pleadings filed by the plaintiff to a much more watered down allegation.

The defendant then filed its plea. It denied that the publication was malicious but admitted the publication. The defendant denied that the words complained of bore the defamatory meanings alleged by the plaintiff or any other meaning injurious to the plaintiff's reputation. The defendant also denied that the publication was insulting, injurious or contumelious towards the plaintiff. In an amendment to the defendant's plea filed shortly before the trial, the defendant included, as para 4 of the plea, the defence of fair comment, pleading that in any event the words complained of insofar as they were expressions of opinion constituted fair comment in that -

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"(a) the facts upon which the comment was based are true, and these are that *inter alia,* the plaintiff is of a solemn and serious demeanour;

(b) that the matter was one of public interest;

(c) that the comment was fair in the circumstances."

In the further alternative, the defendant pleaded that the words were in their context in essence true and that the publication of the words was in the public interest. Accordingly, in addition to fair comment the defendant was pleading the defence of justification. In yet a further alternative, the defendant pleaded that the words were published on a privileged occasion, that is, that the defendant was also pleading qualified privilege.

Effectively, the defendant was putting forward what might be described as, a full house defence - the statement complained of was not defamatory but, if by some chance it was found to be

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defamatory, all (or at least one) of the defences known to law would apply.

There was a request for further particulars for trial and such particulars were provided. I do not, however, consider it necessary to burden the judgment with a summary of those particulars. Having outlined the pleadings, it is necessary to briefly summarise the evidence led before moving to consider the pleadings and the various convoluted legal issues involved.

SUMMARY OF THE EVIDENCE

Not a great deal turns on the evidence led. In their lengthy addresses, neither counsel sought to comment on the credibility or probabilities of the evidence as led by the plaintiff, Joseph Madhimba, or the defendant's witness, the editor of *The Chronicle,* the defendant newspaper. Accordingly there was little, if any, dispute of consequence on the verbal evidence.

THE PLAINTIFF'S EVIDENCE

The basis of the plaintiff's evidence was that he was the head of TV news at the Zimbabwe Broadcasting Corporation, a post he had held for six years. He produced a copy of his job description and described his background and an impressive list of qualifications. Of particular relevance is the plaintiff's description of the qualities required of a news reader. He stated that a news presenter must be a knowledgeable person with wide horizons. He emphasized that a news reader should be sound, sober, serious-minded and businesslike

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in order to be able to convince viewers of the veracity of what was being read. The plaintiff also indicated that a news reader must be presentable. Not necessarily handsome, or pretty, but presentable. If a news reader were not presentable, that would be flaw of a serious nature. A person with an unattractive television presence or appearance would be unsuitable to be a newscaster.

The plaintiff also described an image survey carried out by the ZBC. The relevant portion of this detailed survey carried out in June 1994, concerning the popularity of newscasters, was produced. This made it quite clear that, in the eyes of the public, the plaintiff emerged without any serious rival as Zimbabwe's most popular newscaster.

The plaintiff gave his view of the meaning of the words particularised in para 5 of his declaration. The plaintiff, of particular relevance, described himself as being quiet and phlegmatic by nature. He stated that he was extremely hurt to be likened to a grim death's head. He indicated that that would create a decidedly negative impact. He emphasized that the use of the word "dead" was very painful and made it appear as if he looked like a corpse. In the culture of the majority of Zimbabwe's population, the connotation would be that he was so useless that he may as well be dead.

The plaintiff accepted that he was of serious demeanour and emphasized that it was not his habit to joke with the news. He indicated that news bulletins were by their very nature serious and should be read seriously, but said that there would be certain articles, in the course of a

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news bulletin, where it would be appropriate to smile. Accordingly, news bulletins should be read as appropriate. The newscaster should be serious where necessary, but where there were lighthearted stories the demeanour should also be light-hearted in line with the story. He stated that his approach as a newscaster was in accordance with these requirements.

The plaintiff described the effect of the letter in *The Chronicle* as being extremely negative. One of his functions, as head of the TV news department, was to be responsible for training sessions for TV newscasters and he said that attendance at these training sessions had dropped after the publication of the offending letter. There were also snide comments made about him in the corridors of the ZBC and by some people he met in the street.

The plaintiff did not agree that the article was humorous or satirical. He stated that the matter had been brought to court as a matter of principle. He had not

wished it to come all the way to court and had hoped that the sister media organizations, the ZBC and *The Chronicle,* could resolve it by an apology. But when an apology was not forthcoming he had no choice but to come to court on principle. It was pointed out to him that his letter of demand had, right from the start, required damages in the amount pleaded and he accepted that that was the case.

The plaintiff gave his evidence clearly and there were no adverse suggestions made in argument in regard to his credibility. His evidence must obviously be regarded as evidence given credibly and well. He accepted that he could be regarded as having a serious demeanour as a news reader - but that he smiled when appropriate.

THE DEFENDANT'S EVIDENCE

The defendant called Stanley Mpofu, the editor of *The Chronicle*, who was also the editor of the newspaper at the time in question. His evidence was to the effect that the letter in question could be regarded as a comment on a matter of public interest in that it related to a public figure who read the news and who, the witness believed, could be criticised - albeit in a manner not damaging to reputation. He indicated that his understanding was that the plaintiff was a very serious news reader, and that he rarely smiled. He regarded the wording complained of in the letter as metaphorical used to heighten the criticism of the plaintiff as too serious a news reader.

He stated, under cross-examination, that he had the highest professional regard for the plaintiff. He maintained that he did not consider the article defamatory and considered that it constituted fair criticism of the plaintiff. Once again, no argument was led to suggest that Mr Mpofu's evidence contained any weaknesses and, like the plaintiff, he gave his evidence clearly and well.

THE VIDEOTAPE

Before turning to analyze the law on the matter, I should point out that I was handed a video

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tape containing, amongst other things, an example of the plaintiff reading a news bulletin in June 1994. The video was, however, left hanging in the air. It was handed to me by Mr *Andersen,* for the plaintiff, and I was informed that arrangements may be made for the video to be shown in court - but that it would not be considered inappropriate if I simply looked at the video myself. After that no further reference was made to the video, although it had been produced as an exhibit.

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I was somewhat surprised that neither party had produced a video relating to the plaintiff reading a news bulletin at the relevant time, that is, October/November 1990. A video of the plaintiff reading a news bulletin in June 1994 is, to my mind, of no particular relevance to the matter. It cannot be assumed that the plaintiff's manner of reading the news in 1994 over three years after the publication concerned would be the same as it was in November 1990. It should not have been an insuperable task for the defendant to have obtained video footage of the plaintiff reading the news in October 1990 or thereabouts. It could have asked the ZBC (shortly after receiving summons) for video footage of news bulletins read by the plaintiff and tendered the necessary fee. If there were any difficulty it would, to my mind, have been relatively simple for the defendant to have asked the plaintiff to assist by providing relevant video footage. If the plaintiff declined to assist, that may have been a matter which the defendant could have sought to emphasize in court.

Similarly, in regard to the plaintiff, it seems to me that it would have been a matter of common sense to have produced a video dating back to October or November 1990, as opposed to one in June 1994. It should have been easy for the plaintiff as head of the TV news to have obtained and provided such a video. Although I have looked at the video, I must admit that I have always regarded the plaintiff as a very capable and professional news reader. The result of the survey making him unquestionably the country's most popular news reader does not surprise me at all. But this case is not about my view of the plaintiff as a news reader. It is common cause that the plaintiff should be amenable to criticism. The case is about whether the boundary has been crossed from criticism to defamation or from criticism to *injuria.*

APPROACH IN APPLYING THE LAW

Having outlined the pleadings and summarized the evidence led and made reference to the exhibits produced, I must now outline the law to be applied in properly considering the matter. I am in agreement with Mr *Biti*, for the defendant, that I should adopt the approach which I also adopted in *Chinamasa v Jongwe P & P Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H) in dealing with the legal aspects of the matter. This requires a three pronged approach. I first need to decide whether the words complained of are capable of bearing the meaning attributed to them, that is, whether the defamatory meaning alleged is within the ordinary meaning of the words. I then need, secondly, to decide whether that is the meaning according to which they would probably be reasonably understood. Thirdly, I need to decide whether the meaning identified is defamatory.

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I should point out that this approach would require to be modified if there were a need to determine the possibility of an innuendo or *quasi* innuendo. Accordingly, I need to point out that although there was reference in the pleadings to a secondary meaning, nothing was led in evidence in regard to the secondary meaning, and not a word was addressed in argument, by either the plaintiff or defendant's counsel, in regard to the innuendo or secondary meaning pleaded. I can understand why there was no reference to that aspect of the pleadings in evidence or argument. I am satisfied that there clearly would be no basis on which it could be stated that the language complained of suggested "in a tongue-in-cheek manner" the conclusion that the plaintiff retained his job other than through merit. Accordingly, there is no need to deal with the question of the innuendo alleged. I would reiterate that the wide innuendo (or quasi-innuendo) alluded to in the declaration was greatly narrowed in the further particulars and further and better particulars, provided by the plaintiff, to the very limited "tongue-in-cheek" allegation. I now deal with the matter on the basis outlined in *Chinamasa v Jongwe P & P Co (Pvt) Ltd & Anor supra*.

WHETHER THE DEFAMATORY MEANING ALLEGED IS WITHIN THE ORDINARY MEANING OF THE WORDS

The first aspect which I need to look at is whether the words are capable of bearing the meaning attributed to them, that is, whether the defamatory meaning alleged is within the ordinary meaning of the words. This question is for myself alone - see *Sutter v Brown* 1926 AD 155 and *Beesham v The Solidarity Party & Anor* 1991 (3) SA 889 (N) at 892.

A substantial amount of evidence was led by both sides to show how their witnesses understood the words in question. I would in this regard refer to the observation by ALEXANDER J in *Beesham v The Solidarity Party & Anor supra* at p 892G where he states:

> "One would think by now that practitioners would know that such evidence is inadmissible where the issue is whether or not the statements are defamatory *per se*."

I do appreciate that there was the question of the innuendo referred to in the pleadings. But the innuendo, as clarified in the further particulars and further and better particulars, was one of the few aspects that was not dealt with in evidence as to the meaning of the words. I must, accordingly, exercise the court's judgment as to whether the words are capable of bearing the meaning

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attributed to them, that is, whether the defamatory meaning as alleged is within the ordinary meaning of the words.

I will look initially at the first part of the words complained of, namely:

> "Joseph Madhimba who cut his teeth on those dated comments that used to disgrace the main news in our

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unrepentant red days."

I need to consider the argument addressed by Mr *Andersen,* who appeared for the plaintiff. Mr *Andersen* said that the letter contained a general attack and a mixture of fact and comment. He stated that it contained a personal attack on the physical characteristics of the plaintiff and included an attack on his professionalism - suggesting that he was not professional in his delivery or compilation of the news. In particular, with regard to the words to which I have referred, Mr *Andersen* stated that the words complained of contained an attack that the plaintiff used dated, and he emphasized the word "dated", comments that disgraced the main news. He also emphasized the word "disgraced", and the reference to the "unrepentant red days", which in the context, he argued, was plainly intended to be derogatory. I need to consider this argument against the basis of the complaint, as pleaded, namely, that the words indicated that the plaintiff lacked the skill and ability to discharge the duties of his office, that his comportment was revolting, disgraceful and foolish, that he resembled gloom and death and that he was an unwitting tool of communist forces within the country.

My view of that first sentence, in the words complained of, is that it would be stretching the meaning of those words to conclude that the ordinary meaning thereof is that suggested by the plaintiff. They seem to me to be more akin to meaningless abuse. However, in order to be as fair as possible to the plaintiff, I am prepared to accept that, at a considerable stretch, the defamatory meaning of the words alleged may be within the ordinary meaning of the words. The crunch in regard to the first phrase of the words complained of will be when the second and third steps of the approach are applied to those particular words.

I turn now to deal with the remainder of the words complained of and that is that the plaintiff, Joseph Madhimba, "looks and sounds like a grim death's head. I saw him conduct an interview the other day. He smiled." Mr *Andersen* argued that this was a personal attack on the physical characteristics of the plaintiff and that it constituted an attack on his professionalism, suggesting that he was not competent in his delivery of the news. Mr *Andersen* referred

the court to a number of authorities indicating that an allegation of a lack of professionalism, in broad terms, is *prima facie* defamatory. He referred to *Johnson v Beckett* 1992 (1) SA 762 (A) in support of his contention, and that case certainly does uphold that contention. He also referred to *Channing v SA Financial Gazette & Ors* 1966 (3) SA 470 (W) at 475G-H, where it is stated that it is defamatory, if nothing more is done than to impute weakness in the sense of incompetence in one's calling. A similar approach was laid down in *Die Spoorbond & Ors v SA Rlys* 1946 AD 999 at 1007.

I am satisfied that when one looks at the pleadings, on the basis of the approach laid down in these authorities, that the meaning attributed to the words complained of is within their ordinary meaning.

I am, accordingly, satisfied that applying the first stage of the three-stage test, referred to in *Chinamasa v Jongwe P & P Co (Pvt) Ltd & anor , supra*,, that it must be accepted that the words are capable of bearing the meaning attributed to them, that is, the defamatory meaning

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alleged is within the ordinary meaning of the words. I, however, emphasize, in regard to the first sentence complained of, that my view is that this is really stretching the ordinary meaning to the very limits.

THE ORDINARY READER TEST

I must now turn to apply the second part of the test which I have referred to and that is whether the meaning pleaded is the meaning which would probably be reasonably understood. This requires the application of the ordinary reader test. In this regard, I would refer to the authorities listed in *Chinamasa v Jongwe P & P , supra*, at 34 to 40, where the approach in applying the ordinary reader test is analysed. Particular reference needs to be made to the approach referred to in *Morgan v Odhams Press Ltd & Anor* [1971] 2 All ER 1156 (HL). A relevant observation in that matter, quoted with approval in *Demmers v Wyllie & Ors* 1980 (1) SA 835 (A) relating to the care with which an article is read, is as follows:

> "Further, it was said that what must be contemplated is that a person would read an article with care. With respect, I do not agree. What must be contemplated is a reading of a newspaper in what a jury would consider to be the ordinary way in which a newspaper article would be read. The average reader does not read a sensational article with cautious, critical and analytical care" (*per* LORD MORRIS at 1170f-g).

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Further relevant observations were made by LORD PEARSON at 1181g-h:

> "The article was written so as to be sensational rather than informative, and allusive rather than specific. The sequence of events and the connections between them are far from clear, especially on a first reading which is the only reading which an article of this character is likely to receive."

And at 1184d-f:

> "Regard should be had to the character of the article. It is vague, sensational and allusive; it is evidently designed for entertainment rather than instruction or accurate information. The ordinary, sensible man, if he read the article at all, would be likely to skim through it casually and not give it concentrated attention or a second reading. It is no part of his work to read this article nor does he have to base any practical decision on what he reads there. The relevant impression is that which would be conveyed to an ordinary sensible man (in this case having knowledge of the relevant circumstances) reading the article casually and not expecting a high degree of accuracy."

The overall approach to be adopted is aptly summarised by HOLMES JA in *Dorfman v Afrikaanse Pers Publikasies (Edms) Bpk en Andere* 1966 (1) PH J9 (A) at 45 where the learned JUDGE OF APPEAL stated that -

> "A court deciding whether a newspaper report is defamatory must ask itself what impression the ordinary reader would be likely to gain from it. In such an inquiry the court must eschew any intellectual analysis, of the contents of the report and of its implications, and must also be careful not to attribute to the ordinary reader a tendency towards such analysis or an ability to recall more than an outline or overall impression of what he or she has just read. Furthermore, in view of the mass of material in a newspaper, it is in general unlikely that the ordinary reader would peruse and ponder a single report in isolation."

I am satisfied that this is the sort of approach which one would expect of an ordinary reader of *The Chronicl*e. No evidence was led as to the ordinary readership of *The Chronicle*, but I think it is not inappropriate for the court to note that *The Chronicle* is the leading daily newspaper in

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Bulawayo. It would be regarded as a newspaper, to my mind, read by average, ordinary members of the public. It is not a newspaper to be regarded as having a limited

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readership or readers of a particular intellectual bent. I think it appropriate to emphasize (in the words of LORD PEARSON) that the letter in question was written, in my view, so as to be sensational, rather than informative, and allusive, rather than specific.

I finally emphasize that in approaching this matter I need to take careful note of the comments made by LEON J in *Ngcobo v Shembe & Ors* 1983 (4) SA 66 (D) at 71B-G where it is stated that -

> "The technique of interpretation which is required is a matter of great importance. It is a hangover from the jury system and is by no means free from difficulty. For a court must attempt the difficult task of striving to read the article through the eyes of an 'ordinary reader'. Frequently, the court attempting this task (as here), does not qualify as an ordinary reader at all, *inter alia*, because those articles in a newspaper which are read are read with close attention and critically at that. In most circumstances the subconscious temptation to substitute one's own views for those of the ordinary reader may be strong, and in some cases, I suspect, has proved fatally irresistible. Within the limits of my ability I have endeavoured to guard against this danger."

I also endeavour, within the limits of my ability, to guard against that danger in applying the ordinary reader test. As pointed out in Burchell *The Law of Defamation in South Africa* at p 84, this test should be applied by looking at the offending statement in the light of the article as a whole.

The learned author quotes MULLER JA in *Demmers v Wyllie supra* as follows:

> "The reasonable person or reasonable man is a person who gives a reasonable meaning to the words used within the context of the document as a whole and excludes a person who is prepared to give a meaning to those words which cannot reasonably be attributed thereto."

APPLYING THE ORDINARY READER REST

To my mind the ordinary, reasonable reader, glancing quickly through the letter, on the basis of the authorities to which I have referred, would initially have his attention drawn to the headline above the letter - NEWS IS A BIG BORE. He would then, on glancing through the letter, see that it was a criticism of the content of news bulletins shown on ZTV, and of the news-casters. He would note Noreen Welsh being criticised as being "hardly a ball

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of fire", with the black lady newsreaders criticised as being "wound automata". Here, I must say that the ordinary reader might have difficulty in understanding what was meant by the words "wound automata", particularly on a quick read of the letter. The ordinary reader, on leaving the words "wound automata", would then see the comments about the plaintiff.

Here I need to deal with the matter particularly carefully. I do not consider that the ordinary,

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reasonable reader reading the words "Joseph Madhimba who cut his teeth on those dated comments that used to disgrace the main news in our unrepentant red days" would consider that Joseph Madhimba was maligned in any way by those words. The criticism is clearly directed at the comments, not the reading thereof. I do not consider that the ordinary, reasonable reader would know that Joseph Madhimba, apart from being the news reader, was also the head of the news department and responsible, at least in part, for writing the comments referred to. I do not consider that the ordinary, reasonable reader would understand anything from those words other than a criticism of the content of the news bulletins read by the plaintiff. He would not think the newscaster, or newsreader, was responsible for the content of the bulletins. It would only be a reader, who was aware of the precise responsibilities of Joseph Madhimba, who might draw that connotation. I do not consider that the ordinary, reasonable reader, of the nature that I have described, with average knowledge and intelligence, would be such a person

To my mind, the ordinary, reasonable reader, continuing to read the letter, would then note that the letter was also critical of the plaintiff. The ordinary reader would, to my mind, understand that the criticism of the plaintiff was that he was far too serious and far too grim in his approach to reading news bulletins. The words "looks and sounds like a grim death's head. I saw him conduct an interview the other day. He smiled" can, to my mind, only indicate to the ordinary, reasonable reader that the plaintiff was far too serious and far too grim in reading the news and that he should smile more often. The ordinary reader would then glance through the remainder of the letter, noting that it made suggestions as to alterations in the timing of news bulletins and further comments as to their contents.

Accordingly, my overall view is that the ordinary, reasonable, reader glancing quickly through the letter, would regard it as criticising the plaintiff for being too grim, too serious and as suggesting that he should smile more often. In my view, the ordinary reader would then probably turn to read the adjoining cartoon, *Hägar the Horrible,* before glancing at the remaining letters and then continuing with his quick read through the newspaper. I do

not consider that the ordinary, reasonable reader, from his quick run through of the letter, would think that the plaintiff was a communist tool. Nor do I think that the ordinary, reasonable reader would think that the plaintiff was professionally incompetent and should not be reading news bulletins. I also do not consider that the ordinary reader would believe that the plaintiff's comportment was revolting, disgraceful and foolish, or that the plaintiff resembled gloom and death. I do not consider that the ordinary reader would take the metaphorical wording literally. If someone, for example, was said to be as cool as a cucumber I do not think a reader would think that that person was a cucumber. Or if someone is said to be as cold as a fish I do not think that a reasonable reader would think that that person was a fish.

To my mind, the reader of the letter in question would be reading the letter because he probably had watched news bulletins; he would agree or disagree with the comments in the letter and then carry on reading the rest of the newspaper. I think it would be attributing far too much to the mentality of the ordinary reader of the letter to draw any connotation other than too

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serious, too grim and not smiling enough. Bearing in mind that the ordinary reader is reasonable, of average intelligence and knowledge, I do not think the ordinary reader would analyse the article and conclude in particular, that the plaintiff should not be reading the news at all and was incapable of so doing. I emphasize that the authorities specifically indicate that the ordinary reader would eschew intellectual analysis, and in any event, a reader of average intelligence and knowledge would, in my view, appreciate a metaphor.

THE RIGHT THINKING TEST

Having made my assessment as to the application of the ordinary, reasonable reader test, I must now consider the third stage of the approach, as laid down in *Chinamasa v Jongwe P & P supra*, that is, whether the meaning as identified is defamatory. This is generally judged on the right thinking test - see *Simm v Stretch* [1936] 2 All ER 1237 (HL). As pointed out by Mr *Biti,* the proper approach was explained by Muchechetere J (as he then was) in *Velempini v Eng Svcs Dept Workers' Cttee for the City of Bulawayo & Ors* 1988 (2) ZLR 173 (H) at 178G-H, where the learned judge stated that the approach is whether the offending statement -

> "is calculated to bring another person into contempt, or undue ridicule, or which is calculated to diminish the willingness of others to associate with the plaintiff or which is calculated to lower him in the estimation of right thinking or reasonable members of society generally."

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IS THE RIGHT THINKING TEST NECESSARY?

I should emphasize that the application of the right thinking test, to my mind, is essentially similar to the application of the ordinary reader test. This point is made by Burchell *op cit* at p 97, where the learned author points out that it seems that when they refer to "right thinking" persons, the South African courts are almost always expressing the reasonable or ordinary reader test in a different form. He adds that, if this is so, the right thinking test serves no meaningful purpose and may lead to ambiguity and difficulty because of the dual sense in which "right thinking" can be interpreted. He, accordingly, suggests that the test should be abandoned and that the workable, and well tried, test of reasonableness should alone be applied. While I sympathise with the comments of the learned author, my view is that although the two tests are very similar, in order to properly assess this matter, it is important for me to apply the right thinking test as laid down in the various authorities. The right thinking test is clearly entrenched in Roman-Dutch law and a decision to dispense with it as the fifth wheel on the coach is not within the province of this court.

APPLYING THE RIGHT THINKING TEST

I now apply the right thinking test, based on my findings, as to the meaning understood by an ordinary reader. I do not consider that the offending statement could be regarded as being calculated to bring the plaintiff into contempt or undue ridicule, or as being calculated to diminish the willingness of others to associate with the plaintiff, or as being calculated to lower him in the esteem of right thinking or reasonable members of society generally. My view is that, applying the right thinking test, it cannot be said that the ordinary, reasonable reader, having

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regard to the offending statement, would think any more than that the plaintiff read the news in too grim or too serious a fashion, and should smile more often. I do not think that, in applying the right thinking test, it could be stated that any of the requirements of that test would result because of that view. I do not think that a right thinking person, regarding the plaintiff as too grim, or too serious, or smiling too little, would regard that as bringing him into contempt, or undue ridicule; nor that it would diminish their willingness to associate with him, or lower him in the esteem of such right thinking person. I reiterate that the ordinary, reasonable reader, or a right thinking person would, to my mind, simply note the criticism, either agree or disagree with it, and carry on reading the rest of the newspaper.

1995 (1) ZLR p409

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A SECTIONAL APPROACH IN APPLYING THE RIGHT THINKING TEST

A related aspect which needs to be considered is whether, in applying the right thinking test, a sectional approach is allowable or not. This is considered in Burchell at p 97 where the learned author states that, generally, the South African courts do not apply a sectional approach - although there are some cases where such an approach has been adopted. Burchell is of the view that a compromise approach would be appropriate. He states at p 101-102:

> "There can seldom, if ever, be total unanimity. This is reflected in the courts' use of the word 'generally', which implies that absolute unanimity is not insisted upon, but that the next best (ie the general consensus) is adopted. On the other hand, to take account of the view of every section of society would be just as impracticable an approach as to look for total unanimity. It is submitted that in South Africa a *via media* is needed and that a sectional view should be adopted in those situations where there is an injury to reputation, even though it is so regarded only by a minority group of persons. However, in deference to the generality of the traditional test and in the interests of practicability, a limitation should be imposed in that these persons, as in the American law, would have to constitute a substantial and respectable portion of the community. This limitation would prevent a proliferation of defamation actions ..."

I sympathise with the comments of the learned author subject to emphasising that the sectional group should very clearly constitute a substantial and respectable portion of the community. But in order to apply a sectional test which would assist the plaintiff in this matter, the test would have to be of a very small section. I accept that it is possible, if the letter were read by fellow journalists, who knew the precise position of the plaintiff within the ZBC, and the precise background of the plaintiff in regard to his work experience, that such a right thinking person might possibly make the connotations as suggested in *Velempini's* case *supra*. However, I am quite satisfied that, even if one were to apply the right thinking test on a sectional basis, there is no basis on which it could be applied to such a limited section as would be necessary for the connotations to be drawn as I have indicated.

FINDING AS TO DEFAMATORY NATURE OF STATEMENT

Accordingly, having analysed the three-stage approach and applied it to the matter in question, I am not satisfied that the plaintiff has established that the second and third stages of the test have been met. I am of the view that it has

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not been established by the plaintiff that the defamatory meaning is the meaning by which the words would probably be understood by an ordinary, reasonable reader. I am also not satisfied that the plaintiff has established that the meaning identified is defamatory on application of the right thinking test. Accordingly, I am satisfied that the basic defence raised by the defendant, namely that the statements cannot be regarded as defamatory, has been established.

WHETHER THE DEFENCES RAISED WOULD HAVE SUCCEEDED

I propose, however, not to leave the matter there. Lest I am thought to be incorrect in my findings, on the question of whether the statements are defamatory, I propose to consider whether any of the defences raised by the defendant would have succeeded.

There is no need to deal with the defence of justification. This, although raised in the pleadings, was not suggested in evidence, nor raised in argument - and understandably so. The defence of qualified privilege was not pursued by Mr *Biti*, for the defendant, as he accepted that on the basis of *Neethling v The Weekly Mail* 1994 (1) SA 708 (A) the defence of qualified privilege could not be upheld.

FAIR COMMENT

The defence which, accordingly, needs to be considered carefully is the defence of fair comment. The basis of the defence of fair comment has been laid down in a number of authoritative decisions. For example, in *Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A) at 1167 JANSEN JA set out the requirements for the defence of fair comment as being (as summarized in Burchell at p 221):

1. the allegation in question must amount to comment (opinion);

2. it must be fair;

3. the factual allegations on which the comment is based must be true;

4. the comment must be on a matter of public interest.

In *Heard v Times Media Ltd & Anor* 1993 (2) SA 472 (C) it is stated by FRIEDMAN JP (at 477A-G) that there is a fifth requirement - viz that the defence is available only if it is based on facts expressly stated or clearly indicated, in a document or speech, which contains the defamatory words.

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See also *Crawford v Albu* 1917 AD 102 at 114 and *Johnson v Beckett supra* at 779A-B.

Mr *Andersen's* approach in regard to the question of fair comment was to attack the basis on which fair comment had been pleaded in the amendment to the defendant's plea. He suggested

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that the pleading was inadequate in that it referred to the words complained of in so far as they are expressions of opinion, without specifically suggesting that they were. I have considered the argument raised by Mr *Andersen* in this regard. I agree with him that the pleading is inelegant and could have been more carefully drafted. But my view is that looking at the plea of fair comment in the overall context of the defendant's plea, the defence of fair comment is adequately pleaded.

I have already referred to the lack of a relevant video tape depicting the manner in which the plaintiff read news bulletins at the relevant time, and in my previous comments have been critical of both the plaintiff and the defendant in regard to their failure to produce such a video. It is alleged in the defendant's plea that:

> "The facts upon which the comments are based are true, and these are that, *inter alia*, the plaintiff is of solemn and serious demeanour; that the matter was one of public interest; that the comment was fair in the circumstances."

WHETHER THE REQUIREMENTS OF FAIR COMMENT HAVE BEEN ESTABLISHED

I am satisfied that the basic facts on which the plea is based are common cause; that is, that it is common cause that the plaintiff reads the news, and that it is common cause that the plaintiff is of serious demeanour. I do not consider that the defendant needs to go further than that to establish the third requirement of fair comment (as listed above). The defence will, in essence, stand or fall on the second requirement - whether the comment is fair. It is also common cause that the comment is on a matter of public interest. I am also satisfied that the allegation in question amounts to comment or opinion. Accordingly the first, third and fourth requirements of the defence as set out in *Marais v Richard , supra*, and summarised by Burchell have been met. What I need to decide is whether the second and fifth requirements of the defence have been properly established by the defendant. Not being numerically minded, I will deal with the fifth requirement first.

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THE FIFTH REQUIREMENT: WHETHER THE COMMENT IS BASED ON FACTS EXPRESSLY STATED OR INDICATED IN THE LETTER

In this regard, I would refer to *Heard v Times Media Ltd & Anor supra*. I refer in particular to the observations at 477C-F by FRIEDMAN JP where the learned judge states:

> "The general rule is that, for a defence of fair comment to operate, the comment must be based on facts expressly stated or clearly indicated so that the reader is able to distinguish between what is fact and what is comment. It is not necessary to set out the facts verbatim and in full, but there must be some reference in the article which indicates what facts are being commented upon ... This rule is however not immutable. For example, it does not apply in the case of literary criticism, where the attack is not directed at the personal character of the person defamed but at the author as the person responsible for the literary work. In the case of literary criticism, the author submits his work to the public at large and thereby invites comment. It is thus unnecessary in that type of case for a defendant to state the facts on which he relies for the comment complained of; those facts consist of the literary work itself, where the subject matter on which comment is made is available to the world at large. See *Kemsley v Foot & Ors* [1952] 1 All ER 501."

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The learned JUDGE PRESIDENT then quotes extensively from *Kemsley v Foot & Ors, supra*, noting that LORD PORTER, after pointing out that if an author writes a play, or a book, or a composer composes a musical work, he is submitting that work to the public and thereby inviting comment, went on to state (at p 504) that -

> "The same observation is true of a newspaper. Whether the criticism is confined to a particular issue or deals in the way in which it is, in general, conducted, the subject matter on which criticism has been made has been submitted to the public, though by no means all those to whom the alleged libel has been published will have seen or are likely to see the various issues. Accordingly, its contents and conduct are open to comment on the grounds that the public have at least the opportunity of ascertaining for themselves the subject matter on which the comment is founded."

And at 505G-H:

> "The facts necessary to justify comment might be implied from the terms

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> of the impugned article, and, therefore, the inquiry ceases to be: can the defendant point to definite assertions of fact in the alleged libel in which the comment is made? and becomes: is the subject matter indicated with sufficient clarity to justify the comment being made?" (I would point out that *Kemsley v Foot* was specifically approved in *Johnson v Beckett supra*).

I am satisfied that by analogy the same approach should be extended to the position in this matter. The persons reading the letter in *The Chronicle* would, since they were reading a letter about the quality of the news bulletins on TV, very likely be persons who had listened to television news bulletins and watched the plaintiff reading the news bulletins. Accordingly, they would have a basis on which to assess whether the criticism was valid, or not, and whether the comment was fair, or not. In the situation pertaining in this case it would also not be unexpected or inappropriate for persons to be able to look at subsequent news bulletins. Having read the letter, they could then form an opinion as to whether the plaintiff was in their opinion too grim, too serious, too unsmiling or not - and whether the comment was fair or not. They would, in addition, need, casting their minds back to past news bulletins, to assess whether the "comments" were "dated" or not and whether they "disgraced" the news bulletins or not. Accordingly, I am satisfied that, although the basis of fair comment could have been more elegantly put in the pleadings, that on the authorities I have referred to, the fifth requirement for seeking to establish the defence of fair comment has also been met by the defendant.

THE SECOND REQUIREMENT: WAS THE COMMENT FAIR?

What is now necessary to decide is whether the contents of the letter can be regarded as fair comment. In this regard, I would refer to the approach laid down in *Gatley on Libel and Slander* 8 ed. At para 726, it is stated that the limits of criticism are exceedingly wide and that the mere circumstance that the language complained of is violent, exaggerated or unjust will not render it unfair. I also refer to para 728 of *Gatley* where the learned author refers to a passage from the summing up in *Stokes v Sutherland* [1924] House of Lords Printed Cases 375 where LORD HEWART CJ pointed out the latitude of fair comment, stating as follows:

> "What is it that fair comment means? It means this and I prefer to put it in words that are not my own. I refer to the

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famous judgment of LORD ESHER MR in *Merryvale v Carson* (1887) 20 QBD at p 280 to 281 where

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> it is stated that every latitude must be given to opinion and to prejudice and then an ordinary set of men with ordinary judgment must say, not whether they agree with it, but whether any fair man would have made such a comment. Mere exaggeration or even gross exaggeration would not make the comment unfair however wrong the opinion expressed may be in point of truth or however prejudiced the writer may still be within the prescribed limit."

I also refer to para 745 of *Gatley* where the analogous question of public performers, actors and singers is referred to and it is stated that -

> "the performance of individual artists at places of public entertainment is also subject matter for legitimate comment whether expressed in the press or by immediate applause or censure of the audience. One who goes upon the stage to exhibit himself to the public or who gives any kind of performance to which the public is invited may be freely criticized. Such criticism is not actionable however severe or incorrect it may be so long as it is the honest expression of the critic's real views and not mere abuse or invective under the guise of criticism."

I would also refer to the observations in Nathan *The Law of Defamation in South Africa* at p 115, where the learned author states that -

> "by doing a public act, a public man creates a situation to which his fellow citizens are invited to criticize, comment or pass judgment on his acts."

It is common cause that the plaintiff as a newsreader is in a position similar to that described in the extracts to which I have referred. He is a person who by the very nature of his function as a newscaster must expect criticism. His complaint, of course, is that the criticism in this case is unfair. The authorities to which I have referred indicate the wide basis on which criticism is allowed.

I would also refer to the approach laid down in *Beesham v Solidarity Party & Anor supra*. I appreciate that the extracts that I will refer to in this case and the case itself relate to criticism of a political nature. But to my mind the position is analogous to the position of the plaintiff. In my view, the general approach as laid down in the extracts to which I will refer are also applicable to a person in the position of the plaintiff. At p 895B-C in *Beesham's* case *supra* ALEXNADER J quotes with approval the following comment by DE VILLIERS CJ in *Walter v Powrie* (1877) 7 Buch 35:

> "There is no doubt that there is far greater latitude allowed in criticizing

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> the acts of public men than would be allowed in the case of private individuals; but at the same time no writer is allowed to go beyond the limits of fair comment and bona fide criticism. Whenever any writer goes beyond that and imputes even to a public man base or sordid or corrupt motives for his acts, he is bound to prove the truth of his charges."

Reference is then made at p 895H-I to *Shepstone v Davis & Sons* (1886) 11 AC 187 where

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LORD HERSCHELL stated:

> "the distinction cannot be too closely borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed ... or discreditable language used. It is one thing to comment or criticize, even with severity, the acknowledged or proved acts of a public man and quite another to assert that he had been guilty of a particular act of misconduct."

At p 897B-C VAN ZIJL JP's comments in *Min of Justice v SA Assoc Newspapers Ltd & Anor* 1979 (3) SA 466 (C) at 475C are quoted with approval:

> "It is the right of every citizen to concern himself with the affairs of the country by expressing his views, approving or disapproving of the actions of persons concerned directly in the government of the country, and, as long as he does not impute to them improper motives or dishonourable conduct, his words are not defamatory, however unfair or unfounded his criticism or condemnation may be."

I reiterate that all the above observations relate to political matters but that I am of the view that the analogy in relation to a person in the plaintiff's position is not inappropriate.

I would also refer to *Johnson v Beckett & Anor supra*. In that matter, it was held that the comment published in the article in question which referred to the plaintiff editor as being depraved was fair in the sense that, objectively speaking, it qualified as an honest, genuine, though possibly exaggerated or prejudiced expression of opinion relevant to the facts upon which it was based. It seems to me that those observations are not inappropriate to the nature of the comment or criticism in this matter.

I would finally, on this aspect of the matter, refer to *Pelser v SA Assoc Newspapers Ltd & Anor* 1975 (1) SA 34 (N) where at 41 HILL AJ referred

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with approval to the following passage quoted in *Pienaar & Anor v Argus P & P Co Ltd* 1956 (4) SA 310 (W) at 318:

> "In cases of comment on a matter of public interest the limits of comment are very wide indeed. This is especially so in the case of public men. Those who fill public positions must not be too thin skinned in reference to comments made upon them."

Applying all the approaches laid down in the authorities I have referred to, I am satisfied that against that background, I can only, as I have indicated, echo the comments made in *Johnson v Beckett supra*. It has not been contended that the comments contained in the complained letter were not honest and genuine. I am of the view that they may, as stated in *Johnson v Beckett supra*, be exaggerated or prejudiced, but that they do not go beyond the bounds of legitimate criticism. It is clear from the authorities I have referred to that exaggerated criticism is within the bounds of fair comment. As I have indicated my view of the comment or criticism in the letter in question is to suggest that the plaintiff is too grim, too serious and does not smile as often as he should. The juxtaposition of the words, "I saw him conduct an interview the other day. He smiled.", after the words "looks and sounds like a grim death's head", to my mind, clearly indicate, that the writer is indicating a belief that the plaintiff is too grim and too serious and should smile more often. I agree that the wording uses metaphorical terminology. I do not

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consider that it goes beyond the bounds of fair comment. Accordingly, my view is that if I had found that the tests I referred to had been met and that the statements were defamatory, I would be of the view that the defence of fair comment would have been successful.

I should perhaps comment more specifically on the first phrase complained of - "Joseph Madhimba who cut his teeth on those dated comments that used to disgrace the main news in our unrepentant red days". I would first point out that "cut his teeth" means got started or got his grounding, as Mr *Andersen* pointed out, and is not an insulting phrase. To my mind, as I have indicated, there is no doubt that the phrase criticises the contents of news bulletins and makes a related oblique reference to a criticism of political philosophy. The ordinary reader would clearly not attribute those criticisms to the newscaster and make the conclusions alleged by the plaintiff in his declaration. It is accordingly artificial to assess whether a comment is fair which does not refer to the person who is complaining of it. However, if the words were to be regarded as defamatory of the plaintiff, I am satisfied that the comment is overall undoubtedly political in nature and would fall well within the ambit

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of the wise sentiments eloquently expressed in *Min of Justice v SA Assoc Newspapers Ltd & Anor supra*.

A further aspect I would emphasize in regard to the letter in question is that it should not be forgotten that this was a letter to the editor. It was not an editorial indicating the paper's view of the matter. It was not an article in the paper. It was not even an article by the paper's television critic. It was just a letter to the editor indicating an individual's view of ZTV news bulletins and, in particular, that individual's view of how the plaintiff read such news bulletins. That is a further aspect which, to my mind, would have made it clear in the mind of an ordinary reader, or right thinking person, that this was simply an expression of opinion by an individual reader - and that the ordinary, reasonable reader, or right thinking person, would simply have noted that that was the view of that person and would have either agreed or disagreed with it and gone on to something else. If it had been an editorial comment, then the matter would have perhaps needed to be looked at in a slightly different light.

Before leaving the aspect of fair comment, I would observe that a characteristic shared, I believe, by all who walk this earth is to be stung and hurt by criticism. But the right to express criticism is the lifeblood of a free land. A strength of character not shared by all is the ability to listen objectively to criticism, to disregard and forget that which is ill-informed or biased, and to accept and learn from that which is fair and correct. Such a strength is particularly necessary for all those who choose to appear in the public eye, be they politicians, government officials, leading business persons, sports personalities or newscasters. I am of the view that although exaggerated and metaphorically phrased to enhance their effect, the relevant comments that are the subject of this action say no more than that the plaintiff was too grim and too serious and should smile more often. That, to my mind, is well within the bounds of the criticism and fair comment to be expected by a person in the plaintiff's position.

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INJURIA

Having dealt with the defamatory aspect of the matter, I must now turn to deal with the alternative suggestion that an *injuria* has been established. In dealing with the question of *injuria*, I can do no better than to quote from the head note to *de Lange v Costa* 1989 (2) SA 857 (A) where it is stated that:

> "the three essential requisites to establish an action for *injuria* are:

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> (a) an intention on the part of the offender to produce the effect of his act (*animus injuriandi*);
>
> (b) an overt act which the person doing it is not legally competent to do (wrongful act); and which at the same time is
>
> (c) an aggression upon the right of another, by which aggression the other is aggrieved and which constitutes an impairment of the person, dignity or reputation of the other.
>
> In an action for *injuria* the enquiry should commence with the second requisite, viz whether there has been a wrongful overt act. A wrongful act, in relation to verbal or written communication would be one of an offensive or insulting nature. Once the wrongfulness of such act has been determined, *animus injuriandi* (the first requisite) will be presumed. It would be open to the defendant to rebut such presumption by establishing one of the recognised grounds of justification. If the defendant fails to do so, the plaintiff in order to succeed, would have to establish the further requirement that he suffered an impairment of his dignity.
>
> Unless a wrongful act is established intention becomes irrelevant, as does the question whether, subjectively, the aggrieved person's dignity was impaired. In determining whether or not the act complained of was wrongful, the court applies the criterion of reasonableness. This is an objective test and requires that the conduct complained of be tested against the prevailing norms in society in order to determine whether such conduct can be classified as wrongful. To address words to another which might wound his self esteem but which are not, objectively determined, insulting (and therefore not wrongful) cannot give rise to an action for *injuria*. There is no such thing as an absolute right not to be criticized. A person must be prepared to tolerate legitimate criticism, ie criticism which is fair and honest. An act done in the exercise of a right is not a wrongful act, and cannot therefore constitute an *injuria.* An expression of honest or legitimate criticism is such an act. Whether in given circumstances criticism may be regarded as legitimate must depend upon, *inter alia,* the relationship between the parties involved and the nature of the affairs in which they engage."

I would also refer to McQuoid - Mason *The Law of Privacy in South Africa* at p 217 where the learned author states that -

> "Academic writers have suggested that the defences of privilege, fair

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> comment and consent which are applicable in cases of defamation should be available as defences to actions for invasion of privacy, as well as the special defences of necessity and private defence."

I agree with the observations of the learned author in that regard and indeed the Supreme Court, in the recent matter of *Zimbabwe Newspapers (1980) Ltd v Zimunya* 1995 (1) ZLR 364

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(S), observed at p 366:*(5)

> "I also agree with Mr *Colegrave*'s submission that there is no real need for drawing a distinction between defamation and other forms of *injuria* because such a distinction would be artificial. An *injuria* which damages one's reputation is, in my view, on the same footing with an *injuria* which results in degradation and humiliation" (*per* MUCHECHETERE JA).

Accordingly, it seems to me the Supreme Court is clearly indicating that the approach to *injuria* should be the same as the approach to defamation, and I am satisfied that the defences which can be set up to an action for defamation are also available to an action for *injuria.*

In deciding whether an *injuria* has been established, I must, as laid down in *de Lange v Costa supra*, apply the criteria of reasonableness. This is an objective test requiring the conduct complained of to be tested against the prevailing norms of society in order to decide whether such conduct can be classified as wrongful. As indicated, the approach in *de Lange supra* also refers to the question of legitimate criticism - at 862G-I. It seems to me that applying the objective test in regard to injuria as laid down in *de Lange*'s case is very similar to applying the second and third stage tests in regard to the defamatory aspects approach of the ordinary, reasonable reader or the right thinking person. I am satisfied that, in applying the objective test, it can be stated that the *injuria* complained of has not been established. I do not consider that applying that test to the publication it could be regarded as insulting, injurious and contumelious towards the plaintiff. My view is that, looking at the letter and applying the criteria of reasonableness, the publication does no more than indicate that the plaintiff is regarded as being too grim, too serious, and not smiling enough when reading the news. I do not think that that can be regarded as insulting, injurious and contumelious towards the plaintiff. I consider that applying the test as laid down in *de Lange v Costa supra*, or applying the analogous tests of the ordinary, reasonable reader and

the ordinary right thinking person would achieve the same result. There is no doubt that the words complained of could not be regarded as being injurious.

If my finding in that regard were to be wrong, I am satisfied that in applying the reasoning that I have already referred to in applying the approach in *de Lange*'s case *supra*, and applying the criteria for the defence of fair comment, that the defence of fair comment would have been established. Accordingly, I am satisfied that the alternative claim made by the plaintiff has also not been established.

OVERALL FINDING

Overall, I am of the view that the plaintiff has not established that the words complained of were defamatory but if my finding is wrong in that regard then the defence of fair comment would have been established by the defendant. I am of the view that plaintiff has not established the *injuria* he alleges but if I am wrong in that regard, the defence of fair comment would also have been established.

Accordingly, for all the reasons I have given, I am of the view that the court must find, as it does,

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that the plaintiff's claims be dismissed with costs.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Coghlan & Welsh, defendant's legal practitioners

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Endnotes

1 (Popup - Popup)

See 1994 (1) ZLR 95 (H) - *Editor*.

2 (Popup - Popup)

The portion of the judgment dealing with the detailed evidence is omitted from this report. The report recommences at the stage at which the judge makes his findings on the evidence.

3 (Popup - Popup)

See p 48C *ante* of this Volume - *Editor.*

4 (Popup - Popup)

See p 161E *Ante - Editor*

5 (Popup - Popup)

See *supra* - Editor

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