NYAMBIRAI v NATIONAL SOCIAL SECURITY AUTHORITY & ANOR 1995 (2) ZLR 1 (SC)

Court **Supreme Court, Harare**

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

Constitutional application

15 June & 13 July 1995 Judgment No. S-110-95

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 16 - protection against compulsory acquisition of property - compulsory pension scheme - whether scheme constitutes the imposition of tax - whether scheme reasonably justifiable in a democratic society

Headnote

The applicant objected to being forced to contribute to the NSSA scheme for pension and other benefits, arguing that his property or rights were being compulsorily acquired contrary to s 16 of the Constitution.

Held, that s 16 of the Constitution allows the acquisition in satisfaction of any tax, except if that tax is not reasonably justifiable in a democratic society.

Held, further, that a tax is a compulsory, not optional, contribution, imposed by the Legislature or other competent authority and imposed upon the public as a whole or a substantial sector thereof, with the revenue from the tax to be utilised for the public benefit or to provide a public service.

Held, further, that the mandatory contributions to the NSSA meets all these requirements and the scheme amounts to the imposition of a tax.

Held, further, that the scheme was formulated to provide a service in the public interest and the Minister's assessment of the public interest must be respected, unless it was manifestly without reasonable foundation as the national authorities are in principle better placed than the Judiciary to appreciate what is to the public benefit.

Held, further, that this tax was not shown to be unjustifiable in a democratic society. The tax satisfied the three criteria used by the court to determine

whether a measure was reasonably justifiable in a democratic society. That the legislative

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objective of the scheme was sufficiently important to justify limiting the fundamental right was demonstrated by the fact that Zimbabwe was lagging far behind most other countries in the provision of social security, despite international conventions calling for it, and was, before the introduction of the scheme, one of only five countries which provided the least coverage for employees. The fact that the measures designed to meet the legislative objective were rationally connected to it was demonstrated by the fact that Government could not carry the burden of providing social security alone. For the scheme to be viable, compulsory contributions by employees and employers were necessary. Finally, that the means used to impair the right or freedom were no more than is necessary to accomplish the objective was established by the fact that the compulsion to contribute to the scheme was outweighed by the importance of the major objective of this scheme.

Held, further, that in deciding this matter, the court should have regard to the attitude of many other countries towards similar schemes, and cases elsewhere where similar objections had been raised and rejected.

Held, therefore, that the application should be dismissed, but with no order as to costs as the issues raised were important and controversial.

Cases cited:

New South Wales v Collector of Customs of New South Wales (1908) 5 CLR 818

Alberts v Roodepoort - Maraisburg Municipality 1921 TPD 133

Fouche v Randfontein Stadsraad en Andere 1964 (2) SA 318 (T)

City Treasurer & Rates Collector, Newcastle Town Council v Shaikjee & Ors 1983 (1) SA 506 (N)

Permanent Est & Finance Co Ltd v Johannesburg City Council 1952 (4) SA 249 (W)

Leake v CoT (State) (1934) 36 WALR 66

Constantinides v Electrical Authority of Cyprus (1982) 3 CLR 798

James v UK (1986) 8 EHRR 123

Mellacher v Austria (1989) 12 EHRR 391

US Railroad Retirement Bd v Fritz 449 US 166 (1980)

Schweiker v Wilson 450 US 221 (1981)

Apostolou & Ors v Republic of Cyprus [1985] LRC (Const) 851

US v Lee 455 US 252 (1982)

Bethel Baptist Church v US 822 F 2d 1334 (3rd Cir, 1987)

Woods & Ors v Min of Justice & Ors 1994 (2) ZLR 195 (S); 1995 (1) SA 703 (ZS); 1995 (1)

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

R v Oakes (1986) 19 CRR 308

Hewlett v Min of Finance & Anor 1981 ZLR 571 (S); 1982 (1) SA 490 (ZS)

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

Applicant in person

P A Chinamasa, Attorney-General, with him *A V M Chikumira* and *B Patel,* for the respondents

Judgment

Gubbay CJ:

INTRODUCTION

The applicant is a professional assistant in the employ of a firm of legal practitioners. The first respondent, the National Social Security Authority (NSSA), is a body corporate established under the National Social Security Authority Act [*Chapter 17:04*], and capable of suing and being sued.

In terms of s 3(1) of the Act, the second respondent, who is the Minister of the Public Service, Labour and Social Welfare (the Minister), may by notice in the *Gazette*, establish one or more schemes for the provision of benefits to or in respect of all employees, or such classes of employees, as may be specified in the notice, and may in like manner amend or abolish any such scheme. Under s 3(2)(c) any such notice may provide for:

> "the compulsory payment of contributions by employers and employees, the rates of such contributions and the deduction of contributions payable by employees from any salary, wages or other moneys payable to them."

On 24 December 1993 the Minister, by SI 393 of 1993, entitled the National Social Security Authority (Pension and Other Benefits Scheme) Notice, 1993 (NSSA (POBS) Notice), established a scheme to be known as the Pensions and Other Benefits Scheme. Section 4 reads:

> "(1) Subject to this notice, any person who, on or after a date specified by the Minister by notice in the *Gazette*, is working in a profession, trade or occupation specified by the Minister in the notice, and -
>
> (a) is a citizen of or ordinarily resident in Zimbabwe; and.

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(b) has attained the age of sixteen years; and

(c) has not attained the age of sixty years;

shall register and contribute as an employee in terms of this notice.

(2) Subject to this notice, every employer who has a place of business in Zimbabwe shall, within one month after becoming an employer of a person who is required to register in terms of subsection (1), register and contribute as an employer in terms of this notice."

Section 7 of the NSSA (POBS) Notice expresses the obligations of the employer. The most important of these are: (i) to notify the general manager of NSSA by the sixteenth day of each month the amount of contributions payable by him in respect of every employee for the previous calendar month; (ii) to maintain a record in respect of every employee; and (iii) to notify the general manager within one month of any change of address, termination of employment or death of an employee, of his ceasing to be an employer, and of any other relevant information.

The rate of contribution of each employee and employer, as laid down in s 10 of the NSSA (POBS) Notice, as read with s 3 of the National Social Security Authority (Pension and Other Benefits Scheme) (Rates of Benefits) Notice, 1994 (SI 193C of 1994), is three *per centum* of the employee's "insurable monthly earnings" (as defined). The maximum amount of monthly earnings in respect of which contributions under the Scheme are payable is $4 000, that is, $120 per month.

Under s 13(1) of the NSSA (POBS) Notice, the contributions paid by the employer are deemed to be contributions paid by the employee.

The benefits under the Pensions and Other Benefits Scheme are listed in s 21 of the NSSA (POBS) Notice. They consist of: (a) invalidity pension; (b) invalidity grant; (c) retirement pension; (d) retirement grant; (e) survivor's pension; (f) survivor's grant; and (g) funeral grant. Where an employee retires at the age of sixty years (or fifty-five years in the case of an employee who has been employed in arduous occupations and subject to the production of a medical certificate), he becomes entitled to a retirement pension if he has contributed for more than one hundred and twenty months. A retirement grant will be made if the employee has contributed for less than one hundred and twenty months but more than twelve months (ss 26 and 29). Other benefits may be paid in addition or instead of, such as invalidity benefits

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(ss 22 to 25), funeral grants (s 32) and survivor benefits to widows and widowers or, in the event of their demise, to dependants (ss 33 to 36). An employee who has contributed for less than twelve months before his employment terminates is entitled to receive a refund of contributions with interest (s 30).

On 8 July 1994, under the National Social Security Authority (Pension and Other Benefits Scheme) (Registration and Contribution) Notice, 1994, (SI 146A of 1994), the Minister specified that every person who is gainfully employed in Zimbabwe in any profession, trade or

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occupation, other than persons employed in the service of the State or as domestic workers in private households, shall be liable to register and, with effect from 1 October 1994, to contribute as employees for the purposes of the NSSA (POBS) Notice.

THE CONSTITUTIONAL DISPUTE

The applicant comes under s 4(1) of the NSSA (POBS) Notice. Since October 1994 both he and his employers have been contributing $120 every month to the Pensions and Other Benefits Fund ("the Fund") established pursuant to s 63 of the NSSA (POBS) Notice. As a member of a private pension scheme which provides adequate security for himself and his family in the event of his disability or retirement and for his family upon his demise, the applicant strongly objects to being liable to contribute to the Fund. He approaches this court for redress in accordance with his entitlement to do so under s 24(1) of the Constitution of Zimbabwe, upon the contention that the provisions of ss 4(1) and 7 of the NSSA (POBS) Notice infringe s 16 of the Constitution. He has the support of his employers who, while not seeking any relief, do not consider it equitable that they are compelled to contribute to the Fund.

Except under the authority of a law as described in paras (a) to (f), none of which pertain, s 16(1) of the Constitution mandates that:

> "No property of any description or interest or right therein shall be compulsorily acquired ..."

Subs (4), (5), (7), (8) and (9) are provisions which derogate from the protection afforded by subs (1). Of relevance is subs (7) which reads in relevant part -

> "Nothing contained in or done under the authority of any law shall be held

> to be in contravention of subsection (1) to the extent that the law in question makes provision for the acquisition of property or any interest or right therein in any of the following cases -
>
> (a) in satisfaction of any tax or rate;
>
> ...
>
> 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."

It was common cause that the contributions payable by employees and employers to the Fund under the authority of ss 4(1) and 7(1) of the NSSA (POBS) Notice amount to a compulsory acquisition of property in the form of moneys. In contention, however, was whether such mandatory contributions are saved from being held to be in contravention of s 16(1) as being:

(i) in satisfaction of a "tax"; and are

(ii) reasonably justifiable in a democratic society .

It is to these issues that I now turn, the second only arising for determination if an affirmative

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answer is given to the first.

WHETHER THE CONTRIBUTIONS PAYABLE BY EMPLOYEES AND EMPLOYERS ARE IN SATISFACTION OF A TAX WITHIN THE MEANING OF S 16(7)(a) OF THE CONSTITUTION

Section 113(1), in Part 2 of the Constitution, provides that:

> "unless the context otherwise requires -
>
> 'tax' includes duty or due".

At the outset it is important not to overlook the caution of ISAACS J, sitting in the High Court of Australia, in the case of *New South Wales v Collector of Customs of New South Wales* (1908) 5 CLR 818 at 848, that:

> "The word 'tax' and its plural 'taxes' are not words of invariable signification indicating any exercise whatever of the power of taxation; they are not infrequently used to denote a particular species of imposition, in contradistinction to duties and to duties of various kinds. "

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Examples of the term being used by the law-maker in this wide sense are to be found in *Alberts v Roodepoort - Maraisburg Municipality* 1921 TPD 133 at 136 (sanitary fees charged by a local authority); *Fouche v Randfontein Stadsraad en Andere* 1964 (2) SA 318 (T) (a levy contribution to be paid by every person employing a Bantu worker within the jurisdiction of the council); *City Treasurer & Rates Collector, Newcastle Town Council v Shaikjee & Ors* 1983 (1) SA 506 (N) at 507-508 (a general rate on immovable property).

In *Permanent Est & Finance Co Ltd v Johannesburg City Council* 1952 (4) SA 249 (W) RAMSBOTTOM J (as he then was) at 259A-B expressed the view that:

> "[to] require any person who carries on a business or who owns a dog or a motor car to pay a prescribed fee is, I think, to impose a tax. The money paid is taken into general revenue and is used for general purposes; the person who pays receives no specific service in return for his payment. Endowment money paid by a township owner is quite a different thing; it is an agreed payment for services which are to be performed for the improvement of the township and from which the township owner will derive financial benefit."

In another Australian decision, that of *Leake v CoT (State)* (1934) 36 WALR 66, DWYER J specified the characteristics of a tax. He said at 67 that:

> "A compulsory contribution, or an impost may be nonetheless a tax, though not so called; the distinguishing features of a tax being in fact that it is a compulsory contribution imposed by the sovereign authority on, and required from the general body of subjects or citizens, as distinguished from individual levies on individuals."

These criteria accord with the meaning of the word "tax" as given in *Black's Law Dictionary,* Abridged, 5 ed and in *Webster's Third International Dictionary.*

With particular reference to whether compulsory contributions to a social insurance fund fell within the meaning of the term "tax" in Article 24(2) of the Constitution of Cyprus, the Supreme Court in *Constantinides v Electricity Authority of Cyprus* (1982) 3 CLR 798 held:

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"that an imposition is a tax if it is found to fulfil certain characteristics,

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namely, (a) it is compulsory and not optional, (b) it is imposed or executed by the competent authority, (c) it must be enforceable by law, (d) it is imposed for the public benefit and for public purposes and (e) it must not be for a service for specific individuals but for a service to the public as a whole, a service in the public interest."

From these authorities the following features which designate a tax may be said to emerge:

(i) It is a compulsory and not an optional contribution,

(ii) imposed by the legislature or other competent public authority,

(iii) upon the public as a whole or a substantial sector thereof,

(iv) the revenue from which is to be utilised for the public benefit and to provide a service in the public interest.

The applicant argued that the fourth requirement of a "tax" is lacking since the NSSA (POBS) Notice provides no direct benefit to members of the public in general. The benefits under it derive only to employees specified by the Minister in Statutory Instrument 146A of 1994, or their survivors in the event of demise. In short, so it was urged, what has been created is a Scheme pursuant to which specified employees receive a service or benefits in return for contributions made; the nature of the Scheme, save for the element of compulsion, being similar to other schemes established in compliance with the provisions of the Pension and Provident Funds Regulations, SI 323 of 1991, for the benefit of members only.

The social and economic policies that moved the Government to introduce a compulsory pensions scheme are pertinent to the enquiry of whether the terms of the Pensions and Other Benefits Scheme so formulated, benefit the public and provide a service in the public interest. They are spoken to by the Minister in his opposing affidavit, and may be restated and summarised as follows :

(1) Previously about a third of the workforce in the country enjoyed no social security. So a scheme was designed both to provide employees with the security they deserve and are entitled to enjoy in retirement and in old age, and to play a significant rôle as a basis for national social protection. Although presently restricted to formal sector employees, the Pensions

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and Other Benefits Scheme is the foundation of a more comprehensive coverage, drawing on the underlying concept of national solidarity and as an integral part of national development.

(2) For a considerable period of time the Government was concerned to alleviate the miseries

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of numerous employees who, after many working years, end up destitute upon leaving employment either on old age or as a result of disability. It was recognised that this country had fallen far behind very many developed and lesser developed countries in the provision of adequate social security for employees.

(3) The objective of social security is to promote the quality of life and to guarantee income security. It is meant to give individuals and families the confidence that their level of living will not be eroded by social ills such as work accident, sickness, death and old age.

(4) It is the Government's national responsibility to make adequate provision for employees. It cannot afford to carry the heavy burden alone. Hence it is necessary to raise the funds for a social security scheme through enforced contributions payable by employers and employees. The employer bears a moral obligation to improve the protection and welfare of the employee. And the employee, as a matter of self-interest, must contribute to his own social security.

Furthermore, it is of significance that Zimbabwe has acceded to the International Covenant on Economic, Social and Cultural Rights of 1966. Article 6 thereof reads:

> "The State Parties to the present Covenant recognise the right of everyone to social security, including social insurance."

By its accession, the Government undertook an international commitment to establish and maintain a system of social security for its people. The passing of the National Social Security Act and the NSSA (POBS) Notice fulfil that obligation. Put otherwise, the welfare and well-being of the substantial number of employees (with the exception of the State and domestic service sectors) was seen to be too important a legitimate governmental and public concern to be left in abeyance any longer - the aim being to eliminate what was adjudged a grave social injustice in the sphere of employment.

I do not doubt that because of their superior knowledge and experience of

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society and its needs, and a familiarity with local conditions, national authorities are, in principle, better placed than the Judiciary to appreciate what is to the public benefit. In implementing social and economic policies a government's assessment as to whether a particular service or programme it intends to establish will promote the interest of the public, is to be respected by the courts. They will not intrude but will allow a wide MC of appreciation, unless convinced that the assessment is manifestly without reasonable foundation. See *James v UK* (1986) 8 EHRR 123 at para 46; *Mellacher v Austria* (1989) 12 EHRR 391 at para 51; *US Railroad Retirement Bd v Fritz* 449 US 166 (1980) at 175; *Schweiker v Wilson* 450 US 221 (1981) at 230.

The Minister has proclaimed that the Pensions and Other Benefits Scheme provides a service in the public interest. That is an assessment which this court should respect. Certainly, it is not manifestly without reasonable foundation.

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The few authorities dealing with social insurance schemes to which this court was referred in argument, support the view that compulsory contribution payments made thereunder are utilised for the public benefit to provide a service in the public interest.

In *Apostolou & Ors v Republic of Cyprus* [1985] LRC (Const) 851, the validity of a social insurance scheme that imposed on all self-employed persons a contribution payable to the Social Insurance Fund established under the Social Insurance Law of 1980, was considered by the Supreme Court of Cyprus. It was submitted by the applicants, who were self-employed practising lawyers, that the enforced contributions, being twelve *per centum* of a person's insurable earnings, were not contributions by way of tax within the meaning of Article 24 of the Constitution and, therefore, could not be levied. In rejecting the submission, the court said at 859 e-i:

> "There is no doubt that this constitutional command and the International commitments undertaken by the Republic in furtherance thereof are for the public benefit, have cast an obligation on the State to promote the welfare of the individual and, as in this instance, by an all-embracing Social Insurance System providing benefits for the people in their time of need, such ensuing public burden being met by contributions as prescribed by the law. These contributions are a form of 'tax' in the sense of Article 24 of the Constitution, that satisfy the test laid down in the *Constantinides* case *supra.*

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> That they are contributions towards a public burden there is no doubt in the light of the obligations of the State to care for the welfare and well-being of its citizens."

The *Digest of Case Law* relating to the European Convention on Human Rights 1955-1967, at paras 441, 442 and 443, cites three reports of the European Commission of Human Rights concerning the obligation to pay social security as prescribed by legislation. In each, the Commission was of the opinion that the mandatory payment of the contributions was compatible with the second paragraph of Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which expressly reserves the right of a State "to enforce such laws as it deems necessary ... to secure the payment of taxes or other contributions"; the schemes having been established in the public interest.

In *US v Lee* 455 US 252 (1982) a member of the Old Order Amish, who believe that it is sinful not to provide for fellow members the kind of assistance contemplated by the Social Security Act, namely, old age and unemployment benefits, and that, therefore, both the acceptance of such benefits and contributions to the social security system are prohibited, employed several other Amish as workers on his farm and in his carpentry shop. For several years the Amish employer refused to withhold social security contributions from the wages of his employees or to pay his share as their employer. But upon being assessed by the Inland Revenue Service for overdue taxes, he paid a portion thereof. Thereafter, he sued for a refund, claiming that the compulsion to make such payments violated his First Amendment free exercise rights and those of his employees. While recognising that mandatory participation in the social security system may interfere with the free exercise rights of religious groups who provide for their members, the United States Supreme Court held, at 258, that the State may justify the infringement by demonstrating that it is essential to the accomplishment of an overriding governmental interest.

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It found that the national social security system served the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants with costs shared by employees and employers. This governmental interest outweighed any private religious interest in the non-payment of the compulsory contributions. See also *Bethel Baptist Church v US* 822 F 2d 1334 (3rd Cir, 1987) at 1339, a decision to the same effect.

The case of *James v UK supra* is apposite insofar as it dispels a contention similar to that advanced by the applicant. It was there argued before the

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European Court of Human Rights that the "public interest" test was not met where the compulsory transfer of property was not for the benefit of the public generally but for the benefit of a few private individuals. The argument did not find favour. The court held that, depending on the circumstances, compulsory transfer of property from one individual to another carried out in pursuance of legitimate social, economic or other policies, may be in the public interest as required by the second sentence of Article 1 of the First Protocol to the European Convention, even if the community at large had no **direct** use or enjoyment of the property (see paras 40 and 45). The leasehold reform legislation was not, therefore, *ipso facto* an infringement of Article 1 merely because the immediate beneficiaries of the compulsory transfer of property which it empowered were private parties.

By parity of reasoning, the fact that the beneficiaries of the Pensions and Other Benefits Scheme are the employees or their survivors and not the members of the public in general, does not mean that the contributions are not utilised for the public benefit in order to provide a service in the public interest.

The design of the Pensions and Other Benefits Scheme involves a system which necessitates support by compulsory contributions from employees and employers. Such mandatory participation seems to me indispensable to its fiscal success. Individual voluntary coverage would undermine the inherent soundness of the Scheme. Moreover, voluntary participation would be almost a contradiction in terms and would render the Scheme difficult, if not impossible, to administer. Thus, in my opinion, the Government's interest in assuring a compulsory and continuous participation in and contribution to the Scheme is very high .

I conclude, accordingly, that the contributions made payable under the authority of s 4 of the NSSA (POBS) Notice are in satisfaction of a "tax".

WHETHER THE "TAX" SO CONSTITUTED IS REASONABLY JUSTIFIABLE IN A DEMOCRATIC SOCIETY

In *Woods & Ors v Min of Justice & Ors* 1994 (2) ZLR 195 (S); 1995 (1) SA 703 (ZS); 1995 (1) BCLR 56 (ZS) this court emphasised that an abridgment of a guaranteed right should not be arbitrary or excessive. It was said at 199B-C, 706E-F and 59C-D respectively:

> "What is reasonably justifiable in a democratic society is an elusive

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> concept. It is one that defies precise definition by the courts. There is no legal yardstick, save that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual."

From a procedural aspect the *onus* is on the challenger to establish that the enactment under attack goes further than is reasonably justifiable in a democratic society and not on the State to show that it does not. See *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S) at 382 *in fine* - 383A; 1984 (2) SA 778 (ZS) at 783H. The standard of proof is a preponderance of probability.

In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:

(i) the legislative objective is sufficiently important to justify limiting a fundamental right;

(ii) the measures designed to meet the legislative objective are rationally connected to it; and

(iii) the means used impair the right or freedom are no more than is necessary to accomplish the objective.

See *R v Oakes* (1986) 19 CRR 308 at 336-337 (a decision of the Supreme Court of Canada). I shall deal with each in turn.

(I) IS THE LEGISLATIVE OBJECTIVE SUFFICIENTLY IMPORTANT TO JUSTIFY THE IMPOSITION OF A TAX UPON EMPLOYEES (SAVE FOR THOSE PRESENTLY EXCLUDED) AND EMPLOYERS?

The answer, in my view, is emphatically in the affirmative.

In establishing a national social security pension and other benefits scheme for the very large number of employees who formerly enjoyed no social security coverage, the Government followed the tradition of many developed and lesser developed countries. Annexed to the Minister's opposing affidavit was a list of social security programmes operated by one hundred and sixty-three countries throughout the world. It reflects that Zimbabwe was one of

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only five countries which provided the least coverage for employees , namely, social security for work injury.

In resolving to improve the social security of employees the Government, during the early years

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of the country's independence, set up a commission of inquiry. It recommended the introduction of a national social security system to provide income protection to employed persons in the event of contingencies such as old age, invalidity, death, unemployment and sickness. The International Labour Organisation, as well as various other bodies, such as the Employers Confederation of Zimbabwe, the Association of Pension Funds and the Zimbabwe Congress of Trade Unions, were also consulted. There was general consensus as to the need for social security .

Furthermore, the right to social security and social insurance is embodied in several international instruments. I mention, especially, Article 22 of the Universal Declaration of Human Rights, 1948, and Article 9 of the International Covenant on Economic, Social and Cultural Rights, 1966. In addition, there are about twenty International Labour Organisation Conventions dealing variously with medical care, sickness, old age, invalidity, survivors, employment injury and unemployment benefits. See, in particular, Article 57 of Convention No. 102 (27 April 1955) and Convention No. 157 (11 September 1986).

The internationally recognised right to social security in the wide sense and the extent to which that obligation has been implemented throughout the world, offers cogent evidence of the Government's objective in establishing the Pensions and Other Benefits Scheme in 1993, as one sufficiently important to justify the imposition of the tax.

(II) ARE THE MEASURES DESIGNED TO MEET THE LEGISLATIVE OBJECTIVE RATIONALLY CONNECTED TO SUCH OBJECTIVE?

It appears to me that the rational connection is self-evident and merits little elaboration. For a national social security scheme to be viable and effective, contributions payable by employees and employers to it must be made compulsory. To allow such funding to be optional would place the very existence and life-span of the scheme in jeopardy. As stressed by the Minister, it is the Government's national responsibility to care for its people who have no social security and no means to provide for themselves at old age. Government cannot afford to carry the burden for such a scheme alone. It is necessary to finance it through contributions by employees and employers.

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(III) ARE THE MEANS USED TO IMPAIR THE RIGHT OR FREEDOM NO MORE THAN IS NECESSARY TO ACCOMPLISH THE OBJECTIVE?

Under this part of the inquiry into the means by which the objective is attained, the court must weigh the impact of the limit upon the right of the applicant, against the importance of the legislative objective. There must be a balancing process. The importance of the objective and the reasonableness of the manner in which it is achieved must be measured against the gravity of the infringement of the protected right. Generally, this involves weighing the significance of the public interest in the limit against the seriousness of the infringement of the private right protected by the Constitution. This is so in this case. One asks: Is the infringement too high a price to pay for the benefit of the law?

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The applicant complains that the Pensions and Other Benefits Scheme does not take into account that some employees have their own private schemes or other arrangements which provide similar or even better benefits. And that the effect of compelling such class of employees to contribute is to require them to be doubly insured.

I do not accept this proposition. Section 74 of the NSSA (POBS) Notice specifically permits, but does not oblige, an employer to continue operating any scheme which provides benefits for employees, whether such benefits are similar to, greater or lesser than the benefits provided under the compulsory scheme. Existing private pension schemes are not abolished. They may be operated in conjunction with the Pensions and Other Benefits Scheme. If employee and employer consider that the benefits under the compulsory scheme are inadequate or not as beneficial as those offered under a private scheme (an issue much in contention), they are at liberty to cover any shortcomings under a private pension or insurance scheme.

To my mind, the limitation on the applicant's right, that is, the compulsion to contribute to a national pension scheme, is far outweighed by the objective to which the limitation is directed. For that objective is of major import.

As has been noted already, numerous countries, which most people would consider democratic, have chosen to enact and sustain similar social security legislation. Their attitudes are relevant and confirm my opinion as to which side of the scale the limitation placed upon the applicant falls.

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THE ORDER

For the reasons aforegoing, the application must be dismissed.

In line with the approach to costs adopted in *Hewlett v Min of Finance & Anor* 1981 ZLR 571 (S) at 596F; 1982 (1) SA 490 (ZS) at 508A and *Bull v Min of Home Affairs* 1986 (1) ZLR 202 (S) at 203G-H; 1986 (3) SA 870 (ZS) at 876B-C, the applicant is not to be penalised because a decision adverse to him has been given. The issue raised by him was important and controversial and the proceedings he instituted have led to its resolution.

There is to be no order as to costs .

Korsah JA: I agree.

Ebrahim JA: I agree.

Muchechetere JA: I agree .

Sandura AJA: I agree.

Scanlen & Holderness, first respondent's legal practitioners

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

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ROSE v ARNOLD & ORS 1995 (2) ZLR 17 (HC)

Court **High Court, Harare**

Robinson J

Application for interdict

20 July 1995 Judgment No. HH-96-95

Flynote

Practice and procedure - joinder of parties - non-joinder - application for interdict - party with direct contractual interest in matter not being joined - prejudice to him if he were not heard - application refused

Interdict - perpetual - appropriateness of remedy - applicant seeking to ensure that property of a person not joined as a party and with whom she had no contractual nexus should not be transferred to anyone but her - interdict refused

Headnote

The applicant was the registered holder of a block of eight gold reef claims in the Kadoma district. Next to her block was a gold dump comprising claims registered in the name of GL, a resident of Canada. She wished to acquire these claims. She alleged that she had employed the first and second respondents, her brother-in-law and her sister, to negotiate as her agent to acquire GL's claims, but claimed that her brother-in-law had, in breach of his fiduciary role as her agent, contracted with GL to transfer the claims to her sister instead. Without joining GL as a respondent, she sought an order interdicting the third respondent, the Mining Commissioner for the Kadoma district, from registering any transfer of GL's claims to her sister or brother-in-law. A provisional order was granted on an urgent *ex parte* basis, but when the matter came for confirmation, the first and second respondents opposed it, denying any wrong-doing on their part

Held, that the order should not be confirmed, as it would, without giving GL any opportunity to respond, interfere with his contractual relationship

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with the first respondent, a relationship that had been entered into in all good faith. Such interference could result in the breach of GL's contract with the first respondent. No court could countenance this without giving GL the chance of being heard.

Held, further, that, since there was no contractual nexus between the applicant and GL, she was not in a position to ask the court to grant her an interdict against the respondents pending the outcome of an action to be instituted by her against GL. The effect of confirming the provisional order would be to grant her an open-ended interdict restraining all three respondents

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permanently from doing anything which might result in the transfer of GL's claims to anyone other than her. Again, this was something that no court would do .

Provisional order discharged.

J K Muganhu for the applicant

M R D Stonier for the first and second respondents

Third respondent not represented

Judgment

Robinson J: I have been requested by the applicant's legal practitioners to record the reasons which I gave orally for discharging the provisional order in this matter because the applicant wishes to note an appeal against my order.

The salient facts on which I reached my decision are as follows.

The applicant, Jane Linda Rose, is the registered holder of a block of eight gold reef claims located in the district of Kadoma called Hollis, registered number 19779. Adjacent to the applicant's block of claims is a gold dump comprising certain claims called Hollis 5 which are registered in the name of one Gordon Leliever ("GL"), a Canadian resident, under certificate of registration number 321 ("GL's claims") .

The applicant alleges that she appointed the first respondent, Bryn Arnold, who is married to the applicant's sister, Winnifred Arnold, being the second respondent, who it appears has fallen out with the applicant, as her agent to negotiate with GL in order to acquire GL's claims on behalf of the applicant. However, the applicant contends that the first respondent fraudulently breached his fiduciary role as the applicant's agent by contracting with GL in the first respondent's own name with a view to causing GL's claims to be transferred to, and registered in the name of the second respondent in terms of an application lodged with the Mining Commissioner for the district of Kadoma, being the third respondent, for the purpose.

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Against this background and without joining GL as a respondent, the applicant applied, on a certificate of urgency, for a provisional order calling upon the respondents to show cause why a final order should not be made that the third respondent be interdicted from registering the transfer of GL's claims to the first or second respondent until a final order was made and that all the respondents be restrained from doing anything which might result in the transfer of GL's claims to the first or second respondent or to any other person than the applicant and that, in the interim, the provisional order act as a temporary interdict to that effect. Finally, the first and second respondents were required to show cause why the costs of the application should not be paid by them.

The provisional order sought by the applicant on an urgent *ex parte* basis was granted by one of my brother judges, following which the first and second respondents filed a notice of opposition,

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together with opposing affidavits, in which they vigorously denied any wrong doing on their part in applying to have GL's claims registered in the second respondent's name. In response to this the applicant filed an answering affidavit .

The matter came up before me as an opposed motion, when the applicant moved for the confirmation of the provisional order.

It was not necessary for me to address the merits since the motion for confirmation of the provisional order had no chance of succeeding on two basic preliminary grounds.

In the first place, because the applicant has not joined GL as a respondent to the proceedings, GL has not been given the opportunity of responding to the provisional order, which is of vital concern to him in that, if confirmed, the effect of the final order will be to interdict him permanently from transferring his claims to the first or second respondent in pursuance of a contract which it appears GL entered into with the first respondent in all good faith. Indeed, there is not the vestige of a suggestion in the applicant's papers that, in agreeing to let the first respondent acquire his claims, GL was guilty of any wrong doing or of displaying any bad faith towards the applicant. That being so, this court cannot possibly consider confirming a provisional order the effect of which would be to impinge on or interfere with GL's contractual relationship with the first respondent, the more so when this could result in the breach of GL's contract with the first respondent, let alone interdict GL from transferring his claims to any other person, without affording GL the chance of being heard on the subject. No court would countenance this.

1995 (2) ZLR p20

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In para 14 of her answering affidavit, the applicant states that her belief "that the view which I took of the law and of public policy has been vindicated by Government's action since in uplifting Mr Leliever's EPO".

Whether it is correct that Government uplifted the Exclusive Prospecting Order is immaterial, since the significant fact is that the Exclusive Prospecting Order held by GL covering the gold dump in question was superseded when GL's claims were registered in his name on 18 January 1995 under certificate of registration number 321.

In the second place, in para 9 of her heads of argument the applicant "accepts that no contractual nexus exists" between her and GL. It follows from this that the applicant was not in a position to ask the court to grant her an interdict against the respondents pending the outcome of an action to be instituted by her against GL for the latter to transfer his claims to her, as opposed to the second respondent. This means that the effect of confirming the provisional order as it stands would be to grant the applicant an open-ended interdict restraining all three respondents permanently from doing anything which might result in the transfer of GL's claims to any person other than the applicant. This is something no court would do. The question of whether the court were to find that the applicant did appoint the first respondent to act as her agent for the purpose of acquiring GL's claims from him on the applicant's behalf is of no consequence so far as the issue of an open-ended interdict is concerned.

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What I find difficult to fathom is why the applicant should have adopted and should persist in her present course of action, which could prove counter-productive if, in the circumstances, GL were to transfer his claims to a person other than the first or the second respondent. In para 9.1 of her heads of argument the applicant appears to acknowledge she could not prevent GL from doing this, in which event the applicant might lose all hope of ever acquiring GL's claims; whereas if the applicant were to let GL's claims be transferred to the second respondent, this would at least give the applicant a foot in the door vis-à-vis the second respondent, against whom the applicant could then institute proceedings with a view to seeking to secure an order for GL's claims to be transferred to her by the second respondent on the alleged ground that, in concert with the second respondent, the first respondent had fraudulently breached his fiduciary position as the applicant's agent and had caused GL's claims to be acquired in his name instead of in the name of the applicant as his principal with a view to their being transferred to the second respondent instead of to the applicant .

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It was for the reasons spelt out above that I discharged the provisional order granted on 21 February 1995 and ordered the applicant to pay the first and second respondents' costs. In fact, if I am to be completely frank, I would add that had this application been placed before me in Chambers in the very first place, I would have had no hesitation in declining to grant a provisional order and in pointing the applicant in the direction of what I consider was the correct path for her to follow.

Gollop & Blank, applicant's legal practitioners

Jarvis & Palframan, first and second respondents' legal practitioners

TAYLOR & ANOR v CHAVUNDUKA & ORS 1995 (2) ZLR 22 (HC)

Court **High Court, Bulawayo**

Chatikobo J

Civil action

21 July 1995 Judgment No. HB-97-95

Flynote

Delict - defamation - pleading - plaintiff not named - exception to plaintiff's declaration on grounds that did not disclose cause of action as statement failed to identify plaintiff - what plaintiff must allege

Headnote

The plaintiffs brought an action for defamation against the defendants who were the editor,

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publisher and printer of a magazine. The action was in respect of an article published in a magazine which article was based upon a published report by a London based environmental protection group. The plaintiffs were not named in the magazine article and were not identified by description. They were, however, named in the report from the environmental group. The plaintiff's declaration alleged that the article was published of and concerning the plaintiffs and it also made reference to the report of the environmental group upon which the magazine article was based.

The defendants applied for the striking out of the portions of the declaration referring to the report of the environmental group and excepted to the declaration on the grounds that it disclosed no cause of action.

Held, that the plaintiff in a defamation action must allege and prove that the published statement complained of referred to him as an ascertained or ascertainable person. Where he is not named or identified by description in the statement complained of, he must prove that ordinary, reasonable readers would have understood the statement as referring to him.

Held, further, that where the plaintiff is not named or identified by description in the statement, the plaintiff must do more than simply make a bald allegation that the statement complained of would be understood by

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readers to refer to him; he must set out in his pleadings the special facts and circumstances upon which he relies as supporting the allegation that the statement would have been understood as referring to him.

Held, further, that the portions of the declaration relating to the report of the environmental group were included to show that the unnamed persons referred to in the magazine article were the plaintiffs. However, the plaintiffs had not averred in their declaration that the readers of the magazine had access to the report and thus would have known about the report when they read the article. The inclusion of the reference to the report of the environmental group was thus not relevant and could only serve to embarrass the defendants in their defence and the reference to this report should therefore be struck out of the declaration.

Held, further, that the declaration failed to set out any facts and circumstances upon which the plaintiffs relied as supporting the bald allegation that the statement would have been understood as referring to them. This failure to include a necessary and essential basis of the cause of action could not be cured, as argued by the plaintiffs, by an application for further particulars, as further particulars are only applied for where necessary averments have been made but they are lacking in particularity or specificity. The exception on the basis that it disclosed no cause of action therefore had to be upheld.

Cases cited:

SA Assoc Newspapers Ltd & Anor v Est Pelser 1975 (4) SA 797 (A)

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Argus P & P Co Ltd v Weichardt 1940 CPD 453

Visse v Wallachs' P & P Co Ltd 1946 TPD 441

A Newmann CC v Beauty Without Cruelty Intl 1986 (4) SA 675 (C)

J James for the plaintiffs

D Campbell for the defendants

Judgment

Chatikobo J: On 25 April 1995 the plaintiffs issued summons claiming damages for defamation against the defendants who are the editor, the publisher and the printer of a monthly magazine called *Parade* which circulates in Zimbabwe. The declaration alleges that an article titled "Shocking Report on Poaching in the Region" was published in the May 1992 edition of *Parade*. It is alleged further that such article is defamatory of and was published of and concerning the plaintiffs. The article in question was based largely on a report prepared and published by the London-based Environmental Investigation Agency (the report). The report does not name the plaintiffs.

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The defendants have applied in terms of r 137 of the rules of court, for an order to strike out paras 7.1 and 7.2 of the declaration and any references to those paragraphs in the succeeding paragraphs of the declaration on the basis that the allegations in those paragraphs are irrelevant to the plaintiff's case in the absence of allegations justifying the purported incorporation by reference of the report into the article so as to identify the plaintiffs. It is contended further that, whether or not paras 7.1 and 7.2 are excised from the declaration, that declaration is nevertheless excipiable on the grounds that it does not disclose a cause of action, in that the words printed and published in the article in *Parade* do not identify the plaintiffs nor are they reasonably capable of identifying the plaintiffs to the ordinary reader of normal intelligence who read the article.

In order to put the pith of the defendants' complaint in its proper perspective, it is necessary to quote in full the averments made in paras 6, 7.1, 7.2, 8.1 and 8.2 of the declaration. They are these terms:

> "6. In the issue of the aforesaid newspaper dated May 1992, the First Defendant caused to be printed and published, the Third Defendant printed and the Second Defendant published the following false, malicious and defamatory words of and concerning the two plaintiffs:
>
> > 'SHOCKING REPORT ON POACHING IN THE REGION
> >
> > A recent report by the London based Environmental Investigation Agency says that the elephants of Southern Africa were under fire in the frontline of a conflict that raged for over two decades - In 1987, the Gonarezhou National Park in the South West Lowveld was closed due to heavy poaching of elephants and rhino. Even today foreign tourists are still not allowed into the park. Over the last six years, concerned Zimbabwean conservationists have sent three separate reports on the situation to government ministers on which they implicated National Parks staff, army personnel, SADF contacts and ivory smugglers in the

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poaching operations. But the reports have been consistently ignored and certain suspects have been posted to areas of higher rhino and elephant density.

It is said that in September 1987 a National Park investigation team was ambushed in Gonarezhou while in pursuit of poachers. Two investigators were shot dead and a scout was abducted. These attacks were often blamed on Renamo bandits and the park was declared a

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frozen zone for command by the army. This was also a ploy to afford military personnel the opportunity to poach, says the report. Three central characters - named in the report - have been implicated with the ZNA in poaching activities. They are a former warden of Gonarezhou, a game scout and a dentist. The two officers currently under investigation have been posted near the highest concentration of elephant and rhino.

The dentist, an American, is reported to be still actively smuggling. Allegations have been made that the three men killed Gonarezhou's famous elephant Kabakwa, an old radio collared bull with tusks of over 50 kg each. One of the suspects is reported to have been offering such tusks in South Africa soon after Kabakwa's killing.'

7.1 The report by the Environmental Investigation Agency referred to in paragraph 6 supra was titled "A second report by the Environmental Investigations Agency" and published the following words of and concerning the two plaintiffs:

'In 1987, the Gonarezhou National Park in the south-east lowveld was closed due to heavy poaching of elephants and rhino. Even today, foreign 2tourist are still not allowed into the Park. Over the last six years concerned Zimbabwe conservationists have sent three separate reports on the situation to government ministers (53.54.55). They have implicated National Parks staff, army personnel, SADF contacts and ivory smugglers in the operations. The reports have been consistently ignored and certain suspects have even been posted to areas of highest rhino and elephant density ... In September 1987, a National Parks Investigation team was ambushed while in pursuit of poachers. The team was in constant radio contact and they were the only ones attacked on a road frequented just before and after the ambush. Two investigators were shot dead and a second [sic] was abducted. The attack was officially blamed on Renamo and the parks were declared a "frozen zone" for command by the army. The freezing of National Parks to afford military personnel the opportunity to poach was a strategy deployed during the Rhodesian war. Government reports refer to 823 elephant carcasses found during this era.

THE THREE PROFITEERS

Three central characters are alleged in reports to have been implicated

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alongside the ZNA in poaching activities (53.54.55.56.75). They are ... Enock Mkwebu ..., game scout Zephania Muketiwa and Bill Taylor, a dentist. The two DNPWM Officers are currently under investigations, having been posted near the highest concentration of elephant and rhino. Bill Taylor is reported to be still actively smuggling. (53.54.55).

Bill Taylor, an American, was schooled in South Africa where he came into contact with former Rhodesia and SADF soldiers before moving to Zimbabwe as a dentist. Allegations surround his involvement with Mkwebu and Muketiwa and the three of them were seen on a number of occasions in the vicinity where carcasses were later found (53.54. 55.56.57). Allegations have been made that the three men killed Gonarezhou's famous elephant Kabakwe, an old radio-collared bull with tusks over 50 kg each. Taylor is

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reported to have been offering such tusks in South African soon after Kabakwe's killing ...

At the centre of the Zimbabwe ivory and rhino horn smuggling underworld is American born Bill Taylor, according to witnesses and dossiers implicating him (See Gonarezhou). Taylor's smuggling activities have also taken him as far as Zaire and Angola (88). Taylor has been named as a go-between for Renamo and South African contacts (89). Witnesses also state that Taylor has high level political cover in Zimbabwe.'

7.2 In the aforesaid article, a picture of the First Plaintiff was published with the caption: 'Bill Taylor, an American alleged to have been involved in poaching in Gonarezhou.'

8.1 The nature of the allegations referred to in paragraph 6 supra and the incorporation by reference to the allegations published in the second report of the Environmental Investigation Agency referred to in paragraph 7 supra show quite clearly that the references to the 'three central characters', 'a game scout and dentist' refer to the First Plaintiff who is an American born dentist otherwise known as Bill Taylor, and also the Second Plaintiff who is a former warden of Gonarezhou.

8.2 The article referred to in paragraph 7 specially identifies the two plaintiffs by their names and occupation."

It will be seen that the plaintiffs are not identified by name or description in

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Parade. However, the report upon which the article was based identifies the plaintiffs by name and description. It is apparent upon reference to the averments made in paras 8.1 and 8.2 that the averments made in paras 7.1 and 7.2 were included in order to show that the unnamed persons referred to in the article quoted in para 6 are the plaintiffs. The defendants' objection is that they did not publish the report pleaded in para 7.1 and 7.2. In the absence of an averment that the readers of *Parade* had access to that report, it cannot be inferred that they knew about the report when they read the article in *Parade*. If they were not aware of the contents of the report the information contained therein would not have assisted them in identifying the unnamed persons referred in the article.

It is true that before a person can be held liable for defamation the words complained of must have been published of and concerning the plaintiff. In everyday parlance, the article must refer to the plaintiff. Before the defendants can be held liable the "... plaintiff must therefore identify himself as the person defamed, that is, he must **allege** and prove that the statement complained of referred to him as an ascertained or ascertainable person. The test is whether the ordinary reasonable man hearing or reading the statement would be likely to understand the statement to apply to the plaintiff": *per* R G McKerron *The Law of Delict* 7 ed p 178-9. See also *SA Assoc Newspapers Ltd & Anor v Est Pelser* 1975 (4) SA 797 (A) at 810C. The emphasis at this stage of the inquiry is on the need to allege in the declaration that the statement refers to him. In this regard it has been averred in para 6 that the article in *Parade* was published of and concerned the plaintiffs. But, as I stated earlier, the article does not identify the plaintiffs either by name or by description. McKerron *supra* at p 179 states that "Where the statement contains no reference on the face of it to the plaintiff as an ascertained or ascertainable person, the plaintiff must set out in his pleadings the special facts and circumstances which he relies upon as supporting the allegation that the statement referred to him. Having thus alleged facts connecting himself with the defamation, the plaintiff will be entitled to call witnesses to prove

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that they understood the words complained of to refer to him."

What Professor McKerron says in the passage just quoted above derives strong support from respectable authorities with which I respectfully agree. In the case of *Argus P & P Co Ltd v Weichardt* 1940 CPD 453 at 459, Jones J accepted counsel's argument, correctly in my view, that "... unless the words used obviously referred to the plaintiff, a statement in the declaration that the words were published of and concerning the plaintiff and were meant and understood to refer to plaintiff was not sufficient, but that there should be

allegations in the declaration, fastening the libel on plaintiff". Further down the same page the learned judge, after referring to English and South African cases stated:

> "In the latter cases where the words used did not clearly apply to the plaintiff, and the innuendo alleged did no more than baldly assert that they applied to him, PITTMAN J, said:
>
> > 'this is quite insufficient. Opprobrious terms addressed directly to a number of persons in the absence of the plaintiff, and not clearly on the face of them applying to him, could be understood to refer to the plaintiff, only if there were facts within the knowledge of the person, in whose presence the words were uttered, which caused them to apply the words to the plaintiff. And such facts and knowledge of them on the part of such persons ... would undoubtedly have to be alleged ...'."

The decision in *Weichardt's* case *supra* has been followed in numerous cases since 1940, notably by MURRAY J (as he then was) in *Visse v Wallachs' P&P Co Ltd* 1946 TPD 441, especially at p 446, where the learned judge said:

> "And similarly when the statements complained of do not obviously refer to the plaintiff, it is necessary for the plaintiff, if he wishes to ground his action on such statements, to plead allegations fastening the defamation on to himself: it is not sufficient merely to state that the words were published of and understood to refer to him."

All that has been pleaded in para 6 is that the words were published of and concerning the plaintiff. The circumstances giving rise to this bald assertion have not been pleaded. It is quite obvious to any reader of this declaration that the reference in paras 7.1 and 7.2 to the report was intended by the pleader to show why in para 6 it is averred that the article in *Parade* was published of and concerning the plaintiff. This method of pleading reference to the plaintiff in a declaration overlooks the test to be met. The test is an objective one and it is whether the ordinary reader of the words complained of - not the reader of the declaration - would have understood the words complained of to apply to the plaintiff. See *A Newman CC v Beauty Without Cruelty Intl* 1986 (4) SA 675 (C) at 680B. The reader of the declaration would obviously understand the article in *Parade*, by reading paras 7.1 and 7.2, to have referred to the plaintiffs. That is not so with the ordinary man and woman of normal intelligence reading the article in *Parade* unless he was, at the time, aware of the contents of the report. If that is what is sought to be proved at

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the trial then in my view the averment must be made that the article in *Parade* was intended to and was understood by readers of *Parade* to refer to the plaintiffs by reason of the fact that such readers had access to and had read the report whose contents are reproduced in paras 7.1 and 7.2. This then would constitute the facts and circumstances upon which the innuendo is based. To incorporate by reference a report published by a third party in order to identify the persons who are the subject of the article complained of can only serve to embarrass the defendants in their defence. What the pleader did in this case is not very dissimilar to what the pleader in *Weichardt supra* did. There the defendant published a series of articles concerning the plaintiff. The first article did not identify the plaintiff by name or description. The subsequent articles named the plaintiff by name. The plaintiff sued on each article as a separate cause of action and sought to rely on the subsequent articles in order to show that the first article also referred to the plaintiff. On exception it was held (at 461) that:

> "Plaintiff has chosen in his declaration to separate the publications referred to in paras (6) and (7) [the ones that named the plaintiff] from those set out in paras (4) and (5) [which did not name the plaintiff] thereby setting out two separate and distinct causes of action, and for the purpose of this case they must be viewed separately. And in my opinion any deficiencies in the necessary allegations in respect of the one cause of action, which be it noted, are herein alleged to be false. The sufficiency or otherwise of the averments in the cause of action set out in paras (4) and (5) must be tested by what is contained in those paragraphs, and publications forming the groundwork of another and separate cause of action cannot be used to supply any deficiencies there may be in the earlier one."

Counsel for the plaintiffs in *Weichardt* argued, like Mr *James* did for the plaintiffs in this case, that the proper course was to apply for further particulars to cure any deficiencies which might exist in the pleading. The judge in that case held, as I do in this case, that if averments which are a necessary and essential basis of a cause of action are entirely omitted from a pleading, the defendant is entitled to except or to apply to strike out any averments which are superfluous and irrelevant instead of requesting for further particulars. Further particulars are only applied for where the necessary averments have been made but are lacking in particularity or specificity.

I am therefore satisfied that paras 7.1 and 7.2 and any subsequent references to those paras in the declaration are irrelevant and ought to be struck out.

CHATIKOBO J

Once paras 7.1 and 7.2 are struck out what remains is a bald assertion in para 6 that the words were published of and concerning the plaintiffs. As I have already demonstrated by reference to what I consider to be respectable authorities, such an averment is insufficient in a case where the article complained of does not identify the plaintiffs by name or description. Facts and circumstances upon which the innuendo is based should be set out in the declaration. It follows that the declaration is excipiable for want of proper averments to show that the article refers to the plaintiffs.

In the result it is ordered as follows:

(1) The application succeeds with costs.

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(2) Paras 7.1 and 7.2 and any succeeding reference to those paragraphs in the declaration are struck out.

(3) The declaration discloses no cause of action.

(4) Plaintiffs are granted leave to amend their declaration within 12 days of the date of this order.

Calderwood, Bryce Hendrie & Partners, applicants'/defendents' legal practitioners

James, Moyo - Majwabu & Nyoni, respondents'/plaintiffs' legal practitioners

MASIMBE v MASIMBE 1995 (2) ZLR 31 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Civil appeal

21 July 1995 Judgment No. S-132-95

Flynote

Appeal - execution - pending determination of appeal - when should be granted

Court - abuse of process - court's jurisdiction to protect itself from abuse - appeal noted, not to seek reversal of order of lower court, but in order to stultify urgent remedial relief granted - appeal dismissed

Criminal law - assault - by husband on wife - such assault an offence and police should take action against perpetrator

Headnote

The appellant and respondent were husband and wife. Their marriage relationship had deteriorated and a divorce action was pending. The appellant's attitude towards his wife became petulant and acrimonious and there were threats of violence. She was granted a provisional peace order against him, which was allowed to expire after some nine months, during which time there had been no exhibition of hostility. Later, however, the appellant unsuccessfully sought an order to have his wife evicted from the matrimonial home. When that failed, he resorted to threats of violence against her, actually assaulted her on various occasions, threatened to shoot her and their son and destroyed the plants which she used in her horticulture business. The assaults and threats were reported to the police, who took no other action than to temporarily deprive the appellant of his gun. Although it was suggested to the appellant that he allow the respondent to live in the cottage on the premises, he forced her to live, with their son, in one bedroom of the main house, and allowed

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relatives of his to occupy the cottage, telling her that he would continue to bring in his relatives until she was forced to leave.

The respondent obtained an order from BARTLETT J that she and her son be allowed to live in the cottage and that the appellant be restrained from entering the cottage and from interfering with her. The appellant noted an appeal but, on an application made by the respondent, SANDURA JP ordered that BARTLETT J's order be operative in spite of the noting of the appeal. The appellant appealed against SANDURA JP's order.

Held, that there would be no irreparable harm to the appellant if BARTLETT J's order were to be enforced before the determination of the appeal, but the possibility of irreparable harm and prejudice being done to the respondent was clearly foreseeable.

Held, further, that the appeal was clearly an abuse of the process of the court and was not noted with the *bona fide* intention of seeking a reversal of the order but rather to stultify the urgent remedial relief granted to the respondent and prolong her agony until she could endure it no longer. The court had an inherent jurisdiction to protect itself from such abuse.

Held, further, that it is high time that the police realised that wife battering is an offence and that, where reported, action should be taken against the perpetrator. The primary objective of law enforcement agencies is to keep the peace. Common sense and humanity demanded some intervention in this instance. To take prompt action not only protects the victim from further aggression, but serves to save the aggressor from himself. Inaction on the part of law enforcement agencies could lull him into a false belief that his actions are condoned and could result in him committing more heinous offences which may result in his incarceration or death.

Appeal dismissed.

Case cited:

South Cape Corp (Pty) Ltd v Eng Mgmt Svcs (Pty) Ltd 1977 (3) SA 534 (A)

J B Colegrave for the appellant

M Sinyoro for the respondent

Judgment

Korsah JA: We found this appeal to be totally without merit and dismissed it on the turn with costs, but reserved our reasons for adopting that course. Those reasons now follow.

The appellant is a medical practitioner and the respondent is a nurse. They

have lived together as husband and wife since 1984. Their union was blessed with a son born in July 1991. The relationship between them has soured to the extent that there is now pending

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an action for the division of the property acquired during the subsistence of the relationship. They both reside on that property comprising a main house and a cottage.

Pending the determination of the action for a division of the property, BARTLETT J, on 24 January 1995, ordered:

"1. That pending final determination of case no HC-5876-93:

(a) the applicant, and all those that claim through her, reside at the cottage, situated on Stand 114 Helensvale Township of Subdivision B of Helensvale (the cottage);

(b) the respondent, and all those that claim under him, should vacate the cottage forthwith;

(c) the respondent and all those that claim through him, reside at the main house situated on Stand 115 Helensvale Township of Subdivision B of Helensvale (the main home);

(d) the respondent and all those that claim through him are interdicted and/or restrained from, whether directly or indirectly, interfering with applicant's horticulture business being carried on at the premises around the cottage;

(e) the respondent and all those that claim through him, are interdicted and/or restrained from entering the premises around the cottage; and

(f) the respondent, and all those that claim through him, are interdicted from interfering, whether directly or indirectly, with applicant's occupancy and/or use of the cottage and/or the premises surrounding the cottage;

(g) the respondent, and all those that claim through him are interdicted and/or restrained from behaving towards applicant in a manner likely to cause or provoke breach of peace;

(h) the applicant and all those who claim through her vacate the main house forthwith;

(i) the applicant and all those who claim through her are interdicted and/or restrained from entering the main house;

(j) the applicant and all those who claim through her are interdicted from interfering directly or indirectly with the respondent's occupancy and/or use of the main house.

2. That the respondent pay costs of this application."

KORSAH JA

It was against this order granting an interdict that the appellant lodged an appeal. See s 43(d)(ii) of the High Court Act [*Chapter 7:06*]. The effect of the noting of the appeal was to stay execution of the order granted by BARTLETT J

The respondent, therefore, applied to the High Court to have the order made by BARTLETT J enforced notwithstanding that the appellant had appealed that order. On 20 June 1995, SANDURA JP acceded to her application and granted her prayer as follows:

"(1) That the order granted by BARTLETT J, on 24th January 1995, in case number HC 5963/94 be and is hereby decreed operative and shall not be suspended pending the outcome of the appeal which has been filed by the respondent.

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(2) That in the event of an appeal being noted against this order, notwithstanding such noting of appeal, this order shall remain operative and shall not be suspended pending the outcome of the appeal which would have been noted by the respondent.

(3) That the respondent shall pay the costs of this application."

The appellant's appeal is against the order of SANDURA JP refusing to suspend the order made by BARTLETT J pending the outcome of the appeal lodged by the appellant against the order made by BARTLETT J

The backdrop to this matter is that after the relationship between the parties had broken down, the appellant's feelings towards the respondent became so petulant and acrimonious that there were threats of mayhem and fights between them. Consequently on 7 July 1993, the respondent sought and was granted a provisional peace order against the appellant. That provisional peace order was extended from time to time but allowed to lapse on 22 February 1994, because the legal practitioners of the parties were of the view that a further extention was unnecessary as there had been no exhibition of hostility by the appellant during that period.

The appellant unsuccessfully sought an order of the High Court to have the respondent evicted from 12 Sunningdale Drive, which they had shared together as man and wife since its acquisition in 1990. Turning down the appellant's application on 15 June 1994, MTAMBANENGWE J advised that:

"There are two dwellings on the property and if applicant finds he can no longer live under the same roof with the respondent then he should let her

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occupy the cottage while he and his mother can occupy the main house, till the action respondent has brought in case HC 5876/93 is determined."

After the unrewarded attempt by the appellant to evict the respondent from the property by order of court, he resorted to threats of shooting the respondent and shooting himself.

The respondent is forced to live in one bedroom in the main house with the son of their union. The appellant, subsequent to the judgment of MTAMBANENGWE J, has commenced bringing in his relatives to occupy the property in dispute. The respondent has brought his mother's elder sister to join her mother in the cottage on the premises. Both women have houses of their own in Highfield. Caroline, the appellant's niece, shares the cottage with her grandmother and great-aunt. Caroline's parents live in Harare and have their own house. The respondent alleged, and the evidence is supportive of her, that the appellant has told her that he would continue to bring his relatives in until every inch of the premises is occupied and the respondent is left with no other option but to leave.

After the judgment of MTAMBANENGWE J the relationship between the appellant and respondent worsened. He recommenced his assaults on the respondent. He threatened to kill the respondent and their child and then himself. He commenced playing with a gun he possesses in order to instil fear in the respondent and drive her out of the premises. The respondent made a report to the police about the gun and he was temporarily dispossessed of

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it. The horticulture business carried on by the respondent at the premises has been destroyed by the appellant uprooting her plants and flowers.

On 22 August 1994, when the respondent asked why the appellant was acting in the manner above described rather than await the determination of their dispute by the court, he assaulted the respondent with booted feet and clenched fists, as well as hitting her head against the wall. It is alleged that he swore that if the respondent did not leave the disputed premises she would, one day, wake up dead, and that his life was not going to be run by mere court orders. This assault was reported to the police.

Again, on 15 September 1994, the appellant falsely accused the respondent of having damaged the filter in the jacuzzi when the respondent and their son had bathed in the jacuzzi without switching it on. This false accusation was used as a ground for assaulting the respondent with clenched fists and booted feet. When the respondent returned from Borrowdale Police, where she

KORSAH JA

reported the assault on her, the appellant assaulted her again saying that the police were not going to do anything to him.

I think it is high time the police realised that wife battering is an offence, and that, when it is reported, action must be taken against the perpetrator.

The primary objective of law enforcement agencies is to keep the peace. On the facts in this case common sense and humanity demanded some intervention. To take prompt action does not only protect the victim from further aggression, but also serves to save the aggressor from himself; inaction on the part of the law enforcement agencies lulls him into a sense of false belief that his offences are condoned and exhort him to commit, possibly, more heinous offences which may result in his incarceration or death.

From the foregoing, it does not require a person of great sensitivity to appreciate the brutality to which the respondent has been subjected, and the fear in which she lives. There is much to support her plaintive call that living under the same roof with the appellant had become unbearable. Indeed, the appellant himself confessed to the difficulty in living under the same roof with the respondent when he applied for her eviction. There can be no doubt that a speedy solution to their problems lies in the order which BARTLETT J, with accustomed perspicacity, made.

The effect of the appeal against the order made by BARTLETT J, as stated earlier, was to stay execution of that order and, not only prolong the agony of the respondent, but also put her life at risk pending the determination of the appeal. This surely is a situation which the law cannot tolerate. It stultifies the urgent remedial relief which the situation demands.

SANDURA JP rightly stated that the principles to be applied where a party applies to have an order of court enforced notwithstanding the pending of an appeal were set out by CORBETT JA (as he then was) in *South Cape Corp (Pty) Ltd v Eng Mgmt Svcs (Pty) Ltd* 1977 (3) SA 534 (A)

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at 545 as follows:

> "The court to which application for leave to execute is made has a wide general discretion to grant or refuse leave ... In exercising this discretion, the court should in my view, determine **what is just and equitable in all the circumstances** and in doing so, would normally have regard *inter alia* to the following factors:
>
> (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal, if leave to execute were granted;

KORSAH JA

> (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal, (applicant in the application) if leave to execute were to be refused;
>
> (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, eg **to gain time or harass the other party**; and
>
> (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be" (my emphasis added).

Applying these principles to the facts of this case, I can conceive of no irreparable harm or prejudice resulting to the appellant if the order of BARTLETT J were enforced prior to the determination of the appellant's appeal. On the other hand, I foresee the potentiality of irreparable harm and prejudice being occasioned to the respondent, who is being battered and lives in daily fear of her life and being prevented from earning her livelihood from her horticultural business at the premises.

In my view, this appeal is clearly an abuse of the process of the court and not noted with the *bona fide* intention of seeking a reversal of the order, but rather to stultify the urgent remedial relief granted the respondent and prolong her agony until she can endure it no longer. I believe there is, in the court, an inherent jurisdiction to protect itself from such abuse.

If there is the potentiality of irreparable harm to both parties the balance of hardship or convenience clearly dictates that the respondent will suffer by far the greater hardship, if the order of BARTLETT J were to be suspended during the pendency of the appellant's appeal.

Accordingly, the appeal against the order made by SANDURA JP was dismissed with costs, save that the second paragraph of that order, for the reasons above stated, is to be regarded as *pro non scripto.*

Gubbay CJ: I agree

Muchechetere JA: I agree

Chikumbirike & Asscs, appellant's legal practitioners

Chihambakwe, Mutizwa & Prtnrs, respondent's legal practitioners

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BUSHU & ANOR v NARE 1995 (2) ZLR 38 (HC)

Court **High Court, Harare**

Adam J

Civil trial

12 September 1994 & 26 July 1995 Judgment No. HH-87-95

Flynote

Delict - defamation - justification - need to show truth of allegations - privilege - need to show legitimate interest on part of person to whom information transmitted - fair comment - statements of fact do not constitute fair comment

Headnote

The defendant sent a letter to three parties in which he made a series of allegations of financial mismanagement by the plaintiffs in respect of their handling of the affairs of the Public Service Association Investment Company. The plaintiff sued the defendant for damages for defamation.

Held, that the allegations in the letter were defamatory.

Held, further, that the defendant had proved that many of the allegations were substantially true and were published in the public interest and were covered by the defence of justification, but that he had not established the truth of some of the allegations and these allegations were not covered by the defence of justification.

Held, further, that although the defence of privilege applied in respect of the publication of the statement to one of the parties, it did not apply in respect of the two others as those two parties did not have a legitimate interest in receiving the information transmitted to them.

Held, further, that the defence of fair comment did not apply as the statements were statements of fact rather than comments upon facts.

Held, therefore, that the defendant was liable for publishing to persons other than those who had a legitimate interest in receiving the information the allegations not covered by the defence of justification

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ADAM J

Cases cited:

Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Anor 1994 (1) ZLR 445 (H)

Mahomed v Kassim 1972 (2) RLR 517 (A)

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Tekere v Zimbabwe Newspapers (1980) Ltd & Anor 1986 (1) ZLR 275 (H)

Jensen v Acavalos 1993 (1) ZLR 216 (S)

Perera (MG) v Peiris & Anor [1949] AC 1 (PC)

Moyse & Anor v Mujuru HH-269-92

Neethling v du Preez & Ors; Neethling v The Weekly Mail & Ors 1994 (1) SA 708 (A) *Edward v Bell* 130 ER 162

Borgin v de Villiers & Anor 1980 (3) SA 556 (A)

De Waal v Ziervogel 1938 AD 112

Benson v Robinson & Co (Pty) Ltd 1967 (1) SA 420 (A)

SAUK v O'Malley 1977 (3) SA 394

Monckton v BSA Co 1920 AD 324

Basner v Trigger 1946 AD 83

Rhodes Univ College v Field 1946 (3) SA 437 (A)

Johnson v Beckett & Anor 1992 (1) SA 762 (A)

Marais v Richards en 'n Ander 1981 (1) SA 1157 (A)

Crawford v Albu 1917 AD 102

Roos v Stent & Pretoria Printing Works Ltd 1909 TS 988

London Artists Ltd v Littler [1969] 2 All ER 193

Kemsley v Foot [1952] 1 All ER 501 (HL)

Robertson v Ericksen 1993 (2) ZLR 415 (H)

McCarey v Assd Newspapers Ltd & Ors [1964] 3 All ER 947 (CA)

Argus P & P Co Ltd v Inkatha Freedom Party 1992 (3) SA 579 (A)

Prakash v Wilson & Anor 1992 (2) ZLR 294 (S)

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

Mabikwa v Ndhlovu HB-18-92

Chinengundu v Modus Publications (Pvt) Ltd HH-135-92

Chinamasa v Jongwe P & P Co (Pvt) Ltd & Anor 1994 (1) ZLR 133 (H)

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A P de Bourbon SC for the plaintiffs

J Samkange for the defendant

Judgment

Adam J: The plaintiffs' declaration seeks damages for the first plaintiff of $40 000 and for the second plaintiff of $25 000 arising from the publication of a letter dated 27 April 1992 by the defendant to the Registrar of Companies, Patents & Trademarks, with copies to the Public Service

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Commission and to Mr Mhondoro of the Public Service Commission. That letter, annexed to the Declaration, is as follows:

> "REGISTRATION OF PUBLIC SERVICE ASSOCIATION (PSA) INVESTMENT COMPANY:
>
> I am advised that the Public Service Association Investment Company is about to be registered. I have no objection against this registration of the company because it is long overdue. The prospective company was launched on Saturday 20 July 1991 and it is long overdue as regards its registration. I was one of the founder members of this prospective company. One of the main reasons for the formation of the company was to create jobs for the members of Public Service Association, who had been retrenched due to the Economic Structural Adjustment Programme. The operation of the company is supposed to involve all the members of the Sub-Association, but for the reasons I will tabulate it has become a one man band. As I said above I am not against the registration of the PSA Company, because the shareholders are now worried about the security of their monies. Members or shareholders are now worried that it has taken 9 months to have the company registered. **My concern as a person with the legal background is the appointment of Mr Bushu and Mr Shumba to the directorship of the company. They have a history of the mismanagement of the funds, and it is every member's concern that they should not be included in the management of the company if it is registered.** Please see the documents marked:
>
> 1. Press Statement.
> 2. Call to Suspend PSA Activities.
> 3. Notice to all Members.
>
> **From the document, you can see that the two are not fit to hold any directorship post and be entrusted with people's monies. They are instrumental in the misuse of people's monies. Already they have gone on a spending spree with inflated travelling and subsistence claims. To give you an example, instead of Mr Shumba on the 14 April 1992 travelling by plane from Harare to Bulawayo and then being picked up by one of the suggested directors of the company for Gwanda where there is one of the company projects, he has driven from Harare to Gwanda, a distance of 1 150 [kilometres] return, claiming $2 per kilometre, thus pocketing $2 300 for the return trip, less petrol expenses of about $300. Assuming he had used a plane, he would have used $393,80 for a return journey and then he would**

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> **have been picked up by Mr Tapela, one of the company directors for Gwanda, then do a return journey of about 300 kilometres, and thus he would have claimed $620 at $2 per kilometre. The total expenses for the**

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travel would be about $1 000,00 and thus $1 300,00 would be saved for the proposed Company.

Mr Bushu is employed by government on an average government workers' salary and he **now thrives on the travelling and subsistence claims from the unregistered prospective PSA Investment Company. Despite the call for the prospective company to be audited, this has been thwarted by Mr Bushu, fearing that this would reveal these irregularities.** The Public Service Commission tried to resolve the problem relating to PSA wrangles in particular the monies issue (see minutes marked 4.) You will note that under item 3-2-1 that one of the issues raised related to auditing. **Mr Bushu with the support of the less educated members of Government Workers' Association rejected the terms of reference as tabulated by the Public Service Commission. He feared that this would reveal a lot of irregularities.**

I personally criticised Mr Bushu and Shumba concerning these irregularities and I then had the monies I used to buy shares returned to me and very flimsy reasons being given (see letter marked No. 5). If you raise concern, dirty tricks are used to shut you up.

I would, therefore, plead with you not to have Mr Shumba and Bushu registered as Directors, although they hold the largest shares gotten under very dubious circumstances. The two cannot be entrusted with people's monies.

Without going into detail, I believe the regulations of the Companies Act have not been adhered to" (my emphasis).

This letter was annexed to the plaintiffs' declaration. But the documents mentioned in that letter were not included. At no stage during the trial were those documents produced.

In para 6 of the plaintiffs' declaration it is averred that the said letter stated and concerned the plaintiffs, then reference is made to the parts in bold above. In para 7 the plaintiffs averred that the aforesaid statements are wrongful and defamatory of the plaintiffs, and were made with the intention to defame the plaintiffs and to injure their reputations. In para 8 the plaintiffs averred that,

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as a consequence of such defamation as aforesaid, they have been damaged in their reputations and have suffered damages in the amounts claimed.

In response to the defendant's request for further particulars as to whether the defendant used a letterhead to write or type the letter and was the communication not privileged the plaintiff replied that it was typed on the letterhead of the provincial magistrate's office and the communication was not privileged.

Thereafter, in response to the defendant's request for further and better particulars as to whether the defendant was not entitled to communicate the statement to the recipients and were the recipients not privileged to receive the statements, the plaintiffs replied that the information sought was clearly evidential in nature and in any event had already been replied to, but for sake of absolute clarity the plaintiffs averred that the statements were not provided privileged circumstances.

In the defendant's plea the defendant denied that he was motivated by malice in making the statement complained of. Alternatively, the defendant had an obligation to disclose information to the recipients, the statement was fair comment and made in the interest of the association.

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The statement represented the truth and was made in the public interest.

In the plaintiffs' replication it was averred that the plaintiffs denied all the allegations in the defendant's plea as if specifically traversed.

It is common cause that the letter of 27 April 1992 was sent to the Registrar of Companies, Patents & Trademarks, that copies of it were received by the Public Service Commission and also by Mr Mhondoro of the Public Service Commission.

I should mention that during the trial Mr *de Bourbon*, for the plaintiffs, gave, as the explanation for non-inclusion of the documents mentioned in the letter of 27 April 1992, that the plaintiffs were only provided with the letter and certain documents. At the end of the trial Mr *Samkange*, representing the defendant, undertook to provide the court with them. The plaintiffs' instructing legal practitioners did subsequently address correspondence to the registrar of companies as well for them which were not received. Thereafter the registrar of this court wrote also to Mr *Samkange*, the defendant's legal counsel for those documents without any success. It is not clear, from the failure by the Registrar of Companies to respond, whether those documents

were indeed attached to the defendant's letter of 27 April 1992. Be that as it may, it follows that this court can only determine this matter on the papers filed in these proceedings.

The pre-trial conference minute specifies the issues as being that the onus was on the defendant whether or not the statement was truthful and in the interest of the association; whether or not the statement was truthful and in the public interest; whether or not the defendant had a duty to disclose the information, and whether or not the statement was by way of fair comment and in the interest of the association.

In his evidence the defendant gave his occupation as a regional magistrate, that he was a member of the Public Service Association (PSA) and that he had bought shares in the investment company. He described that at a meeting in July 1991, called by the first plaintiff, articles of association of the investment company were furnished, that 20 people were appointed interim directors amongst them himself and the two plaintiffs, that shareholders would only be the members of the Association, that it was decided that those present at that meeting would recruit shareholders, that in September 1991 that he was the provincial chairman of the association, he was accompanied by the second plaintiff on a recruitment exercise, that a lot of members of the association bought shares, that he bought 20 shares, his wife 10 shares, that according to the second plaintiff over 200 persons bought shares from the Matabeleland Province and that till then their relationship was harmonious. He stated that a meeting was to have been called at the end of October 1991 but it was not. However, at the meeting called at the beginning of November 1991 of the top hierarchy of the association (of which he was not a member) which included the first plaintiff, there were allegations of mismanagement. At a meeting of three sub-associations on 28 February 1992 attended by him, it was decided that the first plaintiff should not be the president, that the second plaintiff was suspended and that auditors should be asked to audit the books of the Association. On 14 April 1992 he attended a

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meeting of the two factions - the first plaintiff's and Chitsaka, the one to which he belonged - where a refund cheque in an envelope was brought by Mr Mashire for the shares in the company and he was told that he was no longer a member of the association. He stated that at the time he happened to know that a lot of journeys were being made by the first plaintiff's faction and thereby accruing a lot of travelling and subsistence money. It was about that time he wrote he 27 April 1992 letter. He stated that he was not given any explanation for that cheque and that he was one of the persons being victimised. By writing that letter to the Registrar of Companies, he was bringing forward to him the

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mismanagement of the monies. He testified that it was at that time the two plaintiffs were specified under the Prevention of Corruption Act [*Chapter 9:16*]. He made reference to an interim report of the "Investigator-cum-Auditor" in "The Public Servant" the official organ of the Public Service Association Special Edition of July 1993 (exhibit 2). He stated that as portrayed in the article in "The Public Servant" there was a lot of financial mismanagement by the first plaintiff's faction and the second plaintiff. He said that there was no difference between his letter of 27 April 1992 and the article. He was asked if he had defamed them and he replied that his letter was for public consumption, for the Public Service Association members though it was addressed to the Registrar of Companies. He said that he did not intend to defame the plaintiffs, nor injure their reputation and that he was not motivated by malice when he wrote that letter. He believed the statements were true as this was later borne out by the investigator's report. He believed that the Registrar of Companies was entitled to receive that information for the benefit of the members of the Public Service Association. The statements were the truth about what was going on in the Public Service Association as far as the plaintiffs were concerned. He was referred to a photocopy of the Public Service Association's Report of Investigation of 19 February 1993 prepared by Mr S J Hammond (exhibit 3) and read out the conclusion. He said that when mention was made in that report to senior members of the PSA's executive and management this was a reference to the plaintiffs, who were also the specified persons. In that report, he said, Mr Hammond deals with the loans of the second plaintiff. The defendant stated that the wrangle in the PA was very protracted and was still on, that he approached the second plaintiff about his letter of 27 April 1992 and his response was that if there was one body for the Public Service there would be no need to go on with the proceedings in the High Court and that he would discuss the question of withdrawal of the matter with his lawyers. His motive in writing the letter was to bring to the attention of the PSA the situation of the financial mismanagement as members of the PSA had joined the investment company in good faith and were waiting for a meeting of the shareholders to find out what was happening to the investment company.

Under cross-examination, he confirmed that the letter of 27 April 1992 was addressed to the Registrar of Companies, Patents and Trademarks with copies to the Public Service Commission. He confirmed that "The Public Servant" (exhibit 2) was published by the Chitsaka faction. He agreed that on a number of occasions he had approached the second plaintiff to settle the whole wrangle in the PSA and that he would not dispute that part of that wrangle was set down in this court for hearing. He was asked if the

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Investment Company was registered and he replied that as far as he knew it was not registered. Under re-examination he stated that the document "Press Statement" in the letter of 27 April 1992 referred to the two plaintiffs.

Thereafter both parties closed their cases with the plaintiffs not calling any evidence. In his address Mr *de Bourbon*, for the plaintiffs, pointed out that the letter of 27 April 1992 made reference to various allegations against the plaintiffs, which were defamatory. He submitted that the onus was on the defendant where the defences of justification and qualified privilege were pleaded - *Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Anor* 1994 (1) ZLR 445 (H) and *Mahomed v Kassim* 1972 (2) RLR 517 (A) at 529. He argued that the whole thrust of the attack was towards the wrangle in the association and not done *bona fide*. The statements were not published to the Public Service Commission. The letter was written to the Registrar of Companies in his official capacity (not in his individual name), who had no interest in the appointment of directors of companies. He conceded that where the defamatory statements had a limited circulation the figure awarded as damages was lower. He stressed that there were aggravating features - *Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Anor supra.*

Mr *Samkange,* for the defendant, submitted that the plaintiffs had not proved that the statements were defamatory. He argued that the defendant had pleaded justification and that in his report Mr Hammond stated that the plaintiffs had mismanaged funds. He submitted that the Public Service Commission, as an employer of the plaintiffs, had an interest in receiving the letter of 27 April 1992 and so did Mr Mhondo, as a representative of the employer.

In his reply Mr *de Bourbon* referred to the Companies Act [*Chapter 24:03*] and reiterated that s 344 gave this court power to restrain fraudulent directors from managing companies. He argued that the Public Service Commission was not the employer of the plaintiff. He submitted that Mr Hammond's Public Service Association's Report on Investigation dated 19 February 1993 (exhibit 3) under the para "2. TRAVEL AND SUBSISTENCE ALLOWANCES" did not show that the plaintiffs mismanaged funds, although Appendix 1 does refer to them. He cited *Tekere v Zimbabwe Newspapers (1980) Ltd & Anor* 1986 (1) ZLR 275 (H) at 286 and asserted that the allegations in that letter were not comment.

Turning to the issues, the plaintiffs' pleadings regard the allegations as being defamatory. The defendant has not averred in his plea that they are not

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defamatory but has instead raised a number of defences. The issues summarised in the pre-trial conference minute confirm this by putting the onus on the defendant to establish his defences.

In this connection I draw attention to what KORSAH JA said in *Jensen v Acavalos* 1993 (1) ZLR

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216 (S) at 223:

> "It is, of course, permissible to raise more than one defence to an action for defamation, but it is desirable that if more than one defence is pleaded that such defence be pleaded in the alternative ... A 'rolled-up plea' is objectionable because the plaintiff is disadvantaged from knowing whether a defendant is setting up a defence of justification or fair comment."

Further, the Privy Council in *Perera (M G) v Peiris & Anor* [1949] AC 1 (PC) at 19-20 said:

> "In Roman-Dutch law *animus injuriandi* is an essential element in processing for defamation. Where the course of development of Roman-Dutch law in Ceylon has, put broadly, been to recognise as defences these matters which under the inapt name of privilege and the apt name of fair comment have in the course of the history of the common law come to be recognised as affording defences to the proceedings for defamation. But it must be emphasised that those defences or, more accurately, the principles which underlie them, find that technical setting in Roman-Dutch law as matters relevant to negativing *animus injuriandi*. In that setting they are perhaps capable of a wider scope than that accorded to them by the common law. Decisions of the common law are indeed, of the greatest value in exemplifying the principles but do not necessarily mark rules under the Roman-Dutch law. The 'gladsome light of Roman jurisprudence' once shone on the common law; repayment to the successor of the Roman-Dutch law should not to be the form of obscuring one of its leading principles."

The basis of the plaintiffs' case is that the statements taken in their ordinary or primary meaning of the words are defamatory. The test to be applied has usually been described as follows: would an ordinary reader of average intelligence and education reading the statements attach to them a meaning which would tend to lower the plaintiffs in the estimation of members of the public: see *Moyse & Anor v Mujuru* HH-269-92.

In *Jensen v Acavalos supra* KORSAH JA stated at 225F-226A:

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> "The words, as in the interpretation of any document, are to accorded their natural and ordinary meaning. But in arriving at the ordinary and natural meaning of the words complained of, regard has to be given to, 'not only what the words are, but what conclusion could reasonably be drawn from them; as a man who issues such a document is answerable, not only for the terms of it but also for the conclusion and meaning which persons would reasonably infer from and place upon the document': per COTTON LJ in *Capital & Counties Bank v Hent* (1880) 5 CP 514 at 536 approved in *Cassidy v Mirror Newspapers Ltd* [1929] 2 KB 331 (CA) at 339".

As regards the defences to defamation in *Neethling v du Preez & Ors; Neethling v The Weekly Mail & Ors* 1994 (1) SA 708 (A) HOEXTER JA said at 769-770:

> "In my view the substantive law governing defamation prescribes not only the facts the plaintiff must prove, but also what facts must be established by the defendant whose defence involves confession and avoidance ...
>
> Apart from the fact that in principle all three defences should be governed by the same onus, there are in the case of the defence of truth in the public benefit cogent policy considerations for burdening the defendant with the full onus of proof. In the case of qualified privilege the defendant who transmits the defamatory matter is generally thus impelled by considerations of duty or of protection of an interest. The matter stands rather differently in regard to the defence of truth in the public benefit. Here no form of compulsion operations on the mind of the defendant whose decision to put the character of the plaintiff in jeopardy proceeds entirely from his own volition. The rationale of the defence seems to be that the law will not allow a person to recover damages in respect of an injury to a reputation which he does not, or at any rate should not, possess; coupled with the fact that society has an interest in correctly estimating the true character of its members ... Since it is entirely of his own accord that the defendant elects to verify the plaintiff, justice demands that he should do so at his peril; and that in an action

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> for defamation he should have to establish what he should have troubled to verify before he maligned the plaintiff ...
>
> Such defences can be sustained by nothing less than proof on a balance of probabilities. In passing it may be mentioned that proof on a balance of probabilities is required also in England and those Commonwealth

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> countries in which the common law of defamation allocates to the defendant the burden of proof."

See also *Jensen v Acavalos supra* 217.

The defendant is here firmly "saddled with the primary onus of proof (the risk of non-persuasion)" and not with the evidentiary burden (adducing evidence in rebuttal) in the words of HOEXTER JA. In other words, the success of the defence of truth in the public benefit depends upon proof of the truth of the defamatory allegations on a balance of probabilities. The statements need not be true in every detail, but they must achieve substantial accuracy. As much must be justified as meeting the gravamen of the charge or the material allegations: *Edward v Bell* 130 ER 162.

Also, as KORSAH JA observed in *Jensen v Acavalos supra* at 228:

> "For the defence of justification to be sustained the second requirement is that it must be established that the publication was to the benefit of the public. Such public benefit 'lies in telling the public something of which they are ignorant, but something which is in their interest to know. If they already knew it, it hardly seems that mere repetition can be of value': per BEADLE CJ in *Mahomed v Kassim* 1972 (2) RLR 517 (A) at 529-530; 1973 (2) SA 1 (RA) at 10 B "

Now the statements against the plaintiffs may be chronicled as follows: (a) they had a history of mismanagement of funds; (b) it is every member's concern that they be excluded in the Management of the Company; (c) the two are not fit to any directorship and be entrusted with people's monies; (d) they are instrumental in the misuse of people's monies; (e) they have gone on a spending spree with inflated travelling and subsistence claims, with the second plaintiff's Gwanda trip given as an example; (f) Bushu is employed by Government on an average government salary, but now thrives on travelling and subsistence claims; (g) Bushu has thwarted an audit to be done, fearing that it would reveal these irregularities; (h) Bushu, with the support of less educated members, rejected the terms of reference tabulated by the Public Service Commission, fearing this would reveal a lot of irregularities; (i) I plead that I do not have them registered as directors although they held the largest shares got under dubious circumstances and; (j) they cannot be entrusted with people's monies.

I am satisfied that the above statements, construed in the proper context in which they appear, are defamatory of the plaintiffs.

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I turn to consider the defence of truth for the public benefit. Here the onus is placed on the defendant to establish the truth of the offending statements, bearing in mind that he is not

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required to justify immaterial details that do not add to the sting of the charge.

In the trial there was no evidence led on the statements in paras (b), (g), (h) and (i). Mr Hammond's report was referred to by Mr *Samkange*. In that report (his appointment was said to have commenced in July 1992 and ended in November 1992) under travel and subsistence allowances (with an Appendix I - Schedule of travelling and subsistence claims) he indicated that some claim forms were missing or were not properly authorised, all of which was gathered from their preliminary investigations. He elaborated:

> "Appendix I details amounts paid out in respect of the above ... The facility appeared to be abused by many senior employees. Many of the trips were not necessary. From our observations both the mileage and the subsistence allowances were exorbitant. Management failed completely to control this expense resulting in the drawing of cash from the association. Those who availed themselves of this facility appeared to be using it to augment their income ..."

In his conclusion he observed:

> "Our investigations have shown a serious lack of control over the financial resources of the PSA and its associate bodies. This lack of control has led to abuses of the system by senior members of the PSA's executive and management, as shown in the schedules of travel and subsistence claims and of loans advanced to individuals. It is likely that our audit report on the financial statements of the PSA and its various funds will be qualified.
>
> The affairs of the association have evidently been badly mismanaged over the period under review. However, it may be difficult to produce evidence of outright fraud by the specified person."

Mr Hammond's statement continued as follows. The scope of their investigation and audit was limited to some extent by non-availability of all relevant documents pertaining to the affairs of the association. More time was spent on the audit due to the poor nature of the association's accounting record. The resources at the disposal of the association are poorly managed with cash being the worst, the executive seems to have no control over the PSA's staff.

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Much time is wasted by the senior employees trying to counteract the activities of the break-away faction, leaving them no time for their official duties. Management generally does not have any sense of responsibility or accountability and overrides most of the controls within the system. The second plaintiff, the association's general secretary has loan repayments that exceed his net salary. He has been erratically servicing some of their loans, especially the housing loans. PSA-Investments was founded in August 1991 with the main objective to acquire labour intensive projects to provide employment for retrenched civil servants. The intention was to register a private company but this could not be done, so the company was to be registered as a trust. PSA Investments raised $1,8 million from issue of "shares". By 31 March 1992 three projects had been acquired for $1 983 million of which $975 000 had been paid, of which only one had the authorisation of the board, while the other two were authorised by Bushu. This acquisition should have been approved by the board. The projects have failed to generate enough revenue. The sellers of two of the projects have handed the matter over to their legal practitioners for collection. The board has not taken heed of their finance officer's recommendation regarding the finances of the company. The PSA-Unemployment and Death Benefit Scheme (UDBS) with monthly contributions from members was intended to assist civil

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servants on being dismissed, suspended or on unpaid leave. Its cash position has been worsened by granting of loans t staff members evidenced by Bushu having obtained a loan of $145 000 against the fixed deposit of the UDBS from Founders Building Society without the executive committee's sanction. The PSA Management made decisions without the executive committee authorisation. The loan was set up for a staff housing scheme. The scheme's accounting record was poorly maintained. Most of the travel and subsistence allowances were being claimed through it yet the trips were for PSA-Investments benefit. PSA Savings and Credit Co-op Society scheme for loans to subscribed members has failed to grant all the loans applied for due to lack of reserves. Interest has not been paid on members' savings in it. Its cash position has been adversely affected by the PSA's heavy dependence on it for most of its funding. PSA's top management was engrossed in the politics of the association resulting in very little time left for official duties.

Now the plaintiff's declaration states that both of them are public servants with their addresses given of care of the Public Service Association. In the Hammond report, the first plaintiff is referred to as the president of the PSA and the second plaintiff as its General Secretary. The document tendered as exhibits in the trial indicate PSA to be composed of those in the Government

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Workers Association (GWA), the Civil Services Employees Association (CESA), the Professional and Technical Officers Association (PROTEC) and Administration and Executive Officers Association (ADEX). On the wrangle in the PSA the defendant was from PROTEC and belonged to the Chitsaka (from ADEX) faction while the first plaintiff belonged to the Bushu faction which the second plaintiff supported.

Mr Hammond's report cannot be said to be complimentary of the staff and of the top management of the PSA and it does make specific reference to the two plaintiffs. In para (a) of the offending statements, the defendant exaggerated when he stated that the plaintiffs had a "history". Nonetheless, Mr Hammond's report does reveal that there was a serious lack of control over financial resources which led to abuses of the system by senior members of the PSA's executive and management. The two plaintiffs fell into that category. Further, Mr Hammond also found that the affairs of the PSA had evidently been badly mismanaged over the period of July 1991 to June 1992. In para (c) it seems to me that reference to the two plaintiffs being unfit to any directorship must be read in conjunction with them being entrusted with people's monies. In this context, an allegation that someone cannot be entrusted with people's monies does not necessarily mean that such a person is dishonest. It could also mean that such a person was in capable of looking after funds properly. Here again Mr Hammond's report discloses that both plaintiffs, because of their positions, must take responsibility for the serious lack of control over PSA's financial resources and the evident bad mismanagement of the affairs of the PSA. It is in this light that para (d), (e), (f) and (j) must be viewed.

It follows that in my view the defendant has established that the offending statements, in para (c), (d), (e), (f), (j) and as for (a) (with the qualification of it being an exaggeration), published of the plaintiffs in the letter, were substantially true in their material parts. The defendant has not

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established the truth of the offending statements in paras (b), (g), (h) and (i).

Turning to the defence of qualified privilege. In *Borgin v de Villiers & Anor 1980 (3) SA 556 (A) cited with approval in Jensen v Acavalos supra* at 231 CORBETT JA (as he then was) stated at 577- 578:

> "The particular category of privilege which, ... would apply in this case would be that which arises when a statement is published by one person in the discharge of a duty or the protection of a legitimate interest to another person who has a similar duty or interest to receive it (see *de*

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> *Waal v Ziervogel* 1938 AD 112 at 121-3). The test is an objective one. The court must judge the situation by the standard of the ordinary reasonable man, having regard to the relationship of the parties and the surrounding circumstances. The question is, did the circumstances in the eyes of a reasonable man create a duty or interest which entitled the party sued to speak in the way in which he did? And in answering this question the court is guided by the criterion as to whether public policy justifies the publication and requires that it be found to be a lawful one. (See generally *de Waal v Ziervogel* (*supra* at 122-3); *Benson v Robinson & Co (Pty) Ltd* 1967 (1) SA 420 (A) at 426D-F; *SAUK v O'Malley* 1977 (3) SA 394 at 402-3) ...
>
> The defence of qualified privilege is, however, not concerned with the truthfulness or otherwise of the publication, though proof that the defendant did not believe that the facts stated by him were true may give rise to the inference that he was actuated by express malice. (See *Monckton v BSA Co* 1920 AD 324 at 332, *Basner v Trigger* 1946 AD 1946 AD 83 at 105). But the truthfulness or otherwise of the statements has no bearing on whether they were germane to the occasion or not. Secondly, the effect of including in a publication made on a privileged occasion statements which are not germane to it is to cause such statements to lose the protection of the privilege (*Rhodes Univ College v Field* 1946 (3) SA 437 (A) at 464)."

I now apply the above test to the present case. It certainly cannot be maintained by the defendant, having regard to the relationship and the surrounding circumstances, that he was under any duty to communicate the offending statements to the Registrar of Companies or that his letter was written in the furtherance or protection of a legitimate interest and the Registrar of Companies had a reciprocal interest to receive it. As correctly submitted by Mr *de Bourbon*, the appointment of directors does not involve the Registrar of Companies and it is not one of his functions to register directors.

As for Mr Mhondoro of the Public Service Commission, Mr *Samkange* spoke of him as a representative of the Public Service Commission, but there was no evidence led that his agency included being responsible for communicating with public servants or what his position was in the Public Service Commission. Similarly, therefore, reciprocity in communicating and receiving the offending statements did not exist between the defendant and Mr Mhondoro of the Public Service Commission..

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In light of the provisions of the Constitution of Zimbabwe which gives the functions of the Public Service Commission as being that of the making appointment of persons either as officers or employees or on special contracts and to fix and regulate their conditions of service and to

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exercise disciplinary powers in relation to such persons, I am prepared to hold that a form of relationship existed between the defendant and the Public Service Commission. It follows that the defendant was clearly under a duty to publish paras (b), (g), (h) and (i) about the plaintiffs as public servants to the Public Service Commission who had a corresponding interest or duty to receive it and to enquire into it. Also, the statements were communication made on a privileged occasion and, so, justifiably disseminated to the Public Service Commission.

Turning to the defence of fair comment. In *Johnson v Beckett & Anor* 1992 (1) SA 762 (A) HARMS AJA (as he then was) stated at 778:

> "The requirements of the defence were stated to be that:
>
> (i) The statement must be one of comment and not of fact;
>
> (ii) It must be fair;
>
> (iii) the facts upon which it is based must be true; and
>
> (iv) the comment must relate to matter of public interest.
>
> *(Marais v Richards en 'n Ander* 1981 (1) SA 1157 (A) at 1167). A fifth requirement was stated to be that the defence is available only if it is
>
> > 'based upon facts expressly stated or clearly indicated in the document or speech which contains the defamatory words.'
>
> See *Crawford v Albu* 1917 AD 102 at 114 ...
>
> The submission that the statement was one of fact and not comment cannot be accepted ... This is a classic case of comment dressed up as fact; it remains an expression of opinion. See *Crawford v Albu* (*supra* at 114) ...
>
> It is therefore necessary to consider the scope of the fifth requirement of the defence of fair comment. Its origin in South African law is to be found in *Roos v Stent & Pretoria Printing Works Ltd* 1909 TS 988. INNES CJ there stated at 998:
>
> > 'But it is obvious that to entitle any publication to the benefit of this defence it must be clear to those who read it what the facts are and what comments are made upon them ...'

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> SMITH J, in a concurring judgment, expressed similar views in the following terms (at 1010):
>
> > 'It is not necessary for the decision in this case, and I do not wish to be understood to lay it down as a principle, that every fact on which a comment is based should be set out in the article. I think there may be cases where the facts are so notorious that they may be incorporated by reference. But in the present article no reference was made to any of the sources from which the writer deduced the facts on which he based the assertion complained of. No opportunity was afforded to a reader of the article to know the grounds on which the imputation was based'....
>
> The last issue of substance to consider is whether the comment was fair. The word 'fair' is used in a specialised sense and means that the opinion must be an opinion which a fair man, however extreme his views may be, might honestly have, even if his views may be, might honestly have, even it the views are prejudiced. It must, objectively speaking, qualify as a genuine expression of opinion which does not 'disclose in itself actual malice'."

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In *London Artists Ltd v Littler* [1969] 2 All ER 193 (CA) LORD DENNING MR stated at 198:

> "There is no definition in the books as to what is a matter of public interest ... I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large, so they may be legitimately interested in, or concerned at, what is going on, or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment."

In *Kemsley v Foot* [1952] 1 All ER 501 (HL) LORD PORTER said at 504G-508:

> "If an author writes ... he is submitting that work to the public and, thereby, inviting comment. Not all the public will see or read ... it, but the work is public in the same sense as a case in the law courts is said to be heard in public ... and the subject-matter on which comment can be made is indicated to the world at large. The same observation is true of a newspaper ... A literary work can be criticised as having an immoral tendency. The fairness of the criticism does not depend on the fact that it is confined to form or literary content ...

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> If the defendant accurately states what some public man has really done, and then asserts 'such conduct is disgraceful', this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables his readers to judge for themselves how far his opinion is well founded; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth. The same considerations apply where a defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states the bare inference without the facts on which it is based, such inference will be treated as an allegation of fact. ...
>
> Is there, then, in this case sufficient subject-matter on which to make comment? ...
>
> I am of the opinion that in this case a sufficient substratum of fact is to be found in the words complained of."

LORD OAKSEY said at 508A:

> "... in my opinion, it is unnecessary that all facts on which the comment is based should be stated in the libel in order to admit the defence of fair comment ... It is sufficient if the subject which, *ex hypothesi*, is of public importance is sufficiently and not incorrectly and untruthfully stated."

Now in this regard it must be shown that there was a sufficient substratum of fact on which the comment was made. It is not disputed that all the offending statements here were clearly allegations of fact. Can it be said that what was written by him was the defendant's opinion masquerading as allegations of fact? The defendant has not alluded to this and has not referred to the offending allegations as a comment upon other correctly and truthfully stated facts. I am inclined to agree with Mr *de Bourbon* that they were not comment, but allegations or statements of fact.

I am therefore left with the following situation. A large number of the allegations against the plaintiffs were shown to be substantially true, except those in paras (b), (g), (h) and (i). Again, as far as the correspondence to the Public Service Commission was concerned, I have held that the defence of

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qualified privilege had been established by the defendant. In short, the plaintiffs were defamed, insofar as the letter was written to the Registrar of Companies and to Mr Mhondoro, by the offending allegations in paras (b), (g), (h) and (i). The question of quantum of damages must therefore be calculated on that basis. In assessing damages the relevant factors that have to be taken into account are the nature and content of the defamation, the extent of the publication, the reputation and status of the plaintiffs, the defendant's conduct and recklessness of the publication - *Robertson v Ericksen* 1993 (2) ZLR 415 (H) at 419. In that case this court also referred to *McCarey v Assd Newspapers Ltd & Ors* [1964] 3 11 ER 947 (CA) at 959 where reputational injuries sustained fell into two categories: (a) the diminution of esteem in which the plaintiff is held by others due to the defamation; and (b) the grief or annoyance caused by the defamation to the plaintiff himself. DIPLOCK LJ (as he then was) was of the view that though under (a) it may be possible to prove pecuniary loss, such as loss of practice or employment, the major consequence under (a) could be purely social. Therefore usually under (a) and (b) pecuniary loss is not involved. This means that the courts are being asked "to equate the incommensurable".

Also, in *Argus P & P Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) E M GROSSKOPF JA succinctly observed at 590:

> "Our courts have not been generous in their awards for *solatia*. An action for defamation has been seen as the method whereby a plaintiff vindicates his reputation, and not as a road to riches."

As already mentioned, calculation of damages is purely on the basis of the defamatory statements proved. In this exercise, *Prakash v Wilson & Anor* 1992 (2) ZLR 294 (S) at 301-302 provides a valuable guidance to this court. It follows that the measure of damages given has take into account the factual allegations that have been shown to be substantially true as highly mitigatory. Viewed in that light the seriousness of the defamatory statements is considerably reduced.

In *Prakash v Wilson & Anor supra* our Supreme Court awarded $200 to the plaintiff for the defamatory statement "Interpol seeks local businessman", an allegation that tended to suggest criminality.

In all the circumstances, the plaintiffs' claim was grossly excessive, taking into account the nature and content of the defamatory statements. These were not extremely serious compared with the defamatory statements in *Tekere v*

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Zimbabwe Newspapers (1980) Ltd supra (award given by this court was $20 000); in *Zvobgo v Kingstons Ltd* 1986 (2) ZLR 310 (H) (award given by this court was $14 000); in *Mabikwa v Ndhlovu* HB-18-92 (award given by this court was $5 500); *Chinengundu v Modus Publications (Pvt) Ltd* HH-135-92 (award given by this court was $23 000); *Robertson v Ericksen supra* (award given by this court was $5 000); *Chinamasa v Jongwe P & P Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H) (award given by this court was $30 000) and in *Shamuyarira v Zimbabwe*

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Newspapers (1980) *Ltd & Anor supra* (award given by this court was $1 500). Since the publication here was to two persons only for purposes of liability, the defamatory statements had a very limited circulation. In the case of the second plaintiff, only paras (b) and (i) apply to him. The other relevant factors in the measure of damages do not feature in any significant manner. All in all, not much damage was suffered by the plaintiffs.

I think their reputation will be vindicated and justice met by this court awarding the first plaintiff $1 000 and the second plaintiff $400. Accordingly, there will be judgment for the first plaintiff in the sum of $1 000 and for the second plaintiff in the sum of $400 and their cost will be on the magistrates court scale.

Winterton, Holmes & Hill, first and second plaintiff's legal practitioners

Byron Venturas & Partners, defendant's legal practitioners

BOSWINKEL v BOSWINKEL 1995 (2) ZLR 58 (HC)

Court **High Court, Bulawayo**

Chatikobo J

Divorce action

26 July 1995

Judgment No. HB-117-95

Flynote

Family law - divorce - domicile - spouse suing for divorce must aver and prove domicile within area of jurisdiction of court

Immigration - Immigration Act [Chapter 4:02] - s 3(3) - whether person resident in Zimbabwe on a temporary permit can acquire domicile of choice

Court - jurisdiction - divorce action - spouse suing for divorce must aver and prove domicile within area of jurisdiction of court

Headnote

A court only has jurisdiction in a divorce action if the person suing for divorce is domiciled within the area of jurisdiction of the court. The person bringing the action must aver and prove that he or she is domiciled within the area of jurisdiction of the court. Jurisdiction is not a matter which the litigants are free to establish by submission. It is the court which must determine the existence or otherwise of jurisdiction. If it appears to the court from evidence led that the question of domicile is in doubt, the court would *mero motu* raise the question of domicile in order to satisfy itself that the basis of jurisdiction relied upon has been established.

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The plaintiff came from the Netherlands with his wife with the intention of settling in Zimbabwe and making it his home. He had sold his properties in the Netherlands and had used that money to buy properties in Zimbabwe. He had abandoned his domicile of origin. In terms of s 3(3) of the Immigration Act [*Chapter 4:02*], a person must be lawfully ordinarily resident in Zimbabwe for a continuous period of two years before he is able to acquire a domicile of choice. The plaintiff had

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satisfied this requirement. However, it is a further prerequisite for the acquisition of a domicile of choice that the person has the fixed and settled intention of remaining permanently in the country of choice. The plaintiff had this intention and thus had acquired a domicile of choice after he had been in Zimbabwe for two years. The fact that he was resident in Zimbabwe under a temporary permit that might not be renewed or could be withdrawn did not prevent him from acquiring domicile. Even if the plaintiff's permit is not renewed s a consequence of which he loses his domicile, the court would still have jurisdiction as summons had been issued at time when he was still domiciled in Zimbabwe.

Cases cited:

Goldschmidt v Folb 1974 (1) SA 576 (T)

Smith v Smith 1962 R & N 469 (FS)

Carvahlo v Carvalho 1936 SR 219

Fozard v Fozard 1924 CPD 62

Kennedy v Kennedy 1978 RLR 58 (G)

Cohen v CIR 1946 AD 174

Mandlbaur v Mandlbaur 1983 (1) ZLR 26 (H)

Howard v Howard 1966 RLR 182 (G)

Mazula v Kopolo S-84-94

Joosub v Salaam 1940 TPD 177

Fenner v Fenner 1943 SR 188

Mills v Starewell Finance (Pty) Ltd 1981 (3) SA 84 (N)

R M Smithwick for the plaintiff

Miss N H Ncube for the defendant

Judgment

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Chatikobo J: The plaintiff, husband to the defendant since 2 December 1972, sued his wife for a decree of divorce and ancillary relief. In his declaration he proclaimed, and his wife in her plea admitted without qualification, that the parties are domiciled in Zimbabwe. It is necessary that the husband avers and proves that he is domiciled within the area of jurisdiction of this court before the court can assume jurisdiction. At the commencement of the trial, Miss Ncube, who appeared for the defendant, applied to amend her plea so as to deny that the plaintiff is domiciled within the jurisdiction of the court. In other words, she sought to withdraw the admission made on the pleadings that the plaintiff is domiciled in this country. Based on that amendment, she proceeded to argue *in limine* that the court lacks jurisdiction to entertain the matter. I allowed her to argue the

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point, because in my view nothing turns on the admission made in the plea because litigants cannot by agreement between themselves confer n the court a basis of jurisdiction which does not exist.

Jurisdiction is not a matter which the litigants are free to establish by submission. It is the court which determines the existence or otherwise of jurisdiction. This much is apparent from the *dictum* of HIEMSTRA J in *Goldschmidt v Folb* 1974 (1) SA 576 (T) at 577A:

> "Private individuals cannot confer jurisdiction on the courts which they do not possess in terms of the common law or of statute; nor can they impose tasks upon the courts which they are not legally obliged to perform."

Indeed, if it were to appear to the court either from the pleadings or from evidence led that the question of domicile was in doubt, then in such event the court itself would *mero motu* raise the question of domicile in order to satisfy itself that the basis of jurisdiction relied upon has been established. See *Smith v Smith* 1962 R & N 469 (FS) 470G.

The facts upon which the defendant objects to the jurisdiction of the court are simple and common ground. The plaintiff's domicile of origin is the Netherlands, his place of birth. He came to this country, together with the defendant, who was born here, on 27 September 1988. He was issued with a temporary permit which was valid for two years. It has since been extended several times over the years. The current permit is due to expire in September 1995 and the plaintiff has already put afoot plans to have the temporary permit renewed when it expires. The plaintiff testified that, although he was born in the Netherlands, he has not lived in that country all the time. He lived in Bolivia for a period in excess of two years. While in Bolivia his wife, the defendant, purchased a piece of undeveloped land for the purposes of speculation. That property is still there. He said his stay in Bolivia was always a temporary set up. His wife, a Zimbabwean by birth, has always wanted to return to this country to settle. She is the one who influenced his decision to come and settle in this country.

Having arrived in this country in September 1988, the parties bought a suburban house in Bulawayo. Some eighteen months later the parties bought another property in the same suburb. In 1991 they bought a flat in Bulawayo. The unchallenged testimony of the plaintiff was that prior to emigrating to Zimbabwe he had invested in immovable property in the Netherlands. Once

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he had decided to come to settle in this country he sold his properties, transferred the money to Zimbabwe and used the funds to purchase the properties I have just mentioned. According to the plaintiff, when he sold his properties abroad, and, when he transferred the proceeds of such sales to this country, he was fully aware that he would not be able to take the money out of this country, but he nevertheless transferred the funds in order to make real his intention to settle here and make Zimbabwe his home. He secured employment from a non governmental organisation of Dutch origin which is based in this country. The temporary residence permit I ave referred to was issued on the strength of such employment by the same organisation.

The thrust of the submission made by Miss *Ncube* was in essence that because the plaintiff has always been in Zimbabwe on a temporary permit he has never acquired a domicile of choice in Zimbabwe because before one can acquire a domicile of choice he must not only intend so but must have the power to carry out his intention. On the expiry of a temporary permit, the holder thereof ceases to be a resident and becomes liable to be removed from the country unless the permit is renewed. This submission derives support from the case of *Carvalho v Carvalho* 1936 SR 219, a judgment of LEWIS J in which the decision of the Cape Provincial Division in *Fozard v Fozard* 1924 CPD 62 was followed. The learned judge in *Carvalho's* case stated the principle thus:

> "... and as to the intention of a person to acquire a domicile of choice in substitution for a domicile of origin that intention must be such as to exclude all contemplation of any event on the occurrence of which the residence would cease (see *Johnson v Johnson* 1931 AD 391). As was decided in ...*Foozled v Foozled* (1924 CPD 62), there must, in order to create a new domicile of choice, be not only residence but the intention to remain permanently and indefinitely **and the power to carry out** that intention" (my emphasis).

The acquisition of a domicile of choice is governed by s 3 of the Immigration Act [*Chapter 4:02*] whose relevant provisions are as follows:

> "(1) Subject to the provisions of this section, a person shall be regarded for the purposes of this Act as being domiciled in a country if:
>
> (a) he resides permanently in that country; or
>
> (b) that country is the country to which he returns as a permanent resident.
>
> (2) ... (not relevant)

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> (3) No person shall for the purposes of this Act, have a domicile in Zimbabwe unless he has lawfully ordinarily resided therein for a continuous period of two years, which period shall not include -
>
> (a) any period during which a person has -
>
> (i) ... (not relevant)

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(ii) resided in Zimbabwe in terms of any permit other than a residence permit.

(b) ... (not relevant)."

It will be seen from these provisions that a person who resides permanently in a country or one who returns to a country as a permanent resident is regarded as being domiciled in that country.

There is before me evidence which satisfies me that the plaintiff is neither permanently resident in the Netherlands nor does he intend to return to it as a permanent resident. He sold all his possessions before he left the Netherlands. On arrival in Zimbabwe he lost no time in investing his money in immovable property. He did so in the full knowledge that it will not be easy for him to remove the funds employed in the purchase of those properties from Zimbabwe. I have to accept that the plaintiff has a genuine intention to settle in Zimbabwe and make it his home. He has abandoned his domicile of origin. But has he acquired a domicile of choice? Before he acquires a domicile of choice he is required to have "lawfully ordinarily resided" in Zimbabwe for a continuous period of two years (s 3(3) above). A person is ordinarily resident in a country if his residence therein is more than casual or intermittent. "It must be the country where, in the settled routine of life, the *de cujus* regularly, normally or customarily lives" (per GUBBAY J (as he was then) in *Kennedy v Kennedy* 1978 RLR 58 (G)). In *Cohen v CIR* 1946 AD 174 at 185 SCHREINER JA said:

> "But his ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings; as contrasted with other lands it might be called his usual or principal residence and it would be described more aptly than other countries as his real home".

See also *Mandlbaur v Mandlbaur* 1983 (1) ZLR 26 (H)

The plaintiff's assertion that it was the defendant who influenced him to come and settle in this country was not challenged. That being so, I have to approach the problem, not only on the basis that the plaintiff has lawfully ordinarily resided in this country for a continuous period of two years, but that

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he did so with the requisite *animus manendi* which is a prerequisite for acquiring a domicile of choice. In other words the plaintiff has not only to show that he has abandoned his domicile of origin *animo et facto*, but that he did so with the necessary state of mind or *animus manendi*. See *Howard v Howard* 1966 RLR 182 (G) 186E.

The acquisition of a domicile of choice demands the satisfaction of three requirements:

(a) a physical element, namely, the fact of residence;

(b) a mental element, the *animus manendi*, or intention of remaining permanently; and

(c) freedom of volition or the need for the *de cujus* to establish a residence in the exercise of his own free will.

See *Mazula v Kopolo* S-84-94. I shall return to this case later on in this judgment. If I

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understood Miss *Ncube's* submissions correctly, she does not quarrel with what I have said so far.

The pith of her attack, which I perceive to be two pronged, is this. In the first place, the two-year period provided for in s 3(3) of the Act does not include any period during which a person resides in Zimbabwe in terms of any permit other than a residence permit. Relying on this provision, she sought to argue that a temporary permit is not a residence permit. There is no substance in this submission and I need not be detained by it. A temporary residence permit is a residence permit of a temporary nature. It confers on its holder the right to reside in Zimbabwe during the period of its validity. The second leg of her argument deserves consideration. She argues on this rung that because the plaintiff resides here on the strength of a temporary permit, he lacks the power to carry out his intention to remain in this country. The decision of LEWIS J in *Carvalho v Carvalho, supra* upon which Miss *Ncube* placed reliance, runs counter to a long line of cases and it is in conflict with a decision of the Federal Suprme Court in *Smith v Smith supra*. The facts in *Smith's* case were that Mr Smith entered this country from England, which was his domicile of origin. His original entry was in contravention of the Federal Immigration Act 1954. He entered under a false name with a British passport in that false name, and he failed to disclose a previous criminal record. A temporary residence permit was issued to him, but since it was obtained by fraud, it was common ground that no reliance could be placed upon it. After an exhaustive examination of cases from this country, South Africa and England, BRIGGS, ACTING FCJ, held that: (a) the mere liability to be deported as an alien did not

make it impossible to acquire a domicile of choice; (b) it was not possible for a person to acquire a domicile of choice if his initial entry into the country was unlawful and his residence at all times thereafter remained unlawful in terms of the Immigration Act 1954; (c) the acquisition of a domicile of choice required both residence and *animus manendi*. The residence should be of one's own free will; (d) the *animus manendi* must be both genuine and honest; and (e) the *animus manendi*, while not requiring an absolute intention to reside permanently, must at least be an unconditional intention to reside for an indefinite period.

The difference between this case and *Smith's* case *supra* is that *Smith's* entry and stay in the country was always unlawful. The plaintiff's entry and stay in the country has always been lawful. The similarity between the two cases is that in each case there is a liability to be removed from the country, in the case of *Smith* because of the illegality, and in the case of the plaintiff because the residence is a temporary one. What the learned ACTING FEDERAL CHIEF JUSTICE stated at p 472B of the report is therefore equally apposite to the present case.

> "There is no doubt that in England mere liability to be deported as an alien does not make it impossible to acquire a domicile of choice. [In] *Boldrini v Boldrini & Anor* [1932] p 9 SLESSER LJ points out at p 17 that at common law all aliens were at all times liable to be deported and that, if such liability were to be treated as a bar, no alien could ever establish a domicile of choice in England ... Our law is to the same effect. In *Joosub v Salaam* 1940 TPD 177, the point directly in issue was not domicile, but whether the respondent was an incola. He had no right to remain permanently in the Union, but it seemed probable that he would later obtain that right. It was held that he should be regarded as an *incola*. GREENBERG JP said at p 180:

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'Thus where a statute (or the common law for that matter) makes it unlawful for a person to live in a country, his residence in that country even though he intends to reside there ... And if the particular requisite of domicile which is affected by this consideration is also a requisite in the case of an incola, then the illegality of residence may be equally relevant. **But I do not think that this disqualification applies to a person who lawfully enters a country but who by reason of his being an alien may be deported either if he commits a crime or merely because for reasons of policy his presence is deemed undesirable'"** (my emphasis).

CHATIKOBO J

The difficulty in the way of Miss *Ncube's* submission is underscored by what TREDGOLD J (as he was then) stated in *Fenner v Fenner* 1943 SR 188 at 191:

"To deal first with the intention: can it be said that the intention to reside permanently is nullified by the fact that such intention may be difficult or uncertain of attainment? I think not. To contend otherwise is to confuse intention with expectation. The distinction between the two is clearly drawn and well illustrated in Salmond *Jurisprudence* (6 ed) pp 336-339. It may be hard to believe that a man intends something which it is extremely difficult or well nigh impossible for him to achieve. Where it is absolutely impossible it might well be impossible to believe him. This is a matter of evidence. But it seems to me clear that a man may have a fixed and settled intention despite the fact that the fulfilment of such intention is liable to be postponed, interrupted or even wholly frustrated by the military or immigration authorities, or by the intervention of other circumstances."

What I believe to be the common principle shared by these *dicta* and the provisions of s 3(3) of the Act is that where a person ordinarily resides in a country lawfully for a continuous period of two years, of his own free will, and with the fixed and settled intention of remaining therein indefinitely, he or she will acquire domicile even though the stay is one that is susceptible to interruption or termination by the authorities. The temporary nature of a person's residence is a factor which may lead to the loss of domicile. It is not an impediment to the initial acquisition of a domicile of choice.

As TREDGOLD J stressed in *Fenner's* case *supra* at 191 when dealing with the case of a person who is not a free agent such as a soldier on military service in another country:

"I cannot see what there is to prevent him if 'actual residence' is used in its ordinary sense and not as a term of art. The fact that such residence may terminate abruptly at the will of another cannot alter its actuality. The requirements of the intention and the residence itself must not be confused. The person seeking to establish domicile is not asked to prove that the residence he has established is in fact permanent. To ask this would be to demand the impossible, for who can say what the future may hold and what circumstances may intervene to terminate his residence. He has simply to show that he is resident and that that residence is coupled with the intention permanently to reside."

CHATIKOBO J

And at p 193

"I am satisfied that an immigrant who comes here freely and voluntarily with the fixed and settled intention of remaining permanently in the Colony, and who is admitted on temporary permit can establish matrimonial domicile here."

So, even if plaintiff's permit is not renewed, as a consequence of which he loses his domicile,

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the court would still have jurisdiction to entertain the matter because the operative date is the date when action was instituted. The time for determining whether or not the court has jurisdiction is when summons is served rather than issued. *Forsyth Private International Law* 2 ed p 163 says:

> "Provided that a court has jurisdiction at the time of commencement of an action it will not matter whether the original ground for assuming jurisdiction subsequently ceases to exist. Where, for example, the court of the defendant's place of residence or domicile hears a matter, its jurisdiction is not upset simply because the defendant later changes his residence or domicile."

See also *Mills v Starewell Finance (Pty) Ltd* 1981 (3) SA 84 (N).

Before concluding this judgment I should deal briefly with the case of *Mazula v Kopolo supra* because Miss *Ncube* also contended that it supports her submissions. It does not. *Mazula*, apart from living in this country for several years, always maintained his Zambian residence. He falls into the category of a person who "actually resides" in one country while he "ordinarily resides" in another. As was stated in *Kennedy v Kennedy supra* at 62E-G:

> "A person is actually resident in the country in which he is in fact living ... Thus, a wife may actually reside in one country although be (sic) ordinarily resident in another. The fact that during the prescribed period her real home had not been in the country where she actually resided would be beside the point."

Mazula's case is thus not in point here.

The plaintiff came to this country in September 1988 and he has remained here ever since. I have held that he has always had a fixed and settled intention

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CHATIKOBO J

to remain here permanently. Therefore he acquired a domicile of choice in this country two years later, in September 1990. Summons was served on 4 August 1992, long after the plaintiff had become domiciled in Zimbabwe. The court, therefore, has jurisdiction to deal with the matter and the point taken in *limine* is decided against the defendant who should pay the costs of the hearing on 26 July 1995.

Coghlan &Welsh, plaintiff's legal practitioners

Lazarus & Sarif, defendant's legal practitioners

WINTERTON, HOLMES & HILL v PATERSON 1995 (2) ZLR 68 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

Gubbay CJ, Korsah JA & Muchechetere JA

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Civil appeal

11 & 27 July 1995 Judgment No. S-115-95

Flynote

Employment - contract - termination - dismissal - suspension pending dismissal - employer suspending employee and applying under Labour Relations regulations for authority to dismiss - employee seeking a court order to set aside suspension - whether court had discretion to refuse to order reinstatement

Legal practitioner - conduct and ethics - professional assistant in dispute with firm - whether court has discretion to decline to order reinstatement where employee resorting to remedies under common law rather than statutory remedies

Headnote

A professional assistant in a law firm became locked in a heated dispute with her employers over various issues. The firm threatened to apply for her dismissal. She complained to the labour relations officials of unfair labour practice, arguing that female assistants were being treated unfairly by the firm. The firm suspended her and applied under the labour regulations to dismiss her. Based on her allegation that she was suspended for consulting the labour officials, she obtained an urgent *ex parte* order calling on the firm to show cause why the suspension should not be declared invalid and they should not pay her salary within twenty-four hours. When she was not paid, she made a chamber application to imprison all the partners for contempt of the provisional order, ignoring advice that the order was ambiguous and, on the face of it, not immediately effective. The court refused to grant any committal for contempt, but made no award as to costs, and ordered the firm to pay her until the main

case was determined. The firm had withdrawn its application to the labour officials and had simply dismissed her. The court referred to trial the question of whether her suspension and dismissal were unlawful and whether she should be reinstated. The firm appealed.

Held, that it was clear that the firm had not suspended the assistant in retaliation for her having referred the matter to a labour official.

Held, further, that the assistant's decision to apply for a court order instead of relying on her statutory remedies meant that she had taken the common law route. Unlike the statutory process, where reinstatement must be ordered if the applicant succeeds, under the common law process the court has a discretion to refuse reinstatement, even where the dismissal was unlawful. In the circumstances of this case, reinstatement was patently inappropriate. The total breakdown of the personal relationships that had occurred, and the complete absence of the mutual trust, confidence and courtesy required amongst lawyers, made it sheer folly to thrust them back together again.

Held, further, that the issue of whether the assistant was lawfully suspended and dismissed was properly referred to trial, but the court had misdirected itself in believing that the question of reinstatement was dependent on it. Although the assistant was not entitled to reinstatement, the order was amended to enable her to make a claim for damages instead.

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Held, further, that the firm should have been awarded its costs in the contempt proceedings because, although the assistant may not have been responsible for the ambiguous wording of the order, she had ignored advice that she could not succeed and had wrongly brought a chamber application instead of a court application. As the firm had been successful in its opposition, costs should have followed the event.

Cases cited:

Pichanick NO v Paterson 1993 (2) ZLR 163 (H)

Masiyiwa v TM Supermarkets 1990 (1) ZLR 166 (S)

United Bottlers (Pvt) Ltd v Murwisi 1995 (1) ZLR 246 (S)

Commercial Careers College (1908) Pvt Ltd v Jarvis 1989 (1) ZLR 344 (S)

Schierhout v Min of Justice 1926 AD 99

Seloadi & Ors v Sun Intl (Boph) Ltd 1993 (2) SA 174 (B)

Johnson v Shrewbury & Birmingham Rly Co (1853) 22 LJ Ch 291

Gründling v Beyers & Ors 1967 (2) SA 131 (W)

Art Corp Ltd v Moyana 1989 (1) ZLR 304 (S)

J C Andersen SC for the appellants

Respondent in person

GUBBAY CJ

Judgment

Gubbay CJ: The appellants are ten legal practitioners who practise in partnership in Harare, under the name of "Winterton, Holmes & Hill". On 1 January 1991 they employed the respondent as a professional assistant.

On 7 December 1992, and pursuant to s 93(1) of the Labour Relations Act [*Chapter 28:01*], the respondent referred a dispute between herself and the appellants to a labour relations officer for hearing and determination. The next day she advised the appellants thereof in writing. On 9 December 1992 the appellants served upon the respondent a letter, dated 8 December 1992, suspending her forthwith from their employment without pay and other benefits, pending an application under s 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985, SI 371 of 1985, to a labour relations officer for an order terminating her contract of employment. The letter set out the grounds of misconduct relied on. These were: (a) wilful disobedience to a lawful order; and (b) conduct inconsistent with the fulfilment of the express or implied conditions of her contract of employment.

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It admits of no doubt that the respondent was not suspended as a retaliatory measure for having sought redress under the Labour Relations legislation. Well before the date of suspension, differences had arisen between the respondent and the appellants in respect of the fees charged by her in certain matters, her overall approach towards the assessment of fees, and her methods of communication and general attitude towards the partners. Eventually it was indicated to the respondent that the appellants wished her to leave their employment and that, failing efforts to secure her resignation on mutually satisfactory terms, they intended to apply for her dismissal. At the respondent's request, the appellants agreed to extend the date for consideration of the matter to the week commencing 7 December 1992. It was on that day that the respondent approached the labour relations officer.

The inference is strong that the respondent sought the extension of time in order to complete and submit her application before the appellants suspended her and applied for her dismissal. In addition, there was irrefutable evidence that the letter of suspension had been prepared prior to the receipt of the respondent's written notification of 8 December 1992.

On 23 December 1992 the respondent, in case no. HC 9817/92, applied upon a certificate of urgency to a judge in chambers for an order that her suspension from employment be declared unlawful and that she be paid her salary and other benefits from the date of such suspension. In effect, what was sought

was reinstatement in employment. The application omitted to disclose the fact that the respondent had been advised, previous to her reference, that the appellants intended to apply for her dismissal.

A provisional order ("the first provisional order") was granted by ADAM J on 24 December 1992, but only issued on 30 December 1992. It called upon the appellants to show cause why a final order should not be made in the following terms:

> "1. That (the appellants), pending the determination of (the respondent's) reference in terms of s 109(1) of the Labour Relations Act, 1985, *(1) pay (her) salary and all benefits with effect from the date of suspension, within twenty-four hours of service of this order.
>
> 2. That the suspension of (the respondent) dated 8 December 1992 be and is hereby declared unlawful.
>
> 3. That (the appellants) pay the costs of this application."

The appellants, and the respondent's then counsel, Mrs J Wood, considered para 1 of the order ambiguous as to when the payment of the respondent's salary and other benefits was to commence. Was it within twenty-four hours of the service of the first provisional order, or would para 1 only become operative if and when the provisional order was confirmed? Nonetheless, on 5 February 1993 the respondent made an urgent chamber application (case no. HC 873/93) for the committal to prison of all ten appellants for contempt of the order, which she euphemistically described in her founding affidavit as "a minor interlocutory application". The application was contrary to rule 388 of the Rules of the High Court, which provides that the

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institution of proceedings for contempt must be by court application. It was postponed s*ine die*.

On 15 February 1993 another provisional order ("the second provisional order"), case no. HC 1107/93, was issued by ADAM J at the instance of the respondent, who had revived the postponed application. The appellants were called upon to show cause why they should not be held in contempt of para 1 of the first provisional order. In addition it was ordered:

> "That pending the determination of case no. 9817/92 (the appellants) ... pay (the respondent's) salary and all benefits every month on the last

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> working day and this shall also include the salary and benefits from the date of suspension to 9 December 1992 up to the end of January 1993 which amount shall be paid within four hours of the service of this order."

The appellants made the payments required of them, but did so under protest. Having received payment, the respondent did not consider it necessary to set down the second provisional order for confirmation. The appellants, however, applied for it to be heard.

The appellants continued to pay the respondent her salary and all benefits every month up to the noting of the present appeal on 20 September 1993.

On 18 February 1993 the appellants filed a notice of set down in case no. HC 9817/92 to bring forward the opposed hearing from 22 July to 16 March 1993. Subsequently, on a chamber application made by the appellants for joinder (case no. HC 1944/93), BARTLETT J ordered that case no. HC 9817/92, together with the second provisional order (case no. HC 1107/93) be set down together for hearing on 30 March 1993, and that the question of costs be argued on completion of the hearing.

The application, together with a counter application and the second provisional order, duly came before SMITH J on 30 March 1993. In a judgment delivered on 2 June 1993 he condoned the late filing of the counter application, in which was sought an order authorising the termination of the respondent's contract of employment and a directive that all monies paid to her subsequent to 9 December 1992, were to be repaid. On the issues of whether the respondent's suspension and dismissal were lawful and, if not, whether she should be reinstated in employment, the learned judge found that the disputes of fact on the papers were incapable of resolution, no matter how robust an approach was taken. Consequently, he referred both issues to trial. Insofar as the contempt proceedings were concerned, he held that the first provisional order of 24 December 1992, whereby the appellants were to pay the respondent's salary "within twenty-four hours of the service of this order" was ambiguous, in that it was not clear that interim relief was being granted; that, in the event, the appellants were not *mala fide* when they failed to pay the salary within the time stipulated; and that they had shown cause why they should not be held in contempt of the first provisional order. He, accordingly, discharged that part of the second provisional order relating to contempt of court, but directed that the interim relief granted in terms thereof requiring the appellants to continue paying the respondent her salary and other benefits, was to continue pending the determination of case no. HC 9817/92,

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subject to deductions from any income the respondent may earn if she should take up alternative employment in the meantime. Finally, the learned judge considered that each party should bear their own costs in the contempt proceedings, being case nos. HC 873/93, HC 1107/93 and HC 1944/93. He made no specific order in respect to case no. HC 9817/92.

On 20 June 1993 the appellants applied for leave to appeal against those parts of the judgment of SMITH J which were interlocutory in nature. The application, though opposed by the respondent, was granted on 15 September 1993, it being ordered that the costs of the application be determined at the hearing of the appeal. See *Pichanick NO v Paterson* 1993 (2) ZLR 163 (H).

On 21 September 1993 the appellants filed a notice of appeal, and on 1 October 1993 the respondent filed a cross-appeal relating solely to the order for costs. Immediately before the hearing, however, the cross-appeal was withdrawn.

In his heads of argument filed on 17 February 1995, Mr *Andersen* made it clear that the appellants did not propose to proceed in respect of paras (c) and (d) of the prayer to the notice of appeal; but did not abandon their claims and reserved their right to commence action by way of summons for the amounts paid to the respondent. Paragraph (c) sought a declaration that the appellants acted lawfully in suspending the respondent without pay and that her employment was terminated with effect from the date of the suspension. And para (d) sought an order that the respondent repay all salary and other benefits received from the appellants since the date of her suspension. Consequently, the contentions advanced on behalf of the appellants were that the court a quo had erred in failing to hold: (i) that the respondent was not entitled to reinstatement; and (ii), that the respondent was liable to pay the costs in respect of both the main proceedings, case no. HC 9817/92, and the contempt of court proceedings, case nos. HC 873/93, HC 1107/93 and HC 1944/93.

Mr *Andersen* emphasized in argument that it was the respondent who had resorted to civil proceedings before the High Court, seeking an order which, effectively, was for her reinstatement and that, accordingly, the contentious matters of her suspension/dismissal and reinstatement did not fall to be decided under the Labour Relations legislation in terms of which, if the suspension was found by the determining authority to be unlawful, there was no option but to order reinstatement. See *Mainsail v TM Supermarkets* 1990 (1) SLR 166 (S) at 170H-171A; *United Bottlers (Pvt) Ltd v Murwisi* 1995 (1) ZLR 246 (S) at 251. The question fell to be determined under the common

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law. See *Commercial Careers College (1980) (Pvt) Ltd v Jarrahs* 1989 (1) SLR 344 (S). I agree. Indeed, it was noted by the learned judge that it was expressly acknowledged by both parties that the High Court had jurisdiction to determine the dispute. If the respondent wished to obtain what she termed "statutory reinstatement" she should not have taken the common law

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route, which permitted a discretion to refuse reinstatement even though the dismissal of the employee was found to be unlawful. She should have left the issue of her suspension to be determined by a labour relations officer in accordance with the relevant legislation.

Mr *Anderson* went on to submit that on the facts revealed in the affidavits of both parties, the learned judge ought to have come to the conclusion that it was wholly inappropriate for the respondent to be reinstated in employment. He ought not to have referred that issue to trial, even though he considered that the validity or otherwise of the respondent's suspension and dismissal could only be resolved after the reception of *viva voce* evidence.

In *Commercial Careers College (1980) (Pvt) Ltd v Jarrahs supra* this court observed at 349E-G that:

> "It is easy to conceive of a situation in which, albeit no blame whatsoever attaches to the employee, the inescapable inference is that the personal relationship between him and the employer has broken down to the extent that trust in one another has been lost. For a court to order reinstatement against such a backdrop of animosity and ill-will, solely because an employee unreasonably and out of wounded pride seeks it, would be to permit the continuation of an intolerable personal relationship - one which would make it impossible for the employee to perform his duties either to his own satisfaction or to that of his employer."

In that case, it was also said that regard was to be paid to the following remarks of INNES CJ in *Scirrhous v Min* of Justice 1926 AD 99 at 107:

> "... the inadvisability of compelling one person to employ another whom he does not trust in a position which imports a close relationship; and the absence of mutuality, for no court could by its order compel a servant to perform his work faithfully and diligently."

More recently, in *Celadon & Hors v Sun Intl (Bop) Ltd* 1993 (2) SA 174 (B) at 188 LAWRENCE ADJ, after referring to a number of decisions, reaffirmed that where a contract of employment has been wrongfully terminated the

court has a discretion whether to grant specific performance (reinstatement) or not, having regard to all the circumstances.

Since the relationship between legal practitioners is one which demands mutual trust, respect, confidentiality and proper behaviour towards one another, especially when working in the same practice, the remarks of KNIGHT-BRUCE RJ in *Johnson v Shrewsbury & Birmingham Wryly Co* (1853) 22 LG Ch 291, are apposite:

> "We are asked to compel one person to employ against his will another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever existed, still if the two do not agree, and good people do not always agree, enormous mischief may be done."

This statement was quoted with approval by TROLLOP J (as he then was) in *Groundling v Beggars & Hors* 1967 (2) SA 131 (W), in refusing to order specific performance in a service contract. The learned judge, at 147A-B, gave this as one of the reasons:

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"Meriting states categorically that the executive committee is antagonistic towards him and will not have him back under any circumstances. He, therefore, should not be thrust back on them ... It seem obvious too that he is also *persona non grata* with the general council. In view of that, the history of the events leading up to his dismissal, and his launching these proceedings, his submission that he could still work in harmony with those bodies, if Beggars' influence were removed, seems unduly optimistic."

In dealing with the issue of reinstatement, the learned judge a quo was alive to the breakdown in the relationship between the appellants and the respondent, with no degree of trust or respect remaining on either side. He aptly summed up the situation in these words:

"The applicant [respondent in appeal] has confessed that her loyalty towards the respondent [appellants] was under strain and in her papers she has accused various partners of bullying and intimidation, of making false statements, of forcing her to carry out work free of charge, of deception, of making derogatory and sexist remarks, of deliberately forcing her to deal with those partners who use bad language, of perverse conduct, of acting willfully and *malar fide* in the present proceedings, of

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trying to influence her lawyer against her and of being in contempt of court such as to warrant imprisonment and a summary order for committal. In her heads of argument she accuses the respondent [appellants] of 'trumping up' reasons for suspension and of 'fabricating' the investigation of her conduct and says 'One may well wonder what professional and promotional rewards lie in store for a reasonable female Professional Assistant' employed by the respondent. In addition, the respondent has stated that it would not be possible for the firm to continue to work with the applicant, especially in view of her conduct during these proceedings."

Not to be overlooked in an assessment of the relationship between the parties, is the respondent's letter of 7 December 1992 to the labour relations officer. It contains a most telling admission, expressed as follows:

"I am sure you will understand that the longer it takes to redress this dispute, the greater will be the strain placed on my loyalty towards the partnership and the more likely the possibility of harm to their clients for whom I act."

In argument before this court the respondent did not attempt to dispute the factual destruction of the personal relationship between herself and the appellants. Her stance was simply that as she had been unlawfully "locked out" by the appellants she was entitled to "statutory reinstatement", no matter how intolerable it would be for her and the partners to work together again. I have already pointed out that the respondent has misconceived the common law position. Even if it be assumed in her favour that the misconduct relied upon by the appellants did not, as a matter of law, warrant the action taken against her, the learned judge was vested with a discretion to decline to order reinstatement.

The question is simply whether on the evidence before him of the breakdown of the personal relationship, the learned judge exercised his discretion correctly in referring the issue of reinstatement to trial.

With the greatest respect, I find it difficult to understand why the learned judge, having observed that the respondent's statements and attempts to have the appellants committed for contempt of court "militate strongly against her being reinstated", should not have been satisfied on the papers that reinstatement was inappropriate. His approach appears to have been that as he was unable to come to a decision on whether the suspension/dismissal of the respondent

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was lawful, that issue, in conjunction with the one of

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reinstatement, was to be referred to trial. That, in my view, was a misdirection which affected the exercise of his discretion.

I entertain not the slightest doubt that the appellants and the respondent are totally incompatible and that there is no prospect whatsoever of their being able to work in harmony. To thrust the respondent back at the appellants would be sheer folly.

This conclusion, I may say, is strengthened, albeit unnecessarily, by the statements made by the respondent in addressing this court. She expressed the belief that because the appellants realised that they were going to lose the present litigation and her reinstatement would follow, their senior partner had entered into a criminal conspiracy with the President and Secretary of the Law Society to have her suspended from practice for a period of two years. She also accused the senior partner of "judge shopping" in order to ensure that the proceedings came before His Lordship Mr Justice SMITH. In addition, in papers filed by the respondent subsequent to the noting of the appeal, she alleged improper and fraudulent conduct on the part of the appellants in connection with the delay in the preparation of the appeal record and in the manner of its preparation. Finally, when advised that the appellants had a new address for service she wrote to the senior partner on 7 February 1995 in unnecessarily abrasive and unacceptable terms:

> "What I find particularly disturbing and suspicious is that you are attempting to transfer the conduct of the above cases from one of your partners (Raymond Milton Passaportis) to someone of the same surname in Honey and Blanckenberg. In view of your attempts to obfuscate the record in Civil Appeal no. SC 347/93, I cannot but infer that your attempt to transfer your case from one Passaportis within your firm to another Passaportis in another firm is calculated to deceive the courts and is part of the same pattern of conduct for which you are notorious. I cannot rule out the possibility that your own partner, Raymond Milton Passaportis, has refused to continue conducting his partnership's litigation because you forced him to disgrace himself by, *inter alia*, breaching fraudulently, behind my back, in my absence and to my prejudice Supreme Court r 15(8) (see case no. HC 502/95). It might well be that your choice of another Passaportis outside of your firm is motivated further by an attempt to obfuscate growing divisions within your own ranks."

I repeat, that to reinstate the respondent would do a grave injustice, not only to the appellants, but to the respondent as well.

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With regard to the existence of a criminal conspiracy on the part of the appellants, let me say without any hesitation that I am convinced that such exists solely in the mind of the respondent. Considered objectively, there is no persuasive factual basis for such an allegation. It is rejected out of hand.

Accordingly, in respect of case no. HC 9817/92, the order referring the issue of the propriety of reinstatement to trial must be substituted by a declaration that the respondent is not entitled to

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her reinstatement in the appellants' employment.

This leaves open the validity of the respondent's suspension/dismissal, which was also referred to trial. Should the respondent succeed on that issue she would be entitled to recover damages. *See Art Corp Ltd v Moyana* 1989 (1) ZLR 304 (S) at 313E-F. On the other hand, should she fail, the appellants would be entitled to recover all payments made to her subsequent to 9 December 1992.

To my mind, the best course to adopt, and one that will ensure some saving of costs, is to allow para 1 of the order made by the learned judge to stand, subject to the deletion of the words "and of her reinstatement" and to suitable provision for a claim for damages by the respondent.

As mentioned, the learned judge made no order for costs in relation to the main proceedings. I take it he intended each party to bear their own costs. See *Pichanick NO v Paterson supra* at 165C. The appellants have succeeded in having part of the order of referral set aside. I think it just, therefore, that they should be awarded a portion of the costs incurred in the court below. Mr *Andersen* stated that by far the greater amount of time was devoted by the parties to the argument on reinstatement. I did not understand the respondent to dispute this. I propose to award the appellants two-thirds of their costs.

I turn now to the appeal against the order that in respect of the contempt proceedings (cases nos. HC 873/93, HC 1107/93 and HC 1944/93 - the application for joinder of the two proceedings) each party should bear their own costs. The contention advanced was that, despite discharging the order, the learned judge failed to take sufficiently into account the substantial degree of the appellants' success as well as the respondent's precipitate action in launching the proceedings. In the circumstances, so it was urged, the respondent should have been ordered to pay the appellants' costs.

In my view, this contention must prevail. The normal principle to be applied

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is that where a party has been substantially successful, costs follow that event. It seems to me that in the exercise of his discretion the learned judge decided not to apply this trite principle because he considered that the ambiguity in para 1 of the first provisional order of 24 December 1992, was not the fault of either party. Even if it be assumed that the respondent was not responsible for the drafting of the order, it is clear that before she sought to have it put into operation under her application in case no. HC 1107/93, she knew that the appellants considered it ambiguous, as did her own counsel. Nevertheless, the respondent went ahead with the application. At the very least, she should have applied to ADAM J for directions as to the meaning of para 1, and so safeguarded her position. I can only conclude that the respondent acted unreasonably in seeking to have the appellants committed for contempt of court upon an order which she must have appreciated might be ruled ambiguous. She was prepared to take the risk of that happening and so must bear the consequences.

In the result, I would make the following order:

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1. The appeals in respect of case no. HC 9817/92, and case nos. HC 873/93, HC 1107/93 and HC 1944/93, are allowed with costs, inclusive of the costs of the application for leave to appeal.

2. The order of the court a *quo* is -

   A. Altered to read:

      "1. It is hereby declared that the applicant is not entitled to be reinstated in the employ of the respondent.

      2. The applicant is to pay two-thirds of the costs incurred by the respondents in respect of case no. HC 9817/92."

   B. Amended as follows:

      "3. In paragraph 1, to be renumbered 3, by the deletion of the words 'and of her reinstatement' and by the addition of these closing sentences -

      'The applicant is to provide the respondents with full particulars of her claim for damages prior to the holding of the pre-trial conference. The respondents shall be entitled to request, for the purposes of trial, further and better particulars of such claim for damages, should they deem it necessary to do so.'

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      4. In paragraph 2, to be renumbered 4, by the addition of the words 'with costs' after the last word 'discharged'.

      5. By the deletion of paragraph 3."

Before concluding, I must draw attention to the disgraceful manner in which the record in this appeal has been compiled. I cannot understand how it came to be certified by an official in the registrar's office as prepared in accordance with r 15(10) of the Rules of the Supreme Court. The most cursory examination would have shown that no effort whatsoever had been taken to assemble the various applications, with affidavits relating thereto, in chronological sequence. The papers were a complete jumble. Even the seventeen-page judgment was bound into the record totally out of order as, pages 2, 1, 4, 3, 6, 5, 8, 7, 10, 9, 12, 11, 14, 13, 16, 15, and 17.

I draw attention to r 15(8) of the Rules of the Supreme Court. This expressly provides that not only the registrar but the legal representatives of both parties have an obligation to participate in the preparation of the record. Quite obviously, this is not being done. I cannot for a moment believe that this record was prepared with the sanction of either the appellants or the respondent.

I strongly urge the registrar to refrain from certifying an appeal record as a true and complete copy until he has called upon the legal representatives of the parties to satisfy themselves that it has been properly compiled and all irrelevant matter excluded therefrom.

This court has been faced with poorly prepared records time without number. They have caused great inconvenience to its members. I must warn that if this undesirable practice persists much

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longer, such records will be rejected and the appeals postponed.

These remarks are to be drawn immediately to the notice of the registrar of the High Court.

Korsah JA: I agree.

Muchechetere JA: I agree.

Honey & Blanckenberg, appellants' legal practitioners

S v McGOWN 1995 (2) ZLR 81 (SC)

Court **Supreme Court, Harare**

Ebrahim JA

Application for leave to appeal

24 & 28 July 1995 Judgment No. S-117-95

Flynote

Appeal - leave to appeal - principles - applicant must not only have arguable case but one of substance - leave to appeal against sentence - should not be approached on same basis as application to appeal against conviction

Headnote

The applicant was convicted by the High Court on two counts of culpable homicide and acquitted on three others. He was sentenced to a term of imprisonment on the first count and to a fine on the second count. An application to the trial judge (GARWE J) for leave to appeal against conviction and sentence was refused. On application to a judge of the Supreme Court for leave to appeal:

Held, that the decision whether or not to grant leave to appeal depends on the prospects of success. If the prospects are reasonable, the application should be granted; otherwise it should be refused. It is not enough to make out an "arguable" case, for there are very few cases which are not arguable in the wide sense of the word, but the authorities in South Africa seem to regard there being a reasonable prospect of success if the case is arguable, in the sense that there is substance in the argument. Where there is substance in the argument, there must *ipso facto* be a reasonable prospect of success.

Held, further, that at the stage of an application for leave to appeal, the judge was not being called on to decide finally whether the argument was sound. At this stage he was looking at the judgment, not the whole record, though it might be possible at this stage of an application to say that an argument had no substance or that the law was firmly against the applicant.

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Held, further, that the facts were complex, with experts on both sides giving evidence about which it was very difficult for a layman in the field to say with any certainty who was right. There were also conflicting views about what the trial judge had found as regards the cause of death on one of the counts. On the other count, there was insufficient information to enable the Supreme Court to make a positive finding at this stage.

Held, further, that an application for leave to appeal against sentence should be treated less rigidly than one to appeal against conviction, because assessment of sentence is one of the more difficult tasks with which a judicial officer is faced. This case, which involved an experienced anaesthetist being prosecuted for the deaths of patients who had undergone surgery, was an unusual one and without precedent. It was not the sort of case for which there was a "normal" sentence.

Application granted.

Cases cited:

S v Tengende 1981 ZLR 445 (S)

Beatley's Trustee v Pandor & Co 1935 TPD 365

S v Mutasa 1988 (2) ZLR 4 (S)

S v Woods & Ors S-60-93

Van Heerden v Cronwright & Ors 1985 (2) SA 342 (T)

R v Muller 1957 (4) SA 642 (A)

R v Baloi 1949 (1) SA 523 (A)

S v Sikosana 1980 (4) SA 559 (A)

R v Rowesayi 1969 (1) RLR 140 (A)

Moore v Lewisham Gp Hospital Mgmt Cttee (1951) *The Times* 5 February

Sidaway v Govrs of Bethlehem Royal Hospital [1985] 2 WLR 480 (HL); [1985] 1 All ER 643 (HL)

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

P A Chinamasa, Attorney-General, with him *R Musakwa*, for the respondent

Judgment

Ebrahim JA: Before in terms of s 44(2) (b) and (e) of the High Court Act [*Chapter 7:06*]

The applicant was convicted by a judge of the High Court in Harare in January 1995 *(2) of two

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counts of culpable homicide. He was sentenced to

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twelve months' imprisonment with labour, of which six months' imprisonment with labour was suspended on certain conditions on the count relating to the death of a twenty-month-old baby boy. In respect of the other count he was sentenced to pay a fine of $10 000 or, in default of payment, six months' imprisonment with labour for causing the death of a ten-year-old girl. At his trial the applicant had been charged with five counts of culpable homicide in all, but at the conclusion of the case he was acquitted on three counts.

This is an application for leave to appeal.

The decision whether or not to grant leave to appeal depends on the prospects of success. How good must those prospects be? BARON JA said in *S v Tengende* 1981 ZLR 445 (S) at 447 that it would be a very serious step to deny a man the opportunity to appeal from a conviction at first instance. He said that the matter should therefore be approached on the basis, not of how good the prospects must be before leave is granted, but of how poor they must be before it is refused. The applicant should, therefore, be required to make out a reasonably arguable case, in the sense of there being substance in the argument: *Beatley's Trustee v Pandora & Co* 1935 TPD 365 at 366, cited in *S v Mutasa* 1988 (2) ZLR 4 (S).

In *S v Mutasa supra*, though, it was held that the test to be applied when considering the application is whether the applicant has a reasonable prospect of success. If he has, then leave to appeal should be granted. If he has not, then leave to appeal should be refused. It is not enough merely to make out an "arguable" case, for there are very few cases which are not "arguable" in the wide sense of the word. See also *S v Woods & Ors* S-60-93 (not reported), where it was held that the test of "reasonably arguable case" was setting the criteria too low.

The South African authorities are consistent in their approach, that there should be a "reasonable prospect" of success on appeal: *van Heerden v Cronwright & Ors* 1985 (2) SA 342 (T) at 343D. But none of them tries to pin down this rather elusive concept. It does seem, though, that they regard there being a reasonable prospect of success on appeal if the case is arguable "in the sense that there is substance in the argument" (my emphasis): per OGILVIE THOMPSON AJA (as he then was) in *R v Muller* 1957 (4) SA 642 (A) at 645, referring with approval to *R v Baloi* 1949 (1) SA 523 (A) at 524. See also *S v Sikosana* 1980 (4) SA 559 (A).

In my view, in whatever way one wishes to formulate the test, it comes to

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much the same thing. Clearly it would be appropriate to refuse an application that has little or no prospect of success or one that is frivolous. But where there is substance in the argument, there must *ipso facto* be a reasonable prospect of success. At this stage I am not being called on to decide finally whether the argument is sound. At this stage, too, I am not looking at the

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whole record, but merely at the judgment. A detailed analysis of the argument at the appeal may show that it is unsustainable; or, on the other hand, that it is unanswerable. It may also be possible at this stage to show that the argument put forward on behalf of the applicant has no substance, as in *Mutasa*'s case *supra*. This may be obvious from the nature of the arguments or because the law is firmly against the applicant or because the factual arguments put forward can be easily refuted. To that extent, the merits of the case will have to be considered during an application for leave to appeal. Unless it is clear that the applicant's argument is without substance, though, it seems to me that the application should be granted.

It is also of interest to note that although our Constitution does not provide a right of recourse to a higher court by way of appeal or review, there is such a right in South Africa (s 25(3) of their Constitution).

The law has for a long time required that a person who wishes to appeal against a conviction or a sentence passed by the High Court must (except where the death sentence has been passed) obtain leave to appeal, whether from the trial judge or from the appeal court. It seems to me to be somewhat anomalous that the Legislature should impose on a judge who has just decided that the guilt of the accused has been proved beyond reasonable doubt the duty of considering whether there is a reasonable prospect of success on appeal. If he had thought that, he would not have convicted in the first place.

In *R v Muller supra* at 645E-G OGILVIE THOMPSON AJA (as he then was) remarked:

> "From the very nature of things it is always somewhat invidious for a Judge to have to determine whether a judgment which he has himself given may be considered by a higher Court to be wrong; but that is a duty imposed by the Legislature upon Judges in both civil and criminal matters. As regards the latter, difficult though it may be for a trial Judge to disabuse his mind of the fact that he has himself found the Crown case to be proved beyond reasonable doubt, he must, both in relation to questions of fact and of law, direct himself specifically to the enquiry of

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> 'whether there is a reasonable prospect that the Judges of Appeal will take a different view' (*per* CENTLIVRES JA in *Kuzwayo* 1949 (3) SA 761 (A) at p 765). In borderline cases the gravity of the crime and the consequences to the applicant are doubtless elements to be taken into account but, even in capital cases, the primary consideration for decision is whether or not there is a reasonable prospect of success (*R v Shaffee* 1952 (2) SA 484 (A)). In this connection it should not be overlooked that, even if leave to appeal pursuant to s 363(1) of the Code be refused, it is, in terms of s 363(4) of the Code, still open to the accused to petition the Chief Justice for leave to appeal: that is to say, refusal of leave to appeal under s 363(1) does not preclude a convicted person from all further relief."

As regards the application for leave to appeal against sentence, it seems to me that such an application should be treated less rigidly than one for leave to appeal against conviction, because assessment of sentence is one of the more difficult tasks with which a judicial officer is faced: *S v Woods & Ors supra*. Sentence is a matter of discretion and there is always room for a difference of opinion. In *R v Rowesayi* 1969 (1) RLR 140 (A) BEADLE CJ at 141D said:

> "So far as sentence is concerned, however, this stands on a somewhat different footing. The assessment of sentence is one of the most difficult tasks with which a judicial officer is faced. Sentence is a matter of discretion, and there is always room for difference of opinion. Applications for leave to appeal against sentence need not,

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therefore, be treated as rigidly as applications for leave to appeal against verdict."

Finally, on the question of the law pertaining to this matter, I have also had regard to *Moore v Lewisham Group Hospital Management Committee [1959], The Times* 5 February, cited in Nelson - Jones & Burton *Medical Negligence Case Law* (1990) where BARRY J said:

"The courts could not do a greater disservice to the community or to the advancement of medical science than to place the hallmark of legality upon one form of treatment as opposed to another when there was a difference of informed medical opinion as to their merits."

The same attitude was expressed by LORD DIPLOCK in *Sidaway v Governors of Bethlehem Royal Hospital* [1985] 2 WLR 480 at 498C-F; [1985] 1 All ER 643 at 657F, where he said:

"Those members of the public who seek medical or surgical aid would be

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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 some more modern treatment, and by some unavoidable mischance it failed to heal but did some harm to the patient. This would encourage 'defensive medicine' with a vengeance. The merit of the *Bolam test* is that the criterion of the duty of care owed by a doctor to his patient is whether he has acted in accordance with a practice accepted as proper by a body of responsible and skilled medical opinion. There may be a number of different practices which satisfy this criterion at any particular time. These practices are likely to alter with advances in medical knowledge. Experience shows that, to the great benefit of human kind, they have done so, particularly in the recent past. That is why fatal diseases such as smallpox and tuberculosis have within living memory become virtually extinct in countries where modern medical care is generally available."

Had I been inclined, at this stage, to refuse the application I would have dealt with the merits of the matter in as much detail as possible, despite labouring under the great disadvantage of not having the full record of evidence available to me. I would also not like in any way to minimise the tragedies that occurred. For the families of the deceased, the events which took place must have been extremely hard to bear. It is entirely understandable that they would feel great anger towards any person whom they believed had caused their grievous losses. I am also mindful of the fact that the practice of surgery and anaesthetics is a risky business. No matter how commonplace, such procedures can never be 100 per cent safe.

What is apparent from the judgment of the learned judge a *quo* is that a number of expert witnesses were called. Clearly some such evidence was essential. It seems to me that it is difficult in a case like this for people who are not experts in these fields to make value judgments. The applicant was an acknowledged expert in the practice of anaesthetics, as were some of the experts who gave evidence against him. That being so, it seems to me that it would be difficult for a layman, which I am in the medical field, to say with any certainty, on studying the judgment only, which expert is right.

It is not apparent from the judgment why the Minister of Health and the Health Professions Council, who considered the conduct of the applicant prior to his trial, apparently found him not to be negligent, as indicated in the

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defence outline. Counsel are not in agreement on what transpired at the trial as regards whether an attempt was made to put the basis of the finding of the Health Professions Council before the court. I certainly would have wanted to know why a body of the applicant's peers had come to the conclusion it did. As to who should have placed this evidence before the court, this is a moot point. My own view is that it should have been the applicant's practitioners who did so, but it would not have been inappropriate for the court to have called this evidence. Whether they made the attempt to do so is not commented on in the judgment. Counsel appearing in this court were in disagreement on what transpired at the trial in this regard.

Be that as it may, it seems to me that at some stage in the future the Health Professions Council will undoubtedly wish to consider the question as to what action it should now take against the applicant in view of his convictions. To do so it would have to look at the whole record of evidence. Depending on what decision it makes, the matter may well come on appeal to this court. A full court will then be required to consider the merits of the appeal and look at the record as a whole. That, in my view, is the most probable scenario which this matter is likely to follow if the applicant fails in his application before me. It seems to me that it would be better for the matter to be aired more fully now, and then, depending on what conclusion this court reaches, for the profession's medical body to determine what steps it should take.

I must, in any event, have regard to the type of case I have before me and to the wide variety of considerations which need to be taken into account and consider whether or not shutting the applicant out at this stage might not lead to a grave injustice.

Mr *Chinamasa*, in explaining the delay in bringing this case to trial, stated that the matter was so complex that the delay was understandable. I share his view on the complex nature of this case. There was a considerable amount of expert medical evidence led and the witnesses in this regard were not always in agreement with each other. This was a most unusual case. What prejudice is there likely to be in the event of the matter being aired fully before this court? This case has been the subject of wide publicity, both internally and externally. It is a matter which has aroused a great deal of public interest and anxiety. These are factors which, in my view, require earnest consideration in determining whether or not the application sought should be granted.

There was, in addition, a divergence of opinion between counsel on what the learned judge *a quo* found as regards the cause of death in respect of the baby

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boy. The learned judge in his judgment stated: "The circumstances clearly suggest depression followed by vomit which the child was not able to eject because his reflexes were depressed by morphine". Mr *Chinamasa* said that death was due to a combination of respiratory depression and vomiting. Mr *Andersen* submits that this is directly the opposite to what the learned judge said. He drew my attention to what the learned judge said in making his ruling on the application

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made to him for leave to appeal, where he said:

> "I take this opportunity to stress that at no time was it ever suggested that death was due to two causes, ie vomiting and respiratory depression. Whilst, as I have already said, the evidence shows that the child eventually died of vomiting, the circumstances also show that there was depression of the child's reflexes."

It was Mr *Andersen*'s contention that this divergence of opinion only served to illustrate the difficulty the court should have had in concluding that his client had no reasonable prospect of success on appeal to the full court. In my view, there is merit in this submission.

As regards the death of the little girl, both counsel were again in disagreement on how the evidence of Sister Chirara had to be interpreted. I had a transcript of her evidence before me. The learned judge found that she acted solely on the instructions of the applicant. Mr *Chinamasa* supports this conclusion. Mr *Andersen* pointed out passages of her evidence which, he submits, indicate otherwise. I do not have the evidence of the applicant before me, explaining what the practice was as regards the care to be taken by nurses such as Sister Chirara. Mr *Andersen* submitted that her conduct amounted to a *novus actus interveniens*. I certainly can make no positive finding at this stage on the limited information I have before me.

On the subject of the application for leave to appeal against sentence, it is clearly apparent that this case is a most unusual one, without precedent. Consequently, even if the convictions are upheld, it is the sort of case for which there is no "normal" sentence. In my view, it would be highly desirable for the Supreme Court to consider the matter.

It is for these reasons as outlined above that I grant the application both as regards the convictions and the sentences imposed.

Winterton, Holmes & Hill, applicant's legal practitioners

SWM ELECTRICAL (PVT) LTD v ELECTRICAL & PULLEY COMPONENT SUPPLIERS (PVT) LTD 1995 (2) ZLR 89 (HC)

Court **High Court, Harare**

Robinson J

Civil application

1 August 1995 Judgment No. HH-153-95

Flynote

Practice and procedure - pleading - admission - what is - offer of- compromise made in pleadings - whether respondent had thereby admitted to claim

Compromise - claim and counter-claim - whether offer of compromise can be interpreted as admission that sum claimed or part thereof is owed

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Headnote

A claim had been brought by the applicant to recover the amount which it claimed was owed to it by the respondent. The respondent had consented to judgment being entered for a portion of the applicant's claim but had asked the court to enter judgment in its favour in respect of the remainder of the claim. The court declined to give judgment in the applicant's favour for the portion of the claim in respect of which the respondent had consented to judgment being entered. The court found that the respondent's agreement to pay the portion of the claim had been made on the basis of a compromise and was conditional upon judgment being entered in its favour in respect of the remainder of the claim, together with costs; it had not admitted that the amount was due. This was confirmed by the fact that the respondent was only prepared to abandon a defence to the claim that it had advanced if the applicant accepted the compromise put up by the respondent.

A J Dyke for the applicant

P C Paul for the respondent

1995 (2) ZLR p90

ROBINSON J

Judgment

Robinson J: I only became aware that an appeal had been noted on 22 August 1995 against the *ex tempore* judgment which I delivered in this matter on the Fast Track Roll when, on 12 December 1995, I was asked by the registry to provide my written reasons for judgment.

Since an appeal has been noted against only part of the judgment, in which I referred this matter to trial on the papers filed of record, on the ground that I erred in failing to enter judgment for the applicant in the sum of $150 000 as allegedly being an indebtedness admitted by the respondent, with the dispute over the balance of $130 466,70 claimed by the applicant being referred to trial, I shall confine myself to giving the reasons for my declining to give judgment for the applicant in the sum of $150 000. These are my reasons for so declining.

In para 10 of his opposing affidavit, the respondent's managing director, Takawira Farikai Zembe, states that because "the major [*sic*] of the value of the goods are second-hand I would not have paid more than $150 000 for all the items sold and I am agreeable to effecting payment of this amount but not the amount claimed by applicant" and then the deponent immediately concludes that "I therefore consent to judgment being entered in the sum of $150 000 but in respect of the remainder of applicant's claim I pray for judgment in my favour plus costs of suit".

When considered in the context of the whole of the respondent's opposing affidavit, I was of the view that the respondent's agreement to pay $150 000 was made on the basis of a compromise, conditional upon judgment being entered in its favour in respect of the remainder of the applicant's claim, together with costs, and not on the basis of an amount admitted by the respondent as being due to the applicant. In this connection, see Christie *The Law of Contract*

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in South Africa 2 ed at pp 549-550.

A factor which points to this being the correct interpretation of para 10 of the respondent's opposing affidavit is that it appears clear from its opposing affidavit that the respondent is only prepared to abandon its defence that the agreement in question does not comply with the requirements of the Hire Purchase Act [*Chapter 14:09*], more particularly s 25, in that the prescribed deposit was not duly paid, with the result that the goods which are the subject of the agreement in question shall be deemed to have been sold to the respondent on credit at a price which is twenty-five *per centum* less than the purchase price, if the applicant accepts the compromise put up by the respondent. In addition, it is not clear whether the amount of $150 000 is

ROBINSON J

intended to take into account the payments amounting to $40 000 which the respondent has already made.

Furthermore, to the extent that a party has not squarely dealt with the allegation, as the present applicant has not done, that that party was guilty of fraud, a court will lean over backwards to allow the aggrieved party every opportunity to canvass that matter fully in the course of a trial.

In passing, it is pointed out that this was not an application for summary judgment as it appears from para 6 of its heads of argument that the applicant mistakenly perceived it to be.

It is further noted that, whereas proceedings were instituted against the respondent in the name of Electrical & Pulley (Pvt) Ltd, it appears from the papers filed by the respondent that its correct name is Electrical & Pulley Component Suppliers (Pvt) Ltd.

What I find difficult to comprehend is that the applicant should have noted an appeal against the part of my judgment mentioned since, apart from the delay which has already been incurred in my being approached for my written reasons for judgment, a further not inconsiderable delay will ensue while the applicant awaits the hearing and outcome of its appeal; and that, if the appeal is successful, the applicant will only be in a position to pursue recovery of the balance or, worse still, if the appeal is lost, the full amount of its claim after the appeal has been determined.

On the other hand, if no appeal had been noted by it, it would have been open to the applicant, after the respondent had filed its plea and discovery of documents had been effected by the parties and after the applicant had filed its summary of evidence in order to apply for a pre-trial conference, to have caused the respondent to file its summary of evidence. Thereafter, the way would have been clear for the judge presiding at the pre-trial conference actively to seek to bring about a resolution of the applicant's claim, failing which the applicant would then have been able to apply for dates of trial. However, as matters presently stand, the applicant will not be able to cause the pleadings to be finalised and discovery of documents to be effected and to move towards the holding of a pre-trial conference until the appeal noted by it has been determined.

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McNaught Wickwar, applicant's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

DAVIES & ANOR v COMMISSIONER OF TAXES 1995 (2) ZLR 92 (HC)

Court **High Court, Harare**

Robinson J

Civil application

1 August 1995 Judgment No. HH-93-95

Flynote

Revenue and public finance - income tax - taxpayer - return - responsibility of employee taxpayer to obtain form from employer to show that tax deductions had been made from salary - no duty on Commissioner to obtain such form - assessment - reconsideration of by Commissioner - no power in High Court to order Commissioner to reconsider assessment - taxpayer's course is to lodge an appeal - Income Tax Act [Chapter 23:06] - s 65 and Thirteenth Schedule, paras 14(1), 17(3) and 22(1)(f)

Headnote

The applicants submitted tax returns after they had left their former employment. They claimed that PAYE had been deducted from their salaries, but did not submit a P6 form to prove the deductions. The deductions were disallowed. The applicants requested the Commissioner to reconsider his assessment, but in the absence of the P6 forms he declined to do so. They then sought an order compelling him to obtain the forms from their former employer and to reconsider his assessment.

Held, that it was the responsibility of the taxpayer to obtain a P6 form from his employer, and it was the duty of the employer to provide one. If the employer failed to do so, action could be taken against him by the employee. There was no duty on the Commissioner to obtain the form from the employer.

Held, further, that in the face of the Commissioner's refusal to reconsider his assessment, the applicants' course was not to seek an order compelling him to reconsider his assessment, but to lodge an appeal in terms of s 65 of the Income Tax Act [*Chapter 23:06*].

ROBINSON J

A Mills for the applicants

M J Gillespie for the respondent

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Judgment

Robinson J: The applicants are seeking an order that the respondent obtain from their former employer a P6 form and that he consider their objections and adjudicate on them within 10 days. Their application is based on the following events.

In the financial year ended 31 March 1991 the applicants were employed by Clouds End Hotel of Makuti. They allege that they had PAYE deducted at source by that employer. However, they did not produce a P6 form from their employer to indicate that the latter had made the deductions and so the respondent did not accept that the employer had made the deductions and made what the applicants allege is a second deduction of the amount concerned. The applicants objected to the disallowance of the alleged PAYE deductions. They also urged the respondent to invoke paras 14(1) and 22 of the Thirteenth Schedule to the Income Tax Act [*Chapter 23:06*] ("the Income Tax Act") in order to compel their former employer to hand over the relevant P6 forms. The respondent wrote to Clouds End Motel, Makuti requesting the P6 forms concerned. However, the respondent also wrote to the applicants saying that the obligation to obtain a P6 form from an employer lay on the taxpayer and not on the respondent or his officials.

The applicants wrote to the respondent asking him to consider their objections and to suspend payment of tax pending his decision. A number of such requests were made but they received little response. The applicants then instituted this application seeking a *mandamus* compelling the respondent to give a verdict concerning their objections.

The respondent opposes the application. Firstly, he claims that it is not his responsibility to obtain P6 forms for employees. In this case, he did try to help the applicants and wrote to their former employer. The former employer responded by submitting a form ITF 36 which indicated the remuneration he had paid to the applicants and that no PAYE had been deducted. The respondent says that he did not treat the applicants' objection as being valid. Only objections which involve an interpretation of the law or which are clearly disallowable are referred to him. The decision of the respondent was that PAYE deductions could not be credited to a taxpayer unless a P6 form from the employer was produced and this was communicated to the applicants.

The applicants' case is based on the assumption that it is the duty or

responsibility of the respondent to obtain a P6 form from an employer who refuses to give it to his employee. Mr *Gillespie*, on the other hand, argues that the respondent has no such duty or responsibility. He also argues that the remedy of the applicants in this case was to appeal in terms of s 65 of the Income Tax Act. They cannot apply for an order that the respondent reconsider the matter.

I agree with the views expressed by Mr *Gillespie*.

Paragraph 17(3) of the Thirteenth Schedule to the Income Tax Act provides that it is the duty of

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an employee or former employee who has not received a P6 form forthwith to apply to the employer for such certificate. In terms of para 14(1) of that Schedule an employer has a duty to deliver such form to each employee and para 22(1)(f) makes it an offence if the employer fails or neglects to deliver the form to any employee or former employee. In my view, these provisions clearly indicate that it is the responsibility of an employee to obtain a P6 form from his employer and it is the duty of the employer to deliver such form to the employee and not to the respondent. If an employer fails or refuses to do so, then the taxpayer should institute an action against the employer to obtain the form. After all, it is the taxpayer who is claiming *vis-à-vis* the respondent that PAYE deductions have been made and it is for him to prove his claim by submitting a P6 form in support. He is the person who knows what his salary s or was and what PAYE deductions were made. He is the only one who can say whether or not the P6 form is correct. The respondent cannot do so. Furthermore, it would, in my opinion, impose an unrealistically onerous obligation on the respondent if he were given the duty to ensure that every employer delivered a P6 form to each of his employees. What could the respondent do if an employer said that he had delivered a P6 form to his employee and the employee said that he had not? If an employer and his employee disagreed about the accuracy of a P6 form so delivered, what could the respondent do? In this case, the applicants claim that PAYE deductions were made and therefore that their former employer is obliged to provide a P6 form. However, the former employer claims that no PAYE deductions were made and so he did not produce a P6 form but he did submit a form ITF 36. I reiterate, it is my view that the Income Tax Act imposes a duty on the taxpayer to obtain a P6 form from his employer or former employer and it is not the responsibility of the respondent to do so.

With regard to the claim that the respondent reconsider the objections lodged by the applicants, the respondent made it clear to the applicants that he was not prepared to review the assessments he had made unless they submitted

ROBINSON J

a P6 form to support their claim that PAYE deductions had been made. Despite the failure on the part of the officials in the Income Tax Department to reply to some of their letters, it should have been clear to the applicants that their objections were being disallowed in the absence of P6 forms and that it was not for the respondent to obtain the forms. The fact that the disallowance was not notified to the applicants on what they claim is the standard form is not relevant. One must look at the pith and substance of the actions and decisions of the respondent. Even if that was not clear to the applicants when this application was filed, it should have been clear when the opposing affidavit was filed, which indicated that the applicants' former employer had submitted a form ITF 36 showing that he had not made any PAYE deductions. The applicants should have proceeded by way of an appeal in terms of s 65 of the Income Tax Act against the assessments made by the respondent. In my view the court cannot order the respondent to reconsider an assessment unless an appeal is lodged in terms of s 65 of the Income Tax Act.

The application is accordingly dismissed with costs.

In conclusion, I would like to express my appreciation to my brother Smith for his assistance in

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the preparation of this judgment, which should really be attributed to him.

Scanlen & Holderness, applicants' legal practitioners

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

ZVOBGO v MODUS PUBLICATIONS (PVT) LTD 1995 (2) ZLR 96 (HC)

Court **High Court, Harare**

Malaba J

Civil trial

26 June & 2 August 1995 Judgment No. HH-90-95

Flynote

Delict - actio injuriarum - defamation - defences - privilege - newspaper publishing fair and accurate report containing defamatory remarks made by one politician against another - whether such publication privileged - newspaper's right to publish defamatory remarks made by another person

Damages - amount - actio injuriarum - defamation - public figure

Headnote

The plaintiff, a Minister in the Government, brought an action for defamation against the defendant company, in respect of statements contained in a report published in an edition of its weekly newspaper, the *Financial Gazette.*

During the 1990 general election campaign, violent clashes took place in the Gweru constituency between supporters of ZANU(PF), the ruling party, and ZUM, an opposition party. The candidate for ZUM, Patrick Kombayi, was shot and seriously wounded by a member of ZANU(PF) and a member of the Central Intelligence Organization. He was admitted to hospital and later went to England for specialist treatment. While in England, he was visited by two Zimbabwean Ministers, Dr Stamps, the Minister of Health, and the plaintiff. After these visits, Edgar Tekere, the national chairman of ZUM, told a press conference of the Ministers' visits to Kombayi, alleging that both Ministers had promised that the Government would meet Kombayi's medical bills and that the plaintiff had discouraged charitable organisations from raising funds. However, Tekere alleged, the plaintiff, on return home, had instructed the Zimbabwean High Commissioner in London to tell Kombayi that the

Government would not take responsibility for his hospital bills. Tekere then made a remark to the effect that the plaintiff's action was vindictive and evil. The remarks were published in the *Financial Gazette.*

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The defendant admitted that the statements were defamatory of the plaintiff but claimed that the publication was privileged, in that it was its duty to publish to readers of the newspaper and the general public what one national politician said about another on a matter of public interest.

Held, that privilege exists when (1) there is a public or private duty, whether legal or moral, for one person to make and the other person to receive the communication; (2) the communication is fairly warranted by any reasonable occasion or exigency and is honestly made; or (3) the statement is in the conduct of the person's own affairs where his interest is concerned. The fact that the speaker honestly believed that the person to whom he made the communication had a duty or interest to receive it is irrelevant to the question as to whether the occasion is privileged. The test is objective, not subjective. Even if the speaker had no such belief, he would be protected if the court found the occasion was privileged.

Held, further, that privilege is a complete defence. The onus is on the defendant to show, on a balance of probabilities, that the occasion was privileged. The question which had to be decided in each case was: was there a duty to communicate? The judge must decide this question in the light of the evidence, coupled with his own views as to what the defendant's duties were in the circumstances.

Held, further, that there is no legal duty on a newspaper to publish what one politician says about another on a matter of public interest. If there were a duty, there would be a right of action on the part of the readers of the *Financial Gazette* if the defendant failed in that duty. There would only be a duty to publish if the general public or the readers of the *Financial Gazette* had the duty or power or responsibility to take steps to protect its interest. There is a distinction between what is in the public interest and what is of public interest. The public had no knowledge of or interest in Kombayi's stay in hospital in England or who was paying his bills until the *Financial Gazette* published the story. It might have been otherwise had the story already been generally known before.

Held, further, that while the shooting of Kombayi was a matter of public concern, because it involved a breach of the law in whose enforcement the public have an interest, his detention in hospital, who visited him and how his bills were to be paid were not matters of public interest.

Held, further, that the fact that the source of the story was a national politician did not confer any special position on the newspaper. A politician has no more rights than an ordinary citizen. A reasonable man would have

considered the reliability of the source before publishing; in this case, Tekere's information was hearsay.

Held, further, that the the defendant could not claim privilege from its fair and accurate reporting of a defamatory statement made by another.

Held, further, that the quantum of damages was a matter entirely within the discretion of the judge, the final decision being based on impression and personal opinion. The sum awarded must carry a complete vindication of the plaintiff's character. The plaintiff was a well-known public figure holding high office. It was seriously damaging to his reputation to portray him as

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heartless. It was injurious to him to suggest that, after Kombayi had been unlawfully wounded, the plaintiff had tried to stop charitable organisations from assisting. There was no retraction or apology. It was mitigating that the source of the statements was not being sued, but the defendant caused them to reach a wider audience than they would otherwise have done. Weighing the circumstances against other cases, an award of $20 000 would be appropriate.

Cases cited:

Pullman v Hill & Co [1891] 1 QB 524

Watt v Longsdon [1930] 1 KB 130

Beach v Freeston [1971] 2 All ER 854 (QB)

Stuart v Bell [1891] 2 QB 341

Hebdith v MacIlwaine [1894] 2 QB 54

Neethling v du Preez; Neethling v The Weekly Mail & Ors 1994 (1) SA 708 (A)

Chinamasa v Jongwe P & P Co (Pvt) Ltd & Anor 1994 (1) ZLR 133 (H)

Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Anor 1994 (1) ZLR 445 (H)

Holzen v Woolwright 1928 TPD 5

Laloe Janoe v Bronkhorst 1918 TPD 165

London Artists Ltd v Littler [1968] 1 All ER 1075 (QB)

Chapman v Ellesmere [1932] All ER Rep 221

Purcell v Sowler (1877) 2 CPD 215

Gardener v Whitaker 1995 (2) SA 672 (E)

Silkin v Beaverbrook Newpapers Ltd [1958] 2 All ER 516 (QB)

Rhodesian P & P Co Ltd v Howman NO 1967 RLR 318 (G)

Haas v Greatermans Stores (Rhod) Ltd & Anor 1966 RLR 313 (G)

Chinengundu v Modus Publications (Pvt) Ltd HH-135-92

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

Tekere v Zimbabwe Newspapers (1980) Ltd & Anor 1986 (1) ZLR 275 (H)

MALABA J

J C Andersen SC for the plaintiff

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E W W Morris for the defendant

Judgment

Malaba J: On 30 October 1990 the plaintiff (Dr Zvobgo) commenced action against the defendant (Modus) claiming damages of $50 000 in respect of defamatory statements contained in a report published in the edition of its weekly newspaper, the *Financial Gazette* of 10 August 1990. Modus admitted that the publication was defamatory of Dr Zvobgo but set up the defence that the publication was made on a privileged occasion in that it was its duty to publish to the readers of the *Financial Gazette* and the general public what one national politician said about another national politician on a matter of public interest.

FACTS

The facts forming the background to the claim are these. During the 1990 general election, the Gweru Central constituency was contested by the Vice - President, Mr Simon Muzenda, for Zimbabwe African National Union (Patriotic Front) (ZANU(PF)) and Mr Patrick Kombayi, the national organising secretary of the Zimbabwe Unity Movement (ZUM), whose national chairman was and still is Mr Edgar Tekere. Dr Zvobgo was and still is a senior member of ZANU(PF) and a Minister in the Government.

During the run-up to the elections violent clashes erupted in Gweru between the supporters of ZANU(PF) and ZUM, resulting in Mr Kombayi being shot and seriously wounded. A member of the Central Intelligence Organisation and a ZANU(PF) supporter were later charged with and convicted of the attempted murder of Mr Kombayi.

Mr Kombayi had been admitted to Bulawayo Central Hospital for treatment soon after he was injured. He later decided to go to England for specialist medical treatment and was admitted at the Royal National Orthopaedic Hospital in Middle sex. Dr Stamps, who had been appointed Minister of Health after the general elections, visited Mr Kombayi at the hospital in May 1990. Dr Stamps and Mr Kombayi had become friends during the days they were councillors in their respective cities of Harare and Gweru. Dr Stamps had stopped in London on his way home from a World Health Assembly meeting when he decided, out of courtesy, to pay a visit to his former colleague in local government. He, however, found Mr Kombayi in intensive care and did not hold any meaningful discussion with him.

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A month after Dr Stamps had visited Mr Kombayi, Dr Zvobgo and his wife also paid him a visit. Dr Zvobgo held Mr Kombayi as a family friend. They had known each other for many years and the friendship had survived the political clashes between their respective parties.

On 4 August 1990 Mr Tekere called a press conference at which he told journalists about the visits to Mr Kombayi by Dr Stamps and Dr Zvobgo. The speech by Mr Tekere was published by Modus in the edition of the *Financial Gazette* of 10 August 1990. The report alleged that Mr Tekere had said that when Dr Stamps visited Mr Kombayi at the hospital he told Mr Kombayi that the Government would pay for his medical treatment and that all invoices should be

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forwarded to the Ministry of Health. Mr Tekere was also quoted as saying that Dr Zvobgo told Mr Kombayi and hospital officials that the payment of the hospital bills would be done by the Government and that it was a matter for the whole Cabinet, not just the Ministry of Health. Dr Zvobgo was said by Mr Tekere to have gone on to discourage charitable organisations from raising funds with which to assist Mr Kombayi to pay the hospital bills. The report also said Mr Tekere told journalists at the press conference that, on returning home, Dr Zvobgo contacted the High Commissioner in London and instructed him to advise Mr Kombayi and the hospital officials that Government had no responsibility for the payment of Mr Kombayi's hospital bills. Mr Tekere was then reported to have said:

> "It just shows the extent of the vindictiveness that we are faced with here. Two fingers got into Mr Kombayi's pie - that of Dr Stamps which was clean and well intended and that of Dr Zvobgo which was full of nothing but evil."

Dr Zvobgo alleged that these statements were defamatory of him, suggesting as they did that he was vindictive, dishonest and evil-minded. Both Dr Stamps and Dr Zvobgo gave evidence at the trial, denying the allegations that they promised Mr Kombayi and hospital officials Government assistance in the payment of Mr Kombayi's medical expenses. Modus accepted what Dr Stamps and Dr Zvobgo said in evidence as the truth. It closed its case without leading evidence from witnesses.

On the facts as outlined above the defence of qualified privilege is to be upheld or rejected. I turn to consider the law that I have to apply to the facts to reach the decision.

MALABA J

LAW

The general principle of the law of defamation is that where there is publication of defamatory matter it is presumed that the publication was unlawful and accompanied by *animus injuriandi*. Publication is the putting out of one's control of the material and letting it known to a person other than the one who is being spoken about. The law, however, recognises instances where, even if there is publication of defamatory matter, the circumstances in which the publication is made are privileged, in the sense that the speaker is presumed to have acted lawfully and without *animus injuriandi*, unless and until the person defamed proves that the publisher of the defamatory matter had express or actual malice. The privilege does not lie between the publisher and the receiver of the publication, but lies against the person who is spoken about, in that he cannot recover damages for defamation from the publisher if he fails to rebut the presumption raised by the privilege: *Pullman v Hill & Co* [1891] 1 QB 524 at 528. These instances that constitute exceptions to the general rule are called privileged occasions.

What, therefore, is a privileged occasion? With the exception of one statement that has been queried for being an incorrect statement, the law was, in my view, fully stated in the judgment of SCRUTTON LJ in *Watt v Longsdon* [1930] 1 KB 130 at 142-143; 146-148 where his Lordship said:

> "By the law of England there are occasions on which a person may make defamatory statements about another, which are untrue without incurring any legal liability for his statements. These occasions are called privileged occasions. A reason frequently given for this privilege is that the allegations that the speaker has 'unlawfully and

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maliciously published' is displaced by proof that the speaker had either a duty or an interest to publish and that this duty or interest confers the privilege. But communications made on these occasions may lose their privilege: (1) they may exceed the privilege of the occasion by going beyond the limits of the duty or interest; or (2) they may be published with express malice, so that the occasion is not being legitimately used, but abused. A very careful discussion of the way in which these two grounds of loss of privilege should be considered will be found in LORD DUNEDIN's judgment in *Adam v Ward* [1917] AC 329. The classical definition of 'privileged occasions' is that of PARKE B in *Toogood v Spyring* 1 CM & R 181, a case where the tenant of a farm complained to the agent of the landlord, who had sent a workman to do repairs, that the workman had broken into the tenant's cellar, got drunk on the tenant's cider, and spoilt

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the work he was sent to do. The workman sued the tenant. PARKE B gave the explanation of privileged occasions in these words:

> 'In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency and honestly made, such C communications are protected for the common convenience and welfare of society; the law has not restricted, the right to make them within any narrow limits.'

It will be seen that the learned judge requires: (1) a public or private duty to communicate whether legal or moral; (2) that the communication should be 'fairly warranted by any reasonable occasion or exigency'; or (3) the statement in the conduct of his own affairs where his interest is concerned. PARKE B had given several other definitions in slightly varying terms. For instance, in *Cockayne v Hodgkinson* (1833) 5 C & P 543, 548 he had directed the jury 'where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interests of another, that which he writes under such circumstances is a privileged communication."

This adds to the protection of his own interest spoken of another where the situation of the writer requires him to protect those interests. This, I think, involves that his "situation" imposes on him a "legal or moral duty". At pp 146 to 148 of the judgment His Lordship continues to say:

"In 1855 in *Harrison v Bush* 5 E & B 344, 348, LORD CAMPBELL CJ giving the judgment of the Court of Queens Bench accepted a principle stated thus:

> 'A communication made *bona fide* upon any subject matter in which the party communicating has an interest or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty although it contains criminatory matter which without this privilege, would be slanderous and actionable.'

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This is the first of a series of statements that both parties, the writer and the recipient, must have a corresponding interest or duty. LORD ESHER MR says in *Pullman v Hill & Co* [1891] 1 QB 524 at 528:

> 'An occasion is privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it and the person who receives it has an interest in hearing it. Both

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these conditions must exist in order that the occasion may be privileged.'

LORD ATKINSON in *Adam v Ward* [1917] AC 309 at 334 expresses it thus:

'It was not disputed in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.'

With slight modifications in particular circumstances, this appears to me to be well established law, but, except in the case of communications based on common interest, the principle is that either there must be interest in the recipient and a duty to communicate in the speaker, or an interest to be protected in the speaker and duty to protect it in the recipient. Except in the case of common interest justifying intercommunication, the correspondence must be between duty and interest. There may, in the common interest cases, be also a common or reciprocal duty. It is not every interest which will create a duty in a stranger or volunteer. This appears to fit in with the two statements of PARKE B already referred to and with the language of ERLE CJ in *Whiteley v Adams* 15 CB (NS) 392 at 418, that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it. This is approved by LINDLEY LJ in *Stuart v Bell* [1891] 2 QB 341 at 348 but think should be expanded into 'either (1) a duty to communicate information believed to be true to a person who has a material interest in receiving the information, or (2) an interest in the speaker to be protected by communicating information, if true, relevant to that interest, to a person honestly believed to have a duty to protect that interest, or (3) a common interest in and reciprocal duty in respect of the subject-matter of the communication between speaker and recipient."

In *Beach v Freeston* [1971] 2 All ER 854 at 858 GEOFFREY LANE J said the following statement by SCRUTTON LJ was not an accurate statement of the law that:

MALABA J

"an interest in the speaker to be protected by communicating information if true, relevant to that interest, to a person honestly believed to have a duty to protect that interest."

Authorities show that the fact that the speaker honestly believed that the person to whom he makes the communication has a duty or interest to receive the communication is irrelevant to the finding by the court whether or not the occasion is a privileged one. The test is not a subjective but an objective one. It is a question of law for the judge alone to decide and is not dependent on the state of mind of the speaker at the time he makes the communication. Even where the speaker subjectively does not believe that the person to whom he makes the communication has a duty or interest to receive it, the occasion will still be privileged if the court finds that it is. The occasion does not therefore become privileged because the speaker, that is the defendant in this case, says it was a privileged occasion.

In *Stuart v Bell* [1891] 2 QB 341 at 349 LINDLEY LJ said:

"Both the defendant and Stanley say that the defendant acted under a sense of duty, but this, though important on the question of malice, is not, I think, relevant to the question whether the occasion was or was not privileged. That question does not depend on the defendant's belief, but on whether he was right or mistaken in that belief. As Chief Justice TINDAL said in *Cox head v Richards* 2 CB 569, 595, if the defendant took a course not justifiable in a court of law, he, and not the plaintiff, must suffer for the error."

In *Hebdith v Macilwaine* [1894] 2 QB 54 (cited with approval by LANE J in *Beach v Freeston*

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supra at 862d) LORD ESHER MR said at 59:

> "It was argued that, although the board of guardians had no power or duty or interest in the matter nevertheless the occasion was privileged, because the defendants honestly and reasonably believed that the board had such a duty or power or interest, and were asking them for redress in the matter, which they believed they could give. Assuming that the defendants had such a belief, though I confess I cannot see how there could be any reason in such a belief, the argument in substance seems to come to this: that the belief of the defendants that the occasion was privileged makes it privileged. I cannot accept the proposition so put forward."

The immunity does not arise until the conditions that are definitive of it are

found by the court to be present. No-one can have the immunity or privilege before the court finds as a matter of law that the facts of the case constitute a privileged occasion. For this reason the immunity is available to any person because it is dependent upon the circumstances of the case.

Newspapers do not, therefore, enjoy a special privilege not available to the ordinary citizen. In *Neethling v du Preez; Neethling v The Weekly Mail & Ors* 1994 (1) SA 708 (A) at 780E HOEXTER JA said that:

> "A journalist who obtains information reflecting on a public figure has no greater right than any other private citizen to publish his assertion to the world."

See also *Chinamasa v Jongwe P & P Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H); *Shamuyarira v Zimbabwe Newspapers (1980) Ltd* 1994 (1) ZLR 445 (H).

The defence of qualified privilege is a complete defence and the onus is on the defendant to establish on a balance of probabilities the facts from which the court may find that the communication was made on a privileged occasion: *Holzgen v Woolwright* 1928 TPD 5; *Pullman v Hill & Co supra; Hebditch v MacIlwaine supra.*

In *Neethling v du Preez; Neethling v The Weekly Mail & Ors supra* at 769G-H HOEXTER JA said:

> "In my view the substantive law governing defamation prescribes not only that **facts** the plaintiff must prove but also what **facts** must be established by a defendant whose defence involves confession and avoidance. If the defendant raises the defence of qualified privilege then he must prove his duty or right to communicate the defamatory matter to another, and the latter's reciprocal interest to receive the communication. These are matters which need to be established on a balance of probabilities ... The requirements of the substantive law cannot here be satisfied by a mere equiponderance of evidence which leaves the court unable to say whether or not either element of the defence has been established. To hold otherwise would be subversive of principles governing the law of defamation deeply entrenched in our legal system" (my emphasis).

On whether the facts have established the legal or social or moral duty or interest in the speaker to communicate the defamatory statement to the person who receives it and whether the person who receives the communication

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has a corresponding duty or interest to receive it, each judge must do the best he can in the circumstances of the case before him. This is seldom an easy question. In *Watt v Longsdon supra* at 143-144 SCRUTTON LJ pointed out the problem thus:

> "The question whether the occasion was privileged is for the judge, and so far as 'duty' is concerned, the question is: Was there a duty, legal, moral or social, to communicate? As to legal duty, the judge should have no difficulty, the judge should know the law; but as to moral or social duties of imperfect obligation, the task is far more troublesome. The judge has no evidence as to the view the community takes of moral or social duties. All the help the Court of Appeal can give him is contained in the judgment of LINDLEY LJ in *Stuart v Bell* [1891] 2 QB 341 at 350:
>
> > 'The question of moral or social duty being for the judge, each judge must decide it as best he can for himself. I take moral or social duty to mean a duty recognized by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal. My own conviction is that all or, at all events, the great mass of right minded men in the position of the defendant would have considered it their duty under the circumstances, to inform Stanley of the suspicion which had fallen on the plaintiff.'
>
> Is the judge merely to give his own view of moral and social duty, though he thinks a considerable portion of the community hold a different opinion? Or is he to endeavour to ascertain what view 'the great mass of right-minded men' would take? It is not surprising that with such a standard both judges and text-writers treat the matter as one of great difficulty in which no definite line can be drawn."

Having referred to the above passage in *Beach v Freeson supra* at 861F LANE J concluded thus:

> "The judge must, accordingly, do his best in the light of such evidence as he has, coupled with his own views as to what the defendant's duties, moral or social were in the circumstances."

As was pointed out by JACOB DE VILLIERS JP in *Laloe Janoe v Bronkhorst* 1918 TPD 165 at 167:

> "We have practically adopted the English law in this respect which is for all practical purposes the same as our own."

APPLICATION

I have no difficulty in holding that there is no legal duty on a newspaper to publish what one national politician said about another national politician on a matter of public interest. No statute or common law was cited for this general and comprehensive proposition. Where there is a duty there is a corresponding right. It cannot be said that the general public or the readers of the *Financial Gazette* have a right of action against Modus if it failed to obey the duty to publish what is said by one national politician against another national politician on a matter of public interest. One does not just stake out a new category of qualified privilege based on a legal duty to publish what one national politician said about another national politician on a matter of public interest without first taking into account the extent to which public advantage may be

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out-weighed by private injustice and injury.

On whether the facts have established that Modus had a moral duty or interest to publish to the general public or the readers of the Financial Gazette the report of what Mr Tekere said about Dr Zvobgo on a matter of public interest, no evidence was led from the reporter or editor of what interest Modus had in the people who paid Mr Kombayi visits at the hospital and in how his medical expenses were to be paid. Modus could have been morally justified at law to communicate its interest in the matter to the general public or to the readers of the *Financial Gazette* only if the general public or the readers of the *Financial Gazette* had the duty or power or responsibility to take steps to protect its interest in the matter. Not only has Modus failed to adduce evidence of facts of its interest in the payment of Mr Kombayi's hospital bills, it also did not satisfy me of the existence of corresponding duty or power or responsibilities in the general public or the readers of the *Financial Gazette* to do anything about the payment for Mr Kombayi's medical treatment.

I am also not satisfied that the general public or the readers of the *Financial Gazette* had interest in who visited Mr Kombayi at the hospital and in knowing how his hospital bills were paid. It would have been the protection or promotion of that interest by the publication of what Mr Tekere said about Dr Zvobgo that would have become Modus' moral or social duty. To satisfy the test of qualified privilege the publication by Modus would have had to be made to protect already existing public interest. In *London Artists Ltd* v *Littler* [1968] 1 All ER 1075 at 1081H CANTLEY J said:

MALABA J

> "Counsel for the defendant conceded yesterday that so far as communication to the public at large is concerned, the privilege should be confined to cases where, to adopt the neat phrase suggested by counsel for the third and fourth plaintiffs, the publication was **in the public** interest and not merely **of** public interest" (my emphasis).

It must be shown to the satisfaction of the court that in the matter which is the subject of the publication the interest of the general public or the reader existed. The interest should not be induced by the publication. There is no evidence that the public or of the readers of the *Financial Gazette* knew anything about Mr Kombayi being detained at the Royal Orthopaedic Hospital in England and that there was a question of who was to pay for his medical treatment before Modus published the report of what Mr Tekere said at the Press Conference. The subject-matter was revealed to the general public and the readers of the *Financial Gazette* for the first time on 10 August 1990. The interest of the general public or of the readers of the *Financial Gazette* in the subject of the publication was not being protected or promoted. It was being cultivated. What Modus may have considered interesting to the general public or to the readers of the *Financial Gazette* was for the purposes of this case not in the public interest In *Chapman v Ellesmere* [1932] All ER Rep 221 at 229I - 230A, LORD HANWORTH MR said:

> "But, though the vehicle of the public Press has been held to be a proper and protected one so as to defeat a claim for libel where it has been used 'as the only effective mode', to answer a charge which had already received as wide a circulation: see *Adam v Ward* (1915) 31 TLR 299; [1917] AC 309; *Brown v Croome* (1817) 2 Stark 301. There is no authority which protects the statement in the newspaper where it is made, not in answer, but as a fresh item on which a general interest, as distinguished from a particular interest already aroused, prevails. BUCKLEY LJ in *Adam v Ward* (1915) 31 TLR 299 at 304) stated a proposition which was approved in the

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House of Lords [1917] AC at 322, stated as follows:

> 'If the matter is of public interest and the party who published it owes a duty to communicate it to the public, the publication is privileged, and in this sense duty means not a matter of law, but, to quote LINDLEY LJ's words in *Stuart v Bell* [1891] 2 QB 341 at 350, "a duty recognised by English people of ordinary intelligence and moral principle".'

But these words must be taken in relation to the facts of the case. It

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MALABA J

> appears to me that the learned judge meant by the words 'matter is of public interest' has already become of public interest. The duty cannot arise in respect of a matter not yet made public to all."

In fact, were the questions of Mr Kombayi's detention at the hospital, who visited him, and how his hospital bills were to be paid matters of public interest? Mr Kombayi had elected to go to England for specialist treatment. That was a decision he took in the best interests of his health. The public could not have influenced the decision. The detention of Mr Kombayi at the Royal Orthopaedic Hospital was a matter of private arrangement between himself and the hospital authorities. So was the way the hospital bills were to be paid. Who visited Mr Kombayi at the hospital was not a matter of public interest. Dr Zvobgo visited Mr Kombayi as a family friend. The visit was not one of his official duties.

In my view, a distinction must be made between the shooting of Mr Kombayi and his detention for medical treatment at the hospital. The shooting incident was a matter of public concern in which the public had a legitimate interest and Modus would have had a moral or social duty to publish material in respect of it even if it was defamatory of a third party. The reason is that the shooting involved the breach of law in whose enforcement the public have an interest. I however think that Mr Kombayi's detention at the hospital, who visited him there and how his hospital bills were to be paid were not matters of public interest.

The facts were that it was not being suggested that the taxpayer's money would be used to pay for Mr Kombayi's medical treatment.

Modus failed even on the "common interest" test. As was said by HOEXTER JA in *Neethling v du Preez; Neethling v The Weekly Mail & Ors supra* at 778H

> "Courts are in general disinclined to recognise between a newspaper and its readers a community of interest sufficient to sustain the defence of qualified privilege."

The fact that the source of the information published was a national politician does not confer on the newspaper any special position. A national politician has no more rights than the ordinary citizen. The source becomes important when considering whether a reasonable man would have taken the risk of publishing the report of what was said. If a reasonable man would have

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considered the source of the information to be so unreliable that, instead of protecting or

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promoting public interest in the subject of publication, it would be damaging to that interest to publish the report, he would not do so. In this case, Mr Tekere was not the original source of the information. The information he gave was hearsay. A reasonable man would not have considered Mr Tekere a reliable source of the information needed to promote public interest in the matter. The language used by Mr Tekere revealed an element of malice against Dr Zvobgo. The words were patently insulting of him and a reasonable man would not have found them of interest to the public.

It is no defence either for Modus to say it "fairly and accurately" reported or published what Mr Tekere said about Dr Zvobgo. By choosing to publish the report in its form and substance Modus adopted the statement as its own and assumed the considerable risk of being found liable for damages arising from the publication of the defamatory matter. It cannot claim privilege from its accurate and fair reporting. In *Purcell v Sowler* (1877) 2 CPD 215 (cited with approval in *London Artists Ltd v Littler supra* at 1082I - 1083B) BRANWELL JA said:

> "If this had been a discussion on the plaintiff's conduct, the facts not being in controversy, the matter was a subject of such general public interest as would have given a right to comment upon it; and fair and *bona fide* comments would have been justified. But that is not this case. This is a case in which the defendants have published a true and *bona fide* report of a statement of facts charged against the plaintiff, but a statement which shows that the person making it was making it in the absence of the plaintiff and without any knowledge on the part of the person making it. There was no duty to report such *ex parte* proceedings; if the guardians did not exclude strangers, as they might well have done, the reporter ought to have taken care what he was about, and not to have reported libellous matter, and the defendants, having published it, must take the consequences."

Mr *Morris* also argued in passing towards the end of his submissions to the court that Modus should not be held liable for the damages claimed by Dr Zvobgo because in publishing the defamatory matter it was exercising its freedom of expression guaranteed by ss 11 and 20 of the Constitution of Zimbabwe. In *Gardener v Whitaker* 1995 (2) SA 672 (E) FRONEMAN J held that the right to the protection of one's good name or reputation is in terms of the Constitution on an equal footing with the right to free speech and expression, as the Constitution does not create a hierarchy of rights. I

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respectfully associate myself with the learned judge's view of the law. A similar view was expressed by DIPLOCK J (as he then was) in *Silkin v Beaverbrook Newspapers Ltd* [1958] 2 ALL ER 516 at 517F-G when he summed up for the jury and said:

> "Freedom of speech, like the other fundamental freedoms, is freedom under the law and over the years the law has maintained a balance between the right of the individual, like the plaintiff, whether he is in public life or not, to his unsullied reputation if he deserves it. That is on the one hand. On the other hand, but equally important, is the right of the public, which means you and me, and the newspaper editor and the man who, but for the bus strike, would be on the Clapham omnibus, to express his views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people."

In *Gardener v Whitaker supra* FRONEMAN J reasoned that where the action for damages arises from alleged defamation of a public official in the performance of public duties and the defence of free speech and expression is set up, regard being had to the values of the Constitution, the onus should be on the plaintiff to show that the right to his good name and

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reputation should take precedence over the defendant's right to free speech and expression. The learned judge said at p 691G that this would involve proving the following:

> "(1) that the statement made by the defendant referred to him, the plaintiff;
>
> (2) that the statement would have been understood as infringing his right to his reputation; and
>
> (3) that the statement is not worthy of protection as an expression of free speech."

As I understand the judgment in *Gardener v Whitaker*, the onus is on the plaintiff to show that the right to his good name and reputation should take precedence over the defendant's right to free speech and expression if he is a public official claiming that he was defamed by the defendant in his performance of public duties. The question of freedom of expression was, as I say, raised by the defendant only in passing towards the end of Mr *Morris*' argument. I did not have the benefit of closely focused arguments from both counsel as FRONEMAN J clearly had in *Gardener v Whitaker supra*. In my view the defendant must still fail because the charges levelled against Dr Zvobgo do not relate to his conduct in the performance of his official duties.

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Although a public official, Dr Zvobgo was acting in his private capacity at the time he visited Mr Kombayi at the hospital.

The defence of qualified privilege fails.

QUANTUM

The assessment of the quantum of damages is a matter entirely within the discretion of the judge presiding over the case. The whole process is a matter of impression and personal opinion: *Rhodesian P & P Co Ltd v Howman NO* 1967 RLR 318 at 342I; *Shamuyarira v Zimbabwe Newspapers (1980) Ltd supra*.

The most important factor in a case like this is that the sum awarded must carry with it a complete vindication of the plaintiff's character: *Haas v Greatermans Stores (Rhod) Ltd & Anor* 1966 RLR 313 at 318D-E.

When it comes to awards in other cases it is important to bear in mind the words of FIELDSEND J (as he then was) in *Rhodesian P & P Co Ltd v Howman NO supra* at 342I- 343A where he said:

> "I was referred to a number of cases, none of which was very closely in point, and, in defamation, where the circumstances differ so widely, there is generally little assistance to be gained from a consideration of the awards in other cases. In the final event, the decision must be based on impression and personal opinion: *Ward - Jackson v Cape Times Ltd* 1910 WLD 257 at 263. The cases are, however, of some assistance in setting the outside limits of an award, provided they are used with circumspection."

Both counsel were agreed that this was a serious case of defamation. The publication had the sharp and nasty sting to Dr Zvobgo's reputation. He is a well-known public figure who is also a Minister of the Government of Zimbabwe. He has been a politician for many years, establishing a good name for himself with those who met him at national and international fora. Those who

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knew and respected him must have felt let down by him when they read about the allegations levelled against him. It must have hurt them to learn that he was vindictive, dishonest and evil-minded. The publication also suggested that he took all the trouble to build a false story about Government's willingness to pay for Mr Kombayi's medical treatment in order to satisfy his vindictiveness against Mr Kombayi, whose condition at the time

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would have inspired in any right-thinking Zimbabwean no other feeling than that of compassion. It was seriously damaging to Dr Zvobgo's reputation to portray him as a a heartless person.

He said some of his friends and political supporters asked him whether it was true that he had behaved in the heartless manner described of him in the newspaper. He said he had to find time to explain in detail that the allegations about him were false. Even then there was no way of telling whether those to whom he personally gave the explanation believed him or not. There were those who did not have the opportunity to ask him. They remained with the impression of him as created by the publication.

It is also important to take note of the fact that Mr Kombayi had been wounded in circumstances of lawlessness. It was highly injurious of Dr Zvobgo's reputation to associate him with a conspiracy to deprive Mr Kombayi of any form of financial assistance to the extent of suggesting that he went out of his way to discourage charitable organisations from raising funds to assist Mr Kombayi in the payment of the hospital bills. The newspaper added a degree of respectability to the allegations by alleging in the heading of the article that Dr Zvobgo "torpedoed" arrangements made by Dr Stamps for the payment of Mr Kombayi's medical treatment.

There was no retraction or apology. A lack of apology does not aggravate damages but it would have been mitigatory had it been offered. It is a mitigating factor, though, that Mr Tekere, who was the source of the defamatory statements published by Modus, was not sued for damages. Modus, however, caused the publication to reach a bigger number of people than would have been the case had the matter ended with Mr Tekere's publication to the journalists at the press conference. No other national newspaper published the story.

Mr *Andersen* has argued that awards of damages for defamation have remained low in this country. He said the low awards have encouraged the prevalence of cases of defamation. Whilst the awards of damages for defamation must not be too high as to discourage the dissemination of information by the press they must be such that they remind the reporters, editors and the publishers of the responsibility that goes with the power they wield through their functions. The awards must also reflect the economic development of the country: *Chinamasa v Jongwe P & P Co (Pvt) Ltd & Anor supra*. Comparisons with awards in South Africa, the United States of America and Britain are not helpful.

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Coming to the awards in cases within our jurisdiction, the case of *Chinamasa v Jongwe P&P Co (Pvt) Ltd & Anor supra* sets the upper limit of awards in such cases. I do not consider the defamation in this case to be as serious as that in *Chinamasa*'s case. The allegations in that case touched on Mr Chinamasa's profession as a legal practitioner and his suitability as the Attorney-General of Zimbabwe. There was no suggestion in this case that Dr Zvobgo's profession as a legal practitioner or as a Minister of Government was threatened. There was never any direct suggestion that he was not suitable for the post of Minister.

It is also possible that readers digested the contents of the article in the *Financial Gazette* with a pinch of salt because of the knowledge that the statements were uttered by a leader of the opposition political party. Both counsel agreed that the *Financial Gazette* is usually aimed at an enlightened and critical readership.

I also do not think the defamation was as serious as that in *Chinengundu v Modus Publications (Pvt) Ltd* HH-135-92 where a Deputy Minister was awarded $23 000 in an action for damages for defamation in which the newspaper alleged that he had been buying votes at a primary election. It was held that it was reckless of the newspaper not to verify the truthfulness of the allegations and that the publication could have destroyed the plaintiff's career. Punitive damages were therefore called for. The suggestion that a Deputy Minister was involved in corrupt methods of winning himself a seat in Parliament was a very serious allegation in a democratic system of government.

The case of *Shamuyarira v Zimbabwe Newspapers Ltd supra* has an award that tends to the lower limits of damages. A minister in the Government of Zimbabwe was awarded $15 000 damages in respect of defamation arising from an article published by the newspaper alleging that he was involved in the Willowvale Car Scandal. Forming the background to the defamatory publication was the massive corruption in the selling and distribution of motor vehicles from Willowvale involving, in some instances, Government Ministers. Although the plaintiff was defamed the circumstances were unusual and strong mitigating factors existed in favour of the newspaper.

The case of *Zvobgo v Kingstons Ltd* 1986 (2) ZLR 310 (H), where an award of $14 000 was given, was decided in 1986 and inflation has since reduced the value of money which is the measure of damages. Inflation is an important factor to take into account in the assessment of damages for defamation: *Chinamasa v Jongwe P & P Co (Pvt) Ltd & Anor supra*.

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In *Tekere v Zimbabwe Newspapers (1980) Ltd & Anor* 1986 (1) ZLR 275 (H) a total award of $20 000 was given to the plaintiff for defamation contained in two articles published by the defendant alleging that he was a lazy and drunken person. Awarding the damages, the JUDGEMENT PRESIDENT said exemplary damages were called for. This was, of course, in 1986. The value of money has been reduced by the passage of time. It is however important to note that most of the factors taken into account by the JUDGEMENT PRESIDENT in the assessment of the damages are present in this case. Although the defamation was marginally more serious than in this case and it was not in the form of a verbatim report of what was said

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by a person who was not sued, and taking into account the passage of time, I am of the view that an award of $20 000 in this case would also be an appropriate recompense to the plaintiff for the loss he suffered.

In the circumstances I order as follows:

(1) That judgment be and is hereby granted to the plaintiff against the defendant in the sum of $20 000 with interest thereon at the prescribed rate from 10 August 1990 to the date of payment.

(2) That the defendant should pay the costs of suit.

Chirunda, Chihambakwe & Partners, plaintiff's legal practitioners

Atherstone & Cook defendant's legal practitioners

S v CHINGONO 1995 (2) ZLR 116 (HC)

Court **High Court, Harare**

Bartlett J & Assessors

Criminal trial

5 August 1995 Judgment No. HH-53-95

Flynote

Evidence - accomplices - cautionary rule - reasons for observing caution - credibility - imperfections in accomplice's evidence - effect - merits of accomplice against accused as a witness - assessment of

Headnote

The accused was charged with attempted murder, the allegation being that he hired two persons to kill the complainant by shooting him with a shotgun that he supplied to them. His defence was that although he had conspired with them, he had instructed them not to shoot the complainant but merely to approach him with an unloaded shotgun and tell him to stop what he was doing at work.

The evidence showed that the complainant was shot and severely wounded by a shot from the shotgun. A relative of the accused's described how the accused borrowed his shotgun on the pretext of wanting to shoot baboons and monkeys at his farm in the communal area. He also said that the accused asked for and was given ammunition for the shotgun. An employee of the company at which the accused was managing director described how he became aware, through discussions with the complainant, of a fraud committed by the accused on the company. The complainant had reported the fraud to the chairman of the board.

The critical witnesses were the two accomplices, who described how the accused employed

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them, instructed them in the use of the shotgun, and told them to shoot the complainant. The accomplices had themselves been convicted on their pleas of guilty of attempted murder and sentenced to lengthy terms of imprisonment. Before giving evidence, they were warned as convicted accomplices and told that they were expected to tell

the truth and that their evidence would in no way affect the sentences they had received. The prosecutor indicated that no offers of reduction of sentence had been made. The accused's evidence was in accordance with his defence. Criticisms were made by counsel for the defence of the accomplices' evidence.

Held, that the principal reasons for observing caution in evaluating the evidence of an accomplice are:

(a) he is *ex hypothesi* a criminal himself;

(b) because he has taken part in the commission of the offence, he is peculiarly equipped to convince the court that his lies are the truth; and

(c) there is the possibility that he may have implicated the accused in order to ingratiate himself with the police and improve his chances of securing an indemnity for himself.

In this case, however, it was common cause that the accused was involved, the only question being the degree of his involvement. The accomplices had already been convicted and sentenced.

Held, further, that it had to be remembered that one cannot expect witnesses of that kind to be wholly consistent, reliable and truthful. It is necessary that the court should be satisfied beyond reasonable doubt that in its essential features the accomplice's story is true, but if more than that were required, the administration of justice would in many cases be rendered impossible. There were discrepancies, alterations and contradictions in the accomplices' evidence, but it had to be remembered that both were unsophisticated and uneducated; and taking into account those facts the accomplices were credible witnesses in the essential features.

Held, further, that it was then necessary to consider whether the court might have been deceived by plausible witnesses. The best way to be satisfied that an accomplice is reliable is to find corroboration implicating the accused. The risk in accepting the accomplice's evidence would also be reduced if the accused were found to be a liar. If this were not shown, the court could still convict if, being aware of the danger, it was satisfied that it could rely on the accomplice's evidence because the merits of the accomplice as against the accused as a witness was beyond question. What this meant was that if the court, having warned itself, was satisfied that despite the imperfections, the evidence of the accomplice is reliable and that the demerits of the accused's evidence are clear, then a conviction would be appropriate.

Held, further, that, assessing the evidence of the accused against that of the accomplices, the accused was a poor witness whose evidence was

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unreliable and unconvincing. His version of the events was wildly improbable, whereas the accomplices' was substantially probable. Viewing the accomplices' evidence against that of the accused, the danger of false incrimination had been eliminated.

Held, therefore, that the State had proved its case beyond reasonable doubt.

Cases cited:

S v Ismail & Ors 1965 (1) SA 452 (N)

R v Kristusamy 1945 AD 549

R v Gumede 1949 (3) SA 749 (A)

S v Mupfudza 1982 (1) ZLR 271 (A)

S v Mubaiwa 1980 ZLR 477 (A)

R v Lembikani & Anor 1964 R & N 7 (FS)

R v Ncanana 1948 (4) SA 399 (A)

R v Judson 1965 RLR 501 (A); 1966 (1) SA 88 (RA)

S v Lawrence & Anor 1989 (1) ZLR 29 (S)

T Chitap, for the State

J C Andersen SC for the accused

Judgment

Bartlett J: The accused is charged with attempted murder and has pleaded not guilty. The broad substance of the State allegation is that the accused hired two persons, Isaac Bero and Joseph Rice, to kill the complainant, George Dhlamini, by shooting him.

The broad substance of the accused's defence is that, although he had conspired with Bero and Rice, he had instructed them not to shoot the complainant, but simply to approach him with an unloaded shotgun, to point that shotgun in the air, and tell the complainant to stop what he was doing at work.

The State summary and defence outlines were produced before the court, together with a warned and cautioned statement made by the accused. A medical affidavit was produced and the doctor himself was called. Also produced were photographs depicting the injuries suffered by the complainant and the shotgun which was used. I propose to briefly summarise the evidence led by the State and the defence, to assess the credibility of the witnesses, and to lay down the approach the court must adopt in assessing the evidence of the various witnesses.

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The first witness called was the doctor who treated the complainant. His

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evidence in medical terminology was that the complainant suffered a complete fragmentation of the interior mandible from canine to canine. The floor of the mouth and the tongue muscles were evulsed, there was a soft tissue loss from the left cheek to the right cheek, and there was a fracture of the mandible between the second and third molar. Debridement and suture of the lacerations was carried out with the doctor noting that the injuries extended to both angles of the mandible. He stated that the fractured mandible was reduced by wiring and reconstructed. In layman's language the doctor stated that the complainant had suffered a very serious injury to his face, and that there was very real danger to life at the time the injury was suffered, due to the massive bleeding which would have been caused. There were, however, reasonable prospects - in fact good prospects - that the fractured mandible could be substantially reconstructed over a period of 6 to 12 months. If that reconstruction was successful, the complainant would be left with a speech impediment. The doctor said that the complainant's speech would be about 60% normal - and described this as meaning he would be able to make himself clearly understood but that he would speak with a lisp. He indicated that there would be what he described as a serious disfigurement of the face because the symmetry of the face would have been substantially adversely affected by the injury and the treatment. He was, however, of the view that the complainant was making a good recovery and that there was no danger at all to his life once proper medical treatment had been provided.

The evidence of the doctor, as clarified by the court, was common cause, and the doctor's evidence is obviously credible and reliable evidence.

The next witness was one whose evidence is of substantial importance in the matter. He was Goodwill Tapfumaneyi Mhanga, an uncle of the accused. The effect of his evidence was that the accused approached him on 10 and then on 11 June, seeking to borrow the witness's Greener shotgun and that the accused told the witness that he wanted the firearm as he was travelling to his communal land over the weekend. The weapon was not available on 10 June and the accused accordingly returned on 11 June to collect it.

The witness said the accused said he was having problems with baboons and monkeys and that he gave him the firearm plus three rounds of ammunition, as that is what the accused had specifically asked for. It was specifically put to the witness that was it the witness's suggestion that the accused should get the rounds of ammunition and the witness' categoric reply was that the accused had asked for them. The details of the accused's defence outline in this regard were put to the witness, and he specifically maintained that he did

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not offer the accused a packet of ammunition, but that the ammunition was specifically asked for by the accused. The witness stated that the firearm and two of the three rounds were returned on the morning of Sunday 13 June at around 6 am - and that the accused explained

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the missing round by saying that he had missed a baboon with it. Again it was put to the witness that the basis of the accused's defence in regard to this latter aspect was that he had told the witness that the weapon had been put to improper use. The witness emphatically maintained that the accused had in fact told him that he had missed a baboon with the round that had been used.

The next witness who gave evidence was the wife of the complainant. She described the events surrounding the shooting of the complainant, her husband. Her evidence was to the effect that she and her husband arrived home about 6 pm on the early evening of 12 June and parked their car outside their flat. As she got out of the car, she noticed two persons, who were strangers, waiting in the vicinity of the car. Greetings took place. Her husband also started to get out of the car holding a beer bottle, keys and the car radio. He asked her to carry the radio as he was having difficulty in getting out of the car holding it. She stated that she moved forward leaving the two strangers who were by the car - and in fact handed one of them her bag so that she was able to receive the radio. She says as her husband then got out of the car there was the shot. The bullet passed her and hit her husband. The radio dropped and her husband fell to the ground holding the right side of his face. She was silent for a moment and then she started screaming, thinking he had died. The two persons who had been standing by the car, one of whom had fired the shot, then fled.

The next State witness was Crispen Zviuya, an employee of the accused at Industrial Confirming (Pvt) Ltd, where the accused was managing director. He gave evidence of being aware, through his discussions with the complainant, of a fraud committed by the accused on the company. He also gave evidence of problems between himself and the accused concerning his work at the accused's company. He described the accused approaching him on the Monday morning after the shooting, that is Monday 14 June, and asking him the whereabouts of the complainant as auditors had indicated they were coming. He told the accused he would find out why the complainant was not at work. When he then found out from the complainant's wife what had happened on the Saturday evening, and because of what he knew of the disagreement between the complainant and the accused, he immediately found an excuse for leaving work himself. He then reported the matter to the police which led to the arrest of the accused.

BARTLETT J

[The learned judge then outlined the the next witness's evidence and continued:]

The next two witnesses were the critical witnesses on whom the State relied, that is Isaac Bero and Joseph George Rice. I propose to briefly summarise the evidence of these two witnesses, as the details of their evidence will have to be carefully assessed by the court in deciding whether their evidence can be believed or not. In summation, Bero and Rice each maintained that they were employed by the accused, that the shotgun in question was brought to the accused's residence on Friday 11 June, and that they were instructed by Tony Pandura as to the operation of that shotgun. They indicated that the accused also took an interest in seeing whether they were learning how to use the shotgun. They both maintained however, that despite the efforts of Pandura and the supervision of the accused, they had very little or no idea

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of how to use the shotgun. Bero described being shown the flat of the complainant and being told that the complainant was a man who caused trouble at work by making advances to married women.

They both described being taken by the accused early on a Saturday evening in a vehicle belonging to the accused to the vicinity of the complainant's flat. They stated that the shotgun was placed in the back of the vehicle. They stated that the shotgun was loaded by the accused in the vicinity of the complainant's residence and that they were then instructed by the accused to go and shoot the complainant. They both stated that this was the first time that they were aware of what was required of them. They said that when they were being taught how to use the shotgun they thought that they were simply being instructed so that they could use the shotgun in the course of their duties as security guards. They indicated that there had been no prior arrangement and no negotiations between them and the accused as to what they would be paid. They, however, maintained that they were instructed to shoot the complainant and not to frighten him by firing an unloaded shotgun into the air.

They described obeying the accused's instructions through fear, and going to the vicinity of the complainant's flat and waiting for the complainant's vehicle to arrive. Bero described firing the shotgun as the complainant came out of the motor vehicle. They then described fleeing the scene to where the accused was waiting for them and returning with the accused to his residence.

Both these witnesses were convicted accomplices. They were convicted on their pleas of guilty of the offence of attempting to murder the complainant

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BARTLETT J

and each has been sentenced to 20 years' imprisonment with labour.*(3) At the commencement of their evidence they were warned as convicted accomplices. They were told that they were simply expected to tell the truth and that their evidence would in no way effect their convictions or the sentences imposed upon them. The prosecutor indicated that no offers of any reduction of sentence had been made to the witnesses.

That is a summation of the evidence of Rice and Bero. The court will, of course, need to carefully assess the evidence of these witnesses in assessing credibility and making its findings. That also constituted the evidence led by the State.

The defence case consisted of the evidence of the accused. In his evidence, he stated that he was the managing director of Industrial Confirming (Pvt) Ltd and that the complainant was the group accountant. He stated that the complainant had discovered that he (the accused) had defrauded Industrial Confirming (Pvt) Ltd of some $400 000 and used this money to obtain two DAF trucks for himself. He stated that the complainant was bent on exposing the accused to the press. Indeed, he stated that the complainant told him that he would ensure that the matter was flashed across the front pages with the same degree of publicity given to the ZimPapers scandal. He told the court that he discussed the matter with the complainant wanting to resolve the matters as men. He suggested that he would sell one of the DAF Trucks he had fraudulently

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obtained in order to make good the $400 000 he had defrauded from his company. He stated that the complainant was adamant that he would report the matter to the press. He stated that the relationship between him and complainant soured to such a degree that they could not even talk to each other or greet each other.

It was clear from Zviuya's evidence that the complainant had in fact made a report of the accused's fraud to the Chairman of Industrial Confirming several months previously. But the accused emphatically stated in evidence that he had no knowledge of the complainant's report to the Chairman and that he was not aware that the complainant had reported to the Chairman. So at the critical time the accused was unaware that anyone else other than the complainant knew of the accused's massive fraud on his company. The accused stated in evidence that in order to encourage the complainant to discuss the matter he decided to send Bero and Rice to approach the

complainant outside his flat with a shotgun. He said that he instructed them to point the shotgun in the air while unloaded and pull the trigger. This would give a clicking noise and one or other of Bero and Rice would then tell the complainant to stop what he was doing at work.

It was the accused's evidence that that was the only message he intended to convey to the complainant and that he never intended to hurt the complainant in any way. He stated that he was sure that the complainant would realise that the message was coming from him and that he expected to speak to the complainant on the Monday morning. He hoped that the complainant, having received the message, would now be prepared to discuss the matter and resolve it - and presumably not refer the matter to the press. He stated that he had initially approached Rice to carry out the "frightening" exercise and that Rice had indicated that he needed assistance. He accordingly asked Rice to find somebody to assist him and Rice came up with Bero. Bero had previously done some work for the accused but was (the accused stated) not employed by him at the time. It was the accused's evidence that the amount was agreed as to what Rice and Bero would be paid and that they were specifically instructed not to have the shotgun loaded. They ere also specifically instructed to simply point the shotgun in the air as the complainant got out of his car, to fire the shotgun by pulling the trigger with the empty barrel, and then tell the complainant to stop what he was doing at work.

It was the accused's evidence that the loading of the shotgun was done entirely without his knowledge, that it must have been done by Bero or Rice, and that they were acting entirely in contradiction to his instructions. He stated that he was horrified and shocked when, once Bero and Rice returned, he was told that a shot had been fired, and that Bero had seen the complainant falling to the ground. He accepted that he had instructed Pandura to instruct Rice and Bero how to use the shotgun - but disputed Pandura's evidence that the bullets had been kept by him instead of being given to Pandura. He disputed the evidence of his uncle stating that he specifically did not ask for bullets. He said that instead his relative insisted that he take a packet of bullets and would not let him go away with less than three bullets. He also disputed his relative's evidence as to what was said when the gun was brought back.

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That then is the evidence before the court. The court must now turn to assess that evidence. I have already indicated that the evidence of the doctor is clearly credible and uncontested evidence and establishes the nature of the injuries suffered by the complainant.

BARTLETT J

[The learned judge then considered the evidence of Mhanga, the complainant's wife and Zviuya, finding them to be credible and reliable. He continued:]

We now turn to the critical matter of assessing the evidence of Bero and Rice. Mr *Andersen*, in his argument, attacked the evidence of these two convicted accomplices on the basis that in their evidence they tried to maximise the guilt of the accused and to minimise their own guilt. Mr *Andersen* made the following specific criticisms of Rice and Bero in his address to the court.

[The learned judge then summarised the criticisms made by counsel and continued:]

We have given careful consideration to all the submissions made by Mr *Andersen* in respect of the evidence of the accomplices and, of course, we must warn ourselves of the dangers of relying on accomplice's evidence.

These dangers were summarised by MILNE JP in *S v Ismail & Ors* 1965 (1) SA 452 (N) at 455E-G where he stated:

> "There would appear to be three principal reasons why special caution should be observed in evaluating the credibility of an accomplice:
>
> 1) he is *ex hypothesi*, a criminal himself;
>
> 2) because he has taken part in the commission of the offence, he is peculiarly equipped by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth;
>
> 3) there is the possibility that he may have implicated the accused in order to gratify the police, in the belief that, by so doing, he will improve his chances of securing an indemnity for himself against prosecution for the offence."

In this case the accomplices are certainly criminals and they have squarely implicated the accused in the commission of the offence they carried out. However, we are of the view that their position is somewhat different from the position normally or often pertaining in relation to accomplices. This is because in this matter it is common cause that the accused was involved in the commission of the offence. The only question is the degree of that involvement. It is common cause that the accused arranged for the accomplices to be trained as to the use of the shotgun. It is common cause that he took the accomplices to the complainant's flat and waited for them. It is common cause that he paid them an amount of money for their actions. The only real

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differences are that he says he instructed them to brandish the shotgun, point it in the air, pull

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the trigger, and tell the complainant to stop doing what he was doing at work, whereas they say he told them to shoot the complainant. Furthermore, he says that they load the shotgun without his knowledge, whereas they say he loaded it before handing it to them.

So it is on these important points of detail that the court has to assess the evidence of the accomplices. It is not a case where there is no question at all of the involvement of the accused in the picture apart from the evidence of the accomplice.

Of course, bearing in mind the third aspect referred to by MILNE JP, in the case I have referred to, the accomplices in this case have been convicted and are serving lengthy sentences. They have also been specifically told that their evidence would not effect the sentences imposed in any way.

In assessing the evidence of the accomplices, we must consider the words of DAVIS AJA in *R v Kristusamy* 1945 AD 549 at 556, where the learned ACTING JUDGE OF APPEAL stated, referring to accomplices, the following:

> "After all, one cannot expect a witness of that class to be wholly consistent and wholly reliable, or even wholly truthful, in all that he says. If one had to wait for an accomplice who turned out to be a witness of that kind - or indeed anything like it - one would, I think, have to wait for a very long time; members of the criminal classes do not usually come nearly up to so high a standard. That fact was fully recognised in *R v Levy* 1943 AD at 561 and in *R v Kubuse & Ors* 1945 AD 189. But it is, of course, necessary that the court should be satisfied beyond reasonable doubt that in its essential features the story which he tells is a true one. If more than that were required, the administration of justice would in many cases be rendered impossible."

These comments of DAVIS AJA were supported by WATERMEYER CJ, TINDALL JA, GREENBERG JA and SCHREINER JA - that is, the full Bench of the South African Appellate Division. These comments were also endorsed by VAN DER HEEVER JA in *R v Gumede* 1949 (3) SA 749 (A) at 758.

The accomplices in this matter, Bero and Rice, were subjected to a lengthy, probing and very skilful cross-examination by eminent senior counsel Mr *Andersen*. They made the alterations, discrepancies and contradictions to which we have referred. But a further fact which we are satisfied must be

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taken into account in assessing their evidence is that they were undoubtedly unsophisticated and uneducated. One of them went no further than Grade 1 at school. The other reached Grade 2. There are, as we have indicated, imperfections in the accomplices' evidence to which we have referred. We have given careful consideration to these imperfections and we have warned ourselves against the dangers of relying on accomplice evidence.

Taking that into account, and into full account, we are satisfied that the accomplices were credible witnesses in the essential features where their evidence is in dispute with that of the accused. In simple terms, we believe them to be truthful witnesses.

Accordingly, applying the first stage of the test laid down in *S v Mupfudza* 1982 (1) ZLR 271 (A) at 273 F-G, we believe the accomplices. We now, in applying the cautionary rule, proceed to

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consider whether we still might not have been deceived by witnesses we have found to be plausible. In so doing, we follow the approach laid down in *S v Mupfudza supra*, the approach laid down in *S v Mubaiwa* 1980 ZLR 477 (A) at 480D-E, where LEWIS JP referred to the requirements in regard to accomplice evidence extracted from the judgment of CLAYDEN FCJ in *R v Lembikani & Anor* 1964 R & N 7. The relevant aspects of those requirements, which are summarised at p 480D-H of *Mubaiwa*'s case, are as follows: The best way to be satisfied that an accomplice was reliable is to find corroboration implicating the accused; the risk in accepting accomplice evidence would be reduced if the accused person were found to be a liar; in the absence of the accused being shown to be a liar, the court could convict if, being aware of the danger, it as satisfied that it could rely on the evidence of the accomplice because the merit of the accomplice as against the accused as a witness was beyond question.

An important aspect which requires to be looked at in detail in this regard is the question of the relative merits of the accomplices' evidence and that of the accused.

In *R v Ncanana* 1948 (4) SA 399 (A) at 405-406, SCHREINER JA had the following to say in regard to this aspect:

> "The risk that he may be convicted wrongly will be reduced and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will be also reduced even in the absence of these

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> features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and the rejection of the accused is in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question."

The interpretation of the last aspect of this statement by SCHREINER JA has been the cause of some difficulty over the years. MILNE JP queried the correctness of the last sentence of SCHREINER JA's approach, when he stated in *S v Ismail & Ors* 1965 (1) SA 452 at 454G-H that if the accused in giving evidence shows himself to be a lying witness, then surely his demerits as a witness are established. The learned JUDGE PRESIDENT continued:

> "It seems to me, with respect, wrong to say, in such a case, that a conviction is only permissible on the single evidence of an accomplice if the merits of the accomplice as a witness are 'beyond question'. If the merits of an accomplice as a witness are beyond question, *cadit quaestio* - you do not need any other factors whatever (apart from proof *aliunde* of the commission of the offence) to warrant a conviction."

These reservations were repeated in the Zimbabwean courts in *R v Judson* 1965 RLR 501 (A); 1966 (1) SA 88 (RA) where, funnily enough, I see Mr *Andersen* was then counsel for the State. The reservations in regard to the application of SCHREINER JA's dictum were stated by MACDONALD AJP (as he then was) at 90A-D and by LEWIS AJA (as he then was) at 94A-D. The matter was, however, resolved in the case to which I have already referred, *S v Mubaiwa supra* at 481A-C. LEWIS JP, referring to difficulties of interpretation to which I have referred, said:

> "... it seems to me that it amounts simply to this. First of all the court has to properly warn itself of the dangers of

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accomplice evidence; having done so, then by contrasting the evidence of the accomplice with that of the accused and viewing it against all the surrounding circumstances and the general probabilities of the case, it has to be satisfied beyond reasonable doubt that the danger of false incrimination has been eliminated. It is not sufficient for the trial court merely to warn itself of the dangers of false incrimination and then to convict simply on its faith in the honesty of the accomplice based on nothing more than his demeanour in the witness box and the plausibility of his story."

This means that if the court, having warned itself, is satisfied that despite the

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imperfections, the evidence of accomplices is reliable and that the demerits of the accused's evidence are clear, then a conviction would be appropriate. We have already indicated that, taking into account the imperfections and contradictions in the evidence of the accomplices, we nevertheless are satisfied that they are credible and reliable witnesses. But in order to apply the test laid down in the authorities to which I have referred, it is necessary that we must carefully assess the credibility of the accused and then look at that against the credibility of the accomplices.

[The learned judge then considered the accused's evidence and continued:]

Overall, giving the accused's evidence careful consideration, we are of the view that the accused was undoubtedly a poor witness and that his evidence is inherently unreliable and unconvincing in many respects. He is, in addition, contradicted and shown to be untruthful by his own uncle on certain important aspects to which we have referred.

The accomplices, we are satisfied, despite the imperfections which we have analysed and referred to, were credible witnesses. We are also of the view that their version is, in addition, very substantially probable, whereas the accused's version is wildly improbable. Accordingly, applying the test laid down in *S v Mubaiwa supra* to which we have already referred, we are satisfied that having warned ourselves of the dangers of relying on accomplice evidence, that we nevertheless believe the accomplices to be credible witnesses despite the imperfections. We believe that we can accept, and do accept, their evidence that the weapon was loaded by the accused and that they were instructed to shoot the complainant. We are satisfied that the demerits of the accused's evidence are beyond question, and that the merits of the accomplices' evidence, as considered against the approach laid down in *R v Judson* and *S v Mubaiwa*, are clear. We are satisfied that, in the words of LEWIS JP at p 481 of *Mubaiwa*'s case, that we have properly warned ourselves of the dangers of accomplice evidence, and by contrasting the evidence of the accomplices with that of the accused, and viewing it against all the surrounding circumstances and the general probabilities of the case, we are satisfied beyond reasonable doubt that the danger of false incrimination has bee eliminated.

We are also satisfied that there is additional corroboration in the form of the evidence of Mhunga which, as we have indicated, is clear and reliable and which shows the accused to be a liar on significant aspects. Of course, the evidence of the second accomplice, can also be

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regarded as corroboratory evidence.

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We would refer finally to *S v Lawrence & Anor* 1989 (1) ZLR 29 (S), where the Supreme Court upheld a conviction on the evidence of a single accomplice, whose evidence, as stated by DUMBUTSHENA CJ, was full of contradictions and abundant with variations. That accomplice had, in addition, been offered a partial remission of sentence if he gave satisfactory evidence. Furthermore, the contradictions and imperfections in his evidence, from his background, were much less understandable and explicable than the contradictions of the accomplices in this case. Yet, as DUMBUTSHENA CJ stated at p 41E-F:

> "In spite of the imperfections in his evidence, everything points to the truth of his testimony."

We are satisfied that the same comments apply to the accomplices in this matter. We are accordingly satisfied that, assessing the evidence, as we have done, that the State has proved its case beyond a reasonable doubt and that the accused is accordingly found guilty as charged.

Gill, Godlonton & Gerrans, accused's legal practitioners

S v BUKA 1995 (2) ZLR 130 (SC)

Editor's Note:(4)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Criminal appeal

18 May & 10 August 1995 Judgment No. S-112-95

Flynote

Criminal procedure (sentence) - general principles - factors affecting - plea - plea of guilty and co-operation with authorities - extent to which credit should be given - imprisonment - lengthy periods of - whether excessively long prison sentences appropriate in interests of deterrence

Headnote

Judicial officers must take proper account of, and give meaningful credit to, the fact that an accused person has tendered a plea of guilty to the charge levelled against him and has co-operated with the authorities. In the present case the co-operation of the appellant with the authorities had allowed the matter to be brought to court expeditiously and had avoided the

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need for a long and expensive trial.

The appropriate total sentence merited by an offence should first be assessed before deciding upon what portion of the total sentence should be conditionally suspended.

Judicial officers should guard against allowing excessive devotion to the cause of deterrence to lead them to impose sentences which are entirely disproportionate to the moral blameworthiness of the offender. The public interest is not necessarily best served by the imposition of a very long sentence of imprisonment. The deterrent effect of a prison sentence is not always proportionate to its length. A point is reached after which additions to an already long prison sentence produce progressively smaller increases in deterrent effect.

Cases cited:

R v Lowe (1978) 66 Cr App R 122

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R v Rose & Shapiro (1980) 71 Cr App R 296

S v Gorogodo 1988 (2) ZLR 378 (S)

S v Wakiri 1981 ZLR 51 (A)

S v Sharma S-117-84

S v Skenjana 1985 (3) SA 51 (A)

S v Hlatwayo S-175-90

S v Moloteni S-177-94

S v v Mupanduki 1985 (2) ZLR 169 (S)

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

A B C Chinake for the appellant

Mrs *J Zindi* for the respondent

Judgment

Ebrahim JA: The appellant was convicted of two counts of fraud, with the total amount defrauded being $387 974,69. He was sentenced to fifteen years' imprisonment with labour, five years of which were suspended on condition of restitution in the sum of $28 000.

The facts are that the appellant, at the time of his trial on 10 January 1994, was aged forty-nine years and nine months. He is married with five children. He was employed in the Ministry of the Public Service, Labour and Social Welfare. He was attached to the Pensions Office as a supervisor. He was a senior executive officer. Employed in the same office was one Licious

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Dembetembe in the position of Deputy Pensions Officer. In August 1990 the appellant lent Dembetembe $9 000. When the time came for the repayment Dembetembe could not repay the loan. Early in 1992 the appellant approached Dembetembe and asked for his money but this was to no avail. Dembetembe advised him that he had thought up a ploy as a result of which they could make money.

Dembetembe told the appellant that if he supplied him with his national registration number, he (Dembetembe), through his contact at the National Registration Bureau, would have a metal ID made for them with his face embossed thereon, bearing false particulars. Using this false disc, Dembetembe would be able to open fictitious pensioners' files and thereafter obtain monies as a result, to be credited into bank accounts opened in the meantime by the appellant in the name of the person whose name appeared on the false ID. To obtain the false ID an amount of $2 000 had to be paid to Dembetembe's contact at the National Registration Bureau. The appellant, on being told of the plan hatched by Dembetembe, told him that he needed time to consider the proposition. They met a number of times after the initial discussion had

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taken place and finally the appellant succumbed and agreed to participate in the plot.

In March 1992 the appellant supplied his national registration number to Dembetembe and indicated to him to proceed with the plan. He was told to have $2 000 available to pay for the forged ID and was advised that it would be ready that afternoon. He called on Dembetembe later that day, who produced the false ID. This had on it a picture of the appellant's face but the name reflected thereon was Sibusiso Dube. This is the name that the parties had agreed on.

Dembetembe requested the appellant to open an account with CABS and to supply him with the account number. He told the appellant that he would in the meantime open a pensioner's file in the name of Sibusiso Dube. The appellant complied and in April 1992 opened the account with CABS and conveyed this information to Dembetembe, giving him the details of the account. In May 1992 Dembetembe advised the appellant to check the CABS account, which the appellant did, and discovered that two deposits had been made, one for the amount of $74 266 and another for $851,09. He reported to Dembetembe what he had observed and was told that the larger amount was a commutation of pension deposit whilst the smaller amount was to be a monthly pension. Dembetembe requested the appellant to withdraw the maximum amount of money permitted, leaving only the minimum required to continue the account. On 10 June 1992 the appellant withdrew $75 000 and took the money to Dembetembe, where they divided the spoils equally. Thereafter a monthly amount of $851,09 continued to be deposited in the clandestine account at CABS and this was withdrawn and shared by the two of them.

On 30 June 1993 the appellant received instructions from Dembetembe to apply for an ATM CABS card, which he did. The address provided to CABS as the appellant's forwarding address was an address occupied by the sister of the appellant, whom he advised to keep all the mail arriving thereat in the name of Sibusiso Dube for him, until he came to collect it. The relevant ATM card duly arrived and was collected by the appellant. The fraudulent CABS account was

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thereafter operated by using the ATM card.

In September 1993 Dembetembe called on the appellant to check the balance of the CABS account and on doing so he noted that a further amount of $98 136,99 had been deposited. Dembetembe requested the appellant to transfer an amount of $75 000 of this amount to another CABS account,

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which was in the name of T Kaseke. This man is related to Dembetembe. The balance remaining in the original CABS account continued to be withdrawn on a daily basis following the instructions of Dembetembe. They shared the amounts withdrawn equally.

In November 1993 the appellant was again told by Dembetembe to check the forged account and when he did so he discovered that an additional amount of $97 986,72 had been credited into this account.

On 2 December 1993, during the course of a post audit exercise carried out by the internal auditor he discovered that something was amiss. A report was made to the police and following investigations the appellant was arrested. A search of his house failed to lead to the recovery of the false ID and ATM cards. Both these had been destroyed when Dembetembe and the appellant heard that investigations were being conducted by the police. An audit revealed that a total of $289 487,60 had been obtained by this fraudulent means. Of this amount a total of $165 785,68 has been recovered.

These were the agreed facts on the first count.

As regards count two, the appellant admitted to being called by Dembetembe in November 1992 and it was he (Dembetembe) who suggested that they initiate the opening of another false account. The appellant agreed and gave Dembetembe permission to use his national registration number. This time, however, they were to use the name Noel Sibanda on the false ID. An ID was obtained in this name reflecting the appellant's image. Each paid $1 000 to obtain the false ID. This time the appellant opened an account with Beverley Building Society and supplied the number to Dembetembe. In January 1993 he was instructed to proceed to Beverley Building Society and to present his passbook. This he did and an amount of $84 884,93 was endorsed as being the amount held in this account. The appellant was advised not to make any withdrawals from this account. When he returned to see Dembetembe he was told that he should proceed to Bulawayo and make a withdrawal of $79 500, which he did and this was supplied to him by way of a cheque. He deposited this cheque into his own Standard Bank account and thereafter withdrew the cash equivalent. He returned to Harare and gave half the money to Dembetembe. On his arrest in respect of count one, the appellant, of his own accord, revealed his illegal conduct in relation to this count. The amount recovered from this account was $2 172,48.

It is against the background of these facts that the appellant was convicted,

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having pleaded guilty before a magistrate who referred the matter to the High Court for sentence. It was in terms of the above admitted facts that the learned judge *a quo* sentenced him.

In assessing the sentence to be imposed on the appellant, the learned judge took into account the following aggravating features:

1. The appellant was party to the theft of monies from his employers but took into account the fact that the appellant's participation into the theft did not depend on the nature of his employment; unlike that of his co-accused, who at the time of the hearing of this appeal had not yet been brought to trial.

2. The amount involved in this theft is considerable totalling $387 974,69, of which only a portion has been recovered.

3. The applellant had ample opportunity to reflect on what was being suggested to him by his co-accused but he decided to go ahead and participate in the commission of the offence.

4. The criminal activity of the appellant and his partner in crime was carried out over a lengthy period of time and only came to an end when the theft was discovered following an internal audit being carried out.

The learned judge *a quo* analysed the mitigating features as being that the appellant pleaded guilty and that he co-operated with the authorities, so much so, that the second count of theft was only discovered by the internal auditors after it was brought to their attention by the appellant. The learned judge also gave the appellant credit for the fact that of the share he was to receive following the theft an amount of $165 000 had been recovered, leaving a balance of $28 000 to be recovered from him. Finally the court gave him credit for having expressed contrition.

I have no difficulty with the analysis of the learned judge in his consideration of the aggravating and mitigating features in this case. He clearly took great care in determining what is an appropriate sentence on the facts of this case.

It is my view, however, that judicial officers do not always give sufficient weight to where an accused person tenders a plea of guilty to a charge levelled against him. It is important not merely to pay lip service by repeating what one is expected to say when a plea of guilty has been tendered. One often

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reads in a judgment the following: "I have taken into account that you have pleaded guilty, that you are a first offender and that you have expressed contrition". It is not enough to repeat these phrases without giving due weight to the plea proffered. They are factors of mitigation and

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judicial officers should take proper account of them.

In the case of *R v Lowe* (1978) 66 Cr App R 122 at 125 ROSKILL LJ said:

> "... substantial credit should be given upon pleas of guilty especially in cases where there is no other evidence against the accused than the accused's own confession. Unless credit is given in such cases there is no encouragement for others to come forward and give information of invaluable assistance to society and the police which enables these criminals ... to be brought to book. Those are the considerations this court has to have in mind."

These sentiments were quoted with approval by McNEILL J in *R v Rose & Shapiro* (1980) 71 Cr App R 296 at 298. He went on to say:

> "There is no such thing as, and the decision in *Lowe (supra)* does not purport to lay down, what is called a tariff. This court desires to make it perfectly clear that no tariff exists for this class of case. The use of the word 'tariff' is wrong. Each case must be approached on its own particular facts, weighing the criminality of the admitted offence **against the offender's assistance to and co-operation with the police, and taking into consideration the public interest in encouraging others to come forward.** One mischief of a so-called tariff is its use in the claim to use it as a bargaining factor. The use of the schedule which Mr Leary used, showing a series of cases in which he had been concerned of a similar sort, where 'supergrasses' were sentenced in each case to only five years' imprisonment, compounds the error which arises from thinking that there is such a tariff in this class of case. Sentencing judges will bear in mind that it is necessary in every case to weigh the particular circumstances in the light of the decision in *Lowe supra* reinforced as it is by the decision in this case" (my emphasis).

It seems to me that what is to be gleaned from the dicta in these cases is that accused persons tendering pleas of guilty and co-operating with the authorities should be given meaningful credit for their co-operation. I am conscious of the fact that in both the cases referred to there were other significant circumstances which were pertinent and which factors were required to be

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taken into account in sentencing the accused persons, but the common thread running through both cases is the need for judicial officers to take proper account where pleas of guilty are tendered and where co-operation is forthcoming.

A further factor which judicial officers should be mindful of when sentencing offenders is the need to assess the appropriate total sentence merited by the offence first, and then the appropriate portion to be suspended depending on the circumstances of the offender. See *S v Gorogodo* 1988 (2) ZLR 378 (S) at 381; *S v Wakiri* 1981 ZLR 51 (A) at 53A, 1981 (2) SA 527 at 529; and *S v Sharma* S-117-84. Presently I will make further reference to the facts of this case and make observations on why I consider that the question of what is an appropriate overall sentence requires further analysis in determining what is a proper sentence in this case.

Before I do so, I make reference to what GUBBAY JA (as he then was) said in the case of *S v Gorogodo supra* at 382H-383A:

> "Nonetheless, such factors must not be permitted to weigh so heavily as to negate others which go in some way to lessen the seriousness of the offence. What is to be guarded against is such an excessive devotion to the cause of deterrence as may so obscure other relevant considerations as to lead to a punishment which is disparate to the offender's deserts. I cannot conceive of any principle which can justify, in my view, for the sake of deterrence

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> and public indignation, the imposition of a sentence grossly in excess of what, having regard to the crime and to the degree of the offender's moral reprehensibility, would be a fair and just punishment."

In this regard I consider it appropriate to repeat what was said by NICHOLAS JA in *S v Skenjana* 1985 (3) SA 51 (A) at 54I:

> "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, so that, for example, the marginal deterrent value of a sentence of twenty years over one say fifteen years may not be significant."

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It is with these considerations in mind that I turn to consider the facts of this case with a view to determining whether the sentence imposed at first instance is appropriate. It is not suggested that the principles I have adverted to are by any means exhaustive of factors to be taken into account when a judicial officer sentences an offender, but it is my view that judicial officers should be mindful of these when sentencing offenders. They are, in any event, relevant to the facts of this case.

The appellant was arrested on 6 January 1994 and taken before the regional magistrate in Harare on 12 May 1994. When the indictment was put to him he pleaded guilty to both counts. The matter was transferred for sentence to the High Court and the learned judge who dealt with him in that court sentenced him, the appellant having stood by his plea of guilty. The appeal in this court was heard on 18 May 1995. At that stage, we were advised that the appellant's co-accused had as yet not been brought to trial. It is apparent that the appellant by his co-operation has facilitated the authorities in bringing his matter to court expeditiously, has avoided the need for a long trial and has prevented the calling of witnesses. His conduct in so doing has resulted in less expenditure being incurred by the State.

The opposite is likely to be the case as regards his co-accused. One is entitled to presume that he will be pleading not guilty and a lengthier and more expensive trial process will have to take place. The question which requires consideration is whether his sentence is likely to be any greater than the fifteen years imposed on the appellant. In my view, this seems unlikely when regard is had to the sentences passed in such cases as *S v Sharma* S-117-84, in which case the accused stole $238 588,08 from his employer, all of which was recovered by the time his appeal was heard. His sentence was reduced to thirteen years' imprisonment with labour. In the case of *S v Hlatwayo* S-175-90 the accused was sentenced to sixteen years' imprisonment of which eight years were suspended on conditions for the theft of $211 734, of which $50 000 had been repaid. See also *S v Moloteni* S-177-94.

Bearing in mind what NICHOLAS JA stated in *S v Skenjana supra* at 176 dicta which were approved by BECK JA in *S v Mupanduki* 1985 (2) ZLR 169 (S), that:

> "... 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",

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EBRAHIM JA

it is unlikely that the appellant's co-accused would receive with justification a sentence greater than one of fifteen years. In effect, the result would be that the appellant would not have received any benefit or credit for pleading guilty, for co-operating with the authorities, and generally for coming clean and throwing himself on the mercy of the court. This offends against the principle so aptly summed up in the *Lowe and Rose & Shapiro* cases *supra*.

The appellant is fifty years old and in the event of his being unable to repay the amount he has been ordered to repay he will be nearing the age of sixty before he is released. In my view, he deserves greater credit for his meaningful co-operation with the authorities, and one way of achieving this is perhaps to suspend a further portion of the overall sentence imposed on him on conditions of good behaviour. I am aware of the case of *S v Kanhukamwe* 1987 (1) ZLR 158 (S), in which case this court confirmed the principle that it may be inappropriate where a lengthy period of imprisonment has been imposed to suspend a portion of the sentence on conditions of good behaviour. On the facts of this case, however, it seems to me that to achieve the desired result of a more equitable sentence on the facts of this case a further suspension of a period of the sentence imposed on the appellant by the court *a quo* would be just.

Accordingly, I would set aside the sentence imposed on the appellant and substitute the following sentence:

> "Fifteen years' imprisonment with labour, of which five years' imprisonment with labour is suspended for five years on condition that during that period the accused does not commit any offence of which dishonesty is an element, for which he is sentenced to imprisonment without the option of a fine. A further period of five years' imprisonment with labour is suspended on condition that the accused repays to the complainant through the registrar of the High Court in Harare the amount of $28 200 by 31 December 1995."

McNally JA: I agree.

Muchechetere JA: I agree.

Kantor & Immerman, appellant's legal practitioners

BARROWS & ANOR v MINISTER OF HOME AFFAIRS & ORS 1995 (2) ZLR 139 (SC)

Court **High Court, Harare**

Annotations Link to Case Annotations

Adam J

Civil application

18 August 1995 Judgment No. HH-150-95

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Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - applicability to aliens - rights enunciated apply to all persons in Zimbabwe, nationals or not

Immigration - person declared to be a prohibited person - detention of - when may be detained - detention of wife and minor children of prohibited person - when justified - detention for purposes of investigation - not justifiable when facts already known to immigration authorities - Immigration Act [Chapter 4:02] - ss 8, 9, 14, 17, 21, 22, 23 - Minister's powers under the Act - extent to which they may be delegated

Headnote

The applicants were husband and wife. They were born in Britain and married there. In 1992 they came to Zimbabwe, where the husband had obtained a job. He was granted a work permit for three years. While here, a child was born to the applicants. In 1994 the first applicant met a man named Madhongo who, for a fee, obtained birth certificates showing the applicants to have been born here. Subsequently, he obtained identity documents and Zimbabwean passports for them.

In June 1995, the third respondent, an immigration officer, called on the first applicant. He told him that Madhongo had been arrested and was in custody at the Harare Police Station. The first applicant was advised to co-operate and requested to come to the police station to identify Madhongo. When he got to the police station, the first applicant was tricked into entering a cell, which was locked behind him. A warrant in terms of s 10 of the Immigration Act [*Chapter 4:02*] was handed to the

police. The first applicant later appeared before a magistrate and was remanded on bail to appear for trial on 28 July. He returned to work. Shortly after his return to work, he was again arrested, though only briefly, by the third respondent, and handed a notice to a prohibited person and a notice in terms of s 25(2) of the Immigration Regulations 1979, cancelling the first applicant's work permit and requiring him to leave Zimbabwe with his wife and child. He was re-detained in spite of a magistrates court upholding his appeal against his detention.

During the first applicant's time in custody, his wife was issued with a temporary extension to enable her to stay for a few days longer. When she requested a permit to stay until the trial, the second respondent (the Chief Immigration Officer) had her detained, ostensibly in order to enable the immigration authorities to prepare the papers necessary to deport her. After representations from British consular officials and the applicants' legal practitioner, she was released.

The immigration authorities claimed that the detention of the first applicant was also for this purpose, not pending trial. However, there was evidence from the applicants' legal practitioner, supported by letters written by British consular officials, that the detention of the applicants was for the purposes of the first applicant's trial, although the Chief Immigration Officer gave evidence to the court contradicting the legal practitioner's evidence and claiming that the applicants' detention was necessary for him to make enquiries through Interpol about the authenticity of the applicants' British passports and about any criminal antecedents. He also said that, as the applicants had appealed to the Minister of Home Affairs, it was necessary for

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him to wait for the Minister's decision before releasing the first applicant.

Held, that the third respondent had abused his power and authority. Section 10 of the Immigration Act only gave him discretion to arrest a person whom he suspected, on reasonable grounds, to have entered or to be in Zimbabwe in contravention of the immigration laws and then only for the purpose of making inquiries. As the facts were already known at the time of the arrest, the third respondent acted contrary to the section.

Held, further, that the detention of the second applicant was unfair, unjust and inhuman. The validity of the notice declaring her a prohibited person depended entirely on the validity of the notice served on her husband. While under s 14(1)(k) of the Immigration Act the wife and minor children of a prohibited person are also regarded as prohibited persons, it does not mean that they have to be detained. There are statutory provisions whereby they may be permitted to remain in Zimbabwe.

Held, further, that the third respondent's lack of reasons for detaining the

second applicant showed that he did not act in good faith. With regard to the detention of the first applicant, he had been devious and insincere. The reasons given for detaining the first applicant were contrived and unreasonable.

Held, further, that the detention of persons for the purposes of completing arrangements for their removal had to be for a reasonable time, which would depend on the circumstances of each case. The second respondent's evidence was unimpressive and evasive. He had not shown that the first applicant's detention was necessary for that purpose. The authenticity of the passports could have been established from the British High Commission in Harare, since they were issued there, and the applicants' possible criminal antecedents would have been checked before they were issued with work permits.

Held, further, that although s 22 of the Constitution allows restrictions to be imposed on the movement of aliens when they are within Zimbabwe, this must be done under the authority of a law that is reasonably justifiable in a democratic society. Although it was not necessary to decide the constitutional point, it was not correct to say that aliens had no rights. Every person in Zimbabwe is entitled to the protection of the law, whether a national or not, and if an official has the power to deprive a person of his property or liberty, he should not do so without giving the person a chance of being heard and of making representations.

Held, further, that before a person could be declared to be prohibited under either s 14(1)(a) or 14(1)(g), the Minister himself had to consider whether there were grounds for so declaring. The form handed to a person declared to be prohibited was deficient, in that it did not advise the person that he could make representations to the Minister under s 23.

Held, further, that though the Immigration Regulations 1979 gave wide powers to immigration officials, such officials were still required to act in a correct and *bona fide* manner. It could not be said that the third respondent exercised his discretion properly.

Held, further, that to show the court's displeasure at their conduct, the second and third

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respondents should be ordered to pay the costs *de bonis propriis* on a legal practitioner and client scale.

Cases cited:

Principal Immigration Officer & Anor v O'Hara & Anor 1993 (1) ZLR 69 (S)

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

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

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Nyambirai v NSSA & Anor 1995 (2) ZLR 1 (S)

R v Oakes [1986] 1 SCR 102

Chirwa v Registrar-General 1993 (1) ZLR 1 (H)

Liversidge v Anderson & Anor [1941] 3 All ER 338 (HL)

R v IRC, ex p Rossminster Ltd [1980] AC 952 (HL)

R v Sec of State for the Home Dept, ex p Khawaja [1984] AC 74 (HL)

A J Dyke for the applicants

T Binali for the respondents

Judgment

Adam J: On an urgent chamber application made on 28 July 1995, MALABA J issued a provisional order whereby the respondents were to show cause to this court why a final order should not be made in the following terms:

1. That the applicants be released forthwith from the custody of the fourth respondent [the Director of Prisons];

2. That the costs of this application be borne by the second and third Respondents (the Chief Immigration Officer and an immigration officer, Mr Mabika) on a legal practitioner and client scale *de bonis propriis* or, alternatively, that the first respondent pay the applicants' costs on the higher scale.

In support of that chamber application, there were filed a certificate of urgency signed by a legal practitioner, as well as a further affidavit from another legal practitioner, together with the founding affidavit of 18 July 1995 made by the applicants.

A notice of opposition and an opposing affidavit was filed on 2 August 1995 on behalf of the first three respondents by a Mr Mbedzi, who described himself as the Principal Immigration Officer,

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who was authorised to represent those three respondents and who said the relevant file of correspondence was in his possession and control. The papers filed indicated that the chamber application was served upon the respondents in terms of the rules and certificates of service were filed, including service being effected upon the Attorney-General through the Civil Division of the Attorney-General's Office.

Thereafter, on 8 August 1995, an answering affidavit was filed by the second applicant, along with a supporting affidavit from Mr Hartley, a legal practitioner. Today an attempt was made to file a further affidavit by the second respondent which is not duly attested in terms of the rules of this court.

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Therefore, this court found it necessary to have the second respondent depose under oath about the contents of that affidavit. In addition, there was another affidavit filed from a person by the name of Martin Elfas Mondo. Again, this was filed without leave of this court, but I am prepared to condone this as it seems it does not in any way contradict or in any way cause problems to any of the applicants. In addition, in an amended draft order filed, the applicants also pray that, notwithstanding the noting of an appeal, the order made by this court be made operative and effective.

Now it appears to me that there is no basic conflict as far as the background to this whole matter before this court, particularly in light of the contents of the opposing affidavit filed on behalf of the first three respondents.

It is not disputed that (i) the first applicant, as well as the second applicant were born in Britain; (ii) they were married to each other according to the laws of Britain; (ii) they have one minor child of their marriage, Jessica Clare Barrows, born in Harare on 17 July 1994; (iv) the applicants came to Harare in September 1992 and the first applicant obtained a temporary work permit which allowed him to work from December 1993; (v) this temporary work permit was to expire in December 1995; (vi) he was employed by Stewart Scott Zimbabwe, as a consulting engineer; and (vii) in 1994 he became a member of the New Club.

It is common cause that he met a person by the name of Mr Shakespeare Madhongo and as a result of meeting him subsequently - in April 1995 at the New Club - the first applicant was given a birth certificate for himself and for the second applicant which disclosed them as being Zimbabweans by birth. Madhongo undertook to obtain identity documents and passports for the applicants upon the first applicant paying him the amount of Z$6 000 in cash, which amount was paid. The first applicant went with Madhongo to the passport office in order to obtain identification documents and eventually obtained in June 1995 Zimbabwean passports for the himself and the second applicant.

On 26 June 1995, the first applicant received a phone call from Madhongo, who indicated to him that there were some difficulties which had arisen with his "contact man" at the Immigration Department. Prior to that date the first applicant had on two occasions gone to the Immigration Department offices in Linquenda House. The office visited turned out to be the office of the third

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respondent, Mr Charles Mabika, though on those occasions Mabika was not there.

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That same day, Mabika and another person called at the first applicant's offices in Pax House. He identified himself as being an immigration officer. The first applicant was advised that he had Zimbabwean documents to which he was not entitled and for which he had paid Madhongo the sum of $6 000. He was advised to co-operate with Mabika so that there would be "less of a problem". He was informed that they were holding Madhongo in the police cells in the main charge office at the Harare Central Police Station. The first applicant agreed to accompany the third respondent to identify Mr Madhongo as being the person who had obtained the documents for him and to whom he had paid the sum of $6 000.

The first applicant then was taken into the police cells and whilst he was in the process of looking for Mr Madhongo, the cell doors were closed behind him and the third respondent handed over a warrant to the police which was in terms of s 10 of the Immigration Act [*Chapter 4:02*]. I will come back to this provision of the Act. So that is how the first applicant was put in detention. The first applicant was given no explanation for his detention or for being placed under arrest.

The first applicant remained in custody in the police cells until 29 June 1995 at which time he appeared before the magistrates court in Harare with his legal practitioner, when the detention warrant was cancelled by another immigration officer, presumably because no notice to prohibited person had been issued or given to the first applicant. The first applicant appeared before the magistrate on a charge of contravening the Births and Deaths Registration Act and the Citizenship of Zimbabwe Act. He was granted bail of $2 000 and remanded out of custody to appear on 28 July 1995 at the magistrates court.

The first applicant returned to work on 3 July 1995. On 5 July 1995, Mabika again came to the first applicant's offices and arrested him and another employee. Then, after detaining them for an hour or two, Mabika released them but issued the first applicant with another warrant in terms of s 10 of the Immigration Act. He served on the first applicant Annexure "A", which is a notice to a prohibited person. At the same time, Annexure "B" was also served upon him, which is a notice in terms of s 25(2) of the Immigration G Regulations 1979.

My understanding, according to the opposing affidavit filed, is that the foregoing was not disputed by the three respondents. I find the conduct of the immigration officer, particularly the third respondent, as being highly deplorable and completely contrary to the provisions of the legislation. He

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has acted completely contrary to the powers granted him under the legislation and in a most deceptive manner. The opposing affidavit on this aspect avers that there are no issues, which means it is admitted that he acted deceptively. This court does not take kindly to persons who

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deceive people they are apprehending and who act in an underhand manner. This is clearly an abuse of power and abuse of authority. Those responsible for keeping him in employment should carefully consider what action, including disciplinary action, should be taken against him, because the Government obviously does not wish such people to abuse their power and act beyond their authority, particularly where it is not disputed that is what they have done. This court will not condone such conduct.

I indicated that I would come back to the provisions of s 10 of the Immigration Act [*Chapter 4:02*] in order to show why this court takes such a serious view of Mabika's conduct. That section provides:

> "An officer in charge of a prison or police cell shall receive into custody or retain in custody any person detained or to be detained in terms of section 8 when required in writing by an immigration officer to do so and any person detained in a prison solely by virtue of the provisions of this section shall be treated as a person awaiting trial."

Section 8 deals with powers and duties in respect of prohibited persons. Section 8(1) reads:

> "Subject to the provisions of section 9, an immigration officer may arrest any person whom he suspects on reasonable grounds to have entered or to be in Zimbabwe in contravention of this Act and may detain such person for such reasonable period, not exceeding 14 days, as may be required for the purpose of making inquiries as to such person's identity, antecedents and national status and any other fact relevant to the question of whether such person is a prohibited person."

It is clear from the papers filed that none of those things were matters about which Mabika had to make any inquiries since he had all those facts before him. He abused his powers under that section which only gives him a discretion to arrest such a person whom he suspects on reasonable grounds for purposes of making certain defined inquiries. Mabika knew exactly what the first applicant had done. There was absolutely no reason for him to exercise his discretionary authority under s 8(1). He had all the information required since charges had been laid against the first applicant by 5 July 1995.

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He acted contrary to the provisions of s 8(1). Furthermore, he acted completely contrary to s 8(2) because he was not even attempting to have the first applicant deported at this stage.

Thereafter, on 5 July 1995, on the first applicant's release, Mabika, not being satisfied with having breached the law, continued to proceed on that date to issue to the first applicant a notice to prohibited person, date-stamped 5 July 1995 under s 14(1)(i) of the Act and a notice in terms of s 25(1) of the Immigration Regulations 1979 (SI 373/79), also dated 5 July 1995, which cancelled his temporary employment permit and informed him that he and his wife and child must depart from Zimbabwe on or before the date of cancellation of his temporary employment permit unless another date in writing had been fixed.

So we have Mabika ignoring the notice under s 25(2) of those Regulations issued by the Chief Immigration Officer (second respondent), as he also issues Annexure "A". At that time Mabika was advised by the applicants' legal practitioners that they were trying to make a booking for them to leave Harare for London on Saturday 8 July 1995.

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As a consequence of receiving those two documents, the applicants' legal practitioners, on 6 July 1995, addressed a letter to the Minister of Home Affairs in terms of s 23 of the Act.

The first applicant's legal practitioners ascertained from Mabika that it was in order for the first applicant's wife to remain in Zimbabwe in order to give evidence at his trial which they hoped would take place on 28 July 1995. Several requests had been made for the arrest of Madhongo without success.

Thereafter the first applicant's legal practitioners duly noted an appeal to the magistrates court which was heard on 7 July 1995. On Monday 10 July 1995, at 12 noon, the first applicant's appeal was upheld. It was confirmed that the first applicant was entitled to be released as a consequence of the fact that he was already on remand and by virtue of s 58(2) of the Immigration Regulations 1979.

Instead of being released, the first applicant was held in detention at Harare Central Remand Prison until 5 pm on 10 July 1995 at which time he was served with Annexure "E", being Form IF20 Notice to Prohibited Person, dated 10 July 1995, issued under s 14(1)(g). This was signed by the same immigration officer who signed Annexure "A".

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As a result of this the first applicant's legal practitioners, on 11 July 1995, wrote to the Secretary of Home Affairs and on 12 July 1995 made representations in terms of s 23(1) of the Act to the Minister of Home Affairs. It was pointed out to the Minister that Annexure "E" had not been signed by him and that he may not delegate his special powers under s 14(1)(g) to any other officer.

The second and third respondents have taken the view that the applicants are in Zimbabwe as aliens without the necessary permits and therefore should be detained, despite the fact that they themselves refuse to deport the applicants, thereby compelling the applicants to be in breach of the Act. Such conduct on the part of the second and third respondents is *mala fide* and unreasonable.

The first applicant submits that when officials such as the respondents are given the power to make decisions affecting the liberty of an individual - such as to declare him a prohibited immigrant and issue a warrant for his detention - the common law imposes upon such persons the duty to act strictly in accordance with the Act and not to abuse the legislation, as has happened in this case.

The applicants submit that the purpose of the first applicant's detention does not satisfy the requirements of the Act and is either solely to punish him for his involvement with Mr Madhongo or to avoid any trial taking place where the corruption involved must be disclosed or, alternatively, to keep him in custody for whatever period it takes for the trial to be set up and completed. In the meantime, during the first applicant's custody, the second applicant was issued by the second respondent with a temporary permit to remain until 12 July 1995, when an interim extension until 14 July 1995 was given to her. On 14 July 1995 a Mr Chipoko of the Immigration Department, who dealt with her, felt that she should be given a permit to stay until

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the trial, but had no authority to do so. She returned later and was advised that she did not need an interim extension but had to see the second respondent on 17 July 1995. On 17 July 1995 the second respondent decided that the second applicant had to be taken into custody nd Annexure "H" being a notice of prohibited person dated 17 July 1995 under s 14(1)(g) was served on her. The third respondent indicated to their legal practitioners that the second applicant was detained to complete the documents necessary to deport her which they would attend to in due course.

The second applicant had handed to her legal practitioners the temporary permit, but under threat of violence from Mabika and another immigration

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officer, her legal practitioner was compelled to hand this document, together with the first applicant's temporary employment permit, back to Mabika under protest.

Mabika said that the notice had to be issued since the second applicant did not have a permit to remain in Zimbabwe. She was compelled to remain in Zimbabwe because the Immigration Department would not deport her and they had taken her British Passport after the first applicant's initial arrest in July 1995. It was, therefore, unfair, unjust and inhuman for them to detain her. The second applicant's prohibition notice and detention is entirely dependent for its validity upon the first applicant's prohibition notice.

The respondents aver that the first applicant was detained at the Harare Central Prison Remand Section, not pending his trial, but pending arrangements for his deportation. They deny that the second applicant was assured that her detention was unnecessary; they say it was only delayed to enable her to make arrangements for the child while she was in detention. It is accepted that air tickets were requested from their legal practitioners, but these are only an integral part of a deportation. Hence the applicants are still in detention. They deny that the second applicant was ever assured that she would be allowed to remain in Zimbabwe for purposes of giving evidence. They say that the first applicant was deemed by the Minister a prohibited person on 10 July 1995 in terms of s 14(1)(g) and the second applicant and their child were also rendered prohibited persons pursuant to s 14(1)(k). In terms of s 22(1) no appeal lies against a decision made in terms of s 14(1)(g) and (k). There is nothing therefore illegal n their actions and nothing *mala fide* about it. In terms of s 6(1), the Minister may, in relation to all cases or any case or class of cases, impose upon any immigration officer or class of immigration officers all or any of his powers. Then it stands with logic that the Minister does not have to sign any notice in person. They say, finally, the second applicant is an alien and also a prohibited person in terms of s 14(1)(k) and pursuant to s 8(2) an immigration officer may remove or cause to be removed from Zimbabwe any prohibited person.

In an affidavit of 8 August 1995 in answer to the opposing affidavit, the second applicant avers that she has now been released from detention and issued with a temporary permit to reside until 2 September 1995 for the purposes of waiting for her husband's trial. The circumstances leading to her release are set out in the affidavit of Mr C R Hartley.

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In his affidavit, Mr Hartley, a legal practitioner for the applicants, averred

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that he was informed by Mr *Dyke* that, at the resumed hearing of the application for remand out of custody of the first applicant before the magistrates court on 1 August 1995, Mabika gave evidence that his detention was necessary because it was the intention of the Chief Immigration Officer to deport him and that his detention was necessary. He averred that at approximately 3 pm on 1 August 1995 Mr P S Covill, the First Secretary (Consular) of the British High Commission in Harare, in a telephone call, informed him that the Chief Immigration Officer had agreed that the second applicant's detention was no longer necessary, if her legal practitioners were to confirm her agreement to give evidence at the first applicant's trial, would surrender her passport (which in fact the Chief Immigration Officer already possessed) and the air ticket to the Chief Immigration Officer's office. A copy of the letter of 1 August 1995 addressed to her legal practitioners by Mr Covill is annexed to his affidavit. This reads as follows:

> "JULIE BARROWS
>
> I refer to our telephone conversation of 3 pm today.
>
> I have just spoken to Mr Mugwadi, Chief Immigration Officer.
>
> He has told me that if you write a letter to him agreeing to surrender Julie's passport and air ticket to his office, and confirm her agreement to give evidence at Simon's trial, he will release her before the end of the day."

Mr Hartley averred that a letter was duly despatched by him to the office of the Chief Immigration Officer on 1 August 1995 at 3.30 pm. He satisfied himself that the letter was received in his subsequent conversation with Mr Mondo of the Chief Immigration Officer's office concerning the completion of the formalities that the second respondent required to enable him to release the second applicant before 6 pm. He submits that the foregoing developments show conclusively that the purpose of the first and second applicants' detention was not for their deportation but for purposes of the first applicant's trial and so the first applicant's continued detention in custody is illegal, unnecessary and unlawful. The letter of 1 August 1995 addressed to the Chief Immigration Officer and marked for his attention reads:

> "RE: JULIE ROSE BARROWS
>
> We refer to the abovenamed who is presently detained in the women's

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> prison at the Chikurubi Prison complex. We write to confirm that our client will:
>
> a) surrender her passport and air ticket from Harare to the United Kingdom to you immediately after her release,
>
> and
>
> b) that she will remain in Zimbabwe to give evidence at any trial that may be instituted against her

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husband Simon John Barrows.

This letter is not to be construed in any way in a manner which might prejudice her action for damages and her current action for release with costs on the basis reflected in the papers served upon you last week."

At the hearing an affidavit called "Additional Information" of 18 August 1995, sworn by the Chief Immigration Officer, was produced in an attempt to file it. Since this so-called affidavit was not sworn before a commissioner of oaths who is not involved in the legal proceedings, it became necessary for the Chief Immigration Officer to give evidence under oath as to its contents.

He read out the affidavit which is in fact in response to Mr Hartley's affidavit and particularly to the letter of 1 August 1995 addressed to the Chief Immigration Officer. He admitted para (a) of that letter but denied para (b). He said that the release from detention of Mrs Barrows was negotiated by Mr Covill in a telephone conversation in which the plight of the minor child was highlighted as grounds for humanitarian considerations. In agreeing to release Mrs Barrows from detention, the only conditions he recalled imposing were the surrender of her passport and air ticket to his Department. They did not in any way discuss with Mr Covill the question of Mrs Barrows being required to remain in Zimbabwe to give evidence against her husband and in any event he did not recall imposing such a condition for her release. He further stated that Mr Hartley's letter never reached his office and was only brought to his attention during the court proceedings on 17 August 1995.

In so far as administrative procedures concerning removal of the Barrows' case are concerned, he is still to determine whether Mr Barrows's passport is an authentic British passport and whether he is admittable in the United Kingdom. He had further initiated through Interpol external checks to determine the Barrows' previous antecedents referring to Annexure "A" to that affidavit. This Annexure is a telex of 18 August 1995 at 9.34 am to the Immigration Headquarters for Interpol. The telex makes reference to their telephone conversation of the 1 August 1995 and asks for proof of the authenticity of the British passport for Simon Barrows and his wife. It also

asks for advice of convictions anywhere else. The annexure includes the reply of the 18 August 1995 from the Interpol Desk of the Criminal Investigation Department that his office has sent a request to Interpol London and Interpol Headquarters for external checks.

He said that he had conferred with the Minister who confirmed receipt of representations made to him by the applicants in terms of s 23(1). He was expecting the Minister's decision any time now. In terms of s 8(2)(b) as read with s 8(6), he could not release the first applicant from detention until the outcome of his appeal to the Minister.

As for the issue of the temporary permit to Mrs Barrows he said that the affidavit by the Senior Immigration Officer Mondo fully explained this. In that affidavit Mondo said that on 2 August 1995 he was assigned by Mabika to issue a temporary permit which he did in the belief that the Chief Immigration Officer had made prior agreement with the applicants' legal practitioners that the second applicant should be placed on temporary permit to await and to appear as a witness

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in her husband's case, but he could not verify the information with the Chief Immigration Officer as he was out of the country.

[The learned judge then analysed the other aspects of the Chief Immigration Officer's evidence and continued:]

In his heads of argument, Mr *Dyke* pointed out that s 8(2)(b) provides that an immigration officer may, pending completion of arrangements for the removal of a person, detain a prohibited person. He said that it has been accepted by the respondents that the applicants have the means - air tickets - by which they can leave Zimbabwe and that the other "administrative issues" mentioned by the respondents do not exist. The temporary permit issued to the second applicant clearly shows that she is being allowed to remain pending the first applicant's trial. He submits that the papers filed clearly indicate that the first applicant's detention is *mala fide* rather than for the specific purpose of deporting him and so his detention is not lawful.

On behalf of the respondents, Mr *Binali* submits that the first applicant was declared a prohibited person in terms of s 14(1)(g) and as a prohibited person he is being held in terms of s 8(2)(b). He submits that the first applicant is on remand pending his trial and therefore an attempt to remove him from Zimbabwe before trial would defeat the course of justice. An alien without a permit cannot reside in Zimbabwe lawfully and, despite the fact that he had

been granted bail, the applicant still needs a permit to reside in Zimbabwe. Further, the respondents have not completed arrangements for deportation, thus the first applicant is still in detention. What constitutes arrangements for removal is not defined in the Act. The period of detention is not prescribed by the Act or the Regulations.

He submits that Form IF20 is a standard form which is completed and duly signed by an immigration officer after the Minister has deemed a person under s 14(1)(h) as an undesirable inhabitant or visitor. The Act or Regulations do not make it mandatory for the Minister to personally sign the prohibited person notice. It is only the power to deem a person an undesirable visitor or inhabitant which cannot be delegated under s 6(1) which provides:

> "Subject to such conditions as he may fix, the Minister may, in relation to all cases or any case or class of cases, confer or impose upon any immigration officer or class of immigration officers all or any of his powers and duties in terms of this Act, other than his powers and duties in terms of paragraph (a) and (g) of subsection (1) ... of section *fourteen* and section *forty-one.*
>
> (2) The Minister may withdraw any power or duty conferred or imposed in terms of subsection (1)."

He submits that once an alien has been declared a prohibited person he is not at liberty to move freely since his constitutional right to freedom of movement is curtailed by s 8(2)(b) and that, in terms of s 9(2), it is only the Minister who may permit such a detained person to be released with or without sureties.

He accordingly submits that the respondents are exercising their discretion reasonably. The availability of an air ticket is not the only consideration or decisive factor in the deportation of an

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alien and, since the first applicant is awaiting trial, these together are part of some of the circumstances which the immigration authorities can take into account: *Principal Immigration Officer & Anor v O'Hara & Anor* 1993 (1) ZLR 69 (S) at 76-77.

It is further submitted that natural justice does not avail an alien: *Schmidt & Anor v Sec of State* [1969] 1 All ER 904 (CA) at 908.

Now s 8(2) of the Act states that an immigration officer may, pending completion of arrangements for removal of a prohibited person, subject to the provisions of s 9, detain that person. Section 8(4)(a) of the Act provides that

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whenever any person is informed for the first time that he is a prohibited person in terms of the Act, notice in writing must be given to him under which provision of the Act he is a prohibited person. Section 8(4)(b) provides that any person arrested or detained under s 8(1) or (2) must be informed forthwith the reason for his arrest or detention. Section 8(6) indicates that a prohibited person shall not be removed from Zimbabwe until three days, excluding Saturdays, Sundays and public holidays, has expired from the date of service of a prohibited person notice in terms of s 21(2) or, if he appeals in terms of s 21 or makes representation within 24 hours of the date of service of a prohibited person notice in terms of s 23(1), until his appeal is dismissed, abandoned or withdrawn or the Minister's decision on his representation is favourable; but, subject to s 9, he may be detained during such period. Section 9(1) allows for a prohibited person to be detained in a prison, police cell or other convenient place. That section also states that the Minister may permit a detained prohibited person, with or without sureties, to enter into a bond for his release in an amount including the terms and conditions for such bond to be fixed by the Minister.

Sections 14(1) and (7) provide as follows:

> "Subject to the provisions of this Act, the following persons are prohibited person -
>
> (a) any person or class of persons deemed by the Minister on economic grounds or on account of standards or habits of life to be undesirable inhabitants or to be unsuited to the requirements of Zimbabwe;
>
> ...
>
> (g) any person who, from information received from any source, is deemed by the Minister to be an undesirable inhabitant of or undesirable visitor to Zimbabwe;
>
> ...
>
> (i) any person who has entered or remained in Zimbabwe in contravention of the provisions of this Act ... whether or not he has been prosecuted for such contravention;
>
> ...
>
> (k) the wife and children under the age of eighteen years and any other dependants of a person referred to in paragraphs (a) to (j).

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...

(7) The Minister may revoke any decision or declaration in terms of paragraph (a) to (g) of subsection (1) ... affecting any person or class of persons and, if he does so, he may again exercise his powers in terms of

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this section in respect of that person or class of persons and the provisions of this subsection shall again apply in respect of the exercise of those powers."

Section 16 states that the Minister may, by order in writing, subject to terms and conditions fixed by him, exempt any person described under section 14(1) as a prohibited person and he may also at any time, by notice in writing, cancel this exemption.

Section 17 provides that, subject to the provisions of the Act, a prohibited person shall not remain in Zimbabwe. Section 19 states that, in regulations under s 41, the Minister shall provide for student permits, temporary employment permits and temporary permits, as well as other permits for persons, whether aliens or prohibited persons, to enter or remain in Zimbabwe.

Sections 21, 22 and 23 provide as follows:

"21.(1) Subject to the provisions of subsection (2), ... and section *twenty-two*, any person who receives notice in writing in terms of paragraph (a) of subsection (4) of section *eight* ... that he is a prohibited person may appeal to the nearest magistrates court against ... the allegation that he is a prohibited person, ...

(2) An appeal in terms of subsection (1) shall be noted -

(a) where the person is in Zimbabwe when he receives the notice referred to in that subsection, not later than three days, Saturdays, Sundays and public holidays excluded, after receiving such notice;

(b) where the person is outside Zimbabwe when he receives the notice referred to in that subsection, not later than ten days, Saturdays, Sundays and public holidays excluded, after receiving such notice.

...

22.(1) No appeal shall lie against a decision made in terms of -

(a) paragraph (a) or (g) of subsection (1) or subsection (6) of section *fourteen*, unless such appeal is directed solely to the identity of the person affected by the decision; or

(b) ...

(2) No information or reasons on which a decision in terms of

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section *fourteen* or a decision to withdraw or cancel a permit was made may be disclosed in any court if the Minister certifies that its disclosure is not in the public interest, and no court may question the adequacy of the grounds for any such decision.

23.(1) Any person affected by a decision made in terms of paragraphs (a) or (g) of subsection (1) of section *fourteen* may, within twenty-four hours, Saturdays, Sundays and public holidays excluded, of being served with the

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notice referred to in paragraph (a) of subsection (4) of section *eight*, make representations in writing addressed to the Minister against such decision and the Minister may confirm or reverse such decision.

(2) No person referred to in subsection (1) shall be entitled to be given any information or reasons as to the grounds for any decision referred to therein or for the confirmation of any such decision."

Section 29 states an alien shall not remain in Zimbabwe unless he is in possession of a permit or a visitors entry certificate. But this provision shall not apply to an alien domiciled in Zimbabwe and others specified in s 29(2), including aliens exempted by the Minister on conditions fixed by him in terms of s 30.

Section 36 provides that any person who contravenes any provision of the Act for which no penalty is specifically provided shall be guilty of an offence and liable to a fine of not more than $1 000 or to imprisonment of not more than two years or to both such fine and such imprisonment.

Section 41 provides as follows:

"41.(1) The Minister may make regulations for any matter for which he may by regulation provide or which may be prescribed and, generally, for the better carrying out of the objects and purposes of this Act.

(2) Regulations in terms of subsection (1) may provide for -

(a) the powers and duties of an immigration officer;

...

(e) the procedure for the manner of detention of prohibited persons and unlawful residents pending their removal from Zimbabwe and the procedure for and the manner of such removal; ...

(g) in relation to any permit -

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(i) the purposes for which it is issued;

(ii) the form thereof and the conditions upon which it may be issued, renewed or extended;

(iii) the circumstances in which it may be cancelled or withdrawn or deemed to have been cancelled or withdrawn and the consequences of such cancellation or withdrawal;

(iv) the taking and disposal of a deposit as a condition of the issue thereof;

(v) the fee payable therefor ..."

The relevant provision of the Constitution of Zimbabwe is s 22 which provides as follows:

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

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

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be in contravention of subsection (1).

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

(a) for the imposition of restrictions on the freedom of movement of persons generally or any class of persons that are required in the interests of defence, public safety, public order, public morality or public health;

...

(d) for the imposition of restrictions on the movement or residence within Zimbabwe of persons who are neither citizens of Zimbabwe nor regarded by virtue of a written law as permanently resident in Zimbabwe or for excluding or expelling from Zimbabwe any person who is not a citizen of Zimbabwe;

...

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

It is true that in terms of s 14(1)(k) the wife and children under the age of 18

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years are regarded as prohibited persons once the husband is given a prohibited person notice. It does not necessarily follow since that is the position that the wife, children under 18 years and other dependents should be detained automatically since there are provisions in the regulations whereby such persons under Part II of the regulations may be issued temporary permits or aliens permits if there are valid reasons for wanting such persons to remain in Zimbabwe. In addition, s 9 of the Act gives authority to the Minister to permit the release of such persons, with or without sureties, on a bond being entered into in an amount and on terms and conditions specified by him.

In light of the above, this court requires the utmost good faith, in their affidavits, from the respondents. Nothing is said by them why there was the necessity to detain the second applicant without applying the above provisions of the Act or the regulations initially on 17 July 1995. It must be apparent that the conduct of our immigration authorities may be under scrutiny, particularly when our Government is inviting people from abroad to come and invest in Zimbabwe by the establishment of the Zimbabwe Investment Centre for that purpose. Those responsible for promoting this do not expect such behaviour towards aliens. I do not think for a moment that this type of conduct on the part of our senior immigration officials gives this country the image of being a place where aliens are welcome. In light of the fact that since there has not been any satisfactory explanation as to Mabika's conduct towards the second applicant the reasonable conclusion for this court to draw is that the authority he exercised was no in good faith.

I turn to the detention of the first applicant. It is common cause that he came with his family to Zimbabwe in September 1992 from Britain. He obtained a temporary employment permit for two years from December 1993 to December 1995. Mabika, on a false pretext, enticed him on

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26 June 1995 to go to the police cells at the Harare Central Police Station to identify Madhongo. Whilst in the cells he was detained and a warrant in terms of s 10 of the Act was handed over to the police. He was given no explanation for his arrest or for his detention. On 29 June 1995 he appeared before the magistrates court in Harare with his legal practitioner. The detention warrant was cancelled by another immigration official. The charge against him was for the contravention of the Births and Deaths Registration Act [*Chapter 5:02*] and the Citizenship Act [*Chapter 4:01*]. He was released by the magistrate on a bail of $2 000 and remanded to appear on 28 July 1995. On 5 July 1995 Mabika arrested him for about two hours. Thereafter, on the same date, he was issued with a prohibited person notice under s 14(1)(i) of the Act, as well

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as a notice under s 23(1) of the Regulations. Mabika requested that the first applicant's employers get air tickets for the applicants for their departure to Britain which Mabika wished to achieve as soon as possible. The air tickets were obtained and a booking made for the Harare to London flight on 8 July 1995. On 6 July 1995, representations in terms of s 23 of the Act were made to the Minister. On 7 July 1995 an appeal in terms of s 21 of the Act was made to the magistrates court, which heard it on that date. On 10 July 1995 the magistrates court upheld the appeal and confirmed that the first applicant was entitled to be released as a consequence of the fact that he was already on remand. Instead of being released, the first applicant was detained. On 10 July 1995 at 5 pm he was served with another notice to a prohibited person (signed by the same immigration officer who had signed the previous one dated 5 July 1995) under s 14(1)(g). On 12 July 1995 representations in terms of s 23 of the Act were made on behalf of the first applicant to the Minister. These proceedings were commenced on 28 July 1995, with service on that date on the first three respondents and with the service of the provisional order on the same three respondents as well as on the fourth respondent and the Civil Division of the Attorney-General on 31 July 1995.

Frankly speaking, I am left with the distinct impression from the various affidavits filed on behalf of the respondents and from the evidence heard by me that the immigration officials concerned in this matter have not been sincere and open with this court. Mabika has behaved in a devious manner, to say the least, and they seemed to have contrived to establish some grounds to hold the first applicant, which is a conclusion that any reasonable person who goes through these papers would come to. I am certain that the Chief Immigration Officer, if he were to sit down and search through his mind, would come to the same conclusion if he was conducting his affairs honestly, because I do not expect that a legal practitioner who is an officer of this court to swear an affidavit which is not true. Why would he have done that? There has to be some reason for him doing so. There is no reason for Mr Covill of the British High Commission to fabricate conditions for the release of the second applicant. I have not been given any reason for him to write on the very same afternoon of 1 August 1995 to the applicants' legal practitioners the terms of the conditions laid down by the Chief Immigration Officer. What has not been explained in a satisfactory manner is the letter from the applicants' legal practitioners of the same date that was for the attention of the Chief Immigration Officer, since it is clear from Mr Hartley's affidavit and from Mr Mondo's affidavit that this letter **was** received in the office of the Chief Immigration Officer, that at least Mr Mondo and the Principal Immigration Officers were

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aware of the conditions set by him. Yet the second

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respondent, who must have been in Harare from 1 August 1995 in the afternoon (since he admits having had a telephone conversation with Mr Covill) was not aware of that letter. In addition, the second applicant's affidavit in answer of 8 August 1995 to the opposing affidavit attached these letters as well as the affidavit of Mr Hartley. Yet, in his affidavit read out in this Court, the second respondent avers that Mr Hartley's letter never reached his office and it was only brought to his notice on 17 August 1995, when this matter commenced to be heard.

In Mr Covill's letter of 1 August 1995 and Mr Hartley's letter and affidavit the condition was that the second applicant agreed to give evidence at the first applicant's trial. Even Mr Mondo's affidavit of 8 August 1995 confirms this. Yet in his affidavit read out to this court, the second respondent avers that they (Mr Covill and himself) did not in any way discuss the question of the second applicant being required to remain in Zimbabwe to give evidence against her husband. It is not clear why he avers that the condition required was that the second applicant was to give evidence against her husband; particularly as he had the opportunity since 17 August 1995 to read the affidavits of Mr Hartley and Mr Mondo. In fact the second respondent does not categorically deny that condition. He states he does not recall imposing such a condition. This is what has been described by the Supreme Court and this court as an exquisite form of being evasive.

I reluctantly have to come to the conclusion that I am neither impressed by the demeanour of the second respondent nor with the answers given by him under oath. Under cross-examination he did not do well. In fact, at one stage he seemed to say that he had the power to obtain a prohibited person and only release him when he felt like it. He even talked about such persons being detained for as long as 12 months since this happened in Britain.

What happens in Britain does not mean that this may be correct under our law. It has been accepted by Mr *Binali*, on behalf of the respondents, that detention of prohibited persons under s 8(2) pending the completion of arrangements for removal must be for a reasonable period of time and what is reasonable will depend upon the circumstances of each case. The opposing affidavit did not aver what was needed to be completed as far as arrangements for removal was concerned. In the second respondent's affidavit, read out to this court, the administrative procedures as far as the applicants were concerned were whether their previous British passports were authentic and whether they had any previous convictions elsewhere.

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In order to determine whether the applicant's detention is proper this court must be satisfied, firstly, that it is necessary to detain him pending the completion of the administrative procedures referred to by the second respondent and, secondly, that his detention to date and henceforth falls within what can be said to be for a reasonable period of time.

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The second respondent has not shown that the first applicant's detention is a necessary requirement in order to complete the administrative procedures. No reasons are given why the first applicant (as the second applicant has been issued a temporary permit) cannot be issued a temporary permit while these administrative procedures could be completed. The respondents have in their possession his passport and air tickets. Further, the second respondent accepted that the applicants were issued with their new British Passports in exchange for their expired British Passports by the British High Commission. It would have taken the respondents only a very short moment to ascertain from the British High Commission in Harare whether their previous British Passports were not authentic rather than asking the Interpol Desk at CID Headquarters on 18 August 1995 to send a request to Interpol. What is most disturbing to this court is the failure of the second respondent to explain why only now the applicants' antecedents in he form of previous convictions were being sought. The first applicant had been here since September 1992 and the second respondent issued him a Temporary Employment Permit in December 1993 for a period of two years expiring in December 1995. Obviously it is not being seriously suggested by the second respondent that the applicants may be hardened criminals. Like the conduct of the third respondent, this so-called request smacks of a contrivance to search for grounds to detain the first applicant. This court is not prepared to accept that the second respondent and his senior officials do not routinely check antecedents of aliens who seek to be issued with residence permits, temporary permits, aliens permits and other permits before such persons are admitted to stay or remain in this country.

Mr *Binali* submitted that a prohibited person's right to freedom of movement is curtailed by s 8(2)(b) of the Act. However, there is little doubt that the Immigration Act is covered by the provisions of s 22(3)(d) of the Constitution of Zimbabwe. This means that any provisions of the Immigration Act cannot impose restrictions on the movements of citizens of Zimbabwe and of persons who are permanently resident in Zimbabwe. Nor can it exclude or expel any citizen of Zimbabwe. But any alien can be excluded or expelled from Zimbabwe and those aliens who are not permanent residents of Zimbabwe can have restrictions imposed on their movements, as long as any

provision of a law which imposes restrictions on aliens or anything done under the authority of that law must be shown to be reasonably justifiable in a democratic society.

It is true that in *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S) at 382-3 GEORGES CJ said that it has to be shown that the legislation challenged is not reasonably justifiable in a democratic society and in that sense there is a presumption of constitutionality. However, in *Nyambirai v NSSA & Anor* *(5) GUBBAY CJ accepted that in order for challenged legislation to be reasonably justifiable in a democratic society the three criteria that were set out in *R v Oakes* [1986] 1 SCR 102 at 138-139; 19 CRR 308 at 336-337 (SCC) must be satisfied: firstly, the objective of the legislative measure in question must be of sufficient importance to warrant overriding the constitionally guaranteed right or freedom; secondly, the means chosen to do so must not be arbitrary, unfair or based on irrational considerations but must be rationally connected to the objective which it is designed to achieve;

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and, thirdly, the means chosen should impair as little as possible the guaranteed right or freedom. See also *Chirwa v Registrar General* 1993 (1) ZLR 1 (H) at 19.

Since the parties have not fully raised and have not presented complete arguments to this court on the constitutional aspect, it is not necessary for me to deal with that aspect since the issues before the court can be decided on the other arguments presented by the parties.

Mr *Dyke* submitted that the notice to prohibited person under s 14(1)(g) of 10 July 1995 was not in accordance with Act. It is clear that s 6(1) of the Act makes provision for the delegation of functions of the Minister but in specific terms excludes his powers or duties under s 14(1)(a) and (g), s 14(6) and (7), s 15(1)(f) and s 41. This means that the Minister must himself, under s 14(1)(a), direct his mind and consider the matter so as to deem a person on economic grounds or on account of standards or habits of life to be an undesirable inhabitant or to be unsuited to the requirements of Zimbabwe. Also, he must himself, under s 14(1)(g), direct his mind and consider the matter so as to deem a person, from information received from any source, to be an undesirable inhabitant of or an undesirable visitor to Zimbabwe. Section 8(4)(a) provides that whenever any person is informed for the first time that he is a prohibited person under the Act, notice in writing must be given to that person.

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Form IF20 certainly makes provision for a person to be notified that he is a prohibited person under s 14(1)(a) or (g) and that he may appeal to the nearest magistrates court on the grounds of identity only. That Form IF20 makes no provision for the making of representations to the Minister under s 23(1) where a person has been deemed a prohibited person by him under s 14(1)(a) or (g). To that extent the notice to a prohibited person under s 14(1)(a) or (g) is deficient. It is expecting a great deal from such persons under detention that they are knowledgeable about the relevant provisions of the Act. Therefore, it would be wise for the Immigration Department to amend Form IF20 so that it clearly states that the Minister, in terms of s 14(1)(a) or (g), has deemed him or her a prohibited person. In addition, it should also indicate that such a prohibited person may, within 24 hours, Saturday, Sundays and public holidays excluded, of receiving the prohibited person notice, make written representations to the Minister. Also, Form IF20 should also inform a prohibited person of the provisions of s 9(2) and (3) of the Act.

What is abundantly clear from the terms of s 6(1) is that it is for the Minister himself to act under s 14(1)(a) or (g). This means that he has to exercise his function of deeming a person to be a prohibited person in writing. It is not a requirement under s 8(4)(a) that the Minister himself has to give notice in writing. The person who gives notice in terms of s 8(4)(a) must be aware that the Minister has deemed a person a prohibited person and the date that this was done. He would require this in order to complete Form IF20.

Mr *Binali* argued that the principles of natural justice do not avail aliens, citing *Schmidt v Sec of State supra*. In that case the plaintiffs were students at a College of Scientology who had been granted limited stay permits for purposes of full-time study. They applied for an extension of stay but before a reply was received the British Government announced in a Government statement

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that it was satisfied that scientology was socially harmful and that, although there was no power under the existing law to prohibit its practice, the Government would take all steps to curb it. Further, scientology establishments would not be recognised as educational establishments for purposes of granting admissions to aliens. The step taken was not to grant any extensions of stay to aliens to continue their scientology studies. The Home Secretary accordingly rejected the plaintiffs' applications. The plaintiffs claimed that the Home Secretary's decision was unlawful and void, that he had to consider their applications on their merit and in accordance with natural justice. It was argued on behalf of the plaintiffs that the Home Secretary did not observe the precepts of natural justice and that he ought to have given them a hearing. LORD DENNING said he saw no basis for this and

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made a distinction between a citizen and an alien. He said that as far as natural justice went an alien had no right to be in Britain except by the licence of the Crown so his case was rather different.

It is not disputed that our Supreme Court in *Principal Immigration Officer & Anor v O'Hara & Anor supra*, at 78 quoted the above observation of LORD DENNING. But, if the Supreme Court had referred to the later judgments of the House of Lords they would not have accepted what LORD DENNING said as being the correct position of the law. With the greatest deference to LORD DENNING, what he said was clearly contrary to what was stated in the classic dissent of LORD ATKIN in *Liversidge v Anderson* [1941] 3 All ER 338 (HL) at 362B (later approved by the House of Lords in *R v IRC, Ex p Rossminster Ltd* [1980] AC 952 (HL) at 1011 at 1025) "that in English law every imprisonment is *prima facie* unlawful and that it is for a person directing imprisonment to justify his act". Further, in *R v Sec of State for the Home Dept, Ex p Khawaja* [1984] AC 74 (HL) where the question of two aliens being illegal entrants came up for determination, LORD SCARMAN observed at 111-112:

> "There are, of course, procedural differences between *habeas corpus* and the modern statutory judicial review ... But the nature of the remedy sought cannot affect the principle of the law. In both cases liberty is in issue ... The writ of *habeas corpus* issues as of right. But the difference arises not in the law's substance but from the nature of the remedy appropriate to the case ... This remains the law today ... whatever the process, the party seeking relief carries the initial burden of showing he has a case fit to be considered by the court ... If Parliament intends to exclude effective judicial review of the exercise of a power in restraint of liberty it must make its meaning crystal clear.
>
> Two points remain. First, does our law's protection extend to aliens and non-patrials? There is a suggestion that because an alien is liable to expulsion under the royal prerogative and a non-patrial has no right of abode, it is less difficult to infer a Parliamentary intention to deprive them of effective judicial review of a decision to infringe their liberty. And, secondly, the problem of proof.
>
> *Habeas corpus* protection is often expressed as [being] limited to British subjects'. Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic 'no' to the question. Every person within the jurisdiction enjoys the equal protection of our laws. There is no

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> distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been in the law at least since LORD MANSFIELD freed 'the black' in *Somersett's Case* (1772) 20 St Tr 1. There is nothing here to encourage in the case of aliens or non-patrials the implication of words excluding the judicial review our law normally accords to those whose liberty is infringed".

Also, the Constitution of Zimbabwe under s 18 provides that subject to the provisions of the Constitution, every person is entitled to the protection of the law. In light of the foregoing, the correct statement of the principle should be cast as follows: that where an official has power to deprive any one of his or her liberty or his or her property, the general principle is that this is not to be done without his or her being given a chance of being heard and of making representations on his or her own behalf. That this is so is confirmed to some extent by the actual provisions of s 23 of the Immigration Act itself.

Mr *Binali* also referred to *Principal Immigration Officer & Anor v O'Hara & Anor supra* at 76-77 and asserted that the respondents have wide discretionary powers to impose conditions. But the Supreme Court in that case was dealing with s 41(2)(o) of the Act, which allows the Minister, in the regulations made by him, to make provisions for the conditions on which former residents of Zimbabwe may resume residence in Zimbabwe otherwise than as new immigrants or be deemed to have regained their domicile for purposes of this Act. In terms of s 41 the Immigration Regulations were enacted by the Minister. It was s 38(1) of those Regulations that were considered by the Supreme Court. The High Court in Bulawayo had held that the use of the word "may" in it was mandatory and therefore the Immigration Officer must endorse their passports with an alien's permit. The Supreme Court held that the words "may" had a "permissive" meaning and to construe it as meaning shall would "impose an unnecessary shackle" on the wide discretionery power given to the immigration officers.

It is clear from their judgment that the Supreme Court did not hold that immigration officials could abuse their authority under the guise of exercising a discretionary power. The grant of a discretion is one thing but its exercise requires an official to act in a correct and *bona fide* manner.

On the same day, 1 August 1995, in the morning, Mabika told the magistrate that the first applicant was being held in detention under s 8(2) of the Act pending his deportation as a prohibited immigrant. In the afternoon of that day, the Chief Immigration Officer imposed, as one of the conditions for the

release of the second applicant, that she remain in Zimbabwe in order to give evidence at the first applicant's trial. According to Mr Mondo's affidavit of 18 August 1995, the Principal Immigration Officer, Mr Mbedzi, assigned him on 2 August 1995 to issue a temporary permit to the second applicant. It cannot be asserted by either Mr Mondo or Mr Mbedzi that they were ignorant of that condition imposed on the second applicant by the second respondent. Neither those immigration officials nor the second and third respondents, particularly as the second applicant's answering affidavit of 8 August 1995 had been served upon them, addressed any

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correspondence or made any response to the contrary until the second respondent's affidavit read in this court on 18 August 1995. No explanation is given about this. It cannot, therefore, be said that the third respondent exercised his discretion properly.

In light of the foregoing, I am more than satisfied on the papers filed by the applicants that they have made out a case for the relief they seek. In fact, it was for the respondents to show cause why this court should not grant the relief sought by the applicants. They have failed to do so. To show this court's displeasure the second and third respondents personally shall have to pay costs at the higher scale.

Accordingly the following is the order that I make:

(1) that the first applicant be released forthwith from detention;

(2) that the second respondent be and is hereby directed to issue by 6 pm today (18 August 1995) to the first applicant with a temporary permit in Form IF9 permitting him to remain in Zimbabwe for the purposes of making arrangements to leave Zimbabwe on or before 2 September 1995, failing which the registrar of this court is to provide the first applicant with a certified copy of this order which shall be deemed to be a temporary permit in terms of s 26(1) of the Immigration Regulations, 1979 for all purposes;

(3) that the second respondent, or anyone else having possession thereof, is directed by 6 pm today (18 August 1995) to return to the applicants all the articles and passports, if any, not being held by the applicants;

(4) that this order will operate as an interdict restraining the respondents or anyone acting through them from arresting or detaining or attempting to arrest or obtain the applicants without leave of this court;

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(5) that the costs of this application shall be paid by the second and third respondents, the one paying the other to be absolved, on a legal practitioner and client scale;

(6) that in the event of an appeal being noted against this order, notwithstanding such noting of an appeal, this order be and is hereby declared operative and in effect;

(7) that this order be served on the respondents by the Deputy Sheriff.

Gollop & Blank, applicants' legal practitioners

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

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THE MUSIC ROOM (PTY) LTD v ANZ GRINDLAYS BANK (ZIMBABWE) LTD 1995 (2) ZLR 167 (HC)

Court **High Court, Harare**

Malaba J

Civil action

19 & 20 June & 23 August 1995 Judgment No. HH-98-95

Flynote

Delict - negligence - liability - person obtaining another person's cheque book from bank by false pretences and then using cheques to obtain goods - whether bank negligent - loss - economic loss only - whether bank liable to company for the purely economic loss it suffered from supplying goods on the basis of such a cheque

Headnote

An employee of a bank negligently handed over a cheque book of a customer to a person falsely claiming to be a messenger of the customer who had been tasked by the customer to collect the cheque book. The person who collected the cheque book and a woman then sought to buy goods from the plaintiff company with a cheque from the cheque book. They were told that only a bank certified cheque would be accepted. The person returned with a forged cheque from the stolen cheque book which was endorsed on the back with a forged bank certification. The cheque was accepted and the goods were handed over. The collecting bank advised the plaintiff company that the cheque had been dishonoured for non-acceptance. In a claim against the bank for a sum equivalent to the goods supplied:

Held, that for a claim for damages for purely economic loss to succeed, not only must there have been negligence on the part of the defendant but, in the circumstances of the particular case, the defendant must also have owed a legal duty of care to the plaintiff to avoid causing him such loss by his negligence.

Held, further, that liability for purely economic loss must be confined within

reasonable and manageable bounds and the court must decide in each case on the basis of policy considerations whether there should be liability or not. The policy considerations that the court must consider in deciding whether a legal duty of care is owed include:

(a) whether the loss is finite;

(b) whether the number of potential claimants is limited and identifiable;

(c) whether the success of the action will result in a multitudinous train of claims for incalculable loss;

(d) whether the defendant is to be regarded as possessing skills and special responsibility in the particular commercial activity in which he is engaged;

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(e) the desirability of maintaining long established principles of law which are currently being acted upon;

(f) whether there is need to place the ground of action within the extended scope of the *lex Aquilia*; and

(g) the conduct of the plaintiff.

Held, further, that the extent of liability in this case was not finite as the extent of loss was entirely dependent upon how the fraudster used the stolen cheques. The potential claimants were not identifiable to the bank at the time of the commission of the negligent act. The defendant could not know how many people the fraudster might trick using the stolen cheques and how much loss he would cause those people that he succeeded in duping. The amount of loss would also depend upon the gullibility of the persons approached by the fraudster.

Held, further, that in the circumstances of this case it would not be in the interests of society to impose a legal duty of care on the bank in respect of economic loss suffered by the plaintiff. The legal convictions of the community did not demand that this negligent act be regarded as unlawful. A reasonable person is likely to say that both parties were victims of fraud and the loss should lie where it falls. The plaintiff's employee should have acted with very much more circumspection in the circumstances. No compelling reasons existed in this case for extending the scope of the *lex Aquilia* so as to impose a legal duty of care on a drawee bank towards a third party who suffers economic loss as a result of its negligent act of giving its customer's cheque book to a wrong person who uses a cheque therefrom to defraud the third party, thereby causing him economic loss.

Cases cited:

Cheshire v Bailey [1905] 1 KB 237

Dyer v Munday [1895] 1 QB 742

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Lloyd v Grace Smith & Co [1912] AC 716

United Africa Co Ltd v Saka Owoade [1955] AC 130

Nel & Anor v Min of of Defence 1978 RLR 455 (H)

Nott v ZANU(PF) 1983 (2) ZLR 208 (S)

Fawcett Security Ops (Pvt) Ltd v Omar Entprs (Pvt) Ltd 1991 (2) ZLR 291 (S)

Hirsch Appliance Specialists v Shield Security (Natal) (Pvt) Ltd 1992 (3) SA 643 (D)

Romansrivier Koöp Wynkelder Bpk v Chemserve Mfg (Pvt) Ltd 1993 (2) SA 358 (C)

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Bank of Baroda Ltd v Punjab National Bank Ltd [1944] AC 176

Coronation Brick v Strachan Const Co 1982 (4) SA 371 (D)

Zimbabwe Banking Corp Ltd v Pyramid Motor Corp (Pvt) Ltd 1985 (1) ZLR 358 (S)

Franschhoekse Wynkelder Bpk v SAR&H 1981 (3) SA 36 (C)

Pyramid Motor Corp (Pvt) Ltd v Zimbabwe Banking Corp 1984 (2) ZLR 29 (H)

Caparo Industries plc v Dickman & Ors [1990] 1 All ER 568 (HL)

Tobacco Finance (Pvt) Ltd v Zimnat Ins Co 1982 (1) ZLR 47 (H); 1982 (3) SA 55 (ZH)

Lamb v Camden London Borough Council [1981] 1 QB 625

Anns v Merton London Borough Council [1978] AC 728

Greenfield Eng Wks v NKR Construction (Pvt) Ltd 1978 (4) SA 901 (N)

BCC Zimbabwe Ltd v udc Ltd 1990 (2) ZLR 397 (S); 1991 (4) SA 82

J B Colegrave for the plaintiff

E W W Morris for the defendant

Judgment

Malaba J: On 18 December 1992 the plaintiff (Music Room) issued summons and claimed from the defendant (the Bank) the following:

(a) payment of the sum of $33 598;

(b) interest a *tempore morae;*

(c) costs of suit.

The Bank denied liability, at the same time praying that, should it be found liable, Music Room should also be found to have negligently contributed to its loss.

The circumstances that gave rise to the claim are these. Anabela Fonseca, who traded as "Fonzie Engineering", had a current account with the Bank. On

MALABA J

7 July 1992 she applied for a new cheque book over the counter by completing a pink form. She told the receptionist that she was going to collect the cheque book the following day. The following day Anabela went to Nyanga and did not attend at the Bank to collect her cheque book. A man, however, approached the receptionist that day and said he was a messenger sent by "Fonzie Engineering" to collect the cheque book. He produced a note purporting to be

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authority from Anabela for him to collect the cheque book.

Without asking for particulars of identification from the man or satisfying herself that the signature on the note was identical to that of Anabela, the receptionist handed the cheque book to the man. She also lost the note.

On 9 July 1992 a man and a woman went to Shop No. 49 Leopold Takawira/Speke Avenue whence Music Room carried out the business of selling household goods. The two visitors told Fazila Ismail, the store-keeper, that they wanted to buy goods from the shop. They said they represented a company called "Fonzie Engineering". This was in fact Anabela's trading name; not a company. The two people selected musical instruments valued at $33 598 and said they were going to pay by cheque. Fazila told them that Music Room could accept the cheque if it was bank certified. The two people left. Half-an-hour later one of them telephoned Fazila at the shop, saying a messenger was on the way to the shop with the cheque to collect the goods. Shortly thereafter the messenger arrived at the shop in a motor vehicle driven by another man. The messenger said they were from "Fonzie Engineering". He then handed to Fazila cheque no. 770121 for $33 598 drawn on the Bank in favour of Music Room. The cheque purported to have been drawn by Anabela Fonseca. On the back of it was stamped the following certificate:

> "We certify this cheque good for payment in the sum of $35 000 if in order and presented for payment on or before 22.7.92."

Below the certificate was a signature next to a code number 16173 followed by a rectangular stamp with the words, "ANZ Bank (Zimbabwe) Limited Samora Machel Ave".

Fazila believed that the cheque had been signed by the true owner and certified by the Bank. Without any further ado she accepted the cheque on behalf of Music Room as payment for the goods which she delivered to the messenger and the driver. She did not demand any form of identification from the two people who visited the shop earlier on or from the messenger and the driver. Music Room deposited the cheque with its bank for collection on

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10 July 1992. On 11 July 1992 the collecting bank advised it that the cheque had been dishonoured for non-acceptance.

What had happened is that, on her return to Harare, Anabela had gone to the Bank to collect her cheque book, only to be told that it had been collected by her messenger on 8 July 1992. Investigations revealed that the Bank had been defrauded of the cheque book. Two cheques had already been cashed on 8 July 1992. The payment to Music Room was dishonoured. The Bank published in the national newspapers a warning to members of the public not to accept cheques from the cheque book. The stolen goods were not recovered. Music Room turned to the Bank for compensation for the patrimonial loss it suffered but despite demand the Bank refused to pay the money.

Music Room's claim was founded on two grounds. It alleged that one of the Bank's employees, that is, the receptionist, must have been involved in the fraud perpetrated on it. It argued that

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the Bank was vicariously liable to it for the employee's fraudulent conduct. It also alleged that the Bank owed it a duty of care, which it breached by negligently giving its customer's cheque book to wrong people who used cheques therefrom to defraud it of the goods. The issues for determination are therefore these:

1. Whether an employee of the Bank was involved in the fraud on Music Room in the course of her employment.

2. Whether the Bank owed Music Room a legal duty of care to prevent its customer's cheque book falling into wrong hands.

Music Room called Fazila Ismail whose evidence, in brief, was to the following effect. She did not ask for particulars of identification from the two people who bought goods from Music Room. She believed what they said that they represented a company called "Fonzie Engineering". When she saw the certificate on the back of the cheque she was satisfied that the cheque was "good and proper". She took the certificate to mean that there were funds in the account. She had also said she took it to mean that the signature on the cheque was that of the true owner of the cheque but admitted under cross-examination that the Bank could not have certified that the signature belonged to the true owner of the cheque. She had said she understood the words "If In Order" in the certificate to refer to the amount but admitted under cross-examination that they meant that the whole cheque had to be in order.

She said a receptionist with the Bank was charged with the crime of fraud. She attended the trial at the magistrates court. The receptionist was found not

guilty and acquitted of the charge. After the receptionist was acquitted she did not believe that the Bank was involved in the fraud. She said however Music Room still looked to the Bank for the recovery of the value of the goods it lost because the Bank was negligent in giving the cheque book to a person unauthorised by its customer to collect it.

The Bank called three witnesses. Aleck Alexander Hamilton was in 1992 the Manager of the Samora Machel Branch of the Bank. His evidence was to the following effect. There were two rubber stamps in use at his branch. One was kept by him locked in the drawer in the office if not being used. The other was kept by the deputy manager, Gordon Savanhu. Only the manager and his deputy had the right to use the rubber stamps to certify cheques. A cheque was certified in the presence of the customer. The customer would first sign the cheque and his signature verified by the accounts department before the certification.

The Bank kept a book of signatures. The specimen signatures of the manager and his deputy were contained in this book. After stamping the back of the cheque with the certificate, the manager or the deputy would sign it. Against each signature in the books of signatures there is the group's code number. The number would be recorded next to the manager or his deputy's signature on the back of the cheque. The manager or his deputy would then have a second signature from one of the junior managers. The certificate would therefore be accompanied by

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two signatures.

He said the purpose behind the certificate is to confirm that the account has funds at the time it is stamped on the cheque. He said the signature on the back of cheque No. 770121 did not belong to him and the code number used was not that used by the Bank. There was one signature, instead of two, on the back of the cheque below the certificate. He said the certificate was not made by the Bank.

It was easy for people to copy the rubber stamps that left marks identical to the ones left by the rubber stamps used by the Bank. In 1992 there were numerous cases of fraud involving forged rubber stamps. On 12 February 1992 the Bank had to issue a circular warning branch managers of the increases in cases of fraud involving the use of forged bank certified cheques. Exhibit 2, which is the circular dated 12 February 1992 issued by the Bank's Assistant General Manager Administration, reads in part:

> "It has been brought to our attention that cheques (mostly stolen) are

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> being presented to retail outlets fraudulently endorsed with a rubber stamp to the effect that they are 'Bank Certified' and as such good for payment.
>
> With illegal rubber stamps freely accessible from unscrupulous characters operating from the high density areas it is now becoming openly apparent that wherever possible we should desist from certifying cheques on behalf of customers and in every instance where a request is put forward we should attempt to issue a cash order thereby protecting the interests of the customer and the Bank's own image."

Following this circular he discontinued the use of the rubber stamp to certify cheques. He said he destroyed his stamp by cutting the rubber into pieces. On 25 August 1992 the Bank issued another Circular (exhibit 3) to the effect that "all rubber stamps which may still be in possession of Branches and used for certifying cheques good for payment must be taken into custody by branch managers and destroyed". He said he had destroyed his rubber stamp in February 1992. There was no way by which an employee at his branch could have had access to a rubber stamp in the branch on 7 July 1992.

Gordon Savanhu said he, too, destroyed his rubber stamp in February 1992 following the receipt of exhibit 2. He said he had kept the rubber stamp under lock and key when he was not using it.

William Young has vast experience in banking. He joined Standard Chartered Bank in 1945 and rose through the ranks of management until he became its General Manager in 1990. In March 1995 he was appointed to be its offshore banking representative. His evidence was to the effect that certification of a cheque meant that the cheque would not be returned for lack of funds. Certification usually took place when customers wanted to use bank certified cheques to buy chattels at auctions. The greatest of care must be taken in the certification of cheques. The signature of the customer must be verified before the cheque is certified. The ordinary man places much reliance on the certificate and would assume that the signature of the customer was put on the cheque before it was certified. It is for the protection of the public to require

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banks to take the greatest of care to ensure that rubber stamps used to certify cheques do not fall into wrong hands. Certification was not acceptance by the bank of the obligation to pay the cheque as ordered by the drawer.

That is all the evidence led. I turn to analyse it to make findings of facts

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contained in the issues taking into consideration the credibility of the witnesses and the probabilities raised by the evidence.

ISSUE ONE: INVOLVEMENT OF THE BANK'S EMPLOYEE IN THE FRAUD

The legal principle governing this issue is that an employer is vicariously liable for the acts of his servant committed in the course and within the scope of the employee's employment. By hiring an employee to perform acts which the employer would himself have performed in the course of his business, it is presumed that the acts by the employee are those of the employer and are performed for his benefit as long as they fall within the scope and course of that employment.

If an employee deliberately committed a fraud on another in the course of his employment and the acts constituting the fraud fell within the scope of the authority conferred on him, his employer would be vicariously liable for the loss caused by the employee's fraudulent conduct. LORD CHORLEY in his work *Law of Banking* 6 ed at p 380 refers to the view to the contrary expressed by COLLINS MR in *Cheshire v Bailey* [1905] 1 KB 237 at 241 as a somewhat narrow view. His Lordship said:

> "There is authority for the general proposition that the mere act of committing a crime or at any rate a serious crime such as theft terminates the employment and that the servant's act cannot therefore be within the scope of his authority. (See per COLLINS MR in *Cheshire v Bailey* [1905] 1 KB 237, 241.)
>
> This somewhat narrow view however appears to run counter to several decisions where employers have been held liable for the criminal conduct of their servants acting within the apparent scope of authority (See *Dyer v Munday* [1895] 1 QB 742; *Lloyd v Grace Smith & Co* [1912] AC 716) and since the decision of the House of Lords in *Lloyd v Grace Smith supra* it would appear to be doubtful whether any distinction can be properly drawn between a tortious act of the servant which is not criminal and one which is. It is submitted that the test to apply is to ask the question whether the particular act under discussion would normally speaking and apart from the fact that on this occasion it was criminal, be within the authority of the servant. If it could the employer is responsible for it".

Liability must depend on the nature of the fraud and upon what the fraudulent

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servant was employed to do. The learned authors of *Paget's Law of Banking* 9 ed at pp 170-171 refer to the same subject thus:

> "On the basis of *Lloyd v Grace Smith & Co* [1912] AC 716, responsibility for the wrongful acts of bank staff would

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seem to depend upon whether the act can be said to be within the scope of the servant's authority. In that case it was said by LORD SA OF DUNFERMLINE that:

> 'the fraud was committed in the course of, and within the scope of the duties which the defendants had entrusted Sandles as their managing clerk ... they must in these circumstances be answerable for their agent's misconduct'.

The decision was applied in *United Africa Co Ltd v Saka Owoade* [1955] AC 130 at 144, the judgment in which read:

> '...the fair inference from the facts proved is that the goods were committed expressly to the respondent's servants and that they converted the goods whilst they were on the journey which the respondent had undertaken to carry out and the conversion therefore was in their Lordships' view in the course of the employment of the respondent's servants. There is in their Lordships' opinion no difference in the liability of a master for wrongs whether for fraud or any other wrong committed by a servant in the course of his employment'.

The matter obviously depends in some degree upon the extent of the authority which the servant may be expected to have and of course, on any knowledge in this respect of which the plaintiff may be possessed".

In our jurisdiction the principles have been stated and applied in these cases: *Nel & Anor v Min of Defence* 1978 RLR 455 (H); *Nott v Zanu (PF)* 1983 (2) ZLR 208 (S); *Fawcett Security Ops (Pvt) Ltd v Omar Entprs (Pvt) Ltd* 1991 (2) ZLR 291 (S).

In *Fawcett Security Ops (Pvt) Ltd v Omar Entprs (Pvt) Ltd supra* it was held that an employer can be held vicariously liable for the intentional wrongdoing of his employee. The wrongdoing must have been done in the exercise of the functions to which the servant was appointed and not simply during his employment. For example, it should have been the duty of the security guard to look after the goods placed under his actual control before the employer could be held vicariously liable for his theft of the goods. See also *Hirsch*

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Appliance Specialists v Shield Security (Natal) (Pvt) Ltd 1992 (3) SA 643 (D); *Romansrivier Koöp Wynkelder Bpk v Chemserve Mfg (Pvt) Ltd* 1993 (2) SA 358 (C).

It would, therefore, not be sufficient to simply establish the involvement of the employee in the fraud on Music Room without also proving that what she did was in the exercise of the functions to which she was appointed.

The evidence of Mr Hamilton and his deputy was to the effect that it was their exclusive duty to certify cheques using rubber stamps that left marks with words similar to those on the back of cheque no. 770121. I found Mr Hamilton an honest and credible witness. His evidence was supported by Mr Savanhu who also impressed me as being an honest witness. Their evidence proves that even if the employee was involved in the fraud it would not have been within the scope of her authority to certify cheques.

It was also not the business of the bank to sign customers' cheques. It would not have been in the course of the receptionist's employment to sign the cheque and forge the true owner's signature in order to defraud Music Room.

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In any case, I find as a fact that the receptionist did not take part in the fraud perpetrated on Music Room. The reasons for the finding are these. She was charged in the magistrates court with the fraud but found not guilty of the offence. She was therefore found not guilty of any criminal wrongdoing. Fazila conceded that after the acquittal of the receptionist on the charge she accepted the fact that the Bank was not involved in the perpetration of the fraud on her company. That was a candid concession being made, as it was, against the interests of her principal Music Room.

The behaviour of the two people who purchased the goods from Music Room as adduced to by Fazila, suggests that they first selected the goods they wanted and obtained the price before going away to draw up the cheque in favour of Music Room and stamping the back of the cheque with the certificate. It is highly unlikely that they would have risked being apprehended by going back to the Bank for the receptionist to stamp the certificate on the back of the cheque before having it presented to Music Room.

It was also the evidence of the manager and his deputy that they kept their respective rubber stamps under lock and key when they were not using them. The other employees would not have had easy access to the rubber stamps.

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The argument advanced on behalf of Music Room was that an employee of the Bank must have been involved in the fraud because the certificate on the back of the cheque was similar to that left by rubber stamps used by the Bank. That may be so, but the evidence before the court showed that fraudsters had already got hold of similar rubber stamps as early as February 1992. In the circular dated 12 February 1992 the Bank's Assistant General Manager Administration drew attention to the problem of unscrupulous characters using similar rubber stamps on stolen cheques to defraud retailers. The fraudsters could therefore have had access to rubber stamps that left marks similar to those left by rubber stamps used by the Bank, without the assistance of the Bank's employee. The fact that the certificate on the back of the cheque used to defraud Music Room was similar to that left by rubber stamps used by the Bank becomes colourless. It does not prove that the certificate came from the bank.

In the absence of the fraudulent use of the certificate by the Bank's employee, the certificate could not have the legal significance Music Room sought to read into it. It was, of course, not in dispute that Fazila acted on the certificate because she believed that it had been placed on the cheque by the Bank. The belief in the authenticity of the certificate caused her to accept the cheque as payment for the goods. That does not, however, found the Bank's liability for the patrimonial loss suffered by Music Room.

William Young said certification of a cheque was not acceptance by the Bank of the obligation to pay the money as ordered by the drawer. In other words, the Bank did not become part of the cheque. There is no privity of contract between the drawee Bank and the holder of the cheque arising from a certification of a cheque. William Young was an independent witness. He gave his evidence well. What he said about the effect of a certification on the rights of the parties was an accurate statement of the law of certification of cheques in this country. LORD

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CHORLEY in his book *Law of Banking supra* said at p 51:

> "Such a marking is not legally speaking equivalent to an acceptance and does not make it current as cash.
>
> At the most it appears to be a representation to the payee or to a person proposing to become a holder as to the state of the drawer's account at the time of the marking (*Gaden v Newfoundland Bank* [1899] AC 281). Such a representation could hardly be construed as a binding promise that the account will be kept sufficiently in credit to meet the cheque

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> when presented, though it is said that in practice a bank will ear mark sufficient funds to meet the cheque. In any case it is difficult to see how, in the event of its proving inaccurate, a holder could make the certifying bank liable upon it, except in the rare event of fraud. It might be argued that the representation would create an estoppel but no action will lie upon a bare estoppel and since the holder could not sue the bank upon the cheque even, if the account were in funds there appears to be no duty upon which an action could be founded. *(Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] AC 176)".

The learned authors of *Paget's Law of Banking supra* confirm at pp 248-249 the view that certification of a cheque is not equivalent to acceptance and does not create any liability on the part of the drawee bank to the holder in due course. See also Cowen *The Law of Negotiable Instruments in South Africa* 5 ed Vol 1 p 218.

Even under the provisions of the Bills of Exchange Act [*Chapter 14:02*] certification of a cheque does not constitute acceptance in terms of s 16. The bank does not signify assent to the drawer's orders to pay the holder of the cheque by certifying it. Section 52 of the Act provides that the bill, of itself, does not operate as an assignment by the drawer to the holder in due course of funds in the hands of the drawee bank. The section provides that the "drawee of the bill who does not accept as required" by the Act "is not liable on the instrument". It is clear that the Bank would not have been liable to Music Room on the cheque as a result of the certificate even if the certificate had been placed on the cheque by it. The reason is that under s 16 certification would not constitute acceptance and no liability would therefore arise as provided by s 52. The certificate is usually given at the instance of the drawer who would be the bank's customer. There is no contract between the holder of the cheque in due curse and the bank.

The certificate would not have founded the Bank's liability to Music Room for the patrimonial loss it suffered. In any case, it is my view that Music Room did not acquire a negotiable instrument conferring on it rights against the Bank, particularly when the Bank dishonoured the cheque before the money was paid. There is no doubt that Music Room received the cheque in good faith. Had the Bank paid the cheque, the proceeds would not have been recoverable from Music Room. But it is a fact that the instrument was a sham. It did not satisfy the requirements of a negotiable instrument.

The signature of the true owner was forged. It was inoperative and Music

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Room could not claim on the signature. See s 23 of the Act. It is also clear from ss 42 and 46 of the Act that once a cheque is dishonoured for non-acceptance or for non-payment by the drawee bank the holder's right of recourse accrues, not against the drawee bank, but against the drawer. By dishonouring the cheque the drawee bank does not accept the orders of the drawer and becomes discharged from any form of liability on the cheque in terms of s 52.

I therefore find that the Bank is not liable to Music Room under the heading of fraud.

ISSUE TWO: DID THE BANK OWE MUSIC ROOM A LEGAL DUTY OF CARE?

The Bank admitted its negligence in failing to take reasonable precautions to prevent the cheque book being collected by anyone other than the true owner or her authorised agent. The possibility of the thief using cheques from the stolen cheque book to defraud other people of their goods was a foreseeable consequence of getting the cheque book. The circular of 12 February 1992 shows that the Bank was aware of cases of that nature happening. By placing the means with which to commit the frauds before the thief the Bank provided it with the opportunity of which advantage was taken. The Bank's negligence did not only reside in its failure to demand reasonable identification from the man who posed as Anabela's messenger, but also in its failure to guard against the subsequent forgery which was the direct consequence of its conduct of negligently placing the cheque book in the hands of the thief.

Music Room sought to found the Bank's liability for its patrimonial loss on this negligence. The Bank, on the other hand, argued that there could not be negligence in the air. It is indeed often said that a man is entitled to be as negligent as he pleases towards the whole world provided that he does not owe anybody a duty to take care. See *Charlesworth and Percy on Negligence* 7 ed p 17.

It must be shown from the facts of the case that the defendant was under a precedent legal duty to take care that the direct and proximate consequences of his action do not cause the plaintiff the kind of patrimonial loss suffered. If the defendant is not under a duty of care he has a right to act as he pleases even if his actions cause harm to others. Lord Wright made this point clear in *Grant v Australian Knitting Mills Ltd* [1936] AC 85 at 103 where he said:

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> "All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is to be deduced. It is however essential in English law that the duty should be established: the mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care again no case of actionable negligence will arise unless the duty to be careful exists."

BOOYSEN J in *Coronation Brick v Strachan Construction Co* 1982 (4) SA 371 (D) at 379E-F said that:

> "as has now been said on many occasions it is obviously not our law that a person is liable for all loss caused by his conduct if such loss were foreseen or reasonably foreseeable. He should also have acted unlawfully vis-à-vis the plaintiff ie infringed a legal right of the plaintiff or in breach of a legal duty owed by him to the plaintiff."

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If the defendant was under a legal duty of care he would be expected to take reasonable steps to avoid causing the foreseeable loss to the plaintiff. It is only when the defendant is shown to have been in breach of that legal duty of care, in the sense that he failed to take the steps a reasonable man would have taken to prevent the loss falling on the plaintiff, that he will be held liable to the plaintiff for the loss.

As was said by McNALLY JA in *Zimbabwe Banking Corp Ltd v Pyramid Motor Corp (Pvt) Ltd* 1985 (1) ZLR 358 (S) at 363G "the concept of duty of care" is "a bridge between the person who is negligent and the person affected by that negligence". In the same case GUBBAY JA (as he then was) said that it must be shown on the facts of the case that the patrimonial loss suffered by the plaintiff was "caused wrongfully as well as culpably".

It is easy to find the existence of a legal duty to take care where the actions of the defendant caused patrimonial loss as a result of physical harm to the person of the plaintiff or his property. The existence of a legal duty of care is quite often presumed in such cases. The reason is that the law imposes a duty on anyone who is *doli capax* not to do acts whose consequences are foreseeably harmful to the physical well being of others or their property.

The difficulty arises, however, in cases involving pure economic or financial

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loss not resulting from physical injury to a person or property. Whilst it is now settled that the *lex Aquilia* can be extended to cover cases of patrimonial loss not resulting from physical injury to the person or property, the existence of the legal duty of care cannot be presumed in such cases. The reason is not that pure economic loss is not as important to the plaintiff as loss resulting from physical injury to his person or property. It is because there are policy based considerations that require the limitation of liability in cases involving pure economic or financial loss.

In *Pyramid Motor Corp (Pvt) Ltd v Zimbabwe Banking Corp* 1984 (2) ZLR 29 (H) SCOTT J had assumed that a collecting bank owed to the drawer of a cheque marked "Not Negotiable - A/C payee only", a duty of care not to negotiate it to its customer who was not the payee, thereby causing the drawer financial loss. Although the Supreme Court on appeal reached the same conclusion as was reached by the learned judge in the court *a quo*, GUBBAY JA (as he then was) said the learned judge was wrong to assume that the collecting bank was under a precedent legal duty of care. He said at 371G:

> "In so doing the learned judge, so it would seem, failed to appreciate that a claim against a collecting bank is for economic loss unrelated to damage to property and that the foreseeability test cannot be applied without restriction to such claims. The fact that it is foreseeable that payment of a cheque to the wrong person may cause financial harm to the drawer is not enough to give rise to a duty of care. See *Herschel v Mrupe* 1954 (3) SA 464 (A) at 477F-G; 485A-C and 490A; *Osborne Panama SA v Shell & BP South African Petroleum Refineries (Pvt) Ltd & Ors* 1982 (4) SA 890 (A) at 900G-901A.
>
> There is no general principle of delictual liability for economic loss negligently caused. It must have been caused wrongfully as well as culpably. There must have been an infringement of a legally protected right, the determination of which requires the exercise of a judicial value judgment embracing all relevant facts including

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matters of policy. See *Administrateur Natal v Trust Bank van Africa Bpk* 1979 (3) SA 824 (A) at 833D-H. For whereas physical injury to person or corporeal property is prima facie unlawful, causing economic loss is not. See *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pvt) Ltd* 1985 (1) SA 475 (A) at 497A; Joubert *The Law of South Africa* vol 8 para 24 at p 35."

In *Franschhoekse Wynkelder Bpk v SAR & H* 1981 (3) SA 36 (C) VOS J at 40A-E stated the same principle thus:

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"For conduct to be unlawful or wrongful there must be a breach of a legal duty owed by the defendant to the plaintiff. I refer here to the policy-based aspect of the 'duty of care' concept by which the scope of delictual liability is judicially controlled. See *Shell & BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA* (*supra* at 659C) and the passage from the judgment in *Union Government v Ocean Accident & Guarantee Corp Ltd* quoted above. The two components or elements of the 'duty of care' concept, namely the 'duty issue' and the 'negligence issue', appear from the following extract from Millner *Negligence In Modern Law* (1967) which was referred to by RUMPFF CJ in *Administrateur Natal v Trust Bank van Afrika Bpk* (*supra* at 833):

> 'The duty concept, on the contrary, shows abounding vitality. The key to this paradox is the utility of this concept as a device of judicial control over the area of actionable negligence **on grounds of policy**. Here the ascertainment of liability is linked to the second of the two elements of duty of care referred to above. This second element is not at all concerned with reasonable foresight; it is to do with the range of interests which the law sees fit to protect against negligent violation. It is only when this policy function of the duty of care concept is ignored and the matter examined exclusively in terms of reasonable foresight that the conclusion that the duty concept is redundant, "an unnecessary fifth wheel on the coach", is inescapable. Even so, the concept serves in practice as a mode of addressing that part of the negligence issue which is concerned with the risk to the particular plaintiff and the reasoning of a judgment may be clothed in the language of "duty", whatever the hidden springs of the decisions may be'."

The learned author goes on (see *Coronation Brick v Strachan Construction supra* p 382A-C):

"Divorced from its role as a monitor of policy the duty of care concept becomes dispensable, and is in fact dispensed with in other systems of law. The Roman Law, as, Buckland pointed out, made no reference to a precedent duty of care in the Aquilian action, which is a remedy somewhat analogous to the negligence action of the common law. *Culpa,* unlike negligence, was not defined with reference to a particular person or class. Failure to take that care which a reasonable man, the *bonus paterfamilias*, or *paterfamilias diligens*, would take, was *culpa*, and if damage to property resulted, there was liability (subject only to a causal *nexus*). This was unlawful damage, *damnum injuria datum* and

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the 'unforeseeable plaintiff' rode home with the rest. Modern civil law still maintains this approach."

I agree with Mr *Colegrave*'s submission that, in deciding whether a legal duty of care bound the defendant in this case, to take care not to injure the plaintiff in its economic or financial rights, the court must take a pragmatic view of the facts, having regard to what is fair and reasonable. See *Caparo Industries plc v Dickman & Ors* [1990] 1 All ER 568 at 573E-574F. On the other hand Mr *Morris* was also on firm ground in counselling against a rash finding of a legal duty of care where there is the risk of opening up a Pandora's box for a limitless number of claims.

It is not sufficient to look at the traditional elements such as the relationship between the parties

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the defendant's activities and the foreseeability of the economic loss befalling the plaintiff. There is the policy-based element of the legal duty of care to be considered. As was observed by LORD DENNING in *Lamb v Camden London Borough Council* [1981] 1 QB 625 at 636 "ultimately it is a question of policy for the judges to decide". See also *Anns v Merton London Borough Council* [1978] AC 728 at 751-752.

In *Zimbabwe Banking Corp Ltd v Pyramid Motor Corp (Pvt) Ltd supra* at 374A-B McNALLY JA said:

> "Certainly there is need for 'care and circumspection' in the ascertainment of whether a particular type of action is one which will be confined within reasonable and manageable bounds and is not fraught with what aptly has been described as 'overwhelming potential liability'. Each case must be assessed pragmatically on its own facts and merits, with primary weight being laid upon the policy of the law. The court must ask itself whether, paying due and proper regard to the notion of justice and the 'interests of litigants balanced against the community as a whole, it is socially desirable to impose liability in the particular circumstances'. See *Tobacco Finance (Pvt) Ltd v Zimnat Ins Co Ltd* 1982 (1) ZLR 47 (H); 1982 (3) SA 55 (ZH) at 61F-H."

Whether the defendant was under a legal duty of care in the given circumstances of a case is a question of law answered by reference to the facts. As facts differ from one case to another a finding of the existence of a legal duty of care in one case may be different in another case. In addition to the policy-based elements, the following are some of the factors decided cases and text book writers suggest should be taken into account by a judge

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faced with the question of whether a legal duty of care on the facts exists or not:

1. whether the loss is finite;
2. whether the number of potential claimants is limited and identifiable;
3. whether the success of the action will result in a multitudinous train of claims for incalculable loss;
4. whether the defendant is to be regarded as possessing skills and special responsibility in the particular commercial activity in which it is engaged;
5. the desirability of maintaining long established principles of law which currently are being acted upon;
6. whether there is a need to place the ground of action within the extended scope of *lex Aquilia*;
7. the conduct of the plaintiff. See Boberg *The Law of Delict* vol 1 pp 103-105; *Zimbabwe Banking Corp Ltd v Pyramid Motor Corp (Pvt) Ltd supra* at 374C-E.

In *Coronation Brick v Strachan Construction Co* 1982 (4) SA 371 (D) at 384D-G BOOYSEN J summarised the factors a court has to consider. He said:

> "A defendant's conduct, including an omission, is regarded as unlawful when the circumstances of the case are of

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such a nature that it not only incites moral indignation but also that the legal convictions of the community demand that it ought to be regarded as unlawful and that the damage suffered by the plaintiff ought to be made good by the defendant.

In determining whether conduct is of such a nature as to be determined unlawful, the court must carefully balance and evaluate the interests of the concerned parties, the relationship of the parties and the social consequences of the imposition of liability in that particular type of situation.

In coming to its conclusion the court should, *inter alia*, have regard to the probable or possible extent of the foreseeable or foreseen loss; the degree of risk that the loss would be suffered as a result of the conduct complained of; the value to defendant and/or society of the object which the defendant was seeking to achieve when he conducted himself in the

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manner complained of; whether there were reasonably practicable measures available to the defendant to avert the loss; what the chances had been that those measures would have been successful; and whether the costs of such measures would have been reasonably proportionate to the loss which plaintiff could have suffered."

I turn now to apply some of these principles to the facts of this case. I say "some" advisedly, because the applicability of any one of them depends on the facts of the case.

The loss in this case was finite with respect to the question of quantum, but was not finite in regard to liability. Unlike in *Zimbank Corp Ltd v Pyramid Motor Corp (Pvt) Ltd supra* and *Tobacco Finance (Pvt) Ltd v Zimnat Ins Co Ltd* 1982 (3) SA 55 (Z) where the defendant knew the exact amount involved at the time he negligently conducted himself, the Bank in this case had no way of knowing how much the loss would be at the time it committed the negligent act.

The extent of the loss was entirely dependent upon the decision of the fraudster. It was also dependent on the gullibility of the plaintiff. It was also dependent upon the storekeeper's profiteering instinct. If the storekeeper was desirous to sell a large quantity of goods at once and make a profit she would take the risk of accepting a cheque for a bigger amount as long as it appeared to her to be bank certified. The Bank's negligent act would become subject, in its consequences, to various mercantile forces which eventually determined the extent of the economic loss.

Mr *Colegrave* submitted that the number of claimants was limited. I disagree. It is true that in cases involving the collecting banks there are two potential claimants; that is, the drawer or the drawee bank. The collecting bank would be able to tell who the potential claimants are at the time it received the cheque deposited with it for collection. In this case, the potential claimants were not identifiable to the Bank at the time of the commission of the negligent act. The Bank would not know to whom the fraudster would present the stolen cheques. The fraudster could present cheques to hoteliers, shopkeepers or supermarkets and even use them to get cash from friends.

In cases involving collecting banks where the amounts of the potential losses are known as they are reflected on the cheques, it is not necessary for the defendants to speculate about the identities of possible claimants. In each case there would be one potential claimant who could be likely to be

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prejudiced if the collecting bank negotiated the cheque to its customer who is not the payee: See *Greenfield Eng Wks v NKR Construction (Pvt) Ltd* 1978 (4) SA 901(N); *BCC Zimbabwe Ltd v udc Ltd* 1990 (2) ZLR 397 (S); 1990 (4) SA 82.

In this case the bank would only know that the potential number of claimants was limited by the number of cheques in the cheque book. It would not know who these potential claimants were and how many it was to expect at any one given time.

This is a case of a single act of negligence giving birth to claims potentially as many as the number of cheques in the cheque book but of inestimable value and from a potentially indeterminable class of claimants. The paucity of decided cases involving economic loss arising from banks negligently giving cheque books to wrong people shows that this type of conduct does not happen often enough to incite moral indignation. The circumstances of the case are not such that "the legal convictions of the community demand that it ought to be regarded as unlawful and that the damage suffered by the plaintiff ought to be made good by the defendant".

A reasonable man is likely to say that both parties were victims of one fraud. He is likely to say that Music Room ought to have been more careful. It had the two people tell Fazila that they were representing a company, called "Fonzie Engineering". When she handled the cheque it must have been clear that it belonged to an individual trading as "Fonzie Engineering". There was no company.

The information on the cheque was sufficient to warn Fazila to smell a rat. She did not act on the information before her. She instead acted on her belief that the two people represented a company and that the cheque was bank certified. Further to that, she did not require any identification from the two people or their agents who collected the goods. The certificate on the back of the cheque said the cheque would be accepted only "if in order". She did not act in terms of this warning to verify with the Bank whether there was a possibility of the cheque being rejected. It means that she accepted the risk of it being rejected for not being in order. In the circumstances of this case it would not be in the interests of society to impose a legal duty of care on the Bank in respect of economic loss whose occurrence had more to do with the conduct of the plaintiff itself.

Finally, the state of the law at the moment does not impose on the Bank a duty

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of care towards third parties like Music Room. As seen above s 51 of the Bills of Exchange Act [*Chapter 14:02*] protects the drawee bank from any liability arising from a cheque it has dishonoured for non-acceptance or for non-payment. The learned authors of *Paget's Law of Banking* 9 ed at 319 say that "there is no duty to the payee or holder to take care and without such a duty there can in law be no negligence". Referring to the protection conferred on the drawee bank by the law, LORD CHORLEY in his book *Law of Banking supra* at p 51 also says

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that "since the holder could not sue the bank upon the cheque even if the account were in funds there appears to be no duty upon which an action could be founded". His Lordship had earlier on in the passage pointed at fraud as the only ground upon which action against the drawee bank could lie. He did not mention negligence founded upon the existence of the legal duty of care.

It is important to note that the position of the collecting bank is specifically covered by s 58 of the Bills of Exchange Act [*Chapter 14:02*]. See *Zimbabwe Banking Corp Ltd v Pyramid Motor Corp (Pvt) Ltd supra*.

No compelling reasons exist in the circumstances of this case for extending the scope of the *lex Aquilia* to impose a legal duty of care on a drawee bank towards a third party who suffers economic loss as a result of its negligent act of giving its customer's cheque book to a wrong person who uses a cheque therefrom to defraud the third party of his property. The balance of convenience demands that the principles of law which are currently being acted upon by the parties be maintained.

The claim is therefore dismissed with costs.

Byron Venturas & Partners, plaintiff's legal practitioners

Atherstone & Cook, defendant's legal practitioners

CHIRAMBASUKWA v LAW SOCIETY OF ZIMBABWE 1995 (2) ZLR 188 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Appeal against decision of Legal Practitioners Disciplinary Tribunal

5 June & 29 August 1995 Judgment No. S-135-95

Flynote

Legal practitioner - discipline - striking off register - grounds - criminal conviction or other dishonest or deceitful conduct - must be such as to show that person is unworthy to remain in ranks of honourable profession - conduct unconnected with practice of law - when may be grounds for removal from register

Headnote

The appellant, a legal practitioner, had in 1987 been appointed as Deputy Ombudsman. He occupied that post until he resigned from it in 1991, when a tribunal was set up in terms of s 110(5) of the Constitution to enquire into whether the appellant should be removed from office for misbehaviour. It was alleged and proved, *inter alia,* that in his position as Deputy Ombudsman the appellant had -

(a) falsified or misrepresented certain facts or figures in the official reports which he had to

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present to Parliament;

(b) in those reports he had reproduced without acknowledgement excerpts from official reports from other countries as being his own work;

(c) he had misused an official vehicle by letting his wife drive it and, when she was involved in an accident, made a false report that he had been the driver.

Following his resignation, the appellant set up in practice as a legal practitioner. He was regularly issued practising certificates. The Law Society began proceedings against him in April 1993 and the Legal Practitioners Disciplinary Tribunal made its finding in November 1994. Relying on the items mentioned above, it decided that he should be struck off the register of legal practitioners.

Held, that two of the grounds on which the Disciplinary Tribunal relied were not criminal offences, however morally contemptible they may be. The mere making of false statements to Parliament, in a report not expected to be acted upon by Parliament, is not an offence. Similarly, plagiarism, or the wrongful appropriation or purloining and publication as one's own of another person's ideas, though reprehensible, does not constitute an offence.

Held, further, that the only offence committed by the appellant was the minor one of making a false report that he was the driver. The accident was not his wife's fault and the only reason for the appellant to make the report was to save embarrassment. He was not prosecuted for this offence.

Held, further, that the fact that a legal practitioner has been convicted of an offence does not in every case disqualify him from practising his profession or justify the removal of his name from the register. It would do so only when the conviction reflects on the personal honour of the practitioner and shows that he is of such a character that he is not worthy to be admitted to or remain in the ranks of an honourable profession. This could be the case even if the crime was not committed in the practitioner's professional capacity.

Held, further, that the most serious of the charges laid against the appellant, however contemptible or deceitful the conduct in question was, did not constitute criminal offences. Not every untruth or deceit make a person unsuitable to remain in the ranks of an honourable profession. For example, there must be numerous practitioners who have deceived their spouses, which deceit has resulted in divorce. Sight should not be lost of the enormous work pressure to which the appellant had been subjected and the consequent temptation to resort to plagiarism.

Held, further, that it was also relevant to note that the appellant's conduct had nothing to do with legal practice as such.

Held, therefore, that striking off was not justified and the appellant should be suspended from practice for six months, the whole of which would be suspended on conditions.

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Cases cited:

Pitluk v Law Soc, Rhodesia 1974 (2) RLR 245 (A); 1975 (2) SA 21 (RA)

Law Soc v du Toit 1938 OPD 103

Ex p *Krause* 1905 TS 221

Inc Law Soc Tvl v Mandela 1954 (3) SA 102 (T)

Matthews v Cape Law Soc 1956 (1) SA 807 (C)

Natal Law Soc v N 1985 (4) SA 115 (N)

KORSAH JA

J C Andersen SC for the appellant

B D Brighton for the respondent

Judgment

Korsah JA: It was common cause that the sole issue in this appeal was whether the decision by the Legal Practitioners Disciplinary Tribunal ("the Disciplinary Tribunal") to have the appellant struck off the register of legal practitioners was so unreasonable as to justify that order being set aside and a lesser penalty being imposed.

The appellant was admitted and registered as a legal practitioner on 6 November 1985. He continued in office as the Registrar of the High Court until he was appointed Deputy Ombudsman on 14 August 1987. The matters giving rise to the determination of the Disciplinary Tribunal to have him struck off occurred while he was in office as a Deputy Ombudsman and Acting Ombudsman.

In a letter dated 13 May 1991, a tribunal set up in terms of s 110(5) of the Constitution of Zimbabwe was tasked to enquire into and advise His Excellency the President whether or not the appellant should be removed from office as Acting Ombudsman for misbehaviour. It was alleged, *inter alia:*

> "(1) that in the Annual Reports of the Ombudsman for 1988 and 1989 which were laid before Parliament in July 1990, [he] falsified or misrepresented certain facts and figures; and
>
> (2) that in the said Reports [he] reproduced, without acknowledgment, various excerpts from the 1985 and 1986 Reports prepared by the Bophuthatswana Ombudsman;
>
> (3) That he misused the official vehicle allocated to him by allowing it to be driven by unauthorised persons for unauthorised purposes."

The other allegations levelled against the appellant were not relevant to the proceedings of the Disciplinary Tribunal at which it was determined that the appellant be struck off the register of legal practitioners.

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The appellant tendered his resignation from his office as Acting Ombudsman, with immediate effect, to His Excellency the President even before the tribunal set up to investigate whether or not he should be removed from office for misbehaviour commenced its sittings. Nevertheless, the tribunal felt constrained to accomplish the assignment with which it had been tasked,

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because it said it wanted to ascertain whether the allegations made against the appellant "were well founded", for "if they were not substantiated the President might wish to re-appoint (him)".

The report of the tribunal was accepted *in extenso* at the proceedings of the Disciplinary Tribunal as evidence against the appellant. Particular regard was had by the Disciplinary Tribunal to the following aspects thereof:

> "1. That in his official position as described above the [appellant] had in his Reports of 1988 and 1989 falsified or misrepresented certain facts and figures. Such misrepresentations and falsehoods were admitted to the Tribunal by the [appellant]. They related to reports presented to the Government of Zimbabwe as part of the [appellant's] official duties.
>
> 2. That in his Reports referred to above for both 1988 and 1989 the [appellant] had reproduced without acknowledgement excerpts from the Reports of the Ombudsman for Bophuthatswana for 1985 and 1986 and also from the Report of the Ombudsman for Pakistan for 1988 and from a paper presented at a conference held in Arusha by the Tanzanian Parliamentary Committee. This plagiarism was admitted by the [appellant] and the Tribunal remarked that the [appellant] had no option but to make the admission by reason of the fact that the plagiarism was so extensive and so faithful to the originals.
>
> 3. That the [appellant] had abused a personal issue motor vehicle by allowing a member of his family to drive it. When this driver of the motor vehicle was involved in a road accident the [appellant] had compounded the earlier misdemeanour by making a false report claiming that he was the driver of the motor vehicle himself."

It seems to me that the mere making of false statements to Parliament, morally contemptible as it may be, is not a criminal offence known to our law, unless Parliament was being invited to act on that false statement to the prejudice of another. While to Parliament is due the highest courtesy and respect, it would indeed be exceedingly dangerous, in my view, for the law to hold that untrue statements contained in a report, not expected to be acted upon by Parliament, constitute a criminal offence.

Plagiarism, which is defined in the *Oxford English Dictionary* as "the

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wrongful appropriation or purloining, and publication as one's own, of the ideas, or the expression of the ideas of another", though reprehensible, does not constitute a criminal offence.

If the above observations hold true, then the only criminal offence the appellant committed was the misdemeanour of making a false report claiming that he was the driver, when he was not, of

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his personal issue motor vehicle, which had been involved in an accident. Even then, the motor vehicle accident was not due to the fault of his wife. In other words, he was saving himself embarrassment, but not avoiding the payment of damages. It is no wonder that he was not prosecuted for it.

I draw attention to the non-criminal, and criminal, nature of the offences levelled against the appellant because different standards of proof apply to them. Where an allegation involves professional misconduct *simpliciter* it only has to be proved on a balance of probabilities, but where the allegation involves an element of deceit or moral turpitude of a high order, which might make the accused liable to criminal prosecution, that allegation should be proved beyond a reasonable doubt. See the *dicta* of BEADLE CJ in *Pitluk v Law Society of Rhodesia* 1974 (2) RLR 245 (A); 1975 (2) SA 21 (RA) at 29B-D. The application of the two standards of proof is reflective of the seriousness with which one is viewed over the other.* (6)

The reason for distinguishing between offences of professional misconduct *simpliciter* and those involving an element of deceit or moral turpitude of a high order that might make the accused liable to criminal prosecution, I perceive, is that the latter not infrequently attracts the striking off the register of the name of a legal practitioner (*Law Society v du Toit* 1938 OPD 103 at 104); whereas the former need not be visited with such harshness, if other forms of punishment are appropriate.

As BOTHA JP observed in *Law Society v du Toit supra* at 104:

> "The (disciplinary) proceedings are instituted by the Law Society for the definite purpose of maintaining the integrity, dignity and respect the public must have for officers of this court."

But even so, it is not in respect of every case that a legal practitioner has been convicted of a criminal offence which disqualifies him from practising his

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profession or justifies the removal of his name from the register by the Disciplinary Tribunal. I can do no better than recall to mind the words of INNES CJ in *Ex p Krause* 1905 TS 221 at 223, cited with approval by RAMSBOTTOM J in *Incorporated Law Society, Tvl v Mandela* 1954 (3) SA 102 (T) at 107E-G:

> "Before I deal with the facts I should like to make it clear what to my mind is the ground upon which the court refuses to place upon the roll of its practitioners persons against whose names criminal prosecutions stand. It is not because a criminal conviction *ipso facto* disqualifies a man from admission to the ranks of the Bar or Side - Bar ... we know that in this court there are men enrolled in the ranks of the Bar and Side - Bar, leading members of the profession, worthily occupying the position, against whom criminal convictions do stand. No attempt was made to remove their names, nor was objection taken to their being enrolled anew when the roll of this court was made up; **because those convictions reflected in no way upon the personal honour of the men against whom they stood.** Therefore it is not the bare fact of conviction that disqualifies; nor is it a desire on the part of the court again to mark its sense of the enormity of the crime. **That has been expiated by punishment as far as its actual commission is concerned. The real reason is this - that in most cases the fact of the criminal conviction shows the man to be of such a character that he is not worthy to be admitted to the ranks of an honourable profession.** That is the real ground upon which the court acts in such cases; and it is from that

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stand-point in my opinion that we should regard the facts of this case" (my emphasis).

Much in the same vein as RAMSBOTTOM J commented in the *Mandela* case *supra* at 107C:

"We are not concerned in this case with misconduct committed by an attorney in his professional capacity; the offence committed by the [respondent] had nothing to do with his practice as an attorney. It is clear, however, that the court will in a proper case remove an attorney from the Roll where he has been convicted of a crime which was not committed in his professional capacity: Re *Hill* (1868) LR 3 QB 543 and In re *Weare* LR [1893] 2 QB 439 at 448-449."

In the instant case, not a single one of the specific incidents complained of was done in the appellant's professional capacity. Not a single one of the incidents prejudiced anyone. The most serious of the charges levelled against

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the appellant were plagiarism and laying a report which contained falsehoods before Parliament - neither of which is a criminal offence known to our law. If a court were to sanction the imposition of the severest punishment - the removal of his name from the register of practitioners - for conduct which is not criminal and not committed in relation to practice, what punishment would it be left to impose on legal practitioners who commit heinous offences involving deceit or moral turpitude of a high order in the course of practice? Even where offences involving deceit or moral turpitude are committed in the course of practice, discretion reposes in the Disciplinary Tribunal with respect to the appropriate punishment to impose.

I do not wish to minimise for a moment how contemptible it is deliberately to place a false report before the august body of parliamentarians. The appellant, as a Deputy and Acting Ombudsman, ought not to have made representations of a false nature to Parliament. But, as RAMSBOTTOM J in the *Mandela* case *supra* at 108C:

"The sole question that the court has to decide is whether the facts which have been put before us and on which the respondent was convicted show him to be of such character that he is not worthy to remain in the ranks of an honourable profession."

Mr *Andersen* submitted that, after his resignation from the office of Deputy and Acting Ombudsman, the appellant commenced practice as a legal practitioner in July 1992, since when he has been issued with practising certificates. He called attention to the following facts:

"(a) The Tribunal which investigated the appellant's conduct did so in May 1991. The Law Society commenced its proceedings in April 1993. The Disciplinary Tribunal heard the matter on 13 April 1994 and made its finding in November 1994.

(b) No explanation is given for the inordinate delays before the Law Society commenced proceedings; before the matter was set down; and for the delay of over six months for the Tribunal to reach a decision. The delay was even more unjustified having regard to the fact that the appellant's guilt was not in issue."

Meanwhile the appellant had been in practice without falling foul of the high moral standards the profession sets itself. Mr *Andersen* submitted:

"... that having regard to the fact that the appellant had already been on the

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> Roll since July 1992, there was no need for him to be struck off in November 1994, for conduct for which he had already been severely and publicly censured and for which he had suffered great loss."

True, the appellant has already been punished by his removal from office for the offences proved against him. In fact, he himself saw fit to tender his resignation before the commencement of investigations by the tribunal. The only inference to be drawn from such resignation is an admission that he had committed the offences alleged. There has been adverse publicity and public condemnation of him, both within and outside Zimbabwe, as a result of his suspension, the setting up of a three-man tribunal to investigate the allegations of plagiarism against him, his resignation, and the completion by the tribunal of its report.

With all due deference to Mr *Andersen*, it seems to me that Mr *Brighton*'s submission that the theory of double jeopardy plays no role in the determination to remove, or not to remove, the name of the appellant from the register of legal practitioners is unassailable. Sight must not be lost of the sole question to be decided - which is whether his unsuitability to hold the offices of Deputy and Acting Ombudsman, because of his alleged transgressions while holding those offices, is sufficient to establish that he is not fit to practise. See *Mandela*'s case *supra* at 108C.

It is not, however, untruths or deceit in every form or on every occasion that unsuits a person to remain in the ranks of an honourable profession. For example, there are many distinguished persons of this honourable fraternity who have either deceived their wives or husbands (for the sake of gender balance), or are deceiving them. Some of such deception has resulted in divorce or may result in divorce. Yet such deception has never been characterised, to my knowledge, as making a person unfit to practise. It is not infrequent, in making applications for a postponement or adjournment, that counsel is not fully candid with the court. Much as such conduct is frowned upon, it has not, to my knowledge, led to the removal of the name of a practitioner from the Register. In the words of DE VILLIERS JP in *Matthews v Cape Law Soc* 1956 (1) SA 807 (C) at 814G-815A:

> "Naturally, each case must be dealt with on its own merits. In the instant case it does not appear to me to be a necessary inference that, because [the] applicant in the past broke, and exhorted others to break, what he considered to be unjust law, he will repeat such conduct in the future. It is true that, as was stressed by Mr *Duncan* in his argument for the Society,

KORSAH JA

> [the] applicant has neither expressed any regret for his past actions nor given any promise for the future and that in his petition he maintains the attitude that such actions are not inconsistent with the office of an attorney. It appears to me however that this is mainly attributable to the petition being - understandably enough - largely based upon *Mandela*'s case (*supra*). Apart from relying upon the inference which it claims should be drawn from the applicant's past conduct, [the] respondent society has not put anything before the court to show that [the] applicant is likely to repeat such conduct in the future. Should he do so, he may well find himself subject to the disciplinary jurisdiction of this court. On the information presently before the court, however, I do not think that the court should assume against [the] applicant that he will repeat this sort of conduct in the future."

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The court ordered that the Law Society was to register the applicant's articles.

The above views expressed by DE VILLIERS JP were cited with approval by MILNE JP in *Natal Law Society v N* 1985 (4) SA 115 (N) at 123I-J. The learned judge observed that:

> "In that case [*Matthews supra*], the applicant bore the onus and his unlawful conduct which was intended to influence others covered a period of nearly twelve months. In this case we are dealing with one isolated lapse committed under circumstances of extraordinary pressure upon the respondent."

The court declined the invitation to strike off the roll the name of the respondent.

Whereas in the *Matthews* case *supra* the applicant committed those offences of which he was convicted some time before he applied for registration, in *Natal Law Society v N supra* the Society was seeking the removal of the name of the respondent attorney from the roll of practitioners after his conviction and imprisonment for refusal to testify for the State in criminal proceedings in contravention of s 189 of Act 51 of 1977. GALGUT J, in a separate judgment agreeing with MILNE JP, had this to say at 124I of the report:

> "As the learned JUDGEMENT PRESIDENT has shown, regard must be had to the misconduct of which the respondent was guilty, and the circumstances in which such misconduct occurred. The misconduct of the respondent was undoubtedly of a serious nature, and because he was an officer of the court, constituted a breach by the respondent of his duty to the court."

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Here, as in *Natal Law Society v N supra*, no-one can doubt the serious nature of the misconduct complained of. Regarding the circumstances surrounding the commission of the first two offences, it is pertinent that, a year or more before they were committed, the substantive Ombudsman had complained in the 1986 annual report that:

> "The workload, however, is becoming increasingly onerous due to inadequate staffing. I believe it is important that an urgent appraisal should be undertaken as to our staffing requirements as well as the need to provide a specific budget allocation to the office of Ombudsman."

These specific issues raised in the 1986 annual report had not been addressed when the appellant became Deputy and Acting Ombudsman. Under an ever-increasing burden of work he resorted to plagiarism and placed a false report before Parliament. While this does not excuse the conduct complained of, at least it explains how the appellant came about to yield to temptation.

It is also pertinent that, although a registered legal practitioner at the time of the commission of the conduct complained of, he was not in practice as a legal practitioner; he was not involved in court appearances or handling of clients' funds; his conduct had nothing to do with practice as such. Moreover, the appellant exhibited remorse by tendering his resignation even before the Tribunal tasked with the investigation of the allegations against him commenced sitting. Since 1992 his licence to practise has been renewed annually and it has not been alleged that since embarking on practice he has not been mindful of his obligations as an officer of the court. To adopt the words of DE VILLIERS JP in the *Matthews* case *supra* at 814C-D:

> "Apart from that prior conduct, there is nothing against [the] applicant. The vital issue for decision accordingly is

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> whether or not such prior conduct is by itself sufficient to show that [the applicant] is, in the above cited words of LOPES LJ in Re *Weare supra*, not a fit and proper person to be entrusted with the important duties and grave responsibilities which belong to a legal practitioner."

But, on the other hand, I cannot dismiss the admonition by BOTHA JP in *du Toit*'s case *supra* at 104 that:

> "If we were to overlook misconduct on the part of officers of the court, if we were to allow our desire to be merciful to overrule our sense of duty to the public and our sense of the importance attaching to the integrity of

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> the profession, we should soon get into a position where the profession would be prejudiced and brought into discredit."

While, like MILNE JP in *Natal Law Society v N supra* at 124A: "I do not believe that the respondent is going to fail in his duties to the court, to the profession, or his clients if he remains on the register of practitioners", I am motivated by caution to impose some other sentence which would ensure that the appellant does not betray our trust.

The appeal is allowed with costs. The order of the Disciplinary Tribunal that the appellant's name be deleted from the register of legal practitioners is hereby set aside, and in its place is substituted the following:

> "The appellant is suspended from practice for a period of six months, the whole of which is suspended for a period of two years on condition that during the period of suspension he shall not be found guilty by the Disciplinary Tribunal of unprofessional, dishonourable or unworthy conduct.

The appellant is to pay the costs of the disciplinary enquiry."

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

RETROFIT (PVT) LTD v PTC & ANOR 1995 (2) ZLR 199 (SC)

Court **Supreme Court, Harare**

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

Constitutional application

12 June & 29 August 1995 Judgment No. S-136-95

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Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 20(1) - protection of freedom of expression - exclusive monopoly granted to Posts and Telecommunications Corporation to provide public telecommunications service and to operate a mobile cellular telephone service - a violation of the guarantee of freedom of expression

Human rights - freedom of expression - whether interference with the means of transmission or reception of information interferes with and hinders the right to receive and impart information

Headnote

The applicant company wanted to establish a mobile cellular telephone service in Zimbabwe. It applied to the respondent, the Posts and Telecommunications Corporation, for a licence to establish this service. The PTC declined to grant a licence on the ground that the service was one over which it enjoyed a monopoly in terms of s 26(1) of the Postal and Telecommunications Services Act [*Chapter 12:02*]. In a previous ruling in this matter (*PTC v Retrofit (Pvt) Ltd* 1994 (2) ZLR 71 (S)), the Supreme Court had decided that the PTC had an exclusive monopoly to provide public telecommunications services and that it had no statutory power to grant a licence to another person to operate a mobile cellular telephone service.

The applicant applied to the Supreme Court under s 24(1) of the Constitution, challenging the constitutionality of the monopoly bestowed on the PTC in respect of public telecommunications services. It argued that the monopoly, and consequent inability of the PTC under the law to licence

the applicant to become a provider of a mobile cellular telephone service, violated s 20(1) of the Constitution, in that it interfered with its freedom of expression and, more particularly, its right to receive and impart ideas without interference. The PTC maintained that the monopoly status was necessary to attain a number of objectives. It said that its monopoly enabled it:

- by exercising central control, to provide a less expensive telecommunications services by avoiding unnecessary overlap and duplication;
- to provide a mobile cellular telephone service to people in areas where such a service is not commercially viable;
- to ensure that development takes place in an orderly and methodical fashion, taking in areas of marginal interest;
- to attract more easily expertise and subsidiary participation.

It also argued that the applicant had no *locus standi* to seek a redress for a contravention of the Declaration of Rights, other than in relation to itself; it could not do so either on behalf of the general public or of anyone else.

Held, that as everyone, including corporations, enjoys the right to freedom of expression, the applicant had *locus standi* to bring this action. It was irrelevant to the issue of *locus standi* that the applicant's main motivation in bringing the application was commercial self-interest rather

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than a desire to vindicate the right of freedom of expression.

Held, further, that freedom of expression is a vitally important right that is an indispensable condition for a free and democratic society. Section 20(1) of the Constitution requires not only that persons be free to express themselves, but also that they are not hindered in the means of their expression. Interference with the means of transmission or reception of information necessarily interferes with and hinders the right to receive and impart information.

Held, further, that when deciding whether the granting of the monopoly to the Corporation hinders the right to receive and impart ideas and information, regard must be had to the effect of the monopoly and not its purpose.

Held, further, that telecommunications services are a vitally important means of communication in the modern world and are crucial for conducting business affairs and providing information and in facilitating social interaction.

Held, further, that for the PTC to be given a monopoly over telecommunications services and then to furnish the public with a highly inefficient telephone system available only to a small percentage of the population manifestly interferes with the constitutional right of everyone to receive and impart ideas and information.

Held, further, that on the question of whether the law granting the monopoly

to the PTC goes further than is reasonably justifiable in a democratic society, the onus is on the applicant to establish on a balance of probabilities that it does.

Held. further, that interference with a constitutional right is not reasonably justifiable if it arbitrarily or excessively invades the right according to the standards of a society that has proper respect for the rights of the individual. None of the three criteria used to test whether the interference was reasonably justifiable had been met. Firstly, the objectives advanced by the PTC for the monopoly were not of sufficient importance, taken singly or cumulatively, to warrant the serious inroads into the right. Secondly, there was no rational connection between the monopoly and its stated objectives. Thirdly, the retention of the monopoly by the PTC was not the least drastic means available to it for the attainment of its stated objectives. On the contrary, the objectives of the PTC could be just as readily achieved without any dependence on a monopoly. Without its monopoly, the PTC would still be able to provide a comparatively inexpensive, good quality mobile cellular telephone service to both urban and outlying communities and to control an excessive intrusion into the field by the private sector.

Held, therefore, that a decree nisi should be issued against the Minister of Information, Posts and Telecommunications to show cause, if any, on the return date why the vesting of the exclusive privilege of operating a public mobile cellular telephone service should not be declared to be inconsistent with s 20(1) of the Constitution and, accordingly, invalid.

Cases cited:

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

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Hans Muller v Supt Presidency Jail, Calcutta 1955 AIR 367

In re *Wood & Anor* 1994 (2) ZLR 155 (S); 1995 (2) SA 191 (ZS); 1995 (1) BCLR 43 (ZS)

Ruwodo NO v Min of Home Affairs & Ors 1995 (1) ZLR 227 (S); 1995 (7) BCLR 903 (ZS)

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Woods & Ors v Min of Justice & Ors 1994 (2) ZLR 195 (S); 1995 (1) SA 703 (ZS); 1995 (1) BCLR 56 (ZS)

Whitney v California 274 US 357 (1927)

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NTN (Pty) Ltd & NBN Ltd v The State [1988] LRC (Const) 333

Associated Press v US 326 US 1 (1945)

Informationsverein Lentia v Austria (1993) 17 EHRR 93

US v American Telephone & Telegraph Co & Ors 552 F Supp 131 (1982)

Irwin Toy Ltd v Quebec (A-G) (1989) 39 CRR 193

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

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(2) SA 778 (ZS)

Nyambirai v NSSA & Anor 1995 (2) ZLR 1 (S)

Berkey Photo Inc v Eastman Kodak Co 603 F 2d 263 (1979)

US v Aluminum Co of America 148 F 2d 416 (1945)

Maluleke v Min of Law & Order & A-G of SR 1963 (4) SA 206 (SR); 1963

R & N 554 (SR)

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

Boshoff v Union Govt 1932 TPD 345

W H Trengove SC, with him *A P de Bourbon SC*, for the applicant

J C Andersen SC, with him *J R Devittie*, for the respondent

A V M Chikumira for the intervenor

Judgment

Gubbay CJ:

INTRODUCTION

For several years now the applicant, a company which carries on an electrical engineering business in Harare, has been intent upon providing the public with a mobile cellular radio telecommunication service ("mobile cellular telephone service") in Zimbabwe. The respondent, the Posts and Telecommunications Corporation ("the Corporation") is a body established under the Posts and Telecommunications Act [*Chapter 12:03*]. It operates telecommuni-

cation services throughout the country and internationally, pursuant to the Postal and Telecommunication Services Act [*Chapter 12:02*] and the Radiocommunication Services Act [*Chapter 12:04*].

In July 1993 the applicant requested the Corporation to issue it with a licence for the purpose of establishing, maintaining and working a mobile cellular telephone service. It was the first party to make the approach. The Corporation declined to grant the licence on the ground that the service was one over which it enjoyed a monopoly in terms of s 26 of the Postal and Telecommunication Services Act. The applicant, on the other hand, contended that authority existed under the Radiocommunication Services Act. Ultimately their dispute came before this court on appeal from the decision of the High Court.

In a judgment handed down on 27 June 1994 (*PTC v Retrofit (Pvt) Ltd* 1994 (2) ZLR 71 (S)) MAcNALLY JA (with whom EBRAHIM and MUCHECHETERE JA concurred) held that, by virtue

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of s 26(1) of the Posts and Telecommunication Services Act, the Corporation has an exclusive monopoly to provide public telecommunication services within, into and from Zimbabwe and, thus, was not empowered to licence the applicant to operate a mobile cellular telephone service. The only exceptions to this monopoly were stated to be a private telecommunication service as envisaged by s 26(3) and (4), and the ability of the Corporation to licence small radio stations in geographically remote areas of the country where it was unable to provide telecommunication services. In the course of his judgment, the learned Judge Of Appeal remarked at 73F-74A that:

> "A great deal was made, in argument, about the public interest in having an efficient telephone system, and about the alleged obstructiveness of the PTC in refusing to allow private enterprise to come to the rescue of the long-suffering public.
>
> These are sentiments which must appeal to anyone, even a judge, who uses the Zimbabwe telephone system. But actually they have nothing to do with the case. This case is concerned, and concerned only, with a question of statutory interpretation. Does the legislation provide for a licence of this nature or does it not?
>
> If it does not, then the appeal must succeed. That will mean that the question is properly a political and not a legal one. Should Parliament amend the legislation to remove the PTC's monopoly? That is for Parliament to decide."

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Relying upon the interpretation placed by MACNALLY JA on the existing legislation the applicant, pursuant to s 24(1) of the Constitution of Zimbabwe, now lays directly before this court the issue of whether the monopoly held by the Corporation in the operation of the public telecommunication services and the consequential inability under the law to licence it to become a provider of a mobile cellular telephone service, amount to a contravention of s 20(1) of the Constitution - the protection of freedom of expression. The relief sought is:

(a) A *declarator* that s 26(1) of the Postal and Telecommunication Services Act [*Chapter 12:02*] is inconsistent with s 20(1) of the Constitution of Zimbabwe and invalid insofar as it vests in the Corporation the exclusive privilege of establishing, maintaining and working a mobile cellular telephone service within, into and from Zimbabwe;

(b) An order directing the Corporation to issue the applicant with a licence to operate a mobile cellular telephone service in Zimbabwe within thirty days of service of the order on the Postmaster - General.

Notice of the application was given to the Attorney-General, who is cited as the intervenor.

THE FACTUAL BACKGROUND

The Corporation currently provides the backbone of the telecommunication services in Zimbabwe in the form of a combination of wireline and wireless services. The former consists of the telephones supplied by the Corporation which are connected to its network, known as the public switched telephone network. The Corporation's multi-access radio service is a wireless service which effectively connects rural customers in various parts of the country. It incorporates many features of a cellular system other than the mobility of individual receivers.

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A mobile cellular telephone service uses a physical network different from the public switched telephone network. It utilises air waves, termed "Hertzian waves", instead of metal or glass cables, to transmit its signals. On account of this feature it is called a wireless service.

The Corporation accepts that its wireline service, despite on-going extensions and modernization, is markedly inadequate to meet the present communication needs of the population. The overall penetration rate of its service, measured

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as telephone main lines per 100 inhabitants, is 1,4 main lines per 100 inhabitants, broken down as 3,8 lines per 100 urban inhabitants (one line for twenty-six persons) and 0,4 lines per 100 rural inhabitants (one line for two hundred and fifty persons). There are 145 243 main working lines. There are 95 510 persons on the waiting list for telephone lines. The list has now been closed. At the installation rate of 6 745 lines during the 1993-1994 financial year, it will take the Corporation over fourteen years to supply those on the waiting list, excluding the others it presently declines to place thereon. This task is hugely formidable to its capabilities. The completion rate of telephone calls is also unsatisfactory, being below thirty *per centum.* Only one out of three or four attempts is successful. In most countries the rate rarely falls below ninety *per centum.*

The extent of the shortcomings in the public switched telephone network is a source of major concern among ordinary subscribers, business organisations, donor organisations, consumer organisations, development agencies and the Government. It impacts heavily on the country's economic, social and political well-being.

In a study concluded in 1993, the World Bank reported on the wireline service in Zimbabwe in these terms:

> "The quality of service is poor. For historical reasons, most of the equipment is non-standard, 20-30 years old, worn-out and obsolete. This is a major cause of chronic breakdowns. The average number of faults per subscriber in 1991 was 2,4, which is high, and the situation has been deteriorating over the past five years. The fault rate has increased by 20% over the last five years. Faults take a long time to clear (only 70% of the faults are cleared within 48 hours) due to weaknesses in maintenance organisation, and insufficient vehicles, tools, test equipment, spares and experienced maintenance technicians. Another cause of poor quality is the presence of large quantities of obsolete switching equipment used for party users. This equipment has very limited traffic handling capability and leads to severe frustrations to subscribers."

In its own report, issued in November 1993, the Corporation candidly confessed that:

> "The telecommunications network which has suffered from under-investment for a long time is characterised by lack of connectable capacity and subscriber distribution. This has led to serious network

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> congestion which inhibits traffic flow. Investment that has been undertaken over the years went towards the replacement of obsolete equipment with little expansion realised. The number of waiters for service has grown to its current level of 100 000. The strategy to meet current and future demand for service will be to increase

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exchange capacities through the digitalisation programmes."

A later memorandum, prepared for the Corporation in January 1995, reflected that:

"In order to address the backlog of demand and improve the quality of service of the telephone network the PTC has embarked on a crash programme of connecting new customers onto the network and rehabilitating obsolete plant in the short term. The PTC will also install new services such as the Cellular Mobile Telephone System (CMTS) aimed at mainly the business customer segment."

With reference to the last-mentioned service, the memorandum informed that:

"The Corporation will install a CMTS service by the end of 1995 with a capacity to cater for about 10 000 customers in Harare and Bulawayo mainly. The service will be expanded to other regional centres in phases to reach a projected capacity of about 55 000 by the year 2 000.

The CMTS will be fully integrated into the existing telephone network to enable communication between mobile customers and fixed network customers."

The Corporation does not deny that there is a demand for a mobile cellular telephone service and that the demand is increasing. In a recent professional survey conducted on behalf of the applicant, 72,73 *per centum* of the forty-four persons interviewed intimated that the availability of a mobile cellular telephone service would assist their businesses and quality of life.

It is also worthy of note that of the fifty-three countries in Africa, at least twenty-two, some of which have weaker economies than Zimbabwe, enjoy the facility of a mobile cellular telephone service.

As part of its economic structural adjustment exercise the Government has launched a programme of reforms in the public enterprise sector. It has

obtained from the International Bank for Restructure and Development, a project preparation facility advance to finance the cost of the studies for sector restructuring of the Corporation. It is considering restructuring the whole telecommunications sector.

The picture that emerges, in sum, is this. The wireline telephone service, notwithstanding the efforts of the Corporation to improve its efficiency, remains a delinquent service in need of a "crash programme" of rehabilitation. There is a pressing need to introduce an efficient mobile cellular telephone service. This is recognised by the Corporation. It has recently called for tenders both for the supply of equipment for the installation and commission of a cellular telephone service to be linked to the existing public system, and for managerial assistance for such service.

THE *LOCUS STANDI* OF THE APPLICANT

Section 24(1) of the Constitution, in terms of which the applicant seeks redress, reads in material part:

"If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him ... then, without prejudice to any other action with respect to the same matter which is lawfully available, that

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person ... may ... apply to the Supreme Court for redress."

"Person", unless the context otherwise requires, is defined in s 113(1) to mean:

"any individual or any body of persons, whether corporate or unincorporated."

There is no indication, and none has been suggested, that in context the word "person" requires a meaning different from that given in the definition.

The contention advanced on behalf of the Corporation was that s 24(1) affords the applicant no *locus standi in judicio* to seek redress for a contravention of the Declaration of Rights other than in relation to itself (the exception being where a person is detained). It has no right to do so either on behalf of the general public or anyone else. Put otherwise, a constitutional right that invalidates a law may be invoked by a person affected by the law only if that person is also entitled to the benefit of the constitutional right. If not so entitled, then that person will be precluded from impugning the law.

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See *Hans Muller v Superintendent Presidency Jail, Calcutta* 1955 AIR 367 (Supreme Court of India). The exception is where the person is the accused in a prosecution for breach of the law. See Hogg *Constitutional Law of Canada* 3 ed at p 1274. I have no difficulty in accepting this proposition.

It is plain, to my mind, that the primary purpose in the bringing of this application was not deep-felt anxiety over hindrance in the enjoyment of freedom of expression, caused by the prevailing serious shortcomings in the wireline telephone service and the absence of a mobile cellular telephone service. It was yet another legal attempt to secure a licence to operate a mobile cellular telephone service in Zimbabwe. Commercial self-interest and advantage, not so much the desire to vindicate the right to freedom of expression, was, and is, the main motivation behind the application.

But is this a factor of any relevance? The decision in In re *Wood & Anor* 1994 (2) ZLR 155 (S); 1995 (2) SA 191 (ZS) at 195G-I; 1995 (1) BCLR 43 (ZS) at 46I-47B, cited in support of the applicant's lack of standing, concerned a totally different situation. In that case the right to reside in any part of Zimbabwe, as guaranteed by s 22(1) of the Declaration of Rights, vested in the minor child of Mrs Wood and not in her. No constitutional right afforded her was infringed by the refusal of the immigration authorities to grant her a residence permit. See also *Ruwodo NO v Min of Home Affairs & Ors* 1995 (1) ZLR 227 (S); 1995 (7) BCLR 903 (ZS).

Under s 20(1) of the Constitution the enjoyment of freedom of expression is conferred universally, on everyone, individual and corporate personality alike. In this regard the European Court of Human Rights in *Autronic AG v Switzerland* (1990) 12 EHRR 485, at para 47, said the following:

"In the court's view, neither Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10. The Article applies to 'everyone', whether natural or legal persons. The Court has, moreover, already held on

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three occasions that it is applicable to profit-making corporate bodies."

If the monopoly granted the Corporation of establishing, maintaining and working telecommunication services amounts to a hindrance of the right to freedom of expression, it is a hindrance committed in relation to everyone. The status of the applicant as a corporate entity cannot deny it the shelter of s 20(1). It matters not that the applicant's predominant motivation in

challenging the constitutionality of s 26(1) of the Postal and Telecommunication Services Act is sourced in prospective financial gain. It is entitled to protest an infringement of s 20(1) of the Constitution. This it has done, albeit somewhat *en passant*. In the words of its chief executive:

"Applicant seeks relief for the protection of your applicant's and all Zimbabweans' guarantee of freedom of expression and the right to receive and impart information without hindrance."

And more pertinently:

"The monopoly does not benefit anyone. It impedes economic development and violates applicant's right to freedom of expression as guaranteed by the Constitution. It must be broken to allow competition in the provision of telecommunication services for the benefit of the people of Zimbabwe."

WHETHER SECTION 26(1) OF THE POSTAL AND TELECOMMUNICATION SERVICES ACT IS IN BREACH OF S 20(1) OF THE CONSTITUTION AS HINDERING THE APPLICANT IN THE ENJOYMENT OF ITS FREEDOM OF EXPRESSION, MORE PARTICULARLY, IN THE RIGHT TO RECEIVE AND IMPART IDEAS AND INFORMATION WITHOUT INTERFERENCE

(1) The Relevant Enactments

Subsection (1) of s 20 of the Constitution mandates that:

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

Thus the major elements of the right are:

(a) no person shall be **hindered**

(b) in the **enjoyment**

(c) of his **freedom of expression**; which includes -

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(i) freedom to **hold** opinions,

(ii) freedom to **receive** and **impart** ideas and information **without interference**; and

(iii) freedom from interference with his correspondence.

Subsection (2) allows this right to be restricted by a law which, as materially specified in para b(iv) thereto, makes provision for the purpose of:

> "regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television or creating or regulating any monopoly in these fields."

But that law or anything done under the authority thereof is invalid if "shown not to be reasonably justifiable in a democratic society".

Section 26(1) of the Postal and Telecommunication Services Act reads:-

> "Subject to the provisions of this section and of the Radiocommunication Services Act [*Chapter 12:04*] the Corporation shall have the exclusive privilege of establishing, maintaining and working telecommunication services within, into and from Zimbabwe.

Provided that ..." (irrelevant).

"Telecommunication service" is defined in s 2(1) to mean:

> "any service by means of which signs, signals, sounds, pictures or communications are conveyed by the agency of electricity, magnetism or electromagnetism or by any agency of a like nature, whether with or without the aid of wires, and includes telephony and telegraphy and any improvements and developments thereof, including a radiocommunication service and a diffusion service."

As mentioned above, s 26(1) does not bestow upon the Corporation a blanket monopoly. It excludes a *private* telecommunication service.

(2) The Importance Of Freedom Of Expression

It was stated by this court in In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S) at 56F-H; 1995 (1) SA 551 (ZS) at 557C-D; 1995 (2) BCLR 125 (ZS) at 130B-C that:

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> "The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be underestimated. They lie at the foundation of a democratic society and are 'one of the basic conditions for its progress and for the development of every man'; *per* European Court of Human Rights in *Handyside v United Kingdom* (1976) 1 EHRR 737 at para 49."

In *Woods & Ors v Min of Justice & Ors* 1994 (2) ZLR 195 (S); 1995 (1) SA 703 (ZS) at 705F, 1995 (1) BCLR 56 (ZS) at 58E the comment was added that freedom of expression is "one always to be jealously guarded by the courts".

This approach, which underscores the pre-eminence of freedom of expression as an indispensable condition for a free and democratic society, conforms with what is reflected in international human rights instruments, some of which Zimbabwe has ratified or acceded to.

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See art 19 of the Universal Declaration of Human Rights; art 19 of the International Covenant on Civil and Political Rights; art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; art 9 of the African Charter on Human and Peoples' Rights; art 4 of the American Declaration of the Rights and Duties of Man; and art 13 of the American Convention on Human Rights.

Most jurisdictions recognise that freedom of expression is central to democracy. As JUSTICE CARDOZO so poignantly remarked in *Palko* v *Connecticut* 302 US 319 (1937) at 327 "freedom of thought and speech ... is the matrix, the indispensable condition of nearly every other form of freedom". See also *Whitney v California* 274 US 357 (1927) at 375-376 *per* JUSTICE BRANDEIS; *Yates v US* 354 US 298 (1957) at 344 *per* JUSTICE BLACK. (Such *dicta* are persuasive, as the rights under the First Amendment to the Constitution of the United States may be properly equated to those protected under s 20(1) of the Constitution of Zimbabwe.)

In *Retail, Wholesale & Dept Store Union, Local 580* et al v *Dolphin Delivery* et al (1986) 25 CRR 321 MCINTYRE J, in the Supreme Court of Canada, stressed at 328 that:

> "Freedom of expression is not, however, a creature of the Charter. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection."

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See also *Mandela v Falati* 1995 (1) SA 251 (W) at 258G-259F; 1994 (4) BCLR 1 (W) at 7F-8F; *Govt of the Republic of SA v Sunday Times Newspaper & Anor* 1995 (2) SA 221 (T) at 227A-H; 1995 (2) BCLR 182 (T) at 187I-188F.

The decision in In re *Munhumeso supra* at 57A and 130C-D respectively, recognised that freedom of expression has four broad special purposes to serve. These are:

(a) "It helps an individual to obtain self-fulfilment"

Speech is an expression of self, whether effected by face-to-face exchange, or over the telephone, by writing, by pictures, or by any other mode. The desire to communicate, to express feelings and thoughts and to contribute to discussion and debate, is an essential attribute of human nature. To unreasonably prevent a person from expressing a view, belief or emotion is to deny his or her basic dignity, freedom and individual autonomy as a human being. In an article entitled "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment" in 123 *Univ of PA Law Review*, Richards at 62 explains:

> "[People] are not to be constrained to communicate or not to communicate, to believe or not to believe, to associate or not to associate. The value placed on this cluster of ideas derives from the notion of self-respect that comes from a mature person's full and untrammelled exercise of capacities central to human rationality. Thus, the significance of free expression rests on the central human capacity to create and express symbolic terms, such as speech, writing, pictures and music. Freedom of expression permits and encourages the exercise of these [capacities]."

(b) "It assists in the discovery of truth"

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The search for truth rationale has been articulated in terms of the famous "marketplace of ideas" concept. This holds that truth will emerge out of the competition of ideas. In his classic dissent in *Abrams v US* 250 US 616 (1919) at 630 the redoubtable JUSTICE HOLMES said that:

> "... when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought

> to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out."

(c) "It strengthens the capacity of an individual to participate in decision-making"

The proposition is self-evident and requires little elaboration. The free propagation of ideas and opinions - be they one's own or of others - and of information, together with the process of open debate and argument, far better enables members of society to make informed judgments on matters of national or private interest.

(d) "It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change"

Social stability is strengthened and advanced by freedom of expression. Restraint impedes rational discussion and reduces society's ability to adjust to changing circumstances. The experience of participation makes it easier for those whose views are rejected or criticised to accept and abide decisions reached through an open, objective and non-coercive process. The uninhibited exchange of ideas, opinions and information is, after all, the very lifeblood of democracy.

(3) Interference With The Means Of Expression

Section 20(1) of the Constitution enjoins not only that persons be free to express themselves, but also that they are not hindered in the means of their expression. This is manifest in the freedom "to receive and impart ideas and information without interference".

In *Autronic AG v Switzerland supra*, at para 47, the European Court of Human Rights decided that a similarly worded protection of freedom of expression in Article 10(1) of the European Convention:

> "... applies not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information".

And went on to say:

> "Like the Commission, the court is of the view that the reception of

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> television programmes by means of a dish or other aerial comes within the right laid down in the first two sentences of Article 10(1), without it being necessary to ascertain the reason and purpose for which the right is to be exercised. As the administrative and judicial decisions complained of prevented Autronic AG from lawfully receiving G-Horizont's transmissions, they therefore amounted to 'interference by public authority' with the exercise of freedom of expression."

In *Red Lion Broadcasting Co Inc & Ors v Federal Communications Commission et al* (No 2) 395 US 367 (1969) the United States Supreme Court held that radio broadcasts were protected by the First Amendment guarantee of freedom of expression. Giving the lead opinion, JUSTICE WHITE observed at 390:

> "Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favour of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."

The same court, in *City of Los Angeles & Dept of Water & Power v Preferred Communications Inc* 476 US 488 (1986), was concerned with a cable television company which sought permission to lease space on the utility poles of the City of Los Angeles, in order to provide a cable television service to part of the city. Permission was refused, however, on the grounds that the company had failed to participate in an auction held to award a single franchise in the area. The company sued the city, claiming a violation of its rights under the free speech guarantee of the First Amendment. In affirming the view of the lower court that the city had violated the First Amendment by refusing to issue a franchise to more than one operator, JUSTICE REHNQUIST (as he then was) said at 494-495:

> "We do think that the activities in which the respondent allegedly seeks to engage (namely, the provision of a cable television service) plainly implicate First Amendment interests ... Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers. Respondent's proposed activities would seem to implicate First Amendment interests as do the activities of wireless

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> broadcasters, which were found to fall within the ambit of the First Amendment in *Red Lion Broadcasting Co v FCC supra* at 386, even though the free speech aspects of the wireless broadcasters' claim were found to be outweighed by the Government interests in regulating by reason of the scarcity of available frequencies."

See also *Metro Broadcasting Inc v Federal Communications Commission* 497 US 445 (1990).

The concept of freedom of expression and speech, in the context of modern means of communications, has also been considered in other jurisdictions.

In *Belize Broadcasting Authority v Courtenay & Hoare* [1988] LRC (Const) 276 (Belize Court of Appeal) it was held that restrictions on the use of television broadcasting were not to be countenanced under a constitutional provision protecting the enjoyment of freedom of expression. SMITH P at 284h and 285b quoted with approval the following comments of the CHIEF JUSTICE in the court below:

> "Today television is the most powerful medium for communications, ideas and disseminating information. The

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enjoyment of freedom of expression therefore includes freedom to use such a medium."

And:

"... to broadcast on television is today an integral part of the freedom of expression and to place the need for the Authority's consent before one can do what is an integral part of the freedom constitutes a hindrance to that freedom within the meaning of section 12(1)."

In *NTN (Pty) Ltd & NBN Ltd v The State* [1988] LRC (Const) 333 the applicant companies had been granted the right to establish a television station and other facilities for television broadcasting under an agreement entered into with the Government of Papua New Guinea. They were also issued with the requisite licences and the television broadcasts were to commence on 14 July 1986. However, on 10 July 1986 the Government passed a law prohibiting television broadcasts until after 31 January 1988. The applicants challenged the temporary ban before the Supreme Court of Papua New Guinea as violative of their constitutional right to freedom of expression. The State's argument to the contrary was castigated by BARNETT J at 355h as being "scientifically untenable, tortuous, legalistic and quite

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unacceptable as a justification for curtailing one of the rights guaranteed by the Constitution". The majority of the court dismissed the application, however, on the ground that a temporary ban of fourteen months in the commencement of a new venture in mass media communications for the reason of formulating a policy and setting legislative controls in place, was "reasonably justifiable in a democratic society".

These cases, and there are others, underline the principle that restriction upon or interference with the means of communication, whatever form it may take, abridges the guarantee of freedom of expression. A *fortiori* any monopoly which has the effect, whatever its purpose, of hindering the right to receive and impart ideas and information, violates the protection of this paramount right.

In the United States there has been much litigation over the undesirability of monopolies and their impact upon First Amendment rights.

In *Associated Press v US* 326 US 1 (1945) JUSTICE BLACK, who delivered the opinion of the court, held that the anti-monopoly legislation embodied in the Sherman Antitrust Act of 1890, was entirely consonant with the First Amendment's guarantee of freedom of expression. He pointed out at 20:

"The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."

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Much the same sentiment was expressed by JUSTICE WHITE in the *Red Lion Broadcasting Co* case *supra* at 390, in these words:

> "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolisation of that market, whether it be by the Government itself or a private licensee. ... It is the right of the public to

> receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."

In Europe it is recognised that States are permitted to regulate, by a licensing system, the manner of broadcasting in their territories, with respect to the technical aspects, the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments.

In *Informationsverein Lentia v Austria* (1993) 17 EHRR 93 the first applicant complained that it had been unable to set up an internal cable television network in a housing development in Linz and the remaining applicants, radio stations in other parts of the country. Under Austrian law these rights were reserved to the Austrian Broadcasting Corporation. All the applicants asserted that this legislation constituted a monopoly which interfered with the exercise by them of their freedom to impart information and ideas, and was thus incompatible with Article 10 of the European Convention. The European Court of Human Rights agreed. The rationale for its judgment is expressed in the passages at paras 38 and 39:

> "The court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.
>
> Of all the means of ensuring that these values are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station. The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need."

Finally, there is the important case of *US v American Telephone & Telegraph Co & Ors* 552 F Supp 131 (1982), a decision of the District Court of Columbia. It provides the only direct judicial comment to which this court

has been referred (my research has not proved any more successful) on the dangers of monopoly power over a nation's wireline telephone network. In the course of a long and

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well-reasoned judgment, GREEN J said at 164-165:

> "The telecommunications industry plays a key role in modern economic, social, and political life. Indeed, many commentators have asserted that we are entering an age in which information will be the keystone of the economy ...
>
> **The only pervasive two-way communications system is the telephone network. It is crucial in business affairs, in providing information to the citizenry, and in the simple conduct of daily life. In its present form AT & T has a commanding position in that industry**. The men and women who have guided the Bell System appear by and large to have been careful not to take advantage of its central position in America's economic life. There is no guarantee, however, that future managers will be equally careful. In any event, it is antithetical to our political and economic system for this key industry to be within the control of one company" (my emphasis).

In considering whether the Corporation's monopoly hinders the enjoyment of the applicant and the general public of Zimbabwe to receive and impart ideas and information - a fundamental right in every society - it is the effect of the monopoly and not its purpose, to which regard must be had. See In re *Munhumeso supra* at 561D-E and 134C respectively; *Irwin Toy Ltd v Quebec* (A-G) (1989) 39 CRR 193 at 234 (Supreme Court of Canada). What must be decided is whether the **effect** of the Corporation's public monopoly, which prohibits the establishment by the applicant, in the particular circumstances pertaining, of a mobile cellular telephone service, is an abridgment of the right of freedom of expression.

In my view, it is axiomatic that for the Corporation to monopolise telecommunication services in Zimbabwe, and then to furnish a public switched telephone network of dubious worth, available to but a small percentage of the populace, manifestly interferes with the constitutional right of every person in the country to receive and impart ideas and information by means of this "pervasive two-way communications system".

Evidence was placed before this court of the injurious consequences of the prevailing inadequacies upon commercial farmers, building contractors, transport operators, journalists, publishers, the manufacturing industry, the

mining industry, and members of both the Zimbabwe Import and Export Association and the Indigenous Business Development Centre. All these bodies expressed a substantial dependency upon the telephone system, and protested that their operations were being prejudiced financially by the inefficiency and poor quality of its performance. All supported the urgent introduction, by private enterprise, of a mobile cellular telephone service.

Persons in every walk of life, be they professional men and women, academics, artisans, domestic workers or simple rural dwellers, are entitled to a telephone service which affords them a rapid and reliable means of receiving and imparting ideas and information on any matter, however mundane. A public monopoly which fails to fulfil that essential role imposes a severe restraint upon the constitutionally protected freedom of expression.

WHETHER THE CREATION AND REGULATION OF A MONOPOLY IN THE FIELD OF TELEPHONY IS REASONABLY JUSTIFIABLE IN A DEMOCRATIC SOCIETY

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In *Woods & Ors v Min of Justice & Ors supra*, at 199B, 706E-F and 59C-D respectively, it was stated by this court that:

> "What is reasonably justifiable in a democratic society is an elusive concept. It is one that defies precise definition by the courts. There is no legal yardstick, save that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual."

From a procedural aspect the onus is on the challenger to establish that the enactment impugned goes further than is reasonably justifiable in a democratic society and not on the State to show that it does not. See *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S); 1984 (2) SA 778 (ZS) at 382 *in fine* - 383A; 1984 (2) SA 778 (ZS) at 783H. The standard of proof is a preponderance of probability.

It was mentioned recently in *Nyambirai v NSSA & Anor** (7) that the court will look to three criteria in determining whether or not the limitation is permissible

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in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:

(i) the legislative objective is sufficiently important to justify limiting a fundamental right;

(ii) the measures designed to meet the legislative objective are rationally connected to it and are not arbitrary, unfair or based on unreasonable considerations;

(iii) the means used impair the right or freedom no more than is necessary to accomplish the objective.

I shall deal with each in turn:

Is the legislative objective, insofar as it vests in the Corporation the exclusive privilege of establishing, maintaining and working a mobile cellular telephone service within, into and from Zimbabwe, sufficiently important to justify hindering the right of every person to receive and impart ideas and information without interference?

The Corporation appears to accept that there may no longer be any need to retain the monopoly of its telecommunication services. It proclaims that "it is not intent upon protecting the monopoly it presently enjoys" and goes on to say:

> "The Government will be considering changes to the regulatory framework including the separation of regulatory and operational functions and defining services to be reserved for monopoly and those to be thrown or left open to competition. The Corporation fully supports the Government's approach in these matters."

This notwithstanding, the Corporation suggests that its monopoly enables it, by the exercise of central control, to render telecommunication services less expensive by the avoidance of unnecessary overlap and duplication. The applicant's response is that the proposition is unsound because, if true, it would justify a State monopoly in virtually every sector of the economy. I am constrained to agree. Free market competition, not public or private monopoly, almost invariably makes for greater economy.

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Undoubtedly the trend amongst democratic countries is to move away from

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the exercise of monopoly power over a public telephone service. Even those few countries of the industrialised world, such as France, Germany, Spain and Greece, which still retain a monopoly over basic wireline telephone services, have competitive private providers in cellular services. Other industrialised countries, including United Kingdom, Japan, United States of America, Canada, Sweden, Australia and New Zealand, have introduced competition even in respect of basic wireline telephone services. Forty-one *per centum* of the countries in the continent of Africa now permit private mobile cellular telephone services.

The abolition of the Corporation's monopoly in respect of the mobile cellular telephone service would not, of course, preclude it from entering this comparatively new field of telecommunication. The spur of competition should inspire greater efficiency and economy on its part. And the free market competitors who choose to come into the market, would do so at their own risk and expense.

The Corporation also maintains that the preservation of the monopoly would enable it to provide a mobile cellular telephone service to people in areas where such a service is not commercially viable. It does not, however, explain why it needs the monopoly to do so. There is no apparent reason why it should not embark on this commendable project even if others were permitted to establish a mobile cellular telephone service.

It is further claimed by the Corporation that its quasi-government nature instils greater investor confidence which enables it to attract increased finance. Yet it offers no supporting evidence of this. In any event, it will always remain free to continue to attract investment even though its monopoly over the cellular telephone service is broken.

Next it is said that the "national scope" of its undertaking "enables development to take place on an orderly and methodical basis, taking in areas of marginal interest in the cause of the overall extension of the updated network". But surely the Corporation is at liberty without holding a monopoly over the mobile cellular telephone service to be as orderly and methodical in the development of its undertaking as it might wish. If necessary, it could bring order and method to the free market provision of mobile cellular telephone services by stringent regulation.

Lastly the Corporation proclaims that its monopoly makes it easier to attract expertise and subsidiary participation. Again, it does not elaborate why to do

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so should require the exercise of a monopoly over a mobile cellular telephone service.

It follows, in my opinion, that the stated objectives are not of sufficient importance, taken either singly or cumulatively, to warrant a serious inroad into the constitutional right of freedom of

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expression.

Is there a rational connection between the Corporation's monopoly and its stated objectives?

In *Berkey Photo Inc v Eastman Kodak Co* 603 F 2d 263 (1979) KAUFMAN CJ condemned the use of monopoly power in characteristically striking prose. He said at 273:

> "Because, like all power, it is laden with the possibility of abuse; because it encourages sloth rather than the active quest for excellence; and because it tends to damage the very fabric of our economy and our society, monopoly power is inherently evil."

See also *US v Aluminum Co of America* 148 F 2d 416 (1945) at 427, *per* LEARNED HAND J

Conversely, the values and advantages of open market competition were praised in *US v American Telephone & Telegraph Co & Ors supra* in equally eloquent language by GREENE J at 149-150:

> "Competition has not been endorsed by the Congress and the courts as a purely academic matter. The need to safeguard free competition is a direct result of the fundamental premise of our economic system that unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

It is instructive to note that, reflecting retrospectively on the benefits which the originally resisted competition had brought to AT & T, its chairman announced that:

> "The spur of competition has made AT & T a stronger company; it is now more efficient, more innovative, quicker to market, and more responsive to its customers. Because of the competitive marketplace, long distance

> carriers and equipment manufacturers have invested heavily and successfully in a wealth of new technologies and services. Competitive market pressures assure that these trends will continue."

(As reported in *Federal Communications Law Journal* (1994) Vol 4 at p 154).

It does not seem to me tenable to contend that there is a rational connection between the Corporation's monopoly over a mobile cellular telephone service in Zimbabwe and its stated objective of economy and viability. To the contrary, as the *dicta* I have quoted reveal, it is healthy competition that is likely to make this service cheaper, of better quality and greater efficiency, than were its provision left entirely in the hands of the Corporation.

It is beyond question that the introduction of a mobile cellular telephone service to outlying communities is a worthy objective. But this does not mean that there is a rational connection between the monopoly and that cause. Its feasibility does not depend at all on the operation of a monopoly. Without the monopoly, the Corporation would remain free and uninhibited to implement its proposal. In fact, the existence of competitors may be a strong inducement for it to do so with increased expedition.

Nor am I able to perceive a rational connection between the monopoly and the objective of

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bringing order and method to the provision of the mobile cellular telephone service. The fall of the monopoly would not deprive the Corporation of authority to oversee the number and quality of applications from the private sector to establish and operate a mobile cellular telephone service. To that extent it will retain a central element of control.

Lastly on this aspect, it is mere supposition that the Corporation's ability to attract finance, expertise and subsidiary participation in the establishment and operation of a mobile cellular telephone service would be affected adversely by the loss of its monopoly. At best, it is an apprehension that has not been set to the test. There is no evidence of any rational connection between the existence of the monopoly and its influence upon would-be investors. The incentive to invest or participate, so it seems to me, would be grounded rather upon the Corporation's proven ability in the field of tele-communications than on the exclusive privilege accorded it under the law.

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Is the monopoly in the provision of a mobile cellular telephone service the least drastic means by which the objectives of the Corporation may be accomplished?

Under this part of the enquiry, one asks whether the hindrance upon the right of the applicant to receive and impart ideas and information without interference is too high a price to pay for the benefit of the monopoly. There must be a balancing process. The importance of the monopoly must be measured against the gravity of the infringement of the fundamental right.

For the reasons given in considering the preceding two criteria, I am amply satisfied that the retention of the Corporation's monopoly is not the least drastic means available to it for the attainment of its stated objectives. Indeed, I would go further and assert that such objectives may be just as readily achieved without any dependence upon the monopoly. The Corporation would still be able to provide a comparatively inexpensive, good quality mobile cellular telephone service to both urban and outlying communities, together with the ability to control an excessive intrusion into the field by the private sector.

THE APPLICABILITY OF S 24(5) OF THE CONSTITUTION

The applicant has been successful in showing that it should not be accepted that s 26(1) of the Postal and Telecommunication Services Act (only insofar as it vests in the Corporation the exclusive privilege of establishing, maintaining and working a mobile cellular telephone service within, into and from Zimbabwe) is reasonably justifiable in a democratic society for the purpose of creating or regulating a mobile cellular telephone service. Consequently this court is obliged, in terms of s 24(5) of the Constitution, to issue a rule *nisi* calling upon the Minister of Information, Posts and Telecommunications to show cause why s 26(1), to the extent indicated, should not be declared in contravention of s 20(1) of the Constitution.

As correctly observed by BEADLE CJ in *Maluleke v Min of Law & Order & A-G of SR* 1963 (4) SA 206 (SR) at 215D-E; 1963 R & N 554 (SR) at 562H-I:

> "... the court may not deprive the Minister of his right to put proof before the court, simply because the court may

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think that it may not be possible for the Minister in the particular circumstances of the case to place any proof before it which might satisfy it. The Minister is entitled, as of right, to be heard on this issue ..."

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See also In re *Munhumeso & Ors supra* at 562B-D and 134J-135C, respectively.

WHETHER IN THE EVENT OF CONFIRMATION OF THE RULE *NISI* THE APPLICANT IS ENTITLED TO AN ORDER DIRECTING THE CORPORATION TO ISSUE IT WITH A LICENCE TO OPERATE A MOBILE CELLULAR TELEPHONE SERVICE

In determining the issue at this stage of the proceedings it is not to be assumed that the court has pre-judged any inability on the part of the Minister to satisfy it that the limitation upon the applicant's enjoyment of freedom of expression is reasonably justifiable in a democratic society.

The argument advanced was that s 14(1) of the Radiocommunication Services Act [*Chapter 12:04*] empowers the Corporation to issue a licence to establish, maintain and work a mobile cellular telephone service; and that as the Corporation has exhibited a marked degree of bias against the applicant, the end result of a referral to it to consider the application is a foregone conclusion and a waste of time. Thus, so it was urged, this court should interfere in the sphere of practical administration and make the decision itself. See *Dir of Civil Aviation v Hall* 1990 (2) ZLR 354 (S) at 361E-H.

The argument falls at the first hurdle. The judgment of McNALLY JA in *PTC v Retrofit (Pvt) Ltd supra* decided that the Corporation has no power to licence the operation of a mobile cellular telephone service under the provisions of the Radiocommunication Services Act. The following passages make this clear:

"The argument is that the service which the applicant company wishes to introduce consists of 'base stations' and 'mobile stations' which are referred to in the Schedule. Therefore the service which the applicant company wishes to introduce may be licensed in terms of the provisions of s 14 of *Chapter 252* [now *Chapter 12:04*].

The argument is ingenious but I think it is demonstrably fallacious." (At 637A-B).

Then at 637G-H:

"It is straining the language to argue that the exceptional provisions for

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licensing of radio stations under *Chapter 252* [now *Chapter 12:04*] can be used for the licensing of a full-scale telecommunication system throughout Zimbabwe. This is so particularly when, as I have said, the definition of 'telecommunication system' in *Chapter 250* [*Chapter 12:02*] has not been amended. 'Telecommunication system' still includes radiocommunication system'."

And finally at 639A-D:

"It would equally be wrong to interpret *Chapter 252* [*Chapter 12:04*] in such a way that a licence under that enactment could authorise a person to introduce a nation-wide telecommunication system when such systems are

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governed by *Chapter 250* [*Chapter 12:02*].

I am fortified, therefore, in my view that *Chapter 252* [*Chapter 12:04*], and in particular s 14 thereof, cannot be used for the licensing of a nation-wide telecommunication system simply because that system happens to be a radiocommunication system.

I am further fortified in my view by referring to the powers of the PTC as set out in s 19 of *Chapter 251* [*Chapter 12:03*] - the Posts and Telecommunications Corporation Act. In summary the relevant functions of the PTC are there set out as -

a. To provide telecommunication services.

b. To regulate, control and supervise radio stations.

c. To establish radiocommunication services.

There is no mention of regulating (ie licensing) radiocommunication services."

This interpretation is binding on the applicant. It involved a judicial determination of a question of law. See *Boshoff v Union Govt* 1932 TPD 345 at 350. I respectfully agree with it.

Because in its present form the Postal and Telecommunication Services Act does not permit the applicant to be licensed, it follows that if the rule *nisi* is confirmed on the return day, it will then become necessary for the lawmaker to put in place suitable provisions under this Act enabling the Corporation to regulate the field of cellular telephone services. See, for example, the

requirements for other licences in the Postal and Telecommunication Services (Private Telecommunications) By - Laws (RGN 391 of 1973) and the Radiocommunication Services By - Laws (RGN 390 of 1973).

COSTS

The applicant has achieved substantial success and is deserving of an order for costs. However, to be excluded therefrom are one half of the costs in respect of the preparation of the voluminous answering affidavit which contained much irrelevant, unnecessarily disparaging and argumentative matter, and the entire costs incurred in the filing, well after the conclusion of the hearing and without leave of this court, of the affidavit of Mr Masiyiwa with annexures.

THE ORDER

A rule *nisi* will issue calling upon the Minister of Information, Posts and Telecommunications to show cause, if any, before this court at 09.30 hours on 6 December 1995, why:

(1) s 26(1) of the Postal and Telecommunication Services Act [*Chapter 12:02*], insofar as it vests in the Posts and Telecommunications Corporation the exclusive privilege of establishing, maintaining and working a public mobile cellular telephone service within, into and from Zimbabwe, should not be declared inconsistent with s 20(1) of the Constitution of Zimbabwe and, accordingly, invalid;

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(2) he should not be ordered to pay the costs in the event of any unsuccessful opposition to the confirmation of this rule.

Korsah JA: I agree.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Sansura AJA: I agree.

Kantor & Immerman, applicant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

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

DONGO v MWASHITA & ORS 1995 (2) ZLR 228 (HC)

Court **High Court, Harare**

Smith J

Civil application

13 & 27 July & 10 & 30 August 1995 Judgment No. HH-106-95

Flynote

Elections - non-compliance with laws governing the conduct of elections - when this will lead to the setting aside of an election

Headnote

During a general election the applicant was a candidate in the Harare South constituency but another candidate had been declared the winner in that constituency. The applicant applied for the election result to be set aside on the grounds of alleged irregularities in the conduct of that election. In setting aside the election result -

Held, that various irregularities had occurred in the conduct of the elections in this constituency. These included the following:

- the Registrar-General had wrongly required those persons not on the voters' roll to prove that they were normally resident in the constituency where they wished to vote, whereas the electoral law provided that voters may only vote in the constituency for which they were registered, even if they are no longer resident in that constituency at the time of voting;
- the Registrar-General had wrongly required voters not on the printed roll to produce not

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only their voter's registration cards but also national identity documents or, in lieu thereof, driver's licences or passports, whereas the electoral law required that such voters were eligible to vote on the production of their voter's registration cards only;

- instructions were issued to some polling stations to extend voting hours without this being for the purpose of allowing voters queuing at the designated closing time to cast their ballots, whereas the

electoral law allowed the extension of voting hours only for the purpose of allowing voters who were in the queue at the designated closing time to vote;

- voters were improperly registered on the voters' roll, in that details of their places of residence were either not set down in their claim forms or were not properly recorded.

Held, further, that where an applicant had shown non-compliance with laws governing the conduct of an election, the onus was on the respondent to show that these were trivial matters and had not affected the result of the election.

Held, further, that trivial deviations from laws governing the conduct of elections would not lead to the setting aside of an election.

Held, further, that the irregularities in the present case were substantial and had affected the result of the election and that, therefore, the election had to be set aside.

Held, further, that although the law governing the holding of elections did not require that there be a printed voters' roll, there were a number of reasons that made it advisable that a printed voters' roll should be prepared prior to an election. The judge also criticised the failure to keep voter's rolls properly and to update the rolls.

Cases cited:

Putter v Tighy 1949 (1) SA 1070 (T)

Gerdener v Returning Officer & Anor 1976 (2) SA 663 (N)

Putter v Tighy 1949 (2) SA 400 (A)

Woodward v Sarsons LR 10 CP 733

Pio v Smith 1986 (2) ZLR 120 (S); 1986 (3) SA 145 (Z)

Borough of Hackeney Case; Gill v Reed & Holms (1879) 31 LTR 69

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T L Biti for the applicant

S Gwaza for the first respondent

P A Chinamasa, Attorney-General, for the second and fourth respondents

Judgment

Smith J: The applicant (hereinafter referred to as "Dongo"), who was a candidate in the last general elections, has lodged an election petition seeking an order that the election of the first respondent (hereinafter referred to as "Mwashita") as a Member of Parliament for the Harare South constituency be set aside and that the second respondent [the Registrar - General] prepare a new voters roll for that constituency. She bases her petition on alleged irregularities in the election. She claims that, of the voters who voted in the

poll in that constituency, some were not resident in the constituency, others were not on the voters roll and others voted outside the hours fixed for voting in terms of s 45 of the Electoral Act [*Chapter 2:01*] (hereinafter referred to as "the Act"). She alleged that more than 200 people who were resident outside the constituency voted and that up to 600 people whose names were not on the voters roll were allowed to vote. The places of residence of some voters could not be ascertained because post box numbers were given or else no address was indicated. She attached to her application an affidavit from Joshua Cohen who was also a candidate for the election in the Harare South constituency. He said that on Sunday 9 April 1995 at about 7.05 pm he was at the Queensdale polling station. The polling station was about to close when instructions came from the Election Directorate Headquarters to extend the voting until further notice. The polling station then stayed open until 8.10 pm when it closed and the ballot boxes were sealed.

The applicant also filed an objection to certain votes that had been cast in the election in the Harare South constituency. She objected to 201 votes on the basis that the voters concerned were not resident in the Harare South constituency. From the residential addresses shown for some of the voters she has specified, it is not possible to say where the voters are resident. In the case of six of the voters, the residential address is shown as a post office box number. In two cases, no residential address is shown. In other cases the residential address is given as "SG Pvt Ltd 3580", "single quarters Harare", "18B Flats", "Harare Street", "13 Assos House 107", "16601", "ZRP Block", "Gweru (PDR) Gweru", "6", "25", "R M & Son", "Homeaxed Farm", "Windmill", "Harley Mine 196", "5 Cranborne" and "HID 18". She also objected to 719 votes on the basis that the voters concerned do not appear on the voters roll as defined in s 3 of the Act.

The first, second and third respondents*(8) opposed the application. Mwashita, who was the successful candidate in the election, submitted that the applicant had not made out a case warranting judicial interference with the election result. The second respondent gave the following account of "the background to, and procedure followed during, the general elections of the 8th and 9th April". In March 1994 his office embarked on a voter registration scheme in preparation for the 1995 general elections. Applicants had to fill in a claim form. If the

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registration officer was satisfied that the applicant was eligible to be registered as a voter, he issued to the applicant a certificate of

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registration which indicated the appropriate constituency. This registration exercise was a mere updating of the rolls because it was carried out "without any legal instrument or proclamation having been issued first". During the internal processing of the claim forms, difficulties were encountered and some forms were assigned wrong block numbers and hence the voters concerned were enrolled in the wrong constituencies. The registration exercise ended in June 1994. Voters who had been enrolled on the 1990 Voters Rolls but who had not re-registered in the registration scheme in June were still entitled to remain on the rolls. Proclamation 2 of 1995 (SI 72A of 1995) fixed 1 April 1995 as the day on which the common roll would be regarded as closed for the purpose of accepting voters who could vote at the general election. Registrations of voters during the period July 1994 to 31 March 1995 were to form a supplementary roll. However, owing to the limited time between the official close of the rolls and the date the elections were held, "it became apparent that the data input of all forms for the said period could not be achieved". It was therefore decided that the supplementary voters rolls were to consist of records that had been computerised by 19 March 1995. It was also decided that voters whose names had not been put on the printed roll by 19 March 1995 were to be allowed to vote during the general election on production of a certificate of registration as a voter accompanied by a national identity card and, if need be, proof of residence in the constituency concerned. To facilitate the easy handling of these voters, every presiding officer was issued with a list of block numbers relevant to his constituency. If a person wanted to cast his vote but his name was not on the voters roll, he or she would have to produce a certificate of registration as a voter and a national identity card. The presiding officer would satisfy himself as to the person's address and determine whether the person's block number fell within the constituency. If it did, the person would be allowed to vote and his or her name was recorded in a special register.

According to the Registrar - General, the persons who were allowed to vote during the 1995 general elections were those who were 18 years old or more and were citizens of Zimbabwe or permanent residents who were qualified to vote. In addition, their names should appear on the main or supplementary printed voters roll. If their names were not on any such roll, they could vote if they produced a "block-numbered" voter registration certificate, a voter transfer certificate or a voter registration confirmation card, supported by a national identity document or by a drivers licence or a passport which contained the person's national registration number. Some voter registration or transfer certificates had no block numbers. In those cases, the presiding officer would question the prospective voter to ascertain whether he or she

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was a "normal resident" of the constituency. He would ask the prospective voter to produce a lease agreement, title deed or mortgage bond, telephone account statement, radio or television listeners licence, lodger's rent card or water bill. In the case of communal land dwellers, the

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village head could testify as to the "residence status" of the intending voter or else a Grain Marketing Board or Cotton Marketing Board card could be produced.

The third respondent filed an affidavit from the vice-chairman of the Electoral Supervisory Commission, saying that the Commission took no particular stance in the matter. Its view was that if there were irregularities in the election conducted for the Harare South constituency of a kind that invalidated the result, then the court should act according to the powers conferred upon it by law. He then said that it was his duty to place before the court what information was available which may assist the court in coming to its conclusion. The following information was given, and comments were made, in the affidavit.

Just before the general election was held in 1985 it was found that many people who were entitled to vote had not registered as voters or else had registered but their names did not appear on the voters' roll. It was therefore decided to prepare a "rectification register" to enable such persons to vote. At the time of the general election in 1990 the Electoral Supervisory Commission was of the view that the rectification register should not be used, there should be a proper registration of voters in place before the election and that the printed voters roll, which members of the public and candidates could inspect, should be the only register of persons entitled to vote. However, it soon emerged that there had been no attempt since 1985 to update the voters' roll or even to integrate the rectification register with the voters' roll. The integration of the voters' roll and the rectification register was completed shortly before the 1990 election and there was a campaign to urge voters to inspect the voters' roll for errors and for necessary corrections and for those qualified but not yet registered to register as voters. Despite these efforts, however, it emerged that many people had not registered or, if they had registered, their names did not appear on the voters' roll. Accordingly, once again the rectification register was used in the general election of 1990.

Following the general election of 1990, the Commission continued to be concerned about the voters' rolls. The problems with the voters' rolls were highlighted again in certain by-elections held at the beginning of 1993. Eventually the Commission prepared a report in April 1994 with a request that the Minister lay it before Parliament, which he did in October 1994. The

report showed that the Commission was concerned about the state of the voters' rolls and supported an entirely fresh registration of voters.

In June 1994 there was an exercise conducted by the Registrar - General to urge all voters to register. Registration centres were set up over a period of weeks all over the country. Nevertheless, without consultation with the Commission, the Registrar - General or the Election Directorate decided to add the voters that had registered to the existing voters' roll rather than to scrap the existing voters' roll and rely only upon the new registration exercise. Inevitably there were many duplications: people who had previously registered registered again in June 1994. In order to produce a usable voters' roll these "double registrations" had to be processed through a computer in order to replace the new registration (which may reflect a new address) with the old registration of the particular voter. Inevitably this exercise was not perfect. The commission

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itself discovered a number of instances of both persons whose names appeared twice. Sometimes this was accompanied by the name of the spouse no longer appearing on the voters' roll. It would seem that the process in regard to spouses was prone to remove the name of one spouse and to leave a double registration in the name of the other spouse - at least in some instances. Moreover there was no system in place to remove from the voters' roll those who had died since registration. Accordingly the voters' roll inevitably contained the names of many persons who were no longer voters.

Despite the re-registration exercise in June 1994, it soon appeared that there were a significant number of persons who had registered and had an official receipt recording such registration issued in June 1994, whose names nevertheless did not appear on the printed voters roll.

The Electoral Supervisory Commission instituted a system of monitoring the polling in the general elections in April 1995. Persons were appointed as monitors in the various constituencies where elections were held. With regard to the Harare South constituency, the vice-chairman of the Commission made the following statement:

> "None of the monitors from Electoral Supervisory Commission who were present at the polling stations in the Harare South constituency have reported on any irregularity during polling days relating to the qualification of persons seeking to vote, save that all monitors reported that numbers of people, sometimes hundreds, were turned away from polling stations because their names did not appear on the voters' roll and they could not

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> otherwise establish their qualification to vote in that constituency. There was a complaint received from Mrs Dongo that soldiers were voting twice at Cranborne barracks, but this turned out to be a misunderstanding over postal votes and appears to have been resolved. Mrs Dongo does not now pursue this particular matter.
>
> In regard to the polling station at Queensdale Primary School, the monitor of the Electoral Supervisory Commission, Stanley Dube, in his report the day after polling, stated in regard to the second day of polling:
>
> > From 10 am to 12 noon a small improvement in the turn-up as people turned at intervals getting the chance to cast their votes.
> >
> > - More people from Hatfield continued to pour in here today and were turned away since they were not voting. Some felt disappointed by this.
> > - Code Dongo arrived at 3.30 and Mr Cohen arrived at 5.10 pm.
> > - Not many voters from 6 until 7 pm.
> > - Closed at 8 pm after the extension from the Registrar General's office to ensure everyone voted'."

At the hearing of the application Mr *Chinamasa* and Mr *Gwaza* applied for an order that the sealed packets containing the counterfoils, ballot papers and other documents referred to in s 78 of the Act relating to the election in the Harare South constituency be opened so that the allegations made by the applicant could be investigated. Mr *Biti*, on behalf of the applicant, agreed and the necessary order was granted in terms of s 78(5) of the Act. The hearing of the application was postponed for fourteen days for the investigation to be made. At the resumed hearing, Mr *Chinamasa* applied for a further postponement of fourteen days so that the investigations could be completed. Mr *Biti* opposed the application for a further postponement

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on the grounds that sufficient irregularities had already been found to justify the setting aside of the election. He pointed out that the investigations showed that the total number of persons registered to vote and who voted as reflected by their names being crossed-off in the printed voters roll was 10 409. The number of people who voted but whose names were not on the printed voters roll was 1 273. That gave a combined total of 11 682. Yet the number of ballot papers, including both unspoilt papers (12 377) and spoilt papers (330), was 12 707. That meant that the number of ballot papers exceeded the number of voters by 1 025.

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The application for a further postponement was duly granted. When the hearing was resumed the second and fourth respondents consented to judgment in the following terms -

(a) the election results for the Harare South constituency elections on 8 and 9 April be set aside;

(b) the second respondent bears applicant's costs;

(c) the second respondent prepares a printed roll up to 10 August 1995;

(d) the preparation of the printed roll and its inspection be done within three weeks of the date of judgment;

(e) thereafter the provisions of the Act as to the proclamation and holding of a by-election in Harare South constituency apply.

In terms of s 135(3) of the Act, at the conclusion of the trial of an election petition the court shall determine whether the respondent was duly elected or whether any, and if so what, other person was or is entitled to be declared duly elected. If the court determines that the respondent was duly elected, the election remains valid. If the court determines that the respondent was not duly elected and that no other person was or is entitled to be declared duly elected, the seat of the respondent shall forthwith become vacant and the court shall forthwith certify its determination to the Speaker of Parliament. Section 149 of the Act provides that an election shall be set aside by the court by reason of any mistake or non-compliance with the provisions of the Act if, and only if, it appears to the court that the election was not conducted in accordance with the principles laid down in the Act and that such mistake or non-compliance did affect the result of the election.

Mr *Chinamasa* submitted, in his heads of argument, that it was not necessary in terms of the Act for the voters roll to be printed. Mr *Biti,* on the other hand, argued that it was necessary and that the decision of the second respondent to permit people whose names did not appear on the printed voters roll to vote in the election amounted to a fatal irregularity. In s 3(1) of the Act, various terms are defined. "Voter" means a person who is entitled to vote and is registered on a voters' roll. "Registered", in relation to a voter, means registered in terms of Part V of the Act for the purpose of voting at an election. "Voters' roll" means the voters' roll or supplementary voters' roll for any constituency prepared and maintained under the Act by the Registrar - General of

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Elections.

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Section 8 of the Act provides that each constituency registrar shall have charge and custody of the voters roll for his constituency and that the roll shall be kept in such form as may be prescribed. In terms of subs (3) thereof, a constituency registrar may, for the purposes of keeping his voters' roll, use the claim forms submitted for registration or transfer of registration. Section 18(3) of the Act provides that a constituency registrar may, whenever he considers it to be desirable, have the voters' roll for his constituency printed. Where a voters' roll has been printed immediately before a general election or by-election and it contains the names of the voters who will be entitled to vote at that election, the Registrar - General of Elections may, in terms of subs (4) of s 18, publish a notice in the *Gazette* declaring that the printed voters' roll shall be used for the purposes of the identification of voters at that election. Part V of the Act regulates the registration of voters. Section 21 of the Act deals with claims for registration and s 22 provides for transfers of registration from one constituency to another. Subsection (3) of s 21 provides that if the constituency registrar is satisfied that the claimant is entitled to be registered as a voter on the voters roll for his constituency he shall, pursuant to the claim form and subject to the other provisions in Part V, enter the claimant's name and particulars on the roll. (I would mention, at this stage, that the Registrar - General of Elections is empowered by s 15(3) of the Act to assume and exercise any function which the Act vests in a constituency registrar.) In terms of s 23 of the Act, on the registration of a voter he must be furnished with a voters registration card unless he has been issued with an identity document or notice in terms of s 7 of the National Registration Act [*Chapter 10:17*] (hereinafter referred to as a "national identity document").

The procedure to be followed in connection with the polling at an election is set out in Part XIII of the Act. Section 56 of the Act deals with the number of votes and identification of voters. In terms of s 56(1), every voter registered on the voters roll for the constituency concerned shall be entitled to vote. The presiding officer at the polling station may, in terms of s 56(2), put to an applicant for a ballot paper such questions as he considers necessary to ascertain whether or not the applicant is registered as a voter for the constituency. Section 56(3) provides that the presiding officer, unless otherwise directed by the Registrar - General of Elections, must require an applicant for a ballot paper to produce his voters registration card. If that card shows that the applicant for a ballot paper is registered for the constituency, then the card is marked and the applicant is handed a ballot paper. However, the provisos to subs (3) specify three circumstances when it is not necessary for an applicant for a ballot paper to produce a voters registration card, which are:

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(a) where the applicant has received a postal ballot paper and hands it in; or

(b) where a declaration has been made in terms of s 18(4) of the Act that a printed voters

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roll shall be used for the purposes of identifying voters; or

(c) where the applicant produces a national identity document.

From the above, it seems clear to me that the Act does not require that the voters roll must be printed. Despite the arguments put forward by Mr Biti, I am not persuaded that where s 18(4) of the Act provides that the Registrar - General of Elections may publish a notice declaring that the printed voters' roll shall be used for the purposes of the identification of voters at that election the Legislature intended the provision to be mandatory ie the "may" should be interpreted as meaning "shall". My reasons for coming to that conclusion are as follows. Firstly, s 17(3) of the Act provides that the claim forms for registration or transfer of registration may be used for the purpose of keeping the voters' rolls. Secondly, s 18(3) of the Act provides that the constituency registrar may have the voters roll printed whenever he considers it necessary. It does not provide that he shall have the roll printed immediately before a general election or by-election. Thirdly, s 18(4) of the Act provides that the Registrar - General of Elections may publish a declaration that the printed voters' roll shall be used for the purpose of identifying voters. Finally, s 56(3) of the Act provides that at the polling station an applicant for a ballot paper must produce his voter's registration card unless a declaration has been made in terms of s 18(4) of the Act. If s 18(4) were mandatory, s 56(3) would be unnecessary in its present form. There would be no need for an applicant for a ballot paper to produce his voter's registration card or national identity document.

Since the Act does not require that voters' rolls must be printed and that printed voters' rolls must be used to identify applicants for a ballot paper, is there any other basis on which it can be said that the election in the Harare South constituency was not conducted in accordance with the principles laid down in the Act? From the affidavit filed by the Registrar - General, it appears clear to me that the principles laid down in the Act were violated. As I have pointed out above, the Act requires that a registered voter can only vote in the constituency for which he is registered. The fact that at the time of the election he is actually resident in another constituency is irrelevant. If a voter changes his place of residence from one constituency to another and wishes to cast his ballot in the constituency to which he has moved, then he must apply for a transfer of registration. The Registrar - General states in his affidavit that an applicant for a ballot paper whose name did not appear on the printed voters

roll was required "to prove normal residence status in the constituency". That is not the same as proof of the constituency for which the applicant is registered. The use of village heads to testify as to the residence status of intending voters was also highly irregular and violated the principles of the Act. A village head would be able to confer voting status on a person who was not eligible therefor or to deny the vote to a registered voter merely by giving false evidence as to his place of residence.

In his affidavit, the Registrar-General says that it was decided that all voters whose registrations had not been put on the printed roll by 19 March were to be allowed to vote on production of a certificate of registration accompanied by a national identity card and, if need be, proof of

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residence in the constituency. Such a statement illustrates his misunderstanding of the provisions of the Act. In terms of s 56(3) of the Act, the primary requirement from an applicant for a ballot paper is a voter's registration card. Therefore, if a person produces a voter's registration card he or she must be given a ballot paper. The Registrar - General cannot decide otherwise. Furthermore, in terms of proviso (iii) to s 56(3) of the Act, an applicant for a ballot paper may produce a national identity document **in lieu** of a voters registration card, not **in addition** thereto. Therefore it was not right that persons who produced a voter's registration card should be required to produce, in addition, a national identity document or a drivers licence or passport in lieu thereof. Furthermore, the applicant must produce proof of the constituency in which he is registered, not resident, at the time of the election. The objection filed by Dongo to certain votes clearly shows that the registration procedures were defective. Voters were registered without proper identification of their places of residence.

The hours fixed in terms of s 53 of the Act for voting at the general election were 7 am to 7 pm. In terms of s 53(4), the presiding officer is authorised to keep a polling station open after the closing hour but only to enable people then at the station to record their votes. From the affidavit filed by Joshua Cohen and from the monitor's report contained the affidavit by the Vice-chairman of the Electoral Supervisory Commission, it would appear that either the Registrar - General or the fourth respondent or an official in the department of the Registrar - General extended the voting hours at polling stations in the Harare South constituency to 8 pm. The Registrar - General, in his opposing affidavit, responded by saying that solely for the purpose of clearing all the intending voters who were in the queues, all polling stations were instructed to remain open in terms of s 53(4) of the Act. It seems that at some polling stations a different instruction was received. From the papers

it is not possible to say whether the extension of the voting hours did affect the results of the election. It is an indication, however, that some officials were inclined to make rulings they thought appropriate, whether or not they were authorised by law. In *Putter v Tighy* 1949 (1) SA 1070 (T) the court held that the election concerned had not been affected by the fact that a polling booth had been shut for 15 minutes when it should have been open. It seems to me that the extension of the closing hours of voting to 8 pm, although improper, would not have affected the results of the election in the Harare South constituency.

By consenting to judgment against the second and fourth respondents, the *Attorney-General* impliedly conceded that the elections in the Harare South constituency were not conducted in accordance with the principles of the Act. For the reasons set out above, I consider that such concession could not have been avoided. It appears from the evidence that the voters' rolls have not been properly kept and that no effort has been made for very many years to update the rolls. Obviously no competent person scrutinised the rolls before they were printed. From the objections raised by the applicant it is apparent that voters were improperly registered in that details of their places of residence were either not set down in their claim forms or were not properly recorded. How could people be registered for a constituency if the only address given was a post office box number?

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Although the Act does not require that only printed rolls be used for identifying voters at an election, I would strongly recommend that this procedure be adopted. It appears from the evidence placed before the court that the system of issuing voter's registration cards to voters has not been efficiently maintained. It is also clear that it is virtually impossible for a voter who does not have a voter's registration card to prove in which constituency he is registered. As I have pointed out, proof of residence at the date of the election is not sufficient. An applicant for a ballot paper must prove that he was resident in the constituency at the time he was registered as a voter and that he was in fact registered for that constituency. The proof of registration as a voter is crucial not only at the polling booths but also at the nomination of candidates. Section 46(1) of the Act requires that a nomination paper must be signed by at least ten persons who are registered on the voters' roll for the constituency or which the candidate seeks election. The absence of a proper, printed voters' roll could make it very difficult for a candidate to ensure that his nomination is in order. Furthermore, for candidates at an election to canvass support, the existence of an accurate, printed voters' roll would obviously be essential.

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In *Gerdener v Returning Officer & Anor* 1976 (2) SA 663 (N) the court considered the effect of s 91 of the Electoral Consolidation Act 46 of 1946 of South Africa which is similar to s 142 of the Act. At 674 JAMES JP said:

> "In the case of *Putter v Tighy* 1949 (2) SA 400, the Appellate Division interpreted this section and its views are perhaps best summed up in the judgment of TINDALL JA at p 408:
>
> > 'The history above-mentioned of s 91 shows, therefore, that it has its origin in the curative section in the English statute. Accordingly it is permissible to consider the interpretation placed by British Courts on the corresponding English section, bearing in mind of course any material difference in the language used. In *Woodward v Sarsons LR* 10 CP 733 at pp 750-751, the court held that -
> >
> > > "the non-observance of the rules and forms which is to render the election invalid must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of the voters, or, in other words, the result of the election."
> >
> > Reverting to our s 91, in my opinion, its true interpretation is that which I have indicated above, namely, that where there has been a mistake, or even a non-compliance with Chapter III amounting to an infringement of a principle laid down by that chapter, the court shall not set aside the election if it is satisfied (1) that the election as a whole was substantially conducted in accordance with the principles laid down in Chapter III; and (2) that such non-compliance did not affect the result of the election. On this view of s 91 the question whether the mistake or non-compliance is sufficient to prevent the curative provision from operating becomes a matter of degree.'
>
> TINDALL JA also dealt with the question of onus in the following passage at p 410:
>
> > 'Passing to the onus of proof under s 91, it seems to me clear that, once it has been shown by the petitioner that a non-compliance with the provisions of Chapter III has occurred, the onus lies on the respondent to prove that both conditions mentioned in the curative section have been satisfied.'"

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SMITH J

In *Pio v Smith* 1986 (2) ZLR 120 (S); 1986 (3) SA 145 (Z) at 171 MFALILA J quoted with approval the following views that were expressed by GROVE J in the *Borough of Hackeney Case*; *Gill v Reed & Holms* (1879) 31 LTR 69:

> "An election is not to be upset for a triviality. It is not to be upset because the clock at one of the polling stations was five minutes too late or because some of the voting papers were not delivered in a proper manner, or were not marked in a proper way. The objection must be something substantial, something calculated really to affect the result of the election."

I was satisfied that the irregularities which I have mentioned above are not mere trivialities. They are substantial and affected the result of the election. Accordingly, I determined that Mwashita was not duly elected and that no other person was entitled to be declared duly elected as envisaged in s 135(3)(c) of the Act. I did not make the orders consented to by the *Attorney-General* that the Registrar - General prepare a printed voters roll for the Harare South constituency of voters who had registered up to 10 August 1995, because the court has no authority to do so. In my view, it would be preferable if a printed voters' roll was prepared. The relevant date can only be fixed by the President.

With regard to costs, Mr *Chinamasa* conceded that the Registrar - General should pay the applicant's costs. I considered that, having regard to the circumstances, it would be just and reasonable to relieve Dongo and Mwashita from all costs because of the failure on the part of the Registrar - General to ensure that the principles of the Act were complied with. There was no evidence that the improper performance or failure of performance of his functions by the Registrar - General was *mala fide*. Accordingly, in terms of s 135(7)(a) of the Act, I ordered that the costs of Dongo and Mwashita in connection with this action be paid from the Consolidated Revenue Fund.

Honey & Blanckenberg, applicant's legal practitioners

Chirunda & Partners, first respondent's legal practitioners

Civil Division, Attorney-General's Office, second and fourth respondents' legal practitioners

Kantor & Immerman, third respondent's legal practitioners

S v NYAJENA 1995 (2) ZLR 242 (HC)

Court **High Court, Harare**

Adam J

Criminal review

30 August 1995 Judgment No. HH-105-95

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Flynote

Criminal procedure (sentence) - fraud involving large amount of money committed by two persons - appropriate sentence

Headnote

The accused was convicted of a number of counts of fraud involving a total amount of $267 468,21. The accused committed these frauds jointly with another person, but he was the brains behind the crime. The money taken was shared with his fellow criminal, with the accused getting about $90 000. None of the money appropriated was recovered. The accused was sentenced to seven years' imprisonment, of which one year was conditionally suspended. The review judge declined to certify the proceedings as being in accordance with real and substantial justice. He held that a sentence in the region of 13 to 15 years would have been appropriate. He pointed out that a person of 29 years of age should not be treated as a young offender for the purposes of sentence. He also pointed out that the accused should not have been sentenced on the basis that he had acquired only $90 000 as a result of the crime. He was responsible for the loss of the entire amount derived from the fraud.

Cases cited:

S v Wakiri 1981 ZLR 51 (A)

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

S v Nyoni HB-24-84

S v Madzima HH-36-84

S v Tsvanhu S-70-84

S v Sharma S-117-84

1995 (2) ZLR p243

ADAM J

S v Chirata & Ors S-4-86

S v Chitongo S-122-86

S v Mawere S-87-86

S v Mpofu S-24-80

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

S v Zindoga 1988 (2) ZLR 86 (S)

S v Gorogodo 1988 (2) ZLR 378 (S)

S v Mazurura HH-35-89

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

S v Zhou & Ors S-153-91

S v Hundizarira HB-12-91

S v Chiunye HH-240-91

S v Mvula S-69-92

S v Patel HH-169-93

S v Chamunorwa 1993 (2) ZLR 49 (H)

S v Chirwa HH-79-94

S v Ramushu & Ors S-25-93

R v Sargeant (1974) 60 Cr App Rep 74 (CA)

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

Judgment

Adam J: The accused was convicted on his guilty plea of 27 counts of fraud involving the total amount of $267 468,21. He was sentenced by the regional magistrate, with all the counts treated as one, to seven years' imprisonment with labour of which one year was suspended for five years on appropriate conditions.

The agreed statement of facts were that the accused was employed by Zimbank International Branch, at First Street, Harare as an assistant administration officer. His duties included writing vouchers from the head office suspense accounts. Two of his friends, Pikitayi Makuvise and Forbes Jangira had savings accounts with Zimbank, First Street, Harare where the accused was employed. Between 15 March 1994 and 22 February 1994 on diverse occasions the accused wrote false vouchers in favour of Makuvise and Jangira. In this way he transferred $93 370,90 into Makuvise's account and $174 091,31 to Jangira's account. Both of his friends withdrew the monies transferred into their account. This was shared by the three of them. The accused had no right to do this. Of the $267 468,57 withdrawn, nothing was recovered.

In mitigation of sentence, the accused said that he was not married, aged 29 years, with his mother, four sisters and two nieces as dependants. He was

earning $2 700 per month and he had no savings. He has household effects, a house bought in Ruwa for $90 000 and a motor vehicle valued at $25 000. He told the magistrates court that he got a third of the amount transferred to his friends' savings account. He agreed when asked that he was "the brains behind the fiddle".

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The prosecutor told the trial magistrate that the accused had a Ford X 3 vehicle, an Opel Kadett vehicle and a Peugeot 504 sedan vehicle and that both his friends were in police custody. In his response to this, the accused indicated he only had the Opel Kadett and that the other two vehicles belonged to his two friends.

In sentencing him the trial magistrate took into account that he was a "young first offender" and what the accused had stated in mitigation. The trial magistrate found that there were more aggravating features than mitigatory ones and that from the money shared the accused got about $90 000. He indicated that the accused as a bank employee was in a position of trust which had been abused over a long period; that this was a carefully planned and premeditated crime; that the persistency with which the accused proceeded and the deliberateness of his action reflected a high degree of criminal resolve and determination on his part until he was caught. The trial magistrate referred to the prevalence of theft from employers; that there was no element of sudden temptation as the accused handled money daily; that this was not a one-off type of crime and the amount involved was staggering - sufficient to acquire a house and a motor vehicle. It seemed to the trial magistrate that his employers could still recoup the accused's share. He decided against referring, in terms of the Magistrates Court Act, the matter on the issue of sentence to the Attorney-General because the accused had shared the proceeds and because of the type of sentences being meted out by the High Court in crimes of this magnitude.

There is little doubt that the trial magistrate erred. The accused, aged 29 years, should not have been treated as a "young offender". Some person between 19 and 26 years of age can be said to be a young offender. The trial magistrate did not cite any decisions of this court involving large sums of money where the type of sentence imposed by him was meted out. Further, he was in error when he said that because the amount was shared between the three the sentence he imposed was proper.

Taking into consideration all the features of the offence and the quantum of sentences imposed in the past, I think the accused's conduct warranted a

sentence in the region of 13 to 15 years, with about seven years suspended on condition of restitution.

In *S v Wakiri* 1981 ZLR 51 (A) at 52 FIELDSEND CJ observed that one must look primarily at the sentence which the offence should attract and once that is done to decide what should be suspended.

Looking at previous decisions of this court and the Supreme Court would be illuminating.

In *S v Chikopa* 1984 (1) ZLR 209 (A) an acting senior clerk at the Harare Magistrates Court over a period of 5 months, by falsifying receipts, stole $80 351. The High Court imposed a sentence of 12 years. The Supreme Court did not consider this sentence out of line with other sentences imposed. The cases of *S v Nyoni* HB-24-84 and *S v Madzima* HH-36-84 were considered. However, the Supreme Court suspended three years of the High Court sentence on condition of

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good behaviour.

In *S v Tsvanhu* S-70-84 the accused, a cashier, was convicted of theft of $45 196,11 from his employer over a two-year period. The High Court sentenced him to 6 years. The Supreme Court upheld that sentence.

In *S v Sharma* S-117-84 the accused between September 1982 to March 1983 stole $238 588,08 of which $185 658,06 was recovered and so the loss was $52 930,02, but $4 500 was repaid leaving $48 530,02. The High Court sentenced him to 20 years, MCNALLY JA said at p 6 of the cyclostyled copy of the judgment:

> "It is admittedly a serious case involving theft from an employer, breach of trust, and a course of conduct over a period of months.
>
> How does one begin to measure the outer limits of a sentence in a case of this magnitude? One may say that even murder with actual intent often attracts a sentence of 16 to 18 years. One may ask - what sentence would be appropriate where a quarter of a million dollars is stolen and nothing is recovered? What sentence would be appropriate where five or six million dollars is involved?
>
> These considerations and suggestions suggest to me that a twenty year sentence for a crime of dishonesty unaccompanied by violence must be approaching the outer limit of what any court in this jurisdiction would impose for such a crime."

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The Supreme Court concluded that the sentence was manifestly excessive and so reduced it to 13 years' imprisonment with labour.

In *S v Chirata & Ors* S-4-86 $247 000 was stolen. The first accused got 15 years; the second accused 18 years (because of a previous conviction) and the third accused got five years, of which two years were suspended, from the High Court. The Supreme Court allowed the appeal of the third accused and altered the sentence of the first accused to 10 years and of the second accused to 13 years.

In *S v Chitongo* S-122-86 $30 000 was stolen. The High Court sentence of nine years, of which two years was suspended, was altered by the Supreme Court to six years, of which two years were suspended.

In *S v Mawere* S-87-86 the accused, an executive secretary, was convicted on one count of theft and one count of fraud. He was sentenced by the Regional Magistrate to 12 years for the theft count and two years for the fraud count. The amount involved was $19 380,14. The Supreme Court substituted a sentence of five years of which two years was suspended.

In *S v Mpofu* S-24-80 the accused, an assistant financial accountant, was convicted of 11 counts of theft by conversion involving $48 714. He was sentenced by the High Court to nine years of which two years was suspended on condition of good behaviour and three years on condition of restitution. The Supreme Court upheld that sentence.

In *S v Kanhukamwe* 1987 (1) ZLR 158 (S) a senior public servant (an Under Secretary) stole

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$100 000 during a 16-month period. The High Court imposed 20 years' imprisonment. The Supreme Court held that a lengthy period of imprisonment was justified, with a portion suspended on condition of restitution, and the High Court was correct in holding that it was inappropriate, where a lengthy imprisonment term is imposed, to suspend a portion on conditions of good behaviour. It found it difficult to support a sentence of more than 15 years in cases like this. The Supreme Court substituted a sentence of 15 years, of which seven years was suspended on condition of restitution.

In *S v Zindoga* 1988 (2) ZLR 86 (S) the accused was convicted of 27 charges of theft of R19 743,03 from the Zimbabwe Trade Mission in South Africa over a period of eight months. The High Court imposed six years' imprisonment of which two years was suspended. The Supreme Court altered the sentence

ADAM J

by suspending 18 months of it on conditions of good behaviour and a further two years on condition of restitution.

In *S v Gorogodo* 1988 (2) ZLR 378 (S) the accused was convicted of 55 counts of theft by conversion of $730 42,63 over an 18-month period. The trial magistrate imposed a globular total of 17 years of which five years was suspended. The Supreme Court found this sentence disturbingly severe and substituted a sentence of 12 years.

In *S v Mazurura* HH-35-89 the accused, a female teller at a building society, was convicted of 96 counts of theft by conversion of $13 893 over an 18-month period. On appeal, the High Court upheld the sentence of eight years of which one year was suspended on conditions of good behaviour and two years on condition of restitution.

In *A-G v Paweni Trade Corp (Pvt) Ltd & Ors* 1990 (1) ZLR 24 (S) the second accused was convicted of eight counts of fraud involving actual prejudice of $1 352 906,20. The High Court sentenced him to 25 years. The Supreme Court reduced it to 18 years, being influenced by the remarks of McNALLY JA in *S v Sharma supra.*

In *S v Zhou & Ors* S-153-91 the accused was convicted of theft by false pretences of $40 000. The Supreme Court altered the sentence of seven years by suspending four years on condition of restitution.

In *S v Hundizarira* HB-12-91 the accused was convicted of six counts of theft of $61 989,25 through a scheme involving false invoices. The High Court upheld his sentence of 12 years of which three years was to run concurrently.

In *S v Chiunye* HH-240-91, a Rural Council secretary, was convicted of 27 counts of theft of $24 000 over a two-year period. The High Court sentenced him to seven years, of which one year was suspended on condition of restitution and one year on conditions of good behaviour.

In *S v Mvula* S-69-92 the accused was convicted of 11 counts of theft by conversion of $12 325,31. The sentence of 11 years, of which four years were suspended on conditions of good

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behaviour and four years on condition of restitution, was reduced by the Supreme Court to seven years, of which three years was suspended on conditions of good behaviour and two years on condition of restitution.

In *S v Patel* HH-169-93, the accused stole an editing machine valued at

ADAM J

$250 000 which was recovered. The accused, with two others, was sentenced to five years two years, of which were suspended for three years on conditions of good behaviour. The High Court on appeal upheld that sentence.

In *S v Chamunorwa* 1993 (2) ZLR 49 (H) the accused stole Peugeot 504 pick-up parts valued at $1 743 171,90 of which $1 722 171,90 worth was recovered. The High Court, after referring to *S v Sharma supra* and to *A-G v Paweni Trade Corp (Pvt) Ltd supra*, sentenced him to 15 years, of which three years were suspended on condition of restitution of the outstanding amount.

In *S v Chirwa* HH-79-94 the accused, a postmaster, stole $12 000 over a three-month period which he converted to his own use. On appeal the High Court altered the sentence of 12 years by suspending five years on condition of restitution.

In *S v Ramushu & Ors* S-25-93 the accused were convicted of armed robbery of emeralds valued at $160 000 to $200 000 of which not more than half was recovered. The emeralds were shared with one Abel Nziramasanga, the ringleader and not one of the accused, who took most for himself. The High Court held that although the third accused played a lesser role than the others he played a significant one. All were sentenced to 12 years, of which five years were suspended on condition of good behaviour and two years on condition of token restitution. The Supreme Court upheld that sentence. It did not suggest that because most of the emeralds were taken by Nziramasanga that the accused should receive a lesser sentence.

Clearly the trial magistrate went wrong in approaching the sentence by equating the accused's theft as being about $90 000. Even on that score the trial magistrate's approach was not in keeping with similar sentences imposed for that amount.

I would like to repeat what LAWTON LJ (as he then was) said in *R v Sargeant* (1974) 60 Cr App Rep 74 (CA) at 77:

> "The Old Testament concept of an eye for an eye and a tooth for a tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked; it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentence they pass. The courts do not have to reflect public opinion. On the other hand

ADAM J

they must not disregard it. Perhaps the main duty of the court is to lead public opinion."

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I also agree with HOMES JA in *S v Sparks & Anor* 1972 (3) SA 396 (A) at 410:

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

The sentence passed on the accused did not satisfy those requirements. In my view it was not appropriate for the foregoing reasons. Accordingly, I decline to certify the proceedings as being in accordance with real and substantial justice.

S v MUVANDIRI 1995 (2) ZLR 250 (HC)

Court **High Court, Harare**

Malaba J

Criminal review

20 September 1995 Judgment No. HH-110-95

Flynote

Criminal procedure - review - court's powers on review - accused charged on main and alternative charge - convicted on alternative charge though evidence supported main charge, not alternative - court's power to substitute conviction on main charge and to remit case for sentence - High Court Act [Chapter 7:06]- s 29(2)(viii)

Headnote

The accused was charged with rape, alternatively, with contravening s 3(1)(d) of the Criminal Law Amendment Act [*Chapter 9:05*], that is, having sexual intercourse with an imbecile. The accused admitted intercourse, but claimed consent. A clinical psychologist gave evidence that, though mentally retarded, the complainant was not an imbecile. The magistrate, having simply repeated in his judgment the evidence of the State witnesses and the accused, held that the complainant was mentally retarded and convicted the accused on the alternative charge. After hearing evidence in mitigation, he adjourned to consider sentence and then came across authorities dealing with the evidence required to prove imbecility. He considered that the facts showed that the accused had raped the complainant and that she was not shown to be an imbecile. He sent the matter on review for correction.

Held, that the High Court has power on review to quash a conviction erroneously returned. This power included the power, after setting aside a verdict erroneously entered on the alternative charge, to convict a person on a main charge on which he had been acquitted, provided that the evidence supported the main charge.

MALABA J

Cases cited:

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S v Nyathi 1982 (2) ZLR 197 (H)

S v Mbizi 1989 (3) ZLR 317 (S)

S v Chamukwanda 1990 (1) ZLR 172 (H)

S v Matekukamizora HH-192-94

S v Hutchings 1970 (1) RLR 176 (H)

S v Sibanda 1978 (1) RLR 182 (G)

S v Hove 1981 ZLR 610 (H)

R v V 1953 (3) SA 315 (A)

R v Tru Products (Pty) Ltd & Ors 1954 (4) SA 356 (C)

R v Kharwa 1956 (1) SA 5 (N)

R v M 1961 (1) SA 534 (T)

S v Beeharie 1966 (1) PH H122 (N)

Judgment

Malaba J : The accused was charged before the regional magistrates court with rape, alternatively contravening s 3(1)(d) of the Criminal Law Amendment Act [*Chapter 9*] (having sexual intercourse with an imbecile). The accused pleaded not guilty, but the trial magistrate convicted him of the alternative charge after a full trial. He was acquitted of the main charge of rape.

In the defence outline, the accused said he was left in the lodger's room by the complainant's brother when he went to work the previous evening. At 6 am he was lying on the bed when the complainant knocked at the door. He opened the door and the complainant told him she was afraid of sleeping alone as her mother had gone to Mbare. He refused to let her into the room. She then sat in the verandah until he decided to invite her into the room. She came into the room and sat on a sack on the floor. It was then that he proposed to make love to her and she accepted the proposition. As he held her by the shoulders to take positions for sexual intercourse a woman walked into the room. He therefore did not have sexual intercourse with her.

The complainant's evidence was that she went to the toilet at 6 am. On her way back to the bedroom the accused was standing at the doorway to the lodger's room. He asked her to come into the room. She obliged. The accused asked her to sit on the bed and she did as he directed. He proposed love to her but she turned him down saying she was still interested in going to school. The accused said he would give her money to buy sweets. He grabbed her by the shoulders and laid her on the bed. The accused removed her pair of pants and had sexual intercourse with her. She said she screamed because she was not consenting to sexual intercourse. The accused accomplished his purpose.

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MALABA J

She had not had sexual intercourse before and was bleeding from her private parts. The accused gave her a towel and said she should wipe the blood off her body.

When the accused opened the door to let her out one of the female lodgers was at the door. She asked her what had happened and she told her.

Mrs Elizabeth Kamutengo is the female lodger who was at the door. She told the court that she was in her own room when she heard the complainant screaming at 6 am from a room she knew was not occupied by a woman. She went to the door to investigate. The accused opened the door and the complainant emerged from the room crying. The complainant was holding a piece of cloth with which she was wiping blood from her private parts. She asked the complainant what had happened. After the complainant had reported to her what had happened, she advised the complainant to go and make a report to her aunt.

When the accused gave evidence in chief he abandoned the defence outline. He now admitted sexual intercourse, but claimed that it was with the complainant's consent. The accused also admitted that the complainant screamed, but claimed that the scream was an expression of ecstasy.

The medical report showed that penetration had taken place, as the complainant had her hymen perforated. The clinical psychologist who examined the complainant's mental condition found that she suffered from *grand mal* seizures. He said she suffered from moderate mental retardation which did not affect her memory recall capacity. She was not an imbecile.

The trial magistrate simply repeated the evidence of State witnesses and the accused before concluding that the complainant was mentally retarded so as not to know what the accused had done to her.

Without much ado he returned a verdict of guilty of the alternative charge and acquitted the accused of the main charge of rape.

After recording mitigation, the trial magistrate remanded the accused to another day for sentence. In the interim period the trial magistrate came across the following decided cases which are authorities for the principle that mental retardation is not synonymous with imbecility and that the degree of mental retardation required to constitute imbecility was a question of fact provable by medical evidence: *S v Nyathi* 1982 (2) ZLR 197 (H); *S v Mbizi*

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1989 (3) ZLR 317 (S); *S v Chamukwanda* 1990 (1) ZLR 172 (H); *S v Matekukamizora* HH-192-94.

The trial magistrate then realised that the evidence adduced by the complainant and her witness, corroborated as it turned out to be by the accused's admissions and the screams,

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proved the offence of rape beyond reasonable doubt. The medical evidence clearly established that the complainant was not an imbecile. The verdict of guilty of the alternative charge was itself not returnable on the facts proved because the essential element of the complainant being an imbecile had not been established. In *S v Matekukamizora supra* I had the occasion to state at p 4 of the cyclostyled judgment that:

> "The fact of the complainant's mental condition at the time she had sexual intercourse with the accused formed part of the *actus reus*. The onus was on the State to prove *aliunde* that the offence contained in s 3(d) of the Act was committed."

There is no doubt that the evidence led by the State had proved the accused's guilt on the main charge of rape.

Having noticed his error of judgment the trial magistrate forwarded the record of proceedings to the High Court with a request that the conviction on the alternative charge be set aside and corrective measures taken to have the proper verdict returned.

The proceedings are clearly not in accordance with real and substantial justice and are therefore reviewable under s 29 of the High Court Act [*Chapter 7:06*]. There was an irregularity which manifested itself, in the trial magistrate holding a mistaken view of the law and bringing that erroneous view to bear on the facts of the case, resulting in a wrong decision. A review court is, of course, not concerned with the correctness or otherwise of the decision, but the process of arriving at that decision.

In *S v Hutchings* ng factors existed in favour of the new 1970 (1) RLR 176 (H), GREENFIELD J quashed a conviction before sentence where a magistrate had after thoughts, following the conviction and before sentence, on the propriety of the conviction. The learned judge reasoned that it was "clearly undesirable that the accused should be sentenced if, inevitably, the conviction has to be quashed."

The power of the High Court to quash on review a conviction erroneously returned before sentence was endorsed by GUBBAY J (as he then was) in *S* v

MALABA J

Sibanda 1978 (1) RLR 182 (G) at 185B-C. In *S v Hove* 1981 ZLR 610 (H) the magistrate convicted the accused of a lesser offence of attempted possession of emeralds in contravention of s 3(2) of the Precious Stones Trade Act [*Chapter 21:06*], when the evidence proved the substantive offence. GUBBAY J (as he then was) found that the magistrate had misdirected himself. With the concurrence of NEWHAM J he altered the verdict to guilty as charged and imposed the attendant mandatory minimum sentence of three years' imprisonment.

My research has, however, failed to produce a case decided within our jurisdiction where a verdict of guilty of the alternative charge had been quashed and the accused found guilty of the main charge on which he had been acquitted by the court *a quo.* A line of decisions by South African courts, starting with the decision in *R v V* 1953 (3) SA 315 (C), shows that a review court has power to quash a conviction on an alternative charge and return a verdict of guilty of

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the main charge, provided that offence is proved by the evidence led at the trial.

In *R v V supra,* the accused was charged with sodomy, or alternatively, contravening s 21 of Ordinance 46 of 1903 (a male person aiding another male person to commit acts of gross indecency with another man). He was found not guilty of the main charge but guilty of the alternative charge. An appeal was allowed against the conviction on the alternative charge because the evidence had not proved that offence. There was, however, evidence proving the commission of attempted sodomy. Section 98 (2) of the Magistrates Court Act 32 of 1944 provided that, if the accused was convicted on one of two or more alternative counts, the court of appeal could, when quashing the conviction, convict the accused on the other alternative count. It also provided that the court could give such judgment "as the magistrate's court ought to have given". (See s 29(2)(b) (iii) of the High Court Act.) The prosecution asked that the accused be convicted of attempted sodomy.

GREENBERG ACJ said at 322E-323A:

> "Mr *Dison* raised two objections to this contention. The first was that the power in regard to alternatives only applied to the case where a magistrate convicting on one of two or more alternative charges returned no verdict in regard to the other or others and not to a case such as the present where the appellant was actually acquitted on the charge on which the Crown now asks for a conviction. He based this argument on the contention that it is a fundamental principle of our law that, once an accused person has

MALABA J

> been acquitted on a charge, the matter is finally concluded and no court of appeal can alter that acquittal, into a conviction.
>
> But this sacrosanctity of an acquittal has been encroached upon by the Legislature; s 104 of the Act entitled the court of appeal to reverse a decision on a point of law which has resulted in an acquittal by a magistrate and s 103 (4) provides that on an appeal on facts, the court of appeal may increase the sentence which apart from special legislation, had enjoyed the same security, in regard to an increase as an acquittal. The reason advanced, therefore, affords no ground for not giving the passage in regard to alternatives their plain meaning and this meaning does not justify the distinction contended for. The alternative charges in this case are alternatives in terms of s 126 of the Criminal Procedure Act 31 of 1917 (our s 145 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]) I think therefore the court of appeal (and consequently this court also) has the power to convict the appellant on the charge of sodomy and it is unnecessary to consider the other new portion of s 98(2) that I have quoted. I think that this is a case where, if the evidence warrants it, the power should be exercised because if it were not and the appeal was allowed, it would not be competent for the Crown to prosecute the appellant on the sodomy charge in view of the acquittal."

The learned ACTING CHIEF JUSTICE then considered the evidence and concluded that the offence of attempted sodomy had been proved and convicted the accused of that offence.

In *R v Tru Products (Pty) Ltd & Ors* 1954 (4) SA 356 (C) at 367F, after setting aside a conviction on an alternative charge, OGILVIE THOMPSON J (as he then was) accepted the principles stated in *R v V supra* that the court had the power to convict the accused of the main charge of fraud of which he had been acquitted by the court *a quo.* He examined the evidence led at the trial and concluded, however, that the main charge had not been proved.

SELKE AJP, in *R v Kharwa* 1956 (1) SA 5 (N), also recognised the power of the court on

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review to return a verdict of guilty of the main charge after setting aside a conviction on an alternative charge. In *R v M* 1961 (1) SA 534 (T), the accused was charged with bestiality, alternatively contravening s 3(1) of Act 56 of 1923 (entering enclosed land or kraal at night). He was convicted of the alternative charge. Setting aside the conviction DOWLING J considered whether he could on review convict the accused of the main charge. The learned judge accepted that he could, but found that the evidence had not

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proved that offence. He referred to *R v V supra* for authority. Last, but not least, in *S v Beeharie* 1966 (1) PH H122 (N), the accused was charged in the magistrates court of a main and alternative charges. He was convicted of the alternative charge. Setting aside the conviction on review, MILLER J, with the concurrence of FRIEDMAN J, said the court had the power to return a verdict of guilty of the main charge and remit the case to the magistrate for the passing of sentence afresh. He however declined to exercise the court's discretion that way, saying that the prosecution evidence placed before the magistrate was presented on a basis of misguided economy and in particular the charge under the main count was almost unintelligible. "It would appear that this was the main reason why the prosecutor decided to press for the conviction on the alternative charge."

The learned judge also considered the fact that the prosecutor had told the magistrate at the trial that he was not asking for a conviction on the main charge. The accused would therefore have decided not to lead evidence in his defence in respect of the main charge. He would have been prejudiced if a conviction on the main charge were to be returned on review. In 1984 the legislature amended s 29 of the High Court Act by inserting s 29(2)(viii) through s 5(b) of the Criminal Procedure Laws Amendment Act 3 of 1984. Section 29(2)(viii) provides:

> "If the convicted person has been convicted of an offence and the inferior court or tribunal could on the indictment, summons or charge have found him guilty of some other offence, whether because it was, according to law, a competent verdict, or because that other offence had been alleged as an alternative count, and on the findings of the inferior court or tribunal it appears to the High Court that the inferior court or tribunal must have been satisfied of facts which proved him guilty of that other offence, the High Court may, when quashing the conviction, substitute for the judgment of the inferior court or tribunal a judgment of guilty of that other offence whether or not the convicted person had been acquitted of that offence at the trial, and may -
>
> A. ...
>
> B. remit the case to the court or tribunal concerned for the passing of such sentence in substitution for the sentence passed at the trial, whether more or less severe, as may be warranted in law for that other offence."

The legislature recognised the power of a review court to quash a conviction

MALABA J

on an alternative charge and find the accused guilty of the main charge of which he had been acquitted. The conviction on the alternative charge of contravening s 3(d) of the Criminal Law

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Amendment Act [*Chapter 9:05*] is quashed and the accused is found guilty of rape.

The matter is remitted to the trial magistrate for sentence.

Chidyausiku J agrees.

S v NDANGA 1995 (2) ZLR 258 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Criminal appeal

25 September & 2 October 1995 Judgment No. S-149-95

Flynote

Roads and road traffic - negligent driving - test - negligence unrelated to other persons or property - driver overcorrecting and losing control of vehicle - "negligence in the air" - whether relevant to criminal cases

Headnote

The appellant, while driving a motor car on a main road in the country, came behind a bus. He moved to the right to see if the road was clear for him to overtake, but, as it was not, moved back to the left behind the bus. In so doing he over corrected and lost control. His vehicle left the road and struck a tree. In so doing, he was negligent, in that he lost control in a situation where a reasonably skilful motorist would not have done so. It was argued that, as no other person was involved, his negligence was "negligence in the air".

Held, that it is doubtful whether the phrase "negligence in the air" has a useful place in the criminal law. Generally speaking, negligence by a driver on a public road will almost always have the potential to injure other persons on or adjacent to the road, or might be reasonably expected to be there, even if they are not. In this case, the negligence of the driver caused damage to a vehicle owned by a third party, so for that reason, too, it was not a case of "negligence in the air".

Appeal dismissed.

Cases cited:

Ndaba v Purchase 1991 (3) SA 640 (N)

Thomas v Quatermaine (1887) 18 QBD 685

McNALLY JA

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Old Mutual Fire & General Ins Co of Rhodesia & Ors v Britz & Anor 1976 (1) RLR 119 (A)

Donoghue v Stevenson [1932] AC 562 (HL)

R v Oldfield 1969 (2) RLR 223 (A)

S v Ephraim 1971 (1) RLR 14 (A)

R v Collier 1957 R & N 78 (SR)

D P Carter for the appellant

J Chinyama for the respondent

Judgment

McNally JA: The appellant in this case was convicted of negligent driving, in contravention of s 52(2) of the Road Traffic Act [*Chapter 13:11*]. *He was sentenced to a fine of $300 or, in default of payment, thirty days' imprisonment with labour. Mr Carter*, who appeared for him, has conceded that if the appeal against conviction fails he cannot press the appeal against sentence.

The facts, in broad outline, are not in dispute. On 3 August 1993, and at about 2.15 pm the appellant was driving on the Harare - Masvingo Road at approximately the 169,5 km peg. We are told this is somewhere between Chivhu and Mvuma, but the exact location is immaterial. It was an ordinary clear day, the road was straight, and the tar surface was 6,5 m (22 ft) wide. There was a gravel verge, marked on the plan as being 15 m wide. I assume this should read 1,5 m.

The appellant caught up with a bus travelling in the same direction as he was. He was thinking of overtaking it. He moved to his right to see if the road was clear. It was not. He saw a vehicle coming from the opposite direction. So he moved back behind the bus (all this is confirmed by the driver of the oncoming vehicle who gave evidence).

This manoeuvre is one which most drivers have performed hundreds of times. But on this occasion something went wrong. The appellant explained it in his evidence as an "over correction". His defence outline reads:

> "As the accused went back to his lane as aforesaid, he moved to the extreme left lane to let the other vehicle pass safely. As he did so the left wheels of his vehicle encroached on to the aforesaid loose gravel, forcing the motor vehicle to skid and swerve to the extreme left, off the road.
>
> The accused applied brakes but the vehicle proceeded towards the fence

> and hit onto a tree." (The tree was 67,4 m from where skid marks began on the road).

The two basic arguments put up by Mr *Carter* for the defence were:

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1. it was merely an error of judgment;

2. it was "negligence in the air".

The State alleged three grounds of negligence, namely:

1. excessive speed in the circumstances;

2. failing to stop or act reasonably when an accident or collision seemed imminent;

3. failing to keep vehicle under proper control.

ERROR OF JUDGMENT

This phrase has been used to describe situations where a driver has made (to use a neutral word) a mistake which does not amount to negligence. If the mistake or unwise decision or error of judgment, is one which the reasonable man could have made in the circumstances, it may not amount to negligence, or, to put it another way, it may not be proof of negligence.

The situation will usually, though not inevitably, arise in a situation of sudden emergency.

But one must be careful in the use of such phrases. To overtake on a blind rise and have a head on collision with an oncoming vehicle could be called an error of judgment. But it is not an error of judgment which a reasonable driver, acting reasonably, would commit. So an error of judgment, if it is not to be culpable, must be the sort of error which is excusable, by the standards of a reasonable driver. It is difficult to think of examples, other than the "sudden emergency" situation, in relation to road accidents.

I refer here generally to the discussion of the subject in Cooper *Motor Law* vol 2 p 80, to the cases there cited, and to the more recent case of *Ndaba v Purchase* 1991 (3) SA 640 (N).

In the present case the manoeuvre in which the appellant was involved was a simple and commonplace one. He does not allege any factors which might take this case out of the commonplace.

I am thinking here of cases where the bus was emitting impenetrable clouds of exhaust smoke; or where the oncoming vehicle was unlighted and it was

after dark; or where the bus suddenly and unexpectedly braked. None of these complications are suggested. It was a straightforward situation.

So why did the appellant lose control of his vehicle? Why did he run off the road?

He says he "over corrected", and got onto the verge and then lost control because the verge was composed of loose gravel. If he did, then it seems to me that his over correction was negligent. It was not something the ordinary reasonable driver should have done, in what was

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an ordinary situation.

But the police witnesses say two things which contradict his attempted explanation (I use that phrase because the appellant is clearly telling us what he thinks must have happened. He probably does not know exactly how it happened). First the police say there was no significant amount of loose gravel on the verge. But more importantly they say his skid marks begin on the road. So he was out of control of his vehicle before it left the tar. We cannot say whether he lost control because of excessive speed, excessive braking, or too violent a turning of the steering wheel. But we can say he lost control of his motor vehicle in a situation in which a reasonably skilful motorist would not have done so. That amounts to negligence, not a mere error of judgment.

NEGLIGENCE IN THE AIR

This dangerous and sometimes misleading phrase was originally used (in the form "negligence in the abstract") by BOWEN LJ in *Thomas v Quatermaine* (1887) 18 QBD 685 at 694, and cited by BEADLE ACJ in *Old Mutual Fire & General Ins Co of Rhodesia & Ors v Britz & Anor* 1976 (1) RLR 119 (A) at 126. See also per LORD ATKIN *in Donoghue v Stevenson* [1932] AC 562 (HL) at 580.

The phrase is certainly more appropriate in the civil context, where one is concerned to determine the causative link between the negligence of the offender and the loss of the one offended. But I have doubts about the extent of its applicability in the criminal law.

The phrase has certainly been used in a criminal context in our courts. See *R v Oldfield* 1969 (2) RLR 223 (A) at 227 et seq and *S v Ephraim* 1971 (1) RLR 14 (A) at 17A. but it may be noted that in *Oldfield supra,* LEWIS AJP took the clear view that:

McNALLY JA

> "The inquiry here is whether a reasonable man, in the particular circumstances in which the appellant was placed, ought to have foreseen, as a reasonable possibility, that there might be persons on or adjacent to this road at night who might be endangered by his manner of driving."

Mr Oldfield had failed to negotiate a bend and had driven straight into the veld. His conviction was upheld.

In *Ephraim supra* the appellant, driving a heavy articulated lorry and trailer, had approached an 18-foot wide bridge hooting loudly and at a speed which made it clear that he was not willing to give way to a car approaching from the other side, although that car was much closer to the bridge than the lorry was. The driver of the car wisely pulled over to the side. The lorry went past, whereupon the car driver, a policeman, chased and charged him.

LEWIS JA again referred to "negligence in the air". But on analysis his judgment shows that the learned judge, quite properly, concluded that the lorry driver was not negligent at all. His driving was aggressive and deliberate rather than negligent. The conviction was altered to one of driving without reasonable consideration for other persons using the road.

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I am doubtful that, in a criminal context, the phrase "negligence in the air" has a useful place. Generally speaking, negligence on a public road by a driver will almost always have the potential to injure other persons on or adjacent to the road, or who might reasonably be expected to be there even if they are not.

At the other extreme, a person who deliberately and in order to improve his skills, carries out dangerous manoeuvres on a Kalahari salt pan, miles from anyone else, is not being negligent "in the air". He is not being negligent at all.

I say nothing of the fact that in this case the negligence of the driver resulted in damage to a car which was owned by a third party (the Government). Can that be called "negligence in the air?"

I conclude that the actions of the appellant were neither "a mere error of judgment" nor "mere negligence in the air". He was properly convicted.

Mr *Carter* tried finally to persuade us, although the point was not mentioned in his grounds of appeal, nor in his heads, that the negligence was so slight

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McNALLY JA

that the conviction should have been for driving without due care and attention.

There is no doubt a "grey area" on the borderline between the two offences. If a case fell into the "grey area" and the magistrate decided to put the offence into the one category, I do not think it would be open to this court to interfere with his discretionary decision, even if we thought the other was more appropriate.

But speaking for myself, I do not see this case as being in that "grey area". To lose control of your vehicle at relatively high speed on a main road on which other vehicles are present is, to my mind, at least moderate negligence. The facts are much worse than those in *R v Collier* 1957 R & N 78 (SR), to which Mr *Carter* referred us. *Collier,* in my view, must represent the outer limit of an offence normally associated with minor collisions in parking lots or in city centre traffic. The maximum fine is $250 for such offences.

The appeal is dismissed.

Ebrahim JA: I agree

Muchechetere JA: I agree

Chuma, Gurajena & Partners, appellant's legal practitioners

HAMBLY v CHIEF IMMIGRATION OFFICER (1) 1995 (2) ZLR 264 (HC)

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Court **High Court, Harare**

Sandura JP

Civil application

27 July & 4 October 1995 Judgment No. HH-112-95

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 22(1) - right of freedom of movement etc - whether deportation of spouse of female citizen violates right to freedom of movement

Immigration - Immigration Act [Chapter 4:02] - s 14(1)(h) - declaring person to be prohibited person - exclusion of right of appeal - whether that excludes court from hearing application in terms of s 24(1) of Constitution

Headnote

The husband of the applicant, a female citizen of Zimbabwe, had been declared a prohibited immigrant and was going to be deported. The applicant had approached the Supreme Court, which ordered that the applicant should institute an application in the High Court and in that hearing the judge should determine whether the marriage between the applicant and her husband was a marriage of convenience and whether the order declaring the husband a prohibited immigrant was invalid on the grounds of ulterior purpose.

When the application was brought in the High Court, counsel for the respondent argued *in limine* that the court did not have jurisdiction to hear the matter. Alternatively, even if the court did have jurisdiction, the applicant was not entitled to be supplied with reasons for the decision to declare her husband a prohibited immigrant, as the Minister had issued a certificate that the reasons could not be disclosed.

Held, that although in terms of s 22(1) of the Immigration Act a person declared to be a prohibited person in terms of s 14(1)(g) of the Act has

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SANDURA JP

no right of appeal, the present application was not an appeal but an application for a declaratory order in terms of s 24(1) of the Constitution and the court had jurisdiction to hear the application.

Held, further, that the certificate by the Minister in terms of s 22(2) of the Immigration Act that it was not in the public interest to disclose the reasons why the applicant's husband was declared a prohibited immigrant does not bar the disclosure of the reasons in court as s 18(12) of the Constitution provides that where a Ministerial certificate has been issued that it is not in the public interest for any matter to be publicly disclosed, the court must make arrangements for evidence relating to that matter to be heard in camera and it must also take necessary measures to prevent the disclosure of that matter.

Cases cited:

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Rattigan & Ors v Chief Immigration Officer & Ors 1994 (2) ZLR 54 (S)

A P de Bourbon SC for the applicant

F M Zenda for the respondent

Judgment

Sandura JP: This matter came before this court following an order made by the Chief Justice in chambers. The order reads as follows:

"IT IS ORDERED BY CONSENT:

1. THAT the applicant shall within five (5) days hereof institute a court application in the High Court of Zimbabwe, using the present papers as the founding, opposing and answering affidavits, which matter shall immediately thereupon be referred to oral evidence in terms of rule 239(b) before a single judge to determine:

    a. whether or not the marriage between Roslynn Clare Hambly and Andrew George Hambly is a marriage of convenience, in respect of which the respondent bears the onus of proof; and

    b. whether the issue of the notice declaring Andrew George Hambly to be a prohibited person is valid, or whether it was issued for an ulterior purpose, in respect of which issue the applicant bears the onus.

2. That the High Court shall make such findings of fact and law as are necessary to dispose of the dispute in the matter, and may make such order, including such order as to costs, as it considers to be necessary.

SANDURA JP

3. That the Registrar of the High Court is requested to place this matter before a judge as a matter of priority ..."

Following the issue of that order the present court application was instituted. The relief sought by the applicant is set out in a draft order which reads as follows:

"IT IS ORDERED:

1. That it is hereby declared that the right of the applicant under s 22(1) of the Constitution of Zimbabwe to freedom of movement, that is to say, the right to reside in any part of Zimbabwe, has been contravened by the actions of the first respondent (*sic*).

2. That by virtue of the applicant's right under the aforementioned s 22(1) to have her husband residing with her in any part of Zimbabwe, it is hereby ordered that -

    a) the first respondent (*sic*) issue to ANDREW GEORGE HAMBLY, within 30 (thirty) days hereof, such written authority as is necessary to enable him to remain in Zimbabwe on the same standing as any other alien who is a permanent resident;

    b) That the said ANDREW GEORGE HAMBLY be accorded the same rights as are enjoyed by all permanent residents of Zimbabwe, including the right to engage in employment or other gainful activity in any part of Zimbabwe and that the first respondent (sic) impose no restriction on such right.

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3. That the cost of this application are to be borne by the respondent."

Stated briefly, the facts of this case are as follows. The applicant, a female citizen of Zimbabwe, is married to an alien who has been declared a prohibited person in terms of s 14(1)(g) of the Immigration Act [*Chapter 4:02*], and is due to be deported. In the circumstances, the applicant avers that if her husband is deported she would be deprived of her right in terms of s 22(1) of the Constitution of Zimbabwe to reside permanently with him in Zimbabwe. She therefore seeks the relief already set out above and relies upon the Supreme Court decision in *Rattigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S). That case established that a female citizen of Zimbabwe, married to a man who is an alien, being a citizen of a foreign country, has the right to reside permanently with her husband in Zimbabwe.

SANDURA JP

When the application came before me and before any evidence was heard, Mr *Zenda*, who appeared for the respondent, took a point *in limine* and made two submissions. The first submission was that this court has no jurisdiction to hear the matter, and the second submission was that if the court has jurisdiction, then on the basis of the certificate issued by the Minister of Home Affairs, the Minister responsible for the administration of the Immigration Act, no information or reasons on which the decision to declare the applicant's husband a prohibited person was made could be disclosed to the court. After hearing argument from both counsel on the point in limine, I reserved my decision. Shortly thereafter I went on leave and could not prepare this judgment until after I resumed my duties.

Before dealing with counsel's submissions I would like to set out the provisions of s 14(1)(g) of the Immigration Act (the Act) in terms of which the applicant's husband was declared a prohibited person. It reads as follows:

"14. (1) Subject to the provisions of this Act, the following persons are prohibited persons -

(g) any person who, from information received from any source, is deemed by the Minister to be an undesirable inhabitant of or undesirable visitor to Zimbabwe."

Section 21(1) of the Act deals with appeals and provides, *inter alia,* that any person who receives written notice that he is a prohibited person may appeal to the nearest magistrates court. However, this right of appeal is qualified by s 22(1) of the Act which denies some persons the right of appeal in certain circumstances. The section reads as follows:

"No appeal shall lie against a decision made in terms of -

(a) paragraph (a) or (h) of subsection(1) or subsection (6) of section *fourteen*, unless such appeal is directed solely to the identity of the person affected by the decision; or

(b) ..."

What this means in the case of the applicant's husband is that as the decision to declare him a prohibited person was made in terms of s 14(1)(g) of the Act he cannot appeal against that decision, unless the appeal is directed solely to his identity. However, s 23(1) gives him the right to make written representations to the Minister against the decision to declare him a prohibited

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person, provided such representations are made within the time given in that section.

SANDURA JP

I now wish to deal with Mr *Zenda*'s first submission, ie that this court has no jurisdiction to hear the matter. In making that submission, counsel relied upon the provisions of s 22(1) of the Act, which I have already set out in this judgment. As stated earlier, s 22(1) qualifies the right of appeal granted by s 21(1) of the Act by denying some persons, including the applicant's husband, the right of appeal unless the appeal is directed solely to the identity of the person who was declared a prohibited person. In my view, the section has no relevance to the present application which was instituted in terms of s 24(1) of the Constitution of Zimbabwe, and seeks, *inter alia,* a declaratory order that the applicant's right under s 22(1) of the Constitution of Zimbabwe to reside in any part of Zimbabwe has been breached. The application is not an appeal against the Minister's decision in terms of the Immigration Act. In the circumstances, I am satisfied that the court has jurisdiction to hear the matter.

I now proceed to deal with Mr *Zenda*'s second submission, ie that in view of the certificate issued by the Minister of Home Affairs, the reason why the applicant's husband was declared a prohibited person cannot be disclosed to the court. In making this submission counsel relied upon the provisions of s 22(2) of the Immigration Act which reads as follows:

> "No information or reasons on which a decision to withdraw or cancel a permit was made may be disclosed in any court if the Minister certifies that its disclosure is not in the public interest, and no court may question the adequacy of the grounds for any such decision."

He also produced a certificate signed by the Minister of Home Affairs which reads as follows:

> "I hereby certify that to disclose the reasons why Andrew George Hambly was declared a prohibited person in terms of section 14(1)(g) of the Act is not in the public interest."

The issue which I must determine is whether the reasons why the applicant's husband was declared a prohibited person cannot be disclosed to the court. In my view, the Minister's certificate does not bar the disclosure of the reasons to the court. I say so because of the provisions of s 18(12) of the Constitution of Zimbabwe which reads as follows:

> "Notwithstanding anything contained in subsection (4), (10) or (11), if in any proceedings before such court or other adjudicating authority as is

SANDURA JP

> referred to in subsection (2) or (9), including any proceedings by virtue of section 24, a certificate in writing is produced to the court or other authority signed by a Minister that it would not be in the public interest for any matter to be publicly disclosed, the court or other authority shall make arrangements for evidence relating to that matter to be heard *in camera* and shall take such other action as may be necessary or expedient to prevent the disclosure of that matter."

In the circumstances, the issues raised *in limine* on behalf of the respondent are of no

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substance and are dismissed with costs.

Winterton, Holmes & Hill, applicant's legal practitioners

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

S v MORRISBY 1995 (2) ZLR 270 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Application for permanent stay of criminal proceedings

26 September & 5 October 1995 Judgment No S-152-95

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(2) - right to fair trial within reasonable period - delay in handing down judgment - remedy for - correct party to cite in such proceedings

Headnote

The applicant applied for a permanent stay of criminal proceedings on the grounds that her right to be afforded a fair hearing within a reasonable period of time had been violated. The delay in the proceedings had been caused mainly by the delay by the trial magistrate in handing down a judgment.

The application was dismissed because the proceedings had been instituted against the wrong party, namely the State. In this sort of situation, the correct remedy was for the applicant first to pursue her administrative remedies by writing to the magistrate and then, if necessary, to the Chief Magistrate. If these measures proved to be unsuccessful, she could then have instituted this application, citing the magistrate himself as respondent (with a copy to the Director of the Civil Division of the Attorney-General's Office in terms of SI 368/90).

Cases cited:

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

S v Mhosva 1980 ZLR 74 (G)

T Biti for the applicant

J Chinyama for the respondent

McNALLY JA

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Judgment

McNally JA: This is an application for a permanent stay of proceedings on the grounds that the applicant's right to be afforded a fair hearing within a reasonable time has been violated.

Section 18(2) of the Constitution of Zimbabwe, under which this right arises, has been considered on a number of occasions in this court, primarily in In re *Mlambo* 1991 (2) ZLR 339 (S). But this, I think, is the first occasion on which the complaint has been mainly about the delay in handing down a judgment. It has not been disputed that the word "hearing" in the Constitution includes the handing down of judgment. A criminal case is not concluded until the final sentence is delivered: *S v Mhosva* 1980 ZLR 74 (G).

The applicant was charged with a contravention of s 3(1)(a) of the Prevention of Cruelty to Animals Act [*Chapter 19:09*]. The offence is punishable, on a first conviction, by:

> "a fine not exceeding two hundred dollars, or imprisonment for a period not exceeding six months, or by both such fine and such imprisonment."

On a second or subsequent conviction the fine is four hundred dollars and the period of imprisonment one year.

The allegation related to cruelty by neglect of a horse. The horse was apparently destroyed by a veterinary surgeon on 23 December 1991, and the allegation of cruelty related to a period immediately prior to that when the horse was in the custody of the applicant.

The applicant was first summoned to court on 11 October 1993. The case was remanded for trial to 11 January 1994. The docket could not be found. It was remanded to 7 March 1994. The State witnesses were not there. It was remanded to 10 May 1994. The State case was presented on that day, and there was an application for discharge of the applicant. The case was remanded while the magistrate considered the application. On 16 May 1994 he refused the application, the defence case was presented, and the matter was further remanded, pending judgment, to 6 June 1994.

From that date on there was a series of remands, and judgment had still, in late September 1995, not been delivered. It must also be borne in mind that the applicant was obliged, under pain of arrest, to be present on each of the remand dates.

McNALLY JA

She appeared for judgment on 6 June 1994, 12 July 1994, 29 July 1994, 2 September 1994 and 30 September 1994. On that date this present application was launched.

The distinction between this case and the others which have come before this court is that it is not the State (in the sense of the prosecution) which is at fault in relation to the delay in delivering judgment. Mr *Chinyama*, who appeared for the State, has made this point. It is the magistrate, in his independent judicial capacity, who has caused the delay. The prosecution may, for all we know, be just as anxious as the defence to achieve finality in this matter.

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It is, of course, in a broad sense the State, in the sense of the overall state apparatus, which is prejudicing the applicant. But it seems to me that the point made by Mr *Chinyama* is valid to this extent - that the wrong party has been cited as respondent. These proceedings should have been instituted against the individual magistrate in his official capacity.

This is not just a mere technical procedural point. The present form of proceedings causes real problems. For instance it seems clear that as a result of the application made on 30 September 1994 - almost exactly a year ago - the applicant has not been required to attend court for further remands. The magistrate appears to be acting as if some sort of temporary interdict has been imposed on him prohibiting him from delivering judgment until this application has been decided.

That is not so. There is nothing to stop the magistrate from delivering his judgment even as this present judgment is being drafted.

This underlines the point made to Mr *Biti*, in the course of argument. The proper remedy in this situation would have been for the applicant to pursue first her administrative remedies by writing to the magistrate and then if necessary to the Chief Magistrate. Failing success, she should then have instituted this application citing the magistrate himself as respondent (with a copy to the Director of the Civil Division of the Attorney-General's Office in terms of SI 368/90).

In my view, therefore, the applicant has not taken the proper steps to enforce her right, and the application to this court is premature as well as being incorrect in citing the wrong respondent. Had the proper steps been taken, the judgment would probably have long since been handed down. As it is, the application has had the effect of causing further delay.

1995 (2) ZLR p273

McNALLY JA

Although, therefore, the application must fail, I must express the concern of this court at the cavalier way in which the applicant has been treated. To call an accused person to court time after time, and on each occasion to send her away because the magistrate is too disorganised to adhere to his own self-imposed schedule is grossly inconsiderate. The matter is made worse because there is here the possibility, however remote, of a prison sentence. How can a person get on with his or her life with the possibility of a prison sentence looming and receding every fortnight?

To the extent that I understand that some of the problem arises from the fact that the magistrate has been moved to another station, the blame for the present situation must be shared by the magistracy as an organisation. Administrative transfers must not be allowed to impede the administration of justice.

A copy of this judgment is to be sent to the Chief Magistrate. It is hoped that the matter will be resolved with the utmost urgency without the need for further court applications.

In the circumstances it would not be appropriate to award costs to the State. The application is dismissed with no order as to costs.

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Ebrahim JA: I agree

Muchechetere JA: I agree

Honey & Blanckenberg, applicant's legal practitioners

S v MUDAMBI 1995 (2) ZLR 274 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Criminal appeal

2 & 9 October 1995 Judgment No. S-156-95

Flynote

Criminal procedure - plea - change of - after conviction and sentence - what must be shown

Headnote

Where a person pleads guilty but wishes to change his plea before conviction, there is no onus on him. He simply has to give a reasonable explanation as to why he wishes to change his plea. After sentence, however, the court is *functus officio.* It must then be shown by the accused that there was a miscarriage of justice of the kind which would enable an appeal court to quash a conviction. Where the appellant understood what he was pleading, pleaded guilty voluntarily and correctly, and admitted the offences in question when speaking in mitigation, it would not be possible to say that there was a miscarriage of justice, even if the appellant's motive for pleading guilty might have been erroneous. Appeal against conviction dismissed. Sentence reduced.

Cases cited:

S v Matare 1993 (2) ZLR 88 (S)

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

S v Mapawona & Ors A - 79 - 71

S v Kwainona & Ors 1993 (2) ZLR 354 (S)

S v Matanhire 1992 (1) ZLR 336 (S)

S v Kunditsungira S-154-92

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M R D Stonier for the appellant

T Chitapi for the respondent

Judgment

McNally JA: The applicant was convicted, on a plea of guilty, of three

McNALLY JA

charges of contravening s 3(a) of the Criminal Law Amendment Act [*Chapter 9:05*]. It was alleged that on three occasions he had had sexual intercourse with a girl of fourteen, during the course of 1994.

He was convicted and sentenced on 16 January 1995 to two years' imprisonment with labour, six months of which was suspended for five years on the usual conditions.

He appealed, not only against sentence, but against conviction. He made an application for the matter to be remitted for trial afresh on a plea of not guilty. He maintained that he had in effect been tricked into pleading guilty.

The position of a person who wishes to change his plea has been a matter of some controversy. In *S v Matare* 1993 (2) ZLR 88 (S) at 99, the majority of this court held that there was no onus on an accused person wishing to change his plea at any stage during the trial proceedings. He simply had to give a reasonable explanation as to why he wished to change his plea.

If he wished to change his plea after sentence, and thus after the court is *functus officio,* the position is different. In *R v Patrick* 1962 (1) SA 263 (FS) the Federal Chief Justice, SIR JOHN CLAYDEN, held that it must be shown that there has been a "miscarriage of justice" in the sense in which that phrase was used in the Federal Supreme Court Act 11 of 1955. The same phrase appears in s 11(1)(c) of the Supreme Court Act [*Chapter 9:07*] where this court is authorised to quash a conviction where "on any other ground there was a miscarriage of justice". So the applicant/appellant bears the onus of showing there was a miscarriage of justice.

In *S v Mapawona & Ors* A - 79 - 71, MACDONALD JP (as he then was) noted that *Patrick's* case *supra* placed an onus on the person concerned to show that his plea was not voluntarily and understandingly made. In this case, as in *Patrick supra* the application failed. So did the application in *S v Kwainona & Ors* 1993 (2) ZLR 354 (S).

In the present case nothing can be said against the proceedings before the magistrate. There was a plea of guilty, he followed the required procedure under s 271(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], and he was convicted. Therefore there is no basis on the record upon which an appeal against conviction could possibly succeed. We can therefore only intervene if there has been a failure of justice.

Has an innocent man been convicted? Or is there even any reasonable

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McNALLY JA

possibility that an innocent man has been convicted? To my mind, the answer to each question is a clear "no".

It is abundantly clear that the applicant wishes to have this matter remitted because he hopes, not without reason, that he will be able to settle the matter in the traditional way, by paying damages to the family of the girl. Once that is done, he again expects that the complaint will be withdrawn and the complainant will decline to give evidence against him.

His affidavit in support of his application alleges a complex scheme whereby the police and the prosecutor tricked him into believing that he had to go to court to have the case "cancelled" before he could settle the matter traditionally. Once in court he was "under the impression that I had to agree to the charge for the matter against me to be cancelled". Note that nobody had told him he had to "agree to the charge". If the case was indeed to be cancelled, one would have thought he would have pleaded not guilty.

He also, in his affidavit, denies he ever had sexual intercourse with the girl. This is patently untrue, and thus makes all the allegations in his affidavit unreliable. They are all denied by the police in their affidavits.

It is utterly clear from what the applicant said in court in mitigation, that he did commit the offences. Not only did he specifically admit each allegation but he said:

> "This was a temptation to me and [I and] her father are close friends. This girl is, in a way, my cousin. I just fell into temptation. I have apologised to [the] parents. The parents wanted to withdraw the charges. [I] would compensate her parents. The matter is supposed to have been closed."

Later he said (as to her being a virgin):

> "I don't want to annoy anyone. It is not true she was a virgin ... The fact that it happened three times is an indication that there was a love affair.
>
> Sometime, she was going out with a certain boy. But when I observed this I had already stopped the affair with her ..."

So he is not being truthful when he says that he has a defence. What he has is a hope that, if the matter is brought to trial on his plea of not guilty, she will decline to do her duty by testifying against him. Compare *S v Matanhire* 1992 (1) ZLR 336 (S), where MANYARARA JA commented at 337G:

McNALLY JA

> "What the appellant is really saying is that, thanks to the kind heartedness of the complainant, he had an opportunity to escape justice, but he missed that opportunity because of his ignorance of court procedure.
>
> It is the function of this court to dispense justice, not to dispense good luck ..."

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There has been no miscarriage of justice in this case. He understood what he was pleading and he did so voluntarily and correctly. He may have had some erroneous motive for so pleading, but that is beside the point.

The application therefore fails.

As to sentence, Mr *Chitapi* for the State has conceded that the magistrate misdirected himself in saying that the only mitigatory factor was that the appellant was a first offender. We have to take into account that the girl was obviously mature for her age, possibly already sexually experienced, and was not an unwilling partner. We also have to take into account that her family were apparently ready to settle the matter in the customary fashion. The appellant is a man in a good job, already married and with one child. And, despite his attempts in this court, the fact is that he pleaded guilty.

The facts of the case are not, to my mind, as bad as those in *S v Kunditsungira* S-154-92. In that case the sentence was one of 12 months' imprisonment with labour, of which four were suspended. In the present case a greater period may be suspended, but the seriousness of the offence does not justify a lower overall sentence.

Accordingly, while the appeal against conviction and the application for remittal are dismissed, the appeal against sentence is allowed. The sentence imposed by the magistrate is set aside. In its place the appellant is sentenced as follows:

> "Twelve months' imprisonment with labour of which eight months is suspended for five years on condition that the accused is not convicted of an offence, committed during that period, involving a sexual assault upon a female, for which he is sentenced to a term of imprisonment."

Ebrahim JA: I agree

Muchechetere JA: I agree

Danziger & Partners, applicant's legal practitioners

MOTSI v ATTORNEY-GENERAL & ORS 1995 (2) ZLR 278 (HC)

Court **High Court, Harare**

Mubako J

Civil application

19 January & 11 October 1995 Judgment No. HH-116-95

Flynote

Administrative law - natural justice - observance of rules of - whether principles must be observed by an investigator appointed by Minister to investigate whether there has been corruption in a company - whether

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Minister's action was based on reasonable grounds

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 13 - protection of personal liberty - s 15 - protection from inhuman or degrading treatment or punishment - s 16 - protection from compulsory acquisition of property - s 17 - protection from arbitrary search - s 18 - protection of the law - s 22 - right to freedom of movement - "specification" of persons under

Prevention of Corruption Act [Chapter 9:16] and powers of investigators under Act - whether contravene any of those sections of the Constitution

Practice and procedure - joinder of parties - improper joinder - joinder of cases in which there was little commonality - whether there had been misjoinder

Criminal procedure - search and seizure - warrant to seize property - whether covers incorporeal property

Headnote

The applicants were suspected of committing the crimes of theft, fraud and money-laundering, involving large amounts of money from a company in which they worked. Using his powers under the Prevention of Corruption Act [*Chapter 9:16*], the Minister of Justice, Legal and Parliamentary Affairs had "specified" the applicants. Counsel for the applicants argued that the provisions authorising specification by the

Minister were unconstitutional because they violated several of the rights guaranteed by the Constitution of Zimbabwe. He also raised objections to the action by the police in terms of a warrant to seize property and to the way in which the Minister exercised his power. Counsel for the respondents argued that the power of specification was constitutional and that the actions taken by the various respondents were legally valid. He also argued that the joinder of the ten respondents together in the same action had been improper and prejudicial.

Held, that although there was not much commonality of issues in relation to the cases against the respondents, there was some similarity in the origin and nature of certain of the issues and it was more convenient in the interests of justice that the respondents be joined in one action.

Held, further, that where the police are authorised by a warrant to seize any "article", they are entitled to seize incorporeal property, such as bank accounts. If this were not so, the police would not be able properly to investigate white-collar crimes such as fraud.

Held, further, that neither the power of the Minister to specify a person nor the powers granted to the person appointed by the Minister to investigate the allegations violated the provisions of the Constitution. Police and other investigators must be given the necessary investigation powers, even though the exercise of these powers will lead to some curtailment of people's absolute liberties. Corruption and white collar crime are pervasive, difficult to detect and cause great harm to society. There is a pressing social need to extend extraordinary powers to the authorities to root out these insidious crimes. The powers afforded to the authorities by the Prevention of Corruption Act are powers that are reasonably justifiable in a democratic society. In relation to the specific constitutional provisions alleged to have been violated:

(a) the power of the investigator to require a specified person to attend interrogation

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sessions at times which are laid down by the investigator is a necessary power in order for investigations to be conducted and falls within the ambit of the limitation of the right to personal liberty permitted in terms of s 13 of the Constitution. This power also does not violate the provision protecting a person from torture and inhuman or degrading punishment or treatment (s 15). To oblige a person to attend for interrogation may cause inconvenience to that person but it does not violate s 15.

(b) the power of the investigator to prevent a specified person from alienating his property whilst the matter is under investigation does not violate the constitutional provision protecting a person against acquisition of his property by the State without compensation (s 16).

Neither does the exercise of this power violate the provision giving the right to freedom of movement (s22).The specified person is not necessarily revented from moving from place to place by this measure and, in any case, even if he is restricted in exercising this right by this measure, it is a restriction that is reasonably justifiable in a democratic society that falls within the ambit of the permissible limitations allowed by s 22.

(c) the wide powers given to the investigator and the denial of the privilege against self-incrimination do not violate the protection of the law guaranteed in s 18 of the Constitution. Although his powers are wide, the investigator's powers are not unfettered. The denial of the privilege against self-incrimination does not violate s 18, because this right only applies in respect of a person giving evidence at his trial and does not apply to the pre-trial stage as in respect of questioning of a specified person before he has been charged. Even at the trial stage, there is only a limited privilege against self-incrimination, as the Consitution allows adverse inferences to be drawn from silence.

(d) the extensive powers of entry and search allocated to the investigator under the Act did not violate the protection against arbitrary search (s 17). these powers were reasonably justifiable in a democratic society for the purposes of rooting out the insidious crime of corruption and the powers fell within the derogation provision in s 17 relating to the investigation of crime.

Held, further, that the principles of natural justice only apply to judicial and quasi-judicial adjudication. A person appointed by the Minister to investigate is not an adjudicator, but a person who investigates and reports back to the Minister. The principles of natural justice thus do not apply to such an investigator. Thus the appointment could not be impugned on the basis of the fact that the investigator was a director in the complainant company and could be biased as a result.

Held, further, that the Minister validly and properly exercised the powers given to him in terms of the Act. He had acted on reasonable grounds and in the national interest as required. The property involved is property within the ambit of s 6(1)(a) and (b) of the Prevention of Corruption

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Act.

Cases cited:

Glens Removal & Storage Ltd v Schonken & Anor 1973 RLR 205 (G)

Gundu & Anor v Sheriff of Rhodesia & Anor 1965 RLR 301(A)

R v Runyowa [1967] AC 26

S v Ncube & Ors 1987 (2) ZLR 246 (S)

MUBAKO J

Hewlett v Min of Finance & Anor 1981 ZLR 571 (S); 1982 (1) SA 490 (ZS)

In *re Munhumeso & Ors* 1994 (1) ZLR 49 (S); 1995 (1) SA 551 (ZS); 1995 (2) BCLR 125 (ZS)

Akar v A-G for Sierra Leone [1969] 3 All ER 384 (PC)

Olivier v Butigie [1967] AC 115

DPP v Obi [1961] 1 All NLR 182

Franklin v Min of Town & Country Planning [1948] AC 87

Witham v Dir of Civil Aviation & Anor 1983 (1) ZLR 52 (H)

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

M J Gillespie for the applicants

A V M Chikumira for the respondents

Judgment

Mubako J: The applicants in this case are Elizabeth Motsi, Lovewell Mazarura, William Mutizwa, Davis Tendai Midzi and Virginia Munzawa.

They are all former employees of Zimpapers (1980) Ltd Following suspicions of their involvement in the misappropriation of money which belonged to Zimpapers (1980) Ltd, the applicants were specified by order of the Minister of Justice Legal and Parliamentary Affairs under the Prevention of Corruption Act [*Chapter 9:16*]. They are challenging the legality of the Minister's action and the constitutionality of the legislation authorising specification. There are ten respondents including the Attorney-General; the Commissioner of Police and the Minister of Justice, Legal and Parliamentary Affairs.

PROCEDURAL QUESTIONS

The first question raised by counsel for the respondents was that the joinder of all 10 respondents was irregular, improper and prejudicial. It was argued that the actions brought

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against respondents as varied as the Commissioner of Police, and Founders Building Society, or the magistrate, Mr Kudya, and the Standard Chartered Merchant Bank do not possess or raise common questions of law or fact nor do all the rights claimed arise out of the same series of transactions in order to justify joinder of the parties in terms of rule 85 of the High Court Rules. The learned counsel submitted further that joining cases which are in fact not related is time wasting for the respondents and therefore prejudicial to them. He submitted further that this was not a proper case for the exercise of judicial discretion to permit a misjoinder such as in the case *Glens Removal & Storage Ltd v Schonken & Anor* 1973 RLR 205 (G).

MUBAKO J

In response, counsel for the applicants stated that there were indeed common elements linking all the applicants and all the respondents. There was the common complaint that each of the respondents acted *mala fide.* Moreover, the whole sequence of events and the alleged unlawful actions against the applicants are interlinked. It was argued that it is clearly more in the interests of justice to bring one action instead of a series of separate ones. He submitted further that, even if there was a misjoinder, rule 87 of the High Court Rules permits the court to determine the issues as they affect the parties before it.

I accept that, as relates to a number of the respondents, little commonality is self-evident in the cases against them. As Mr *Chikumira* points out, even the allegation of *mala fides* against some of the respondents does not establish a sufficient nexus against all of them, since they acted independently of each other. However, it is infinitely more convenient in the interests of justice that, in a case where there is some similarity in the origin and nature of some of the issues, the parties be joined in one action rather than tried in five or ten separate actions. Accordingly, judicial discretion is exercisable in favour of determining the issues affecting the parties as such alleged misjoinders should not lightly be permitted to defeat an otherwise well founded cause or matter. Misjoinder gives rise to no relief except costs (see rule 87).

THE WARRANT OF SEIZURE

The applicants challenged the legality of the warrant to seize the property belonging to the applicants. Initially they did so on only one ground, namely, that the Act authorises seizure of any "article". They contended that only corporeal things fall under the definition of "article." Incorporeal things are not "articles" and cannot be seized. Now, the warrants purported to seize the applicants' bank accounts, and these are in reality not the original bank notes or coins that were deposited therein, but only book entries. These are incorporeal things which are incapable of being seized.

The meaning of the word "article" must be sought in the context of the legislation in which it is used and not in its abstract or metaphysical sense. Mr *Gillespie* wants to limit the term article to "corporeal, material property", including bank notes, but would exclude "account book entries standing to the credit of the applicants". He says these are incorporeal and cannot be seized.

To conclude that an incorporeal thing is incapable of being seized, *ergo* it is not an "article", would be to engage in a circular theological disputation. In

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my view, the proper approach was adopted by Mr *Chikumira,* counsel for the respondents. He points out that the word "article" as used in s 49 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] means anything which is "concerned in or reasonably suspected to be intended for use in the commission of an offence" or which may afford evidence of the offence. And the suspected offences in the case at hand are theft, fraud, and money laundering. In these offences the object of the investigation is the money in a bank account. Such money is rarely the same coins or bank notes that were stolen. It is correctly pointed out that the money may have been deposited by means of a cheque or other bills of exchange, including money orders or telegraphic transfers.

The important thing from the point of view of criminal investigation is that there is money in the bank account suspected to possess criminal origins, not whether the original bank notes, if any, are still there. Seizure of articles as an instrument of investigation is not limited to particular offences. The term "offence" means any crime. If bank accounts were not "articles" as argued, the result would be that frauds and a great deal of white-collar crimes would be excluded from the particular method of investigation. If bank accounts could not be frozen the result of such a restriction on police powers would simply be to remove the most effective weapon in their armoury. Such a restriction on police powers cannot be inferred from the relevant provisions of the Criminal Procedure and Evidence Act or from the Prevention of Corruption Act. On the contrary, these enactments confer powers of investigation with the widest possible ambit and scope.

As a result, I am of the opinion that for the purposes of the relevant legislation, the word "article" includes incorporeal things and these may be seized for the purpose of investigating suspected offences. If the incorporeal thing cannot be physically seized then the object or thing in which it is manifested can certainly be seized.

Accordingly, the warrant of seizure referred to above cannot be impugned on the basis of a restricted interpretation of the word "article." The warrant was issued by a justice of the peace, Chief Superintendent Mawere, authorising Detective Assistant Inspector Chizhowa to seize funds in the bank accounts of applicants. In terms of ss 49 and 50(2) of the Criminal Procedure and Evidence Act, a police officer has authority to seize any article which on reasonable grounds is believed to be concerned in the commission of an offence or is believed may afford evidence of the commission of an offence.

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The offences under investigation were the following:

1. A charge of fraud involving Lovewell Mazarura and Mathew Magonde, the prejudice being $113 000.

2. A charge of fraud against Lovewell Mazarura and Mathew Magonde, the prejudice being

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$415 000.

3. Charges of fraud and violation of the Exchange Control Act [*Chapter 22:05*] against Davies Midzi, William Mutizwa, Elizabeth Motsi and Virginia Munzeiwa, the prejudice being $1 990 000.

These suspects were also being investigated for forming shell companies whose stolen monies ended up in the applicants' bank accounts which were the objects of the warrants of seizure. I can see nothing exceptionable either in the procedures adopted in issuing the warrants or in their substantive contents. The warrants were a valid exercise of police powers of investigation provided for by the law.

CONTRAVENTION OF THE DECLARATION OF RIGHTS

The applicants have attacked the entirety of Part III of the Prevention of Corruption Act, alleging that its provisions contravene the Declaration of Rights in the Constitution of Zimbabwe. They argue that the wide powers conferred on the Minister and the investigator by those provisions are incompatible with the rights and freedoms of the individual conferred on Zimbabweans by the Constitution. They point to the powers of the investigator under s 8(2) of the Act, whereby he may enter and search premises, seize and examine any property and interrogate persons. They cite s 9, which gives the investigator power to summon the specified person if the investigator believes that the person may be able to provide material information or that he or she possesses a document or record containing such information. The provision specifically removes from the person being interrogated the right to refuse to answer any question on grounds of self incrimination or marital privilege. By ss 9 and 10 a specified person can be placed under the disability of being precluded from using his property or money except with the approval of the investigator. He may not dispose of the property, operate a bank account or conduct the business of a company or partnership without approval.

It was alleged that these powers and restrictions contravene ss 13, 15, 16, 17,

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18 and 22 of the Constitution. It is necessary to examine that claim in respect of each of those articles.

SECTION 13

By s 13 the Constitution guarantees every person in Zimbabwe the right to personal liberty. The State is prohibited from depriving any person of his liberty, save as may be authorised by law in any of the enumerated situations. Section 13(2)(c) and (e) provides one of the situations wherein a person may be deprived of freedom, namely "execution of the order of a court made in order to secure the fulfilment of an obligation imposed on him by law" or "upon reasonable suspicion of his having committed or being about to commit a criminal offence". This permissible derogation includes execution of a sentence or order of court or a lawful arrest in the investigation of a crime. All in all, the permissible derogations are wide ranging, adding up to a fairly formidable subtraction from any sense of absolute personal liberty of the Robin Hood type.

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The price of living in human society is that every person's liberty has got to be curtailed in order to preserve any freedom at all for anybody. Because the existence of crime is a fact of life, the police must be allowed powers of investigation whose effect is the restriction of people's liberties. All constitutions, including ours, provide for that type of restriction.

It is alleged by Mr *Gillespie* that the Prevention of Corruption Act contravenes s 13 of the Constitution by depriving a person of personal liberty because the Act empowers the investigator to require a specified person or his spouse "to attend upon the investigator, or his delegate, at his pleasure in order to suffer inquisition". Moreover, it is said, the spouse may also be restricted even though she is not suspected of committing a crime.

Despite the strident censure, the power to require a person to assist with enquiries into suspected criminal activity is not new in our legal system. The powers are commonly conferred on the police and are simply being extended to the investigator. They are a limitation on freedom, but one which is recognised by the Constitution.

SECTION 15

Section 15 protects the individual from torture and inhuman and degrading punishment or treatment. This article has seen much judicial interpretation. It has been said that the words relate to types or methods of punishment or treatment, not to its severity or appropriateness: *Gundu & Anor v Sheriff of*

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Rhodesia & Anor 1965 RLR 301 (A); *R v Runyowa* [1967] AC 26. In the *Runyowa* case LORD MORRIS at p 49 said "the words do not enable the court to declare an enactment imposing a punishment to be ultra vires on the ground that the court considers that the punishment laid down is inappropriate or excessive for the particular offence". (See *S v Ncube & Ors* 1987 (2) ZLR 246 (S).)

By s 15(2), (3), (4) and (5) the Constitution recognises certain conduct which shall not be regarded as being prohibited by s 15 (1), namely:

- treatment which is reasonably justifiable to prevent the escape from custody of a person who has been lawfully detained;
- moderate corporal punishment inflicted upon male persons under the age of eighteen;
- the execution of a person who has been sentenced to death by a competent court;
- delay in the execution of a sentence of death imposed in respect of a criminal offence of which the person has been convicted.

To require a specified person or his spouse to submit for interrogation does not by itself constitute torture, degrading punishment, or inhuman treatment. To attend for interrogation may be inconvenient, but it does not constitute a violation of s 15 of the Constitution. If being compelled to answer questions were prohibited, our system of justice, indeed society as we

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know it, would grind to a halt.

SECTION 16

The applicants also allege that the Act is an infringement of the rights and freedoms of the individual in respect to property. They argue that the property of a specified person, when it is restricted, is in fact compulsorily acquired and vested in the investigator. Section 16(1) of the Constitution provides:

> "No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that requires ..."

There are several requirements, if such a law is to be allowed in derogation of the right to property, including giving reasonable notice, providing for the payment of fair compensation within a reasonable time, providing for justiciability before the courts, etc.

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Section 16(7)(p) provides a permissible derogation which is most relevant to the case in hand. It says

> "Nothing contained or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision for the acquisition of any property or any interest or right there in any of the following cases:
>
> ...
>
> for so long only as may be necessary for the purpose of examination, investigation, trial or inquiry."

There is no question that the investigator is given extensive powers to interfere with property rights, powers of control or denial of use by the owner. But these powers are exercisable for one purpose and for one purpose only - to facilitate investigation - and the powers are transitory in nature. They come to an end as soon as the investigation is over.

Such powers are akin to the powers which the police use while investigating ordinary theft. Customs officers may impound vehicles or other goods for long periods while awaiting a determination in respect to them, and the Sheriff exercises similar powers, the effect of which may be to temporarily deprive the owner of their use or disposal. Various statutes and regulations empower officers to impose restrictions on the right of the owner of property to alienate or to exercise other powers of dominion over the property.

The crisp question is whether any of this deprivation of the property or its enjoyment also amounts to acquisition of the property, even temporarily. The ordinary man has no difficulty in understanding the difference between a situation where a policeman takes to the police station a car which he believes to be stolen and one in which the Sheriff attaches a debtor's goods for auction. In both cases, the owner or possessor is deprived of the right to use or alienate the property but only in the second case is acquisition an issue. Mr *Chikumira* has elucidated the difference as follows:

> "Deprivation is a much wider concept than acquisition. Any acquisition is a deprivation of the owner of his right of

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ownership and enjoyment of property, but not all deprivations are tantamount to acquisition" (respondent's heads p 9).

This distinction is a common-sense view, which is also the legal interpretation of s 16 of the Constitution. FIELDSEND CJ stated that there is a distinction

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between deprivation and acquisition and "not every deprivation of property must carry compensation with it. Indeed, government could be made virtually impossible if every deprivation of property required compensation". See *Hewlett v Min of Finance & Anor* 1981 ZLR 571 (S); 1982 (1) SA 490 (ZS) at 502.

If the State acquires a person's property, the Constitution requires that compensation be paid. When the State merely uses police powers which may result in temporary restriction of a person's property rights, no constitutional issues under s 16 arise. It is true, as the applicant's counsel observes, that the investigator may prevent a specified person from exercising his rights to alienate his property for the time being. However, it does not follow that these rights have for that time been acquired by the State and vested in the investigator. If that were the case, then after the investigation we would have to say that the bundle of rights is transferred back from the investigator to the original owner. It is not necessary to conjure up such legal fictions in order to appreciate the legal process. What happens is simply that when a person's property is seized by the investigator the owner's rights are suspended until the conclusion of the investigation. He may not, during the period of suspension, exercise hose rights eg. by leasing or selling the property to a third party. That is the jurisprudential process which comports easily with the common man's understanding. All the State says to the owner is, keep your bundle of rights, but you may not use it until the investigator has finished his job. The investigator does not at any time assume the power to alienate or dispose of any of the specified person's property. Such a process, though restrictive, is a far cry from acquisition. The process sanctioned by Part III of the Prevention of Corruption Act is not *per se* violative of s 16 of the Declaration of Rights.

SECTIONS 18 and 22

The applicants have also challenged the Act on the grounds that it violates their right to protection of the law (s 18) and their right of freedom of movement (s 22). In relation to s 18, counsel for the applicants cites what he calls "unfettered powers of investigation and the denial of the privilege against self-incrimination" as examples of provisions which are repugnant to the right of protection by the laws. He dismisses the built-in safeguard of the right of appeal to the Minister as worthless and concludes that "in practice, the specified person and his family are at the mercy of the investigator". Little of substance is in reality contained in these strictures. In the first place, the powers of investigation are ample but they are not unfettered. They are

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circumscribed by the very statute which creates them and their application is subject to judicial review, as now. Secondly, s 18 can hardly be said to enshrine the privilege against self-incrimination. It is specifically provided in some foreign constitutions that an accused person may refuse to answer questions if to do so would result in incriminating himself.

In the Constitution of Zimbabwe, the so-called right is recited but immediately it is deprived of its sting. Subsection 8 provides: "No person who is tried for a criminal offence shall be compelled to give evidence at the trial". But subs 13(e) qualifies this right by stating that a law shall not be held to be in contravention of subs (8) "to the extent that the law in question authorises a court, where the person who is being tried refuses without just cause to answer any question put to him, to draw such inferences from that refusal as are proper and to treat that refusal, on the basis of such inferences, as evidence corroborating any other evidence given against that person". In our legal system, the provision has existed for a long time in the Criminal Procedure and Evidence Act that, if an accused person refuses to answer a certain question, the judicial officer may draw inferences against him. A magistrate may confirm a warned and cautioned statement which is attributed to an accused person, even though the accused person refuses to answer any questions about it or to admit that he made the statement at all, and such a statement shall be received in evidence before any court upon its mere production by the prosecutor without proof.

The provisions of the Prevention of Corruption Act do not go much further in abolishing "the privilege against self-incrimination." At any rate, it cannot be said to violate a non-existent provision in s 18, since the provision covers the situation of a person giving evidence at his trial and the specified person has not yet reached trial stage.

Thirdly, the specific subsections of s 18 which are said to be contravened by the Prevention of Corruption Act have no relevance to the impugned act. In particular, subs (3) applies to "every person who is charged with a criminal offence." A specified person is a person who has not yet been charged.

In reality, the Prevention of Corruption Act does not remove the specified person's right to the protection of the law any more than does the Criminal Procedure and Evidence Act.

Section 22 states:

> "No person shall be deprived of his freedom of movement, that is to say,

> the right to move freely through out Zimbabwe, the right to reside in any part of Zimbabwe, the right to enter and to leave Zimbabwe, and immunity from expulsion from Zimbabwe."

In relation to s 22, the challenge to the Act is simply that by denying a person the use of his money the State transgresses his freedom of movement, for a person cannot move without his money. This argument is as simplistic as it sounds. Firstly, it does not always follow that, by holding funds which are suspected to have been stolen, one necessarily extinguishes or even necessarily affects the person's ability to move around the country or abroad. The person might

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have other resources; he might be assisted by friends, the journey may not require funds. There are many other ways in which a specified person whose bank account is frozen can organise his travel. The investigator has no power to interfere with that movement.

In any event, the freedom of movement, like all other freedoms, is not an absolute freedom. It may be curtailed in pursuance of a lawful arrest or detention; or under a law imposing reasonably required restrictions in the public interest (defence, safety, order, morality or public health), or the removal from Zimbabwe of non-citizens. Police investigations often entail a measure of restriction on people's movement; in order to ensure attendance at court or prevent interference with witnesses, bail conditions may impose restrictions on the freedom of movement. In matters of criminal investigation in these days of jet travel and electronic communication, the restriction of the suspect's movement may be a *conditio sine qua non* for the attainment of justice. In such cases, the question to ask is not whether freedom of movement has been restricted, but whether the restriction is reasonable.

The law which imposes the restriction, even within the accepted derogations, may still contravene s 22 if it is shown that it is not reasonably justifiable in a democratic society.

In my opinion the Prevention of Corruption Act cannot be impugned on the footing that it violates s 22 of the Constitution of Zimbabwe or that it imposes restrictions which are not reasonably justifiable in a democratic society.

Generally, it has been alleged by the applicants that the powers of search and entry conferred on the investigator are "a mark of totalitarianism and cannot be accepted as reasonably justifiable in a democratic society" and are a contravention of s 17 of the Constitution of Zimbabwe which states:

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> "... No person shall be subjected to the search of his person or his property or the entry by others on his premises."

There are the usually accepted derogations:

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

(b) for law enforcement, "where there are reasonable grounds for believing that the search or entry is necessary for the prevention, investigation or detection of a criminal offence, for the seizure of any property which is the subject matter of a criminal offence or evidence relating to a criminal offence ..."

Now it is accepted that "reasonably justifiable in a democratic society" is not a term of art. GUBBAY CJ stated the difficulty of definition in the following terms:

> "What is reasonably justifiable in a democratic society is an ellusive concept - one which cannot be defined by the courts. There is no legal yardstick save that the quality of reasonableness of the provision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed

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right: Re *Munhumeso & Ors* 1994 (1) ZLR 49 (S)."

However, there are certain minimal standards in the legal protection of individual liberties below which a state cannot go and still be entitled to be considered a democratic society. Any restriction on people's liberties must be regarded as a necessary evil which requires justification and which must not be accepted as a matter of course. For a law which imposes a restriction on freedom to be reasonably justifiable in a democratic society, (a) it must be necessary or expedient in the public interest and (b) the restriction must not be excessive or out of proportion to the object which it is sought to achieve. In *Akar v A-G for Sierra Leone* [1969] 3 All ER 384 the Judicial Committee of the Privy Council held that a law which purported retrospectively to limit Sierra Leone citizenship to "persons of Negro descent" contravened the Constitution because there was no justification for the Act to make it reasonably justifiable in a democratic society.

In *Olivier v Butigie* [1967] AC 115 the Judicial Committee of the Privy Council ruled that a ministerial order banning a newspaper from being read

in government offices interfered with the editor's freedom of expression and was not reasonably justifiable in a democratic society.

In *DPP v Obi* [1961] 1 All NLR 182 a law under which a man was convicted of sedition for publishing the words "Down with the enemies of the people, exploiters of the weak, and oppressors of the poor', was held to be reasonably necessary in a democratic society. It was found necessary to take reasonable precautions by prohibiting acts which might lead to public disorder.

In most states, the problems of corruption and white-collar crime are pervasive and difficult to detect and uproot. The evils of the crime of corruption are difficult to exaggerate. I agree with Mr *Chikumira*'s description of corruption as "an ugly offence which pollutes the very fountains which the public survives on" (respondents' heads of argument p 12). There is no argument but that in Zimbabwe the incidence of corruption is widespread and growing and outpacing the ordinary police methods of investigation. For that reason, the State has brought into the field other investigating agencies such as the Central Intelligence Organisation, the Economic Crimes Unit and the investigator in terms of the Prevention of Corruption Act. The principal objective of the Act is stated in its preamble as "to provide for the prevention of corruption and the investigation of claims arising from dishonesty and corruption ..." The intention of the legislature was to provide powers which enable society to combat corruption more effectively than before. Corruption was perceived as a pressing social need which called for extraordinary powers to meet the task of combating crime. The measures adopted are appropriate and safeguards are provided. I conclude, therefore, that the Act is reasonably justifiable in a democratic society.

The appellants attack the Minister's action in declaring them specified persons on jurisdictional and procedural grounds. They argue that the Minister does not state that he acted on suspicion based on reasonable grounds or that his action was in defence of the national interest. Secondly, it is submitted that the appointment of the investigator in the instant case was invalid

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because the investigator was a member of the Board of Zimpapers and therefore has an interest in the case.

Taking the second submission first, it is common ground that the person who was appointed to carry out the investigation was a director of the complainant company and that to that extent he has an interest and might be biased.

The question is: does an investigator need to be free from self interest or bias

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in relation to the case he is handling? Is an investigator, like a judicial officer, bound by the *audi alteram partem* rule of natural justice?

The Prevention of Corruption Act does not provide by express words or necessary implication that the investigator must act impartially within the rules of natural justice. He would therefore only be covered if the rules applied to his functions at common law.

The allegations made on behalf of the applicants really apply to two maxims: *nemo judex in causa sua* and *audi alteram partem.* In modern law, it is a question of public policy and a rule of the law that no person who is a party to the proceedings or has a pecuniary or other interest in the result may adjudicate in those proceedings. And when the person does adjudicate he must be able to hear both sides impartially. The rules are calculated to maintain public confidence in the administration of justice. The courts would normally nullify proceedings in which these principles are violated.

The principles were evolved with regard to the conduct of judges and magistrates and therefore apply primarily to the courts. By extension the principles have also been applied to administrative bodies which exercise judicial or quasi-judicial functions which include deciding on *lites inter partes.* The rules do not apply to parliament or local legislative councils or assemblies. They do not normally apply to officials making reports, or to a Minister considering objections to his own proposals: *Franklin v Min of Town & Country Planning* [1948] AC 87. *A fortiori,* the rigid impartiality required of judges and magistrates exercising judicial function is not required of the police or of the investigator in performing their functions. Professor S A de Smith identifies administrative bodies which are bound to follow the rules of natural justice as follows:

> "The strict standards applied to courts of justice will readily be applied to bodies possessing the following characteristics: a procedure analogous to that of the courts; a duty to decide disputed questions of law or fact; a duty to exercise discretionary powers by reference to standards that are not self-created but are explicitly prescribed by statutory or other rules; a duty to decide in accordance with evidence openly tendered; members who can normally be expected to preserve a detached attitude towards the parties or issues that come before them."

See *S A de Smith Judicial Review of Administrative Action* 2 ed p 238.

No one in his senses would expect to find these characteristics in the

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functions of the investigator or that of a police officer. Their duty is not to adjudicate, but to investigate and report and some one else would decide: *Witham v Dir of Civil Aviation & Anor* 1983 (1) ZLR 52 (H).

In the result, I am of the view that the invocation of the rules of natural justice to challenge the appointment and functions of the investigator is ill-founded.

Finally, it is contended that there was no national interest involved or declared when the Minister specified and that the Minister did not act on the reasonable suspicion apparent or declared, and also that Zimpapers is not a government department nor a parastatal as required by the Act.

The allegation is therefore that s 6 of the Prevention of Corruption Act was not complied with. Section 6(1) provides:

> "Where the Minister, on reasonable grounds, suspects that any person -
>
> (a) by theft, fraud or other unlawful means, has caused the misappropriation or loss of property of the State, a statutory body, a local authority or any other person; or
>
> (b) has received property from the State, a statutory body, a local authority or any other person, whether directly or indirectly, in contravention of any law or as a result, either direct or indirect, of the action of any person who has caused misappropriation or loss such as is referred to in paragraph (a); or
>
> (c) has accepted or obtained a gift or consideration in contravention of section three; or
>
> (d) has obtained any advantage or profit corruptly or in circumstances that amount to an offence in terms of this Act; or
>
> (e) is associated with, or has been party to any transaction what-soever with, any other person who has done anything referred to in paragraph (a), (b), (c) or (d) and, as a result of such association or transaction, may be liable to the State, a statutory body, a local authority or any other person for any claim or proceeding in respect of any property or be liable to have the transaction set aside;
>
> `and is satisfied that it is in the national interest to do so, he may, by notice in the *Gazette,* declare such person to be a specified person."

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The argument that the property of Zimpapers which is the subject matter for investigation was not covered by the Act was stated in some of the affidavits by applicants but it was not followed in Mr *Gillespie*'s final submissions in court. Most probably counsel appreciated the weakness of that line of protest. I consider that the State has sufficient historical, financial, and administrative interest in Zimpapers to bring the property in the ambit of s 6(1)(a) and (b) ie "the property of the state, a statutory body, a local authority or any other person." These words indicate the wide coverage of the provision relative to the property whose loss may be investigated. The Minister's action cannot be questioned on that score.

The Act requires that specification must be based on the Minister's suspicion, on reasonable

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grounds, that the property in question has been stolen or misappropriated. The Minister is not required to possess anything more than information that would lead a reasonable person to suspect that any of the stated offences may have been committed. In this case, the Minister had information from the police that $1 916 385,72 was in one of the applicants' Standard Bank accounts and that large sums of money had been misappropriated from Zimpapers. I am satisfied that such information was sufficient to enable the Minister to form a reasonable suspicion. The Minister, on the face of it, is allowed a wide and unfettered discretion, only qualified by the requirement of reasonableness. That requirement is met if in fact there was in existence an objective foundation of fact or evidence on which the suspicion could be justified. In the present case, the Minister clearly had ample reasonable grounds to suspect and the public would be entitled to query the Minister's conduct if he suspected nobody in spite of the evidence placed before his very eyes.

Finally, it is alleged that the Minister was not "satisfied that it was in the national interest" to specify the applicants. Through his legal practitioners, his officials and his actions, the Minister has shown that he believed that he acted in "the national interest". There is no reason to suppose that he could have acted capriciously or frivolously or out of any other motive. He was responding to information that serious offences of the type which the Prevention of Corruption Act was designed to suppress had been perpetrated. Investigation of serious crime is self-evidently a matter of national interest, and so is an attempt to recover large sums of money which directly or indirectly belongs to the state. Even applying the objective standard to the Minister's action, the national interest readily springs to the surface. But the Act only requires that the Minister be subjectively satisfied that he was acting in the national interest, and on such matters Ministers are the sole judges of

what the national interest requires: *Bull v Min of Home Affairs* 1986 (1) ZLR 202 (S); 1986 (3) SA 870 (ZS) at 884. I am of the opinion that it is futile to challenge the Minister's action on this basis either. All in all, I find that the actions which were taken by the Minister were a valid exercise of the powers bestowed on him by the enabling provisions. The applicants have not succeeded in challenging the Minister's specification of them, either on the basis that the Prevention of Corruption Act is *ultra vires* the Constitution or on the basis that the process of specification has contravened the provisions of the Act. Moreover, I have already made the finding that the office and functions of the investigator do not *per se* contravene the rules of natural justice.

In the result the application is dismissed with costs.

Kantor and Immerman, applicant's legal practitioners.

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

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S v BANGA 1995 (2) ZLR 297 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Constitutional application

17 October 1995 Judgment No. S-182-95

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(2) - right to fair hearing within reasonable time - when violated - obligation of accused to assert right - accused must be called to give evidence of his assertion of his right and effects of delays upon him - prosecution entitled to have time and opportunity to investigate cause of delay

Headnote

The legal practitioner representing the accused at his trial in the magistrates court requested the magistrate to refer to the Supreme Court the issue of whether or not the applicant was entitled to a permanent stay of the criminal proceedings brought against him on the grounds that there had been a breach of his right to a fair hearing within a reasonable time as provided in s 18(2) of the Constitution. The legal practitioner did not given proper notice to the prosecution that he intended to raise this issue. He also did not call his client to testify, but simply made a statement from the bar, pointing to the length of the delay. The trial magistrate referred the matter as requested. At the start of the hearing in the Supreme Court, the applicant's legal practitioner sought a postponement in order to prepare and tender an affidavit from the applicant dealing with some of the facts outlined in the respondent's head of argument. In dismissing this application:

Held, that the applicant must assert his right to trial within a reasonable time. A failure to object along the way until the stage is reached when the State is able to commence with the trial will lead to the inevitable inferences that the accused was quite content to leave the situation in abeyance in the hope that somehow the charge would be forgotten; and that his

eleventh-hour protest was nothing more than a desperate tactic to avoid the outcome of the trial.

Held, further, that where a legal practitioner requests the referral of the matter to the Supreme Court, he must call his client to give evidence before the trial court. This is essential, as it will be on the basis of the record of that testimony that the Supreme Court will decide whether there has been an infringement of the right to trial within a reasonable time. The accused must be called to testify about all the matters that will have a bearing upon this issue, such as whether the accused himself has been responsible for the delay, whether the delay has caused him mental anguish and has disrupted his business and social activities and whether the delay has interfered with his ability to defend himself. Cogent reasons will therefore have to be provided to explain why this evidence was not presented to the lower court.

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Held, further, that before permitting the accused to raise this issue, the trial court should be satisfied that ample written notice has been given to the State, with a copy filed of record. The prosecution is entitled to be given the time and opportunity to investigate the cause of the delay and be ready to adduce evidence as to the reasons for it, if it is considered necessary to do so. In carrying out this investigation, the prosecution should examine the police dockets and relevant court records. The prosecutor should not acquiesce in a situation where, having received inadequate notice of the complaint, he is unable to proffer a detailed explanation of the reasons for the delay.

Cases cited:

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

Hungwe & Ors v A-G S-50-94

S v Matarutse S-101-94

S v Marisa S-126-95

S v Ruzario 1990 (1) ZLR 359 (S)

S v Musvitisi & Anor S-229-93

S v Demba S-194-94

Farmers Co-op Ltd v Borden Synd (Pvt) Ltd 1961 R&N 28 (FS); 1961 (1) SA 441 (FS)

Leopard Rock Hotel Co (Pvt) Ltd v Walenn Const (Pvt) Ltd 1994 (1) ZLR 255 (S)

Bevan Trading (Pvt) Ltd v Voest - Alpine Intertrading GmbH S-149-94

R Ncube for the applicant

Miss *B Hammond* for the respondent

GUBBAY CJ

Judgment

GUBBAY CJ: This matter was referred to the Supreme Court by the Regional Magistrates Court, Eastern Division, pursuant to s 24(2) of the Constitution of Zimbabwe. It concerns the question of whether the applicant is entitled to the grant of a permanent stay of proceedings by the State in case no. R 300/94 by reason of an alleged breach of his right under s 18(2) of the Constitution, to "a fair hearing within a reasonable time".

At the inception of the hearing before this court Mr *Ncube*, for the applicant, sought a postponement in order to prepare and tender an affidavit, deposed to by his client, dealing with some of the facts outlined in the respondent's heads of argument. The postponement was resisted by Miss *Hammond,* who appeared for the respondent, and at the conclusion of

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argument thereon, was refused. Thereupon the application was not persisted with. It was formally dismissed, no order for costs being sought by the State. The reasons for that decision now follow.

On 4 June 1990 the applicant was charged by the police: first, with contravening s 11 of the Miscellaneous Offences Act [*Chapter 9:15*], it being alleged that on 20 December 1988 he had knowingly made a false statement to a police officer that a Peugeot 404 motor vehicle owned by him had been stolen. And second, with the crime of fraud alleged to have been committed on 15 February 1989, involving the sum of $9 283,80, being the amount wrongfully claimed and received from the Unity Insurance Company in respect of the said "ghost" motor vehicle. Warned and cautioned statements were recorded from him. The applicant was not, however, placed on remand. His freedom of movement was not restricted in any way nor at any time.

After a delay of just over four years, the trial was set down to commence, with the agreement of the defence, on 16 August 1994. On that day, the State was ready to proceed with the case. Yet, without affording the prosecution any prior notice, the applicant's legal practitioner raised the constitutional issue before the regional magistrate. The procedure adopted was to make a statement from the bar in which were stressed only the length of the delay and the allied factor of lack of complexity of the charges. Put simply, what was contended was that the extent of the delay was excessive and that, *a fortiori,* a stay of the proceedings was justified. The prosecutor was caught unawares by the application. He was confidently expecting the trial to begin. He was unable to make an adequate response as he had been denied the opportunity to ascertain the precise cause of the delay and the degree to which the applicant had contributed to it.

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The subsequent commendable investigation undertaken by Miss *Hammond* shows that the conduct of the applicant certainly played some part in creating the length of the delay complained of. There were occasions when he was either in default of appearance or had arrived hours late at court. Furthermore, on 7 March 1994 he sought and obtained a postponement of the trial for fourteen days in order to obtain legal representation. On 21 March 1994, either at the request of the legal practitioner who then appeared, or at least with his concurrence, the trial was postponed to 20 July 1994, subject to the availability of a regional magistrate to preside on that day. No protest was voiced over the preceding delay. In the event, due to the perceived unavailability, a further postponement to 16 August 1994 became necessary.

On the other hand, although these investigations reveal that the State was faced with certain problems in bringing the applicant to trial, there is little doubt that it was guilty of a not insubstantial measure of dilatoriness. It failed to handle the case with the expedition expected of it.

The principles which govern applications of this nature are now well settled. They were set out in In re *Mlambo* 1991 (2) ZLR 339 (S) and have since been applied on many occasions; more recently in *Hungwe & Ors v A-G* S-50-94; *S v Matarutse* S-101-94 and *S v Marisa* S-126-95.

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In this application, the period of slightly over four years was presumptively long enough to trigger an enquiry into the factors that go into the balance in the determination of whether the delay in bringing the applicant to trial was reasonable in the pertaining circumstances. These factors are:

(i) the explanation and responsibility for the delay;

(ii) the assertion by the applicant of his fundamental right to a hearing of the case within a reasonable time;

(iii) the existence of any prejudice suffered by the applicant resulting from the delay.

See In re *Mlambo supra* at 353E-354E; *S v Marisa supra* at p 8.

Regrettably, the manner in which the legal practitioner requested the referral was totally misconceived. It was wholly insufficient to make a statement from the bar, and then to point solely to the length of the delay. He was obliged to call the applicant to testify to the extent to which, if at all, the cause of the delay was his responsibility; to whether at any time before 16 August

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1994, he had asserted his right to be tried within a reasonable time; and, even more importantly, to whether any **actual** prejudice had been suffered as a result of the delay.

Such a fundamental omission on the part of the defence is fatal to the success of the application.

This court has stressed frequently that if an accused is of the view that the State is dragging its feet in bringing him to trial, he must assert his constitutional right to be tried within a reasonable time and in default of compliance with such protest seek a stay of proceedings. See *S v Ruzario* 1990 (1) ZLR 359 (S) at 367F-G; *In re Mlambo supra* at 354B-C; *S v Musivitisi & Anor* S-229-93 at p 6; *S v Matarutse supra* at p 3.

A failure to object along the way until the stage is reached where the State is able to commence with the trial, will lead to the inevitable inferences that the accused was quite content to leave the situation in abeyance in the hope that somehow the charge would be forgotten; and that his eleventh hour protest was nothing more than a desperate tactic to avoid the outcome of the trial.

Moreover, the absence of *viva voce* evidence completely disables findings to be made that the long delay has been the cause of mental anguish and disruption to the business and social activities of the accused, particularly where, as here, his liberty was not interfered with; and that it has impaired his ability to exonerate himself from the charge due to the death, disappearance or forgetfulness of potential witnesses. See In re *Mlambo supra* at 352G and 354D-E; *S v Demba* S-194-94; *S v Marisa supra* at p 9.

I trust that I have made it clear that it is essential for an accused, who requests a referral to this court of an alleged contravention of the Declaration of Rights, to ensure that evidence is placed

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before the lower court. It is on that evidence that the opinion has to be expressed as to whether the question raised is merely frivolous or vexatious. It is on that record that the Supreme Court hears argument and then decides if a fundamental right had been infringed. Only in exceptional circumstances will an applicant be permitted to supplement the record of the proceedings before the lower court by the production of affidavits. Cogent reasons will have to be provided as to why the further evidence was not presented to the lower court. The well known requirements laid down in *Farmers' Co-op Ltd v Borden Synd (Pvt) Ltd* 1961 R & N 28 (FS), 1961 (1) SA 441 (FS) and as discussed latterly in *Leopard Rock Hotel Co (Pvt) Ltd v Walenn Const (Pvt) Ltd* 1994 (1) ZLR 255 (S) and

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Bevan Trading (Pvt) Ltd v Voest - Alpine Intertrading GbmH S-149-94, will have to be met.

It seems to me, also, that before permitting an accused to raise the question of not having been brought to trial within a reasonable time, the lower court should be satisfied that ample written notice has been given to the State, with a copy filed of record, of the intention to advance the complaint. The prosecution is entitled to be afforded the time and opportunity to investigate the cause of the delay and to be ready to adduce evidence as to the reasons therefor, if it is considered necessary to do so. The sort of investigation to be carried out is that which was undertaken by Miss *Hammond.* It will require a close examination of all relevant court records as well as the police docket. A prosecutor should not acquiesce in a situation where, having received inadequate notice of the complaint, he or she is unable to proffer a detailed explanation as to why it has taken so long to bring the accused to trial.

McNally JA: I agree

Korsah JA: I agree

Gill, Godlonton & Gerrans, applicant's legal practitioners

S v RUNGANGA 1995 (2) ZLR 303 (HC)

Court **High Court, Harare**

Malaba J

Criminal review

25 October 1995 Judgment No. HH-122-95

Flynote

Criminal procedure - review - review procedure should not be used where conviction attacked - court refusing to grant adjournment in order for defence to call witness - when this will amount to gross irregularity - failure to

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allow State and defence to address court before judgment - effect of

Headnote

The accused was charged with a driving without due care and attention arising out of an accident in which the lorry being driven by the accused had collided with a railway wagon. He raised the defence that the accident had been caused as the result of illegal action of railway employees in suddenly releasing the wagon. There was a conflict in the evidence of the State on this point, with one of the State witnesses giving evidence that tended to support the defence. After the accused had given his evidence, the defence applied for an adjournment in order to be able to call a witness who was at the scene when the accident occurred. The day before the resumption of the trial, defence counsel contacted the witness and advised him to be in court the next day. When the case resumed, the defence witness was not present. Defence counsel applied for the matter to be stood down until the afternoon to enable him to contact the witness. The prosecutor was agreeable to this adjournment. However, the magistrate refused to rant the adjournment. Instead, he ordered the case to be remanded to a later date for judgment. When the case resumed on the appointed date, the magistrate immediately delivered judgment without allowing the State and the defence to address the court first. He found the accused guilty. Purporting to act in terms of s 57(1)(b)(ii) of the Magistrates Court Act [*Chapter 7:10*], defence

counsel sought to have the case reviewed. He argued that the conviction was improper because there had been gross procedural irregularity. The matter came before a High Court judge.

Held, that the legal practitioner should not have used the review procedure to attack the conviction. He should have appealed against the decision. However, in the circumstances the court was prepared to deal with the matter.

Held, further, that not every refusal of an adjournment or postponement of a trial to give the defence time to call a witness who is not available at court constitutes a gross irregularity. The decision on whether or not to grant an adjournment of a trial in terms of ss 165 and 166 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is a matter within the discretion of the trial court. However, the decision to refuse an adjournment or postponement will be interfered with if the decision in the circumstances amounted to a gross irregularity because material facts were not taken into consideration.

Held, further, that in the circumstances of this case the magistrate had erred in refusing to grant the short adjournment requested. The accused and his legal practitioner were not to blame for the failure of the witness to attend court. The magistrate shut his mind to some of the material facts bearing on the decision and the magistrate wrongly concluded that the evidence of this witness would not be relevant as he erroneously believed that the offence in question was a strict liability offence. The evidence of the witness the defence wanted to call was material in the light of the conflict in the State evidence and the adjournment should have been granted. The magistrate's rash decision to refuse the adjournment and his arbitrary action in remanding of the case for judgment and launching straight into judgment when the case resumed led to the

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inference that he had deliberately decided to prevent the State and defence from exercising their rights to address the court before judgment. These actions constituted a gross irregularity in the proceedings and the conviction therefore had to be quashed.

Cases cited:

R v Pria & Anor 1967 (1) RLR 106 (G)

S v Stokie 1980 ZLR 280 (G)

S v Hulley HB-60-95

S v Muchazivepi 1973 (2) RLR 163 (A)

R v Cooke 1959 (3) SA 449 (T)

R v Parmanand 1954 (3) SA 833 (A)

S v Mutamanengwe 1975 (2) RLR 219 (A)

MALABA J

R v Zackey 1945 AD 505

R v Croeser 1947 (2) SA 483 (C)

R v Kistah (1908) 29 NLR 580

R v Steyn 1918 TPD 152

R v Levin & Ors 1928 TPD 357

Judgment

Malaba J: The accused was charged with contravening s 51(1) of the Road Traffic Act [*Chapter 13:11*]; it being alleged that on 9 March 1993 and at National Railways Complex No. 2 Harare he drove a motor vehicle without due care and attention and collided with a railway wagon. The accused, who was legally represented at the trial, pleaded not guilty but was nonetheless convicted and sentenced to pay a fine of $400 or in default of payment imprisonment for six weeks.

The facts of the case are these. On 9 March 1993 at 12.15 pm the accused drove a lorry pulling two trailers to the National Railways Complex No. 2 yard near the Seke Road. His assignment was to load bags of drought-relief food on to the lorry and the two trailers from a loading shed at the complex. In order to have his motor vehicle take the position from which it could be loaded with the bags, the accused had to first drive it forward and then reverse it into position.

A few metres in front of the lorry was a railway line level crossing. The accused drove his motor vehicle forward and had the front wheels cross the railway line. The nearside of the cab was

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then struck by a railway wagon which was moving along the railway line.

The accused's defence to the charge was that the wagon was suddenly released by the railway employees engaged in an illegal activity called "high-shunting". He said he had checked the side of the railway line whence the wagon came and satisfied himself before driving across the railway line that all the wagons were stationary.

Two railway employees gave evidence for the State. They denied that the railway wagon was suddenly released. They also denied that they were engaged in "high-shunting". Their evidence was to the effect that the wagon was being engine driven. The State then called the police detail who attended the scene soon after the collision. He said the railway wagon that was involved in the collision was not engine driven. Although called by the prosecution, the police detail's evidence supported the defence case.

After the accused had given evidence in chief and had been cross-examined

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by the prosecutor the defence applied for an adjournment so that they could call a witness who was at the scene when the collision occurred. The case was adjourned to 9 December 1994. It is not in dispute that defence counsel contacted the witness the previous day and advised him to be at court the following day. It was not in dispute also that the witness agreed to attend court. When the trial resumed at 8.30 am on 9 December 1994, the witness the defence intended calling was not at court. Defence counsel could not give any reason for the witness' absence. He applied for the matter to be stood down to 2.15 pm to enable him to contact the witness.

The prosecutor was agreeable to the matter being adjourned until 2.15 pm. The magistrate refused the adjournment. He instead ordered that the case be remanded to 12 December for judgment.

When the trial resumed at 8.30 am on 12 December 1994, the magistrate straightaway commenced delivering the judgment by which he found the accused guilty as charged. The State and the defence had not been afforded opportunities to address the court on the merits of the case before judgment. In the reasons for judgment the magistrate said the accused's defence was untenable because he was under a duty to stop at the railway crossing. He reasoned that the accused failed to stop at the railway crossing and therefore committed a strict liability offence.

On 19 December 1994 the accused's legal practitioner wrote to the clerk of court requesting that the record of proceedings be forwarded to the High Court for review. He purported to act in terms of the provisions of s 57(1)(ii)(b) of the Magistrates Court Act [*Chapter 7:10*]. The record of proceedings was not placed before the magistrate for his comments as is required to be done by s 57(2) of the Magistrates Court Act.

In the grounds for review attached to the letter, the legal practitioner attacked the propriety of the conviction. He said it was grossly irregular for the trial magistrate to refuse the adjournment

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to enable the defence to call its witness. He also contended that it was a gross irregularity for the magistrate not to afford the state and defence the opportunities to address the court.

The legal practitioner did not have to use the review procedure to attack the conviction. In *R v Pria & Anor* 1967 (1) RLR 106 (G) DAVIES J said at 107G-H:

> "In terms of subs 55 and 58 of the Magistrates Court Act [now

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> ss 57(1)(ii)(b) and 57(2)] a person who has been convicted before a magistrate's court is entitled only to submit a written statement, on review, setting out the grounds or reasons upon which he considers the sentence imposed upon him not to be in accordance with real and substantial justice. He is not entitled to submit written representations attacking the conviction. The proper course if he wishes to attack the conviction is to note an appeal."

The learned judge went on at 108C to point out that:

> "Appeal procedure is entirely different from review procedure and it is wholly inappropriate for an accused person to attempt to attack his conviction by way of review."

Section 29(4) of the High Court Act [*Chapter 7:06*] is worded in terms that are identical to those of s 64(4) of the Magistrates Court Act which was repealed by s 59 of Act 29 of 1981. The section confers upon a judge of the High Court the power to review proceedings of an inferior court which come to his notice "notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review".

The judge can only exercise his review powers in terms of s 29(2) of the High Court Act if he is satisfied that the proceedings brought to his notice in the circumstances set out in s 29(4) are not in accordance with real and substantial justice.

When the record of proceedings in this case was placed before me in chambers I was rather reluctant to review the proceedings because it appeared that the legal practitioner was seeking to abuse the review procedure to have the conviction set aside when he ought to have noted an appeal against conviction with the Supreme Court. I could not, however, resist the temptation to peruse the record and having done so was satisfied that the allegations of irregularity in the proceedings were not without foundation. Following the procedure adopted in *R v Pria supra* and in *S v Stokie* 1980 ZLR 280 (G) I sought the views of the Attorney-General on the propriety of the conviction.

It is important to point out to legal practitioners that procedures should be used for the purposes for which they were created. The indulgence of reviewing the proceedings where the propriety of the conviction is attacked under s 29(4) will not be readily granted. In *S v Stokie supra* GUBBAY J (as

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he then was) sounded the warning to legal practitioners when he said at 282F-H:

> "I have no hesitation in remarking that it is wrong to use s 64(4) (of the Magistrates Court Act) as a cover to get the benefit of an appeal in proceedings not subject to automatic review. The ordinary procedure of appeal must be followed. If the attitude of this court were otherwise, it would be inundated with complaints in the most trifling of cases. As it is the time of a reviewing judge is sufficiently occupied with matters that properly come before him. In the light of the above, I was sorely tempted to refuse to consider the merits of this particular conviction ... I emphasize however, that my decision to exercise my power under s 64(4) of the Act in this instance must not be taken by practitioners as a precedent for obtaining for a client thought to be aggrieved a cheap form of redress not provided by the legislature by slipping in by the back door."

In *S v Hulley* HB-60-95 CHATIKOBO J, with the concurrence of CHEDA J, refused to review the merits of the conviction. At p 3 of the cyclostyled judgment the learned judge gave the reasons for his refusal to grant the accused the indulgence and said:

> "The letter addressed to the Registrar does not state the reasons for the request. I see no reason to grant the accused an indulgence when he himself or his counsel has not explained the basis upon which the request has been made."

In this case the accused's legal practitioner gave the reasons for the request for the review of the propriety of the conviction. He also set out the grounds for contending that the conviction should be quashed.

The Attorney-General was unable to support the conviction. His views on the matter were expressed by his representative who said:

> "The Attorney-General does not support the conviction for the following reasons:
>
> 1. It is trite that once an accused has pleaded not guilty to a charge there should be a full and fair trial no matter what the opinion of the court might be. The presiding magistrate should have, under the circumstances, allowed a postponement of the case to enable the defence to call its witness.

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2. It cannot be disputed that there is a conflict in evidence between the State case and the case of the accused. The question whether the wagon which collided with the motor vehicle driven by the accused was on its own and was then suddenly released or was being driven by an engine cannot be determined on the evidence on record. There was thus a compelling need on the part of the presiding magistrate to grant a postponement of the case to allow the defence to call the witness who was not available on the day in question. Indeed, there is case law to the effect that if a witness is available to settle a conflict and the witness is not called by either party, it is the duty of the court to call such witness. Refer to *S v Muchazivepi* 1973 (2) RLR 163 (A).

3. The Police detail who visited the scene testified, contrary to testimony by State witnesses, that he saw a wagon without an engine. It was then incumbent upon the State to tender evidence as to the removal of the engine before the Police attended the scene. The State did not do so, thereby giving credence to the accused's version of events.

4. In the light of the provisions of s 200 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] the presiding magistrate should have permitted the parties to address the court if they so wished. A refusal or failure to permit the exercise of this right is an irregularity which will, in general, lead to the

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> setting aside of a conviction. Refer to *R v Cooke* 1959 (3) SA 449 (T); *R v Parmanand* 1954 (3) SA 833 (A) and *S v Mutambanengwe* 1975 (2) RLR 219 (A). It is submitted with respect that in the instance, addresses should have been permitted as these would have touched on the conflict in evidence between the State and the accused."

I am indebted to the Attorney-General for his assistance. It is of course a recognised principle of our law that the decision whether or not to grant an adjournment or postponement of a trial in terms of ss 165 and 166 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is a matter within the discretion of the trial court. Where the trial court has taken into account all the material facts bearing upon the decision, the review tribunal will not interfere with the decision, even if on the same facts it would have reached a different decision. See *R v Zackey* 1945 AD 505 and *R v Croeser* 1947 (2) SA 483 (C).

The question is not whether the review tribunal would have exercised the

discretion differently, but whether in refusing the adjournment all the material facts were taken into consideration.

It follows, therefore, that not every refusal of an adjournment of a trial to give the defence time to call its witness who is not available at court constitutes a gross irregularity necessitating interference with the proceedings. See *R v Kistah* (1908) 29 NLR 580.

In *R v Steyn* 1918 TPD 152 defence counsel asked for an adjournment to call one Susan who was not at court. The trial magistrate refused the application, saying it was absurd. On appeal, GREGOROWSKI J had this to say at 155:

> "It is true that if an idea were to get abroad that an accused has only to ask for a postponement to get it, such a power would be very much abused and would lead to wanton waste of time of the court and waste of money. But I think in all cases where there are grounds for a postponement the magistrate should investigate the matter and grant the postponement even if he has a doubt because the presumption should be that the application is *bona fide* ... I think the magistrate should have given the defence time enough to see Susan and in a case like this, where the liberty of the subject was at stake, I think the magistrate erred in refusing an adjournment and coming to the conclusion that the application was merely made with the object of gaining time."

The question whether the refusal to grant an adjournment for the defence to call its witness necessarily amounts to a gross irregularity or not was decided in *R v Levin & Ors* 1928 TPD 357. Defence counsel applied for an adjournment to enable the accused to call their witnesses who were not at court. The trial magistrate refused to grant the adjournment. Thereafter defence counsel withdrew from the case and the accused conducted their own defence. They were convicted. The convictions were attacked on review on the ground that the refusal by the magistrate to grant the adjournment amounted to a gross irregularity necessitating interference with the proceedings.

GREENBERG J, concurring with DE WAAL JP, who delivered the leading judgment said:

> "On the facts which I take to be correct the magistrate it seems to me clearly erred. I think it was his duty to have enquired into the reasons for the request for a postponement and for the reasons why the attorney was

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> not ready to go on with the case. Once he had enquired fully into those reasons he should then have made up his mind whether to grant the postponement or not. It has been contended by Mr *Thompson* that no matter how negligent an accused may be unless he deliberately delays the trial proceedings the court should always grant a postponement. I am not prepared to make any comment on the correctness of that contention. I think that on the facts before us if the magistrate had investigated the matter he ought to have granted the postponement, because even though the accused may have been at fault I do not think they were at fault to such an extent as to deprive them of the right to put their case before the court fully. But though I think the magistrate was wrong in the matter I do not think his error was such as to amount to gross irregularity.
>
> We have been referred by Mr *Thompson* to the case of *R v Steyn* 1918 TPD 152 where GREGORWSKI J said that a magistrate erred in refusing to grant an adjournment to call a witness and the case was sent back to the magistrate. I do not agree that it follows that every error is gross irregularity."

In this case the accused or his legal practitioner was not to blame for the failure by the witness to attend court. The accused's legal practitioner had advised the witness to attend court on 9 December and he had promised to do so. The magistrate did not find out from the legal practitioner why a subpoena had not been issued. No-one knew why the defence witness was not at court. He could have had a perfectly valid explanation for his absence. The magistrate ought to have given the defence time to investigate the matter.

It was not as if the case had been remanded on numerous previous occasions for the defence to secure the attendance of the witness. The adjournment being requested was for a few hours until 2.15 pm. The magistrate erred in refusing to grant the adjournment.

The refusal to grant the adjournment was on the facts of this case a gross irregularity. It is clear that the magistrate shut his mind to some of the material facts bearing upon his decision. A reasonable court acting carefully might not have convicted the accused on the conflicting evidence adduced by the State. The evidence of the police detail added credence to the accused's defence that the railway wagon was suddenly released by railway employees engaged in the illegal activity called "high-shunting". The evidence of the witness the defence wanted to call was material in the resolution of the conflict in the evidence of state witnesses. There was even need in the interests of justice for

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the magistrate to call the witness if the defence had not indicated their intention to call him.

The magistrate did not apply his mind to the grounds for the adjournment. He erroneously believed that the accused was charged with a strict liability offence. In his mind, the facts disclosed a failure by the accused to stop at a railway crossing in compliance with the law requiring all heavy motor vehicles to stop at a railway crossing. The accused was however charged with an offence that required proof of negligence on his part in order to find him liable for what he did if his conduct was in fact wrongful.

It must follow that the magistrate convicted the accused of a different offence from the one in

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respect of which he purported to return the verdict of guilty. Believing that the accused was guilty of a strict liability offence, the magistrate reasoned that the evidence of the witness the defence wanted to call was not relevant and therefore refused the adjournment for a wrong reason. The decision led to a miscarriage of justice. The conviction cannot stand.

In light of his rash decision to refuse the adjournment and arbitrarily remanding the case to 12 December for judgment, the magistrate's abrasive conduct of commencing to deliver the judgment on 12 December 1994 immediately after the court sat leads to the only reasonable inference that he deliberately decided to prevent the State and defence from exercising their rights to address the court before judgment. The magistrate had in fact made up his mind against addresses on 9 December when he remanded the accused to 12 December for judgment. He must have known that the question of addresses had not been raised when he decided to deliver judgment on the next remand date.

There is no doubt in my mind that the conduct of the magistrate in preventing the State and the defence from exercising their rights to address him before judgment amounted to a gross irregularity.

The conviction is therefore quashed.

Garwe J agrees.

S v PILLAY 1995 (2) ZLR 313 (HC)

Court **High Court, Bulawayo**

Chatikobo J

Criminal review

27 October 1995 Judgment No. HB-136-95

Flynote

Criminal procedure - review - sentence - review of proceedings of magistrates court - High Court's powers of review - limitations on - whether Attorney-General may refer a case for review if he is dissatisfied with sentence passed - High Court Act [Chapter 7:06] - ss 26 to 29 - Magistrates Court Act [Chapter 7:10] - ss 57 and 62

Headnote

If the Attorney-General is dissatisfied with the sentence passed by a magistrates court, his recourse is to apply to the Supreme Court for leave to appeal against the sentence. There is no longer any provision for him to refer the matter to the High Court for review. Even if the matter comes to the notice of the High Court, the court's powers are limited to withholding its certificate that the proceedings are in accordance with real and substantial justice. The court cannot set aside the sentence and substitute another one, even if, as in the present case, it considered

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the sentence passed to be so lenient as to be a travesty.

Cases cited:

A-G v Mharapara 1986 (1) ZLR 19 (S)

Hawkins v Admin of SWA 1924 SWA 57

S v Stokie 1980 ZLR 280 (G)

R v Lungen 1967 RLR 162 (G)

R v Schaube - Kuffler 1967 RLR 374 (G)

S v du Chattlier 1973 (2) RLR 339 (G)

S v Wilson HH-125-95

S v Bandera HH-170-94

CHATIKOBO J

Fikilini v A-G 1990 (1) ZLR 105 (S)

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

Nyakabambo v Min of Justice & Ors 1989 (1) ZLR 96 (H)

Judgment

Chatikobo J: The accused appeared before a provincial magistrate at Bulawayo on 24 March 1995 and pleaded guilty to a charge of theft on which she was duly convicted. The passing of sentence was postponed for five years on two conditions, one of future good behaviour and another of satisfactory performance of community service. She, together with the accomplice boyfriend, stole property consisting mainly of jewellery items, all valued at $14 600. Of that property, only $1 800 worth of property was recovered.

The Attorney-General was aggrieved by the inadequacy of the sentence. He noted an appeal against sentence to this court on 19 April 1995. Nothing happened thereafter until 23 June 1995 when the accused's legal practitioner wrote to the Attorney-General, pointing out that an appeal against sentence by the Attorney-General lies to the Supreme Court and not the High Court. That in fact is the case. Section 62(1)(b) of the Magistrates Court Act [*Chapter 7:10*] provides that:

"(1) If the Attorney-General considers that the sentence imposed in any criminal case by a court is -

(a) ... [not relevant]

(b) inadequate -

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(i) in the light of the findings of fact made by the court and the nature of the charge or

(ii) because it was based on findings of fact for which there was no evidence or on a view of the facts which could not reasonably be entertained;

he may, with the leave of a Judge of the Supreme Court, appeal against that sentence."

The appeal that was noted to this court by the Attorney-General was therefore incompetent. On becoming aware of the nullity of the appeal the Attorney-General, in what one can only call a show of forensic resilience, referred the matter to me, advising that he had on reconsideration of the matter decided to withdraw the appeal. He now wanted the matter to be dealt with by way of review. There was no appeal which could be withdrawn in the first place. I therefore referred the matter back to him asking him on what basis he contended that the matter was reviewable in terms of s 63 of the Magistrates

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CHATIKOBO J

Court Act. In his response, he has referred me to the powers of review granted to the High Court by Part IV of the High Court Act [*Chapter 7:06*]. I have not had the benefit of his views on the practical effect of s 57 of the Magistrates Court Act on the review which he seeks.

By s 26 of the High Court Act, the High Court is vested with extensive powers to review "all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe". The grounds upon which such proceedings or decisions may be reviewed are set out in s 27 of the same Act. They include, among others, the existence of gross irregularity in the proceedings or decisions. By s 28 it is provided that when reviewing such decisions or proceedings the High Court may, if the proceedings are of a civil nature, "set aside or correct the proceedings or decisions." Section 29 gives the High Court power to regulate the process of review, including the power to hear argument on review where the proceedings are not being reviewed at the behest of the convicted person. The same section provides for the courses which are open to the High Court when reviewing proceedings or decisions. Notably, the court can either confirm the proceedings or quash the conviction and set aside the sentence or substitute the sentence, provided the substituted sentence is not more severe than the one set aside, unless the convicted person was a company or was represented at the trial in the court *a quo* and the review is brought at his behest. The section goes on to set out other powers which are not of relevance here. Subsection (4) of the same section provides that the powers set out in sub ss (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge thereof that criminal proceedings of an inferior court are not in accordance with real and substantial justice, even though the proceedings are not the subject of an application to the High Court or even though they have not been referred for review. I shall deal with the purpose of s 29(4) in due course.

These provisions, on the face of them, give the High Court judges wide powers of review. That notwithstanding, the powers conferred on judges and the High Court by Part IV of the Act are not untrammelled.

Sections 26 and 27 are predicated by the phrase "subject to the provisions of this Act and any

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other law". Section 27(2) provides that:

> "Nothing in this section shall affect the provisions of any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities."

The phrase "subject to" has been interpreted to mean "except as curtailed by".

CHATIKOBO J

See *A-G v Mharapara* 1986 (1) ZLR 19 (S) at 21C, in which BECK JA followed the decision in *Hawkins v Administration of SWA* 1924 SWA 57 at 67, and came to the conclusion that the right of appeal enshrined in s 44 of the High Court Act was curtailed by the ensuing provisions of the same Act. I respectfully share that view. There is nothing in Part IV of the High Court Act which warrants a different interpretation of the same phrase in the same Act. If the view I take of the meaning of the phrase "subject to this Act or any other law" is the correct one, as I perceive it to be, then it must follow that the power of the High Court to review all proceedings and decisions of inferior courts enacted by s 26 is curtailed by that phrase and made subject, *inter alia*, to any other law regulating the review process. Similarly, the grounds of review set out in s 27 are subject to the same curtailment. But more importantly, the grounds of review in s 27 are further curtailed by the provisions of subs (2), which is to the effect that nothing in s 27 shall affect the provisions of any other law relating to the proceedings or decisions of inferior courts. This can only mean that where an enactment provides for grounds of review not provided for in s 27, then the provisions of such other enactment shall prevail. The same applies where another enactment or, for that matter, the common law, ousts the court's powers of review. For present purposes, it is the opening words of s 26 and those of s 27(1) which subordinates the High Court's powers of review and the grounds upon which such review can be carried out to the provisions of "any other law." It is in view of this obvious curtailment that I asked the Attorney-General if the matter is one that can be properly reviewed in terms f s 63 of the Magistrates Court Act, because, if the matter is not reviewable in terms of this latter Act, then the High Court Act does not save the situation, because its provisions are made subject to the provisions of the Magistrates Court Act.

Section 57 of the Magistrates Court Act is, of course, the provision which stipulates when a matter may be reviewed by a judge or by the High Court. In s 57(1) it is provided that when any court sentences any person to any period of imprisonment in excess of six months or to a fine exceeding two hundred dollars or to corporal punishment, the clerk of court shall forward the record to the registrar within seven days for review. The proviso to that section provides that the section shall not apply to any person who is represented by counsel at his trial or any person which is a company unless the convicted person or the company representative, through their counsel, request the clerk of court to forward the case on review. Section 57(2) sets out the steps which must be followed by an accused person who makes a request in terms of the proviso to s 57(1). Section 57(3) then provides that where the convicted person receives a sentence which is not subject to review

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in the ordinary course he may, if he considers the sentence not to be in accordance with real and substantial justice, request the clerk of court to send it to the registrar for review.

It is apparent from these provisions that the Attorney-General is not given the right to refer a case for review in the ordinary course of events. The right is so circumscribed that even a convicted person who is legally represented at this trial is deprived of that opportunity unless a request is made in accordance with the terms of the Act. The right is one which ordinarily attaches to the unrepresented accused. Even in those exceptional cases, where an accused person who is legally represented requests a review, the courts will not review his case as a matter of course. In fact, the court deprecates the practice of resorting to such requests in order to secure a cheap appeal. See *S v Stokie* 1980 ZLR 280 (G). The only authorities I have been able to find where cases were reviewed at the behest of the Attorney-General are *R v Lungen* 1967 RLR 162 (G) and *R v Schaube - Kuffler* 1967 RLR 374 (G). These cases, however, do not detract from what I have said thus far, because the precursor to the present Magistrates Court Act, which was Chapter 15 of 1963, had a specific provision, s 62, which gave to the Attorney-General the right to refer a case for review if he felt that the sentence imposed was inadequate. That Act gave the High Court power (s 62(2) thereof) to pass a sentence warranted in law in place of the inadequate sentence. The absence of a similar provision in the current Magistrates Court Act can only point to the fact that the intention of the legislature was to take away that right. The fact that the proviso to s 29(2)(b) of the High Court Act does not permit a judge on review to pass a more severe sentence which he could do under s 62(2) of Chapter 15 points decisively to a deliberate decision by Parliament to take away that right from the Attorney-General.

It is only logical that the Attorney-General be divested of this right. If an accused who is legally represented can only enjoy a right to have his case reviewed in limited circumstances, it would be the height of illogicality to allow the Attorney-General to refer any case in which he is aggrieved by the decision of a magistrate to the High Court or a judge on review. It is a truism that the majority of persons who are arraigned before the magistrates courts in this country are unrepresented. It is only fair that their cases be reviewed as a matter of course. The few who can afford legal representation enjoy a circumscribed access to the process of review. Why should the Attorney-General, who is the authority vested with the power to prosecute, who has a right to appeal to the Supreme Court, albeit with leave in the case of an appeal against sentence, and who is always represented in all prosecutions in the

magistrates courts, be granted a *carte blanche* to pick and choose between review and appeal? The fact that the powers of the High Court contained in Part IV of the act are curtailed by the provisions of the Magistrates Court Act, coupled with the absence of a right on the part of the Attorney-General in the Magistrates Court Act, leads me to conclude that no such right was intended.

I return to deal with the provisions of s 29(4) of the High Court Act which states that whenever it

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comes to the notice of the High Court or a judge that any proceedings of an inferior court are not in accordance with real and substantial justice, then, notwithstanding that such proceedings are not the subject of an application to the High Court or have not been submitted for review, the High Court or a judge thereof can exercise his review powers *mero motu.* I think the question that must be answered is whether the power of review can be exercised *mero motu* even in a case which is not covered by the provisions of the Magistrates Court Act. I think not. The power to review is given by s 26 and the grounds of review are set out in s 27. Section 29 sets out what the reviewing court or judge may do in the course of such a review. The substantive powers of review - if I may call them that - and the grounds on which those powers can be used, are contained in ss 26 and 27. Section 29 prescribes the procedures to be allowed when exercising those powers. In particular, s 29(4) gives to the court the power to intervene to correct an injustice even when no one has applied or where the matter has not been referred for review. It does not, in my view, seek to create any new powers separate from or additional to those powers created by s 26 and s 27. So if the powers created by s 26 and s 27 are curtailed by the provisions of s 57 of the Magistrates Court Act, it necessarily follows that the powers in s 29 which are largely procedural are similarly curtailed. That means the High Court or a judge would review a case *mero motu* if it is covered by s 63 of the Magistrates Court Act. As far as I am aware, cases which have been reviewed *mero motu* in line with the power in s 29(4) fall into this category. They were cases which would have been reviewed in the fullness of time. Examples which come to mind are *S v du Chattlier* 1973 (2) RLR 339 (G); *S v Wilson* HH-125-95 and *S v Bandera* HH-170-94.

I must not be understood to say this is so in every case. There could be other cases emanating from other courts or tribunals governed by different legislation. In each case it is a question of construction of the relevant legislation.

Also, what I have said so far only applies to a situation where a review is

sought by the Attorney-General in the absence of an application on notice to the accused and other interested parties. There is nothing in s 63 of the Magistrates Court Act to prevent the Attorney-General from applying in terms of the rules of court for a review of proceedings of a magistrates court. That is a procedure different from a review in terms of s 63 of the Magistrates Court Act. Had the Attorney-General used that procedure, as was done in *Fikilini v A-G* 1990 (1) ZLR 105 (S) and in *Ndhlovu v Regional Magistrate, Eastern Division & Anor* 1989 (1) ZLR 264 (H), then clearly the case would have been reviewed, but this is not what happened here. The reason why it is important not to review a matter on the record at the behest of the Attorney-General is that in mounting a prosecution he exercises a quasi-judicial function. See *Nyakabambo v Min of Justice & Ors* 1989 (1) ZLR 96 (H). That being so, in the course of making decisions about the charges to be preferred and sentences to be meted out he is perfectly entitled to make judgements and concessions which may influence the court to, say, pass a sentence below the norm. A reviewing court, which may not be privy to such pre-trial consultations between the prosecutor and the defence, cannot be properly placed to review the matter. In fact, what happened in this case affords a good illustration of the problem I have in

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mind. The trial magistrate, in his response to the purported notice of appeal, stated that the public prosecutor did not object to the imposition of community service, so he acted under the assumption that the prosecutor was in agreement with what is happening. The prosecutor has now filed an affidavit in which he says he was not given an opportunity to address on sentence. He says the court raised the issue of community service *mero motu* and simply advised him and the defence counsel to find a suitable place for the accused to perform community service. I am now expected, on review, to make a finding as to who between the magistrate and the prosecutor is telling the truth. That is why it is undesirable to refer a case like this on review in the way the Attorney-General has done.

In any event, if I am satisfied that the sentence is not in accordance with real and substantial justice all I can do is withhold my certificate. I cannot set aside the sentence and substitute another in its place.

I have therefore come to the conclusion that the procedure adopted by the Attorney-General is not the correct one. Ideally he should have taken the matter on appeal. Having said that, I should say in passing that the sentence imposed on the accused is a travesty of justice. For an offence for which at least 24 months' imprisonment with labour should have been imposed she has escaped with

community service. If her luck derives from her sign of the zodiac she would do well to bear in mind that luck has a tendency to run out.

In the result the request by the Attorney-General is declined.

S v DUBE & ANOR 1995 (2) ZLR 321 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA and Korsah JA

Criminal appeal

16 October & 6 November 1995 Judgment No. S-189-95

Flynote

Criminal procedure (sentence) - general principles - assessment of - tariff sentence - not to be used - pre-trial incarceration - factors affecting - plea - guilty - weight to be afforded to - specific common law offences - theft - motor vehicle - factors in relation to sentence

Headnote

Where the court's sentencing discretion has not been fettered by statute, the court must

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properly exercise its discretion. It is wrong for the court to apply a tariff sentence. The court must always arrive at a just sentence, taking into account the circumstances of the particular case and mitigating and aggravation factors. The desire to achieve uniformity in sentencing must not lead the sentence to abdicate his judicial responsibility to decide upon an appropriate sentence in respect of the case under consideration. The use of a tariff approach is an abandonment of judicial discretion in relation to sentencing and amounts to a misdirection.

In sentencing a person, credit should be given to the fact that he has confessed his guilt to the police (especially where there is no evidence against him other than his confession) and to the fact that he has co-operated with the police in bringing to book his accomplices or recovering stolen property. Even in the absence of earlier co-operation with the police, a plea of guilty in court should be a factor that is taken into account in his favour when it comes to sentence as such a plea saves the State time and unnecessary expense in proving the case against the accused.

As regards sentencing for offences involving theft of motor vehicles:

1. Theft of a motor vehicle is a very serious offence as it has become rampant and has assumed international proportions. Where the

offence trancends international boundaries it deprives the owner of a valuable asset and destabilises the economy.

2. Where a receiver has made common cause with a thief by agreeing to deal with the stolen vehicle after it has been stolen, no distinction should be drawn between the thief and the receiver.

3. Where a person is dealing in stolen vehicles, the fact that the stolen vehicle is recovered undamaged is irrelevant, as it is in the interests of the dealer that the vehicle is kept in good condition.

Cases cited:

S v Mayberry 1985 (1) ZLR 192 (H)

S v Mugwenhe & Anor 1991 (2) ZLR 66 (S)

S v Reddy 1975 (3) SA 757 (A)

S v Rose & Shapiro (1980) 71 Cr App R 296

S v Buka S-112-95

S v Chirara & Ors 1990 (2) ZLR 156 (H)

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

R v Lowe (1978) 66 Cr App R 122

S v Mpofu 1985 (1) ZLR 187 (S)

S v Sadziva S-226-91

S v Munyaradzi S-103-92

S v Mapotsa S-102-92

S v Chimbetu S-107-92

S v Manyika S-174-93

S v Chimanga S-51-93

A J Chirunda for the first appellant

W Munyanyi for the second appellant

T Chitapi for the respondent

Judgment

Korsah JA: Both these cases concern appeals against sentences imposed by the High Court, Bulawayo, after the appellant in each case had tendered a plea of guilty to receiving a stolen vehicle, knowing it to have been stolen. Each appellant was sentenced to ten years' imprisonment with labour, none of which was suspended. Apart from the sentences imposed, there are features common to both cases, and the views expressed by the learned judge who presided over both cases in his reasons for sentence, which make it expedient that the two appeals be taken in tandem.

In Dube's ("appellant A") case, the court found that appellant A received a Mazda 626 motor vehicle in Harare on 14 April 1993, from a South African

national known as Godfrey Mduduzi Zondo, knowing the motor vehicle to have been stolen, but unaware of the circumstances surrounding the theft of the vehicle.

According to the statement of agreed facts, amplified by evidence given by appellant A in mitigation of sentence, appellant A was desirous of visiting his younger brother whose birthday fell that weekend. His younger brother was stationed at Victoria Falls and appellant A had no means of transportation at the time so Zondo offered him the use of the stolen vehicle for the purpose of visiting his brother at Victoria Falls.

Appellant A alleged that on his way to Victoria Falls he met a cousin of his, a Mrs Moyo, in Bulawayo. Mrs Moyo was unwell and requested appellant A to convey her to Botswana to be

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attended to by a certain witch doctor. He took Mrs Moyo to Victoria Falls, where they spent the night, and on the following day drove her across the border to Botswana. When they got to Botswana they were informed that the witch doctor that Mrs Moyo wished to consult had travelled to Kazungula on the Zambian side of the border and would be away for about three weeks.

Appellant A alleged he decided to drive his cousin to Zambia for a consultation with the witchdoctor. They were, however, refused entry into Zambia because he did not have authority from the person whose name appeared as the owner in the false registration documents covering the vehicle to take the vehicle across the border.

On their return to the Zimbabwe border post the officer-in-charge asked appellant A for the temporary export permit that had been issued to him when he left Zimbabwe with the car in the morning. Appellant A told him that he had misplaced it and so appellant A was required to leave the registration book of the vehicle with the officer-in-charge, so that he could confirm with the border post that appellant A had earlier on left the country with the vehicle. Appellant A was to collect the registration book, after such confirmation, the following day.

Appellant A said the next morning, 24 April 1993, he was driving to town from Victoria Falls Airport, after visiting his younger brother at his workplace, when he noticed a vehicle following him. He suspected that he was being pursued by the police and so he tried to avoid them by driving into town and doubling back to the airport, where he hid the car and went to an office where his brother allegedly worked. After about two hours he was approached by

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police officers from Victoria Falls who invited him to come outside for questioning. Appellant A refused to furnish the police with his name and so the police conducted a body search, which yielded appellant A's passport and the keys to the stolen vehicle. On appellant A's indications, the stolen vehicle was recovered.

It is to be observed that the vehicle was stolen at 11 pm on 14 April 1993, and appellant A acquired possession of it knowing it to have been stolen on the same day the theft of it occurred. He alleged that he was lent the vehicle by one Zondo, who had robbed the owner of his vehicle, to facilitate appellant A's visit to his brother at Victoria Falls over the weekend. Yet appellant A, by his own account, was in possession of the vehicle from the day it was stolen until its recovery on 24 April 1993. Appellant A had his passport on him when he was arrested.

While it is not unusual for tourists to carry their passports on their persons, it is highly suspicious for one in possession of a recently stolen vehicle to be visiting his brother at a border post, such as Victoria Falls, with a passport at hand to cross the border in a "hot" car. It is also pertinent that, upon his arrest, appellant A offered the police no information concerning the whereabouts of the alleged thief, Zondo, until he appeared before the High Court, Bulawayo, some time in December 1993 or January 1994, some eight months after the commission of the offence, thereby denying the police the advantage of acting timeously to effect the arrest of Zondo. It is little wonder that Zondo's last contact was in May 1993 with a woman whose address was

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furnished to the police by appellant A

That said, appellant A was a twenty-one-year-old first offender who pleaded guilty, albeit belatedly. He is married and there is a child of the union. He had been in custody for some ten months before the sentence of ten years' imprisonment with labour was imposed on 11 February 1994. The vehicle, which was valued at $100 000, was recovered undamaged.

In regard to Roberts's ("appellant B's") case, the vehicle, a Peugeot 504, was stolen in Bulawayo on 27 May 1992. He took custody of the vehicle in Harare from one B J Kudakwashe Zengeya on the same day that it was stolen. Zengeya operated a business at Kuwadzana Township in Harare styled Coach (Pvt) Ltd Zengeya informed appellant B that the vehicle was a stolen vehicle and requested him to drive the vehicle over to Zambia for a commission of $6 000. To facilitate crossing the border with a stolen vehicle, Zengeya wanted it spray-painted at M Phillips Panelbeaters at Zengeya's

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expense. The vehicle had no ignition key and could only be started by the manual touching together of the ignition wires.

On 28 May 1992, in compliance with an agreement with Zengeya, appellant B drove the stolen vehicle to the yard of M Phillips Panelbeaters to meet Zengeya. In the absence of Zengeya, appellant B assumed the responsibility of having the vehicle spray-painted, but before appellant B's instructions could be carried out the police arrived and arrested him and others.

In mitigation of sentence, it was accepted that appellant B was a twenty-six-year-old first offender, who was married with three children of the union. He had received no reward for undertaking to be a courier. He pleaded guilty to the offence. He had been in custody for fifteen months prior to the sentence of ten years' imprisonment with labour being imposed. The stolen vehicle was recovered undamaged.

On the facts of both cases, the learned judge rightly concluded that the circumstances surrounding the thefts and the receiving did not justify a distinction between the thieves and the receivers being drawn with regard to the severity of the punishment to be imposed, because they received the vehicles knowing them to have been stolen and made common cause with the thieves by agreeing to deal with the vehicles dishonestly.

Mr *Chitapi*, for the State, in conformity with the high moral principles which the legal profession expects of its members, conceded that the learned judge misdirected himself by sentencing each of the appellants on the basis of a tariff sentence for the theft of a motor vehicle, being ten years' imprisonment with labour. In respect of Dube, the learned judge said:

> "Now the tariff for offences involving the deprivation of complainants of their motor vehicles is now in the region of ten years' imprisonment. I need not cite authority for that ..."

With regard to Roberts, he expressed himself in similar vein thus:

> "If you and like-minded persons will not learn from the severity of the present tariff of sentence for this offence, so

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be it."

The implication in these statements, submitted Mr *Chitapi,* is that because car thieves were not being deterred by the lengthy sentences imposed, the appellants, other relevant factors of mitigation notwithstanding, should

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suffer a sentence fashioned to deter would-be offenders, without consideration for the appellants' moral culpability, or their personal circumstances, or any of the other factors to which regard must be had in the imposition of sentence.

It has been said time and again in our courts that the punishment should not only fit the crime, it should fit the person as well. If that is to be, there can be no place for a tariff sentence in respect of any crime with regard to which the courts' discretion is not fettered by statute law; for the circumstances of the offender and other factors of mitigation or aggravation may vary infinitely. Be it as serious as murder, the sentencing authority is enjoined to consider all factors, both in aggravation and mitigation of sentence and, in the exercise of its discretion, to impose a just punishment. A sentence based on a tariff is indicative of an abortion of judicial discretion, which is tantamount to a misdirection. If authority in support of the above views is required, see *S v Mayberry* 1985 (1) ZLR 192 (H) at 194-195; and *S v Mugwenhe & Anor* 1991 (2) ZLR 66 (S) at 69D-E, where EBRAHIM JA cited with approval the following passage from the judgment of BOTHA JA in *S v Reddy* 1975 (3) SA 757 (A) at 759H:

> "Though uniformity of sentences, that is of sentences imposed upon accused persons in respect of the same offence, or in respect of similar offences or offences of a kindred nature, may be desirable, the desire to achieve such uniformity cannot be allowed to interfere with the free exercise of his discretion by a judicial officer in determining the appropriate sentence in a particular case in the light of the relevant facts in that case and the circumstances of the person charged."

Similar apposite sentiments were expressed by McNEILL J in *S v Rose & Shapiro* (1980) 71 Cr App R 296 at 300-301, cited with approval by EBRAHIM JA in *S v Buka* S-112-95 (unreported) at p 8 of the cyclostyled report:

> "There is no such thing as, and the decision in Lowe [(1978) 66 Cr App R 122] does not purport to lay down, what is called a tariff. This court desires to make it perfectly clear that no tariff exists for this class of case. The use of the word 'tariff' is wrong. **Each case must be approached on its own particular facts, weighing the criminality of the admitted offence against the offender's assistance to and co-operation with the police, and taking into consideration the public interest in encouraging others to come forward.** One mischief of a so-called tariff is its use in the claim to use it as a bargaining factor. The use of the schedule which Mr *Leary* used, showing a series of cases in which he had

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> been concerned of a similar sort, where 'supergrasses' were sentenced in each case to only five years' imprisonment, compounds the error which arises from thinking that there is such a tariff in this class of case. Sentencing judges will bear in mind that it is necessary in every case to weigh the particular circumstances in the

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light of the decision in *Lowe supra* reinforced as it is by the decision in this case" (my emphasis).

Whereas in *S v Rose & Shapiro supra* counsel sought to rely on a so-called tariff to have the sentences imposed reduced, in the instant case the sentencing judge applied a so-called tariff and thereby commended to cold oblivion all mitigatory circumstances in favour of the appellants. In neither use of a tariff can a just sentence be achieved.

As a result of the above misdirection, this court is at large with regard to the sentences to be imposed.

I turn then to the factors to which the sentencing judge in these cases should have given consideration.

The appellant in each case was a young first offender. I agree with Mr *Chitapi* that it is a salutary practice of our courts to suspend, in appropriate cases, a portion of the custodial sentence imposed on young first offenders, on condition of good behaviour, so as to operate as a deterrent of a personal nature: *S v Chirara & Ors* 1990 (2) ZLR 156 (H). This practice has, on occasion, not been followed where the seriousness of the crime and the moral turpitude of the accused warrant to be visited with effective imprisonment for a lengthy period, notwithstanding his youthfulness or that it was his first venture in crime. The reason is that "where an offender is incarcerated for a substantial period, he should not need any further encouragement to behave himself after release": *S v Kanhukamwe* 1987 (1) ZLR 158 (S) at 160F. Having regard to the seriousness and prevalence of theft of motor vehicles, and the appellants' readiness to associate themselves with the thieves and lend support to the intentions and actions of the thieves, custodial sentences of some length were indicated. In those circumstances, a refusal to suspend any of the sentences imposed may be justified.

I am more concerned with the absence of any reflection, in the so-called "tariff" sentences imposed, that the appellants pleaded guilty and thereby saved the court time, and the State unnecessary expense. In *S v Buka supra* EBRAHIM JA cautioned at p 7 that:

"One often reads in a judgment the following: 'I have taken into account

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that you have pleaded guilty, that you are a first offender and that you have expressed contrition'. It is not enough to repeat these phrases without giving due weight to the plea proffered. They are factors of mitigation and judicial officers should take proper account of them."

In support of his assertion the learned JUDGE OF APPEAL referred to the following recommendation by ROSKILL LJ in *R v Lowe supra* at 125:

"... substantial credit should be given upon pleas of guilty, especially in cases where there is no other evidence against the accused than the accused's own confession. Unless credit is given in such cases there is no encouragement for others to come forward and give information of invaluable assistance to society and the police which enables these criminals ... to be brought to book. Those are the considerations this court has to have in mind. There are others; crimes of gravity must receive proper punishment. ... if these charges against him had gone to trial in the ordinary way and he had been convicted there is no doubt, as the learned judge said when passing sentence, that the sentence would have been very long. It is not necessary to speculate how long, but the

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learned judge rightly said that they would obviously call for a very substantial term of imprisonment."

Theft of a motor vehicle is a serious crime. It has become rampant. It is almost invariably committed with the assistance or connivance of one or more people, constituting a gang. It must, of course, be indicated, here and now, that each of the appellants herein did not readily confess and render assistance to the police to enable the police to bring to book their accomplices. To this extent, their pleas of guilty are shorn of some of the merit that goes with such pleas. But they nonetheless tendered such pleas and saved the State time and unnecessary expense. They are thus deserving of some credit for coming clean, albeit belatedly.

Another effect of employing the tariff system was that the learned judge, in assessing sentence, completely ignored the pre-trial incarceration each of the appellants had undergone prior to the imposition of sentence. In *S v Mpofu* 1985 (1) ZLR 187 (S) at 190D McNALLY JA said:

"I am of the view that not sufficient account was taken of the inordinate period spent by the appellant in custody pending trial. Eighteen months in the remand prison is in some ways the equivalent of a twenty-seven month sentence, bearing in mind that a convicted prisoner in practice

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earns an automatic remission of one-third of his sentence in consequence of the provisions of s 109 of the Prisons Act [*Chapter 7:11*]."

Dube was in custody for nine months, and Roberts for fifteen months, prior to the imposition of sentence. However, regard must be had to the fact that each of them was in part the architect of his own fortune for being incarcerated for such a lengthy period before trial. Had either of them confessed earlier and rendered assistance to the police leading to the arrest of their accomplices, no doubt their detention in custody would have been minimal and society may have benefited enormously. While, therefore, some consideration must be given to their pre-trial incarceration, which the trial court did not give, the whole of such incarceration cannot be credited to them as they were originally putting the State to proof of all allegations levelled against them.

That the two vehicles were recovered undamaged, to my mind, was fortuitous and of no consequence, since it was never the intention of either of the appellants that the vehicles be restored to their respective owners. No credit is deserving to either for the condition of the vehicles at the time of their recovery. If they were to maximise their profits from their illicit dealings it behoved them to maintain the stolen vehicles in pristine condition.

Having put in the balance all that can be said on behalf of the appellants, sight must not be lost of the seriousness of the offence each of them committed. Theft of vehicles, apart from being a gang offence, has not only become rampant but has assumed, of late, international proportions, prompting insurance agencies to call in aid the assistance of Interpol.

In my view, any offence which transcends international boundaries, from the point of view that it deprives an individual of a valuable asset causing him great inconvenience and also destabilises national economies, requires to be visited with custodial punishment of appropriate

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duration. Dube was about to cross the border into Zambia with the vehicle when arrested. Roberts was apprehended prior to having the vehicle spray-painted to make detection difficult when crossing into Zambia with the vehicle.

In *S v Sadziwa* S-226-91, this court confirmed a sentence of ten years' imprisonment, none of which was suspended, for the theft of a motor vehicle. Sadziwa was a hardened recidivist who had been incarcerated for fairly lengthy terms. He was, in fact, warned of being rewarded with a term of extended imprisonment if he continued with his criminal pursuits.

In *S v Munyaradzi* S-103-92, the appellant was a self-employed dealer in

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second-hand vehicles. A sentence of twelve years' imprisonment with labour, two years of which were suspended on conditions, for receiving a vehicle with actual knowledge that it had been stolen, was altered by this court to a sentence of eight years' imprisonment, one of which was suspended. Munyaradzi had three previous convictions for crimes involving dishonesty.

In *S v Mapotsa* S-102-92, this court again upheld a sentence of ten years' imprisonment, two years of which were suspended, for receiving a vehicle knowing it to have been stolen. The appellant was the proprietor of a company involved in buying and selling motor vehicles as well as panel-beating and spray-painting them. He had three previous convictions involving the theft of motor vehicles.

It is pertinent that in the above three cases the appellants were not youthful first offenders who pleaded guilty to the offences charged.

It was urged by counsel for the appellants that in *S v Chimbetu* S-107-92, *S v Manyika* S-174-93, and *S v Chimanga* S-51-93 lighter sentences than seven years' imprisonment had been imposed for theft of motor vehicles. I hasten to point out that in *Chimbetu's* case McNALLY JA, in upholding the sentence imposed, said:

> "In view of the recent judgments in car theft cases, namely, *S v Sadziwa* S-226-91; *S v Munyaradzi* S-103-92; and *S v Mapotsa* S-102-92, I do not think it necessary to say more than that the sentence is not open to criticism as being too heavy."

This is a far cry from saying that a sentence of about five years' imprisonment is appropriate for theft of a motor vehicle. And in the other two cases the appeals were against convictions only, and it was not open to this court to interfere with the sentences imposed.

Having regard to the circumstances surrounding the appellants, the commission of the offences, and their tender of pleas of guilty, I would set aside and substitute for the sentences imposed the following:

(a) in the case of Dube, a sentence of seven years' imprisonment with labour; and

(b) in the case of Roberts, a sentence of eight years' imprisonment with labour.

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Gubbay CJ: I agree.

McNally JA: I agree.

Chirunda & Partners, appellant A's legal practitioners

Munyanyi & Associates, appellant B's legal practitioners

MAGWENZI v CHAMUNORWA & ANOR 1995 (2) ZLR 332 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

24 October & 9 November 1995 Judgment No. S-193-95

Flynote

Contract - sale - conditional - condition that premises sold on "lease to buy" by local authority should not be alienated without consent of local authority - purported sale to third party - validity of sale - such sale not invalid, merely unenforceable by third party - once first buyer took transfer, he would be entitled to alienate the premises

Headnote

The appellant (plaintiff in the court below) sought an order that the second respondent (second defendant in the court below), the City Council of Harare, transfer a certain stand in Mufakose to the first respondent (second defendant), on payment to it of the sum of $378 and that, simultaneously, the first respondent transfer the stand to the plaintiff.

The first respondent had bought a stand and house from the Council in terms of a "lease-to-buy" contract. In spite of a term in the contract that he should not alienate the property without the Council's consent in writing, he sublet the premises for six years to the appellant. In 1985, the parties made an agreement whereby the first defendant purported to sell the premises to the plaintiff for $4 500. In 1987, the first defendant tendered the return of the purchase price, though there was a dispute as to why and what happened next. The plaintiff claimed that he continued to occupy as owner, while the defendant said that the plaintiff occupied as a tenant under a new agreement of lease. In any event, the plaintiff continued in occupation. In 1988 the first defendant entered into another lease to buy agreement with the Council in respect of the stand, but by 1991 he had paid off the debt to the Council and received transfer. In 1990, the first

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defendant entered into an agreement with another party to sell the remises, this time for $45 000 and with the Council's consent.

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The defendant argued, and it was accepted in the court below, that even if the plaintiff's version of the facts was correct, the purported sale by him to the plaintiff was invalid and that he could not cede title.

Held, that on that version of the facts, the purported sale by the first defendant was not invalid because of the failure to get the council's consent. It was merely a sale that was unenforceable as long as the Council remained the owner. Once the Council transferred ownership to the first defendant, he in turn could cede title.

Held, further, that as there was a dispute on the facts and as it would be impossible to decide which version was correct, the matter should be remitted for trial.

Cases cited:

Gomba v Makwarimba 1992 (2) ZLR 26 (S)

Pedzisa v Chikonyora 1992 (2) ZLR 445 (S)

Kelly v Wright 1948 (3) SA 522 (A)

Hundah v Murauro 1993 (2) ZLR 401 (S)

H C Thompson for the appellant

H Simpson for the first respondent

Judgment

Ebrahim JA: In this matter, the appellant (plaintiff in the court below), sought an order that:

(1) the second defendant (the City of Harare) transfer to the first defendant stand 5041, Mufakose Township, on payment to it of $377,98;

(2) that simultaneously, the first defendant (now the first respondent) transfer the stand to the plaintiff.

The facts were that the first defendant was the registered owner of the stand in question. He had originally acquired it from the second defendant (City of Harare) in terms of a "lease-to-buy" contract. The date and the exact terms of the contract are not clear, because the contract is not included in the record, but it seems that it was one in terms of which the first defendant was entitled to take occupation of the stand but would not become the owner until he had completed payments of the instalments specified in the agreement. It also appears that it was one of the terms of the contract that the first defendant could not -

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(a) cede or assign the agreement or any rights acquired by him thereunder; or

(b) part with the possession of the property or any part thereof; or

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(c) alienate, donate or otherwise dispose of the property; without the prior consent in writing of the second respondent (I am assuming that the terms of the original contract were similar to those of the second contract, dated June 1988, a copy of which is included in the record).

In spite of this provision, the first respondent sublet the premises to the plaintiff in 1979 at an agreed rent. The plaintiff occupied the premises as a tenant until 1985. In July of that year, he and the first defendant entered into an agreement under which the first defendant purported to sell the stand to the plaintiff for the sum of $4 500. The plaintiff continued to occupy the premises. It seems undisputed that in 1988 the first defendant entered into another purchase agreement with the City of Harare (a copy of which is included in the record) under which he was to pay the City of Harare the sum of $1 016 over thirteen years. By December 1991 he had paid off the debt to the Council and received transfer of the property.

The first defendant avers in his plea that he became aware in 1987 that the agreement of sale concluded in 1985 was invalid because of the lack of consent by the Municipality to the sale and tendered to the plaintiff the return of the purchase price. While the plaintiff admits that the purchase price was tendered, there is a dispute as to what happened next. The plaintiff claims that he refused to accept the first defendant's purported cancellation of the sale, while the first defendant claims that it was agreed that the plaintiff would continue to occupy the premises as though the old lease agreement stood, and that the rent would be deducted from the $4 500 until it was exhausted. The first defendant alleges that the rental payments in due course exhausted the $4 500 and that the plaintiff now owes him money for his subsequent occupation of the property.

It is also not in dispute that in late 1990 the first defendant gave the plaintiff notice to quit, but the plaintiff refused on the grounds that he was not obliged to do so. It is pertinent to note that the first defendant took no other steps to evict the plaintiff until the plaintiff brought the present action in August 1991. Five months later, in his plea, the first defendant made a counterclaim for, among other things, the eviction of the plaintiff.

The first defendant, also in 1990, entered into an agreement with another person to sell the property to that person for $45 000. He says he did this with the consent of the Municipality.

There is thus a clear dispute on the facts. The plaintiff claims that there was

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an agreement in 1985 in terms of which he bought the stand; the first defendant claims that that agreement was cancelled by mutual consent in 1987 and that the plaintiff's continued occupation of the stand was as a sub-tenant. If the first defendant's version is correct, then he must succeed.

What if the plaintiff's version is correct? The first defendant argues that the agreement in 1985 was contrary to the clause in the first defendant's contract with the Municipality, in terms of which the first defendant could not alienate the stand without the consent of the Municipality, which consent was not sought or given. Had the first defendant taken legal action against the plaintiff at any time when the contract with the Municipality was still applicable, he may well have succeeded in ejecting him. The first defendant was not the owner of the stand, merely the "lessee-to-buy". See *Gomba v Makwarimba* 1992 (2) ZLR 26 (S). As such he could not cede title to the plaintiff and could have obtained an ejectment order against him, though the plaintiff would, if he had been ignorant of the defect in the first defendant's title at the time he contracted, have been entitled to claim damages for the disturbance in the use and enjoyment of the property: *Pedzisa v Chikonyora* 1992 (2) ZLR 445 (S) at 453-4. However, nothing was done by the first defendant, who allowed the plaintiff to remain in occupation. This occupation continued even after the first defendant took transfer of the property and became entitled to transfer the property to whomever he wished. This situation, it seems to me, is entirely distinguishable from that in *Pedzisa*'s case *supra.*

Once the first defendant had taken transfer of the property, he was entitled to sell it. The first defendant had agreed to sell at a time when he was not the registered owner. All the time that the City of Harare remained the owner, the agreement to sell was unenforceable, because the first defendant could not transfer ownership without the consent of the Municipality. Once the Municipality's consent was not required, however, the contract became enforceable.

The agreement in *Pedzisa*'s case *supra* was described as "invalid", because it had failed to comply with a contractual formality. *Kelly v Wright* 1948 (3) SA 522 (A) was cited as authority for that statement. With respect, Kelly's case *supra* appears to relate to a situation where as a matter of statutory law the consent of an official was required before a certain property could be leased. Without that consent, the lease was illegal. I would respectfully agree with the proposition that the present situation was not one where the purported sale was invalid because of failure to comply with the requirement to get the Municipality's consent. It was, in my view, a sale that was

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unenforceable. The plaintiff could not have obtained title from the first defendant, who did not have title to transfer. The Municipality could have decided to cancel the agreement between themselves and the first defendant and obtained the ejectment of the plaintiff. But none of those events occurred. The first defendant allowed the plaintiff to remain in occupation until a time when the sale became enforceable.

However, it is impossible on the record to decide what the facts are, as there is a clear dispute

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on the facts and the only satisfactory way of resolving these is for the matter to proceed to trial.

The appellant, in his notice of appeal, included the following prayer:

> "Wherefore the appellant prays for the judgment in favour of the first respondent to be set aside and with an order directing that the matter proceed to trial and that the costs of the application *in limine* be reserved for determination by the trial court."

Essentially he has succeeded in achieving his first goal, which was to have the matter remitted for trial, not on the basis that *Pedzisa and the Hundah v Murauro* (1993 (2) ZLR 401 (S)) cases were wrongly decided, but on the basis that, on the peculiar facts of this case, if the facts were as stated by the plaintiff, he may well succeed. The appellant would therefore be entitled to his costs of the appeal but in my view, one must reserve the issue of costs of the matter at first instance.

Accordingly the order I would make is as follows:

> "The matter is to proceed to trial before the High Court with the costs of those proceedings being costs in the cause. The appellant is awarded the costs of this appeal."

Gubbay CJ: I agree

Korsah JA: I agree

Winterton, Holmes & Hill, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

S v SIPHAMBILI 1995 (2) ZLR 337 (SC)

Court **High Court, Bulawayo**

Chatikobo J & Assessors

Criminal trial

10 November 1995 Judgment No. HB-143-95

Flynote

Criminal procedure - charge - particulars - date - allegation that misrepresentation made to one individual on a particular date - evidence showing that it was made to other persons first, then to named individual at a later date - charge not fatally defective - defective charge - lack of particularity - when such defect should be raised - if defect not raised before plea, it should not be raised at the end of the trial - Criminal Procedure and Evidence Act [Chapter 9:07] - ss 146(1), 172 and 203

Headnote

The accused was charged with fraud, it being alleged that on 3 July 1994 and at Victoria Falls he had misrepresented the extent of certain balances in the books to a senior employee of the

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company. The evidence disclosed that he had made the misrepresentation to auditors who were at Victoria Falls, and not to the named employee, who was not there on that date, but that he had repeated the misrepresentation to the employee by telephone on a later date. In argument at the end of the trial it was urged that there was a fatal flaw in the charge.

Held, that the indictment clearly disclosed an offence, but if it was deficient in particularity that deficiency would not necessarily be fatal. The test was whether it would prejudice the accused. Unless time is of the essence of the charge, it is sufficient if the day or period alleged in the charge falls within a period of three months before or after the commission of the offence.

Held, further, that any embarrassment which might have resulted from the inaccuracy in the charge should have been raised before plea, as a request

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for further particulars or as an exception. An accused who does not object before plea to the lack of particularity in a charge which discloses an offence cannot rely on the defectiveness of the charge at the end of the trial.

Cases cited:

R v Mlotshwa 1968 (2) RLR 172 (G); 1968 (3) SA 360 (R)

R v Wantenaar 1940 SR 174

S v Continental Painters (Pvt) Ltd 1968 (2) RLR 132 (A)

R v Henry 1963 R & N 247 (SR)

R v Mangure 1962 (1) SA 869 (SR)

R v Gweshe 1964 (1) SA 294 (SR)

J Mahamba for the State

J James for the accused

Judgment

Chatikobo J: The accused pleaded not guilty to one count of fraud and an alternative count of theft, in which the State alleged a general deficiency in line with the provisions of s 148 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the Code). Mr *Mahamba*, who appeared before us on behalf of the State, conceded at the outset of his closing submissions that the evidence led does not support the allegations contained in the alternative count of theft. He was wise to do so. This judgment is therefore confined to the main count of fraud.

It is alleged in the main count that on or about 3 July 1994 and at Super Saver Superette, Victoria Falls, the accused, who was a manager for the said Superette and an employee of Bata Shoe Co Ltd, "unlawfully and with intent to defraud, misrepresented to Arthur Ndowora, an

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employee of the said company, that entries relating to debtors outstanding balances as at June 1994 at Super Saver Superette amounted to $490 601,47, whereas in truth and in fact, only an amount of $270 637,19 was outstanding and by means of this representation caused prejudice to Bata Shoe Company Limited".

As appears from the charge, the accused was employed by Bata Shoe Co Ltd (Bata) as manager of its superette in Victoria Falls. It was common cause that it is the practice within Bata to conduct a stock verification exercise at its outlets every six months. In between each stock taking exercise and the next one, the manager compiles fortnightly reports of the stock levels in his shop, which he forwards to Bata head office in Gweru. A stock count was done at the superette in Victoria Falls in December 1993. At the end of June 1994

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another stock counting exercise became due. A team of Bata employees from Gweru, who were described throughout the trial as auditors, even though they do not profess to be qualified as such, journeyed to Victoria Falls to verify the stock levels. They were led by Felix Midzi, and Anthony Chigwa, the then personnel officer for Bata retail outlets, was one of their number.

At the superette they counted the goods in the superette and the adjoining storerooms, after which they compiled a report which was produced in this court as exhibit 4. It shows among other items that the amount outstanding in respect of debtors accounts was the sum of $490 607,47.

[The learned judge then considered the evidence in relation to this sum, concluding that the accused had misrepresented to the auditors and later to Ndowora that the figure was false. He then continued:]

Since he deliberately gave to the auditors a figure different from the one on exhibit 5, he must have intended that his misrepresentation be acted upon. Similarly, his conduct in dealing with the request by Ndowora bespeaks his intention to deceive.

Naturally the deceit perpetrated by the accused was potentially prejudicial. One only has to point to the fact that, when another stock take was done a month later, the deficit was now $187 000 and not $210 000. Ndowora says this could have come about due to the inflation of prices aimed at recovering the shortage. Had the figure for outstanding accounts not been queried, the accused would have had six months within which to recover the loss by inflating prices in the superette. The prejudice inherent in such conduct is more than apparent.

It will be recalled that the charge alleges that a misrepresentation was made to Ndowora on 3 July 1994 at Victoria Falls. Ndowora was not at Victoria Falls on that day and no representation was made to him there or elsewhere. Understandably, Mr *James* argued vehemently that this flaws the charge and is destructive of the State case.

Section 146(1) of the Code provides that an indictment should set out the offence with which the accused is charged in such manner and with such particulars as to time and place of the commission of the offence as to inform the accused sufficiently of the nature of the charge he is

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facing. In other words, the charge must disclose an offence and it must do so with sufficient particularity. The material facts constituting the offence must appear *ex facie*

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the indictment. See *R v Mlotshwa* 1968 (2) RLR 172 (G); 1968 (3) SA 360 (R); *R v Wantenaar* 1940 SR 174. If the charge does not disclose an offence, it is fatally flawed and, unless it is amended, no conviction can be founded upon it. If it discloses an offence but is deficient in particularity, it is not necessarily fatal. The test is whether the accused has been prejudiced or not. The indictment in this case clearly discloses an offence. It, however, contains averments which do not tally with the known facts. In particular, it alleges that the misrepresentation was made to Ndowora on 3 July 1994 at Victoria Falls. On that day Ndowora was not at Victoria Falls, so the misrepresentation could not have been made to him. If time is not of the essence of the offence, it is sufficient if the day or period alleged to be the day or period when the offence was committed falls within a period of three months before or after the commission of the offence (s 173(a) of the Code). See *S v Continental Painters (Pvt) Ltd* 1968 (2) RLR 132 (A); *R v Henry* 1963 R&N 247 (SR).

The indictment alleges that the misrepresentation was made to Ndowora, but the evidence shows that it was made to the audit team first before it was repeated to Ndowora over the telephone on a later date. Any embarrassment which may have resulted from this inaccuracy cannot be raised at this stage. It is a matter which should properly be raised by way of a request for further particulars or exception before pleading to the indictment. An accused who does not object before plea to the lack of particularity in a charge which discloses an offence cannot rely on the defectiveness of the charge at the end of the trial. Compare *R v Mangure* 1962 (1) SA 869 (SR).

The defect in the indictment or the lack of particularity therein can be cured by evidence during the course of the trial (s 203). I am satisfied that little turns on the lack of particularity in the charge in this case.

It is necessary to stress the point that the indictment does not allege that the accused misappropriated the amount constituting the difference between the $490 607,47 and the $270 637,19 shown on exhibits 4 and 5 respectively. The allegation, which is amply supported by the evidence led, is that the accused made a false statement concerning the amount of outstanding accounts claims. It is indeed clear beyond doubt that, at the time the representation was made, the money and/or goods had already gone missing. If the accused stole the money or the stock, then the loss was caused by such theft long before the misrepresentation was made. In the case of *R v Gweshe* 1964 (1) SA 294 (SR) at 295F where, like in the present case, the loss was suffered before the misrepresentation was made, it was held that:

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> "If the accused had stolen the goods or the money he had received after selling the goods, it was the accused's theft which brought about this loss and not any subsequent false representations made by him. He was not

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charged with theft."

However, it is quite clear from the same case that, if one can reasonably infer that the false representation was made deliberately in order to cover up some dishonest conduct, then a conviction for fraud can follow if there is proof of prejudice, actual or potential. We have already held that there was potential prejudice, in that the accused may have made the misrepresentation in order to give himself time to make good the loss by inflating the prices of goods in the shop. We are satisfied that the State case has been proved to the required degree and we find the accused guilty of fraud. He is found not guilty and acquitted on the alternative count.

James Moyo - Majwabu and Nyoni, accused"s legal practitioners

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1995 (2) ZLR p342

GEOFF'S MOTORS (PVT) LTD v LILFORDIA ESTATES (PVT) 1995 (2) ZLR 342 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

30 October & 13 November 1995 Judgment No S-197-95

Flynote

Prescription - interruption - plea of lien in answer to claim for return of property - not sufficient to interrupt prescription - not a process whereby payment of a debt is claimed - Prescription Act [Chapter 8:11] - s 19(2)

Headnote

Lilfordia sued Geoff's Motors for the return of an engine which had been sent for repair. In its plea, Geoff's Motors pleaded a lien, saying they were owed money for repair work done and not paid for. Later, but more than three years after the repair work had been done, they claimed in reconvention for the cost of the work. In answer to the claim in reconvention, Lilfordia pleaded prescription, but Geoff's Motors argued that the plea of lien had interrupted prescription, because it alleged that a specified sum was owing.

Held, that prescription may be interrupted by any process in which a creditor claims payment of a debt. A plea is process, in which a claim for payment of a debt may be made. However, a defence of lien is not a claim for payment of a debt. A lien is a right of retention, based on a claim for money due, but is not itself a claim for that money and does not give rise to a cause of action. For Geoff's Motors to get judgment for the sum owing, it had to make a claim in reconvention; without such a claim, it could not have got judgment for the sum. Although the plea of lien was made timeously, the claim in reconvention itself was prescribed.

Appeal dismissed.

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McNALLY JA

Cases cited:

Mountain Lodge Hotel (1979) (Pvt) Ltd v McLoughlin 1983 (2) ZLR 238 (S)

Joint Municipal Pension Fund v Pretoria Municipal Pension Fund 1969 (2) SA 78 (T)

Great North Farms (Edms) Bpk v Ras 1972 (4) SA 7 (T)

Brooklyn House Furnishers Ltd v Knoetze & Sons 1970 (3) SA 264 (A)

Neon & Cold Cathode Illuminations v Ephron 1978 (1) SA 463 (A)

Conress & Anor v Gallic Const 1981 (3) SA 73 (N)

First Consolidated Leasing v Servic SA & Anor 1981 (4) SA 380 (N)

Mias de Klerk Broedery (Edms) Bpk v Cole 1986 (2) SA 284 (N)

A J Dyke for the appellant

A P de Bourbon SC for the respondent

Judgment

McNally JA: This is an appeal from a judgment of BARTLETT J in the High Court. The learned judge allowed a special plea which had the effect that judgment was granted in favour of the plaintiff and the defendant's claim-in-reconvention was dismissed with costs.

The central issue was prescription. It arose in the following way.

The plaintiff (Lilfordia) sued the defendant (Geoff's Motors) for the return of a diesel tractor engine. Geoff's Motors pleaded a lien. They alleged they were owed money for repair work done on the engine and that they had a lien over it so long as their account was not paid.

Subsequently, but more than three years after the repairs had been completed, Geoff's Motors claimed in reconvention for the cost of the repair work.

Lilfordia pleaded prescription. Geoff's Motors countered with the submission that the plea, which was filed before the expiry of the three years, had interrupted prescription. It had contained allegations that the sum of $14 364 was owing, and that until that sum was paid, Geoff's Motors had a lien.

This simple legal point is decisive of the whole dispute. The learned judge decided that Geoff's Motor's claim had prescribed. The appeal is on this point alone.

Section 19(2) of the Prescription Act [*Chapter 8:11*] provides:

> "The running of prescription shall, subject to the provisions of subsection

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(2) [which is irrelevant in the present case] be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt."

It is necessary also to cite s 19(1), which reads:

"In this section -

'process' includes -

(a) a petition

(b) a notice of motion;

(c) a *rule nisi*;

(d) a pleading in reconvention;

(e) a third party notice referred to in any rule of court;

(f) any document whereby legal proceedings are commenced."

The argument is that the defendant's plea in this case was "process" in terms of that definition, bearing in mind that the definition is inclusive not exclusive.

In support of his argument, Mr *Dyke* relied on the decision in *Mountain Lodge Hotel (1979) (Pvt) Ltd v McLoughlin* 1983 (2) ZLR 238 (S) at 242C *et seq.* The difference between the present case and *Mountain Lodge supra* is that in the present case the defence was lien while in *Mountain Lodge supra* it was set-off. Mr *de Bourbon,* for Lilfordia, contended that *Mountain Lodge supra* was wrongly decided, alternatively it is distinguishable.

Mountain Lodge supra was a decision of two eminent judges of this court, GEORGES CJ, who wrote it, and BECK JA, who concurred. They held, first, that a plea fell within the broad definition of the word "process", and second, that a plea of set-off was a claim for payment within the meaning of s 18(1).

It seems to me, with respect, that that reasoning is correct and logically defensible. The first part is straightforward. A plea is clearly "process".

It is in the second part of the reasoning that the facts of *Mountain Lodge supra* diverge from the facts in the present claim. The section allows the interruption of prescription where there is process **"whereby the creditor claims payment of the debt".**

There is a fundamental difference between a plea raising the defence of lien and a plea raising the defence of set-off. Let us look at two simple illustrations .

McNALLY JA

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1. In the present case, if one leaves aside the claim-in-reconvention and one assumes that Geoff's Motors establish that Lilfordia owed it $14 364 for repairs to, the engine, the judgment would have gone in favour of Geoff's Motors, but it would not have sounded in money. Lilfordia's claim for the engine would have been dismissed. There would not have been judgment for Geoff's Motors in the sum of $14 364. And the reason for that would be precisely because Geoff's Motors had not claimed payment of that sum.

2. Take the case where A sues B $1 000 and B admits the claim and pleads set-off of $1 000 in respect of a different debt between the different parties. If B succeeds then A's claim is dismissed. But the reason why it is dismissed is that set-off has operated. B's allegation is not merely a defence. It is a counter-attack. B does not need to counter-claim for his $1 000.

Thus it has been said (by TROLLIP J in a full bench decision in the Transvaal) that set-off "is a payment effected *brevi manu".* See *Joint Municipal Pension Fund v Pretoria Municipal Pension Fund* 1969 (2) SA 78 (T) at 86A-B. It operates ipso facto and not only after or as a result of the plea of set-off. See *Great North Farms (Edms) Bpk v Ras* 1972 (4) SA 7 (T). *Amler's Precedents of Pleadings* 3 ed at p 269 says:

> "But once set-off has been established, the claim would be regarded as extinguished from the moment the mutual debts were in existence together."

Thus a mere plea of set-off is effectively a counter-claim for payment of the (counter) creditor's debt. But a plea of lien is not, as I will now seek to show.

Lien, in *Wille's Principles of South African Law* 8 ed, is defined at p 342 in the following way:

> "A person who bona fide incurs necessary expenses on the property of another person, whether as a result of a contract or not, has a salvage lien on the property for the amount of such expenses as have maintained or advanced its market price."

Another name for lien is "a right of retention". The possessor has the right to retain possession of the property until he has been duly compensated. It does not give rise to a cause of action: *Brooklyn House Furnishers Ltd v Knoetze*

McNALLY JA

& Sons 1970 (3) SA 264 (A) at 270F-G. As at the date that the right of retention was pleaded, the debt which founded the right (assuming that it was owing) had not yet become prescribed. So Geoff's Motors undoubtedly had a lien. Nor did that lien depend upon the exact quantum of the debt. Even if they were owed only $100, they had a lien.

But the pleading of the lien was not a claim for payment of the debt of $14 364. *Compare Neon & Cold Cathode Illuminations v Ephron* 1978 (1) SA 463 (A) at 470 in fine to 471A. The clearest proof of that is to look at what would have happened if no counter-claim had been made, the question of prescription had not been raised, and the court had found that $14 364 (or some lesser sum) was indeed owing. There would have been no judgment for that sum, **because**

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there was no claim for that sum. A claim-in-reconvention was necessary. But unhappily, by the time the claim-in-reconvention was lodged, the three years had elapsed, the debt was extinguished and the claim-in-reconvention was prescribed. No debt, no lien, as was stated, somewhat less pithily in *Conress & Anor v Gallic Const* 1981 (3) SA 73 (W) at 76F *et seq.*

In short, a plea of lien is no more than a plea alleging the right to retain movable property which belongs to the claimant. It is based on a claim for money due, but it is not itself a claim for that money. Compare *First Consolidated Leasing v Servic SA & Anor* 1981 (4) SA 380 (W) at 383F.

The decision in *Mountain Lodge supra* was approved in *Mias de Klerk Broedery (Edms) Bpk v Cole* 1986 (2) SA 284 (N). There it was held that a notice in terms of the rules of court of intention to substitute a new plaintiff was a "process" which interrupted prescription. At the top of p 288 of the report FRIEDMAN J said:

> "It is also true that the notice as such is not, in terms, a claim for payment of the debt by the company. Upon the assumption, however, that the notice was served, *inter alia*, on behalf of the company and with its authority, it seems to me to be necessarily implicit in the notice that by means of it, the company is claiming payment of the debt allegedly due to it by the defendant and has thereby 'formally involved his debtor in court proceedings for the enforcement of his claim'. (See Santam *Ins Co Ltd v Vilikasi* 1967 (1) SA 246 (A) at 253H)."

One cannot say the same for Geoff's Motors on the facts of this case.

In my view the learned judge was right.

McNALLY JA

The appeal is dismissed with costs.

Ebrahim JA: I agree

Muchechetere JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

KANENGONI v ZIMBABWE SPINNERS & WEAVERS (PVT) LTD 1995 (2) ZLR 348 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Civil appeal

9 & 16 November 1995 Judgment No. S-202-95

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Flynote

Appeal - civil matter - record - reasoned judgment must be provided

Prescription - Prescription Act [Chapter 8:11] - s 15(a)(ii) - "judgment debt" - whether order under employment regulations falls within meaning of judgment debt.

Headnote

The Minister of Labour and Social Services had, in 1983, made an order in terms of s 7(1) of the Employment (Conditions of Service) Regulations 1981 that the appellant, an employee of the respondent who had been retrenched, be reinstated in employment. When the respondent failed to reinstate him as ordered, the appellant applied to the High Court for an order directing the respondent to reinstate him. The respondent successfully raised the defence that the claim had prescribed. On appeal, the appellant argued that the order made under the Regulations was a judgment debt and thus only prescribed after thirty years in terms of s 15 of the Prescription Act.

When the matter came on appeal, there was no written judgment from the trial court in the record.

Held, that every civil appeal record must contain a reasoned judgment. If no such judgment has been provided, the appellant's legal practitioner should request the judicial officer to prepare a judgment.

Held, further, that the phrase "judgment debt" in s 15(a)(ii) of the Prescription Act means a judgment of a court of law that a debt is payable to the judgment creditor which judgment allows the judgment debtor to levy execution or to exact performance of the debt.

1995 (2) ZLR p349

GUBBAY CJ

Held, further, that the order of reinstatement is not a judgment debt, as it was not the pronouncement of a judicial body upon relief obtained in a suit and was therefore not covered by s 15(a)(ii) of the Prescription Act. It was, instead, covered by s 15(d). As the three-year period prescription period had expired, the trial court was correct in dismissing the action on the basis that it had prescribed.

Cases cited:

Fox & Carney (Pvt) Ltd v Sibindi 1989 (2) ZLR 173 (S)

Shereni v Moyo 1989 (2) ZLR 148 (S)

Leviton & Son v de Klerk's Trustee 1914 CPD 685

ESC v Stewarts & Lloyds of SA (Pty) Ltd 1981 (3) SA 340 (A)

The Master v I L Back & Co Ltd 1981 (4) SA 763 (C)

Hodgson v Granger & Anor 1991 (2) ZLR 10 (H)

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Kilroe - Daley v Barclays National Bank Ltd 1984 (4) SA 609 (A)

Dickson & Anor v Fisher's Exors 1914 AD 424

Heyman v Yorkshire Ins Co Ltd 1964 (1) SA 487 (A)

ANZ Grindlays Bank (Zim) (Pvt) Ltd v Hungwe 1994 (2) ZLR 1 (S)

Pyramid Products (Pvt) Ltd v udc Ltd S-200-95

W Madzivire for the appellant

D P Carter for the respondent

Judgment

Gubbay CJ: On 17 July 1983 the appellant, who was employed by the respondent company as a security guard, was informed that he was to be retrenched from employment forthwith. Deeply aggrieved by the action taken against him, the appellant lodged an objection with the Ministry of Labour and Social Services, as it was then known. This he was entitled to do, pursuant to the Employment (Conditions of Service) Regulations 1981 (SI 894 of 1981), which had been made by the Minister in terms of s 5 of the Employment Act 1980 (repealed on 15 December 1985 with the coming into operation of the Labour Relations Act 1985 (now *Chapter 28:01*)).

Section 4(1) of the aforementioned Regulations provided that no employer was empowered to retrench any employee without the prior written approval of the Minister. And s 7(1) read:

> "Whenever it appears to the Minister that an employee has been retrenched, laid off, suspended or dismissed unjustly or without lawful cause or in contravention of these regulations, he may make such order or direction as appears to him to be necessary or expedient for the purpose of ensuring

> that any injustice or unlawfulness is rectified or the provisions of these regulations are observed, as the case may be."

On 15 September 1983 the Minister confirmed in writing that on 5 September 1983 the respondent had been ordered to reinstate the appellant in employment. Such reinstatement, under s 7(4) of the Regulations, took effect from the date of retrenchment, the continuous service of the appellant being deemed not to have been interrupted. Thus, the appellant became immediately entitled to receive from the respondent the salary and benefits which would have been payable to him during the period 17 July to 5 September 1983.

Notwithstanding the Ministerial order and the availability of the appellant to resume employment, he was not permitted by the respondent to do so.

Having long persevered, but without success, in his efforts to regain his employment, the appellant, on 21 December 1989, issued a summons and declaration out of the High Court. He claimed an order directing the respondent to reinstate him with full pay and benefits to date.

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Service of this process was effected on the respondent on 9 January 1990.

The respondent entered appearance to defend the action and on 28 March 1990 filed a plea, the final paragraph of which raised, as an alternative defence to its factual allegations, that the appellant's claim had been extinguished by prescription.

At the inception of the trial, counsel for the respondent proposed, without objection, that the issue of prescription be argued in limine. To this the learned presiding judge agreed. In the event, he upheld what was in effect a special plea in abatement (see Beck's *Theory and Principles of Pleading in Civil Actions* 5 ed para 73) and dismissed the action with costs.

Regrettably, the reasons by means of which the learned judge concluded that the claim was prescribed were not furnished. Certainly, in the accepted and conventional sense, no judgment is to be found in the appeal record. In this connection, I draw attention to the remarks of this court in *Fox & Carney (Pvt) Ltd v Sibindi* 1989 (2) ZLR 173 (S) at 178B-181B, and in *Shereni v Moyo* 1989 (2) ZLR 148 (S) at 149B-C. I reiterate the requirement that every civil appeal record must contain a reasoned judgment. The omission in this case was to a large extent the fault of the appellant's legal practitioner. He should have requested the learned judge to prepare a judgment for the purposes of the appeal. But the respondent's legal practitioner is not entirely

blameless. He should have reminded his opponent of the need to obtain a reasoned judgment and, as a last resort, made a request for it himself.

I must point out further that the absence of a judgment has disadvantaged this court. We have been obliged to deal with the issue as if hearing it at first instance. The benefit of the views of the court *a quo* have been lost to us. That is not how an appellate court should have to function.

With that digression, I turn to consider the argument advanced on behalf of the appellant that the order made under the Employment (Conditions of Service) Regulations falls within the meaning of "judgment debt" in s 15(a)(ii) of the Prescription Act [*Chapter 8:11*], and so the claim made will only become prescribed after a period of thirty years.

The word "debt" is defined in s 2(1) of the Prescription Act as including:

> "anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise."

Embraced within this wide and general meaning were the appellant's entitlement to be paid his salary and benefits as well as his right to be reinstated in employment. See *Leviton & Son v de Klerk's Trustee* 1914 CPD 685 at 691 in fine; *ESC v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344F-G; *The Master v IL Back & Co Ltd* 1981 (4) SA 763 (C) at 777E-H; *Hodgson v Granger & Anor* 1991 (2) ZLR 10 (H) at 14F-15A; Christie *Business Law in Zimbabwe* at p 117.

However that may be, in order to save the appellant's claim from prescription it is necessary that

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it qualify as a "judgment debt", a term not defined in the Prescription Act.

The meaning to be assigned to "judgment debt" in the corresponding s 11(a)(ii) of the South African Prescription Act 68 of 1969 was considered by GALGUT AJA in *Kilroe - Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A). At 624 E-F the learned JUDGE OF APPEAL said that:

> "... 'judgment debt' in s 11(a)(ii) refers, in the case of money, to the amount in respect of which execution can be levied by the judgment creditor; that in the case of any other debt steps can be taken by the judgment creditor to exact performance of the debt, ie delivery of the property or performance of the obligation. A further feature of a judgment debt is that the judgment is appealable."

GUBBAY CJ

I respectfully agree with these *dicta.* I would merely add that the word "judgment", standing alone, describes "a decision of a court of law upon relief claimed in an action" (*per* INNES ACJ in *Dickson & Anor v Fisher's Executors* 1914 AD 424 at 427). See also *Heyman v Yorkshire Ins Co Ltd* 1964 (1) SA 487 (A) at 490D; *Stroud's Judicial Dictionary* 5 ed at p 1374 *sensu* (1).

Plainly the order for the appellant's reinstatement lacked the characteristics of a judgment. It was not the pronouncement of a judicial body (or quasi-judicial body) upon relief obtained in a suit.

Subsequent legislation has placed the wronged employee in a stronger position. The Labour Relations Act [*Chapter 28:01*] initially made provision in s 111(3) and (4) for the registration by a court of the order made by a hearing officer or Labour Relations Board (the matter having been referred to each by a labour relations officer), thereby giving them the effect, for the purposes of enforcement, of a civil judgment. Sections 109 to 114 were repealed and substituted, on 1 January 1993, by the Labour Relations Amendment Act 1992. Section 96(2) now allows a determination made by a labour relations officer or a senior labour relations officer to be registered by a magistrate's court having jurisdiction in the area where the dispute or unfair labour practice arose. So registered, it has the effect of a civil judgment of the magistrate's court. See generally *ANZ Grindlays Bank (Zim) (Pvt) Ltd v Hungwe* 1994 (2) ZLR 1 (S).

Since the order upon which the appellant relies is not a "judgment debt" and as the action he instituted was outside the period of three years, the debt has been extinguished by prescription. (See s 15(d) of the Prescription Act.) It follows that the appeal must be dismissed.

The respondent's heads of argument in the appeal were filed well out of time. Condonation was applied for and granted. Nonetheless as a mark of this court's displeasure, I propose to order that the respondent's counsel is not to charge, or is to refund any charge made, for drawing the heads of argument. See *Pyramid Products (Pvt) Ltd v udc Ltd* S-200-95. Subject to such disallowance, there will be an order for costs in favour of the respondent.

Korsah JA: I agree.

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Muchechetere JA: I agree.

Madzivire & Assocs, appellant's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

MINERALS MARKETING CORP OF ZIMBABWE v MAZVIMAVI 1995 (2) ZLR 353 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Appeal against decision of Labour Relations Tribunal

6 & 23 November 1995 Judgment No. S-205-95

Flynote

Administrative law - natural justice - disciplinary committee set up by employer - required to observe rules of natural justice - right to legal representation - right dependent on provisions of employees' disciplinary code

Administrative law - fair hearing - disciplinary committee - irregularity in conduct of hearing - irregularity calculated to prejudice person being disciplined - fatal unless shown not to have caused any prejudice

Employment - appeals under Labour Relations Act [Chapter 28:01]- appeal against determination of disciplinary committee under disciplinary code - Labour Relations Tribunal - powers on appeal - do not include powers of review - Labour Relations Act - ss 97 and 101

Headnote

The respondent was an employee of the appellant Corporation. The Corporation's human resources manager, Mr Sibanda, accused the respondent of various disciplinary offences. The accusations were heard by a disciplinary committee established under the Corporation's disciplinary code. The committee found him guilty and recommended his dismissal, which was carried out by the general manager. The respondent appealed to the Labour Relations tribunal under s 101 of the Labour Relations Act. The Tribunal handed down a judgment, in which it expressed the opinion that it had general powers of review akin to those of the High Court and declared that the disciplinary committee had committed a series of irregularities in the hearing. These included (a) a denial of the respondent's request to be legally represented; (b) the

improper composition of the committee and (c) allowing Mr Sibanda to attend the hearing and take part in the proceedings. The Tribunal set aside the proceedings of the committee and ordered the respondent's reinstatement. The Corporation appealed to the Supreme Court.

Held, that a person aggrieved either by a determination made in his case under a code or by the conduct of any proceedings in terms of a code may appeal against such determination or conduct to the Tribunal. The Tribunal is empowered to confirm the proceedings appealed

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against, remit the matter for determination by the person or body responsible for enforcing the code, or substitute its own determination for that appealed against. The Act gave no power of review in this situation, whereas, in an appeal against a decision of a labour relation officer, the Act specifically gave the appellant the right to seek a review. It was clear, therefore, that in this case the Tribunal had no general powers of review.

Held, further, that although the Tribunal had no powers of review, the disciplinary committee was still obliged to observe the rules of natural justice, though any breach of those rules would require an aggrieved person to seek relief by review in the High Court. *Held,* further, that where a disciplinary code governs the conduct of employees, the right to be represented at an enquiry depends on the provisions of the code itself. The Act requires that a code of conduct must grant a right to be heard, and the Corporation's code provided for representation by the workers' committee. As no mention was made in the code of legal representation, no right to representation, other than by the workers' committee, was intended to be conferred.

Held, further, that the composition of the disciplinary committee was set out by the code; this did not include the human resources manager. While Mr Sibanda was not present as a member of the committee, nor was he present merely as an observer. Allowing him to be present other than a silent observer went beyond the parameters of the code. This was a procedural irregularity which, if not vitiating the proceedings, rendered them voidable at the instance of the respondent. The irregularity was calculated to prejudice the respondent and was not shown by the Corporation not to have caused any prejudice.

Held, therefore, that although the other "irregularities" found by the Tribunal were not sufficient to make the proceedings of the committee a nullity, the irregularity caused by Mr Sibanda's presence and participation was ground for setting aside the committee's proceedings. For this reason alone, the Tribunal's order would be upheld.

Appeal dismissed.

GUBBAY CJ

Cases cited:

PF-ZAPU v Min of Justice 1985 (1) ZLR 305 (S)

Thandroyen v Sister Annuncia & Anor 1959 (4) SA 632 (N)

Turner v Jockey Club of SA 1974 (3) SA 633 (A)

Rossouw v SA Mediese Navoringsraad 1990 (3) SA 297 (C)

Blacker v Univ of Cape Town & Anor 1993 (4) SA 402 (C)

Mutare, City of v Mlambo 1992 (1) ZLR 17 (S)

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

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Dladla & Ors v Admin, Natal & Ors 1995 (3) SA 769 (N)

Dabner v SAR&H 1920 AD 583

Cuppan v Cape Display Supply Chain Svcs 1995 (3) SA 175 (D)

Lamprecht & Anor v McNeillie 1994 (3) SA 665 (A)

Gründling v Beyers & Ors 1967 (2) SA 131 (W)

Cohen v SA Pharmacy Council 1993 (1) SA 297 (C)

Jockey Club of SA & Ors v Feldman 1942 AD 340

Rajah & Rajah (Pty) Ltd & Ors v Ventersdorp Municipality & Ors 1961 (4) SA 402 (A)

A P de Bourbon SC for the appellant

T Biti for the respondent

Judgment

Gubbay CJ: On 4 July 1994 the respondent, a senior administrative officer and vice-chairman of the workers' committee of the appellant ("the Corporation") was notified that in two days' time a disciplinary hearing would be held to enquire into certain allegations of misconduct levelled against him. The notification was dated 30 June 1994 and had been signed by the Corporation's human resources manager, Mr Abel Sibanda. The allegations detailed therein were of a serious nature. They included: (i) engaging in clandestine activities calculated to cause disharmony and bring the Corporation into disrepute; (ii) wilful disobedience to lawful orders and instructions; (iii) unlawful access to and interception of documents; and (iv) conduct inconsistent with the contract of employment. It was further indicated that the proceedings against the respondent were to be carried out in terms of subparas 5(ii)(a) and (h) and subpara 5(iii) to Section B of the Corporation's registered employment code of conduct.

The relevant provisions of Section B of the code read:

> "5 DISCHARGE
>
> This is the final sanction and should be used:

GUBBAY CJ

> (i) ...
>
> (ii) When an employee commits the following offences -
>
> (a) wilful disobedience to a lawful order given by the employer;
>
> ...
>
> (h) any act, conduct or omission inconsistent with the fulfilment of the express or implied

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conditions of his contract.

(iii) When an employee commits any other serious offence which the disciplinary committee deems merits a discharge."

A request for one week's postponement of the hearing, in order to enable the respondent to prepare a defence, was granted.

The respondent was found guilty at the hearing of the disciplinary committee held on 13 July 1994. He was advised that it was to be recommended to the general manager that he be dismissed.

In a letter dated 19 July 1994 the general manager informed the respondent that he was discharged from employment with effect from that date.

Aggrieved both by the manner in which the disciplinary committee had conducted the hearing and the determination made, the respondent noted an appeal to the Labour Relations Tribunal ("the Tribunal"), pursuant to s 101(7) of the Labour Relations Act [*Chapter 28:01*].

The appeal was heard on 24 October 1994, yet it was only on 3 March 1995 that judgment was handed down. Expressing the opinion that s 101(7)(b) of the Labour Relations Act vested it with general powers of review akin to those possessed by the High Court, the Tribunal declared that during the course of the hearing the disciplinary committee of the Corporation had committed a series of gross irregularities. These were: (i) the denial of the respondent's request to be legally represented before it; (ii) the hearing of the charges in the exercise of original jurisdiction when under the code it was constituted solely as an appellate body; (iii) its improper composition of four members from management instead of the prescribed three and the error in allowing Mr Sibanda to attend the hearing and participate in the conduct of the proceedings; (iv) the possibility that two members from management, Mr Sibanda and a divisional manager, Mr Chingwena, were biased against the respondent; and (v) the manner in which the finding of guilt was arrived at. In the result, the Tribunal set aside the proceedings of the disciplinary

committee and ordered that the respondent be reinstated in his employment without any loss of salary or benefits with effect from the date of the unlawful dismissal.

It is convenient to deal with the findings of the Tribunal, the propriety of which is challenged by the Corporation, in the sequence in which they are set out above.

THE REFUSAL TO PERMIT THE RESPONDENT TO BE LEGALLY REPRESENTED

At the outset it is necessary to decide whether in enacting s 101(7)(b) of the Labour Relations Act the Legislature intended to constitute the Tribunal as a review body. Section 101(7) and (8) reads:

"(7) Any person aggrieved by -

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(a) a determination made in his case under a code; or

(b) the conduct of any proceedings in terms of a code;

may, within such time and in such manner as may be prescribed, **appeal** against such determination or **conduct** to the Tribunal.

(8) On an **appeal** in terms of subsection (7) the Tribunal may -

(a) confirm the determination or proceedings appealed against; or

(b) remit the matter for determination by the person, committee or authority referred to in paragraph (d) of subsection (3); or

(c) substitute its own determination for that appealed against" (my emphasis).

It is immediately apparent that the lawmaker deliberately chose to use the words "appeal" and "appealed against" both in respect of "a determination made" and "the conduct of any proceedings". The aggrieved person is entitled to **appeal** against the conduct of any proceedings in terms of a code and the Tribunal is empowered to confirm the proceedings **appealed against** or remit the matter for determination to the person or body responsible for implementing and enforcing the code. If the lawmaker had been minded to clothe the Tribunal with the conventional powers of **review,** which are the prerogative of the High Court, would it not have used express language, as it did when enacting s 97? That provision, which was inserted into the Act simultaneously with s 101, by the Labour Relations Amendment Act 12 of 1992, deals with appeals to the Tribunal against the determination of a senior labour relations officer or against the conduct of the investigation of a dispute

or unfair labour practice by a labour relations officer or senior labour relations officer. Subsection (2) provides:

"An appeal in terms of subsection (1) may -

(a) address the merits of the determination or decision appealed against; or

(b) **seek a review** of the determination or decision **on any ground on which the High Court may review it;** or

(c) ..." (my emphasis).

A comparison of the different remedies given by s 97(2)(b) and s 101(8)(a) clearly indicates that the Legislature did not intend under the latter to afford the person aggrieved the right to seek a review by the Tribunal of the conduct of proceedings in terms of a code, on any ground that the High Court may review such conduct. In my opinion, all that the Tribunal is empowered to do under s 101A(7)(b) is to determine whether the conduct of the proceedings conformed with the specific clauses of the registered employment code of conduct, and not whether the manner of the proceedings thereunder offended the principles of natural justice, as adumbrated in such cases as *Patriotic Front - ZAPU v Min of Justice* 1985 (1) ZLR 305 (S) at 326B-327B. This is not to imply, however, that in conducting a hearing the disciplinary committee is not obligated to

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apply the elementary tenets of natural justice - to act fairly and honestly. It most assuredly is. See *Thandroyen v Sister Annuncia & Anor* 1959 (4) SA 632 (N) at 639H-640A *Turner v Jockey Club of SA* 1974 (3) SA 633 (AD) at 646F-646 in fine; *Rossouw v SA Mediese Navoringsraad* 1990 (3) SA 297 (C) at 308 H-I; *Blacker v University of Cape Town & Anor* 1993 (4) SA 402 (C) at 407E-F. But any breach by it requires the aggrieved employee to take the High Court route in pursuit of relief.

Whether or not a denial of legal representation before a tribunal other than a court of law infringes the right of the person affected to a fair hearing is a somewhat open question. See *City of Mutare v Mlambo* 1992 (1) ZLR 17 (S) at 21, *Vice - Chancellor, University of Zimbabwe & Anor v Mutasah & Anor* 1993 (1) ZLR 162 (S) at 174G-H; Baxter *Administrative Law* at pp 555-556. But it is one which falls squarely within the purview of the High Court's review powers. This is so even where what is in contention is a failure by that body to exercise a proper discretion in refusing legal representation and not merely the existence of an absolute right to enjoy it. See *Dladla & Ors v Admin, Natal & Ors* 1995 (3) SA 769 (N) at 776B-J.

In the sphere of employment law, where a disciplinary code governs the

conduct of employees, the right to be legally represented at an enquiry is dependent on the provisions of the code itself. See *Dabner v SAR&H* 1920 AD 583 at 598; *Cuppan v Cape Display Supply Chain Svcs* 1995 (3) SA 175 (D) at 182G-I. It is just as if the employment relationship were regulated under a contract. See *Lamprecht & Anor v McNeillie* 1994 (3) SA 665 (A) at 668 B-I.

Section 101(3)(f) of the Labour Relations Act mandates that an employment code of conduct must grant to the employee, alleged to be in breach thereof, the right to be heard by the person, committee or authority responsible for its implementation, before any decision is made in the case. The Corporation's code provides that members of staff accused of committing work-related offences may be represented at the disciplinary hearing by the workers' committee. It was common cause that this form of representation was always available to the respondent. But there is no mention in the code of legal representation. The omission, I think, gives rise to the inference that no right to representation, other than by the workers' committee, was intended to be conferred.

It follows, in my view, that, at the very least, the Tribunal erred in believing that it was empowered by s 101(7)(b) to decide whether the refusal to permit the respondent to be legally represented amounted to a violation of the principles of natural justice.

THE HEARING OF THE CHARGES OF MISCONDUCT BY THE DISCIPLINARY COMMITTEE IN THE EXERCISE OF ORIGINAL JURISDICTION

It was held by the Tribunal that, under the Corporation's code, the disciplinary committee was vested solely with appellate jurisdiction; and that, since it sat as a body of first instance when enquiring into the allegations of misconduct against the respondent, it had acted *ultra vires* the

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code. It was the Corporation's contention that the Tribunal had erred in this regard.

Section A of the code contains a classification and definition of work-related offences ranging from absenteeism to management ineptitude.

Section B sets out the various penalties that may be imposed. In degrees of severity they consist of: (i) verbal warning; (ii) written warning; (iii) suspension; (iv) demotion; (v) discharge.

GUBBAY CJ

Verbal warnings are to be issued by a supervisor and are subject to an appeal to a divisional manager.

Written warnings are to be given by a divisional manager and arise in consequence of the submission of a complaint by the employee's supervisor. The divisional manager must then carry out the investigation. If the complaint is found by him to be of substance, the warning is entered on the employee's disciplinary record. The levels of written warning provided for are the first, the second, and the final. The offences for which these particular warnings can be given are specified. An appeal lies from a decision of the divisional manager to the disciplinary committee.

The next level of sanctions are suspension, demotion and discharge. As already noted, the last option is to be resorted to: (i) when all other forms of disciplinary action have failed; (ii) when a specified offence was committed, eg, wilful disobedience to a lawful order, theft or fraud; (iii) where any other serious offence was committed which the disciplinary committee deems merits a discharge.

Section C of the code deals first with Disciplinary Structure. Four responsible authorities, in order of rank, are mentioned. They are: (i) supervisor; (ii) divisional manager; (iii) disciplinary committee as an appeal body; (iv) general manager as a review body. The sanctions of suspension, demotion and discharge are not referred to as possible "actions"; only verbal and written warnings. Consequently, the capacity in which the disciplinary committee sits in relation to the sanction of discharge is to be sought else-where in the code.

The answer is to be found in the specific provisions relating to dismissal, which fall under the heading of Disciplinary Procedure. They read:

> "Where an employee has failed to make the required improvement or a disciplinary offence warranting dismissal is committed the employee may be dismissed. Dismissal should only be implemented by the General Manager.
>
> Dismissal follows only after:
>
> (a) appropriate investigation and consideration by management;
>
> (b) meeting of the disciplinary committee;
>
> (c) putting the company position clearly to the employee;
>
> (d) an opportunity to make a case has been given to the employee and/or his/her representative;

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GUBBAY CJ

(e) final consideration by the disciplinary committee of the employee's and/or the representative's statement(s) or position."

The following features, to my mind, point inextricably to the disciplinary committee sitting as a body of first instance where the final sanction of discharge may be used against an employee.

First, the disciplinary action of the divisional manager extends only to the issue of written warnings and to the confirmation or variation on appeal of a verbal warning given by a supervisor. It does not embrace the most serious sanctions of suspension, demotion and discharge.

Second, the investigation is to be undertaken by **management** and not by a **divisional manager upon submission of a complaint by the employee's supervisor.**

Third, the duty of the disciplinary committee to put the company's position clearly to the employee accords more with the conduct of a first hearing than with a situation in which the members of the disciplinary committee have before them "a copy of the appeal".

Fourth, the duty cast upon the disciplinary committee to afford the employee the opportunity to "make a case" would be unnecessary were it hearing an appeal. The injunction requires that the employee be allowed to present his defence to the charge(s) of misconduct - a defence not previously presented.

For these reasons I am in respectful disagreement with the Tribunal's finding that under the code the disciplinary committee is limited to the exercise of appellate jurisdiction.

THE COMPOSITION OF THE DISCIPLINARY COMMITTEE AND MR SIBANDA'S PRESENCE AT AND PARTICIPATION IN THE PROCEEDINGS

The code provides that the disciplinary committee, on the management side, is to be made up of the deputy general manager (services) or his alternate, the deputy general manager (sales), and two divisional managers; and of three members of the workers' committee representing the employees generally. A quorum is four persons.

The specific complaint made by the respondent was that Mr Sibanda, the

GUBBAY CJ

human resources manager, was included as a member of the disciplinary committee. Certainly, the first set of minutes lists him as one of the managers; the other set of minutes simply records him as being present, but places his name after those of the chairman and the two divisional managers yet before the names of the three members of the workers' committee. The respondent's name comes last. However, it is clear from the utterances recorded from Mr Sibanda during the hearing that he was present in his capacity as human resources manager

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and not as a member of the disciplinary committee. Unquestionably, when the members were called upon to express their views and vote on whether the respondent was guilty or not, Mr Sibanda was excluded.

Nonetheless, it is certain that Mr Sibanda was not present merely as an observer. The minutes reflect that he was permitted to put questions to and make statements concerning the respondent, although the occasions on which he did so were few. The purpose of his attendance was, in his own words, "to guide the committee". It is probable, therefore, that he took part in their deliberations. The extent to which he may have influenced the deputy chairman and the two divisional managers or hampered their discussions is not known. What is plain is that in allowing Mr Sibanda to be present, in a capacity other than a silent observer, the disciplinary committee went beyond the parameters of the code. It was an act impliedly forbidden. Thus a procedural irregularity occurred which, if not vitiating the proceedings, rendered them voidable at the instance of the respondent. See *Gründling v Beyers & Ors* 1967 (2) SA 131 (W) at 151H-152H; *Cohen v SA Pharmacy Council* 1993 (1) SA 297 (C) at 303C. The irregularity was calculated to prejudice the respondent and was not shown by the Corporation not to have caused any prejudice. See *Jockey Club of SA & Ors v Feldman* 1942 AD 340 at 359; *Rajah & Rajah (Pty) Ltd & Ors v Ventersdorp Municipality & Ors* 1961 (4) SA 402 (A) at 408A; *Blacker v University of Cape Town & Anor supra* at 408C; *Cohen v South African Pharmacy Council supra* at 303H-J.

THE COMPLAINT THAT BOTH MR SIBANDA AND MR CHINGWENA, A DIVISIONAL MANAGER, WERE BIASED AGAINST THE RESPONDENT

The Tribunal's approach to the issue of bias is exemplified in the following passage of the judgment:

> "The protestations that two members from management ... were biased

> were brushed aside without any consideration on the merits. The chairman made no ruling on the objection and the proceedings simply went ahead as if there had been no objection.
>
> As the record stands now there is no way of knowing whether or not Mr Sibanda and Mr Chingwena were in fact biased against (Mr Mazvimavi). For that reason the proceedings were a nullity for justice must not only be done, it must be seen to be done."

What this means is that, in the absence of any proof of bias, and merely upon the respondent's bald assertion that bias existed, the Tribunal found there to be a fatal irregularity in the proceedings. That was a misconception on its part.

THE MANNER IN WHICH THE FINDING OF GUILT WAS REACHED

The Tribunal was of the opinion that the minutes revealed that:

> "... the decision to convict was that of the chairman and not the disciplinary committee. The chairman had no authority to determine the matter single-handedly. The responsibility lay with the disciplinary committee. For that

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reason the proceedings were a nullity."

A careful overall reading of the relevant part of the minutes suggests to me that the verdict of guilty was not that of the chairman alone. It is true that after the last witness had testified the chairman asked the respondent what he had to say in mitigation, pronounced his own verdict of guilty and then sought the comments of the other members. It would have been preferable if he had asked for their views before expressing his own. Be that as it may, each member was afforded an opportunity to speak and did so. Thereafter, the chairman announced the verdict of the majority.

I do not consider therefore that this aspect of the proceedings rendered them a nullity.

In the result, however, I agree with the Tribunal's order that the proceedings of the disciplinary committee of 13 July 1994 be set aside. But I hold this to be by reason of the irregularity caused by Mr Sibanda's presence and participation.

It follows that the respondent is to be placed in the position he was in prior to 13 July 1994.

GUBBAY CJ

I would add, however, that if there is to be another hearing by the disciplinary committee into the allegations of misconduct, members on the management side, as well as those from the workers' committee, must be different from those who previously comprised the disciplinary committee.

The appeal is accordingly dismissed with costs.

Korsah JA: I agree.

Muchechetere JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

POCOCK v AFC 1995 (2) ZLR 365 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Ebrahim JA

Civil appeal

13 & 23 November 1995 Judgment No. S-208-95

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Flynote

Evidence - document - written statement made at relevant time - Civil Evidence Act [Chapter 8:01] - s 27(4)(b) - whether or not the person making statement has incentive, or might have been affected by the circumstances, to conceal or misrepresent any fact

Prescription - interruption - acknowledgement of indebtedness by legal practitioner of debtor - whether prescription interrupted by such acknowledgement

Legal practitioner - conduct and ethics - impropriety - whether unethical to prolong negotiations knowing that opponent unaware of looming prescription

Headnote

In response to a claim for a debt, the defendant filed a special plea in abatement alleging prescription. The court a quo held that prescription had been interrupted by an acknowledgement of the indebtedness of the defendant made by his advocate before the expiry of the period of prescription. On appeal, the central issue was whether the acknowledgement of indebtedness had been made before or after the expiration of the period of prescription. Neither the defendant's nor plaintiff's advocates could clearly recollect the date of the acknowledgement, although plaintiff's advocate thought it was made some months after the expiry of the prescription. However, a file note had been tendered in evidence from the legal practitioner acting for the plaintiff. This file note gave the date of the acknowledgement as just one month before the expiry of the prescription period. The legal practitioner was not called to give evidence

on oath and to submit himself to cross-examination, despite there being no suggestion that he was not available to give such evidence. The defendant' lawyers admitted that they were aware that the prescription deadline was fast approaching and were happy to extend the negotiating period while the other side were apparently unaware of the prescription precipice ahead.

Held, that although the court had some disquiet about the admission made by the defendant's lawyers that they extended the negotiating period when the other side apparently were unaware of the looming prescription, this conduct could not be described as unethical. It is the responsibility of the claimant to ensure that his claim does not prescribe. It is not for his opponent to warn him of the danger of prescription. Provided that the opponent does not positively mislead the creditor, there will be no breach of ethics.

Held, further, that in terms of s 27(4)(b) of the Civil Evidence Act 1992, the court is enjoined to have regard particularly to whether or not the person making the statement "had any incentive, or might have been affected by the circumstances, to conceal or misrepresent any fact". The court a quo had erred in attaching any weight to the evidence pertaining to the file note when its authenticity was suspect and the practitioner who had made it had not given evidence although he was available. In the absence of the file note, the court could not have avoided the conclusion that prescription had run its full course. If the legal practitioners for the claimant had allowed the claim to prescribe, they might have exposed themselves to an action for damages by their client. There was thus a possible reason for falsification of the date in the file note, namely, to avoid a malpractice claim involving a considerable amount of money. In any event,

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there were contradictions in the file note that pointed to the incorrectness of the date recorded.

Appeal allowed.

Cases cited:

Globe Sugar Refinery Co Ltd v Greenock Port & Harbour Trustees [1921] 2 AC 66

Schoeman v Thompson 1927 WLD 282

Noffke v Credit Corp of SA Ltd 1964 (3) SA 451 (T)

Hall & Anor v Heyns & Ors 1991 (1) SA 381 (C)

Mutimwinyi v Mutimwinyi & Anor S-192-95

D P Carter for the appellant

A J Dyke for the respondent

McNALLY JA

Judgment

McNally JA: I will refer to the parties as Mr Pocock and the AFC respectively. Mr Pocock was a farmer who borrowed money from the AFC. The loans, in the total sum of $335 396,73, became due and payable in March 1986. At the end of March 1989 these loans would have become prescribed in terms of s 18 of the Prescription Act [*Chapter 8:11*]. Summons was served in January 1992, two years and eleven months after the alleged interruption of prescription.

The AFC contends that prescription was interrupted in February 1989, just one month before the debt would have been extinguished, when Advocate de Bourbon, acting for Mr Pocock, acknowledged indebtedness to Advocate Gillespie, acting for the AFC. Mr Pocock denies that such an acknowledgement was made and has filed a plea in abatement alleging prescription. This is the issue before us.

In the court below the learned judge held that prescription had indeed been interrupted and he dismissed the plea in abatement. On appeal Mr Pocock raises two aspects of this issue:

1. whether an acknowledgement of his indebtedness was indeed made on his behalf;
2. if it was, whether it was made in February 1989, rather than in about August 1989, when it would have been too late to interrupt prescription.

Section 18 of Chapter 8:11 provides as follows:

> "(1) The running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor.
>
> (2) If the running of prescription is interrupted in terms of subsection (1), prescription shall commence to run

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afresh -

(a) from the date on which the interruption takes place; or

(b) if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due."

The debate centres on one event - a discussion in Chambers between Advocates de Bourbon and Gillespie - which led to the preparation of an agreed pre-trial minute in an action in which the AFC (represented by Mr Gillespie) was suing Messrs Honey & Blanckenberg ("H & B") (represented by Mr de Bourbon).

McNALLY JA

It is necessary to explain the relevance of this action. It was an action in which the AFC was claiming damages from the partners of H & B on the basis that the latter, acting as legal practitioners for Mr Pocock in regard to his debt to the AFC, had allegedly committed an offence by giving Mr Pocock wrongful advice which caused loss to the AFC in respect of Mr Pocock's debt to it. Mr Passaportis was the one alleged to have given the improper advice and he was also Mr Pocock's attorney. Attempts were being made to settle the matter. It is common cause that the object of the discussions was not only to settle the matter *AFC v H & B* but also the matter *AFC v Pocock.* Mr Pocock had apparently put H & B in funds to reach a settlement.

A further aspect of the matter is that both Advocate de Bourbon and Mr Passaportis admit that they were aware that the prescription deadline was fast approaching and were happy to extend the negotiating period while the other side were apparently unaware of the prescription precipice ahead.

We have given some thought to the ethics of such conduct. While it does leave one with a feeling of unease, I do not think it can be described as unethical. The Act itself provides, in s 20(1), that "no court shall of its own motion take notice of prescription". It is for the party whose debt has been outstanding for longer than the period of prescription to raise the defence. If he does not, judgment will go against him. By parity of reasoning, it seems to me, it is for the creditor to ensure that his claim is not prescribed. It is not for his opponent to remind him of that danger. So long as nothing was done positively to mislead the creditor, there would have been no breach of ethics.

One cannot compare the situation with that in which counsel has a duty to bring to the attention of his opponent, or the court, a decision which favours his opponent. See *Globe Sugar Refinery Co Ltd v Greenock Port & Harbour Trustees* [1921] 2 AC 66; *Schoeman v Thompson* 1927 WLD 282; *Noffke v Credit Corp of SA Ltd* 1964 (3) SA 451 (T); *Hall & Anor v Heyns & Ors* 1991 (1) SA 381 (C).

Those cases involve the misleading of the court. Here, there was no question of misleading the court. Nor was there shown to be any misleading of the opponent, who at all times was aware of the relevant facts. The point is made clear in *Lewis Legal Ethics* at para 71 where he says:

"Paragraph 69 [Argument: Must not be misleading: Citation of Adverse authorities] throws into bold relief an

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apparent inroad upon the general rule that there is no duty upon a practitioner engaged on his client's

McNALLY JA

> behalf in the litigious or disputatious to assist his adversary. This is so even where the adversary is neither counsel nor attorney, but a layman handling his own case. The inroad is called 'apparent' because the duty to mention adverse authority is not designed in assistance of the adversary, but is a duty which the practitioner owes to the court and the assistance to the adversary is merely incidental."

I return, then, to a consideration of the two issues set out earlier. I propose to deal with the second one first, because if the alleged acknowledgement was not shown to have taken place in or before March 1989, the debt was already prescribed, and whether it was an acknowledgment or not makes no difference. The first issue may then be ignored.

The fact is that neither Advocate de Bourbon nor Advocate Gillespie could remember the date of their discussion with any clarity. Mr Passaportis, who also gave evidence, was not questioned about dates. He dealt with the question whether he or Advocate de Bourbon had a mandate for Mr Pocock.

Advocate de Bourbon thought the discussion took place in July or August 1989. Advocate Gillespie had no recollection at all. But there was produced to the court a file note prepared by Mr Hartley of Coghlan, Welsh & Guest, which read as follows:

> "2nd February 1989.
>
> Mike Gillespie rang re AFC and Honey & Blanckenberg. He had just completed the pre-trial with Adv. de Bourbon. They have settled the necessary minute and he is in a position to return the brief to me with the minute duly signed.
>
> During the upshot of the discussions [*sic*] Honey & Blanckenberg and Pocock between them have agreed to settle the matter by Pocock paying to the AFC the remainder of his indebtedness by making a payment of $250 000, which would eliminate substantially the prejudice suffered by the Corporation through Honey & Blanckenberg's errors.
>
> I welcomed the fact that the offer had been made and they had intimated that payment of the $250 000 could be made fairly quickly. I would do my level best to ensure that the offer was accepted by the AFC, but it was imperative that I received from them a written memorandum setting forth the proposals for settlement and the method of payment, which if it was rapid, would ensure its acceptance. He will come back to me shortly."

McNALLY JA

This note was tendered in evidence in terms of s 27 of the Civil Evidence Act [*Chapter 8:01*]. It was this note which finally decided the case in the eyes of the learned judge. One cannot help remarking that it was extraordinarily well-timed. It was just one month before the prescription deadline, looking backwards to March 1986 when the debt arose. It was also just one month within the prescription deadline, looking forward to January 1992 when summons was issued.

I have recently *(Mutimwinyi v Mutimwinyi & Anor* S-192-95 at p 4) commented on the danger of undiscriminating reliance on the provisions of s 27 of the Civil Evidence Act. The present case is

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in some ways a worse example because there was no suggestion that Mr Hartley was not available to give evidence on oath, whereas in *Mutimwinyi supra* the relevant witness was dead.

The fact is that without that note the court could not have avoided the conclusion that prescription had run its full course. If the AFC's legal practitioners had allowed this to happen, they might have been exposed to an action for damages by their client, the AFC. In the circumstances, the court should surely have asked itself: "Why has Mr Hartley not come to court to put this crucial evidence on oath, to support it with such other evidence as may be on his file, and to submit himself to cross-examination?"

The danger must exist, where evidence is tendered by a witness who has an interest to serve, that the evidence may be fabricated. That is precisely the reason why the court is enjoined in s 27(4)(b) of Chapter 8:01 to have regard particularly to -

> "whether or not the person who made the statement had any incentive, or might have been affected by the circumstances, to conceal or misrepresent any fact."

With respect to the learned judge, a perusal of Mr Hartley's file would almost certainly have helped to evaluate the reliability of the date on the file note. Nor, with respect, was it right to ask rhetorically "for what (reason would he do such a thing) one may ask?" There could have been a reason. That reason could be to avoid a malpractice claim of $335 396,73 by the AFC. I do not make the accusation. I simply state the possibility.

There is in addition a sound reason for thinking that the date may be incorrect. The file note records:

McNALLY JA

> "He [Mr Gillespie] had just completed the pre-trial with Adv de Bourbon. They have settled the necessary minute ... "

We have seen the signed pre-trial conference minute. It was filed of record in the case *AFC v H & B* H-4117-87. It was filed on 13 September 1989. Both at the beginning and at the end of that document it is recorded that the minute was signed on, and related to a conference held on, 5 September 1989.

If that is correct, how could Mr Hartley have recorded a reference to the conference having taken place, and the minute having been drafted, seven months before either of the two events had apparently occurred?

There may be some explanation for this, and for other suggested internal contradictions in the note. But the contradictions do no more than underline the force of Mr *Carter*'s submission that in the circumstances the court erred in attaching any weight at all to the evidence of the file note, when its author was readily available and its authenticity was suspect. I consider that the submission is correct. It is decisive of the appeal.

In the circumstances, the appeal is allowed with costs. The judgment of the court a *quo* is set

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aside. In its place the following order is substituted:

"1. The special plea in abatement is upheld with costs.

2. The plaintiff's claim is dismissed and judgment is entered for the defendant with costs."

Gubbay CJ: I agree.

Ebrahim JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Makarau & Gowora, respondent's legal practitioners

S v MOTO 1995 (2) ZLR 372 (HC)

Court **High Court, Harare**

Cheda J

Criminal review

24 November 1995 Judgment No. HB-145-95

Flynote

Criminal law - specific common law offences - contempt of court - accused insulting the magistrate repeatedly during a court case - whether accused should be found guilty of one count or multiple counts

Headnote

Where an accused repeatedly insults a magistrate during court proceedings, this conduct is a manifestation of an ongoing contemptuous attitude and each insult should not be regarded as a separate and fresh act of contempt but rather as a single, continuing contempt. In these circumstances, the accused should be charged with one count of contempt rather than with multiple counts. It would be different if the accused insulted the judicial officer each time he came to court.

Judgment

Cheda J: The accused insulted the presiding magistrate under circumstances that clearly amount to contempt of court. The magistrate was therefore entitled to punish the accused for the contempt there and then.

However, the magistrate says because the accused insulted the magistrate ten times he imposed fines for contempt ten times, which resulted in a total fine of $2 000 or 300 days'

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imprisonment with labour.

Section 71 of the Magistrates Court Act [*Chapter 7:10*] provides as follows:

> "If any person, whether in custody or not, wilfully insults the magistrate during his sitting in court or any clerk, or messenger or other officer of any court during his attendance therein or wilfully interrupts the

CHEDA J

> proceedings of or otherwise misbehaves in court, or being a witness refuses to answer any legal question relative to the matter in issue, it shall be lawful for any police office or private person by order of the magistrate to take such offender into custody and to detain him until the rising of the court, and the magistrate may by warrant under his hand commit any person so offending to prison for any period not exceeding seven days or may impose a fine not exceeding $200 for every such offence, and in default of payment thereof commit the offender to prison for any time not exceeding six months imprisonment with labour unless the fine is sooner paid.
>
> In any case in which the magistrate convicts or fines any person under the provisions of this subsection he shall without delay transmit to the registrar for the consideration of a judge of the High Court in Chambers a statement certified by such magistrate to be true and correct of the grounds and reason for his action, and shall also furnish to the person convicted a copy of such statement so certified as aforesaid."

The magistrate clearly acted in terms of this section.

It is clear the accused's behaviour was contemptuous. He insulted the magistrate. Any repetition of the insults was really a manifestation of his contemptuous attitude. It should not be regarded as a separate and fresh act of contempt.

It is appreciated that in such a situation the presiding judicial officer would find himself or herself in a difficult position, and in an attempt to silence or discipline the accused, would resort to imposing punishment for any act or utterances that he considers contemptuous.

However, one should not overlook the fact that the various utterances, insults or other acts of contempt are really a reflection of the attitude of the accused at the time. The various acts reflect the contempt as at that time. They should all be read as simply reflecting the contempt at the time. He could use many different words or insults, but it should not be considered that each insult or utterance represents a separate act of contempt. There is only one contempt manifested in a variety of utterances, insults or other acts. One should not say that two or three different insults amount to two or three different counts of contempt, especially where they follow each other at about the same time.

Of course the position would be different if the accused did this each time he came to court. These would certainly be taken as separate.

CHEDA J

For the above reasons it is my view that the accused's behaviour in this case should really be taken as one act of contempt for the purposes of punishment. The magistrate imposed a sentence of $200,00 or in default of payment 30 days for the first incident. Any repeat should

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have been regarded as continuation of the same conduct and should not be taken as a separate act for the purposes of sentence.

This is the sort of situation that puts a judicial officer's patience under a test, and there is a need to exercise understanding of human attitudes and restraint. Otherwise, if the accused repeats the insults as long as he is in the dock, and the presiding judicial officers repeats the punishments, where would the whole saga end?

In this case, noting what the accused was doing, the trial magistrate should have simply ordered the accused's removal from the court room, or adjourned while the accused was being removed.

It is for these reasons that I consider that only the first penalty of $200 or 30 days' imprisonment with labour should stand and the other subsequent sentences are set aside.

Chatikobo J agrees.

ELSTON NO v DICKER 1995 (2) ZLR 375 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Civil appeal

6 & 27 November 1995 Judgment No. S-212-95

Flynote

Sale - latent defects - knowledge by seller of defects - duty to make full disclosure - seller not protected by purporting to sell property voetstoots - seller's liability to make good buyer's consequent losses

Headnote

The respondent bought a house from the late mother of the appellant. Before the sale a crack in the building was observed by the buyer, but the seller described it as minor and mentioned no others. Her son, the appellant, had lived in the house for several years and had noticed several cracks, which he said were progressive. They had been filled in as they appeared, but not professionally.

When the sale took place, the agreement included a condition that the property was sold as it stood. It was also recorded that where cracks had appeared they had been temporarily repaired. After the buyer moved in, however, major cracks started appearing at the end of the rainy season. All were old cracks which had been previously patched up and plastered over. Experts were called in to assess the damage and as a result major repair work to the foundations of the house was carried out. The buyer sued the seller's estate for the expenses

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and succeeded in the High Court.

On appeal:

Held, that to establish the seller's liability for the defect complained of, the purchaser must show directly or by inference that the seller actually knew of the defect. It was clear from the evidence that the seller must have known of the defects at the time of the sale and deliberately refrained from disclosing them. Even if she had been unaware of the exact cause of the cracking, she must have appreciated that there was something remiss with the structure.

KORSAH JA

Held, further, that the duty on the seller of the property, notwithstanding legal consequences which flow from the fact that the sale was *voetstoots* (which would otherwise exculpate the seller from liability in respect of all defects of which she was genuinely ignorant up to the time of sale), was to disclose to the purchaser the existence of all defects of which the seller was aware, but which the purchaser did not know of at the time of sale. The duty embraced the full disclosure of the progressive and recurring nature of the defects, regardless of the *voetstoots* provision.

Appeal dismissed.

Cases cited:

Iscor Pension Fund v Marine & Trade Ins Co Ltd 1961 (1) SA 178 (T)

Knight v Trollip 1948 (3) SA 1009 (N)

Dibley v Furter 1951 (4) SA 73 (C)

Glaston House (Pty) Ltd v Inag (Pty) Ltd 1977 (2) SA 846 (A)

Hadley v Savory 1916 TPD 385

Knight v Hemming 1958 R & N 555 (FS)

H Simpson for the appellant

D P Carter for the respondent

Judgment

Korsah JA: Some time in 1987, the respondent and her husband found their two-bedroomed home inadequate for their family needs. They started looking for more commodious premises in a central location suitable for their needs. An advertisement in a paper seemed to promise what they were in search of. She telephoned Southgate and Bancroft Estate Agents and obtained the address of the property. In January 1988, she and her husband went to view the property which was situated at and known as No. 23 Churchill Avenue.

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On their arrival at 23 Churchill Avenue, they met Mr and Mrs Elston, who were owners in occupation of the property, and who had had the premises constructed for them in the mid-1950s. After construction of the property it was let to a tenant or tenants until the Elstons moved into occupation in 1965.

The late Mrs Elston showed the respondent and her husband around the house. The respondent noticed crude repairs to a crack in the passageway and drew the attention of the Elstons to it. They were assured by Mrs Elston that it was a minor crack with which they should not be unduly concerned. She learnt from Mrs Elston that she and her husband had been occupying the

KORSAH JA

premises for the last fifteen years and that a brother-in-law had built the house for them.

At the time of this visit the house was fully lived-in by the Elstons. Curtains draped the windows and wardrobes stood against walls. The respondent saw no other cracks and Mrs Elston was silent on the subject of the presence or manifestation of cracks other than the one the respondent had observed. The respondent expressed their interest in buying the house and Mrs Elston assured them of the desire of her husband and herself, on account of old age, to sell the property and move into a flat which they owned.

The purchase of 23 Churchill Avenue by the respondent and her husband was to be subject to the approval of a bond by Central Africa Building Society. The respondent went to view 23 Churchill Avenue again with her mother and, on this occasion, minor cracks were mentioned by Mrs Elston, although she herself saw no cracks other than the one she had observed on her first visit.

On her observations and the representations made by Mrs Elston, they decided to purchase the 23 Churchill Avenue property. To achieve this the respondent had to dispose of their two-bedroom house at Hillside and obtain a fresh bond to cover the purchase of 23 Churchill Avenue. As good fortune would have it, Central Africa Building Society (CABS) held the bond in respect of the property in Hillside, and was willing to grant a bond to the purchaser of that property and also make available to the respondent a bond to cover the purchase of 23 Churchill Avenue.

An agreement of sale (Exhibit 2), conditional upon the respondent being offered a loan in principle or otherwise in respect of the purchase of 23 Churchill Avenue, was signed by the parties on 1 February 1988. The respondent's application for a bond regarding the purchase of 23 Churchill Avenue was approved by CABS on 11 February 1988 and the sale and transfer of the property were duly concluded.

Clause 5 of the printed General Conditions endorsed on the reverse side of Exhibit 2 stipulates that:

> "The property is sold as it stands together with all fittings and fixtures save those which have been by this Agreement specifically excluded and the Seller shall not be responsible for any defects therein, nor for any error in

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description or deficiency in area."

And at the bottom of the General Conditions is typed in and signed by the

KORSAH JA

parties, Clause 3.5 which, it was common cause, formed part of the Special Conditions of Sale which ends with Clause 3.4. Clause 3.5 reads:

"It is recorded that where cracks have appeared they have been temporarily repaired."

This clause could only have been introduced at the instance of Mrs Elston who alone could have been cognisant of, and have commissioned, such repairs.

The respondent and her husband moved into occupation of 23 Churchill Avenue on 1 March 1988. She testified that when they took possession of the premises they discovered several minor fillings around doors and windows which she thought, because of the representations made to her, were cosmetic repairs undeserving of any anxious concern. However, when the dry spell set in after the end of the rainy season, cracks appeared everywhere in the building. Her concern was aroused because these were no minor cracks, but major cracks through which the light of day could be observed. Three in particular deserved special mention: two were in the passageway of which one goes through the wall to the kitchen, and also a large crack in the dining room wall which again goes through to the kitchen. These cracks seemed to be getting bigger by the day. These were no new cracks. All the cracks were old cracks previously patched up and plastered over.

Having regard to the seriousness of the cracks, the respondent contacted Edwards Construction for advice. Acting upon advice given by Mr Edwards of Edwards Construction, the respondent called in Northern Testing Laboratories to inspect the property and advise on the remedial action to be taken to halt further damage. Included in the opinion and advise proffered by Mr Warren of Northern Testing Laboratories is the following:

"We are of the opinion that 'corner' and 'general' differential downward movement of the foundation system has taken place, resulting in the defects noted. The movement is associated with seasonal active volume change in support soil due to moisture change, and inadequate foundation system.

While this condition has undoubtedly been exacerbated by the dry season recently experienced, it has in our view taken place over a number of years.

...

KORSAH JA

We consider the condition to be progressive and without additional sub-structural support relatively rapid deterioration may be expected.

We are of the opinion that a degree of peripheral stability can be attained by the introduction of reinforced concrete underpinning pads and piers together with supportive 'T' beams as found necessary at 18 selected

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positions to the external walls from underside of footings to stable soil at approximately 3 m below ground level."

For consultation and their advice Northern Testing Laboratories was paid $239,30. Consequent upon the report by Northern Testing Laboratories, Edward Construction was required to put in place and did put in place, eighteen underpinnings, four of them inside the house, and was duly remunerated in the sum of $12 470 for its labours. As a result of the extensive remedial repairs carried out, the respondent expended $3 100 in redecorating the house. The respondent claimed that she had been put to a total expense of $15 909,30 in consequence of the appellant's non-disclosure of the defects in the property whereof Mrs Elston was aware and the causes thereof.

The all important questions were: (a) whether Mrs Elston was aware of the defects in the property whereof the respondent was ignorant; (b) whether there was a duty cast upon Mrs Elston to disclose such knowledge, but failed to disclose this to the respondent; and (c) whether, having regard to Clause 5 of the General Conditions that the property was sold as it stood, such non-disclosure can found an action against Mrs Elston.

Mr Warren of Northern Testing Laboratories testified that stress in a building would take place under an improper foundation and that in his opinion cracking would begin to occur within the first ten years. Though the first cracks may not give cause for alarm, stress due to a faulty foundation would progressively worsen during the first ten years, after which deterioration would be rapid. He said a lay person's attention would be drawn to the soil condition as the cracking in the walls progressively worsened and that would alert a lay person that there was a problem with the foundation.

Mr Edwards of Edwards Construction confirmed that an occupant who had been living in the property for over ten years must have been aware of the deterioration of the property because the cracks had been filled in; and if cracks were continuously appearing it stands to reason that the occupant would want to verify the cause. He added that in such circumstances it would be unreasonable for an occupant of premises subject to such progressive deteriorative cracking not to find out the cause of such defect.

KORSAH JA

Mr Elston, the son of the deceased, appearing as the executor of the estate of his late mother, said he lived in the house between 1967 and 1971 when he was about twenty-five years of age. He noticed several cracks in the structure. One of the cracks he noticed was the one described as being in the passage near the kitchen door. He naturally visited the property on several occasions after he had set up home for himself. He said what was done when cracks reappeared was that a very unprofessional person was called in by his late mother to effect the necessary repairs by putting "Polyfilla" liquid cement into the cracks and redecorating the area. This was an on-going exercise from the time he lived in the house with his parents until the property was sold. He agreed that the cracks were progressive, but said he was not aware, at the time his mother was about to sell the property, that the property suffered from any structural defect.

All relevant evidence points inexorably to the fact that Mrs Elston, at the time of the sale of 23

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Churchill Avenue, knew of the defects in the property by reason of the fact that she was continuously engaging the services, albeit of an unprofessional mason, to repair cracks, which were constantly appearing and progressively worsening over a considerable number of years. The average reasonable person, cognisant of the history of such cracking, would undoubtedly appreciate that there was something remiss with the structure, even if he or she was unaware of the exact cause. Clause 3.5 of the Special Conditions, which was introduced at the instance of Mrs Elston, is supportive evidence of her knowledge of this inherent defect in the property. The question then arises: was Mrs Elston under a legal duty to disclose the defect in the building to the respondent?

In *Iscor Pension Fund v Marine & Trade Ins Co Ltd* 1961 (1) SA 178 (T) ROBERTS AJ at 185 had this to say:

> "In some contracts parties are required to place their cards on the table to a greater extent than in others, but the determination of the extent of the disclosure does not depend on the label we choose to stick on a contract. The principles applicable to contracts of insurance (as being *uberrimae fidei*) do not differ in essence from those applicable to other kinds of contracts, but where one party has means of knowledge not accessible to the other party, and where from the nature of the contract the latter (as in the case of insurance) binds himself on the basis that all material facts have been communicated to him, the non-disclosure of any such fact is fatal *(Anson on Contract* 21 ed (1959) pp 212-3; *Cheshire and Fifoot The Law of Contract* 4 ed (1956) pp 229-30). The contract is void because

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> the risk run is in fact different from the risk understood and intended to be run at the time of the agreement (*Carter v Boehm* (1766) 97 ER 1162) ... very little said which ought not to have been said, and very little not said which ought to have been said would be sufficient to prevent the contract being valid."

In the instant case the respondent sought, not to invalidate the agreement, but to claim damage resulting from non-disclosure.

The duty on the seller of property, notwithstanding legal consequences which flow from the fact that the sale was *voetstoots*, which would otherwise exculpate the seller from liability in respect of all defects of which he was genuinely ignorant up to the time of sale, is to disclose to the purchaser the existence of all defects of which the seller was aware, but which the purchaser did not know of at the time of the sale. To establish the seller's liability for the defect complained of, the purchaser must show directly or by inference that the seller actually knew: *Knight v Trollip* 1948 (3) SA 1009 (N) at 1013.

In the instant case, the only reasonable inference that can be drawn from Mrs Elston's knowledge of the continuous and ever worsening cracking of the walls of the property and her insistence on the introduction of Clause 3.5 of the Special Conditions, is that there was a defect in the property, the existence of which Mrs Elston was cognisant of and from the disclosure of which she deliberately refrained.

I can find no fault with Mr *Carter's* submissions that: (a) "in every contract of sale the seller is obliged to disclose all known latent defects which render the thing sold substantially unfit for the purpose for which it is sold": *Dibley v Furterd* 1951 (4) SA 73 (C) at 86-87; *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A) 867; and (b) the duty on Mrs Elston "embraced the full

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disclosure of the progressive and recurring nature of the defects", regardless of the *voetstoots* provision: *Hadley v Savory* 1916 TPD 385.

Having found that Mrs Elston had knowledge of the defects in the property of which the respondent was unaware; that there was a legal duty cast on Mrs Elston to make full disclosure of her knowledge of such defects and that she was not protected by the fact that she purported to sell the property *voetstoots*, the learned Judge rightly determined the matter in favour of the respondent. In doing so, the learned Judge relied for support on the following passages from the decision in *Knight v Hemming* 1958 R & N 555; 1959 (1) SA 288 (FS) wherein CLAYDEN FJ (as he then was) had this to say at pp 560 and 563 (291B-C and 293G - 294) of the reports:

KORSAH JA

> "For the defect constituted by this cracking, considered apart from its structural cause, would I consider have founded such relief. A house which has cracked on nearly every internal and external wall, and has cracked regularly over the whole period, except for the first few months, that it has been in existence, must I consider be said to possess a defect which materially affects its usefulness. And if that defective condition is known to the seller, and is not patent to the ordinary purchaser, because the cracking has been covered up by the seller, the seller cannot in silence dispose of it. Even, therefore, though the full implication of the cracking was not known to the seller there was duty to disclose its existence as known to him.
>
> ...
>
> The case of the seller who fails to disclose a known defect, which is not obvious because of something done to the thing sold, is almost analogous. In effect a seller in such circumstances is representing that the thing sold is as it appears, although the purchaser perhaps is not to the same extent made to rely on the representation as he is when the representation is in express terms. But the seller in such circumstances is regarded as having been fraudulent in not disclosing the defect - see the authorities referred to in *van der Merwe v Culhane* 1952 (3) SA 42 (T) at pp 46-47, and there seems no reason to adopt different rules in this regard in differing cases of fraud. It is to be noted too that the very author who is mainly relied upon in the argument for the appellant, MacKeurtan, in the very passage relied upon, exempts this case from the rule which he lays down in the words in brackets:
>
> > 'assuming always the seller's ignorance of the defect, for otherwise the purchaser may be negligent without losing his rights.'"

The learned judge cannot be faulted on his conclusion that the respondent was entitled to succeed on the authority of *Knight v Hemming supra.*

Accordingly the appeal is dismissed with costs.

Gubbay CJ: I agree

Muchechetere JA: I agree

Kantor & Immerman, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

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AITKEN v LAW SOCIETY OF ZIMBABWE 1995 (2) ZLR 383 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Civil appeal

14 & 30 November 1995 Judgment No. S-213-95

Flynote

Legal practitioner - discipline - striking off register - dishonourable conduct - conviction for criminal offence - offence committed in practitioner's professional capacity - whether striking off justified

Headnote

The appellant, a long standing legal practitioner, was convicted of three counts of contravening the exchange control legislation. He engaged in these illegal activities on behalf of clients. He made little profit out of the transactions, which were designed to facilitate the unlawful acquisition of foreign currency by his clients so that they could purchase motor cars outside Zimbabwe. The Legal Practitioners Disciplinary Tribunal found that these offences constituted unprofessional, dishonourable or unworthy conduct and the name of the appellant was subsequently deleted from the register of legal practitioners. He appealed against the disciplinary punishment imposed upon him on the grounds that it was grossly excessive and disproportionate.

Held, that the breaches of the exchange control legislation were serious and blatant breaches committed by a legal practitioner and officer of the court whose sworn duty it was to uphold the law. The appellant was aware of the unlawfulness of his actions and his moral culpability was high. He played a pivotal role, without which the transactions may not have taken place. His conduct, which bore a distinct element of dishonesty and deceit towards the fiscus, was such as to bring the profession into disrepute with the public, the courts and those concerned with the administration of justice. There has in recent years been a disturbing outbreak of professional misconduct in the form of criminal conduct that had harmed the reputation of the legal profession.

GUBBAY CJ

Held, further, therefore, that the appellant had shown himself unfit to practice.

Held, further, that although the court would not have felt any sense of unease if the Disciplinary Tribunal had suspended the appellant for a period of nine to twelve months, there was no misdirection or irregularity in its decision that his name should be removed from the register and the punishment was not grossly inappropriate. There was therefore no basis upon which the court could interfere with the decision of the Tribunal.

Cases cited:

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S v Aitken 1993 (2) ZLR 336 (S)

Law Soc v du Toit 1938 OPD 103

Mafara v Law Soc of Zimbabwe 1987 (2) ZLR 293 (S)

Nyembezi v Law Soc, Natal 1981 (2) SA 752 (A)

Fine v Soc of Advocates of SA 1983 (4) SA 488 (A)

Law Soc, Cape v Koch 1985 (4) SA 379 (A)

A v Law Soc of the Cape of Good Hope 1989 (1) SA 849 (A)

Hayes v Bar Council 1981 ZLR 183 (A); 1981 (3) SA 1070 (ZA)

Inc Law Soc Tvl v Mandela 1954 (3) SA 102 (T)

Natal Law Soc v N 1985 (4) SA 115 (N)

Ex p Krause 1905 TS 221

Inc Law Society v Luyt 1915 CPD 763

Matthews v Cape Law Soc 1956 (1) SA 807 (C)

Kaplan v Inc Law Soc (Tvl) 1981 (2) SA 762 (T)

A P de Bourbon SC for the appellant

W Mapombere for the respondent

Judgment

Gubbay CJ: The respondent successfully applied to the Legal Practitioners Disciplinary Tribunal ("the Disciplinary Tribunal") for a directive that the name of the appellant be deleted from the register of legal practitioners in terms of s 28(1)(i) of the Legal Practitioners Act [*Chapter 27:07*], and for an order that he pay its costs of the proceedings in accordance with the High Court tariff of fees for legal practitioners.

The application was founded on the appellant's convictions by the High Court, on 23 September 1993, on three counts of contravening the exchange control legislation; it being the respondent's submission that the commission of these offences constituted unprofessional, dishonourable or unworthy conduct on the part of a legal practitioner as contemplated by s 28(3) of the Legal Practitioners Act. Accepting the validity of the submission the appellant,

as he was entitled to do under the proviso to s 28(3), tendered a written statement to the Disciplinary Tribunal in extenuation of his conduct. In it he contended that the ultimate

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punishment the respondent was seeking to have imposed upon him was grossly excessive and disproportionate to the justice of the matter.

The appellant was born in Scotland on 23 March 1944 and came to live in this country in 1963. He was admitted as an attorney of the High Court of Rhodesia (as it was then known) on 15 January 1976. Prior thereto he was employed as a State prosecutor. Since 1 April 1976 he has practised, in Harare, on his own account under the name of D W Aitken & Co. He is a senior legal practitioner of considerable experience and ability and carries on a busy and lucrative practice. Regrettably, on two previous occasions the appellant's professional conduct has warranted discipline. On 19 May 1978 he was fined $150 by the respondent after being found guilty of disregarding a client's instructions for the amendment of an affidavit in an application for summary judgment, and in permitting a false affidavit to be signed and produced to the court. Then, on 18 September 1989, he was formally admonished by the respondent for breach of client confidentiality.

The facts in the High Court trial were summarised by this court in its judgment in *S v Aitken* 1993 (2) ZLR 336 (S). It is convenient to quote the relevant narration at 338D-340E, with "the applicant" being understood to refer to the appellant:

> "After three witnesses had testified on behalf of the State, the prosecutor and defence counsel agreed upon two matters: first, that the number of counts be reduced to three by consolidating in a single count what had formerly been counts two to six; and, second, that the particulars set out in the indictment be amended to reflect that during the period between 26 November 1991 and 13 April 1992, the applicant had assisted Andrew McGeoch, Mr and Mrs Dorianno - Rizzo and Jonathan Upton to sell or exchange foreign currency in varying amounts totalling DM 209 264,68 (Z$650 550,69) to and for the benefit of Donald Edgerton and Timothy Milwarde, which foreign currency was transferred by McGeoch, the Dorianno - Rizzos and Upton, to the bank account of Mercedes Benz AG at the Deutsche Bank, Stuttgart, Germany, in payment for Mercedes Benz motor vehicles imported into Zimbabwe through the agency of Zimoco (Pvt) Ltd for the benefit of Edgerton and Milwarde. Whereupon the applicant tendered unequivocal pleas of guilty to the three counts.

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AS TO COUNT ONE

The applicant was approached by McGeoch. He was informed that McGeoch had £17 000 available in Scotland which he was willing to sell at the rate of Z$17 to £1, as he was desirous of purchasing a property in Zimbabwe with the proceeds. The applicant was aware at the time that Edgerton was prepared to pay a large amount in Zimbabwe dollars in order to finance, in part, the purchase of a Mercedes Benz 500 SEL motor vehicle. So he, Geoffrey Dartnall of Zimoco (Pvt) Ltd and Edgerton decided that an account with Beverley Building Society be opened in the applicant's name, upon which all three would be signatories. The applicant advised McGeoch that if he were to transfer his foreign currency to the bank account of Mercedes Benz AG in Stuttgart, he would ensure that McGeoch received the agreed equivalent in Zimbabwe. The applicant prepared a typed facsimile instruction to McGeoch's bank in Scotland to pay £17 000 to the bank account of Mercedes Benz AG in Stuttgart. McGeoch signed the facsimile and handed it to Dartall who arranged for its despatch. Dartnall later confirmed to the applicant that the money had been received by Mercedes Benz AG. Thereupon the applicant withdrew $289 000 by cheque from the DW Aitken Account 'Wunderkin', No. 4-04-01031L, with the Beverley Building Society and, on 19 February 1992, placed it in a new account with Beverley Building Society styled DW Aitken Account 'AMCG', No. 4-04-01053B. On 8 June 1992, $324 273,33, inclusive of interest, was paid by the applicant to McGeoch.

AS TO COUNT TWO

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In January 1992, Nigel Hodder, with the knowledge and consent of the applicant, opened the DW Aitken Account 'GDM', No 4-04-010505, at Beverley Building Society, with a cheque of $500 000 drawn on the account of First Mutual Life Assurance Society of Zimbabwe, of which company Edgerton was the Chief Executive. The applicant, Hodder and Dartnall, were signatories to this account. A further deposit thereto of $419 490 was made by cheque, again drawn on the aforementioned company. From their bank account in France the Dorianno - Rizzos transferred, upon five dates between 24 February 1992 and 13 April 1992, a total amount of DM 88 930,98 to the bank account of Mercedes Benz AG in Stuttgart. On six occasions the applicant withdrew the sum of $50 000 from account number 4-04-010505 when advised by Dartnall that money from the Dorianno - Rizzos had been received by Mercedes Benz in Stuttgart. These monies were handed by the applicant to one Benard, the Sales Manager of Zimoco (Pvt) Ltd At the applicant's arrest

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on 1 March 1992, the sum of $296 490 remained in the account. The foreign currency purchased from the Dorianno - Rizzos was utilised to finance the acquisition of the aforementioned Mercedes Benz 500 SEL motor vehicle from Edgerton.

AS TO COUNT THREE

On 15 November 1991, the applicant deposited a cheque for $522 476, drawn in favour of his firm by Milwarde, to the DW Aitken and Co Account 'Showers P/L'. No. 4-04-010360C, with Beverley Building Society, On 2 December 1991, the account was closed and an amount of $525 730,77 was withdrawn by two cheques paid into DW Aitken Trust Account at Standard Chartered Bank. A cheque for $500 000 was then drawn on that account, made payable to Johnny Mathews Estate Agency, and sent to Dartnall to be handed to Upton. Dartnall gave the cheque to Upton, who paid it to Johnny Mathews Estate Agency as part of the contract price of $675 000 due for the purchase of a residential property. The money paid to Upton represented the amount in local currency agreed between Upton and Milwarde, through the agency of Dartnall, for the sum of DM 71 765 transferred by Upton, on 26 November 1991, from his account with the Bank of Scotland to the bank account of Mercedes Benz AG in Stuttgart. The foreign currency was in payment of a Mercedes Benz 300 GD motor vehicle which was purchased by Milwarde from Zimoco (Pvt) Ltd This motor vehicle was in the Zimoco bonded warehouse in Harare and could only be purchased in foreign currency payable to Mercedes Benz AG. When payment was received from Upton, Dartnall was informed by telex. He, in turn, advised the applicant to release the local funds to Upton. Milwarde then took delivery of the vehicle."

To this recitation must be added the material and undisputed facts mentioned later in this judgment.

Two witnesses testified before the Disciplinary Tribunal as to the appellant's proficiency as a legal practitioner and the satisfaction gained from the work handled by him. They found him to be scrupulously honest in his dealings. Each ventured the opinion that public confidence in the profession would not be shaken were a legal practitioner to commit a minor offence. Neither shared the view of the respondent that the appellant's convictions were serious and reflected adversely on the profession as a whole.

The Disciplinary Tribunal considered that there was nothing which exonerated

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the appellant's conduct in committing the offences. It quoted with approval the following observations of BOTHA JP in *Law Society v du Toit* 1938 OPD 102 at 104 - as did this court in

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Mafara v Law Soc of Zimbabwe 1987 (2) ZLR 293 (S) at 300B-D:

> "We are not concerned here to-day with any theory of punishment. The proceedings are instituted by the Law Society for the definite purpose of maintaining the integrity, dignity and respect the public must have for officers of this court. The proceedings are of a purely disciplinary nature; they are not intended to act as a punishment of the respondent. He has received his sentence for the offence he committed and it is no longer a matter that will influence us in dealing with this case. It is for the courts in cases of this nature to be careful to distinguish between justice and mercy. An attorney fulfils a very important function in the work of the court. The public are entitled to demand that a court should see to it that officers of the court do their work in a manner above suspicion. If we were to overlook misconduct on the part of officers of the court, if we were to allow our desire to be merciful to overrule our sense of duty to the public and our sense of the importance attaching to the integrity of the profession, we should soon get into a position where the profession would be prejudiced and brought into discredit."

The Disciplinary Tribunal then went on to hold that the appellant had shown himself to be not a fit and proper person to practise his profession, and that the only appropriate punishment was that suggested by the respondent.

The approach of an appeal court faced with the decision of a court or tribunal of first instance that a person is unfit to remain in practice, was considered by CILLIE JA in *Nyembezi v Law Soc, Natal* 1981 (2) SA 752 (A). The learned JUDGE OF APPEAL said at 758A-C:

> "In the first stage of the proceedings the court of first instance finds as a fact on the balance of probability whether the respondent is not a fit and proper person to continue in practice as an attorney. As this is a finding of fact this court on appeal will investigate whether or not the finding is correct and set it aside if it is not.
>
> In the second stage the court of first instance decides in the exercise of its discretion whether to strike the attorney off the roll or whether to suspend him from practice. With this decision this court on appeal will only interfere on the ground of a material misdirection or irregularity or

> because the decision is one which no reasonable court could have made."

See also *Fine v Soc of Advocates of SA* 1983 (4) SA 488 (A) at 494H - 495A; *Law Soc, Cape v Koch* 1985 (4) SA 379 (C) at 386G-H; *A v Law Soc of the Cape of Good Hope* 1989 (1) SA 849 (A) at 851C-D.

Consistent with this approach, which I propose to follow, is the view expressed in *Hayes v Bar Council* 1981 ZLR 183 (A) at 197C-D; 1981 (3) SA 1070 (ZA) at 1079H, that the issue whether an applicant is a fit and proper person to be admitted as an advocate is not one to be decided as a matter of discretion by the trial court, but is an objective question of fact.

In this appeal, the correctness of the finding by the Disciplinary Tribunal that the appellant is unfit to practice is challenged. As it is a finding which is fully susceptible to re-assessment by this court, it becomes necessary to investigate the facts on which it was based.

In the first place it was determined by the Disciplinary Tribunal that the three offences were committed by the appellant in his professional capacity. That finding, if correct, is of importance. Generally, a crime committed by a legal practitioner is regarded as less reprehensible if it had nothing to do with the conduct of his practice. Motoring offences are the commonest example,

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but there are others arising from carelessness, thoughtlessness and even ignorance. This distinction was underscored in *Inc Law Soc Tvl v Mandela* 1954 (3) SA 102 (T). In the course of a perceptive judgment RAMSBOTTOM J, as he then was, said at 107B-D:

> "While I think that in certain circumstances an attorney who is privileged to practise in the courts may be expected to observe the laws more strictly than other persons, the fact that an attorney has deliberately disobeyed the law does not necessarily disqualify him from practising his profession or justify the court in removing his name from the roll. We are not concerned in this case with misconduct committed by an attorney in his professional capacity; the offence committed by the respondent had nothing to do with his practice as an attorney. It is clear, however, that the court will in a proper case remove an attorney from the roll where he has been convicted of a crime which was not committed in his professional capacity."

He continued at 108C-F:

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> "The sole question that the court has to decide is whether the facts which have been put before us and on which the respondent was convicted show him to be of such character that he is not worthy to remain in the ranks of an honourable profession. To that question there can, in my opinion, be only one answer. Nothing has been put before us which suggests in the slightest degree that the respondent has been guilty of conduct of a dishonest, disgraceful, or dishonourable kind; nothing that he has done reflects upon his character or shows him to be unworthy to remain in the ranks of an honourable profession. In advocating the plan of action, the respondent was obviously motivated by a desire to serve his fellow non - Europeans. The intention was to bring about the repeal of certain laws which the respondent regarded as unjust. The method of producing that result which the respondent advocated is an unlawful one, and by advocating that method the respondent contravened the statute; for that offence he has been punished. But his offence was not of a 'personally disgraceful character', and there is nothing in his conduct which, in my judgment, renders him unfit to be an attorney."

In *Natal Law Soc v N* 1985 (4) SA 115 (N) the respondent had refused to testify as a State witness in a criminal trial in which five black persons were charged with treason. For such refusal he had been sentenced to three years' imprisonment. He explained that the accused person against whom he had been called to testify was a close friend, for whom he had the strongest feelings of loyalty. Nonetheless he disclaimed any knowledge of his friend's alleged treasonable activities. For these reasons, coupled with fears of the adverse reaction of the black community of which he was a member, he had maintained silence; a decision not taken by him in his professional capacity but on a personal level. MILNE JP, who gave the lead judgment, said at 121H:

> "... it is clear that the respondent, when he declined to testify, was present in court in his capacity as a witness and not, in any sense in his capacity as an attorney. He was, nevertheless, an attorney and as such, one must bear in mind that he is an 'officer of the court'."

And later at 122F:

> "When the respondent in this case refused to testify he had, it is common cause, no just excuse for doing so. In my view, he was, furthermore, in breach of his duty to the court. He has, however, been punished for that. The question is whether this single lapse is sufficient to establish that he is not fit to practise."

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In the result the learned JUDGE PRESIDENT held, with the concurrence of GULGUT J (KRIEK J dissented, in as much as he was of the opinion that, at the very least, a period of suspension was called for) that it could not be said the respondent would fail in his duties to the court, his profession or his clients, if he were to remain on the roll. The application for his striking off was accordingly dismissed. See also Ex p *Krause* 1905 TS 221 at 223; Inc *Law Soc v Luyt* 1915 CPD 763 at 765; *Matthews v Cape Law Soc* 1956 (1) SA 807 (C) at 814G-815A.

These cases, and there are others, concern convictions for offences not committed in the course of practice. They have been termed "untainted offences" because they lack any element of wickedness or moral unworthiness. Compare *A v Law Soc of the Cape of Good Hope supra* at 850E-J.

In this matter, I am entirely satisfied that the three contraventions of the Exchange Control Act, as read with the Regulations, were committed by the appellant in his professional capacity. The cumulative effect of the following facts allow of no other conclusion.

(1) The appellant was introduced to Beverley Building Society by one Scott, a former legal practitioner, in order to enable him to take over the control of accounts previously operated by Scott on behalf of clients. The appellant agreed to the arrangement for three reasons. First, he was informed that as an agent of Beverley Building Society his firm would earn an introductory fee of one-half per cent of new monies invested for three months or more. Second, he was assured that his firm would be placed on a panel of legal practitioners to secure conveyancing work from the Society. Third, a dividend would be paid on money deposited for the period of the investment. Thus, by opening these accounts with Beverley Building Society, the appellant intended to gain for his practice the advantages promised him.

(2) It was precisely because the appellant was a legal practitioner that he was approached to act as the middle man in the three transactions. The purchasers and sellers of the foreign exchange appreciated that as a member of the legal profession the appellant could be trusted not to convert to his own use the monies placed in his care or disclose their wrongdoing.

(3) Some of the persons for whom the appellant held the monies were clients. On occasion the appellant interviewed them at his offices. It was

also there that he received or made telephone calls and facsimile transmissions concerning the three transactions.

(4) The account opened by the appellant into which were deposited the monies received from Milwarde was in the name of the firm, D W Aitken and Company, Account "Showers P/L".

(5) On 2 November 1991 the appellant closed the aforementioned account. An amount of $525 730,77 was withdrawn by way of two cheques which were paid into DW Aitken Trust

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Account at Standard Chartered Bank.

(6) The sum of $324 273,22 paid to McGeoch was by cheque drawn from DW Aitken Trust Account at Standard Chartered Bank. What the appellant did was to withdraw an amount of $290 549,74 from the DW Aitken Account "AMCG" and deposit the monies into another account at Beverley Building Society in the name of D W Aitken Account "AH Caithness". He then withdrew the same amount by cheque made payable to DW Aitken and Company which was deposited into the firm's trust account.

(7) The accounts at Beverley Building Society were credited with dividends totalling $15 068,20. Of this amount the appellant estimated his firm retained $2 500.

The second crucial finding made by the Disciplinary Tribunal was that the three offences committed by the appellant constituted improper conduct of so serious a nature as to render him unfit to continue in practice. It was said that even if the fine of $175 000 imposed upon the appellant at his trial were to be reduced on appeal to as low as ten per cent, it would still be considered to be a substantial punishment upon a legal practitioner in the eyes of the public at large.

I have no hesitation in agreeing with the view that the offences were serious. They were blatant breaches of exchange control prohibitions by a legal practitioner and officer of the court whose sworn duty it is to uphold the law. There is no question of the appellant being unaware of the unlawfulness of his actions. The feeble attempt to suggest the contrary does him no credit. There was no temptation put before him. His moral culpability was high. He played a pivotal role without which the transactions may not have taken place. His conduct, which bore a distinct element of dishonesty and deceit

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towards the fiscus, was such as to bring the profession into disrepute with the public, the courts and those concerned with the administration of justice. This, notwithstanding that no breach of a client's trust was involved.

The appellant's counsel cited the unreported judgment of the Disciplinary Tribunal in *Law Soc of Rhodesia v Collins*, dated 19 November 1979, in support of a contention that the offences committed by the appellant were trivial and undeserving of the consequential condemnation that he be found not a fit person to practise. I consider the judgment unhelpful. I say so primarily for the reason that it was made clear to the Disciplinary Tribunal that the Law Society was not seeking that the errant practitioner be subjected to even an effective period of suspension from practice. In such circumstances it is understandable that the Disciplinary Tribunal was influenced, though of course not bound, by the recommendation of a body best placed to assess what punishment was required in the interests of the profession and the public. See *Kaplan v Inc Law Soc, Tvl,* 1981 (2) SA 762 (T) at 781H. Furthermore, that inquiry concerned a number of small transactions between friends. Even so I regard the Law Society's attitude to have been overly generous to the practitioner. Be that as it may, the respondent's stance in this matter, which involved large sums of money, was very different both before the Disciplinary

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Tribunal and in this appeal.

It is an unfortunate reality than in recent years there has been a disturbing outbreak of professional misconduct which has harmed the image of the profession. Where a legal practitioner engages in criminal activity of a serious nature on behalf of clients, the result can only damage the integrity, dignity and respect in which the profession is held by fair minded and righteous persons. It is essential for the maintenance of the profession's prestige that practitioners should not be identified with any such offending conduct.

It is for these reasons that I am in respectful agreement with the finding of the Disciplinary Tribunal that the appellant has shown himself unfit to practise.

Having so found the Disciplinary Tribunal was left with two options. Either to order as it did or suspend the appellant for a specified period from practising as a legal practitioner. I would not have felt any sense of unease if the Disciplinary Tribunal had suspended the appellant for a period of nine to twelve months. However, I am not able to point to any misdirection or irregularity which would entitle this court to interfere with the order made in the exercise of the Disciplinary Tribunal's discretion. Nor have I been

persuaded that the deletion of the appellant's name from the register of legal practitioners is grossly inappropriate in all the circumstances.

Accordingly, I would dismiss the appeal with costs.

McNally JA: I agree

Ebrahim JA: I agree

Atherstone & Cook, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

S v AITKEN 1995 (2) ZLR 395 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Criminal appeal

14 & 30 November 1995 Judgment No. S-216-95

Flynote

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Criminal procedure (sentence) - general principles - factors affecting - pre-trial incarceration - accused held for lengthy period in high security on offences for which he was not later charged - effect of incarceration on income - facts arising between trial and appeal - decision by Law Society to take disciplinary action and resultant order of striking off - discriminatory treatment - principal offenders not prosecuted

Headnote

The appellant, a legal practitioner, had been convicted of three counts under the Exchange Control Act and Regulations. The offences related to the acquisition of foreign currency by local businessmen who wished to purchase motor vehicles. The appellant had aided the transactions, though had not himself exported the foreign currency or acquired any outside Zimbabwe. His only direct benefit was a small amount of interest in a local building society account. The people on whose behalf he acted were not prosecuted at all. He was sentenced by SANDURA JP to a fine of $175 000.

Before the trial, he had been held for five months in maximum security on charges of money-laundering which were never brought. Apart from the mental and physical suffering endured, he would have lost a large amount of income. After the trial, the Law Society referred the matter to the Legal Practitioners' Disciplinary Tribunal, which ordered the appellant to be struck off the roll.

Held, that the appellant's striking off the roll constituted a far greater penalty than the payment of the substantial fine imposed. The hardship and

GUBBAY CJ

suffering caused by the termination of a long and successful career in the law and the requirement to enter untried fields would amount to a double punishment.

Held, further, that insufficient weight was given to the pre-trial detention of the appellant. Had he been arrested only on the offences for which he was finally charged, he would undoubtedly have been released on bail.

Held, further, that while it is the Attorney-General's prerogative to decide who to prosecute and who not to, it was legitimate, in determining the punishment, to recognise the inequity of treatment between the appellant and the other perpetrators of the transaction.

Held, accordingly, that the sentence imposed was excessive and should be reduced to a fine of $30 000.

Cases cited

S v Aitken 1993 (2) ZLR 336 (S)

Aitken v Law Soc 1995 (2) ZLR 383 (S)

A P de Bourbon SC for the appellant

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T Chitapi for the respondent

Judgment

Gubbay CJ: The appellant was convicted in the High Court, upon pleas of guilty, on three counts of contravening s 5(1)(a)(i) of the Exchange Control Act [*Chapter 22:05*], as read with s 3(1)(a)(ii) of the Exchange Control Regulations 1977. The particulars set out in the indictment reflected that during the period between 26 November 1991 and 13 April 1992, he had assisted Andrew McGeoch, Mr and Mrs Dorianno - Rizzo and Jonathan Upton to sell or exchange foreign currency in varying amounts totalling DM 209 264,68 (then equivalent to Z$ 650 550,69) to Donald Edgerton and Timothy Milwarde, which foreign currency was transferred by McGeoch, the Dorianno - Rizzos and Upton, to the bank account of Mercedes Benz AG at the Deutsche Bank, Stuttgart, Germany, in payment for Mercedes Benz motor vehicles imported into Zimbabwe, through the agency of Zimoco (Pvt) Ltd, for the benefit of Edgerton and Milwarde.

The three offences were taken as one for the purpose of sentence and a fine of $175 000 or, in default of payment, eighteen months' imprisonment with labour, was passed upon the appellant by the learned JUDGE PRESIDENT. Leave to appeal therefrom was granted.

The relevant facts in respect of each count are summarised in *S v Aitken* 1993 (2) ZLR 336 (S) at 339A-340E, and are also set out in this court's concurrently

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GUBBAY CJ

delivered judgment in *Aitken v Law Soc* 1995 (2) ZLR 383 (S). It is unnecessary to repeat them yet again. They reveal that foreign currency was neither exported by the appellant nor personally acquired by him outside Zimbabwe. What he did was to materially assist in the sale of foreign currency from McGeoch, the Dorianno - Rizzos and Upton, to Edgerton and Milwarde. In return for his involvement the appellant retained a percentage of the dividends earned on the various accounts with Beverley Building Society in an amount of about $2 500. He also would have gained further indirect benefits from Beverley Building Society by virtue of having deposited the large sums of money with it.

In his assessment of punishment the learned JUDGE PRESIDENT weighed the mitigatory features against those which aggravated the offences. He took account of the appellant's personal and domestic circumstances; that he was a first offender who had pleaded guilty; that he had been held in custody for five months before being admitted to bail; and that the offences did not involve the acquisition of foreign currency outside Zimbabwe. On the other side of the scale, he viewed the offences as inherently serious, made even more so by the appellant's standing as a senior legal practitioner with seventeen years' experience. He described the appellant's role in the three transactions as "pivotal", and considered that his action had brought the legal profession into disrepute.

I agree entirely with those observations and readily accept that legal practitioners who offend against the law deserve to be dealt with severely. They are, after all, officers of the court, sworn to uphold the law, not to break it. The public is entitled to expect nothing less of them. Legal

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practitioners are there to set an example. Their obligation is to maintain the profession's integrity, dignity and respect.

There is, however, a material consequence of the convictions which was absent on 9 December 1993, when the learned Judge President proceeded to sentence the appellant. At that time it was not known whether the Law Society would refer the appellant's convictions to the Disciplinary Tribunal for enquiry. Latterly it did so. The enquiry resulted in the Disciplinary Tribunal directing that the appellant's name be deleted from the register of legal practitioners.

That is an event which occurred after the date of sentence. In terms of s 12(4)(a) of the Supreme Court Act [*Chapter 7:13*], this court is permitted to take account of it in considering whether to interfere with the sentence. To

that extent this court is now at large. It has before it a compelling feature of mitigation, rightly and fairly conceded as such by Mr *Chitapi*, who appeared for the State.

I do not doubt that more than anything else it is the inability to practise his profession which, from the appellant's point of view, constitutes a far greater penalty than the payment of the very substantial fine. A successful, long and lucrative career in the law has been terminated. The appellant will have to change his life style. He will have to enter fields of endeavour hitherto unknown and untried in order to maintain himself and his dependants. This is the real hardship and suffering resulting from what in effect amounts to a double punishment.

This apart, I am in agreement with Mr *de Bourbon* that the learned JUDGE PRESIDENT attached insufficient weight to the five-month period of incarceration that the appellant was forced to endure as a D Class high-security prisoner. I say so because the appellant was held in custody, upon a denial of bail, in respect of the extremely serious crime of money-laundering, for which he was not, and will not be, brought to trial. If he had been arrested on 11 March 1992 for the three offences for which he was later convicted, I feel certain that he would have been admitted to bail, if not immediately, within a matter of days. Certainly he would not have been held under the harsh conditions he was. It seems to me that the appellant was subjected by the State to what for him, as a first offender, was a form of torture. His incarceration as an awaiting trial prisoner - which in the end proved to be unjustified - caused much mental and physical suffering. Thereafter, and until November 1992, the appellant was prohibited in terms of the conditions of bail granted him from leaving his residence other than to report to the police. Effectively he was held under house arrest.

The appellant estimated - and it was not disputed - that over the period he was prevented from attending to his practice he was deprived of income in excess of $200 000. That, too, was a weighty factor.

Finally, the point was made on behalf of the appellant that the State's decision not to prosecute the other perpetrators in the transactions but to proceed only against him (who acted more as the middleman or "stakeholder"), and not to seek to recover from McGeoch, the Dorianno - Rizzos or Upton, the premiums received by them for the sale of foreign currency, amounted to

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victimisation. It resulted in the appellant alone being punished for offences for which all were guilty. Although the decision who, and who not, to prosecute is the

GUBBAY CJ

prerogative of the Attorney-General, it seems to me legitimate in this case to recognise that inequity in the determination of the appellant's punishment.

Although I unhesitatingly accept the seriousness of the offences, I am satisfied that there are nonetheless substantial mitigatory features. To allow the sentence imposed by the learned JUDGE PRESIDENT to stand would be to punish the appellant far too severely. In balancing the scales of justice a fair and just sentence has to be imposed.

I consider that the fine of $175 000 should be reduced to $30 000 or, in default of payment, three months' imprisonment with labour, and that the appeal be allowed to that extent.

McNally JA: I agree.

Ebrahim JA: I agree.

Atherstone & Cook, appellant's legal practitioners

ZIMBABWE BANKING CORP LTD v MASENDEKE 1995 (2) ZLR 400 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Muchechetere JA

Civil appeal

30 November 1995 Judgment No. S-223-95

Flynote

Practice and procedure - default judgment - principles - when default wilful

Costs - de bonis propriis - legal practitioner - may be awarded personally against practitioner who snatches at judgment and stubbornly and unreasonably clings to it

Headnote

Default judgment was granted against the appellant in the High Court. The appellant applied to the High Court for rescission of that judgment. The court ruled that because there had been wilful default and no explanation had been offered for the default, the application for rescission had to be refused, regardless of whether there was any defence on the merits. On appeal:

Held, that wilful default occurs when a party freely takes a decision to refrain from appearing

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with full knowledge of the service or set down of the matter. Where there is negligence in relation to the default, the court will examine whether the negligence is so gross as to amount to wilfulness. In coming to its conclusion, there is a certain weighing of the balance between the extent of negligence and the merits of the defence.

Held, further, that in the present case the default had not been wilful but had been the result of a mistake in misfiling of the summons. The judge *a quo* was wrong to say there was no explanation; the appellant had offered an explanation.

Held, therefore, that the appeal must succeed.

Held, further, as regards costs in cases in the future the court will consider

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McNALLY JA

awarding costs personally against lawyers who not only snatch at judgments but then stubbornly and unreasonably cling to them when they could have saved trouble and expense by contacting the lawyers on the other side.

Cases cited:

Neuman (Pvt) Ltd v Marks 1960 R & N 166 (SR); 1960 (2) SA 170 (SR)

Simbi v Simbi S-164-90

Mdokwani v Shoniwa 1992 (1) ZLR 269 (S)

Songore v Olivine Industries (Pvt) Ltd 1988 (2) ZLR 210 (S)

Stockil v Griffiths 1992 (1) ZLR 172 (S)

A P de Bourbon SC for the appellant

A Moyo for the respondent

Judgment

McNally JA: In this case we made an order at the end of the hearing allowing the appeal with costs and setting aside the order of the High Court (GARWE J) made on 4 April 1995. We substituted an order in the following terms:

> "That the judgment entered in default against the applicant by this Honourable Court in Case No. HC 5806/94 on 16 November 1994 be set aside and that the applicant be given leave to defend. The applicant to pay the costs on an opposed basis."

The facts of the matter summarised from the heads of argument of Mr *de Bourbon*, who appeared for the appellant (Zimbank), are as follows.

On 29 January 1993 officials of Zimbank wrote a letter to the senior public prosecutor in

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Bulawayo. It made certain allegations against the respondent, Mr Masendeke.

In May 1994 a letter of demand was written to Zimbank, alleging that the letter was defamatory. The letter was acknowledged, and it was said the matter was being considered.

Summons was issued and served, not on the Head Office of Zimbank, but on the accountant of a smaller branch in Harare. He sent it to Head Office. It reached the office of the General Manager, but for some unexplained and apparently inexplicable reason, was filed away. It was not seen by the General Manager. No appearance to defend was entered.

McNALLY JA

Without further communication, default judgment was sought against Zimbank, though not against the other defendant, the author of the letter. Default judgment was granted in the sum of $16 000, with interest and costs.

Zimbank's lawyers became aware of the judgment on the date it was granted, 16 November 1994. An application for rescission was launched on 16 December 1994.

The learned judge ruled, on 4 April 1995, that there had been wilful default. No explanation had been offered for that default. Therefore the application was to be refused, regardless of whether there was any defence on the merits.

It seemed to us, with respect, that the learned judge erred, both as to the concept of wilful default, and as to the fact that no explanation had been proffered.

Wilful default occurs when a party, with the full knowledge of the service or set down of he matter, and of the risks attendant upon default, freely takes a decision to refrain from appearing: *Neuman (Pvt) Ltd v Marks* 1960 R & N 166 (SR) at 169; 1960 (2) SA 170 (SR) at 173; *Simbi v Simbi* S-164-90 at p 6; *Mdokwani v Shoniwa* 1992 (1) ZLR 269 (S) at 271.

Here there was a mistake. It was clearly a mistake. Zimbank had no possible reason to allow the claim against it (which was for $50 000) to go by default. No-one, and in that term I include Mr Moyo of Chikumbirike and Associates who acted for Mr Masendeke, could reasonably have thought otherwise.

The mistake was, like many mistakes where documents go astray in the filing system of an organisation, inexplicable. And one wonders how the court would benefit if a minute and detailed investigation were to reveal how the summons came to be filed without coming to the attention of the General Manager. The important explanation is that it **was** filed, and it did **not** come to his attention.

It is a credible explanation precisely because of the point I made earlier - the extreme improbability that Zimbank, through its General Manager, would intentionally abstain from defending this claim.

So the explanation that the summons was filed in error is an explanation. The learned judge was wrong to say there was no explanation. **How** it happened may be inexplicable, but **that** it

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happened is undeniable.

McNALLY JA

The wilfulness of a default is seldom, if ever, clear-cut. There is almost always an element of negligence, and the question arises whether it was gross negligence and whether it was so gross as to amount to wilfulness. And in coming to a conclusion there is a certain weighing of the balance between the extent of the negligence and the merits of the defence. See *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S); *Stockil v Griffiths* 1992 (1) ZLR 172 (S); and *Mdokwani v Shoniwa supra.*

Here, while it is inappropriate to dwell on the merits, it is obvious that there are *prima facie* grounds for saying there may be merit in the defence both on liability and on quantum.

We were in no doubt that the appeal should succeed with costs, but we were in more difficulty about the costs of the application for rescission. We may have been over generous in allowing Mr Masendeke his costs. On the other hand, it is difficult to say that he should not have opposed the application when in the event the learned judge found his opposition to be not only reasonable but compelling.

Speaking for myself, I would say that a lawyer in Mr Moyo's position must have at least suspected, when no appearance was entered by Zimbank, that something had gone wrong. A telephone call to Zimbank's legal department would, as we can now see by hind-sight, have saved a lot of trouble and expense.

He did not do that. He obtained default judgment. But he must have at least half-expected that what did in fact happen, would happen. In future cases, we may have to consider awarding costs personally against legal practitioners who not only "snatch at their judgments" but then stubbornly and unreasonably cling to them.

Korsah JA: I agree

Muchechetere JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Chikumbirike & Assocs, respondent's legal practitioners

KARIMAZONDO v STANDARD CHARTERED BANK ZIMBABWE 1995 (2) ZLR 404 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Muchechetere JA

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Appeal against refusal to grant rescission of summary judgment

30 November & 7 December 1995 Judgment No. S-224-95

Flynote

Practice and procedure - summary judgment - rescission - principles - applicant in wilful default - meaning - effect of being in wilful default

Contract - enforceability - public policy - when contract may be declared void on grounds of public policy - principles

Contract - suretyship - terms - provision whereby certificate of balance provided by creditor is "conclusive proof" of balance - contrary to public policy

Contract - divisibility - illegal clause in contract - when may be treated as severable - test of severability

Headnote

Summary judgment may be given in the absence of the party against whom it is given. As such it is a default judgment and susceptible of rescission. However, wilful default by an applicant disentitles him from obtaining rescission. Wilful default can include the conduct of the applicant's legal practitioner, even where the applicant personally is not in default.

Public policy demands, in general, full freedom of contract - the right of people freely to bind themselves in respect of all legitimate matters. It also demands that contracts freely entered into should be enforced. However, the court has the power to treat as void certain contracts which are against public policy or contrary to public morals. This power should not be exercised rashly or hastily, though the court would be failing in its duty if it did not declare to be void an arrangement which was against public policy. This would be the case where the contract is clearly inimical to the interests of the community, contrary to law or morality, or runs

counter to social or economic expedience. A conservative approach is adopted by the court, and it will intervene only if the perceived harm to the public is substantially incontestable or where a tendency to harm will in the majority of cases result in harm. Stringent obligations imposed on a party will not lead to such a finding unless they can be said to be plainly improper or unconscionable, unduly harsh or oppressive.

In a contract of suretyship, any "conclusive proof certificate", in terms of which a certificate by the creditor in respect of what is owed is treated as proof that the sum is in fact owed, is contrary to public policy.

Whether an illegal or void portion of a contract is severable from the rest depends on whether the illegal promise is substantially the whole or main consideration for the promise sought to be enforced. If the elimination of the invalid promise or promises would lead the substantial character of the contract unchanged, the legal portion will generally be enforced. It is only where the promises sought to be struck out are not subsidiary to the main purpose, even if the lawful promises are not associated with the unlawful ones, that the promises will not be severable.

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Cases cited:

Tlhohoe v Maury (Edms) Bpk 1988 (3) SA 922 (O)

Beltac (Pvt) Ltd v Gallico S-174-95

Evander Caterers (Pty) Ltd v Potgieter 1970 (3) SA 312 (T)

Neuman (Pvt) Ltd v Marks 1960 R & N 166 (SR); 1960 92) SA 170 (SR)

Zimbabwe Banking Corp v Masendeke 1995 (2) ZLR 400 (S)

Masama v Borehole Drilling (Pvt) Ltd 1993 (1) ZLR 116 (S)

Eastwood v Shepstone 1902 TS 294

Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A)

Law Union & Rock Ins Co Ltd v Carmichael's Exor 1917 AD 593

Jajbhay v Cassim 1939 AD 537

Olsen v Standaloft 1983 (1) ZLR 67 (S)

Botha (now Griessel) & Anor v Finanscredit (Pty) Ltd 1989 (3) SA 933 (A)

Standard Bank of SA Ltd v Wilkinson 1993 (3) SA 822 (C)

Nedbank v Abstein Distributors (Pty) Ltd & Ors 1989 (3) SA 750 (T)

Donnelly v Barclays National Bank Ltd 1990 (1) SA 375 (W)

Ex p Min of Justice: in re Nedbank Ltd v Abstein Distributors (Pty) Ltd & Ors & Donnelly v Barclays Natl Bank Ltd 1995 (3) SA 1 (A)

Cameron v Bray Gibb & Co (Pvt) Ltd 1966 RLR 418 (G)

T N Malunga for the appellant

M J Gillespie for the respondent

McNALLY JA

Judgment

McNally JA: I will call the appellants "the Karimazondos" and the respondent "the bank". The facts of the case are that the bank sued the Karimazondos, who are husband and wife, in the magistrates court, Gweru, for the sum of $1 034 298,58. Summons was served on 10 February 1994.

The claim was based on three agreements of guarantee and suretyship entered into by the

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Karimazondos jointly and severally for the debts and obligations of a company called Staper (Pvt) Ltd.

Before a plea was filed, an application for summary judgment was made on 2 March 1994. Notice of opposition was given, an opposing affidavit was filed, and annexed to that affidavit was the plea which the Karimazondos intended to file.

In that plea they admitted all the factual allegations in the particulars of claim except for certain of them which, in the event, were not persisted with. They raised two legal contentions, as follows.

First, they alleged that the three agreements were contrary to public policy and, as such, invalid and unenforceable by reason of clause 11 of each of them - the so-called "conclusive proof" clauses.

Second, they alleged that these clauses 11 were neither severable nor capable of interpretation as so-called *"prima facie* proof" clauses. Therefore again the clauses were invalid, unenforceable, and the agreements also.

By consent, the hearing of the application for summary judgment was postponed to 6 April 1994 to allow the parties to make certain additions and amendments to the affidavits, and to submit written argument.

On 6 April 1994 the bank's lawyer, Mr *Harvey,* of Danziger and Partners, Gweru, appeared and developed his written argument with oral submissions. Mr *Banda* of Wilmot and Bennet, Gweru, correspondents for Kantor and Immerman, Harare, did not appear although he had also filed written argument. The court took time to consider, and on 13 April gave judgment for the bank.

The Karimazondos filed and served an application for rescission of judgment on 23 May 1994, which was set down for hearing on 8 June 1994. The application was refused on the dual grounds that the applicants had been in wilful default and that they had no *bona fide* defence.

McNALLY JA

The Karimazondos now appeal against that decision.

There was some initial dispute about what was the correct procedure by which to seek to upset the summary judgment. Should there have been an appeal, or was the rescission procedure correct?

It now seems (correctly) to be common cause that a summary judgment given in the absence of the party against whom it is given is a default judgment and thus susceptible of rescission in terms of Order 30 of the Magistrates Court Rules. See Order 30 rule 1; Order 1 rule 5(1); *Tlhohoe v Maury (Edms) Bpk* 1988 (3) SA 922 (O); *Jones & Buckle Civil Practice of the Magistrates Courts in South Africa* vol 2 8 ed p 358; *Beltac (Pvt) Ltd v Gallico* S-174-95 (not reported).

The application must be made within one month of the defendant becoming aware of the

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judgment, although the court may extend the time - Order 33 rule 2(1); *Evander Caterers (Pty) Ltd v Potgieter* 1970(3) SA 312 (T) at 315-6.

In this case the judgment was given on 13 April. The Karimazondos are presumed to have had notice of it by 15 April. The application for rescission, though apparently prepared and signed on 12 May, was filed only on 23 May. It was thus out of time. No formal application for condonation or for an extension of time was made.

Wilful default disqualifies an applicant from obtaining rescission of judgement: Order 30 rule 2(1); *Neuwman (PVT) Ltd v Marks* 1960 R & N 166 (SR) at 168F-170A; *Zimbabwe Banking Corp v Masendeke* 1995 (2) ZLR 400 (S).

Mr *Gillespie*, for the bank, supports the magistrate's finding on wilful default. I can do no better than repeat his words:

> "5. In doing so he found wilful default on the part of the appellants. Wilful default disqualifies the appellants from the relief sought: Order 30 rule 2(1); *Neuman v Marks* 1960 R & N 166 (SR) at 168F-170A
>
> This finding was correct in that not only was the attorney guilty of a lamentable disregard of the rules of court, the ethics of the profession and of his clients' interest, but so too the appellants themselves made no appearance at the application for summary judgment. It is no part of the appellants' case either that they were

> unaware of the hearing and reliant entirely upon their attorney who let them down; or that they were present at the hearing but unable to do anything to prevent the granting of default judgment. Rather, the unequivocal deposition that they failed to appear - opposing affidavit para 15 is uncontradicted.
>
> 6. The attorney's reason for failing to appear is a classic exposition of the concept of wilful default - he was fully aware of the hearing date; of the consequences of failure to appear; and took a calculated decision to prefer his own business to that of the appellants. He has apparently been mendacious in his explanations. They are contradicted by the opposing attorney; by the clerk of court and by the facts (that is: he could not possibly have heard from the magistrate on the 6th that judgment had been given. This falsity must necessarily extend to the whole of his explanation).
>
> 7. Even if the default were, despite the absence of any claim in that regard, to be seen as the default only of the attorney and not of the appellants, then still no good cause has been shown for the rescission of judgment. This is a case where:
>
> 'the oft-repeated warning that notwithstanding an understandable reluctance to penalise a litigant on account of the lack of the diligence of his legal practitioner, there is a limit beyond which the results of his conduct cannot be escaped':
>
> *per* GUBBAY CJ in *Masama v Borehole Drilling (Pvt) Ltd* 1993 (1) ZLR 116 (S) 117E.
>
> It is not as if the appellants had given any excuse of their own which would show that they ought to be held not responsible for their default and for their attorney's misconduct."

s to the merits, Mr *Gillespie*'s submissions were so compelling that Mr *Malunga,* who took over in this court from Mr *Banda* the duty of representing the Karimazondos was constrained to concede that he had no answer to them. Those submissions were as follows:

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"8. In any event there are no merits to the defence. The only point raised in the entire opposing affidavit that has any arguable substance to it is the suggestion that clause 11 of the suretyship agreement is contrary to public policy (opposing affidavit to summary judgment application para 2(a)(iii)). This clause reads:

McNALLY JA

'The amount of the indebtedness of the debtor and of each of us hereunder to the said Bank at any time (including interest and the rate of interest) shall be determined and proved by a certificate signed by any manager or accountant of the Bank. It shall not be necessary to prove the appointment of the person signing any such certificate, and such certificates shall be binding on us, and shall be conclusive proof of the amount of our indebtedness hereunder and shall be valid as liquid documents against us in any competent court for the purpose of obtaining provisional sentence or summary judgment against us thereon.'

9. It seems fashionable presently to take a point of public policy against deeds of suretyship. Undoubtedly the court has the power to determine whether a contract, which is not otherwise illegal, contravenes certain acceptable standards and ought therefore to be treated as void. The acceptable standards thus prayed in aid are generally termed public policy.

'Now this court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is not a power to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the court would be wanting in its duty if it hesitated to declare such an arrangement void':

per INNES CJ in *Eastwood v Shepstone* 1902 TS 294 at 302.

What constitutes public policy is not readily determinable and the requirements of that desideratum must needs be a difficult and contentious matter: *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 7J-8G.

It can be stated generally, however, that agreements will be contrary to public policy where they are: 'clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience': *per* SMALLBERGER JA in *Sasfin supra* at 8D.

Certain fundamentals of public policy are identifiable. So it is held that: 'public policy demands in general full freedom of contract; the right of men freely to bind themselves in respect of all legitimate subject-matters': per INNES CJ *Law Union & Rock Ins Co Ltd v Carmichael's Exor* 1917 AD 593 at 598. So also does it demand, as the *maxim pacta sunt servanda* demonstrates, that contracts freely

MCNALLY JA

entered into should be enforced. Public policy, and the judicial oath, demand alike "the doing of simple justice between man and man": *per* STRATFORD CJ in *Jajbhay v Cassim* 1939 AD 537 at 544.

So difficult a task is it for a judge to pronounce upon the dictates of public policy that, as has already been intimated, a conservative approach is adopted to any invitation to pronounce a contract freely entered as unconscionable: *Sasfin supra* at 9B.

The court will only intervene where the perceived harm to the public is substantially incontestable: *Olsen v Standaloft* 1983 (1) ZLR 67 (S) at 74E - 82D; or where a tendency to harm will in a majority of cases result

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in the harm: *Olsen supra* at 82H; *Eastwood supra* at 302.

Stringent obligations imposed on a party will not lead to such a finding unless they can be said to be plainly improper or unconscionable, unduly harsh or oppressive. *Botha (now Griessel) & Anor v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 783B; *Standard Bank of SA Ltd v Wilkinson* 1993 (3) SA 822 (C) at 831I-832G.

10. In *Sasfin supra* it was held that a surety containing a number of clauses, including a 'conclusive proof certificate' provision, (set out at 11), was contrary to public policy. It did not appear to state conclusively that the provision in itself was necessarily contrary to public policy (at 14I-15B). In *Nedbank Ltd v Abstein Distributors (Pty) Ltd & Ors* 1989 (3) SA 750 (T) at 753G - 754E it was held that *Sasfin* was authority for the proposition that any such clause was contrary to public policy. A different conclusion was reached in *Donnelly v Barclays National Bank Ltd* 1990 (1) SA 375 (W) 383G et seq. The divergence of judicial views as to the effect of the leading decision was resolved in Ex p *Min of Justice:* In *re Nedbank Ltd v Abstein Distributors (Pty) Ltd & Ors & Donnelly v Barclays National Bank Ltd* 1995 (3) SA 1 (A), in which it was held that *Sasfin is authority for the proposition that any "conclusive proof clause" in favour of a creditor in an agreement in terms whereof the creditor is to be the author of the certificate of balance is in itself contra bonos mores*.

11. On that authority, clause 11 of this agreement is against public policy. The question then is whether it is severable from the main body of the deed.

'The test appears to be whether the illegal promise is substantially the whole or the main consideration for the promise sought to be

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McNALLY JA

enforced. If the contract is divisible into a number of separate promises, and the elimination of one or more of the invalid promises would still leave the substantial character of the contract unchanged, then the legal portion will generally be enforced. It is only in a case where the promises sought to be struck out are not subsidiary to the main purpose, even if the lawful promises are not associated with the unlawful promises, that the fact that there is no appropriation of consideration is strong evidence that the promises are not severable': *per* GOLDIN J (as he then was) in *Cameron v Bray Gibb & Co (Pvt) Ltd* 1966 RLR 418 (G) at 421F.

In *Sasfin* the offending accumulation of clauses was held by the majority not to be severable on the grounds that the securities sought to be severed were 'material, important and essential to *Sasfin*'s ends' (at 17D) and were such that without their protection *Sasfin* would never have entered the agreement. Also that the changes were so drastic as would amount to the making of a new contract for the parties (at 18B). *Per contra in Nedbank* where a clause almost identical to the present was held to be severable:

'This case differs from the *Sasfin* case where it would have been difficult to sever all the offending clauses from the contract. Here there is a single clause.

It does not detract from the main object of the agreement; it is merely collateral and procedural.

I can find no cogent reason why the plaintiff would not have concluded the agreement without that clause. (See *Kriel v Hochstetter House (Edms) Bpk* 1988 (1) SA 220 (T)). A certificate serving as *prima facie* proof or documentary proof readily available in the ordinary way might have sufficed. One must not forget that these agreements were concluded merely to reinforce the plaintiff's security.

I therefore come to the conclusion that the clause in this case is severable and the entire deed of suretyship is therefore not invalid': *per* LE ROUX AJ at 755 E-J.

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12. In *casu*, equally the sureties in the severed form would have been acceptable to the parties. The alteration is to the appellants' benefit and the respondent would have been satisfied without the need for a conclusive proof certificate; particularly in that there is no need to establish the exact amount of the indebtedness, the surety is up to a

McNALLY JA

maximum limit, well below the certified indebtedness of the appellants, and it cannot be said that the papers anywhere disclose any dispute by the appellants that the indebtedness of the principal debtor exceeds the limit of their own sureties. Compare *Donnelly* at 385.

13. It is accordingly respectfully submitted that even if the clause attacked is *contra bonos mores,* it is severable from the main body of the suretyships. No defence is disclosed in the event of the continuing validity of the suretyships and no good cause has been shown for the rescission of the judgment."

It remains only to say that in the summary judgment application there was no reliance on the certificate referred to in clause 11. The quantum of the indebtedness was proved by the annexing of the appropriate bank ledger cards, and was, in any event, admitted in the Karimazondos' affidavit and annexed draft plea.

The appeal has no merit and is dismissed with costs.

Korsah JA: I agree

Muchechetere JA: I agree

Wilmot & Bennett, appellants' legal practitioners

Danziger & Partners, respondent's legal practitioners

S v CHEWE 1995 (2) ZLR 413 (HC)

Court **High Court, Harare**

Adam J

Criminal review

8 December 1995 Judgment No. HH-144-95

Flynote

Roads and road traffic - driver's licence - cancellation - conviction for drunken driving - accused the holder of a licence issued in another country - order for cancellation of licence must still be made

Headnote

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Where a person is convicted of contravening s 55(1) of the Road Traffic Act [*Chapter 13:11*] (driving while under the influence of alcohol), the court convicting the person is obliged, unless there are special circumstances, to prohibit the accused from driving for a period of at least six months and, if the accused is the holder of a licence, cancel his licence. The word "licence" in s 2(1) of the Act includes a foreign driver's licence, that is, one issued by the competent authority of a state, territory or province outside Zimbabwe, and accordingly the court must order the cancellation of such a licence, if that is what the person holds. The court is not required to speculate whether an order cancelling a foreign licence would be a *brutum fulmen.*

Judgment

Adam J: The accused, a Zambian national holding a foreign driver's licence was convicted of the contravening s 55(1) of the Road Traffic Act [*Chapter 13:11*]. It was alleged that on 15 October 1995 he unlawfully drove a motor vehicle, an International truck, registration number ZSC 506 T on the New Chitungwiza Road in Harare whilst under the influence of alcohol or drugs to such an extent as to be incapable of having proper control of the motor vehicle. The accused on that day at about 7:40 pm was following behind a Nissan Sentra whose driver indicated that he was stopping opposite Irvine's Day Old Chicks on the New Chitungwiza Road. The accused, a long-

distance truck driver, was far too close and collided with the Nissan Sentra, causing damage to the rear of the Nissan Sentra. On their arrival at the scene of the collision, the accused was observed by the police to have bloodshot eyes and to be smelling of alcohol. He was taken to Harare Central Police Station and at 9:35 pm, according to the breach analysis certificate tendered as an exhibit, the accused had a reading on the Lion Alcometer EBA instrument which showed a concentration of alcohol of not less than 247 mg per 100 ml of blood.

In terms of s 55(2) of the Act, where a concentration of alcohol in the blood was not less than 155 mg per 100 ml at any time within a period of two hours after the offence, it shall be presumed, unless the contrary is proved, that the accused was at the time of the offence under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle concerned.

The accused admitted that he was drunk. The trial magistrate convicted him. He was sentenced to a fine of $800 or, in default of payment, two months' imprisonment with labour.

Section 55(4) of that Act provides that a court which convicts a person under s 55(1) shall prohibit the person from driving for a period of not less than six months and shall, if he is a holder of a licence, cancel the licence.

The regional magistrate inquired of the trial magistrate as to why the accused was not prohibited from driving and his driver's licence cancelled. The trial magistrate's reply stated that the accused was a holder of a foreign driver's licence and the magistrate's court did not have jurisdiction to cancel a foreign driver's licence. In his view, the cancellation of the driver's licence would not be enforceable in Zambia and therefore of no effect. He conceded that he erred in not

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prohibiting the accused from driving.

The Road Traffic Act [*Chapter 13:11*], under s 2(1) defines - "drive" to include cause or permit to drive; "driver" means the person having control of the steering apparatus of a vehicle; "driver's licence" means a driver's licence issued in terms of s 10(6) or s 14(1); "foreign driver's licence" means a licence bearing a photograph of the holder of a licence and endorsed with his signature and issued by the competent authority of any state, territory or province outside Zimbabwe for purpose of enabling the holder of the licence to drive unaccompanied a motor vehicle on a road in such state, territory or province; "internal licence" means a driver's licence, a learner's licence, a tractor driver's permit or an international driving permit issued in terms of

ADAM J

s 17(1); "licence" means ... an internal licence or an international driving permit referred to in s 18(1) or a foreign driver's licence; "prohibit from driving" means prohibit from driving a motor vehicle on a road.

Further, s 66(6) of the Act makes it mandatory for the clerk of court to notify the Registrar of Traffic Licences in writing of any prohibition from driving and any cancellation of a licence. Also, s 66(3) requires any licence held by a person convicted of an offence in respect of which he is prohibited from driving to be endorsed with the particulars of such conviction and of such prohibition in such manner as may be prescribed.

It must be mentioned that s 49(1) makes it an offence for a person to drive a motor vehicle on a road whilst prohibited from driving whether in terms of the Road Traffic Act 1976 or a law in force in a country outside Zimbabwe on grounds which would be a cause for prohibition from driving in terms of the Road Traffic Act 1976.

Now s 55(4) makes it mandatory for a court to prohibit from driving for not less than six months a person whom it convicts under s 55(1). The court must also cancel, if he is a holder of a licence, his licence. "Licence" is defined under s 2(1) to cover a foreign driver's licence.

It is clear from the foregoing that the trial magistrate was in error when he said that he saw no authority which required him to cancel a foreign driver's licence since it was not issued in terms of the Road Traffic Act [*Chapter 13:11*].

In this connection reference must also be made to s 6 of the Act which makes it an offence for a person to drive a motor vehicle on a road unless he is a holder of a licence. A foreign national driving a motor vehicle on a road in Zimbabwe without a licence commits an offence under s 6(1) of that Act. A person such as the accused who is prohibited from driving and whose licence is cancelled would be committing an offence if he were to drive a motor vehicle on a road in Zimbabwe whilst his foreign driver's licence was cancelled. Under the Road Traffic Act after the expiry of the period of prohibition from driving, the cancelled licence remains cancelled. By failing to prohibit the accused from driving a motor vehicle on a road in Zimbabwe and cancelling his foreign driver's licence, the trial magistrate made it easy for the accused, were he so minded, to return from outside to Zimbabwe and perhaps wrongfully believe that since his foreign driver's licence was not cancelled he may be permitted to drive a motor vehicle on a

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road in Zimbabwe.

ADAM J

It must be brought to the attention of presiding magistrates that where a statutory provision makes it mandatory for a court to prohibit a person from driving a motor vehicle on a road in Zimbabwe and to cancel his licence in terms of the Road Traffic Act [*Chapter 13:11*], it is not the court's function to speculate as to whether or not a prohibition or cancellation would have effect in a foreign driver's home country or whether its order of prohibition and the cancellation would be a *brutum fulmen.* It is a universal problem that besets many countries in trying to control driving whilst under the influence of alcohol or drugs. This has led to mutual co-operation between countries and beneficial sharing of information. Zimbabwe cannot be said to be unique in having a provision like s 49(1) of the Road Traffic Act.

In the circumstances of this case, the matter is remitted to the trial magistrate so that the provisions of ss 55(4), 65(6) and 66(3) of the Road Traffic Act [*Chapter 13:11*] are complied with.

ZIMBABWE BANKING CORP LTD v MASHAMHANDA 1995 (2) ZLR 417 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Muchechetere JA

Civil appeal

27 November & 14 December 1995 Judgment No. S-231-95

Flynote

Damages - amount - actio injuriarum - defamation - false allegation in newspaper advertisement inserted by bank that former employee had been dismissed for incompetence - appeal - when appeal court will interfere with award of trial court

Headnote

An appeal court is slow to interfere in the trial court's exercise of a discretionary function, but will do so where the trial court took into account a factor which it should not have taken into account. In an appeal against an award of damages for defamation, it will intervene if it considers that due effect has not been given to all the factors which properly enter into the calculation, or if the final award is excessive.

An award of damages for defamation is intended to provide vindication and consolation, not to provide the plaintiff with a financial windfall. Awards in Zimbabwe will generally not equate with those in larger and wealthier economies, but they must take into account the rapid rate of

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inflation here.

Where an employee of a bank had been dismissed for insubordination, but the bank, in answering parliamentary criticisms, had alleged in newspaper advertisements that the employee had been dismissed for incompetence and insubordination,

Held, that an award of $45 000 was not excessive.

Cases cited:

SA Assoc Newspapers Ltd & Anor v Samuels 1980 (1) SA 24 (A)

Hulley v Cox 1923 AD 234

McNALLY JA

Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194

Norton & Ors v Ginsberg 1953 (4) SA 537 (A)

Manyenga v Muza S-145-95

Robertson v Ericksen 1993 (2) ZLR 415 (H)

Chinamasa v Jongwe P & P Co (Pvt) Ltd & Anor 1994 (1) ZLR 133 (H)

Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Anor 1994 (1) ZLR 445 (H)

Chinengundu v Modus Publications (Pvt) Ltd HH-135-92

Zimunya v Zimbabwe Newspapers (1980) Ltd 1994 (1) ZLR 35 (H)

Trans - Tabac (Pvt) Ltd & Anor v Jongwe P & P Co (Pvt) Ltd HH-67-94

Mudukuti v Hove & Ors HH-152-94

Desfontaine v Chinamasa & Ors HB-53-95

Desfontaine v IBDC & Ors HB-54-95

Desfontaine v Chikowore HB-55-95

Zvobgo v Modus Publications (Pvt) Ltd 1995 (2) ZLR 96 (H)

A P de Bourbon SC for the appellant

A M Gowora for the respondent

Judgment

McNally JA: This is an appeal and cross-appeal against the decision of ZIYAMBI J to award

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$45 000 damages to Mr Mashamhanda for defamation of him by the appellant, which I will call "Zimbank".

Zimbank has accepted that it defamed Mr Mashamhanda. But it says $45 000 is far too much. It is a Zimbabwean record award for defamation. Mr Mashamhanda says it is far too little. He wants $250 000. Originally he asked for $1 million.

The facts of the case are fully set out in the judgment of ZIYAMBI J I will therefore repeat them only briefly here.

It all began with criticism in Parliament of Zimbank, because of its alleged dealings with a company called Lorac (Pvt) Ltd Zimbank was incensed about these criticisms, made under the cloak of parliamentary privilege. It decided to defend itself. It put an advertisement in four major publications - *The Herald, The Sunday Mail, the Gazette and The Chronicle.*

The advertisement did not adopt the time-honoured technique of challenging the Member of Parliament concerned to repeat his statement outside Parliament and to disclose his sources. Instead, and as it transpired unwisely, it included the following paragraph:

McNALLY JA

> "The Bank has reason to believe that one of the sources of the information made available to Cde Mangwende is the Mr A E Mashamhanda who, as mentioned by Cde Mangwende, is employed by the Bank, and who has been suspended for incompetence and insubordination. When he was suspended Mr Mashamhanda indicated that he would do his best to damage the Bank's image."

Now, it was proved that Mr Mashamhanda had been one of Cde Mangwende's sources. And that he had been suspended - and subsequently dismissed after the formalities under the Labour Relations Act were completed. But he was dismissed only for insubordination, not for incompetence.

Zimbank did not prove incompetence. It was shown that his lending policy was regarded by some of those senior to him as being "too socialist". This allegedly resulted in some of the loans and advances he approved becoming "sticky". But only general evidence in this regard was led. No specific instances of "incompetent" decisions were identified. And, in any event, incompetence was not mentioned in the proceedings for his dismissal.

Nor was Zimbank able to prove the truth of the last sentence of the quoted extract, with its innuendo that Mr Mashamhanda would not hesitate to lie in order to get revenge on Zimbank. The man who allegedly would have been able to confirm this allegation had died before the trial began.

No allegation of misdirection by the learned trial judge is made. It is simply alleged, by Zimbank, that she "grossly failed in her assessment", and by Mr *Mashamhanda* that the award was "manifestly inadequate".

An appellate court is slow to interfere in the trial court's exercise of a discretionary function, though a duty to interfere will arise, inter alia, where the trial court took into account a factor in

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favour of the plaintiff which should have been left out of account. See *per* KOTZE JA in *SA Assoc Newspapers Ltd & Anor v Samuels* 1980 (1) SA 24 (A) at p 11 of the translation (p 34 of the original).

That is not the case here.

But the court will intervene "if we think that due effect has not been given to all the factors which properly enter into the calculation, or if the final award is in our opinion excessive", as INNES CJ said in *Hulley v Cox* 1923 AD 234 at 246. These remarks were approved by WATERMEYER JA in *Sandler v*

McNALLY JA

Wholesale Coal Suppliers Ltd 1941 AD 194 at 199-200, and by HOEXTER JA in *Norton & Ors v Ginsberg* 1953 (4) SA 537 (A) at 551.

More recently, and in a small case decided without the benefit of counsel *(Manyenga v Muza* S-145-95), I remarked at p 5 of the cyclostyled judgment:

> "The *quantum* of an award for defamation is not easy to assess. It is not, save where exemplary damages are considered appropriate, intended to provide the plaintiff with a financial windfall. It is intended essentially to show the world that the court is upholding him or her and restoring his or her reputation. As long as the award does not fall into the category of contemptuous damages, that result is achieved. Vindication and consolation are the twin objectives."

The approach to damages in defamation cases has been set out recently in a number of High Court cases, most extensively in *Robertson v Ericksen* 1993 (2) ZLR 415 at 419-420; *Chinamasa v Jongwe P & P Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H); and *Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Anor* 1994 (1) ZLR 445 (H).

We have also been referred to: *Chinengundu v Modus Publications (Pvt) Ltd* HH-135-92; *Zimunya v Zimbabwe Newspapers (1980) Ltd* 1994 (1) ZLR 35 (H); *Trans - Tabac (Pvt) Ltd & Anor v Jongwe P & P Co (Pvt) Ltd* HH-67-94; *Mudukuti v Hove & Ors* HH-152-94; *Desfontaine v Chinamasa & Ors* HB-53-95; *Desfontaine v IBDC & Ors* HB-54-95; *Desfontaine v Chikowore* HB-55-95; and *Zvobgo v Modus Publications (Pvt) Ltd* 1995 (2) ZLR 96 (H).

Awards in this country will not generally equate with those in larger and wealthier economies like South Africa, England and the United States of America. But they also have to take account of what every housewife is aware of, namely, the rapid rate of inflation in Zimbabwe.

The present case has unusual features. For example, on the one hand, the publication was not a front page news report, but an advertisement, which is perhaps less likely to be noticed by the average reader. But, on the other hand, it is an advertisement by a leading bank, whose statements might be thought, with all due deference to the journalistic profession, to be more reliable. Journalism is ephemeral; a banker's advertisement is the result of deliberation. People will think "You can bank on its being correct". So the sting is greater. And, of course, it was in the major newspapers. Everyone in the banking world would know of it.

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McNALLY JA

Similarly, it is argued "the respondent had indeed been suspended (and later dismissed). The damage to his reputation stems from that, rather than from the defamation".

But to say that a man has been suspended/dismissed for incompetence is far more damning than to say he was suspended/dismissed for insubordination. And the sting is far greater, and more difficult to assuage, because the two reasons become confused and combined in the public mind.

Moreover, it is one thing for a man to be quietly dismissed for insubordination. It is a far worse thing for him to have it blazoned in the press that he has been dismissed for incompetence.

Taking all these factors into account, I would say only that I might have awarded a little less. I would certainly have awarded no more. But I cannot find a rational ground for interference. I am not shocked either at the excess or at the meanness of the award.

Accordingly, both the appeal and the cross-appeal are dismissed with costs.

Korsah JA: I agree.

Muchechetere JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Makarau & Gowora, respondent's legal practitioners

RETROFIT (PVT) LTD v MINISTER OF INFORMATION, POSTS & TELECOMUNICATIONS 1995 (2) ZLR 422 (SC)

Court **Supreme Court, Harare**

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

Return day of rule *nisi*

6 & 18 December 1995 Judgment No. S-238-95

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 20(1) - right of freedom of expression - PTC's monopoly to provide public telecommunication service - whether reasonably justifiable in a democratic society - PTC's loss of profits and inability to provide adequate services if free market system allowed - not sufficient to justify inroad into freedom of expression - no rational connection between retention of PTC's monopoly and its stated objectives - monopoly not the least drastic means of accomplishing PTC's

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objectives - s 24(4) - whether Supreme Court, having determined that constitutional right has been infringed, may delay enforcement of right

Headnote

The Supreme Court had, in August 1995, ruled that the monopoly, granted to the Posts and Telecommunications Corporation (PTC) by s 26(1) of the Postal and Telecommunications Services Act [*Chapter 12:02*], of providing public telecommunication services within, into and from Zimbabwe, was in contravention of the right of freedom of expression granted by s 20(1) of the Constitution. A rule *nisi* was issued, calling on the respondent, as responsible Minister, to show cause why s 26(1) of the Act should not be declared to be invalid.

On the return day, it was argued for the Minister that the function of the PTC was to provide telecommunication services as widely as possible, to both the profitable urban areas and the unprofitable rural areas. If the appellant were allowed to operate a cellular telephone system, which would be predominantly in the urban areas, this would take traffic away

from the PTC in its most profitable areas and adversely affect its income and thus its ability to achieve its objectives. It was contended, in the alternative, that the rule nisi should be extended for at least five years, to enable the PTC to implement in full its objective of establishing a comprehensive telephone system (including cellular phones) and to set in place an adequate regulatory framework to ensure that the liberalisation process would be carried out in an orderly and systematic manner.

Held, that for the court to hold that the retention of a monopoly by the PTC over the establishment of a cellular phone system was necessary in order for the PTC to achieve its objective of developing and extending affordable telephone services to outlying areas would be to justify a State monopoly in virtually every sector of the economy. The loss of profit to the PTC from the privatisation of a cellular phone system was speculative, and the PTC was not precluded from entering into this field. Even if there would be a loss of profit, that would not be sufficiently important to warrant a serious inroad on the constitutional right of freedom of expression. If the State were committed to providing affordable telephone services in the rural areas, it should subsidise them, not impact on a fundamental human right.

Held, further, that there was an absence of a rational connection between the monopoly and the PTC's stated objectives. The monopoly was also not the least drastic means by which the PTC's objectives might be accomplished.

Held, further, that once the court had made the determination that one of the guaranteed rights had been contravened, it had no option but to enforce the right at the instance of the aggrieved party. There was no provision for delaying the enforcement of the right.

Held, accordingly, that s 26(1) of the Postal and Telecommunications Services Act [*Chapter 12:02*], insofar as it vested a monopoly in the PTC of establishing, maintaining and working a public mobile cellular telephone service, was inconsistent with s 20(1) of the Constitution and thus invalid.

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Cases cited:

Retrofit (Pvt) Ltd v PTC & Anor 1995 (2) ZLR 199 (S); 1995 (9) BCLR 1262 (ZS)

NTN (Pty) Ltd & NBN Ltd v The State [1988] LRC Const 333

Osborne v Canada (Treasury Bd) (1991) 82 DLR (4th) 321 (SCC)

Schachter v Canada (1992) 93 DLR (4th) 1 (SCC)

A P de Bourbon SC for the applicant

GUBBAY CJ

P A Chinamasa, Attorney-General, with him *B Patel* and *A Guvava,* for the respondent

Judgment

Gubbay CJ: In a judgment handed down on 29 August 1995 in *Retrofit (Pvt) Ltd v PTC & Anor* 1995 (2) ZLR 199 (S) at 1280J - 1281A; 1995 (9) BCLR 1262 (ZS) this court held at 224D-E, that the applicant had succeeded in showing that it should not be accepted that s 26(1) of the Postal and Telecommunication Services Act [*Chapter 12:02*] (insofar as it vests in the Posts and Telecommunications Corporation, "the Corporation", the exclusive privilege or monopoly of establishing, maintaining and working a public mobile cellular telephone service within, into and from Zimbabwe) is reasonably justifiable in a democratic society for the purpose of creating or regulating a public mobile cellular telephone service. Consequently, and in compliance with s 24(5) of the Constitution of Zimbabwe, a rule nisi was issued calling upon the present respondent, as the responsible Minister, to show cause, on 6 December 1995, why s 26(1), to the extent indicated, should not be declared in contravention of s 20(1) of the Constitution and accordingly, invalid.

Prior to the return day the respondent gave written notice of his opposition to the confirmation of the rule *nisi* and annexed thereto a lengthy affidavit. This was answered by a director of the applicant in an affidavit, supplemented by another a few days later.

It was correctly accepted in argument that at this stage of the proceedings the respondent was not at liberty to challenge the finding that the Corporation's monopoly to provide public telecommunication services within, into and from Zimbabwe, which thus prohibits the establishment by the applicant of a public mobile cellular telephone service is, in the particular circumstances pertaining, an infringement of the fundamental right of freedom of expression (see the judgment at 1273E-1277C). The opposition was, accordingly, aimed at showing that the Corporation's monopoly, though in contravention of s 20(1) of the Constitution, is nonetheless reasonably justifiable in a democratic society and therefore ought not to be declared invalid by this court.

What, then, has to be considered is whether the three criteria set out by this court, at 1277H-I of its judgment, have been met. I shall deal with each in turn:

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(i) Is the legislative objective, insofar as it vests in the Corporation the exclusive privilege of establishing, maintaining and working a public mobile cellular telephone service, sufficiently important to justify

GUBBAY CJ

hindering the right of every person to receive and impart ideas and information without interference?

The argument advanced on behalf of the respondent ran along these lines. It is the function of the Corporation, as mandated by s 19(a) of the Posts and Telecommunications Corporation Act [*Chapter 12:03*], to provide a telecommunication service within, into and from Zimbabwe to the fullest extent possible consistent with its resources; in other words, to provide universal services - to both the profitable urban areas and the unprofitable rural areas. It is from the public switched telephone network in the urban areas that most revenue is generated. The introduction of privately operated mobile cellular telephone services to the urban areas will be directed at the largest customers. It will take traffic away from the Corporation and so will adversely affect the revenue earned by it. Free market competition will be detrimental. It will diminish the extent of monies available to the Corporation for expansion of the telecommunication service at affordable prices to rural consumers.

For this court to hold that the retention of a monopoly over the operation of a public mobile cellular telephone service in Zimbabwe is absolutely essential in order for the Corporation to be able to develop and extend affordable telephonic communication to outlying areas, would be to justify, in my view, a State monopoly in virtually every sector of the economy. (See the judgments at 220F and 1278D). In any event, any loss of profit to the Corporation resulting from the privatisation of a mobile cellular telephone service is purely speculative. The abolition of the Corporation's exclusive privilege over this particular service, will not preclude it from entering the same field. The spur of competition may well make for greater economy.

But even if a loss of profit to the Corporation should occur, that factor is not, I believe, of sufficient importance to warrant a serious inroad upon the constitutional right of freedom of expression. Many public services are provided at a cost to the central fiscus. A government committed to the grant of affordable telephonic communication for its people in the rural areas must be prepared to bear portion of the expense required to promote such a commendable endeavour. The remedy lies in subsidising this social need; not in impacting upon a fundamental human right. I shall repeat what was said in the earlier judgments at 219B and 1277B-C with regard to the crucial importance attaching to the lack of hindrance with the freedom of expression:

> "Persons in every walk of life, be they professional men and women, academics, artisans, domestic workers or simple rural dwellers, are

GUBBAY CJ

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entitled to a telephone service which affords them a rapid and reliable means of receiving and imparting ideas and information on any matter, however mundane. A public monopoly which fails to fulfil that essential role imposes a severe restraint upon the constitutionally protected freedom of expression."

(ii) Is there a rational connection between the retention of the Corporation's monopoly and its stated objectives?

To this question, the respondent's argument was no different from that I have already outlined. It fails to persuade. The same point and others were made before by the Corporation. They are dealt with in the passages of the judgment of this court at 222B - 223G and 1279D-1280C). I do not propose to repeat the reasons for holding that an absence of a rational connection existed between the monopoly over a public mobile cellular telephone service and the Corporation's stated objectives.

In as much as it was suggested that the implementation of the monopoly has not yielded unfair or unreasonable results and so was not irrational, I must again disagree. I do so without attributing blame to the Corporation for its performance.

With the advent of this country's independence in April 1980, the Corporation inherited a public service telecommunication network beset with many serious problems, such as antiquated equipment, the exodus of experienced and qualified technicians, and the lack of adequate foreign currency in the years preceding 1994. All this had to be faced against a rapid growth of demand for service availability. But this unfortunate reality is of no assistance to the Corporation in its opposition to the applicant entering the field of mobile cellular telecommunication.

At the present time, and in spite of the on-going efforts and the plans of the Corporation to improve the standing of its public switched telephone network, it remains an unsatisfactory facility. Indeed, the pressing need to introduce a complimentary efficient mobile cellular telephone service is acknowledged by the measures taken by the Corporation to establish and operate such a service either by itself or through the agency of another.

(iii) Is the monopoly in the provision of a public mobile cellular telephone service the least drastic means by which the objectives of the Corporation may be accomplished?

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It was indicated in the earlier judgment, at 223H - 224A (1280G), that to this aspect of the enquiry one asks whether hindrance in the enjoyment of the applicant's right to receive and impart ideas and information is too high a price to pay for the benefit of the monopoly. There must be a balancing process. The importance of the monopoly must be weighed against the gravity of the infringement of the fundamental right.

The only submission addressed by counsel for the respondent was that if the two preceding criteria were met, this one was easily achieved. Since the argument that the retention of the Corporation's monopoly is necessary for it to attain the stated objective of providing better and affordable services to the rural consumer is rejected, it follows that the third criterion likewise

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remains unsatisfied.

The respondent's alternative contention was that it was fitting for this court to extend the rule nisi for a minimum duration of five years. This additional time-span, so it was stated, would permit the Corporation to implement in full its objective of building a pervasive telephonic infrastructure by the year 2000, comprising 240 700 additional exchange lines with 217 000 new customers, 63 000 cellular mobile telephones and 100 000 paging customers. Furthermore, the extra period would enable the Corporation to set in place an adequate regulatory framework and thereby ensure that the liberalisation process, upon the fall of the monopoly, is carried out in an orderly and systematic manner; it would avoid a prospective "free for all" and "a regulatory nightmare".

Reliance was placed on the decision of the Supreme Court of Papua New Guinea in *NTN (Pty) Ltd & NBN Ltd v The State* [1988] LRC Const 333 for the proposition that this court is empowered to grant an extension of the rule *nisi*.

In that case the applicant companies had been given the right, under an agreement entered into with the Government of Papua New Guinea, to establish a television station and to commence television broadcasts on 14 July 1986. In pursuance thereof the applicants established a television station and other facilities required for television broadcasting. They were also issued, in terms of the Radiocommunications Act, with the necessary licences. This notwithstanding, on 10 July 1986 the Radiocommunications (Television) Regulations came into force, the effect of which was to prohibit television broadcasts until after 31 January 1988. On 21 August 1986 a lower court declared the Regulations invalid. However, on the same day the

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Parliament of Papua New Guinea enacted the Television (Prohibition and Control) Act, which specifically prohibited the operation of a television station, even under licence, before 31 January 1988. The issue before the Supreme Court was whether the temporary ban of eighteen months provided fr by legislation, although violative of the applicants' constitutional right to freedom of expression was nonetheless saved by s 38(1) of the Constitution, as being "reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind". The majority of their Lordships held that it was.

I do not regard the case cited to be of assistance to the respondent. It is wholly distinguishable. The present matter is not concerned with the constitutional validity of a **law that makes provision for a delay** in the enforcement of a fundamental right. The extension of time which it is claimed this court should grant is not founded upon any legislative enactment. If it were, its validity would depend on whether it was reasonably justifiable in a democratic society. The desired delay in postponing the enjoyment of the applicant's right to freedom of expression is based solely on the Corporation's intention to improve its own infrastructure and its present unpreparedness for the introduction of a privately owned and operated cellular system.

In any event, in terms of s 24(4) of the Constitution, the Supreme Court may only "make such orders, issue such writs and give such directions as it may consider appropriate **for the**

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purpose of enforcing or securing the enforcement of the Declaration of Rights" (my emphasis). Where the determination is made that one of the guaranteed rights has been contravened, the Supreme Court has no option but to enforce the right at the instance of the aggrieved party. No other recourse is open to it. That this is as it should be was recognised by WILSON J in *Osborne v Canada (Treasury Bd)* (1991) 82 DLR (4th) 321 (SCC). With reference to the comparative section in the Canadian Charter of Rights and Freedoms, her Ladyship observed at 325e-g:

> "Once these findings (namely, that the impugned legislation on its proper interpretation is over-inclusive, infringes on a guaranteed right, and cannot be justified as a reasonable limit) have been made I believe that the court has no alternative but to strike the legislation down or, if the unconstitutional aspects are severable, to strike it down to the extent of its inconsistency with the Constitution. I do not believe that it is open to the court in these circumstances to create exemptions to the legislation (which, in my view, presupposes its constitutional validity) and grant individual remedies under s 24(1). In other words, it is not, in my

> opinion, open to the court to cure over-inclusiveness on a case by case basis leaving the legislation in its pristine over-inclusive form outstanding on the books."

See also SOPINKA J at 347f-g.

More recently in *Schachter v Canada* (1992) 93 DLR (4th) 1 (SCC) LA FOREST J, in slightly more guarded terms, said at 35b-e:

> "It is the duty of the courts to see that those laws conform to constitutional norms and declare them invalid if they do not. This imposes pressure on legislative bodies to stay within the confines of their constitutional powers from the outset. Reliance should not be placed on the courts to repair invalid laws. In social assistance schemes, there is perhaps more room (and certainly more temptation) for judicial intervention ... where the remedy is obvious and Parliament would clearly enact it rather than have the whole scheme fail. But when one is dealing with laws that infringe on the liberty of the subject, the judicial stance should be one that does not encourage the legislature to overreach, and the courts should be slow indeed to provide a corrective."

Lest the impression be gained that this court agrees with the respondent that the entry of privately worked mobile cellular telephone services into the field of telecommunication will result, in the absence of a regulatory framework, in immediate chaos, it is necessary to allude to the very different picture asserted by the applicant. The following points are made:

(1) The cost of establishing a cellular network to service 10 000 subscribers is estimated at Z$120 million. If the network is to cover most of the country, which is the applicant's intention, the cost is likely to be Z$500 million. Thus the enormous expenditure involved is a warrant against "a free for all" situation.

(2) The international guide-lines, which the Corporation has accepted should be utilised for the cellular service, set the frequency range at 890 MHz to 960 MHz. Only two cellular operators can fit this range.

(3) Although a cellular service provider is able to operate independently, interconnection with the public switched telephone network is less costly. To interconnect, of course, requires the agreement of the Corporation, which will be able to specify the conditions acceptable to

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it.

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(4) Mobile cellular telephone services are now widespread in the African continent. There is no evidence that their introduction to any of those countries by private enterprise was accompanied by crisis or even undue complexity.

(5) Research has shown that not a single country has established a regulatory body specifically for cellular telephony anywhere in the world. This accords with the recommendation of the World Bank (which has played a pivotal role in the liberalisation of telecommunications), that it is not necessary to regulate cellular communications. It is only once the monopoly on basic service is abolished that it becomes essential to establish a regulatory framework for it.

Whatever difficulties and problems may arise from the privatisation and operation of a mobile cellular telephone service in Zimbabwe - and hopefully they will be few, minor and easily overcome - this court is now obliged to declare that s 26(1) of the Postal and Telecommunication Services Act [*Chapter 12:02*], insofar as it vests in the Posts and Telecommunications Corporation the exclusive privilege of establishing, maintaining and working a public mobile cellular telephone service within, into and from Zimbabwe, is inconsistent with s 20(1) of the Constitution of Zimbabwe and, accordingly, invalid.

The respondent is to pay the resultant costs of his unsuccessful opposition to the confirmation of the rule *nisi.*

Korsah JA: I agree.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Sandura AJA: I agree.

Kantor & Immerman, applicant's legal practitioners

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

HAMBLY v CHIEF IMMIGRATION OFFICER (2) 1995 (2) ZLR 431 (HC)

Court **High Court, Harare**

Annotations Link to Case Annotations

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Sandura JP

Civil application

8 & 20 December 1995 Judgment No. HH-147-95

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 22(1) - right of freedom of movement etc - right of citizen wife to have husband reside with her in Zimbabwe - validity of marriage

Headnote

The applicant sought an order: (1) declaring that her constitutional right under s 22(1) of the Constitution had been contravened by the respondent's refusal to grant a residence permit to her husband: and (2) ordering the respondent to grant a permanent residence permit to her husband. The respondent opposed the application on the ground that the marriage was one of convenience.

The applicant was the managing director of a computer company. Mr Hambly had first met the applicant in 1990, when his mother was attached to the British High Commission in Harare. The applicant was ten years older than he was and had a young daughter. Nonetheless, a close relationship developed. In 1992 he had gone to work in Malawi for an associated computer company but whenever he visited Harare would live with the applicant as husband and wife. In 1993, the applicant sought a temporary work permit, to allow Mr Hambly to work for the Zimbabwean company. The application was rejected by the respondent, in spite of two appeals asking him to reconsider. In June 1994, Mr Hambly came to Zimbabwe on a visitor's permit. In July, shortly after the judgment in *Rattigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S), was handed down, the applicant and Mr Hambly got married. They had, because of press publicity, been aware of the judgment in the *Rattigan*

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case when they decided to get married. They had no plans to have any children.

Held, that the marriage was one of convenience. It was clear from the sequence of events that the marriage was entered into in order to enable Mr Hambly to stay in Zimbabwe and work for the applicant's company.

Cases cited:

Hambly v Chief Immigration Officer (1) 1995 (2) ZLR 264 (H)

Rattigan & Ors v Chief Immigration Officer & Ors 1994 (2) ZLR 54 (S)

A P de Bourbon SC for the applicant

F M Zenda for the respondent

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Judgment

Sandura JP: The applicant in this matter seeks the following order:

"IT IS ORDERED:

1. That it is hereby declared that the right of the applicant under s 22 (1) of the Constitution of Zimbabwe to freedom of movement, that is to say, the right to reside in any part of Zimbabwe, has been contravened by the actions of the respondent.

2. That by virtue of the applicant's right under the aforementioned s 22 (1) to have her husband residing with her in any part of Zimbabwe, it is hereby ordered that-

   (a) The respondent issue to ANDREW GEORGE HAMBLY, within 30 (thirty) days hereof, such written authority as is necessary to enable him to remain in Zimbabwe on the same standing as any other alien who is a permanent resident;

   (b) That the said ANDREW GEORGE HAMBLY be accorded the same rights as are enjoyed by all permanent residents of Zimbabwe, including the right to engage in employment or other gainful activity in any part of Zimbabwe and that the respondent impose no restriction on such right.

3. That the costs of this application are to be borne by the respondent."

The matter first went to the Supreme Court earlier this year, but because the determination of the issues between the parties required the hearing of oral

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evidence, the CHIEF JUSTICE issued an order in chambers, with the consent of both parties, directing the applicant to institute a court application in the High Court using the papers which she had filed in the Supreme Court. That application was subsequently filed in the High Court and came before me on 27 July 1995. On that day, before any oral evidence was led, Mr *Zenda* who appeared for the respondent, took a point *in limine* and made a number of submissions. After hearing the submissions made by both counsel, I reserved my decision. I later dismissed the point *in limine* in a judgment handed down subsequently.* (9) Thereafter, oral evidence was heard on 8 December 1995 in order to determine the following issues:

1. whether or not the marriage between the applicant and Andrew George Hambly is a marriage of convenience; and

2. whether the issue of the notice declaring Andrew George Hambly to be a prohibited person is valid, or whether it was issued for an ulterior purpose.

The brief facts of this case are that the applicant, a female citizen of Zimbabwe, is married to an alien who has been declared a prohibited person in terms of the Immigration Act [*Chapter 4:02*], and is due to be deported to the United Kingdom. In the circumstances, she alleges that the deportation of her husband would contravene her right under s 22(1) of the Constitution of Zimbabwe to freedom of movement, that is to say, the right to reside in any part of Zimbabwe, because she would have to leave Zimbabwe with her husband. She therefore seeks the relief already set out above and relies upon the decision of the Supreme Court of Zimbabwe in

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Rattigan & Ors v Chief Immigration Officer & Ors 1994 (2) ZLR 54 (S); 1995 (2) SA 182 (ZS). That case established that a female citizen of Zimbabwe married to a man who is an alien, being a citizen of a foreign country, has the right to reside permanently in Zimbabwe with her husband, unless the marriage is one of convenience ie a marriage contracted in an effort to evade the immigration laws of the country or in order to persuade the immigration authorities to allow the alien husband to remain living unimpeded in the country of his wife.

I now proceed to look at the evidence adduced by the parties in order to determine the first issue, ie whether the marriage between the applicant and Mr Hambly is a marriage of convenience. On that issue the burden of proof rested on the respondent. He called one witness, Mr Mbedzi, the Principal

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SANDURA JP

Immigration Officer, whose evidence was as follows. On 30 December 1993 a company called Quantum Solutions (Pvt) Ltd, which intended employing Mr Hambly as a computer consultant, applied for a temporary employment permit on his behalf. The respondent referred the application to the committee which dealt with the recruitment of foreign manpower. That committee rejected the application on the ground that Mr Hambly's qualifications and services were not required in Zimbabwe. Accordingly, Quantum Solutions (Pvt) Ltd was informed by the respondent that its application for a temporary employment permit had been unsuccessful. Thereafter, the company wrote letters to the respondent on a number of occasions requesting him to reconsider his decision, but all these efforts were unsuccessful. Subsequently, the applicant and Mr Hambly got married. That was shortly after the Supreme Court decision in the *Rattigan case supra* had been handed down. In the circumstances, the respondent and his officials concluded that the marriage was not a genuine one and that it had been entered into in order to enable Mr Hambly to stay in Zimbabwe and work for Quantum Solutions (Pvt) Ltd In other words, they concluded that the marriage was a marriage of convenience.

Dealing with the issue of the notice declaring Mr Hambly to be a prohibited person, Mr *Mbedzi* denied the allegation by the applicant that the notice had been issued for an ulterior purpose. He said that Mr Hambly was declared a prohibited person because he had stayed in Zimbabwe unlawfully after his visitor's permit had expired on 16 January 1995. He said that Mr Hambly had been informed that his permit would not be renewed and that he had to leave the country, but had ignored that advice and stayed in the country without authority.

That sums up the respondent's evidence on the two issues which I must determine.

The applicant gave evidence and called her husband, Mr Hambly, as a witness. In addition she relied upon the affidavits of two other persons supporting her contention that the marriage in question is a genuine one.

Her own evidence was as follows. She was born in Bulawayo on 18 November 1959. Her maiden name was Roslynn Clare Tully. She is a citizen of Zimbabwe and has no desire to live anywhere other than Zimbabwe. She has a daughter who was born in 1984. She first met her husband, Mr Hambly, in 1990 in Harare. He had come to Zimbabwe from the United Kingdom

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with his mother, who was then attached to the British High Commission in Harare.

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She and Mr Hambly subsequently developed a close relationship. She was the Managing Director of Quantum Solutions (Pvt) Ltd In 1992 Mr Hambly went to Malawi to work for a company associated with Quantum Solutions (Pvt) Ltd, and whenever he came back to Harare he would live with the applicant as husband and wife. In December 1993, Quantum Solutions (Pvt) Ltd offered Mr Hambly a post in Harare and filed an application for a temporary employment permit for him with the respondent. The application for the permit was unsuccessful. A number of appeals were made to the respondent urging him to reconsider his decision, but all such appeals did not succeed. Subsequently Mr Hambly came to Harare from Malawi in June 1994 and on 1 July 1994 he got married to the applicant. The applicant denied the respondent's allegation that the marriage in question is a marriage of convenience. She admitted, however, that just before the marriage she had read about the *Rattigan* case *supra* in the press. She also admitted that before June 1994 she and Mr Hambly had not seriously discussed marriage because they were not sure that they were ready for such a commitment. She added that she and her husband have no plans to have children. She also stated that if her application is unsuccessful and her husband is deported, she too would have to leave Zimbabwe in order to continue living with her husband.

Mr Hambly's evidence was as follows. He was born on 15 February 1969 and came to Zimbabwe in 1990. In general, he confirmed the applicant's evidence and denied that his marriage to the applicant is a marriage of convenience. He admitted, however, that shortly before his marriage to the applicant somebody mentioned the *Rattigan* case *supra* to him. He said that he had been informed that it had been decided in that case that foreign husbands of female citizens of Zimbabwe had a right to live in Zimbabwe. However, he said that he had taken no special interest in that decision. Nevertheless, he admitted that he and the applicant decided to marry shortly after the decision in that case had been brought to his attention.

That sums up the evidence adduced for the applicant.

The events upon which the respondent relies in the allegation that the marriage in question is a marriage of convenience are as follows:

1. On 30 December 1993, the applicant, acting on behalf of Quantum Solutions (Pvt) Ltd, filed an application for a temporary employment permit for Mr Hambly with the respondent. In that application she stated that, because of Mr Hambly's special qualifications, it was necessary for her company to employ him. She added that Mr Hambly was one of just

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two people in the SADC region with the expert knowledge required by her company.

2. On 31 January 1994 the respondent wrote a letter to the applicant informing her that her

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application for a temporary employment permit for Mr Hambly had not been successful.

3. On 18 February 1994 the applicant wrote a letter to the respondent, appealing to him to reconsider his decision. In that letter the applicant stated that Mr Hambly had certain special skills essential to her company. To that letter she attached three letters from organisations supporting Mr Hambly's application for a temporary employment permit.

4. On 26 April 1994 the respondent wrote a letter to the applicant informing her that her appeal had been unsuccessful.

5. At the beginning of June 1994 Mr Hambly arrived in Harare from Malawi.

6. On 13 June 1994 the judgment in the Rattigan case, supra, was handed down. The judgment received wide publicity in the press on 14 June 1994.

7. On 1 July 1994 the applicant and Mr Hambly got married.

8. On 4 August, 1994 a director of Quantum Solutions (Pvt) Ltd wrote a letter to the respondent asking him to reconsider the application for a temporary employment permit for Mr Hambly, and indicating that Mr Hambly had recently married a Zimbabwean citizen.

On the evidence before me, I am satisfied that the marriage in question is a marriage of convenience. I say so for the following reasons. It is clear from the letters written by the applicant to the respondent that she desperately wanted Mr Hambly to work for her company because of his special skills which she considered essential to her company. When the application for a permit did not succeed, she made a number of appeals to the respondent urging him to change his mind. The appeals did not succeed. Subsequently, on 13 June 1994 the Supreme Court judgment in the *Rattigan* case was handed down. The judgment received wide publicity in the press on 14 June 1994 because, for the first time, the Supreme Court of Zimbabwe decided that a female citizen of Zimbabwe married to a man who is an alien, being a citizen

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of a foreign country, has the right to reside permanently in Zimbabwe with her husband, unless the marriage is one of convenience. Both the applicant and Mr Hambly admitted in evidence that they married shortly after the judgment had been given and that at the time of the solemnisation of the marriage they were aware of the judgment. Mr Hambly added that the decision to marry had been taken after the judgment had been brought to his attention. All this evidence does not support the submission made by Mr *de Bourbon,* who appeared for the applicant, in para 3 of the applicant's supplementary heads of argument filed on 21 June 1995. The paragraph reads as follows:

> "The timing of the marriage was in no way related to the decision in the *Rattigan* case, which was given on 13 June, 1994. No publicity was given to that judgment, and the parties married in blissful ignorance of their rights thereunder."

Quite clearly, Mr and Mrs Hambly told their legal practitioners a story different from what they

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told this court. Furthermore, I find it difficult to believe Mr Hambly's evidence that when the decision in the *Rattigan* case was brought to his attention, he took no special interest in it.

In my view, the sequence of events in this case clearly shows that the marriage was entered into in order to enable Mr Hambly to stay in Zimbabwe and work for the applicant's company. In addition, Mr Hambly is about 10 years younger than the applicant. He is 26 and she is 36 years old. Added to that, the parties have no plans to have any children. In the circumstances, I am satisfied that the marriage in question is a marriage of convenience.

As far as the second issue is concerned, I am satisfied on the evidence before me that the issue of the notice declaring Mr Hambly to be a prohibited person is valid and that the notice was not issued for an ulterior purpose.

The application is, therefore, dismissed with costs.

Winterton, Holmes & Hill, applicant's legal practitioners

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

S v BARNJUM 1995 (2) ZLR 438 (HC)

Court **High Court, Harare**

Adam J

Criminal appeal

21 December 1995 Judgment No. HH-151-95

Flynote

Criminal procedure - review - automatic review - procedures for forwarding of documents for review

Criminal procedure (sentence) - statutory offences - Firearms Act [Chapter 10:09] - s 4(1) - possession of firearm - whether forfeiture order is automatic on conviction

Headnote

The accused was convicted of an offence under the Firearms Act involving the possession of a firearm without a certificate. In sentencing the accused the magistrate imposed a fine than was greater than the normal fine because the accused was affluent. He also ordered the forfeiture of the firearm, holding that forfeiture was automatic for this offence.

The accused also pleaded guilty to a charge under the Immigration Act involving the forging of a travel document. The magistrate convicted the accused on the basis of his plea. On review:

Held, that all magistrates must familiarise themselves with the provisions of ss 57(1), 57(3) and 59(1) of the Magistrates Court Act [*Chapter 7:10*] regarding the procedures relating to

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forwarding of cases for review. Magistrates must make comments on the reasons given for a request made in terms of the proviso to s 57(1). But if the documents are transmitted under ss 57(3) and 59(1), the magistrate is not required to make comments.

Held, further, that in regard to the charge under the Firearms Act, the magistrate had assessed the fine on a wrong basis and the fine imposed was excessive. The magistrate had also wrongly decided that forfeiture of the firearm was automatic for this offence.

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Held, further, that in regard to the charge under the Immigration Act, the magistrate was wrong to convict the accused on the basis of his plea, as it was clear from the agreed statement of facts that the offence with which he had been charged was the incorrect one and that he should instead have been charged with the offence of unlawfully possessing or making use of a travel document issued to another. In these circumstances, the magistrate should have entered a plea of not guilty to the charge.

Cases cited:

S v Ndhlovu HH-263-89

R v Chamangwani 1962 R & N 688 (SR)

S v Stanton 1974 (1) RLR 66 (G)

S v Appelton 1982 (2) ZLR 110 (A)

Judgment

Adam J: The accused was convicted on the first count of the contravention of s 4(1) of the Firearms Act [*Chapter 10:09*] and on the second count of the contravention of s 36(1)(a)(ii) of the Immigration Act [*Chapter 4:02*]. He had pleaded guilty. He was sentenced on the first count, on the regional magistrate being satisfied that there were special reasons, to a fine of $3 000 or in default of payment six months' imprisonment with labour. On the second count he was sentenced to nine months' imprisonment with labour.

The regional magistrate has intimated that it does not appear as if there is provision for review in terms of s 59 of the Magistrates Court Act [*Chapter 7:10*]. This was in relation to a notice of application for review of the magistrate's decision filed by the legal practitioner on behalf of the accused within three days of the sentence imposed on him.

Now s 57(1) of the Magistrates Court Act provides for automatic review where an accused is sentenced to imprisonment for any period exceeding six months or to a fine exceeding $1 000. But proviso (ii) indicates that the provisions of s 57(1) shall not apply to an accused who is represented by a legal practitioner or where the accused is a company as defined in the Companies Act, unless within three days of the determination of the case that legal practitioner or the person representing the company requests the clerk of the magistrates court concerned to forward the case on for review. Section 57(2) requires such a request to be made in writing

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and to be accompanied by a brief statement of the reasons for the request and the magistrate must comment on these reasons before the record of proceedings are forwarded together with such comments to this court.

It is clear from the foregoing that the legal practitioner for the accused was

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entitled to make a written request within three days of the imposition of the sentence by the regional magistrate.

I should also point out that s 63(3) deals with cases where the sentence imposed is not subject to automatic review under s 63(1). In that case if an accused considers that such a sentence is not in accordance with real and substantial justice he may make a written request within three days of the imposition of the sentence to the clerk of the magistrates court concerned who must forward the record of proceedings to this court for review. But a proviso to s 63(3) makes this inapplicable to an accused who is represented by a legal practitioner or where the accused is a company.

In addition s 66(1) provides that an accused, where the case is subject to automatic review under s 63(1), if he thinks that an excessive sentence has been imposed can deliver to the clerk of the magistrates court concerned within three days of the imposition of the sentence a written statement setting out his grounds or reasons which that clerk of the magistrates court must forward along with the record of proceedings to this court for review.

The Legislature saw fit to restrict the presiding magistrate to make comments to those cases that fall under the proviso of s 63(1). The transmission of documents by the clerk of the magistrates court under ss 63(3) and 66(1) does not call for the presiding magistrate to make comments.

In *S v Ndhlovu* HH-263-89 this court warned presiding officers to follow strictly the particular provisions laid down in the Magistrates Court Act. Once again the presiding officers' attention is being drawn to the specific provisions of s 63(1), s 63(3) and s 66(1) so that they become well aware before acting under them.

Now on the first count it was submitted on behalf of the accused that the sentence was excessive and that a fine between $500 to $1000 would have been appropriate. To this the regional magistrate commented that the accused had said that he had "lots of money". In the regional magistrate's view a fine, of $500 would have sufficed for a man of average means but because of the accused's affluence there was a need for an upward adjustment. In so doing the regional magistrate erred.

He also commented that the forfeiture order was not in the true sense part of the sentence, it was automatic. In his reasons for sentence the regional magistrate said that the accused's actions in respect of the firearm's count

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ADAM J

was tantamount to a technical commission of the offence, that the accused did not intentionally bring the firearm into Zimbabwe, having forgotten to leave it behind in South Africa, that the firearm was not being used for a criminal purpose, and that it could not be denied that the accused had a South African firearm certificate for the firearm. He was satisfied that there were special reasons in terms of s 4(2) of the Act.

In *R v Chamangwani* 1962 R & N 688 (SR) MAISELS J said that the forfeiture provisions were directed at preventing the commission of further offences and unless a court has relevant evidence that has been brought to its attention it cannot be satisfied that a forfeiture order is proper. Also, in S v Stanton 1974 (1) RLR 66 (G) at 67-68 GREENFIELD J said that it would have been proper, in his opinion, to have afforded the owner of the gun an opportunity to make representation.

It is clear that the regional magistrate was wrong to hold that a forfeiture order was automatic on a conviction for the contravention of s 4(1) where the person is in possession of a firearm without a certificate for it.

Also, in *S v Appleton* 1982 (2) ZLR 110 (A) on the death of the appellant's neighbour and good friend, his widow had brought him the deceased's gun for safe-keeping since she did not have a secure place. He locked it in a secure place with his guns where the police found it. He was sentenced to a small fine, the whole of which was suspended on appropriate conditions.

It is clear from the foregoing that the fine imposed by the regional magistrate was excessive. In addition, the forfeiture was improper.

Turning to the second count it was submitted on behalf of the accused that the proper offence should have been under s 36(1)(f) not under s 36(1)(a)(ii). Section 36(1)(a)(ii) provides that any person who for the purpose of entering, remaining or departing from Zimbabwe in contravention of the Act or of assisting any other person so to enter, remain or depart forges any travel document or uses any such travel document knowing it to be forged. The statement of agreed facts upon which the State relied disclosed that the accused was the holder of a foreign passport when police approached him whom they suspected of drug trafficking. On searching his car they found in his possession a Zimbabwean Passport in the name of Mike Stewart and other particulars but it had the photograph of the accused. The regional magistrate commented that the record of proceedings suggested that he had paid $300 in order to facilitate the forgery and supplied his photograph. The record of

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proceedings discloses that the accused denied when the so-called essential elements were put to him that he had forged the Zimbabwean Passport. The accused told the regional magistrate that a Mr Delaney informed him that he could get him a passport so he paid him $300 and

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provided him with his photograph and that Mr Delaney had forged it for him.

Section 36(1)(f) makes it an offence for any person to be in unlawful possession of or to make use of any travel document issued to another.

It is clear from the foregoing that the accused was not pleading guilty, according to the facts before the regional magistrate, as a person covered under s 36(1)(a)(ii). The facts did not show that for the purpose of entering, remaining in or departing from Zimbabwe in contravention of the Immigration Act or of assisting any other person to do so, the accused had forged the Zimbabwean passport found in his possession in the name of Mike Stewart with his particulars but not with his photograph but that of the accused's.

In these circumstances the regional magistrate should have entered a plea of not guilty instead of convicting the accused on the facts placed before him. The proper charge, as submitted on behalf of the accused, would have been the contravention of s 36(1)(f).

Accordingly, the conviction on the first count is confirmed but the sentence and the forfeiture order are set aside and instead a fine of $500 or in default of payment one month's imprisonment with labour is substituted. The matter is remitted to the regional magistrate as to the question of forfeiture so as to afford the accused the opportunity of leading evidence on this or to make representation on it.

The conviction and sentence on the second count are set aside. Since the accused has already served more than one month in custody, he shall not pay the fine of $500 and he is to be released forthwith.

Gibson J: I agree.

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Endnotes

1 (Popup - Popup)

Now s 93 of Chapter 28:01 - *Editor*

2 (Popup - Popup)

See *S* v *McGoen* 1995 (1) ZLR 1(H) - *Editor*

3 (Popup - Popup)

Reduced on appeal to 15 years: See S v Bhero & Anor 1994 (2) ZLR 66 (S) - *Editor*.

4 (Popup - Popup)

The accused was sentenced to 24 years' imprisonment. With the leave of the trial judge, he appealed against sentence. On appeal, this sentence was reduced to 20 years' imprisonment. See *S v Chingono* S-177-95.

5 (Popup - Popup)

See above at p 1 of this volume - *Editor*

6 (Popup - Popup)

See also *Mugabe & Anor* v *Law Soc of Zimbabwe* 1994 (2) ZLR 356 (S) - *Editor.*

7 (Popup - Popup)

See *ante* at p 1 of this volume - *Editor*

8 (Popup - Popup)

The third and fourth respondents were representing the Chairman, Electoral Supervisory Commission, and the Chairman of the Election Directorate - *Editor*

9 (Popup - Popup)

See ante p 264 - *Editor*

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