## S v STODDART 1996 (1) ZLR 1 (HC)

**Court** **High Court, Bulawayo**

Editor's Note:(1)

Chatikobo J

Criminal review

12 May 1995 Judgment No. HB-65-95

### Flynote

Criminal procedure (sentence) - general principles - juveniles - corporal punishment - suspension of sentence of whipping - whether permissible - suspended sentence - conditions of suspension - community service - whether appropriate sentence for rape

### Headnote

The accused, a 14-year-old juvenile, raped a four-year-old girl. The magistrate sentenced him to receive a moderate correction of three cuts with a light cane, but wholly suspended this sentence on condition that the accused performed community service. On review:

Held, that the magistrate had committed two errors:

(1) he had incorrectly suspended the sentence of juvenile whipping. A sentence of juvenile whipping must not be suspended or delayed. It would be undesirable if, sometime during the performance of the community service, the accused breached the condition of suspension and then had to undergo the whipping.

(2) community service is a completely inappropriate sentence for the rape of an infant aged four.

Cases cited:

*S v A Juvenile* 1989 (2) ZLR 61 (S)

*S v Ncube & Ors* 1987 (2) ZLR 246 (S)

*S v Ndhlovu & Ors* 1981 ZLR 600 (H)

*S v Zaranyika & Ors* 1995 (1) ZLR 270 (H)

*S* v *Zhou* 1995 (1) ZLR 329 (H)

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## Judgment

**Chatikobo J:** The accused, who is aged 14, was properly convicted on his own plea of guilty of the crime of rape. He raped a four-year-old girl. Consequent upon that conviction he was sentenced to receive a moderate correction of three cuts with a light cane to be administered in Bulawayo Prison by the Officer-in-Charge of that prison. This sentence was wholly suspended on condition the accused performs community service.

The magistrate committed two irregularities. The first relates to the suspension of the cuts and the second concerns his decision to order the juvenile to perform community service. As to the first irregularity one only need refer to the review judgment of Gubbay J, now the Chief Justice, in *S v Ndhlovu & Ors* 1981 ZLR 600 (H) in which the authorities are conveniently collected. The pith of that decision and the cases upon which the learned judge relied, is that a sentence of whipping must be administered soon after its imposition. At p 602H - 603A-B of the report he states the principle thus:

> "The courts have repeatedly held that if a whipping is imposed, it should be inflicted as soon as reasonably possible. See for instance, *R v du Plessis* 1948 SR 94; *R v Mefana* 1948 SA 612 (O); *R v Mloso & Anor*, *R* v *Cronje* 1953 (4) SA 135 (T) at 142H. This principle finds recognition in s 110 of the Prison Regulations 1956.
>
> The rationale for it is not hard to find. It is simply that it is objectionable and cruel to keep this severe form of punishment hanging over the head of a prisoner for any length of time. Such a practice tends to dishearten and harden him and destroy any incentive towards reformation. See *R v Quilo* 1935 EDL 12. Further, the additional anguish caused by the delay effectively increases the severity of the sentence. A corollary of this principle is that it is not competent to suspend the award of a whipping. See *R v du Plessis supra*; *R v Chapman* 1953 SR 28; 1953 (2) SA 671 (SR). But there is authority that it is permissible to do so where the legislature has provided a compulsory whipping for the offence. See *R v Mlozo, R v Cronje supra*; *R v Mlianga* 1956 (1) PH H38 (N)."

The community service which the accused has to perform should be completed within six months. If the accused reaches the conditions of suspension after, say, four months, he will be liable to receive the suspended cuts some four months after their imposition. Such a course is undesirable and runs counter to the authorities referred to in *S v Ndhlovu supra*.

In the case of *S v Ncube & Ors* 1987 (2) ZLR 246 (S) in which the Supreme



CHATIKOBO J

Court held that adult whipping was unconstitutional in that it constituted inhuman and degrading punishment, no opinion was expressed on whether its delayed administration made it so. Gubbay JA, who delivered the judgment of the court, however noted in passing at 252D-E that an award of whipping should neither be suspended nor delayed. Similarly in *S v Juvenile* 1989 (2) ZLR 61 (S) in which the whipping of juveniles was declared unconstitutional, the question of its delayed administration was not dealt with. When the Constitution was amended in 1990 to legalise the whipping of persons under the age of eighteen years, no reference was made to the legality or otherwise of delayed whipping. I consider it to be a logical inference to be drawn from these developments, which took place after the decision in *S v Ndhlovu & Ors supra* in 1981, that neither the pronouncements by the Supreme Court nor the amendment of

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the Constitution by Parliament have altered in any way the time-honoured principle that an award of whipping can neither be suspended nor delayed in its administration. By suspending the award of cuts in this case the magistrate therefore made a fatal error. In view of the delay which has resulted I cannot now order the cuts to be administered.

The second error which the magistrate fell into was to order community service. The point has been made repeatedly that courts should not order community service in circumstances which will provoke a public outcry. I have had occasion to underpin that important point in another review judgment recently. That was the case of *S v Zhou* 1995 (1) ZLR 329 (H) which also involved the rape of an infant of four years by a juvenile.

The offence of rape by its very nature is one that should be punished by severe prison terms. While courts are enjoined to endeavour to keep juveniles, especially those as young as fourteen years, out of prison, the alternatives they settle upon must not be so disproportionate to the gravity of the offence as to give the unfortunate impression that those who sexually molest defenceless infants can hide behind their youth and escape punishment. Furthermore, the idea must not be allowed to go abroad that the novel sentencing system of community service is open to people who commit serious offences like rape. Such persons should be sentenced according to the guidelines laid down by Bartlett J in a thorough and able judgment in *S v Zaranyika & Ors* 1995 (1) ZLR 270 (H).

As I stated earlier in this judgment, the strokes have to be deleted. The result is that I find myself unable to impose an appropriate sentence in the exercise of my review powers. The sentence I am going to impose in place of that imposed by the magistrate should therefore not be regarded as a precedent.

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CHATIKOBO J

My hands are tied. I am merely imposing a sentence which is competent but clearly not appropriate.

Accordingly the conviction is confirmed. The sentence is set aside. In its place the following is imposed:

> "The passing of sentence is postponed for five years on condition (1) that the accused performs community service in accordance with the terms laid down by the magistrate and (2) that the accused does not commit any offence involving violence on the person of another or of a sexual nature for which he is sentenced to imprisonment without the option of a fine."

Cheda J agrees.

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**S v MOYO & ANOR 1996 (1) ZLR 5 (HC)**

Editor's Note:(2)

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**Court** **High Court, Bulawayo**

Chatikobo J

Criminal review

19 May 1995 Judgment No. HB-68-95

## Flynote

Criminal procedure (sentence) - general principles - suspended sentence - conditions of suspension - compensation - multiple accused - propriety of suspending portion of sentence imposed on each accused on condition that they pay compensation jointly and severally, the one paying, the other to be absolved - Criminal Procedure and Evidence Act [Chapter 9:07] - ss 358 and 362

## Headnote

The two accused were convicted on their pleas of guilty to three counts of theft and sentenced to a total of five years' imprisonment, of which portion was suspended on condition that each accused paid compensation to the complainants, in the full amount of the prejudice, jointly and severally, the one paying, the other to be absolved.

Held, that the power given under s 358 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] to suspend a sentence or part of it on condition that compensation is paid is on an entirely different basis from compensation awarded under s 362 of the Act. In the latter event, the court does not make an award *mero motu*. There has to be an application made by or on behalf of the complainant and in making the award the court does so as a civil court, hearing a civil claim for damages. In that event, joint wrongdoers are jointly and severally liable; in fact, s 371 of the Act so provides. But where restitution is made a condition of suspension, the object is to reward the offender by having a portion of the senetnce suspended if he makes the restitution. That rationale would be defeated if joint and several liability were to be allowed, because if one joint offender were to pay in full, the other would be absolved, though



he had paid nothing. It could even mean that he would retain the proceeds of his crime.

Held, further, that where a sentence is suspended on condition of restitution, each accused must pay restitution in order to benefit by not serving the suspended sentence. It would be necessary for the court to inquire into the proportion in which the spoils were shared by the co-offenders. It would be inequitable to order an offender to repay less than he received and benefit to the same extent as one who pays more than he received.

Cases cited:

*Naude & du Plessis v Mercier* 1917 AD 32

*R v Chari & Anor* 1940 SR 1

*S v Donga & Anor* HB-37-95 (not reported)

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*S v Mlilo & Anor* 1978 RLR 411 (G)

*S v Tutayi & Ors* 1976 (1) RLR 183 (G)

Statutes referred to:

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 358, 362

and 371

## Judgment

**Chatikobo J:** The sole issue raised by this review concerns the propriety of suspending a portion of the sentence imposed on two or more accused persons on the condition that they pay restitution to the complainant*(s)* jointly and severally, the one paying the other to be absolved.

What happened in this case is this. The two accused were properly convicted on their pleas of guilty of three counts of theft. On each count the victim of the theft was different. The magistrate treated the three counts separately and imposed the same sentence on each accused on all three counts. By this process he arrived at a total sentence of five years' imprisonment with labour for each accused. He then proceeded to suspend a portion of the sentence in the case of each accused on the condition that he pays compensation to each of the three complainants in the full amount of the prejudice jointly and severally, the one paying the other to be absolved.

I asked the Attorney-General for his views on the propriety of the practice which seems to have gained currency among magistrates - of suspending sentences on the condition that co-accused should pay restitution jointly

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CHATIKOBO J

and severally, the one paying the other to be absolved. I have now received his well researched views, for which I am grateful.

Prior to receiving the Attorney-General's views, the point arose in an appeal which came before my brother Blackie J and myself in which I prepared the judgment of the court. That was the case of *S v Donga & Anor* HB-37-95 (not reported). Before dealing with the salient observations made in that judgment, I propose to deal with the relevant provisions of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the Act) which deal with suspension of sentences on conditions of restitution and those dealing with orders of compensation *per se*. The relevant part of s 358 of the Act is in these terms:

> "(2) Whenever a person is convicted before any court of any offence other than an offence specified in the Eighth Schedule, it may in its discretion
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> *(a)* . . .
>
> *(b)* pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order; or

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*(c)* ...

*(d)* ...

(2) Conditions specified in terms of paragraph *(a)* or *(b)* of subsection (2) may relate to any one or more of the following matters:

*(a)* ...

*(b)* compensation for damages or pecuniary loss caused by the offence:

Provided that no such condition shall require compensation to be paid in respect of damage or loss that is the subject of an award of compensation in terms of Part XIX."

Part XIX of the Act provides in s 362(1) that a court which convicts a person of an offence may forthwith award compensation to any person whose right or interest in property has been lost or diminished as a result of the offence. Section 363 gives the court power to award compensation for personal injury occasioned by the commission of the offence.

These provisions have existed side by side in the Act and its precursors for several decades and the question of their proper application has been dealt with by the courts of this country several times. It is therefore somewhat



surprising that, notwithstanding the plethora of cases which exist, magistrates continue to make what should by now be elementary mistakes. In *S v Majecha* HH-16-84 (not reported), Squires J, dealing with suspensions of sentence based upon restitution in terms of s 358(2) of the Act said at p 3 of the cyclostyled judgment:

"Ordering an accused to make restitution to complainant is another way of repairing the financial or patrimonial loss caused to a victim which can be achieved without an application by the complainant for compensation under s 341(1) (now [s 362]). Such restitution can be achieved in appropriate circumstances - such as a desire or a capacity to do so on the part of the accused - by ordering part of the sentence to be suspended under the court's general powers to suspend all or portion of any sentence it imposes on suitable conditions. This power is given under s [358(2)*(b)*] and is on a different basis entirely from compensation awarded under s [362]. In the case of restitution the criminal sanction is being used to achieve performance of the condition, because it is part of the sentence which the court imposes. In this case the court does have a discretion, to order restitution in suitable circumstances; and the decision whether to resort to such a course or not is part of the wider question of imposing a suitable sentence."

On the other hand, when a court awards compensation under Part XIX it does not do so *mero motu*; there has to be an application made for it by the complainant or by the prosecutor on behalf of the complainant and in awarding such compensation the court does so sitting as a civil court, hearing a civil claim for damages and is required to apply the common law relating to liability for damages. See *S v Mlilo & Ors* 1978 RLR 411 (G).

The common law rule is that joint wrongdoers are jointly and severally liable *in solidium* for the damage done by them. See *R* v *Chari & Anor* 1940 SR 1; *S* v *Tutayi & Ors* 1976 (1) RLR 183 (G); *Naude & du Plessis v Mercier* 1917 AD 32. In this latter case Innes CJ said at p 38:

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"... if several persons jointly commit a delict they are each and all civilly liable *in solidium* for the consequences."

And at p 39 the learned Chief Justice said:

"As regards procedure, a complainant may sue any of those who jointly injured him for the full damages caused by the injury. Or he may bring



CHATIKOBO J

his action against all of them as co-defendants, and enforce his judgment *in solidum*."

It is in the light of these axiomatic principles that I was driven to observe in *S v Donga & Anor supra* at pp 4-5 of the cyclostyled judgment that -

"A person who offers to repay the complainant what he stole from him must be rewarded by having a portion of his sentence suspended on that condition. If he does not pay the compensation ordered he cannot be allowed to benefit from a suspended sentence because he has not honoured his part of the bargain, that is, to disgorge his profits. A condition of suspension based upon restitution must be formulated in such a way that it does not offend against this rationale. The effect of suspending a portion of a sentence imposed on co-offenders on condition they pay the compensation jointly or severally would in my view offend against this rationale. This is so because if one accused pays the full amount ordered, the other would automatically be absolved. At the same time, he would still be absolved from serving the suspended sentence because the amount has been paid. This would encourage the wicked and cunning to benefit from the efforts of those who choose to comply with the terms of suspension. And, not only would an accused who does not pay his *pro rata* share of the damage serve a shorter sentence but he would retain the proceeds of the crime. If I am right that one of the most important objectives is to induce the offender to part with his ill-gotten gains in favour of the victim of his crime, then it must follow that he should be ordered to pay back an amount equivalent to the extent of his benefit. This must be so because the principle of concurrent wrongdoers does not come into play here at all. In my view, that is the legislature has seen it fit to provide in Part XIX of the Criminal Procedure and Evidence Act [*Chapter 9:07*] for compensation to be ordered for loss occasioned by the accused's actions. Compensation ordered under Part XIX is not made dependent upon the suspension of a sentence. It is in the order of a civil remedy. The principle of concurrent wrongdoing would definitely come into being and co-offenders can be ordered to pay compensation jointly and severally, the one paying the other to be absolved. In fact s [371] provides that liability for compensation under Part XIX shall be joint and several. No similar provision exists in s [358(2)*(b)*] of the Act. Indeed s [358(3)] stipulates that once compensation is awarded under Part XIX, no suspension based upon restitution can be ordered."

In short, therefore, where a sentence is suspended on condition of restitution,



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each accused must pay restitution before he can be allowed to benefit by not serving the suspended sentence. Since the suspended sentence is in the form of credit granted to the accused for his willingness to pay reparation, the amount which he is ordered to pay back must be equivalent to the benefit he derived from the joint crime. This, in my view, makes it necessary for the court to inquire into the question of the proportion in which the spoils of the crime were shared among co-offenders. In my view, it is inequitable to order an offender to repay less than he got and still allow him to benefit to the same extent as one who pays more than what he received from the proceeds of crime.

In this case, no evidence was led on the extent to which each accused benefitted. It would be

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fair to assume, in the absence of claims to the contrary by the accused upon whom rested the duty of establishing mitigation, that they did not benefit equally.

So, while confirming the proceedings, I would set aside the condition of suspension and substitute the following:

> "Of the sentence of 60 months' imprisonment with labour, 12 months' imprisonment with labour is suspended for five years on condition the accused does not commit during that period any offence of which dishonesty is an element for which he is sentenced to imprisonment without the option of a fine. A further 32 months' imprisonment with labour is suspended on condition the accused pays to the complainants through the Clerk of Court, Bulawayo, the sum of $3 970 by 1 July
>
> 1995. The effective sentence is therefore 18 months' imprisonment with labour."

For the avoidance of doubt, if only part of amount is paid then it should be distributed to the complainants on a *pro rata* basis.

Blackie J agrees.

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## S v NDHLOVU 1996 (1) ZLR 11 (HC)

Editor's Note:(3)

**Court** **High Court, Bulawayo**

Chatikobo J

Criminal review

30 June 1995 Judgment No. HB-90-95

### Flynote

Criminal procedure - review - case remitted by Attorney-General for trial before regional court, without Attorney-General specifying charge to be brought - accused tried on same charge as in previous proceedings instead of on a more serious charge - Attorney- General seeking to have proceedings reviewed on the grounds of misdirection - whether procedural irregularity occurred - whether magistrate had failed to follow directive of Attorney-General as to charge to be brought against accused

### Headnote

The accused was originally charged before a senior magistrate with assault with intent to do grievous bodily harm. The magistrate formed the view that the accused should have been charged with attempted murder. He stopped the proceedings in terms of s 54(1) of the Magistrates Court Act [*Chapter 7:10*] and referred the record to the Attorney-General for his directions. The Attorney-General directed that the case be commenced afresh before a regional magistrate. The direction did not state what charge should now be brought against the accused. The accused was again charged with assault with intent to do grievous bodily harm. The

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accused was convicted of this offence and sentence was imposed.

The Attorney-General then referred the case to the High Court for review, alleging that the regional magistrate had misdirected himself by allowing the case to proceed on the basis of a charge of assault with intent to do grievous bodily harm. The Attorney-General alleged that the regional magistrate should have realised, on the basis of the record of the proceedings before the senior magistrate and the directions issued by the



Attorney-General, that the proper charge to be preferred was that of attempted murder. The prosecutor should also have realised that the correct charge to bring was one of attempted murder.

Held, that the regional magistrate had not misdirected himself. The mere fact that the Attorney-General had chosen to place the matter before a regional magistrate did not in itself indicate that a more serious charge than that originally brought was to be preferred. He could have referred the matter to the regional court for other reasons. The Attorney-General should have specifically directed that the accused was to be charged with attempted murder.

Held, further, that even if there was such a misdirection as alleged, it is not one that is reviewable by the High Court in terms of s 57 of the Magistrates Court Act. What the Attorney-General was complaining about was a disregard by the prosecutor of his mandate and a refusal by the magistrate to comply with the Attorney-General's directive. That accusation goes deeper than a procedural irregularity and as such is not one that should be reviewed without giving the two officials an opportunity to explain their conduct. The review was only cognisable in terms of s 29 of the High Court Act [*Chapter 7:06*] and should be sought in terms of rr 357 and 358 of the High Court Rules.

Held, further, that the accused had been put through two separate proceedings due to no fault on his part. Natural justice demanded that he be heard before he is ordered to go through the expense and anxiety of a third trial. The matter must be left to the Attorney-General to decide if he wishes to pursue the matter in an appropriate way.

Cases cited:

*Fikilini* v *A-G* 1990 (1) ZLR 105 (S)

Statutes and regulations referred to:

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 225

High Court Act [*Chapter 7:06*], s 29

High Court Rules 1971 (RGN 1047/1971), rr 357 and 358

Magistrates Court Act [*Chapter 7:10*], ss 54(1) and 57

**Judgment**

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**Chatikobo J**: The accused was a regular patron at a shebeen outlet operated by the complainant in the high density suburb of Lobengula West. It is not clear why, but it may be in recognition of the accused's faithful



CHATIKOBO J

patronage, he was granted a facility in terms of which he could purchase and consume alcoholic beverages on credit. Between December 1993 and about mid-January 1994 the accused ran up an unpaid bill totalling $87.

On 23 January the complainant and the accused came to a mutual arrangement in terms of which the two would meet at a house in North Magwegwe. The purpose of this meeting was for the complainant to be paid his $87. The two met at the appointed rendezvous on 28 January 1994 at 21:00 hours.

Having met, the accused lured the complainant to a spot which was a hundred metres away from the house where they had met on the flimsy pretext that it was better for them to discuss the question of the debt away from the house. It is alleged that the accused then suddenly turned and struck the complainant on the head with a blunt object which might have been a brick but which the complainant did not see. The complainant fell down unconscious as a result of this blow. The accused then proceeded to deliver more blows, mainly to the area of the head, to the complainant while he lay prostrate on the ground.

When the complainant eventually came round the accused had left. The complainant managed to walk home from where he was ferried to Mpilo Hospital, there to be hospitalised for a week. The doctor who examined him swore to an affidavit in which he states that he observed the following injuries: "deep gaping lacerations right and left frontal areas, huge haematoma left occiput, small haematoma right occipital area and perioba (*sic*) swelling laceration and swelling on lower hip". He formed the opinion that the injuries were caused by blunt trauma with iron bars. He considered the injuries to be very serious and was of the view that they were life threatening because of the intercranial injuries.

The accused was, on 9 March 1994, brought before a senior magistrate at Western Commonage, on a charge of assault with intent to cause grievous bodily harm.

After listening to part of the evidence, the presiding senior magistrate formed the view that the accused should have been charged with the crime of attempted murder and not assault GBH. He therefore stopped the proceedings in terms of s 54(1) of the Magistrates Court Act [*Chapter 7:10*] and referred the record to the Attorney-General for his directions. This was on 15 March 1994. The Attorney-General wrote to the senior magistrate on 25 April 1994 giving his directions. It is necessary to quote this directive *in extenso* because



CHATIKOBO J

I think this is where the problems which have necessitated the reference of this matter to this

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court started. It is in these terms: "*State v Temiso Ndhlovu*: charged with the crime of Assault With Intent To Do Grievous Bodily Harm. Under subpara (iii) of para *(a)* of s 225 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], I hereby direct that the case be commenced afresh in the court of the Regional Magistrate for the Western Division, and in doing so draw your attention to s 226 of the said Act."

I pause to point out that the directive does not spell out the nature of the charge to be preferred against the accused in the regional court.

The matter came before a regional magistrate on 15 May 1995. The accused was now represented by a legal practitioner. The public prosecutor preferred a charge of assault with intent to cause grievous bodily harm, to which the accused tendered a plea of guilty, which the prosecutor accepted. The matter then proceeded by way of an agreed statement of the facts and the accused was convicted and sentenced.

The Attorney-General has now referred the case to this court for review, alleging that there was a misdirection. As I understand his complaint, it is this. When the matter resumed before the regional magistrate he had before him the record of proceedings before the senior magistrate as well as the Attorney-General's directive. Those documents should have left him in no doubt that the proper charge to be preferred was attempted murder and, for his part, the prosecutor should never have preferred the charge that he did. Viewed from a purely casuistic standpoint, this is an attractive exercise in forensic reconstruction. A dispassionate analysis of what has happened leaves me in doubt whether or not the proceedings before the regional magistrate are flawed by any misdirection.

Section 225 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the Act) provides that, where a magistrate adjourns a case in terms of s 54(1) of the Magistrates Court Act [*Chapter 7:10*], there are three courses of action open to the Attorney-General. The first is to convert the proceedings into a preparatory examination. This course is normally followed in those cases where it is necessary to hear evidence before deciding on an appropriate charge. The second option is for the Attorney-General to direct the presiding magistrate to carry on with the trial. This I perceive would be done in those cases where the Attorney-General either does not agree with the trial magistrate's reason for stopping the proceedings or where he considers that, notwithstanding the views of the trial magistrate, no injustice would result if





the proceedings continued before such magistrate. The third option, the one adopted by the Attorney-General in the present case, is for him to direct that the matter be commenced afresh before a regional magistrate.

The mere fact that the Attorney-General has chosen to place the matter before a regional magistrate is not in itself an indication that the charge to be preferred must be more serious than, or different from, that previously put to the accused. In my view, this course can be resorted to purely for purposes of expedience. There was nothing to stop the Attorney-General from directing that the accused should be tried on a charge of attempted murder before the

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presiding senior magistrate but, to achieve this course, he would have had to order that the adjourned proceedings be converted into a preparatory examination after which the record would be referred back to him for another directive before the trial of the accused could start in earnest.

In order to circumvent this course the Attorney-General merely has to refer the matter to a regional magistrate. Also, the Attorney-General may have thought that while assault with intent to cause grievous bodily harm was an appropriate charge, justice would be better served by referring the matter to a regional magistrate.

In this regard sight should not be lost of the terms of s 54(1) of the Magistrates Court Act itself. The section enjoins the magistrate to adjourn a case if he thinks that it is proper for the case to go before a court of higher jurisdiction or that from its nature the case is "more proper for the cognisance of a court of greater jurisdiction". The corollary of this power is that the Attorney-General can refer a matter to a regional magistrate if he thinks that for reasons of complexity, importance etc, the matter should be tried before a court of higher jurisdiction.

The contention of the Attorney-General, which I do not agree with, is that since the magistrate adjourned the case because he thought a different charge should be preferred, it necessarily follows that by referring the case to a regional magistrate, he had agreed with the views of the trial magistrate. He may have agreed with the views of the trial magistrate, but he did not say so in his directive. He should have directed that the accused is to be tried on a charge of attempted murder before a regional magistrate. Instead, the directive shows that the charge is one of assault with intent to cause grievous bodily harm and that a fresh trial must be held before a regional magistrate. In the absence of a specific direction that the accused should be charged with attempted murder, I cannot agree that the prosecutor made a mistake in



CHATIKOBO J

preferring the charge that he did, nor can I agree that the magistrate should have queried the prosecutor's decision to charge assault with intent to cause grievous bodily harm.

It may well be that the prosecutor had a separate instruction in his docket directing him to charge the accused with attempted murder. If that is so, then the proceedings may be impugned on the basis that the prosecutor exceeded or acted without the requisite authority, but I do not know if that is so, and I express no views on the matter. Even if that were so, such a review is not one that can be carried out in terms of s 57 of the Magistrates Court. It is one cognisable under s 29 of the High Court Act [*Chapter 7:06*] and should be sought in terms of rr 357 and 358 of the Rules of Court on notice to interested parties. Compare *Fikilini v Attorney-General* 1990 (1) ZLR 105 (S).

Even assuming that I am wrong and that there was a misdirection as alleged by the Attorney-General, it is not one reviewable by this court in terms of the Magistrates Court Act. What is complained of is a disregard by the prosecutor of his mandate and a refusal by the magistrate to comply with a directive given by the Attorney-General under powers granted him by s 225 of the Code. The accusation goes deeper than a procedural irregularity and as such it

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is not one that should be reviewed without giving the two officials an opportunity to explain the basis of their conduct. The accused had, due to no fault of his own, been put through two separate, and I may say, needless proceedings. Natural justice demands that he be heard before he is ordered to go through the expense and anxiety of a third trial, and this time on a more serious charge.

For these reasons I decline the request by the Attorney-General and leave him to decide if he wishes to pursue the matter in an appropriate way.

Blackie J agrees.

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## AMALGAMATED MOTOR CORPORATION (PVT) LTD v F KLEMENT (PVT) LTD 1996 (1) ZLR 17 (HC)

Editor's Note:(4)

**Court** **High Court, Harare**

Robinson J

Civil action

4, 5 & 11 September 1995 Judgment No. HH-48-96

### Flynote

Contract - enforceability - duress - whether contract induced by duress

### Headnote

The defendant's managing director took a company car into a garage for repair. The repair work was carried out by the plaintiff company. The defendant's director handed over a cheque in payment of the account for the repair work done by the plaintiff company. Before the cheque was paid the defendant's director stopped payment on the cheque. The plaintiff company claimed payment of the sum owing on the basis of defendant company's dishonoured cheque. The defendant's director maintained that he had lawful reason for stopping payment of the cheque. He maintained that he had been forced to make the payment by cheque because of an unlawful threat by the plaintiff company that it would retain a new car that the defendant company was going to buy from the garage until the defendant company had paid its outstanding account for the repair work done to his vehicle.

Held, on the basis of the evidence, that the duress complained of by the defendant company was entirely imagined and, therefore, self-induced. The defendant's director had handed over the cheque voluntarily and not under duress.

Held, therefore, that the plaintiff company was entitled to judgment.

*D P Carter* for the plaintiff

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*E W W Morris* for the defendant



## Judgment

**Robinson J:** In this case it is common cause that on 23 April 1991 F Klement Electrical (Pvt) Ltd ("the defendant") drew a cheque in favour of Amalgamated Motor Corporation (Pvt) Ltd trading as TA Motors ("the plaintiff") for the sum of $12 731,21 in payment of an account for work done and materials supplied in respect of the defendant's Peugeot 404 diesel pick-up motor vehicle, registration number 324-148J (the defendant's "motor vehicle") at a time when its account for that amount was in dispute by the defendant. It is further common cause that on 24 April 1991 the defendant stopped payment of its said cheque for $12 731,21, as a result of which the plaintiff issued summons against the defendant on 19 June 1991, claiming payment of the sum of $12 731,21 on the basis of the defendant's dishonoured cheque, together with interest thereon at the rate of 10% *per annum* from 3 May 1991, being the date of demand, and costs of suit.

Upon the defendant's entering an appearance to defend the plaintiff's action, the plaintiff applied for summary judgment. In paras 3, 4 and 5 of its founding affidavit, the plaintiff's then senior credit controller, Faith Natalie Brown ("Mrs Brown"), alleged as follows:

> "3
>
> In the latter part of 1990 the respondent brought a vehicle for repair to one of the applicant's branches. Repair work had to be carried out on several occasions on the same vehicle. Mr Henwood's position was that the original work had not been carried out correctly but this has not been accepted by the applicant.
>
> 4
>
> On or about the 23 April 1991, after Mr Henwood continued to complain about the vehicle, applicant and the respondent endeavoured to settle the matter. In terms of the settlement, the respondent's vehicle was purchased by the applicant and the respondent purchased from the applicant a new pick-up truck. These transactions were made subject to the respondent paying the outstanding accounts for the repairs to the respondent's vehicle. A cheque was handed over in favour of the applicant in the sum of $12 731,21. A copy of this cheque is attached as Annexure 'B' to the Summons in HC 2545/91.
>
> 5
>
> The respondent cannot possibly have a defence to the relief sought in the summons. It has come to the applicant's notice that the respondent avers that the cheque was paid under protest. Even if it was, which is denied,



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> the respondent had no lawful right to stop payment. In fact, the true position is that when payment was made Mr Henwood told me that there were Ôone or two things which would have to be sorted out later'. It was not clear at the time what precisely he was referring to but the words Ôunder protest' were not used when the respondent handed over the cheque."

In opposing the plaintiff's application for summary judgment, the defendant, in the opposing

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affidavit of its managing director, Ronald Henwood ("Mr Henwood"), set out the history of the problems it had encountered with the plaintiff in having its motor vehicle repaired properly from the time the defendant first delivered it to the plaintiff on 9 August 1990 for a two day engine exchange. In essence, the defendant's defence is that after the plaintiff's Mr McGregor had led the defendant's Mr Henwood to believe in a telephonic conversation between them on 23 April 1991 that the plaintiff would sell the defendant a new Mazda B2200 against the trade-in of the defendant's motor vehicle for $15 000, to the surprise of Mr Henwood, the plaintiff's Mr David Ainscow Heaton, to whom Mr Henwood had been referred by the plaintiff's Mr McGregor in connection with the sale, required the defendant first to settle its outstanding account for the work done on its motor vehicle, which was still in the plaintiff's possession, with the plaintiff's accounts department upstairs. Mr Henwood avers that he was "shocked and amazed" by this requirement because "no mention had been made previously of this condition or account as part of the attempt to settle the matter" (see para l*(c)(i)(a)* of the defendant's founding affidavit). Accordingly, when he went upstairs to pay the account and saw the plaintiff's Mrs Brown, Mr Henwood told Mrs Brown that the defendant was paying the account under protest, pointing out to Mrs Brown that the account had always been under query by the defendant since he, Mr Henwood, had never been happy with the work purportedly done by the plaintiff to the defendant's motor vehicle.

To quote his own words, Mr Henwood stated as follows in para l*(c)*(ii) of the defendant's founding affidavit:

> "I was furious at the time that I made the payment as I realised or believed that the question of paying the account referred to had deliberately not been made clear to me by applicant. Once I was in a clearer frame of mind and able to reflect on the situation as a whole I realised that if I was to let the cheque go through I would be effectively giving away respondent's vehicle for approximately $3 000."



ROBINSON J

As a result, the defendant stopped payment on its cheque the next day.

The plaintiff's application for summary judgment was dismissed and the question of costs reserved.

In its defence to the plaintiff's action on the dishonoured cheque, the defendant has pleaded as follows:

"1. The defendant admits that it paid the cheque to the plaintiff as alleged and admits that the cheque was dishonoured on presentation but denies that it is liable to pay to the plaintiff the amount thereof, or any amount, for reasons more fully given below.

2. At the time of the issue of the cheque to the plaintiff the plaintiff was in possession of the defendant's motor vehicle which it had just sold to the defendant and for which the defendant had paid to the plaintiff the agreed purchase price.

3. The plaintiff, notwithstanding its obligations under the agreement of sale as aforesaid, unlawfully threatened to retain possession of the newly purchased vehicle unless and until the defendant should pay to the plaintiff the amount of TWELVE THOUSAND SEVEN HUNDRED AND THIRTY ONE DOLLARS AND TWENTY ONE CENTS ($12 731,21), which sum represents an amount claimed by the plaintiff,

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liability for payment of which by the defendant has always been denied.

4. The defendant, in the reasonable and *bona fide* belief that the plaintiff would in fact carry out its threat and for the purpose of obtaining possession of its newly purchased motor vehicle, paid the cheque to the plaintiff under protest expressly made to the plaintiff at the time.

5. But for the said threat the defendant would not have paid the said cheque and immediately on delivery to it of the newly purchased motor vehicle the defendant countermanded payment on the said cheque, as it was entitled to do.

WHEREFORE the defendant claims judgment in its favour together with costs of suit".

It was accepted by counsel that the onus was on the defendant to prove its



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defence that it had lawful reason for stopping payment of its cheque on the ground of what is described as "duress of goods", an expression borrowed from English law.

To this end the defendant's Mr Henwood testified first, after which the defendant closed its case. On its side, the plaintiff called Mrs Brown and Mr Heaton, its new cars sales manager at the material time, to give evidence on its behalf. Neither of these witnesses was still in the plaintiff's employment at the time each testified.

So far as its assessment of the witnesses is concerned, the court found the defendant's Mr Henwood to be, by and large, a credible witness. On the other hand, the plaintiff's Mrs Brown was a confused witness, to say the least, her evidence being unsatisfactory and contradictory in a number of respects, while the plaintiff's Mr Heaton was not really able to add much to the evidence before the court. However, even if the court proceeds on the basis of accepting the evidence of the defendant's Mr Henwood, in particular his evidence that he paid the defendant's cheque to the plaintiff's Mrs Brown under protest, this, as will be seen, will not avail the defendant on the facts as presented and accepted by Mr Henwood himself.

The first issue which commanded the court's attention was whether, when the defendant's Mr Henwood approached Mr Heaton at the plaintiff's premises on 23 April 1991 there was then in existence a binding oral contract between the plaintiff and the defendant which had been concluded earlier between the plaintiff's Mr McGregor and the defendant's Mr Henwood over the telephone, whereby the plaintiff had agreed to sell the defendant the new Mazda B2200 against the trade-in of the defendant's motor vehicle. In this respect, the defendant's counsel, Mr *Morris*, was astute in so framing and putting his questions to Mr Henwood to make it appear that such an oral contract had been concluded between Mr McGregor and Mr Henwood over the telephone. However, when one has regard to Mr Henwood's evidence that when he received the telephone call from Mr McGregor to inform him that the plaintiff had just had a cancellation on a B22 diesel pick-up and to ask whether he would be interested in acquiring it, that Mr Henwood had expressed his delight at the prospect of acquiring the B22 motor vehicle, against which Mr McGregor had said that the plaintiff could offer the defendant $15 000 for the trade-in of its motor vehicle but that nothing was said or discussed about the question of the price of the B22 motor vehicle or the payment thereof and that Mr McGregor had told Mr Henwood that he

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should come in that afternoon to see Mr Heaton, the plaintiff's new cars sales



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manager, to sort out some details, the court finds it would be artificial, in the extreme, to accept that a firm contract was orally concluded between the plaintiff and the defendant over the telephone. Indeed, is it seriously suggested that if, upon arrival at Mr Heaton's office and upon being informed of the controlled retail price of the new Mazda B22, Mr Henwood had said that he had not realised it was as much as that and that he was unable to pay the full purchase price immediately, the plaintiff would have been able to sue him? I think not.

That being the case, the defendant's defence must fail since, at the time he made his protest, the parties were still in the course of negotiations, and accordingly, there could be no question of the defendant's Mr Henwood being under any duress to pay the defendant's outstanding account - a point readily conceded by the defendant's counsel, Mr *Morris*. However, even if it be held that there was a binding oral contract between the parties at the time when Mr Henwood approached Mr Heaton and thereafter made the defendant's payment under protest to the plaintiff's Mrs Brown, the defendant can only succeed if it can satisfy the court that its payment under protest was allied to an unlawful threat by the plaintiff, more particularly by the plaintiff's Mr Heaton, to retain possession of the new Mazda B22 until the defendant had paid the plaintiff the amount of the defendant's outstanding account for the work done on the defendant's motor vehicle, which was in dispute by the defendant.

In this connection I turn to examine the evidence in chief adduced by the defendant's Mr Henwood ("H").

*Counsel:* "Did you see Mr Heaton at 2.00pm?"

*H:* "Correct"

*Counsel:* "Do you recall the conversation?"

*H:* "Yes"

*Counsel:* "Relate it"

*H:* "I walked into the office and Mr Heaton's words were - ÔYou've come to pick up your B22 and we are offering you $15 000 as a trade-in?', I said That's correct', he then indicated, 'Isn't there something else to sort out?'"

*Counsel:* "Was this a genuine question or a rhetorical question? Do you know the difference?"

*H:* "No"

Counsel explains the difference.



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*H:* "I would say the latter"

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*Counsel:* "He then indicated that your account needs to be settled upstairs. What did you say to him about that?"

*H:* "I didn't say anything, I just left and went upstairs"

*Counsel:* "What happened upstairs?"

*H:* "I went and saw Mrs Brown who appeared to know I was to be coming up in the afternoon at some stage, the cheque was to be made out for the repairs for the motor vehicle which I'd still not received and for the purchase of the B22 and the sale of the Peugeot 404"

*Counsel:* "Was only one cheque paid?"

*H:* "She suggested that I pay with one cheque, my answer to that was that since I was paying under protest, I would prefer to keep the cheques separated. She answered, Why, is there a problem?' I indicated to her that there were one or two things on the account that needed to be sorted out. A cheque was made for the repairs and a second cheque was made for the purchase of the B22. The second cheque was cancelled as I'd written it out wrong, I then wrote a third cheque out for the $37 000 which again was cancelled, the reason being that I had not deducted the $15 000 for the sale of the 404. A fourth cheque was then issued for approximately $22 000, basically $37 000 less $15 000 and that's really where it ended. It was that night that I realised that I was now having to pay for repairs of a motor vehicle I'd never received, the next day I went to the bank regrettably to put a stop payment on that cheque."

Under cross-examination, the following exchanges took place between the plaintiff's counsel and Mr Henwood ("H").

*Counsel:* "Did Mr McGregor indicate to you that he would advise Mr Heaton you would be coming in at 2.00 pm?"

*H:* "Correct"

*Counsel:* "Did you understand from Mr McGregor that Heaton would handle the transaction from then on?"

*H:* "Correct"

Counsel: "And when you saw Heaton at the plaintiff's premises that afternoon, Heaton made it quite clear to you that your account required to be settled?"

*H:* "His words were - Firstly, your account has to be settled upstairs'"



ROBINSON J

*Counsel:* "And you went and settled the account?"

*H:* "Correct"

*Counsel:* "You didn't argue or remonstrate with Heaton?"

*H:* "As I've said before, had I made a huge argument out of it at the time I would most certainly have lost the B22, it would not have been offered to me"

*Counsel:* "What gave you that impression or idea?"

*H:* "I had had three years previously an experience from Cairns, Union Avenue, which involved Mr Heaton and Mr Bakewell where after many years of trying to acquire a new B22 or new motor vehicle, I was eventually offered one and asked to come and pay for it in the afternoon. I was shown the new motor vehicle. I was told or asked to bring in a trade-in. This I did do. After being shown the new motor vehicle they requested to take the old motor vehicle, which they had been fully servicing, for a test drive. On their return from the test drive I was told that there

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had been a horrible mistake, that the motor vehicle which was meant for you was in fact for somebody else. This is one of the reasons why I signed the cheque for the repairs which had not been effected."

*Counsel:* "So what you are telling the court is that there was a previous occasion when a deal fell through?"

*H:* "Correct"

Later there were the following further exchanges between the plaintiff's counsel and Mr Henwood ("H") while the latter was still under cross-examination.

*Counsel:* "It is part of your case that Heaton threatened to withhold the motor vehicle if you refused to pay your account but Heaton merely suggested you go upstairs and pay your account?"

*H:* "That is correct but I knew exactly what he meant by that"

*Counsel:* "But he didn't say anything?"

*H:* "From the actions of the day he did not verbally say it but what did it have to do with the purchase of the motor vehicle, why was I being made to go upstairs and pay my account, that is what I was asking myself at the time"

*Counsel:* "Who made you go upstairs and pay your account?"

*H:* "Firstly, he said you have an account to be settled, if that's part of the supposed to be agreement it was definitely not mentioned in the morning".

*Counsel:* "And it wasn't mentioned by Heaton that you had to pay the account before the motor vehicle was handed over to you?"



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*H:* "As I said before, but first you must go upstairs and settle your account or you have an account to settle"

*Counsel:* "But that was not a threat?"

*H:* "At that moment in time I believed it was".

A little further on, the following exchanges continued.

*Counsel:*"In your plea, para 2 you say - At the time of the issue of the cheque to the plaintiff the plaintiff was in possession of the defendant's motor vehicle which it had just sold to the defendant and for which the defendant had paid to the plaintiff the agreed purchase price.' But it is not correct that you had paid to the plaintiff the agreed purchase price?"

*H:* "That is minus $15 000?"

*Counsel:* "No, at the time you issued the cheque for the amount in issue, the first cheque was for $12 000?"

*H:* "Yes"

*Counsel:*"So para 2 of your plea is incorrect?"

*H:* "It is incorrect"

*Counsel:* "Paragraph 3 of your plea reads as follows: The plaintiff, notwithstanding its obligations under the agreement of sale as aforesaid, unlawfully threatened to retain possession of the newly purchased vehicle unless and until the defendant should pay to the plaintiff the amount of $12 731,21, which sum represents an amount

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claimed by the plaintiff, liability for payment of which by the defendant has always been denied?' Who made the unlawful threat to retain possession?"

*H:* "That was Mr Heaton and as I said before, his words were - At first you have an account to settle upstairs', that I saw as a threat"

*Counsel:*"What had he said before that?"

*H:* "You've come to fetch your B22, is that correct?' to which I replied, Yes, it's correct', whereupon Heaton said, And we are giving you $15 000 for your old truck?', to which my answer was, Yes, that's correct' and his answer to that was, But first you have an account upstairs that needs to be settled'"

*Counsel:*"So he didn't threaten to hold the motor vehicle if you did not pay the account?"

*H:* "That's correct, he did not threaten directly, it was more indirectly."

What is of significance in this connection, is that Mr Henwood did not take up with Mr Heaton the matter of the defendant's being required to pay its



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outstanding account, that is to say, he did not give Mr Heaton an opportunity to explain why the defendant was being required to pay its outstanding account. Had he done this Mr Heaton might have given the simple answer that Mr McGregor had led him to believe that that was part of the overall settlement but that he would refer to Mr McGregor to check the position. In other words, so far as Mr Henwood was concerned, he merely assumed the worst without seeking to clarify the position with Mr Heaton. That being so, it is not unfair to say that the duress complained of by the defendant's Mr Henwood was entirely imagined and, therefore, self-induced.

To compound matters for the defendant, Mr Henwood further testified that at the time he paid the defendant's outstanding account by cheque, he thought it better to pay and sort out the problems later.

The following exchange between counsel and Mr Henwood ("H") when the latter was under cross-examination is particularly pertinent in this regard.

*Counsel:* "Is it not correct that it was later that night when you thought of what had happened that you decided to countermand payment on the cheque?"

*H:* "Correct"

*Counsel:* "And you did so the next day?"

*H:* "Correct"

*Counsel:* "So at the time you gave the cheque to Mrs Brown on the afternoon in question it was not your intention to stop payment?"

*H:* "No, it was not".

Again, it is of interest to note the following exchange between counsel and Mr Henwood ("H")

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when the latter was being re-examined by his counsel.

*Counsel:* "When you handed over the cheque, you testified that you hoped to negotiate?"

*H:* "Correct, that is why I said to her there are one or two things that needed to be sorted out but we'll sort them out later, up until that stage she was aware that the account was in dispute as she'd already had two letters written to her and I personally phoned her on one occasion".

Finally, there was the damning reply given by Mr Henwood ("H") to his counsel towards the end of the latter's re-examination of Mr Henwood.

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ROBINSON J

*Counsel:*"When you gave the cheque for $12 000 to Mrs Brown, was it your intention that the cheque would be kept by Cairns?"

*H:* "I don't understand the question."

Counsel repeats his question.

*H:* "That is correct".

In other words, from the exchanges quoted above it appears clear that at the time he handed over the defendant's cheque for $12 731,21 to the plaintiff's Mrs Brown, Mr Henwood did so voluntarily, with the intention that the plaintiff should keep and cash the cheque and that it was only when he reflected on the matter later that night that he rebelled against the idea of the defendant's paying the plaintiff the defendant's outstanding account for $12 731,21 and therefore countermanded payment of the cheque the next day.

In the circumstances the court finds that the defendant has failed to prove the defence of duress of goods on which it relies and that, accordingly, the plaintiff is entitled to judgment, with costs, including the reserved costs of its application for summary judgment, for the capital amount of its claim.

On the question of interest, the defendant had no objection to the amendment sought by the plaintiff, which was therefore granted, that its claim for interest at the rate of 10% per annum be amended and substituted by a claim for interest at the prescribed rate from 3 May 1991 to the date of payment.

In the premises, the court makes the following order:

> That judgment, with costs, including the costs of the plaintiff's application for summary judgment, is hereby entered against the defendant in the sum of $12 731,21 together with interest thereon at the prescribed rate *a tempore morae*, that is to say, at the rate of 10% per annum from 3 May 1991 to 5 September 1991, at the rate of 12,5% per annum from 6 September 1991 to 9 September 1993 and at the rate of 25% per annum from 10 September 1993 to the date of payment.

*Winterton, Holmes & Hill*, plaintiff's legal practitioners

*Coghlan, Welsh & Guest*, defendant's legal practitioners

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## S v CHOGUGUDZA 1996 (1) ZLR 28 (SC)

**Court** **Supreme Court, Harare**

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

Criminal appeal

5 December 1995 & 8 January 1996 Judgment No. S-243-95

### Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(3) and 18(13)*(b)* - right to be presumed innocent until proved guilty - provision whereby the burden of proving certain facts can be laid on the accused - extent to which such burden may be placed on the accused

Criminal law - statutory offences - Prevention of Corruption Act [Chapter 9:16] - s 4*(a)* - public officer doing something that is inconsistent with his duty as such - presumption under s 15(2)*(e)* whereby public officer who did an act to the favour or prejudice of any person did so for the purpose of showing favour or disfavour to that person - constitutionality of presumption

Evidence - onus - on accused person - extent to which enactments creating offences may place onus on accused to prove his innocence

### Headnote

The appellant was a public prosecutor at the magistrates courts in Harare. In July 1992, two foreign nationals were brought before the court for remand on charges of theft of motor vehicles. The request for remand form submitted by the police opposed bail. The two suspects were remanded in custody for a month, not having applied for bail. At the resumed hearing, they were represented by a legal practitioner, who applied for bail. The appellant, on behalf of the State, opposed bail. The magistrate, having initially reserved judgment, refused bail and further remanded the suspects in custody. Thereafter, unknown to the appellant, the suspects' legal practitioner took steps to appeal to the High Court against the magistrate's ruling. On the next remand hearing, the appellant,



without the suspects having made a further application for bail, told the magistrate that he now consented to the suspects being admitted to bail. Before doing so, he had consulted neither the Attorney-General's Office, nor his immediate superior, nor the police. He had not advised the suspects' legal practitioner either; he only discovered that bail had been granted when he went to court to process the appeal to the High Court. The appellant shortly after that left Government service. At a later remand hearing, the appellant now appeared for the suspects and obtained a relaxation of the bail conditions. One of the suspects then fled Zimbabwe; the other was apprehended trying to do so.

On these facts, the appellant was convicted of contravening s 4*(a)* of the Prevention of

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Corruption Act [*Chapter 9:16*], in that he had acted contrary to his duty as a public officer for the purpose of showing favour to the two suspects. Under s 15(2)*(e)* of the Act, it having been shown that he did an act which was to the suspects' favour, an onus was then cast on him to show that he did not do the act with the purpose of showing favour. The trial court found that he had not discharged the onus and convicted him. He was sentenced to 15 months' imprisonment, of which 8 months were suspended on conditions. He appealed against both conviction and sentence. The main point taken in the appeal against conviction was that, had it not been for the presumption placed upon him, the appellant could not have been convicted. The question then arose whether and to what extent the presumption was saved by s 18(13)*(b)* of the Constitution, which provides that nothing contained in any law is in contravention of s 18(3)*(a)* (which provides that every person charged with an offence is presumed innocent until proved guilty) -

> "to the extent that the law in question imposes on any person charged with a criminal offence the burden of proving particular facts".

Held, that it is clear that s 18(13)*(b)* could not be construed as validating a law which actually imposed on the accused the burden of proving his innocence or disproving his guilt.

Held, further, that the following guidelines emerged from the case law:

(1) any presumption must not place the entire onus on the accused; there is always an onus on the State to bring him within the general framework of an enactment before any onus may be placed on him to prove his defence;

(2) the presumption may relate to a state of mind, that is an intention, where the element of the crime is a fact exclusively or particularly within the knowledge of the accused;

(3) a presumption will be regarded as reasonable if it places an onus upon the accused where proof by the prosecution of such a specific



fact is a matter of impossibility or difficulty but where the fact is well known by the accused;

(4) the presumption must not be irrebuttable.

Held, further, that s 18(13)*(b)* of the Constitution did no more than codify or carry forward what was already allowed under the common law, namely, that a reverse onus may be placed on the accused, but did not specify the limits of what was permissible.

Held, further, that a presumption of fact was compatible with the presumption of innocence if it could be shown by the State, due regard being paid to the enacted conclusion of the legislation, that the fact to be proved rationally and realistically follows from that proved; and also if the presumption is no more than is proportionate to what is warranted by the nature of the evil against which society requires protection. On this basis, some presumptions will be justifiable, others not; whether they are will depend on whether it remains primarily the responsibility of the prosecution to prove the accused's guilt to the required standard and whether the presumption is reasonably imposed. The test of proportionality in particular provides useful guidance, since it

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is the need to balance the interests of the individual and society which is at the heart of the justification of an exception to the general rule that the prosecution must establish the accused's guilt.

Held, further, that before the State could rely on the presumption in s 15(2)*(e)* of the Prevention of Corruption Act, it would have to show *(a)* that the accused was a public officer; *(b)* that in the course of his employment or in breach of his duty *(c)* he did something which, objectively considered, showed favour or disfavour to another. Once that is shown, there would be a perfectly reasonable inference that the purpose of doing the act was to show favour or disfavour. Proof of the actual purpose of showing favour is left to the accused to show; only he could say what his purpose was. The presumption created by s 15(2)*(e)* thus fell easily within the constitutional limits, being a reasonable and natural presumption from the facts proved; it impaired the rights of the accused as little as possible and related to a fact peculiarly within his knowledge.

Held, further, that the appellant came nowhere near to discharging the onus placed on him; the strong probability was that the appellant must have been induced by a gift or other consideration to act as he did.

Held, further, that corruption is viewed with abhorrence and calls for imprisonment unless there are cogent reasons to the contrary. Corrupt practices by public prosecutors are particularly serious.

Appeal dismissed.

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Cases cited:

*A-G v Chinyerere & Anor* 1983 (2) ZLR 329 (S)

*A-G of Hong Kong v Lee Kwong-kut* [1993] 3 All ER 939 (PC)

*Curtis' Est v Gronningsaeter & Anor* 1942 CPD 531

*Edgington v Fitzmaurice* (1889) 29 ChD 459 (CA)

*Katz & Khan v Germiston Town Council* 1930 TPD 373

*Miller v Min of Pensions* [1947] 2 All ER 372 (KBD)

Ex p *Min of Justice* in re *R v Jacobson & Levy* 1931 AD 466

*S v Bhulwana; S* v *Gwadiso* 1996 (1) SA 388 (CC)

*R v Blackmore & Anor* 1959 (4) SA 486 (FS)

*R v Britz* 1949 (3) SA 293 (A)

*S v Broughton's Jewellers (Pvt) Ltd* 1971 (2) RLR 276 (A); 1971 (4) SA 394 (RA)

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*R v Carr-Briant* [1943] 2 All ER 156 (CCA)

*R v Chapman* 1934 CPD 338

*R v Chaulk* (1991) 1 CRR (2d) 1

*R v Downey* (1992) 90 DLR (4th) 449 (SCC)

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

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*S v Newyear* 1995 (1) SACR 626 (A)

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*S v Taanorwa* 1987 (1) ZLR 62 (S)

*S v van der Westhuizen* 1974 (4) SA 61 (C)

*S v Zuma & Ors* 1995 (2) SA 642 (CC)

*Salabiaku v France* (1991) 13 EHRR 379

Statutes referred to:

Constitution of Zimbabwe 1980, s 18(3) and 18(13)*(b)*

Prevention of Corruption Act [*Chapter 9:16*], ss 4*(a)* and 15(2)*(e)*

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*E W W Morris*, for the appellant

Miss *B Hammond*, for the respondent

## Judgment

**Gubbay CJ:** The appellant was arraigned in the court of the regional magistrate upon a contravention of s 4*(a)* of the Prevention of Corruption Act [*Chapter 9:16*]. It was alleged that, being a public prosecutor in the employ of the Attorney-General's Office and, thus, a public officer, on 17 September 1992 he unlawfully and corruptly consented to the admission of Emmanuel Malunga and Patrick Kanyemba to bail, in the knowledge that he had no authority to do so in respect of that class of offender. To this charge the appellant pleaded not guilty. Nevertheless, he was convicted and sentenced to fifteen months' imprisonment with labour, of which period eight months were conditionally suspended for three years. He now appeals to this court against both conviction and sentence.

An important preliminary point was taken by counsel for the appellant. It was that, save for the invocation by the State of the presumption in s 15(2)*(e)* of the Prevention of Corruption Act which, so it was submitted, placed upon the appellant the onus of establishing his innocence, he could not properly have been convicted of the charge.

The presumption of innocence conferred by s 18(3)*(a)* of the Constitution of Zimbabwe upon every person charged with an offence lies at the very heart of criminal law. It finds expression in the fundamental and hallowed principle that the prosecution bears the burden of proving the guilt of the accused (instead of the accused having to prove his innocence) upon a standard of proof to be satisfied beyond a reasonable doubt (instead of proof on the balance of probabilities). This principle, which is reflected in the maxim "*in favorem vitae, libertatis et innocentiae omnia praesumuntur*" (in favour of life, liberty and innocence all possible presumptions are made), was affirmed by Davis AJA in *R v Ndhlovu* 1945 AD 369 at 386. The only common law exception to it is that where the defence is one of insanity, the burden of proof rests on the accused. See *R v Britz* 1949 (3) SA 293 (A) at 302; *S v Taanorwa* 1987 (1) ZLR 62 (S) at 65F; and generally, Hoffmann and Zeffertt *South African Law of Evidence* 4 ed at pp 513-515.

There is, however, a qualification in s 18(13)*(b)* of the Constitution. It reads:

> "Nothing contained in or done under the authority of any law shall be held to be in contravention of -
>
> *(a)* ...



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> *(b)* subsection (3)*(a)* to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts."

The immediate questions that arise are: How far does this provision go? What particular facts

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are involved? What proportion of the facts could the accused be expected to prove? No indication is given as to where the line should be drawn. Yet what is clear is that, read in the context of the presumption of innocence, s 18(13)*(b)* cannot be construed as holding valid a statutory provision that in actuality imposes upon the accused the burden of proving his innocence or disproving his guilt.

In the resolution of these questions I have examined many cases dealing with the extent to which it is permissible for legislation to create presumptions, commonly referred to as "reverse onus provisions", against an accused. From them the following guidelines emerge:

1. The presumption must not place the entire onus onto the accused. There is always an onus on the State to bring the accused within the general framework of a statute or regulation before any onus can be thrust upon him to prove his defence. See *S* v *Broughton's Jewellers (Pvt) Ltd* 1971 (2) RLR 276 (A) at 279E-G, 1971 (4) SA 394 (RA) at 396E-F; *S* v *Marwane* 1982 (3) SA 717 (A) at 755H-756C.

2. The presumption may relate to a state of mind, that is, an intention, where the element of the crime is a fact exclusively or particularly within the knowledge of the accused. See *Katz & Khan v Town Council of Germiston* 1930 TPD 373 at 376; Ex p *Minister of Justice:* In re *R v Jacobson & Levy* 1931 AD 466 at 470-471. The proposition that a state of mind is a fact has never been doubted since the famous *dictum* of Bowen LJ in *Edgington v Fitzmaurice* (1889) 29 ChD 459 (CA) at 483 that -

   > "... the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else."

   See also *Curtis' Estate v Gronningsaeter & Anor* 1942 CPD 531 at 540; *R* v *Blackmore & Anor* 1959 (4) SA 486 (FS) at 493H; *S* v *Pineiro* 1993 (2) SACR 412 (Nm) at 418A.



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3. A presumption will be regarded as reasonable if it places an onus upon the accused where proof by the prosecution of such a specific fact is a matter of impossibility or of difficulty; whereas such fact is well known to the accused. See *R* v *Chapman* 1934 CPD 338 at 341; *R* v *Michelson* 1939 AD 10 at 15; *R v Mahabeer* 1945 NPD 130 at 132; *R* v *Maseko* 1946 TPD 263 at 268; *R v Rabinowitz & Ors* 1950 SR 77 at 80, 1950 (3) SA 279 (SR) at 282H; *S* v *Schoenfeld* 1963 (4) SA 77 (T) at 81E-F; *S* v *Pineiro supra* at 415b.

4. The presumption must not be irrebuttable: *R* v *Rabinowitz & Ors supra* at 80 and 282D-E respectively; *S* v *Schoenfeld supra* at 81D.

Under s 4*(a)* of the Prevention of Corruption Act, an offence is committed when -

*(i)* a public officer

(ii) in the course of employment

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(iii) does anything contrary to or inconsistent with his duty

(iv) for the purpose of showing favour or disfavour to any person.

But by virtue of s 15(2)*(e)* of the Act, if it is proved in any prosecution for an offence in terms of s 4 that -

*(i)* a public officer

(ii) in breach of his duty as such

(iii) did anything to the favour or disfavour of any person "it shall be presumed, **unless the contrary is proved**, that he did ... the thing for the purpose of showing favour or disfavour, as the case may be, to that person" (my emphasis).

The plain language of s 15(2)*(e)* mandates that the presumption will stand unless proof to the contrary is adduced by the public officer, who is the accused. It is a presumption rebuttable at his instance. It imposes a legal burden upon him which must be discharged on a balance of probabilities. It is not discharged merely by raising a reasonable doubt. In *R* v *Carr-Briant* [1943] 2 All ER 156 (CCA) Humphrey J, renowned for his knowledge and experience of criminal law, made the point at 158 *in fine* - 159A in these words:

> "... in any case where, either by statute or at common law, some matter is presumed against an accused person unless the contrary is proved', the jury should be directed that it is for them to decide whether the contrary is proved; that the burden of proof required is less than that required at



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> the hands of the prosecution in proving the case beyond a reasonable doubt; and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish."

See also *S v Ramara* 1965 (4) SA 472 (C) at 474A-B; *S* v *Mhlongo* 1967 (4) SA 412 (N) at 416B-D; *S* v *Nduka* 1972 (1) SA 231 (E) at 232H-234H; *S* v *Zuma* 1995 (2) SA 642 (CC) at 653H-I; *S* v *Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC).

It is apparent, then, that before the State can rely on the presumptive proof of s 15(2)*(e)* of the Act, it must establish beyond a reasonable doubt the following factual premises:

*(i)* that the accused is a public officer;

(ii) that in the course of his employment and in breach of his duty

(iii) he did something which, objectively considered, showed favour or disfavour to another.

This leaves proof of the **purpose** of showing favour or disfavour to the accused to discharge. It is an element that may be described as -

*(a)* a particular fact (a state of mind)

*(b)* a matter which he should know and can easily prove

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*(c)* a matter difficult for the State to prove.

The presumption does not have the effect of requiring the accused unfairly to discharge a major ingredient of the offence for no reason at all. A strong suspicion will have been created on the facts proved by the State from which a permissible inference could be drawn that the purpose was to show favour or disfavour. The accused is simply called upon to reveal something peculiarly within his knowledge - why he acted as he did. This seems to me essentially an exercise in common sense.

As I have mentioned, the exception to the presumption of innocence in s 18(13)*(b)* of the Constitution does not define the facts the proof of which may be placed on the accused. It does no more than codify or carry forward what was already allowed under the common law, namely, that a reverse onus may be placed on the accused. In other words, what the framers of the Constitution intended to convey, without specifying the exact limits, was that it is permissible for the legislature to enact reverse onus provisions in conformity with the guide-lines developed by the common law.

Section 18(13)*(b)* has no counterpart in either the Canadian Charter of Rights



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and Freedoms or the South African interim Constitution (Act 200 of 1993). In both if, as a result of a preliminary enquiry, the statutory presumption is shown to be in breach of the right to be presumed innocent, the court must proceed to consider whether such presumption is nonetheless saved as being reasonably justifiable in a free and democratic society (see, respectively, s 11*(d)* as read with s 1, and s 25(3)*(c)* as read with s 33(1)*(a)*).

In Canada, a presumption will be held to be constitutional if it passes a proportionality test. It must *(a)* be rationally connected to the objective and not arbitrary, unfair or based on irrational considerations; *(b)* impair the right or freedom as little as possible; and *(c)* be such that its effect on the limitation of the right and freedom is proportional to the objective. See *R* v *Chaulk* (1991) 1 CRR (2d) 1 at 26-30; *R* v *Downey* (1992) 90 DLR (4th) 449 (SCC) at 465g-466b. The position in South Africa is similar. See *S* v *Zuma supra* at paras 21-25; *S* v *Bhulwana; S v Gwadiso supra* at paras 12 and 17-18.

More analogous to the situation under ss 18(3)*(a)* and 18(13)*(b)* is art 6(2) of the European Convention on Human Rights and art 11(1) of the Hong Kong Bill of Rights Ordinance [*Chapter 383*]. Each guarantees the right to be presumed innocent until proved guilty according to law, yet does not expressly sanction a reverse onus. Nonetheless, it has been held that a reverse onus provision is permissible within certain limits. This is demonstrated in the judgment of the European Court of Human Rights in *Salabiaku v France* (1988) 13 EHRR 379 where at 388 para 28 it was said:

> "Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

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In much the same vein are the words of Lord Woolf in *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] 3 All ER 939 (PC) at 949c-d:

> "Placing to one side for the moment the decisions in Canada, all of the many decisions in different jurisdictions to which their Lordships were referred recognise that provisions similar to art 11(1) (of the Hong Kong Bill of Rights) are always subject to implied limitations so that a contravention of the provisions does not automatically follow as a consequence of a burden on some issues being placed on a defendant at a criminal trial."

In *R* v *Sin Yau Ming* [1992] HKCLR 127 (CA) the Hong Kong Court of



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Appeal held that a mandatory presumption of fact was compatible with the presumption of innocence if it could be shown by the Crown, due regard being paid to the enacted conclusion of the legislature, that the fact to be proved rationally and realistically follows from that proved; and, also, if the presumption is no more than is proportionate to what is warranted by the nature of the evil against which society requires protection. One of the presumptions with which the court was concerned provided in effect that if the accused was proved to have had more than a certain quantity of dangerous drugs it would be presumed, until the contrary was proved, that he had such drugs in his possession for the purpose of trafficking therein. Clearly the presumption related to an intent on behalf of the accused. On the facts the court declined to uphold the presumption. But it did so on the ground that the amount of drugs to trigger the presumption was so low that it was not in excess of the average addict's daily consumption.

In *Attorney-General of Hong Kong v Lee Kwong-kut supra,* Lord Woolf, giving the opinion of the Board, pointed out that there was a degree of flexibility implicit in art 11(1) of the Hong Kong Bill of Rights. He went on to say at 950c-h:

> "There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict applications of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt. Take an obvious example in the case of an offence involving the performance of some act without a licence. Common sense dictates that the prosecution should not be required to shoulder the virtually impossible task of establishing that a defendant has not a licence when it is a matter of comparative simplicity for a defendant to establish that he has a licence ...
>
> Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which art 11(1) enshrines. The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory provision will be important. However, what will be decisive



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> will be the substance and reality of the language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in *Leary v US* 395 US 6 (1969) at 36, it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact

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on which it is made to depend'."

At 952 *in fine* - 953a the learned Lord of Appeal in Ordinary remarked that where there was real difficulty and the case came close to the borderline, regard could be had to the tests which have been identified in Canada. He added, however, that these tests are not to be applied rigidly or cumulatively, nor the results achieved to be considered conclusive; and that the test of proportionality in particular provides useful guidance, since "it is the need to balance the interests of the individual and society which are at the heart of the justification of an exception to the general rule".

Viewed against the common law limits and guide-lines previously set out, as well as the features referred to in *Attorney-General of Hong Kong v Lee Kwong-kut supra* (respectfully approved as applicable to ss 18(3)*(a)* and 18(13)*(b)*), I am satisfied that the presumption in s 15(1)*(e)* of the Prevention of Corruption Act falls easily within constitutional limits. It is a reasonable and natural presumption flowing from the facts proved. It impairs the rights of the accused as little as possible and relates to a fact peculiarly within his own knowledge.

In my opinion, it would be a perfectly reasonable inference, even without the presumption created by s 15(2)*(e)* of the Act, to conclude that if the State proved that the accused, in breach of his duty as a public officer, did or omitted to do something that was to the favour or prejudice of any person, he would have a case to answer. Only he could say that he did not do the act for the purpose, or with the intention, of showing favour or disfavour.

In any event, I consider that the use of the presumption is justified by the fundamentally important legislative objective of controlling the spread of corruptive practices in this country. Insofar as this offence is concerned, societal interests outweigh individual interests.

It is for these reasons that the preliminary submission fails. The propriety of the conviction must be adjudged therefore on the basis that it was for the appellant to disprove on a balance of probabilities that he had an innocent

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purpose or state of mind in showing favour to the two alleged motor car thieves, Malunga and Kanyemba.

The facts of the case are somewhat unusual.

On 1 April 1992 the appellant entered the employment of the Ministry of Justice, Legal and Parliamentary Affairs as a public prosecutor. After a two-month period he was assigned to prosecute in court six at the Harare magistrate's court. Court six deals exclusively with remands of accused persons and their applications for bail.

During the last few days of July 1992 Malunga and Kanyemba, both Zambian nationals, were apprehended while attempting to smuggle two stolen motor vehicles from Zimbabwe into Zambia. On 3 August 1992 the two appeared in court six. They were unrepresented and were remanded in custody to 17 August 1992. Neither applied for bail.

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The Request for Remand Form 242, signed by the investigating officer, had been handed to the appellant. It bore on its face an instruction from one of the Attorney-General's officers that, on the grounds detailed therein, the Attorney-General was opposed to the grant of bail. These were that the accused were foreigners and likely to abscond; and if released could well resume stealing motor vehicles in Zimbabwe for removal to Zambia.

The instruction was in accord with a circular previously issued to prosecutors by the Director of Public Prosecutions. It drew to their attention that in terms of ss 7 and 10 of the Criminal Procedure and Evidence Amendment Bill 1992, which was shortly to become law, magistrates would be empowered no longer to grant bail to persons charged with certain scheduled offences, which included theft of a motor vehicle, without the specific consent of the Attorney-General.

There was also in operation at the Harare magistrate's court a system of weekly meetings whereat the senior public prosecutor would explain to the prosecutorial staff, who were required to attend, the need for liaison between himself and the Attorney-General's Office before any bail application by alleged motor car thieves was consented to.

On 17 August 1992 Malunga and Kanyemba were again remanded in custody for two weeks. Meanwhile a relative, Annah Malunga-Mhende, had instructed a legal practitioner, Mr David Drury, to apply for them to be admitted to bail.

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This Mr Drury did, after having arranged for his clients to be brought before the magistrate in court six on 18 August 1992. Evidence was led from Mrs Mhende that she was prepared to furnish the two accused with a place of abode in Harare pending the determination of the trial. There was also the offer made by her of the surrender of the title deeds to an immovable property as part of the suggested bail conditions.

The appellant was the prosecutor in court six. Another prosecutor, one Makwakwa, who was inexperienced, was his understudy at the time. The appellant strenuously opposed the application, contending that the accused were facing extremely serious charges, and being foreigners of no fixed abode were likely to abscond if set free. The presiding magistrate reserved judgment to 20 August 1992. On that day he dismissed the application on the basis advanced by the appellant and remanded the two accused to 3 September 1992.

Thereafter, and unknown to the appellant, Mr Drury was instructed to appeal against the ruling to the High Court. He proceeded to prepare the necessary papers for such an appeal.

On 28 August 1992 the Criminal Procedure and Evidence Amendment Act 1 of 1992 became operative. The magistrate in court six, the appellant and Makwakwa only became aware of this several weeks later.

On 3 September 1992 the appellant, who by then was prosecuting mainly in court one but still lending assistance, when required, to Makwakwa in court six, appeared before the magistrate in that court. He announced his consent to Malunga and Kanyemba being admitted to bail on

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condition that each reported to the police three days a week and deposited the sum of $5 000 in cash. The magistrate made the order requested. In acting as he did, the appellant neither consulted the Attorney-General's Office nor advised the senior public prosecutor of his intention. He did not contact the investigating officer to determine if the docket had been completed. He did not even inform Mr Drury that he was now of the opinion that his clients should be admitted to bail and that he was prepared to withdraw his previous opposition. Furthermore, after their admission to bail, the appellant failed to tell Mr Drury of what he had done.

A day or so later Mr Drury, having prepared the appeal papers in draft, went to the Harare magistrate's court to ascertain whether the record of the proceedings of 18 August 1992 had been transcribed and was available for



the High Court hearing. Purely by chance he encountered Mrs Mhende in the office of the clerk of court. She informed him that the two accused had been granted bail (Malunga met the bail conditions on 3 September and Kanyemba on 17 September). This surprised Mr Drury. He went in search of the appellant to establish what had happened. After some hesitation the appellant explained that he had been approached by a relative of the accused with the information that the title deeds to immovable property could be pledged to the State as security for them standing trial. This, he said, had caused him to change his mind and consent to bail. Mr Drury was perplexed at the explanation, for the availability of the title deeds was one of the proposals he had addressed to the magistrate on 18 August 1992 in the presence of the appellant; yet bail had been opposed.

Having tendered notice of resignation on 1 September 1992, the appellant joined a firm of legal practitioners, as a professional assistant, the following month.

On 2 November 1992 the appellant obtained the consent of the senior public prosecutor to the partial relaxation of Malunga's and Kanyemba's reporting condition. He then appeared on their behalf in court six and was granted the requisite alteration by the magistrate. He also applied for the accused to be remanded to 4 January 1993. This lengthy remand was allowed.

Both accused were in default of appearance on 4 January 1993. Malunga was later arrested at Victoria Falls border post while attempting to drive another stolen vehicle into Zambia. Kanyemba absconded successfully.

This scenario was uncontentious at the trial. In addition, there was the telling evidence of the magistrate and Makwakwa, disputed by the appellant, that in court six on 3 September 1992, no verbal application had been made by either Malunga or Kanyemba prior to the appellant indicating that he was prepared to consent to their admission to bail.

The appellant denied in evidence that he had seen the instruction endorsed on Remand Form 242 or that he was aware of the circular issued by the Director of Public Prosecutions. He further maintained that he had not attended any meeting of prosecutors at which the standing

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orders in respect of bail to alleged motor car thieves was discussed.

The regional magistrate resolved these conflicts in favour of the State. In my view, there was every justification to disbelieve the appellant's contrary





assertions. Neither the magistrate nor Makwakwa had any motive to testify falsely, and they corroborated each other as to what occurred on 3 September 1992. It is also inconceivable that the appellant, who must have read the remand form, could have failed to notice the very plain instruction written thereon by the Attorney-General's officer; and, furthermore, that he would have remained oblivious of both the circular and the standing orders.

In short, the appellant, in the circumstances pertaining, acted contrary to his duty as a public officer and showed favour to the two accused. No other conclusion is possible from his extraordinary conduct in not informing the Attorney-General, the senior public prosecutor, the investigating officer and especially Mr Drury, that he had changed his mind and considered bail should be granted. It is, moreover, incomprehensible that the appellant, being totally unmoved by the offer to surrender the title deeds made by Mr Drury on 18 August 1992, would have become persuaded by precisely the same offer just two weeks later; and then have omitted to recommend to the magistrate that the title deeds be surrendered as one of the conditions of bail.

The *actus reus* of the offence of contravening s 4*(a)* of the Prevention of Corruption Act having been proved by the State, it was for the appellant to displace the presumption by satisfying the trial court that his purpose of showing favour was legitimate - that in doing what he did, he had acted with an innocent state of mind. It was not for him to establish that his evidence on this aspect was necessarily true - only that on a preponderance of probabilities it was true. See *S* v *Ndlovu* 1983 (4) SA 507 (ZS) at 510D-G; *Miller v Minister of Pensions* [1947] 2 All ER 372 (KBD) at 374A-B.

I entertain no doubt whatsoever that the appellant came nowhere near to discharging the burden placed upon him by s 15(2)*(e)* of the Act. The strong probability arising from his inexplicable behaviour of 3 September 1992 and, thereafter, in arranging for a reduction of the reporting condition with a long remand, is that he must have been induced by a gift or consideration to act as he did. Why should he, no longer a prosecutor but in private practice, in the knowledge that Mr Drury represented the two accused, gratuitously involve himself? Furthermore, it was far too much of a coincidence that the appellant, as he would have the court believe, fortuitously encountered the two accused at the Harare magistrate's court on 2 November 1992.

The probabilities apart, it must not be overlooked that the appellant was found to be an evasive and untruthful witness. Unless therefore this court considers that such criticisms were unwarranted - which I hasten to add



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it does not - the presumption of a corrupt purpose, by virtue of that finding alone, was not rebutted. See *S* v *Nhari & Ors* S-9-87 (not reported) at p 16.

This brings me to the matter of sentence. Any form of corruption is rightly viewed by the courts with abhorrence. It is a dangerous and insidious evil in any country, particularly in a developing one. It is difficult to detect and more so to eradicate. If unchecked or inadequately punished, it will disadvantage society by depriving it of good, fair and orderly administration. Deterrence and public indignation are the factors which must predominate above all others in the assessment of the appropriate penalty. See the remarks of Baker J in *S* v *van der Westhuizen* 1974 (4) SA 61 (C) at 65G, quoted with approval in *Attorney-General v Chinyerere & Anor* 1983 (2) ZLR 329 (S) at 332E-G and *S* v *Paweni & Anor* 1985 (2) ZLR 133 (S) at 141B-D. As a general rule, therefore, it is right to approach such cases on the basis that imprisonment is called for unless there are cogent reasons which indicate the contrary. See *S* v *Newyear* 1995 (1) SACR 626 (A) at 628i-629a.

Corrupt practices resorted to by public prosecutors, who play a crucial role in the administration of justice, are particularly serious. Prosecutors are placed in positions of authority. It is their duty to ensure that accused persons are dealt with properly and in accordance with the law. As officers of the court, their bounden obligation is to uphold the law and by their conduct set an example of impeccable honesty and integrity. A failure to do so will lead to an erosion of confidence in the minds of the public.

The appellant sorely abused the trust reposed in him. That he disgraced the good standing of his fellow prosecutors by corrupting the system of justice cannot be gainsaid. He acted for personal gain and in so doing knowingly afforded the two accused the opportunity of fleeing the jurisdiction. One of them succeeded in doing so.

I am satisfied that the punishment imposed upon the appellant represents nothing more than he deserved. There is no room for this court to interfere with it.

In the result, the appeal must be dismissed in its entirety.

McNally JA: I agree.

Korsah JA: I agree.

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Ebrahim JA: I agree.

Muchechetere JA: I agree.

*Chikumbirike & Associates,* appellant's legal practitioners

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## PHIRI & ORS v INDUSTRIAL STEEL AND PIPE (PVT) LTD 1996 (1) ZLR 45 (SC)

**Court** **Supreme Court, Harare**

McNally JA, Korsah JA & Muchechetere JA

Civil appeal

28 November 1995 & 9 January 1996 Judgment No. S-242-95

### Flynote

Employment - contract - termination - retrenchment - retrenchment allowed by Minister on certain terms and conditions - appeal against terms and conditions - whether such appeal suspends the decision to approve the retrenchment, pending the outcome of the appeal

Appeal - execution - stay - Minister approving retrenchment of workers, subject to certain conditions - appeal against such conditions but not against aproval of retrenchment - whether noting of appeal has effect of suspending Minister's approval, pending outcome of the appeal

### Headnote

Acting on the recommendation of the Retrenchment Committee, the Minister approved the retrenchment of workers employed by a company on certain terms and conditions. This approval was given by the Minister in terms of the Labour Relations (Retrenchment) Regulations of 1990 (as amended). The workers appealed in terms of the Regulations to the Labour Relations Tribunal, not against the approval to the retrenchment itself, but against the terms and conditions approved by the Minister for the retrenchment.

In an application to the High Court the workers argued that the appeal to the Labour Relations Tribunal had the effect of suspending the Minister's approval of the retrenchment package so that their contracts of employment continued in operation and their employer had an obligation to pay their salaries. In their appeal to the Supreme Court, the main issue for the court to decide was whether the appeal to the Labour Relations Tribunal had the effect claimed by the workers.



Held, that under the common law the execution of all judgments is suspended upon the noting of an appeal.

Held, further, that as the Labour Relations (Retrenchment) Regulations are silent on the effect of an appeal against the decision, the common law rule is not displaced because it can only be displaced if the legislature has expressly or by necessary implication laid down that the common law rule is not to apply.

Held, further, that the suspension of the decision on appeal applies only to the the part of the decision appealed against. What was suspended was what had been appealed against, namely the approval for the terms and conditions of the retrenchment. As the appellants had not appealed against the retrenchment itself, this part of the decision was not suspended by the

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appeal and thus the appellants were not entitled to the relief claimed, namely, payment of their salaries.

Cases cited:

*Arches (Pvt) Ltd v Guthrie Hldgs (Pvt) Ltd* 1989 (1) ZLR 152 (H)

*Bank of England v Vagliano* [1891] AC 107

*Chatizembwa v Circle Cement Ltd* HH-121-94

*Mushaishi v Lifeline Synd & Anor* 1990 (1) ZLR 284 (H)

*Reid & Anor v Godart & Anor* 1938 AD 511

Statutes and regulations referred to:

Labour Relations Act [*Chapter 28:01*], ss 97 and 101

Labour Relations (Retrenchment) Regulations 1990 (SI 404/1990)

*A G Matika*, for the appellants

*D P Carter*, for the respondent

## Judgment

**Korsah JA:** The appellants were the employees of the respondent in its Kwekwe division. On 11 November 1994, the respondent served on the appellants a notice of its intention of closing down its operations in Kwekwe as a result of the heavy losses it had incurred over the preceding two years. At that time, the majority of the employees had been stopped from working though they were still receiving their salaries and wages.

On or about 5 December 1994, the respondent served, on the appropriate authority responsible, a written notice of its intention to retrench the appellants in terms of the Labour Relations (Retrenchment) Regulations SI 404 of 1990, as amended by SI 252 of 1992 (No. 1) and as amended by SI 137 of 1994 (No. 2).



KORSAH JA

Upon the recommendations made to him by the Retrenchment Committee, the Minister, in terms of the said Regulations, approved the retrenchment of the appellants under the following terms and conditions:

"1. 6 months' pay plus 2 weeks' pay for every completed year of service.

2. Employer to meet relocation expenses according to each individual employee's needs (i.e. for transport).

3. Statutory terminal benefits:

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*(a)* Cash in lieu of notice

*(b)* Cash in lieu of leave

*(c)* Pension/Gratuity

4. Effective date of retrenchment - 28-2-95."

Aggrieved and dissatisfied with the Minister's decision, the respondent appealed to the Labour Relations Tribunal in terms of the Labour Relations (Retrenchment)(Amendment) Regulations No. 2 (SI 137 of 1994) against the conditions imposed by the Minister.

The appellants contended in their application to the High Court that the effect of the noting of an appeal to the Tribunal by the respondent against the Minister's decision was to suspend the consequences of the said determination. It was submitted that they were, therefore, still employed by the respondent and that they were ready to resume work and were tendering their services to the respondent.

It was further submitted in the court below that the respondent was in turn obliged by law to pay them their salaries and benefits from the beginning of March 1995 to the date the respondent's appeal is determined by the Labour Relations Tribunal.

The appellants also contended that they were paid up to the end of February 1995, and only advised two or three weeks after receiving the said salaries and wages that the said payments were in respect of their notice pay. It was submitted that since their retrenchment was approved with effect from 28 February 1995, the salaries and wages accruing prior to that date do not fall to be regarded as cash in lieu of notice.

While I am of the view that there is substance in this last submission the



KORSAH JA

central and sole issue for determination by this court is whether an appeal by the respondent to the Labour Relations Tribunal, in such circumstances, has the effect of suspending the Minister's approval of the retrenchment package, resulting in the continuation of their contracts of employment with the respondent and its concomitant obligation on the respondent to remunerate them. Attractive as this argument may appear to a retrenchee, a careful examination of the law is necessary to determine its competency.

"By Roman Dutch Law the execution of all judgments is suspended upon the noting of an appeal": *Reid & Anor v Godart & Anor* 1938 AD 511 at 513, *per* de Villiers JA, cited with approval by Adam J in *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H) at 154G. De Villiers JA explained that -

> "The foundation of the common law rule as to the suspension of a judgment on the noting of an appeal, is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by levy under a writ, or by the execution of the judgment in any other manner appropriate to the nature of the judgment appealed from".

I note, in passing, that *(a)* the rule is a common law rule which can be displaced by statutory

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provisions; *(b)* it is intended for the protection of the appellant against the successful party; and *(c)* it relates, naturally, to the subject matter of the appeal and not to what is unchallenged on appeal.

The respondent does not dispute the common-law rule. It also concedes "that a consideration of legislation indicates that in certain circumstances the noting of an appeal does suspend the determination appealed against and in others it does not". In illustration of this assertion it was indicated that whereas, s 97(3) of the Labour Relations Act [*Chapter 28:01*], provides that an appeal in terms of subs (1) shall have the effect of suspending the determination or decision appealed against, s 101(7) is silent on the effect an appeal to the Tribunal has on the decisions taken in terms of a code of employment. But the provision under subs (8), that on an appeal in terms of subs (7) against any determination, the Tribunal may substitute its own determination for that appealed against, postulates a suspension of the decision appealed pending a determination by the Tribunal; if it were not so, and execution were not suspended by an appeal, there would be nothing for which the Tribunal's determination could be substituted.

The respondent further conceded that its appeal to the Tribunal was not noted



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in terms of s 101 of the Act, but in terms of the Labour Relations (Retrenchment) (Amendment) Regulations No. 2 (SI 137 of 1994), which is silent on the effect of an appeal against the decision by the Minister.

There is a presumption, in the interpretation of statutes, that parliament does not intend a change in the common law, unless it expresses its intention with irresistible clearness or it follows by necessary implication from the language of the statute in question that it intended to effect such alteration in the common law; for "construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction ...": *per* Lord Halsbury LC in *Bank of England v Vagliano* [1891] AC 107 at 120.

I am of the persuasion that, in the absence of a clear indication by the law giver to the contrary, the common law position that the execution of all judgments is suspended upon the noting of an appeal, is not ousted by the silence of the statutory instrument, in terms of which the respondent's appeal to the Tribunal was lodged upon the effect of such appeal against the order made by the Minister. See *Mushaishi v Lifeline Syndicate & Anor* 1990 (1) ZLR 284 (H) at 287D.

However, it must be made clear that, in so far as the Minister approved the retrenchment of the appellants and then set out terms and conditions to be complied with by the respondent, the Minister's order was severable. It could be likened to, or is no different from, a judgment wherein a plaintiff is held liable for negligence and an award of damages is made upon the basis of the finding that he is liable. Such a plaintiff may appeal against the quantum of damages, without laying challenge to the issue of liability. Where the issue of liability is not challenged on appeal it is deemed settled for all time.

In like manner, the appellants' appeal against the Minister's order, restricting its challenge to the

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terms and conditions set by the Minister, without challenging the approval to retrench, accepts the approval to retrench for all time while laying a challenge only to the terms and conditions imposed by the Minister.

It stands to reason that where an order of a determining authority is severable, and only part of that order has been appealed, the part unchallenged on appeal still stands and is not suspended by any rule of the common law. The instant case is not on all fours with *Chatizembwa v Circle Cement Ltd* HH-121-94,



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and, for that reason, I decline the invitation to rely on the ratio in the *Chatizembwa*'s case *supra.*

Having arrived at the conclusion that the Minister's order is severable, and the respondent's appeal challenged only the terms and conditions set, it follows that the Minister's determination, approving retrenchment, stands and is not suspended; *ergo*, the appellants are not entitled to the relief sought, since, in effect their employment has been terminated by the retrenchment.

The appeal is accordingly dismissed with costs.

McNally JA: I agree

Muchechetere JA: I agree

*Scanlen & Holderness,* appellants' legal practitioners

*Coghlan, Welsh & Guest,* respondent's legal practitioners



## S v KASEKE 1996 (1) ZLR 51 (SC)

**Court** **Supreme Court, Harare**

McNally JA, Korsah JA & Muchechetere JA

Criminal appeal

30 November 1995 & 9 January 1996 Judgment No. S-245-95

### Flynote

Criminal procedure - trial - conduct of - judicial officer - extent to which may take part in the examination of witnesses

Evidence - leading questions - when may be put - trial court's discretion to permit leading questions - when appeal court may interfere with that discretion

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Evidence - sexual cases - complainant of tender years - corroboration - what is required

## Headnote

In cases of rape, where the complainant is invariably considered as a suspect witness, the court must, on the totality of the evidence adduced, consider whether the complainant is credible. Only if the court is satisfied that the complainant is credible may it proceed to look for some evidence, independent of her testimony, which shows, or tends to show (though such evidence by itself need not necessarily demonstrate) that the appellant was the offender. There is nothing technical in the idea of corroboration. If one is doubtful about whether or not to believe a particular statement, one looks to see whether it fits in with other statements or circumstances relating to the matter. The better it fits in, the more one is inclined to believe it. Extra care must be taken with regard to both aspects where the complainant is a child of tender years.

With the exception of introductory matters, or matters which are not in dispute, leading questions should not be put to a witness in examination in chief or re-examination. The trial judge or magistrate has a discretion to relax this rule whenever he considers it to be necessary in the interests



of justice; but this discretion must be exercised judicially, otherwise it will be subject to interference by a higher court.

While judicial officers are frequently cautioned not to descend into the arena, this does not mean that they must simply adopt the position of an umpire in a game, to see that neither side commits a foul. They are there to direct and control the trial according to recognised rules and procedures and to ensure that justice is not only done but seen to be done. They have the right, if not the duty, to examine witnesses or the accused in order to clarify some point in the interests of justice, but must refrain from doing so in a way which may, on the one hand, either disconcert the witness or unjustly affect the quality of his replies and, on the other hand, preclude an objective determination and adjudication of the issues that they are being called on to determine.

Cases cited:

Ex p *Bottomley & Ors* [1909] 2 KB 14

*Charles Osten & Co v Johnston* [1942] AC 130 (HL)

*DPP v Kilbourne* [1973] AC 729; (1973) 57 Cr App R 381 (HL)

Re *F (a minor)* [1976] 1 All ER 417 (CA)

*Merber v Merber* 1948 (1) SA 446 (A)

*Moor v Moor* [1954] 2 All ER 458

*S v Betserai* S-65-95

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*S v Chigova* 1992 (2) ZLR 206 (S)

*S v Chuma* 1994 (2) ZLR 284 (S)

*S v Gijima* 1986 (1) ZLR 33 (S)

*S v Hove* S-183-89 1986 (1) ZLR 33 (S)

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

*S v Katerere* S-55-91

*S v Mhlanga* 1987 (1) ZLR 70 (S)

*S v Moyo* 1992 (1) ZLR 158 (H)

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

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

*S v Ponder* 1989 (1) ZLR 235 (S)

*S v Sibanda* S-55-94

*J Tomana*, for the appellant

*T Chitapi*, for the respondent

## Judgment

**Korsah JA:** The appellant was convicted on 6 April 1995 before the regional magistrate at Harare of rape. He was sentenced to ten years' imprisonment with labour, two years of which was suspended on condition of good behaviour. He appeals both against conviction and sentence.



KORSAH JA

The appeal is based mainly on the contention that the evidence of the complainant was wrongly admitted. The reasons for challenging the acceptance of the complainant's evidence as credible are said to be:

(1) that her evidence was induced by leading questions, thus overlooking the high degree of suggestibility among young children in sexual offences;

(2) failure to appreciate that the evidence of young children relating to sexual offences is fundamentally suspect and must be treated with circumspection;

(3) error in holding that there was corroboration of the complainant's allegation of rape;

(4) error in holding that the delay in making a report to the police was not fatal to the State's

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case.

The circumstances leading to the arrest and conviction of the appellant for rape were these. The complainant, who was six years of age, and the appellant, twenty-two years old, were next-door neighbours. On 7 June 1992, the complainant went to play "hosho" with the appellant's four-year-old nephew Tatenda and seven-year-old Tendai, outside the gate at the house where the appellant was resident. The complainant alleged that the appellant dragged her into a log cabin within the compound of the appellant's premises, placed her on a bed in the cabin, removed her pants and started doing "shameful things on her". After the appellant had finished doing "shameful things on her", he threatened to assault her if the complainant made a report to her mother.

In fear of being assaulted should she make a report of the incident to her mother, the complainant told her friend Tendai, as they were about to leave home for school, that the appellant had done "shameful things on her", and that she had been ordered by him not to make a report to her mother. She alleged that she told Tendai to inform her (the complainant's mother) of what the appellant had done.

Tendai confirmed that on a certain day, the date of which she could understandably, having regard to her age, not recall, the complainant reported to her, on their way to school, that the appellant had done "shameful things on her". This, it must be noted, was the earliest report made by the complainant to a friend of similar age in whom she could confide, having regard to the ominous strictures placed on reporting by the appellant.



KORSAH JA

On a day soon thereafter, when the complainant and Tendai were playing, the complainant took away Tendai's ball and would not return it. Incensed by the complainant's refusal to return her ball to her, Tendai, in a fit of retaliation, went and informed the complainant's mother about the complainant's report to her.

This report by Tendai to the complainant's mother was, no doubt, hearsay and of no weight as to the truthfulness of the report made by the complainant. An aspect of its relevance is that it establishes the fact of the complainant making a report, at an early stage, to a friend in whom she could confide. The importance of an early complaint is that it supports the allegation of a sexual attack because it shows consistency of conduct on the part of a complainant.

The circumstances surrounding the revelation that shameful things were done to the complainant by the appellant, insofar as they were not actuated by ill-motive on the part of Tendai against the appellant but rather by anger towards the complainant for not returning her ball, lend credence to Tendai's assertion that a report was made to her by the complainant of the shameful things done by the appellant to or on the complainant.

This report by Tendai was received by the complainant's mother on 17 June 1992. Upon receiving the report, the complainant's mother instructed her younger sister, Tabeth, to enquire from the complainant as to the veracity of the statement made by Tendai. Acting upon a feedback from Tabeth, the complainant's mother requested Rebecca, the complainant's aunt,

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to examine the complainant physically. Rebecca complied with that request and advised that the complainant be taken to a clinic for the nurses to examine and determine what had happened to her.

On 18 June 1992, the complainant was taken to the clinic for examination. The complainant was examined and the sister-in-charge reported that, in her opinion, she had been raped. The medical card from the clinic was tendered as Exhibit 4.

On 20 June 1992, a meeting was convened at the complainant's parents' home, to which the appellant's mother was invited and did attend. It was intended, at the meeting, to ventilate the allegation of rape against the appellant. Any resolution arrived at by those who attended the meeting need not detain us; for we are concerned here with an allegation of a sexual attack upon a child of tender years, and not a female adult of marriageable age, whose family, with her concurrence, may accept an offer of marriage made by the offender in expiation of his sins.



KORSAH JA

On 25 June 1992, on which same date a report was made to the police, the complainant was examined by Dr Zvandasara, whose report was tendered in evidence as Exhibit 3. On 26 June 1992, the appellant was arrested and charged with the rape of the complainant.

The appellant's defence was a complete denial of the charge levelled against him. He made a statement on the day of his arrest which is illuminating and to which I shall have occasion to make reference in the course of this judgment.

It is well established in this jurisdiction that in cases of rape, where the complainant is invariably considered as a suspect witness, we follow the guiding principles approved of in *S* v *Mupfudza* 1982 (1) ZLR 271 (S). In short, the court must, on the totality of the evidence adduced, consider whether the complainant is a credible witness. It is only if the court is satisfied that the complainant is a credible witness that it may proceed to look for some evidence, independent of her testimony, which shows, or tends to show, though such evidence by itself need not necessarily demonstrate, that the appellant was the offender - corroborative evidence: *S* v *Ngara* 1987 (1) ZLR 91 (S) at 97D. In respect of this rubric, we may turn with profit to the advice by Lord Reid in *DPP v Kilbourne* (1973) 57 Cr App R 381 at 409, [1973] AC 729 at 750, that -

> "There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubtful statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."

Not only is the complainant in this case considered in law to be a suspect witness, but by virtue of her tender age of six years the law requires the court to take extra care not only that the complainant is truthful and credible, but that there has been corroboration of her testimony in a material respect implicating the appellant or confirming disputed facts: *S v Mhlanga* 1987 (1) ZLR 70 (S); *S v Ponder* 1989 (1) ZLR 235 (S); *S* v *Sibanda* S-55-94; *S* v *Betserai* S-65-95.

I agree with Mr *Chitapi* that there is some substance in the complaint by counsel for the

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appellant that leading questions were put to the complainant



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by both the prosecutor and the magistrate. Mr *Tomana,* for the appellant, supports his assertion that the complainant had to be prompted by suggestive or loaded questions with the following examples from the evidence-in-chief:

Prosecutor: You told the court that accused did shameful things to you. What was your position?

Complainant: I do not know.

Prosecutor: Were you standing or seated?

Complainant: I do not know.

Prosecutor: Now, is there a bed in the house you were taken to?

Complainant: Yes.

Prosecutor: Did accused sleep on the bed?

Complainant: Yes.

Prosecutor: Before he did shameful things to you did he have his trousers on?

Complainant: Yes.

Prosecutor: Did he at any stage remove his trousers or what did he do?

Complainant: He removed it.

Prosecutor: When he removed his pair of trousers what did he do?

Complainant: He removed my pair of pants and started doing shameful things on me.

Prosecutor: Now did the accused person or he did not produce anything from his pair of trousers?

Complainant: He did produce.

Prosecutor: Do you know what he produced?



KORSAH JA

Complainant: No.

Prosecutor: Do you know what that which he produced is used for?

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Complainant: For urinating.

Prosecutor: Now, when he produced the thing which is used to urinate, where did he put it, or did he put it anywhere?

Complainant: Yes.

Prosecutor: Where?

Complainant: Inside the trousers.

*By Court:* Where did he put it on you?

Complainant: He put it on my thing.

Prosecutor: What is that thing used for or what do you use that thing for?

Complainant: I use it for urinating.

Prosecutor: Now, when the accused inserted his thing into your thing did you feel any pain?

Complainant: No.

Prosecutor: Did you feel anything?

Complainant: No."

Mr *Tomana* submitted that the trial court had to struggle to prise from the complainant, by means of leading questions, a story suggesting that the complainant was raped by the appellant, and that the court fell into error in founding a conviction upon such evidence.

Mr *Chitapi* commented, rightly in my view, that it is a wonder that defence counsel in the trial court did not object to the leading or suggestive questions being put by the prosecutor to the complainant.

It is an elementary and well-known rule of evidence that, with the exception



of introductory or matters which are not in dispute, leading questions should not be put to a witness, either in examination-in-chief or re-examination. *Phipson on Evidence* 13 ed at para 33-35 has this to say:

> "Generally a party may not, either in chief or re-examination, elicit the facts of his case by means of leading questions - ie questions which suggest the desired answer, or which put disputed matters to the witness in a form permitting of the simple reply of yes' or no'."

This rule, as the learned author explains, "is merely intended to prevent the examination from being conducted unfairly, [but] the judge has a discretion, which is not open to review, to relax it whenever he considers it necessary in the interest of justice".

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Thus, submitted Mr *Chitapi,* while questions may take a form so leading as to be quite inadmissible, if no objection is raised to their being put, the answers to them, though irregularly obtained, are not inadmissible, but the weight they carry will vary according to the method by which they were obtained. They may be robbed of all or most of their significance: *Moor v Moor* [1954] 2 All ER 458.

In Ex p *Bottomley & Ors* [1909] 2 KB 14 at 21 Phillimore J expressed himself thus on the subject of leading questions:

> "Sir James Stephen, whose authority is of the highest, in his *Digest of the Law of Evidence* 6 ed, art 128, p 146, says this: Leading Questions - Questions suggesting the answer which the person putting the question wishes or expects to receive, or suggesting disputed facts as to which the witness is to testify, must not, if objected to by the adverse party, be asked in examination-in-chief, or in re-examination, except with the permission of the court, but such questions may be asked in cross-examination'. Then there is the opinion expressed in *Taylor on Evidence* 10 ed s 1405 pp 1012, 1013. The authority of *Taylor* is not so high as that which I have just cited, and before accepting his statement as conclusive one would prefer to look at the cases cited in support of his proposition. Those cases are *Lawder v Lawder* (1855) Ir CLR 27; *Ohlsen v Terrero* (1874) LR 10 Ch 127; and *Moody v Rowell* (1835) 17 Pick (Amer) 490. He sums up the question in these words: Indeed the judge has a discretionary power - not controllable by the Court of Appeal - of relaxing the general rule, whenever, and under whatever circumstances, and to whatever extent, he may think fit, though the power should only be exercised so far as the purposes of justice plainly require.'"



KORSAH JA

We are well aware that the exercise of discretion by a court of first instance is not sacrosanct. The above quotation from the learned author of *Taylor on Evidence* is, therefore, if it be not presumptuous of me, subject to elucidation by the addition of "if exercised judicially", after the words "not controllable by the Court of Appeal". For a court of appeal may interfere with the exercise of judicial discretion by a judge where the judge has gone wrong in principle, or it is satisfied that the judge has given no weight or no sufficient weight to those considerations which ought to have weighed with him, or that he has been influenced by other considerations which ought not to have weighed with him or weighed so much with him: *Charles Osten & Co v Johnston* [1942] AC 130 (HL) at 138, 139, 142, 147 and 148, applied in Re *F (A Minor)* [1976] 1 All ER 417 (CA) at 432-433; *Merber v Merber* 1948 (1) SA 446 (A) at 452-453.

Coupled with the allegation of eliciting proof by means of leading questions is the accusation that the trial magistrate descended into the arena by asking the following questions:

By Court: Just want you to tell step by step, how he dragged you from the gate. Was the door of this log cabin open?

Complainant: Yes.

By Court: Then you went into this log cabin together with Trust?

Complainant: Yes.

By Court: Now, you are inside this log cabin. Before he actually starts doing shameful things on you, what did Trust do first?

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Complainant: He removed his trousers.

By Court: Then what was the next thing he did?

Complainant: He removed my pants.

By Court: Then what happened, what was the next thing?

Complainant: He started doing shameful things on me.

By Court: When Trust removed his pants and removed your pants, were you both standing?



KORSAH JA

Complainant: No.

By Court: What position were you both in?

Complainant: We were lying.

By Court: Where, on the floor?

Complainant: No.

By Court: Where?

Complainant: On the bed.

By Court: Will you tell the court how you were lying on the bed?

Complainant: I do not know.

By Court: Well, I will ask you a direct question. Was Trust lying on top of you, was he lying on your side, what is the position? Now, this is the bed here, was Trust lying here, or you were lying here, or was he on top of you? What was the position?

Complainant: He was lying on top of me.

By Court: You have already told the court that you use the thing for urinating and placed it on your thing you urinate (*sic*), are you meaning he used his private parts to place them on your private parts?

Complainant: I do not know.

By Court: It is important that you tell the court because unless you tell us exactly what he did, it was just you and Trust, the two of you, so when you say he removed his thing for urinating, which part, from which part of his body?

Complainant: From inside his trousers.

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By Court: From the pocket?

Complainant: No.



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By Court: From where?

Complainant: From the trousers.

By Court: Did he have to open a zip?

Complainant: Yes.

By Court: And when you said he placed it on your thing what do you mean? You can point out to me where just he put this thing onto, you can just show it to me?

Complainant: Here (pointing towards her private parts."

The complainant's testimony, which was not solicited by means of any leading questions, supportive of the allegation of rape, was paraphrased by Mr *Chitapi,* and not controverted by Mr *Tomana,* as follows:

> "She was playing hosho' with her friends Tendai and Tatenda. The appellant dragged her into his house. He removed her pair of pants and started doing shameful things' on her. After finishing doing shameful things' on her, he threatened to beat her up if she made a report to her mother. She told her friend Tendai that the appellant had done shameful things to her and that Tendai should tell the complainant's mother. She said Tendai then told her (the complainant's) father and mother. Her mother took her to a clinic. She was asked by her mother what had happened and she told her mother that Trust did shameful things on her. She also, upon questioning, informed her aunt Tabeth that Trust did shameful things on her. She said she was not threatened or assaulted by her mother before making this revelation."

It was after the complainant had testified as above stated that the prosecutor, faced with the problem of having the complainant explain what "shameful things" she alleged were done on her by the appellant, commenced putting the questions now being objected to as leading, but to which at the trial no exception was taken.

To put the evidence in its proper setting, the complainant and Tendai were six-year-old children who were oblivious of dates of the year and could not fix the date when the alleged offence occurred, or when a report of it was made to Tendai. These dates were furnished by the appellant himself in his



KORSAH JA

extra-curial statement, in which he stated that at about 3 pm on 7 June 1992, he was playing with the complainant and a child, by name Trevor aged two years, in a house built of planks behind the main house. While this statement contradicts the complainant's assertion that she was dragged into the cabin, it establishes her presence in the cabin at a material time, as will

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soon become clear.

The question: "Now, is there a bed in this house?", to which the complainant gave an affirmative reply, has been stigmatised as a leading question rendering the complainant's testimony suspect. Yet the appellant himself admitted in evidence on oath that there was a bed in the cabin where he played with the complainant and Trevor on 7 June 1992. The complainant was, therefore, a witness of truth on this issue. Indeed the appellant stated in his extra-curial statement that he was asleep while these children were playing on top of him.

The prosecutor elicited through leading questions, not objected to at the time, that the appellant had on a pair of trousers which he took off and then removed the complainant's pants and did shameful things. The removal of the complainant's pants was something she mentioned before the leading questions were put to her, as were the "shameful things done on her", the elucidation of which strayed into the putting of leading questions.

The appellant, in his extra-curial statement, said that on 8 June 1992 he heard Tendai from next door telling other children that he had done something bad to the complainant. Since Tendai, from the testimonies of both the complainant and the appellant, was not present in the cabin when whatever happened did occur, the complainant's testimony, as well as that of Tendai, that a report was made to Tendai, was borne out by the admission in the appellant's extra-curial statement, and I deduce that the report to Tendai was made timeously, either on the same day or the day following the occurrence complained of.

Why, out of the blue, would a girl aged six, who has no knowledge even of the names given to sexual organs, but only that they are used for urinating, concoct a story such as she told to Tendai? It must be appreciated that she experienced something at the hands of the appellant which, even to the infant mind of the complainant, was "shameful". In fact a deed so shameful, that it would ignite the wrath of her mother and invite chastisement, and so she sought solace by confiding in her friend Tendai, of her peer group, soon after the event.



KORSAH JA

Desirous of avoiding the likelihood of erring either way, the magistrate sought from the complainant a clarification of what actually transpired between her and the appellant. Having regard to her age, the magistrate announced that she was going to put a direct question to her in relation to the positions of the complainant and the appellant on the bed. The object of the exercise was to shed light on the vague phrase "shameful things", employed by the complainant in describing her experience, so as not to do injustice to the appellant by jumping to conclusions unwarranted. In *S v Hove* S-183-89 Gubbay JA (as he then was) said at p 5 of the report:

> "Judicial officers have been cautioned with some frequency not to descend into the arena, but this does not mean that they must merely adopt the position of an umpire in a game to see that neither side commits a foul. They are there *to direct and control the trial according to recognised rules and procedures* and to ensure that justice is not only done, but is manifestly seen to be done. Though they have the right, if not the duty, to examine witnesses or the accused in order to clarify some point in the interests of justice, they must refrain from doing so in a way, or to such an extent, as may, on the one hand, disconcert the witness or unjustly affect the quality of the nature of his replies and, on the other, preclude an objective appreciation and adjudication of the issue they are called upon to determine. If the manner of questioning is such as to sustain the inference of a lack of impeccable impartiality and

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> open-mindedness, then the fundamental prerequisite of a fair trial has not been attained."

Having regard to the tender age of the complainant, it was in the pursuit of justice that the magistrate put to the complainant the questions that she did. The appellant himself had admitted in his extra-curial statement the presence of the complainant on the bed. All that was left was to ascertain the positions taken by these two persons when the alleged foul deed was done. The complainant in cross-examination did not detract from her assertion that "he placed his thing on my thing".

There is no foundation for the criticism that the magistrate failed to appreciate that she had to approach the evidence of a child in a sexual offence with care and circumspection. Her awareness of her duty to so treat the evidence of a child is illustrated by this passage in her judgment:

> "Because the complainant is a child, the court then took upon itself to clarify certain points to make sure that the child was telling the truth."



KORSAH JA

As may be observed from what has been said, she was not paying mere lip-service to this rule.

Of corroboration there was ample evidence. While the report to Tendai does not constitute corroboration of the complainant's assertion, it is illustrative of consistency. The appellant himself admitted that on 7 June 1992 the complainant was in his cabin. He heard Tendai level an accusation against him that he had done something bad to the complainant on 8 June 1992. On 18 June 1992 the sister-in-charge of the clinic, upon examination of the complainant, was of the opinion that she had been raped. On 20 June 1992 a meeting was held with the appellant's mother to discuss what her son had done to the complainant. On 25 June 1992 Dr Zvandasara examined the complainant and observed that the right side of the entrance to her vagina (vestibule) was eroded and the hymen torn. All this leads irresistibly to the conclusion that the complainant was ravished by the appellant.

Mr *Chitapi* rightly conceded that the magistrate fell into error, even in her reply to the grounds of appeal, in holding that the making of a report by the complainant and her repetition of the same account in court constituted corroboration. A witness cannot corroborate himself/herself. Such evidence must spring from an independent source. Mr *Chitapi,* however, submitted, again rightly in my view, that this misdirection by the magistrate did not result in any miscarriage of justice, regard being had to other pieces of corroborative evidence: *S v Ngara supra* at 97A-F.

The appellant's testimony in court contradicted what he had stated in his extra-curial statement. He alleged that Tendai was not allowed to play in his house and because the complainant was playing in his house and would not heed Tendai's invitation to come and play with her outside, Tendai threatened to tell the complainant's mother that the complainant was playing with boys and doing obscene things. This is very different from what is recorded in his extra-curial statement, that it was a day after the complainant had visited his cabin that he heard Tendai tell other children that he had done bad things to the complainant.

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The appellant's defence was an outright denial of any wrongdoing. He alleged that because of hatred between his family and that of the complainant, the complainant's mother had coached the complainant to cry rape, when nothing untoward had happened, in order "to get the court to fix him".

If such hatred existed between the two families, the complainant would not





have been allowed to play at the appellant's family home on almost a daily basis. Nor, indeed, would the complainant's family have convened a meeting for a resolution of the problem, before lodging a complaint with the police.

The magistrate also found corroboration in the lies told by the appellant in evidence: *S v Gijima* 1986 (1) ZLR 33 (S) at 38-39; *S v Mhlanga supra* at 78B-C; *S v Katerere* S-55-91; *S v Chigova* 1992 (2) ZLR 206 (S).

The magistrate, for the reason above given, likewise rejected the danger of false incrimination from motives of ill-will. It was obvious that the complainant had not been coached, hence her difficulty in explaining to the court how the "shameful things" had been perpetrated on her.

The horrors of the effect of rape on victims, especially child victims, have been underscored and well chronicled in many articles and judgments. In *S v Chuma* 1994 (2) ZLR 284 (S) this court refused to endorse the view expressed in *S v Moyo* 1992 (1) ZLR 158 (H) that "anyone who rapes and sexually abuses a child should serve an effective sentence of ten years".

While the rampancy of the offence has been awesome world-wide and has attracted increased sentences to safeguard the public as well as deter would-be offenders, a discretion is reposed in the judicial officer to impose a sentence befitting both the offender and the offence.

I am in agreement with Mr *Chitapi* that a reading of the reasons for imposing the sentence that the court did impels one to the conclusion that the magistrate was swayed more by emotion than reason. But, in offences of a sexual nature, the disparity in the ages of the offender and the victim carries great weight. One cannot over-stress the duty the courts owe to society in protecting children of tender years who cannot fend for themselves. I doubt very much that an adult female is more traumatised by rape than a tender child, who cannot express her horror, except where the rape of the adult is accompanied by violence. Such tragic events tend to leave an indelible impression on the minds of the victims - whether adult or child.

It seems to me that the duty owed by the court to society to protect children must be expressed in sentences reflecting its disapprobation of behaviour such as this towards children who place trust in their assailants.

The only mitigatory features to which the appellant can lay some claim are his youth and his first incursion into crime. The complainant suffered



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KORSAH JA

physical injury which was visible to a doctor almost three weeks after the event. My only concern is that the sentence this offence merits would be a custodial term of a lengthy period. Mindful of the wisdom in the statement by Manyarara JA in *S v Kanhukamwe* 1987 (1) ZLR 158 (S) at 160F that: "where an offender is incarcerated for a substantial period, he should not need any further encouragement to behave himself after release", I am of the view that the sentence imposed should be interfered with.

The sentence imposed is hereby set aside and substituted with the following:

> "The accused is sentenced to seven years' imprisonment with labour".

McNally JA: I agree.

Muchechetere JA: I agree.

*Ziumbe & Mtambanengwe,* appellant's legal practitioners.

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## MURWARA v VALETA 1996 (1) ZLR 67 (SC)

**Court** **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

9 & 15 January 1996 Judgment No. S-1-96

### Flynote

Appeal - late noting of - condonation - requirement to apply for condonation instead of simply appearing

Legal practitioner - conduct and ethics - senior partner belatedly instructing junior who was unaware of requirement to apply for condonation, having not been involved in case earlier - impropriety of sheltering behind junior

### Headnote

An appeal from a judgment of the magistrates court was not noted until well over a year after the judgment was delivered. No application for condonation was made, either at the time the appeal was noted, nor at the Supreme Court hearing, even though the respondent, at least four months before the hearing, took the point that the appeal was not properly before the Supreme Court. The appellant's legal practitioner had done nothing about the point raised by the respondent and instead sent a junior to appear.

Held, that the attitude of the appellant's practitioner, though not uncommon, was wrong. He should not have sat passively by after the respondent took a point which undermined the

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appellant's whole argument. Nor should he have attempted to shelter behind his junior.

Held, further, that because there was nevertheless some merit in the appeal, a postponement would be granted to allow a formal application for condonation to be made, but the appellant's legal practitioner would have to bear the wasted costs personally.

Case cited:

*Makumborenga v Marini* S-130-95 (not reported)

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1996 (1) ZLR p68

*T Mahaso*, for the appellant

*A Thompson*, for the respondent

## Judgment

**McNally JA:** This appeal involves a long-standing dispute over the assignment of rights in a property in the high density area of Mufakose.

Mr Murwara claims that Mr Valeta "sold" him the house in 1982. Mr Valeta had him evicted. Mr Murwara forced his way back in again. In terms of a spoliation order he was ejected. Mr Murwara (or, rather, for some unexplained reason, his wife) then applied *ex parte* to the High Court and somehow obtained another eviction order on a provisional basis. As a result, the Murwaras are back in occupation, and the final judgment and reasons of the High Court (Mubako J) in case No. HC 4710/94 are still awaited.

Meanwhile, we are faced with an appeal from the magistrate's court in case No. 13885/89, in which judgment was given on 22 December 1992 in favour of Mr Valeta. The magistrate declared Mr Valeta to be the owner of Stand 6765 Mufakose Township, also known as 18 Muchakata Road, Mufakose.

In terms of the Civil Rules of the Magistrates Court (SI 290/1980), a party wishing to appeal against a judgment may make a request in writing within seven days after judgment for the magistrate's reasons. This was apparently done by Mr Mutezo. The magistrate then has to deliver his reasons in writing to the clerk of the court within fourteen days. The party then has a further fourteen days within which to note an appeal.

How, one may ask, does a party get to know that the reasons have been delivered to the clerk of the court? The answer, at least where, as here, the parties are represented, is that the clerk puts a copy of the judgment in the appropriate legal practitioner's pigeonhole. It is for the practitioners to collect whatever is in their pigeonhole.

Unfortunately, as I have often commented before, magistrates tend not to put a date on their judgments, and clerks of court do not ensure, as they should, that they date-stamp the judgment when they put it in the practitioner's pigeonhole. So all kinds of disputes arise about when the time for appealing starts to run.

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In this case the magistrate did not date his judgment and the clerk did not date-



McNALLY JA

stamp his pigeonholing. But it seems to be accepted that the reasons were delivered on 22 December 1992.

The appeal was not noted until 17 February 1994. It was more than a year out of time. No application for condonation was made.

The point that the appeal was not properly before us was taken in the clearest possible terms in Mr *Thompson's* heads of argument, which were filed in this court on 13 September 1995 and presumably served on Mr Mutezo on approximately that date - almost four months before the hearing.

Mr Mutezo did nothing about it. This is not an uncommon attitude. We must make it clear to practitioners that it is a wrong attitude. If the other side makes a point, in its heads of argument, which undermines your whole argument, you must do something about it. You cannot sit passively by and say "the court will decide".

Mr Mutezo should have made an application for condonation. Instead, he instructed his associate, Mr *Mahaso,* at the last minute, to appear. When we pointed out to Mr *Mahaso* that he had had four months notice of the need to apply for condonation he said: "But I only became involved yesterday". This is no excuse. Practitioners may not shelter behind their juniors in this way.

Mr *Thompson* argued forcibly, by reference to such cases as *Makumborenga v Marini* S-130-95, that we should not delay further. But the problem is that there may be some merit in the appeal, and it is quite clear that Mr Murwara (or at any rate his wife) has never accepted the judgment. They have taken the law into their own hands; they have been to the High Court; they are still in the house in defiance of the very ruling with which we are concerned. All these actions proclaim their non-acceptance of the judgment.

In the circumstances, we propose to grant a postponement to enable a formal application for the condonation of the late noting of the appeal to be made. The wasted costs of both parties are to be borne personally by Mr Mutezo, because it is his failure to react to the points made in Mr *Thompson's* heads of argument which has caused the costs to be wasted. We will require an explanation for the failure to lodge the appeal in time, together with an explanation why the proceedings in the High Court were in the name of Mrs Murwara. Mr Mutezo should also ensure, by drawing the attention of the High Court registrar to this judgment, that the reasons of Mubako J in case No. HC 4710/94 are available before this application is heard.



McNALLY JA

Accordingly, the following order is made:

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1. The appeal is postponed to a date to be agreed with the registrar;

2. The wasted costs of both parties are to be borne personally by Mr Mutezo;

3. The application for condonation of the late noting of the appeal is to be lodged on or before Friday 9 February 1996, failing which the appeal is to be dismissed with costs;

4. The application and the appeal are to be set down together at the earliest convenient date.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

*Mutezo & Partners*, appellant's legal practitioners

*A J A Peck*, respondent's legal practitioner



## LENS AGENCIES (PVT) LTD v KNIGHT, FRANK & RUTLEY & ANOR 1996 (1) ZLR 71 (HC)

**Court** **High Court, Harare**

Mubako J

Civil application

7 March & 11 November 1995;

17 January 1996 Judgment No. HH-4-96

### Flynote

Landlord and tenant - lease - good tenancy deposit paid by tenant - cessation of lease - refund of deposit - whether tenant entitled to any interest earned on deposit

### Headnote

A landlord had let, through his estate agent, certain property to a tenant. As required by the lease, the tenant had paid a "good tenancy" deposit. The deposit had been paid to the estate agent. It was refundable at the end of the lease unless the tenant had committed some breach which would lead to its forfeiture in terms of the lease. The applicant, the former tenant, sought a determination from the court that he was entitled to the interest earned on his good tenancy deposit during the subsistence of his tenancy.

Held, that where a good tenancy deposit is paid directly to a landlord, the landlord's only obligation is to have the money available to refund the deposit at the end of the lease. If he places the money in an account, it can be an interest bearing or a non-interest bearing account.

Held, further, that where the deposit is paid to the landlord's estate agent, then, in terms of the Estate Agents Act [*Chapter 27:05*], the estate agent must keep the deposit in a separate trust

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fund account. The trust fund is for the benefit of the landlord, not the tenant, and the agent is obliged only to account to the landlord about the funds in the account. The Act gives the agent a discretion as to whether or not to place the money in an account that attracts interest. It does not lay down that any interest earned on the deposit is payable to the tenant.



Held, therefore, that the tenant was not entitled to any interest earned on the good tenancy deposit, nor was he entitled to demand information relating to interest earned on deposit money kept in a trust account by the landlord's estate agent.

Statutes referred to:

Estate Agents Act [*Chapter 27:05*], s 50

*H Simpson*, for the applicant

*A P de Bourbon SC*, for the respondents

## Judgment

**Mubako J:** The applicant in this case seeks a determination of the legal rights over a good tenancy deposit as between a tenant (T), an Estate Agent (A), and the Landlord (L). There is a common practice, sanctioned by statute, whereby tenants who sign leases are made to pay a deposit amounting to one or two months rent which will be held by the landlord until the lease comes to an end. The deposit is refundable if the tenant has incurred no liability or breach of tenancy or may be forfeited or deducted from in case the tenant commits any of the stated breaches. Where the landlord lets the property through an estate agent, the latter collects and keeps the deposit and the Estate Agents Act [*Chapter 27:05*] enjoins the agent to keep the deposit money in a trust account including "a trust account bearing interest at a bank or building society." The question for determination is whether the tenant whose money is deposited is entitled to the interest which the money may earn during the subsistence of the tenancy.

This particular dispute has a history which requires recapitulation. In 1994, Lens Agencies (Pvt) Ltd (T) sued Knight Frank and Rutley seeking court orders stating that:

*(a)* the good tenancy deposit belonged to the tenant and was being held by the estate agency on behalf of the tenant.

*(b)* the good tenancy deposit could only be appropriated where the tenant was in breach of its obligation under the lease agreement and that in this case no breach had been alleged; and

*(c)* interest which had accrued on the deposit belonged to the tenant and that the estate agent must account for such interest within twenty one days.

In the judgment of 7 March 1995 this court dismissed the claims for two reasons:



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MUBAKO J

*(a)* It was held that the estate agent kept the good tenancy deposit as an agent of the landlord and not on behalf of the tenant. Since the tenant has a contractual relationship only with the landlord then the tenant must join the landlord to the action in order to be able to question how the deposit was being kept.

*(b)* Secondly, the estate agent was not obliged to open an interest-bearing account; he has a discretion whether or not to earn interest.

For that reason, if any interest is earned, the estate agent does not, as the law stands today, have to account for the interest to anybody. Bartlett J expressed the view that the legal position ought to be changed by legislation. Until such legislation is enacted, the applicant has no right to claim interest or an account thereof against the first respondent - there is no privity of contract between them and the first respondent is, moreover, not obliged to earn interest for anyone.

Taking a cue from Bartlett J's remarks, the applicant in the present action claims from both the Landlord and the estate agent. He does have privity of contract with the landlord and he knows that the estate agent holds the deposit. The crisp question therefore is whether under the contract of lease there is any term, express or implied, which gives the tenant the right to claim from the landlord interest on his deposit. We must first look at the lease agreement between the applicant and the second respondent. Clause 34 of the lease agreement in question provides as follows:

> "The tenant shall upon signature hereof deposit with the landlord the sum of $600 as security for the due performance by the tenant of his obligations in terms of this lease, and at the conclusion of the lease the landlord shall have the right of appropriating the whole or a portion of the same towards payment of rent, electricity, key replacements, renovation or any other liability for which the tenant is responsible."

By this clause, or a variation of it, the tenant is obliged to deposit with the landlord a good tenancy deposit to be kept by the landlord until the end of the lease. The deposit is a security for the due performance by the tenant of his obligations under the lease. It is refundable in whole or in part depending on whether or not there are outstanding financial obligations of the tenant such as rent, damages, etc.

The lease is silent as to what the landlord does with the deposit throughout



MUBAKO J

the duration of the tenancy. The only obligation of the landlord relative to the deposit moneys is that he must have it available for refunding the tenant at the end of the lease if the tenant has no lease-related liability for which deductions may be made. The landlord may keep the money in his house safe where it is not used and does not earn interest, or he may keep it in his current account where it does not earn interest but he may use it. He may choose to invest it in an interest-bearing account. There is no requirement that he should adopt any one of these methods or that he must inform the tenant of the whereabouts of the deposit.

The landlord may, as in the present case, act through an estate agent. In that case the estate

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agent holds the money on behalf of his principal the landlord, but the manner in which he does so is regulated by the Estate Agents Act [*Chapter 27:05*]. The relevant provision is in s 50, which reads as follows:

"(1) A person carrying on business as an estate agent shall -

*(a)* open and keep a separate trust account at a bank registered in terms of the Banking Act [*Chapter 24:01*] in which he shall, within six days of receiving them, deposit all monies held or received by him on account of any person in the course of his business as an estate agent or by way of a rental or deposit due to such person in terms of a lease of immovable property;

Provided that in addition to any trust account referred to in this paragraph, a person carrying on business as an estate agent may open and keep a trust account bearing interest at a bank or building society or with an institution approved by the Council for the purpose of this proviso in which he may, unless otherwise instructed by the person for whom or on whose account the money is held, deposit any such monies as are not immediately required for any purpose; and

*(b)* keep proper books of account containing particulars and information as to monies received, held or paid by him for on account of any person and as to any interest earned by moneys in an account referred to in the proviso to para *(a)* which are payable to any such person.

(2) A person referred to in subs (1) shall, at least once in every year, cause his trust account and books of that account kept in terms of subs (1) to be examined by an accountant who is registered in terms of



MUBAKO J

the Public Accountants and Auditors Act [*Chapter 27:05*] and shall at such time or times as may be prescribed submit to the Council a report from such accountant in the prescribed form relating to his trust account.

(3) ...

(4) No amount standing to the credit of a trust account kept in terms of subsection (1) by a person referred to in that subsection shall form part of the assets of that person and no such amount shall be liable to attachment at the instance of any creditor of that person:

Provided that any excess remaining after payment of the claims of all persons whose moneys have or should have been deposited in such trust account shall be deemed to form part of the assets of that person."

From these statutory provisions the following propositions can be deduced:

1. An estate agent has an obligation to (shall) keep in a separate trust account of a recognised bank a good-tenant-deposit or rents which he received in terms of a lease of immovable property on behalf of a landlord. The language of s 50 (1)*(a)* makes it clear that the trust account is held on behalf of the landlord and that account does not have to be an interest-bearing account.

   Under the *proviso* the estate agent is allowed a discretion to (may) keep part of the deposit money or rents in a second trust account bearing interest at a bank or building society or an approved institution. Once again, such a trust account is on behalf of the landlord.

2. Section 50 (1)*(b)* provides that the estate agent must keep proper books of accounts which

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shall be audited by an accountant at least once every year. That information is for the benefit of the landlord who is the principal.

The Act does not anywhere refer to the tenant in relation to the trust accounts which the estate agent has the obligation or the discretion to open. I have referred to the fact that the landlord himself has no statutory obligation whatsoever to open a trust account, whether interest-bearing or not. He does not have such obligation, whether he receives the deposit directly or indirectly through an estate agent, unless such obligation arises by way of contract that is to say in the lease. As shown earlier, clauses 34 and 8 of the operative leases do not create any such obligations.

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MUBAKO J

In the result, the landlord in the present case is under no obligation, directly or indirectly, to keep a trust account on behalf of the tenant. The trust accounts which the estate agent is enjoined to maintain are for the benefit and information of the landlord and not for the tenant. The tenant has no cause of action against the landlord on which he can base his demand for an account or information about a trust account which is not owed to the tenant.

At present a tenant can acquire the rights to account and information about the good tenancy deposit if he has the presence of mind and the contractual clout to demand the inclusion of an appropriate clause in a lease. In future he may also acquire those rights if the legislature saw it fit to intervene on his behalf and to compel the landlord to give the tenant such an account about the interest earned by every good-tenancy deposit paid by a tenant.

It is common cause that the good tenancy deposit in the present case was paid into a trust account maintained by the first respondent. It is also common cause that the purpose for holding the deposit was to provide a security for the landlord's interests. There is therefore no basis for comparing the position of the respondents with that of a bank holding its client's money. Different statutes and contractual obligations apply. Even if banks supply their clients with statements about the client's accounts it cannot follow that a landlord must also supply statements about any money which is deposited by a tenant. Such a right of information can only be founded in the contract of lease or in a statute. In the present case, neither is applicable. Equally, the applicant cannot demand statements from the bank where the good tenancy deposit is held by either first respondent or second respondent.

Mr *de Bourbon* submitted that this court should make a special order for costs against Mr Leonard Nyamutsamba personally or the applicant because he felt that their conduct in bringing the present application was vexatious and an abuse of the court's process. Although, given the judgment of Bartlett J, which covers most of the facts of this case, the application had little prospects of success I do believe that the subject of interest earned by good tenancy deposits is a matter of national importance to warrant a second examination from a slightly different angle. It was not purely vexatious.

Accordingly, this application is dismissed with costs.

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*Mushonga & Associates*, applicant's legal practitioners

*Surgey Pittman & Kerswell*, respondent's legal practitioners.



## S v DUBE 1996 (1) ZLR 77 (SC)

**Court** **Supreme Court, Bulawayo**

Gubbay CJ & Korsah JA

Criminal appeal

8 & 18 January 1996 Judgment No. S-6-96

### Flynote

Criminal law - inchoate offences - attempt - rape - where conduct moves beyond mere acts of preparation to point where criminal liability is attracted

Criminal law - rape - attempted rape - accused seizing and attacking woman but desisting from further attack on discovering that she was menstruating - whether attempted rape shown

### Headnote

When it comes to determining the dividing line between conduct which connotes an attempt to commit a crime and that which, despite the intention to commit the offence, is not penalised, no absolute criterion has been devised to cover all situations. What has to be applied is a value judgment of a practical nature, a judgment governed by notions of proximity and remoteness. The overriding endeavour of the court must be to assign to every constituent part of a situation such weight as common sense dictates, and then to decide whether the whole of the situation can, in a fair and practical sense, be said to be too remote to fall within the requisite realm of legal cognizance. Thus, where the appellant, having made sexual overtures to the complainant, had seized her, thrown her on the ground and tried to remove her pants, but then got up and desisted from further attack because he discovered that she was menstruating,

Held, that, although the appellant had not done the last act he had to do before he committed the substantive crime of rape, his change of mind was not voluntary, but was prompted by an unforeseen and extraneous factor.



His conduct, viewed as a whole, was sufficiently proximate to the commission of the offence as to have gone beyond the stage of mere preparation and he was properly convicted of attempted rape.

Cases cited:

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*R v B* 1958 (1) SA 199 (A)

*S v Chaitezvi* 1992 (2) ZLR 38 (S); 1992 (2) SACR 456 (ZS)

*S v du Plessis* 1981 (3) SA 382 (A)

*S v Francis* 1980 ZLR 368 (A); 1981 (1) SA 230 (ZA)

*R v Hlatwayo & Anor* 1933 TPD 441

*S v K & Ors* 1976 (1) RLR 147 (A); 1976 (3) SA 563 (RA)

*R v Katz* 1959 (3) SA 408 (C)

*R v Schoombie* 1945 AD 541

*S K M Sibanda*, for the appellant

*J Mahamba*, for the respondent

## Judgment

**Gubbay CJ:** The appellant was charged in the court of a provincial magistrate with the crime of attempted rape, it being alleged that on the evening of 30 October 1994 and at Ndabankulu area, Kezi, he unlawfully attempted to have sexual intercourse with Sithokozile Ngwenya without her consent. He pleaded not guilty, but was convicted and was ordered to serve three years' imprisonment with labour. An appeal to this court was noted against both conviction and sentence.

The trial magistrate found that the allegations made in the charge had been established beyond any reasonable doubt. The appellant's version of the events on the evening in question amounted to a complete denial. This the magistrate rejected. He was correct in doing so for, despite Mr *Sibanda's* strenuous efforts on the appellant's behalf, I remain wholly unpersuaded that any reasonable possibility exists of the appellant having testified truthfully. I am satisfied that the complainant's account, corroborated as it was in material aspects, must be accepted to be a completely accurate scenario of what transpired. It was to this effect.

At 1800 hours on 30 October 1994 the complainant, a married woman, was at Maphisa Business Centre waiting for a bus to take her to her home in the Ndabankulu area. The appellant, who was known to her only by sight, came over and introduced himself. He handed the complainant an orange, for which she thanked him. When the bus arrived they boarded together, but sat apart. Shortly after the journey commenced the appellant moved to where the





complainant was sitting. He informed her that he had long admired her looks and wanted to have sexual relations with her. Not in the least deterred by the complainant's rejection, the appellant remained seated next to her. And when the conductor approached for the fares he paid for the complainant as well as for himself. He then declined to accept the complainant's

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offer of money.

On arrival at Ndabankulu, the complainant again pressed the appellant to take the two-dollar bus fare he had paid. His reaction was to invite the complainant to accompany him to a bottle store. When she refused the appellant said that she was not to go away. That remark frightened the complainant. It was by now quite dark. She asked one Amon Mlilo, who was in the appellant's company and who was related to her, to escort her home. But he was not interested and went into the bottle store with the appellant. So the complainant went to the nearby home of Samson Moyo. He walked with her some distance before turning back. It was then that the appellant and Mlilo appeared. The appellant started to follow the complainant, telling her repeatedly how much he desired her. Mlilo went his own way. A little later he heard a woman's screams. He assumed it was the complainant but did not go to her assistance.

As the complainant took a path in the bush leading to her home, the appellant suddenly grabbed her by the waist and threw her on her back to the ground. She screamed for help. The appellant lay on top of her. He put his hand underneath her dress and tried to pull down her pants. She continued to scream. The appellant then placed his hand under her pants in order to fondle her private parts. In so doing he discovered that the complainant was menstruating, for his hand came into contact with a sanitary towel. The appellant immediately got up. In abusive language he demanded that the complainant repay him the two dollars. He searched for the money in her basket. The complainant, who was in a state of distress, found it for him. The appellant apologised for what he had done. He offered her $50 if she promised not to report him to her husband. The complainant was not interested in his entreaties. She hurried to the home of Lot Ngwenya, an elderly man she knew, and reported the offence to him. She was crying and afraid to go to her own home.

On these facts the point to be decided is whether at the moment the appellant desisted from the actual commission of the rape, his conduct constituted mere acts of preparation or had proceeded sufficiently far to attract liability.

There have been many judgments, both in South Africa and in England, directed to the formulation of a comprehensive test by which to determine the



dividing line between conduct which connotes an attempt and that which, despite the intention to commit the offence, is not penalised. See Burchell and Milton *Principles of Criminal Law* at pp 369-373. These tests are no more than guides, to be used with caution. As the remarks of de Villiers AJ in *R v Katz* 1959 (3) SA 408 (C) at 421A-423B show, no absolute criterion has been devised to cover all situations. What has to be applied is a value judgment of a practical nature - a judgment similar to what is called for in other spheres of law governed by notions of proximity and remoteness. As the learned Acting Judge so succinctly said at 423C:

> "The overriding endeavour must needs be to assign to every constituent part of a particular situation such weight as common sense dictates, and then to decide whether the whole thereof can in a fair and practical sense be said to be too remote to fall within the requisite realm of legal cognizance."

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This approach has been commended and adopted by this Court. See *S v K & Ors* 1976 (1) RLR 147 (A) at 150C-151G, 1976 (3) SA 563 (RA) at 565C-566C; *S v Francis* 1980 ZLR 368 (A) at 374G, 1981 (1) SA 230 (ZA) at 235B; *S v Chaitezvi* 1992 (2) ZLR 38 (S) at 43F, 1992 (2) SACR 456 (ZS) at 459C; and also *S v du Plessis* 1981 (3) SA 382 (A) at 399 *in fine*-400A.

Thus, stated precisely, the question is whether at the stage the appellant discovered that the complainant was menstruating, his conduct, considered as a whole, was sufficiently proximate to the commission of the offence to have gone beyond mere preparation. This is a matter of a value judgment of a practical nature and not one to be determined by the application of any hard-and-fast rule of thumb.

It is true that the appellant had not done the last act that he had to do before he committed the rape. What he did was to throw the complainant to the ground and lie on top of her. He paid no heed to her screams. He tried to pull down her pants. He touched her private parts. His change of mind was not caused by any feeling of remorse or repentance, but rather because he thought it repulsive to engage in the sexual act with a woman who was having her period.

I do not regard the appellant's change of mind as voluntary. The abandonment of his evil design was prompted by an unforeseen and extraneous factor. See *R v Hlatwayo & Anor* 1933 TPD 441 at 445; *R v B* 1958 (1) SA 199 (A) at 203 G-H; Snyman *Criminal Law* 2 ed at p 291.



GUBBAY CJ

I entertain no doubt that, viewed as a whole, the appellant's conduct was sufficiently proximate to the commission of the offence as to have gone beyond the stage of mere preparation. He had finally made up his mind to rape the complainant, which resolution lasted until the ascertainment of her condition. When he desisted from his purpose he had already commenced the consummation of the act constituting the offence. See *R v Schoombie* 1945 AD 541 at 547. His change of mind did not therefore exonerate his preceding conduct.

It follows that the appellant was properly convicted.

This brings me to the matter of sentence. The appellant attacked a defenceless woman at night in the bush. He subjected her to fear and considerable distress. It was purely fortuitous that he did not achieve his object in raping her. In short, he committed a serious offence.

Nonetheless, Mr *Mahamba,* who appeared for the State, was constrained to concede that the magistrate ought to have suspended portion of the term of three years' imprisonment he imposed. Counsel justified his approach by stressing that the appellant was a first offender; that his conduct had not been accompanied by persistent violence; and that the complainant had not been injured physically.

There is, of course, no rule of practice requiring that part of a custodial sentence passed on a first offender should always be suspended. But more often than not to do so is both desirable and appropriate, for it has a rehabilitative and salutary effect. An offender is discouraged from repeating the crime by knowledge of the consequences of breaching the conditions of the suspension. This is recognised as a more effective deterrent than the mere possibility of a more

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severe punishment for a subsequent offence.

In the circumstances of this case, I regard the concession as proper and that a fair portion of the period of imprisonment should be suspended.

In the result, the appeal against conviction is dismissed. The appeal against sentence is allowed to the extent that one year of the three years' imprisonment ordered by the court *a quo* is suspended for three years on condition that during that period the appellant is not convicted of an offence of a sexual nature for which he is sentenced to imprisonment without the option of a fine.

Korsah JA: I agree.

*S K M Sibanda & Partners*, appellant's legal practitioners

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## ASSOCIATED PRINTING & PACKAGING (PVT) LTD & ORS v LAVIN & ANOR 1996 (1) ZLR 82 (SC)

**Court** **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

11 & 22 January 1996Judgment No. S-7-96

### Flynote

Contract - formation - agreement on some terms of the contract, with final details to be determined later - whether valid and binding agreement formed thereby - whether consensus formed - whether agreement void for vagueness

### Headnote

A seller of certain fixed assets entered into negotiations for the sale of those assets to some buyers. The parties reached agreement on the price for the items being sold, the method of payment and the rate of interest. However, certain details were left to be determined.

Held, that the details that were left to be determined were ancillary matters and the principles upon which those details were to be determined had been agreed. The agreement was therefore not void for vagueness.

Held, further, that the provision that the price of the various assets was to be allocated in a manner that was tax efficient for the seller, without prejudice to the seller, was neither void for vagueness nor in any other way unenforceable. So, too, with the provision entitling the seller to take security in the form of second mortgage bonds and personal guarantees of the buyers and of executive directors of their companies: this provision was clear and was not void for vagueness.

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Held, therefore, that the agreement was a valid and binding agreement of sale.

Cases cited:

*Belmore v Min of Finance* 1948 (2) SA 852 (SR)



*CGEE Alsthom Eqpt v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A)

*Dijkstra v Janowsky* 1985 (3) SA 560 (C)

*Patel v Adam* 1977 (2) SA 653 (A)

*Hillas & Co v Arcos Ltd* (1932) 38 Com Cas 23

*Jammine v Lowrie* 1958 (2) SA 430 (T)

*Lewis v Oneanate (Pty) Ltd & Anor* 1992 (4) SA 811 (A)

*Margate Ests Ltd v Moore* 1943 TPD 54

*Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A)

*Woods v Walters* 1921 AD 303

*E W W Morris*, for the appellants

*A P de Bourbon SC,* for the respondents

## Judgment

**McNally JA:** The respondents were successful in the High Court in persuading Gibson J that Mr Morris had entered into a valid and binding agreement of sale of the fixed assets of the first three appellant companies to them.

I shall refer to the parties as "the seller" (Mr Morris), "the purchasers" (Messrs Lavin and Dearlove) and "the companies".

The seller contends on appeal that there was no agreement, or no consensus, or if there was an agreement it was void for vagueness. In his heads of argument Mr *Morris* (of counsel) concentrated his submissions upon the document which allegedly constituted the agreement, which was Annexure F in the record.

His contention that the agreement was no more than inchoate was based on three passages in the document:

1. *Clause 1*

   "The purpose of this paper is to record the agreement which has been reached between the purchasers and seller, but is subject to the preparation of a comprehensive agreement covering final details."

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2. *Clause 2(b)*

"The allocation of the purchase price is still to be determined but shall be allocated in a manner which is most tax efficient for the seller, without prejudice to the buyers."



McNALLY JA

3. *Clause 2(g)*

"Notwithstanding that the assets purchased are required as security by the purchasers, the seller shall be entitled to take security in the form of second mortgage bonds, and the personal guarantees of the purchasers, and of any other executive director engaged in the business."

Before I consider these passages in the light of the facts of the case, I turn to the case law and the authorities.

Christie *The Law of Contract in South Africa* 2 ed p 37 says:

"Especially in complicated or protracted negotiations it is not uncommon for the parties to record the progress they have made in a partial agreement, thus clearing the points on which they are agreed out of the way and facilitating discussion on the points that remain outstanding.

If agreement is eventually reached on the outstanding points, and a complete contract is drawn up and signed, the prior partial agreement is usually forgotten, but if for one reason or another the intended contract is never concluded, one party will sometimes seek to hold the other to the partial agreement.

Obviously he cannot be permitted to do so, because although the partial agreement may have taken the form of an accepted offer it lacked *animus contrahendi,* being designedly incomplete or provisional."

This, in essence, is Mr *Morris's* submission.

Mr *de Bourbon,* on the other hand, relied on passages at pp 38-39 of the same work:

"The mere mention of further terms will not always show that an offer was intended to be provisional only. It may appear that the intention was for the further terms to be filled in on a basis of what is usual, or reasonable, or for a more comprehensive agreement to be drawn up if (but only if) it should prove necessary."

And later:

"There is of course no reason why parties should not enter into a fully



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binding contract while expressly or impliedly agreeing to discuss the addition of further terms, perhaps very important ones, after the commencement of the contract. If the further terms are not agreed, the original contract stands."

Joubert *Principles of the Law of Contract* p 38 makes the point, in relation to what is an offer, that:

"If the statement merely lists some terms proposed, and then states that a particular term, or some particular matter, is subject to later agreement or negotiations, there is no offer. The statement can be no more than an offer

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> to do business. In the case of immaterial matters it may be that some aspect is left to be determined by the one party ..."

The case law cited begins with an observation by Grindley-Ferris J in *Margate Estates Ltd* v *Moore* 1943 TPD 54 at 58-59:

> "I do not think it can be disputed that before an agreement can be held to bind the parties thereto, all the material terms must have been agreed upon. It is also clear that in the absence of express stipulation in a contract of purchase and sale the purchase price is to be a cash payment.
>
> But when the question of when or how payment is to be made is part of the discussion between the parties, and is left over for determination at a future date, can it be said that all the material terms have been agreed upon?
>
> I think not."

Next we have Schock J in *Dijkstra* v *Janowsky* 1985 (3) SA 560 (C), citing *Jammine* v *Lowrie* 1958 (2) SA 430 (T) for the proposition that -

> "There is no valid contract where a material term has not been finally agreed upon but is left open for further negotiation."

And citing *Patel* v *Adams* 1977 (2) SA 653 (A) at 666A-C for the proposition that -

> "The manner of payment is ordinarily a material term."

In *Dijkstra* there was a clause leaving to the seller's accountants the working

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McNALLY JA

out of the method of payment of a balance of R134 000, which balance was to be payable "monthly, interest and capital to be worked out by the seller's accountant". This was found to be void for vagueness.

Then, reliance was placed on *Scammel* v *Ouston* [1941] 1 All ER 14, where the provision that "the balance of the purchase price can be had on hire-purchase terms over a period of two years" was found to be void for vagueness. (It will be noted that the editor has added a footnote suggesting that he was somewhat surprised by this decision). The decision is contrasted in Furmston's *Law of Contract* 11 ed, with that in *Hillas & Co Ltd* v *Arcos Ltd* (1932) 38 Com Cas 23. At p 41 the learned author points out that judges "will follow, if this is at all possible, the example of *Hillas* v *Arcos* rather than that of *Scammel* v *Ouston".*

Mr *de Bourbon* urged upon us the approach of Corbett JA (as he then was) in *CGEE Alsthom Equipment* v *GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) at 92A:

> "There is no doubt that where, in the course of negotiating a contract the parties reach an agreement by offer and acceptance, the fact that there are still a number of outstanding matters material to the contract, upon which the parties have not yet agreed may well prevent the agreement from having contractual force ...
>
> When the law denies such an agreement contractual force it is because the evidence shows that the parties contemplated that consensus on the outstanding matters would have to be reached before a binding contract could come into existence.

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> The existence of such outstanding matters does not, however, necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract.
>
> In the event of agreement being reached on all outstanding matters, the comprehensive contract would incorporate and supersede the original agreement. If, however, the parties should fail to reach agreement on the outstanding matters, then the original contract would stand."

The similarity between this formulation and that of Christie (*op cit)* is





noteworthy. And see *Murray & Roberts Construction Ltd* v *Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A); and *Lewis* v *Oneanate (Pty) Ltd & Anor* 1992 (4) SA 805 (A).

One must mention the fact that the written document, Annexure F, was not signed. The seller apparently declined to sign it. The law on this point is set out in Christie *op cit* at p 122:

> "This principle, that the burden of proof is on the party who asserts that an informal contract was not intended to be binding until reduced to writing and signed, was adopted by the Appellate Division in *Goldblatt* v *Fremantle* 1920 AD 123 ... "

In *Woods* v *Walters* 1921 AD 303 at 305 Innes CJ referred to the above passage and added:

> "It follows of course that where the parties are shown to have been *ad idem* as to the material conditions of the contract, the *onus* of proving an agreement that legal validity should be postponed until the due execution of a written document lies upon the party who alleges it."

In this context, it is of significance that Mr Morris, the seller, declined to give evidence on oath, or to call any witnesses.

The use of the phrase "subject to" does not necessarily indicate that the agreement in which the phrase appears is an inchoate agreement - Furmston *op cit* p 39 n 15. The case of *Belmore* v *Minister of Finance* 1948 (2) SA 852 (SR) is a good illustration of that, although the actual words were not used.

Turning now to the facts: There were extensive discussions between the seller and the purchasers, and the latter asked their accountant, Mr Neely, to draft heads of agreement as they went along. Annexure F was the third such document, amended in terms of comments in a letter from the seller's accountant, Mr Leith. The letter was dated 6 May 1988. The stage had been reached where the parties had already reached an agreement in outline, and had handed over to their accountants the final detailed negotiations. These had apparently been concluded as a result of the acceptance by Mr Neely of the contents of Mr Leith's letter of 6 May 1988.

Mr Neely then prepared a number of copies of the document for signature on 24 May 1988. At that meeting a proposal was made by Mr Leith to alter the



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McNALLY JA

terms by postponing part of the sale, so that the income for the seller would be spread over several tax years, thus reducing his tax liability. This was accepted, and the meeting was adjourned for a schedule to be prepared by Mr Leith. The meeting was never re-convened because the seller first failed to attend and then declined to sign.

Neither Mr Leith nor Mr Morris gave evidence. We are thus left to rely on the evidence of Mr Dearlove and Mr Lavin, and of their accountant, Mr Neely.

Mr Dearlove made it clear that, although he believed they had been very shabbily treated, he had not initially thought in terms of insisting that an agreement had been reached. Only after consulting his attorney did he decide to take the matter to court. But it is also clear that he had not been aware that a number of details which he had left uncertain had later been clarified and agreed. In particular, the method of payment of the second million dollars had been defined and agreed, and the giving of security for payment of that amount had been agreed in principle.

Despite not knowing that these details had been taken further, Mr Dearlove said: "Had we wanted to get out of the agreement I do not believe we could have done". In short, speaking as a layman, Mr Dearlove believed a binding agreement had been reached and only accounting details remained. He made a very good impression on the learned judge. His evidence reads well.

Mr Lavin also impressed the learned judge as an honest witness, a technocrat who had done his homework thoroughly. He was quite satisfied that an agreement had been reached as a result of the acceptance of all the points made on the seller's behalf in his accountant's (Mr Leith's) letter of 6 May 1988.

Finally, Mr Neely, a chartered accountant and partner in the firm of Price Waterhouse, gave evidence. He had originally received a set of proposals from Mr Leith, an accountant of the firm of Administration and Management Services (Pvt) Ltd, who acted for the seller. He, Mr Neely, acted for the buyers. He and Mr Leith exchanged proposals culminating in his incorporating in his draft a series of proposed amendments put forward on 6 May 1988 by Mr Leith. This resulted in the document Annexure F, which was to have been signed on 24 May 1988.

He, Mr Neely, understood that document to represent an agreement between the parties. He prepared a number of copies of it for signature on 24 May 1988.



McNALLY JA

There was no dispute at the meeting as to the terms but the seller (through Mr Leith) put forward a proposal that the original one million dollar deposit be paid over a period so that it did not all fall in one tax year. There was no disagreement, such a proposal being advantageous for both sides, and the meeting was adjourned so that this provision could be incorporated by Mr Leith into the draft.

Mr Neely later learned that the seller refused to sign. He was surprised. He did not regard the

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outstanding question of the allocation of the purchase price to be anything more than an accounting detail. He conceded that there was a theoretical possibility that he and Mr Leith might not agree on the allocation, but it was clear he did not regard it as a realistic possibility.

Similarly Mr Neely accepted that there might be conflict over the question of security, but he clearly did not expect it. In his view, there was an agreement. Although Her Ladyship did not comment on his demeanour, it is apparent she accepted his evidence.

In the absence of any evidence on oath from the appellants, and most significantly, from Mr Leith, the independent accountant who acted for the seller, it seems to me the appellants are in difficulty when they seek to allege that the agreement was merely inchoate.

All they are able to do is to point to the three passages in the heads of agreement to which I referred at the beginning of this judgment. So one is left with the position that there was, in the minds of the witnesses, an agreement. Does the document, as a matter of law, show that there was not?

I will deal with each of the three passages in turn.

Clause 1 sets out the purpose of the paper, which is "to record the agreement which has been reached between the purchasers and sellers". Therefore, there is an agreement. At the meeting of 24 May 1988, when this document was on the table, no-one suggested otherwise. What then of the words: "but is subject to the preparation of a comprehensive agreement covering final details"? In the particular circumstances, it does not seem to me that these words indicate that no binding agreement may be deemed to have been reached until the details are finalised. I say this because the only two aspects of the agreement on which the appellants rely are clauses 2*(b)* and 2*(g)*. As I propose to show, those "final details" are clearly ancillary, and the principles upon which they are to be determined are clearly defined.



McNALLY JA

Clause 2*(b)* leaves the allocation of the purchase price to be determined. The price itself is agreed. The method of payment and the rate of interest are agreed. It is simply the allocation of that price to the various assets which is to be calculated. And the principle upon which it is to be allocated is set out:

> "... in a manner which is most tax efficient for the seller, without prejudice to the buyers".

Mr Neely was familiar with such provisions. He had often couched transactions on that basis before. He had never encountered problems. He did not expect a problem this time. I decline to hold, in the absence of any evidence to the contrary, that such a provision is void for vagueness or in any other way unenforceable.

Clause 2*(g)* entitles the seller "to take security in the form of second mortgage bonds, and the personal guarantees of the purchasers, and of any other executive directors engaged in the business." I do not consider this either to be void for vagueness. No doubt it was the intention to define in detail what properties of the purchasers were to be bonded. But the agreement is

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clear. The seller could demand second mortgage bonds over whatever properties of the purchasers were available for bonding. He could demand personal guarantees from the purchasers and from any other executive director (presumably if the purchase were to be made in the name of a company).

I find it unnecessary to decide whether, had matters ended with the earlier handshake of 20 February 1988, there would have been a binding agreement. Nor whether, since noting the appeal, the appellants must be deemed to have abandoned it.

I am satisfied that the decision of the court *a quo* was right. The appeal is therefore dismissed with costs.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

*Atherstone & Cook*, appellants' legal practitioners

*Winterton, Holmes & Hill*, respondents' legal practitioners



## ZIMBABWE TEACHERS' ASSOCIATION & ORS v CHAIRMAN, PUBLIC SERVICE COMMISSION & ORS 1996 (1) ZLR 96 (HC)

**Court** **High Court, Harare**

Chidyausiku J

Civil application

23 November 1995 & 24 January 1996 Judgment No. HH-5-96

### Flynote

Administrative law - review - regulations made by Public Service Commission - whether reviewable

Constitutional law - Constitution of Zimbabwe 1980 - Public Service Commission - whether Constitution confers original law-making powers on Commission

Contract - employment - contract of employment between State and public servants - whether governed by common law or by statute

Public service - public servant - relationship between public servant and State - whether relationship contractual - whether relationship governed by common law or by statute - Public Service Commission - law-making powers - whether original or delegated

### Headnote

Section 31(1) of the Public Service (Grade, Salary and Allowances) Regulations (SI 126 of 1992) provided that public servants were to be paid an annual bonus. This bonus had already

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been paid for several years. However, in September 1995, after the bonus had already accrued, the Chairman of the Public Service Commission (PSC) made a public announcement that the PSC had decided that bonuses would not be paid in 1995. A few days later, the PSC amended the Regulations. The amendment, *inter alia*, laid down that no bonuses would be paid for the year 1995. The applicants sought an order declaring unlawful the



decision of the PSC to withhold the 1995 bonus and an order declaring that the PSC was incompetent to amend the 1992 Regulations in such a manner as to take away the right to the 1995 accrued bonus.

Held, that the State is bound by contracts of employment between itself and public servants and if the State has agreed contractually to pay an annual bonus, it is legally obliged to pay the bonus.

Held, further, that only Parliament has original law-making powers and the PSC has not been given such powers. The PSC has only delegated or subordinate law-making powers.

Held, further, that the Regulations made by the PSC are reviewable by the High Court on any of the recognised grounds of review.

Held, further, that as the Constitution confers no power on the PSC to create regulations that have retrospective effect, the amending provision which purported to withhold bonuses was *ultra vires* its powers and unlawful and must be set aside.

Cases cited:

*Anning v Colonial Secretary* 1931 SR 95

*Bloemfontein Municipality v Bosrand Quarries (Prop) Ltd* 1930 AD 370

*Commissioner of Police v Wilson* 1981 ZLR 451 (S)

*Johannesburg Consol Invstms Co Ltd v Marshalls Township Synd Ltd* 1917 AD 662

*McGregor Joyce v Cape Town Provincial Administration* 1946 AD 658

*Middelburg Municipality v Gertzen* 1914 AD 544

*Picken v Balfour of Burleigh* [1945] 1 ChD 90

*R v Dickson* 1934 AD 231

*Shelford v Mosey* [1917] 1 KB 154

*Sutton v A-G* (1923) 39 TLR 294

Statutes and regulations referred to:

Constitution of Zimbabwe 1980, ss 32 and 75

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Public Service (Grade, Salary and Allowances) Regulations 1992 (SI 126/1992), ss 31(1), 33, 34 and 35

Public Service (Grade, Salary and Allowances) (Amendment) Regulations 1995 SI 241A/1995), s 37A

*S Moyo*, with him *G V Mamvura*, for the applicants

*B Patel*, with him Mrs *S Mavangira*, for the respondents

## Judgment

**Chidyausiku J**: The applicants in this case are seeking an order declaring unlawful the first respondent's decision to withhold payment of bonuses due

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CHIDYAUSIKU J

to members of the first applicant and the other applicants in this matter. The applicants also seek an order declaring that the respondent is incompetent to alter the provisions of SI 126/92 in such a manner as to take away the right to receive a bonus accrued to the applicants between 1 January 1995 and September 1995. The applicants also seek costs of suit.

The first applicant is an association representing 54 660 teachers working for the two ministries of education cited in these proceedings. The second, third and fourth applicants are also employed by the two ministries.

The first respondent is the Chairman of the Public Service Commission hereinafter referred to as "the Commission". He is being sued in his official and representative capacity as the Chairman of the Commission. The Commission is responsible for and is the employer of all civil servants in Zimbabwe. The other respondents have been cited because of their interest in the matter and their joinder as parties does not affect the issues that have to be determined in this case.

The facts giving rise to this application are virtually common cause. It is the legal consequences arising from those facts that are hotly contested. The facts are these. On 9 September 1995 the Chairman of the Commission, Mr Nzuwah, made a public announcement of a decision by the Commission not to pay bonuses to members of the first applicant and other civil servants. According to the statement all public servants were not going to be paid any bonus in November 1995. The bonus in question is payable to public servants and has been paid to public servants for a number of years in terms of s 31(1) of the Public Service Regulations SI 126/92. In terms of that provision public servants are entitled to the payment of a bonus with their November salary. In fact s 31(1) provides that -

> "A person who is serving or is appointed or who becomes an officer or employee on the 1st of January of any year *shall* if his service in that year is continuous, be paid the annual bonus at the same time as is paid his salary for the month of November in that year" (my emphasis).

On 15 September 1995 the Commission amended the Public Service (Grade, Salary and

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Allowances) Regulations SI 126/92 by SI 241A. Section 37A of the amending instrument provides as follows:

"(1) Notwithstanding any other provision of this Part, if it appears to the



CHIDYAUSIKU J

Commission, after consultation with the Minister responsible for finance, that the payment of an annual bonus in terms of this Part will place an undue strain on the financial resources of the Government, the Commission may direct -

*(a)* that payment of an annual bonus to all officers and employees or to any class of officers or employees be postponed for such period as the Commission may specify; or

*(b)* that the annual bonus payable to all officers and employees or to any class of officers or employees be reduced by such amount or proportion as the Commission may specify; or

*(c)* that no annual bonus be paid to any officers or employees or to any class of officers or employees;

and the annual bonus concerned shall be postponed, reduced or withheld in accordance with the Commission's direction.

(2) It shall not be necessary for the Commission, before giving a direction in terms of subsection (1), to afford the officers or employees concerned an opportunity to make representations in the matter.

(3) Notwithstanding any other provision of this Part, no annual bonus shall be paid to any officer or employee in respect of the year 1995."

Subsection (3) of the above section extinguishes the payment of a bonus for the year 1995. It is this provision that has given rise to these proceedings.

The applicants maintain that the decision not to pay the bonus to public servants for the year 1995 at least up until September 1995 is unlawful for a number of reasons. The grounds for the challenge can conveniently be summarised as follows:

1. The Commission has no legal basis or competence to enact regulations with retrospective effect abolishing bonuses that had already accrued. Put differently, it is contended that s 37A is *ultra vires* s 75 of the Constitution, which provides for the functions of the Commission.

2. The decision to withhold bonuses was so grossly unreasonable that the court should set it aside under its review jurisdiction.



CHIDYAUSIKU J

The respondents have, on the other hand, strenuously argued that first respondent's decision to cancel the bonus for 1995 was perfectly lawful. They advanced a number of grounds forming the basis of their submission that the first respondent's action was lawful. These can be conveniently summarised as follows:

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1. The respondents contend that the legal relationship between the applicants and the first respondent was governed by common law and at common law the state servant holds office at the pleasure of the State and may be dismissed at will. The corollary of this rule is that emoluments, including a bonus, can be reduced by the State at will.

2. The Public Service Commission was vested with original legislative power within its sphere of jurisdiction and consequently has the competence to legislate with retrospective effect and can, through such regulations, abridge or extinguish accrued rights. Put differently, the Commission's regulations are not reviewable on the grounds of unreasonableness. It is also contended that the bonuses had not accrued at the time they were extinguished.

The first issue that falls for determination is what law governs the relationship between the applicants and the respondents. In particular, is the payment of the bonus governed by common law or by statute? I am persuaded that statutory law or regulation as opposed to common law governs the relationship between the applicants and the respondents. I shall revert to this aspect of the matter later. However, even assuming that common law applies, I have come to the conclusion that the public servant is entitled to payment of a bonus under the common law, if there is in existence a contract of employment providing for the payment of a bonus between the State and the public servant.

There are two schools of thought regarding the correct position at common law. The one school of thought maintains, as Mr *Patel* has contended, that a State servant holds office at the pleasure of the State and may be dismissed at will. Mr *Patel* cited the following cases which indeed do or tend to support this proposition: *Anning v Colonial Secretary* 1931 SR 95 at 105 106; *Davis v Colonial Secretary* 1933 SR 94 at 98-99; *Commissioner of Police v Wilson* 1981 ZLR 451 (S) at 460-461; Mustier *The Law and Organisation of the British Civil Service* pp 41-43. According to these authorities, there is no such thing as a contract of employment between the State and its servant. No legal obligation flows from any undertaking by the State to its servants. I must confess I find the proposition downright crude and raw.



CHIDYAUSIKU J

The other school of thought is that the State is bound by contracts of employment between itself and the public servants. This school of thought maintains that where the State undertakes to pay a bonus and fails to do so it can successfully be sued. This is what happened in the cases of *Sutton v Attorney-General* (1923) 39 TLR 294. In that case the appellant Mr Sutton successfully sued the Crown for the payment of a bonus which he had been promised by the Crown. This case is a clear authority for the proposition that where the State has undertaken to make payment of a bonus the right to be paid such a bonus is enforceable in a court of law. The cases of *Shelford v Mosey* [1917] 1 KB 154 and *Picken v Balfour of Burleigh* [1945] 1 Ch 90, cited by Mr *Moyo,* also support this proposition. They provide instances where the State has been successfully sued for non-payment of a bonus.

I find myself in agreement with the view that the State is legally obliged to pay a bonus where it has contracted to do so. The view that accepts the contractual liability of the State is more enlightened and in line with the needs and the exigencies of a modern state. A modern state

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needs to attract into its service people of high calibre and ability. Those people can only be attracted into the service of the State by favourable conditions, including security of tenure and an assurance that their salaries would be paid at the end of the month. It would be a sad day if the legitimate expectations of the civil servant to be paid a salary at the end of the month were to be left to the whims of a Public Service Commission, which by the way it has handled this case, has failed to impress as a model employer. The State should not be seen to be in the practice of deceiving its servants by promising its servants one thing and reneging on such promises at will with impunity. In January 1995, through s 31(1) of SI 126 of 1992, the State promised its civil servants a bonus to be paid together with the November salary. The offer was accepted by the public servant and a contract was concluded. The contract created a legal obligation on the State to pay the bonus upon the civil servant concluding his side of the bargain. The unilateral decision by the Commission to withdraw the bonus announced on 5 September 1995 is a blatant and palpable disregard of the old and time-honoured principle of the sanctity of the contract and the law cannot be seen to be condoning such an abuse of authority.

But as I said earlier, I hold the view that the relationship between the parties to this case is governed by statute and not common law. SI 126 of 1992 provides detailed regulations dealing with the conditions of service of public servants. The question of bonus is dealt with in some detail in the statutory



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instrument. Part IV of the Regulations, that is s 29 to s 37, provides in detail terms and conditions of the payment of bonuses. Section 31(1) provides that the public servant *shall* and not *may* be paid a bonus. The language is peremptory. It is not directory. The use of the word shall clearly indicates an intention to alter the common law position which at most is discretionary. If it was the intention of the legislature to codify the common law position, the word *may* would have been used. The use of the word *shall* clearly takes the payment of the bonus out of the category of a mere Christmas box from the State to be paid to the public servant at the whim of the State. The language of s 31(1) clearly creates a legal obligation for the State to pay and the right of the civil servant to receive.

I will now turn to deal with the contention that the Public Service Commission has the competence to legislate retrospectively and that the wisdom or reasonableness of its regulations are not justiciable.

Mr *Patel* has argued that because the Public Service Commission derives its authority from the Constitution itself, s 75, as opposed to an Act of Parliament it enjoys what has often been referred to as original legislative powers. Mr *Patel* further argued that subs*(s)* 113 (5) and 114(1a) of the Constitution support the contention that the Commission enjoys original legislative power. Those sections provide for the fixing and variations of conditions of service by the Commission. They also authorise the Commission to exercise such powers as are necessary or incidental to carry out the functions conferred on the Commission by s 75 of the constitution. Section 109(1) of the Constitution also provides that the Commission shall not be subject to the direction and control of any person or authority in the exercise of its functions. It

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was argued that because the Commission's authority springs from the Constitution and because of the provisions of subs*(s)* 113(5), 114*(a)* and 109(1) of the Constitution, the Commission is vested with original and plenary law-making powers in its sphere of competence which is prescribed by s 75 of the Constitution. In this regard Mr *Patel* referred the court to the following authorities: *Middelburg Municipality v Gertzen* 1914 AD 544; *Johannesburg Consolidated Investments Co Ltd v Marshalls Township Syndicate Ltd* 1917 AD 662; *Bloemfontein Municipality v Bosrand Quarries (Prop) Ltd* 1930 AD 370; *R v Dickson* 1934 AD 231; and *McGregor Joyce v Cape Provincial Administration* 1946 AD 658.

A perusal of these cases reveals that they all dealt with the doctrine of original and delegated powers to make laws in the context of countries where more



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than one legislature or Parliament existed. The cases establish three criteria for determining whether a body was vested with original or delegated authority to make laws, namely:

(1) whether the person or authority in question derives his or its authority from the South Africa Act (the then equivalent of our Constitution.)

(2) whether the powers conferred were plenary or not.

(3) whether or not the person or authority is elected.

It would appear from the authorities that by far the most important and strongest criterion pointing towards the existence of original power to legislate is the third criterion, ie whether the person or body is elected.

The cases also establish that an authority vested with original power has power to legislate retrospectively. Such an authority's laws or regulations are not justiciable on the grounds of reasonableness, their restrictions or interference with individual rights. The cases establish that the original legislator enjoys plenary powers within the sphere of its legislative jurisdiction. It is quite immaterial that the legislation concerned may be unreasonable, impolitic or retrospective or that it impinges on existing rights.

Applying the above criteria to the facts of this case, the Commission satisfies the first criterion and possibly the second criterion but certainly not the third and indeed the most important.

Mr *Moyo*, on the other hand, has strenuously argued that the Public Service Commission is not vested with original law-making powers. He contended that whatever law-making power the Commission may have is a subordinate or delegated power which is justiciable. Any regulations that the Commission might make are reviewable by this court on the grounds of *ultra vires*, unreasonableness or any other recognised reviewable grounds. In this regard, he cited the provisions of s 32 of the Constitution which provide that legislative authority in Zimbabwe is vested in the legislature. Section 32(2) specifically provides that the legislature can confer legislative functions on any person or authority. A proper reading of s 32 of the Constitution leaves one in no doubt that Parliament and the President as the legislature is the only original

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law maker which can delegate its law-making functions. Parliament is supreme, and because of this supremacy it can, if it says so, or wishes delegate original law-making powers. The intention to confer such power can be extracted from the statute. In this regard, therefore, one has to look at



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s 75 of the Constitution to see if Parliament has conferred original law-making powers on the Commission. If one regards, as I do, the Constitution of Zimbabwe as an Act of Parliament one can safely say there is nothing in the language of that section that indicates Parliament was conferring original law-making powers on the Commission. I am not persuaded by the argument that, because the Constitution is the progeny of an Order-in-Council, it is therefore not an Act of Parliament.

I agree with Mr *Moyo's* submission that the cases Mr *Patel* referred to deal with the theory of original and delegated powers to make laws in countries where there is more than one legislature, such as South Africa, Canada and the United States. Those cases have no application really to a unitary state with one legislature such as Zimbabwe. That is not to say that in Zimbabwe Parliament cannot create a person or authority with original power to legislate. Parliament can, but it has not done so in respect of the first respondent. The mere fact that the authority of the first respondent, indeed as well as that of the other Commissions, is created by the Constitution is insufficient proof of the intention of the framers of the Constitution to invest in the Commissions original law-making powers. The provision for the Commission and other commissions in the Constitution was a confidence building mechanism. It was intended to reassure the public servant by insulating the Commission or Commissions from undue interference. Sections 75 and 109 of the Constitution were never intended to place the regulations of the Commission beyond the review powers of this court. If that was the intention of the law giver the language would have been more explicit and put the issue beyond doubt.

Members of Commission are appointed and not elected. They represent nobody, they are accountable to nobody and they are not subject to the direction of any authority in the exercise of their function. To accept Mr *Patel's* contention that the Commission's regulations are not reviewable except for non-conformity with the Constitution and Parliamentary Acts would be to place the Commission on the same level with Parliament. I am not satisfied that is the intention of the legislator as revealed by s 75 of the Constitution.

In the result, I have come to the conclusion that the first respondent does not have original law-making powers and its regulations are reviewable on any of the recognised grounds of review.

The next issue that falls for determination is whether s 37A of the regulations is retrospective. As I said earlier, s 31(1) of SI 126 of 1992 provides that an



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employee or officer who continuously serves the first respondent from 1 January to November shall be paid a bonus with his salary for that month. However, employees or officers who discontinue their service before November are paid a bonus in terms of ss 33, 34 and 35. Indeed, those employees or officers whose services terminated in terms of ss 33, 34 and 35 of the regulations prior to the first respondent's announcement were paid their bonuses in the course of the year. For the above reasons, I am satisfied that the bonus accrues proportionately as one advances towards November. On this basis s 37A and in particular subs (3) abolished accrued rights in the form of accrued bonus up until the date of the announcement. I also hold the view that s 75 of the Constitution does not confer on the Commission the power to enact regulations that have retrospective effect. On this basis s 37A(3) of the Public Service (Grade, Salary and Allowance) Amendment Regulations 1995 (No. 2) SI 241A/95 is *ultra vires* s 75 of the Constitution and is of no force or effect. On this basis the first respondent's decision to withhold payment of bonuses due to the applicants, taken obviously in terms of the above provision, is unlawful and is hereby set aside. Having come to this conclusion, the issue of the reasonableness or otherwise of the regulations falls away. The need to consider the chamber application made after conclusion of the hearing, which is only relevant to the question of reasonableness, also falls away.

In the result, the application succeeds. The first respondent's decision to withhold bonuses for 1995 is hereby set aside and the first respondent is ordered to pay the applicants' costs.

*Scanlen and Holderness*, applicants' legal practitioners

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



## MATAMBO v MUTSAGO 1996 (1) ZLR 101 (SC)

**Court** **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

25 January 1996 Judgment No. S-19-96

### Flynote

Evidence - witness - demeanour - extent to which demeanour may be relied on - credibility must be measured by comparing testimony against the real evidence

### Headnote

The plaintiff claimed damages against the defendant arising out of a collision between the vehicles of the plaintiff and the defendant. The magistrate dismissed the claim and based his finding entirely on the fact that the defendant was a credible witness whereas the plaintiff was not. The plaintiff appealed.

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Held, that in such cases credibility cannot be measured by demeanour. Credibility can only be measured by comparing the testimony with the real evidence.

Held, further, the plaintiff's evidence as to how the accident occurred was entirely consistent with the facts. No matter how impressive the defendant was as a witness, his evidence was not consistent with the real evidence.

Held, further, that the basis upon which the plaintiff was found to be a bad and evasive witness was not apparent on the record. His version was straightforward and understandable and, most importantly, consistent with the known facts.

Appeal allowed.

Case cited:

*S v Ramotale* 1992 (2) ZLR 397 (S)

*T Kutsinga*, for the appellant

*J R Devittie*, for the respondent

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## Judgment

**McNally JA:** This case involves a collision between two cars. Each party blamed the other and claimed damages. The magistrate found for the plaintiff and dismissed the defendant's claim.

At the hearing we allowed the appeal with costs, and altered the judgment to read:

> "1. The plaintiff's claim is dismissed with costs.
>
> 2. Judgment is granted to the defendant as prayed."

I now set out our reasons for that decision. In so doing, and for ease of reference I shall refer to the appellant as "Mr Matambo" and to the respondent as "Mr Mutsago".

This is a case in which the magistrate based his finding entirely on credibility. He failed to bear in mind in his undated judgment (how often do we have to remind judicial officers to date their judgments?) the remarks I made in *S* v *Ramotale* 1992 (2) ZLR 397 (S) at 399C:

> "Credibility in such cases cannot be measured by demeanour. It can only be measured by comparing the testimony against the real evidence."

The broad facts are not in dispute. Mr Mutsago, a Government official, was driving a Peugeot pick-up truck at about 7 am on 4 June 1990. He was proceeding out of Harare on the Chiremba Road. He was doing a bit of private taxi operating before going to work.

At a point on Chiremba Road where George Road goes off at right angles to his right, he pulled off the road to his left to drop passengers. It was his intention, as he admitted, to do a U-turn in order to pick up some waiting pedestrians at a bus-stop on the other side - people who wanted

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to go into town.

Meanwhile Mr Matambo was coming along Chiremba Road behind him. He had dropped his child off at Cranborne School and was returning home to Epworth Mission. As he drove along he collided with Mr Mutsago's vehicle.

Unfortunately nobody called the policeman who apparently inspected the scene. So there was no "real" evidence as to the point of impact. All that we know, because it is common cause, is that both vehicles were on the tarmac after the collision.

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McNALLY JA

I do not think I am being unfair when I say that Mr Mutsago's version of the accident is that Mr Matambo veered off the road and struck his car. He explains this wildly irrational behaviour by suggesting that Mr Matambo must have thought he was going to do a U-turn and decided to go behind him.

There are three, perhaps four, fundamental problems with this version:

1. Why did Mr Matambo hit the front driver's side of his car instead of the back?
2. Why did his (Mr Mutsago's) car end up on the road?
3. If he had pulled off the road to drop passengers, how did he manage to turn his pick-up to the right, so that it was at right angles to Chiremba Road, without encroaching on Chiremba Road? He never said he dropped his passengers several metres off the road.
4. What made Mr Matambo think there was a sudden emergency if there was not?

However charmingly, smoothly or impressively Mr Mutsago made these statements, the fact is that they are mechanically impossible. If a witness says he saw water flowing uphill unaided by a pump, you do not judge his veracity by reference to his demeanour. You apply the law of physics.

Set against that version is the version of Mr Matambo. He was proceeding along a straight road. He was in no hurry. He saw a vehicle stationary on the left of the road ahead of him. Suddenly and without warning it swung into a U-turn. Before he could do anything it was crossing his path and he hit it.

This version is entirely consistent with the facts. It explains why the damage was to the front driver's side of Mr Mutsago's car and to the front passenger side of his car. It explains why Mr Mutsago's car ended up on the tarmac. And it is consistent with Mr Mutsago's admission that he did indeed intend to do a U-turn. It is apparent that the thought was father to the deed. He intended to do a U-turn and he did in fact start to do so. He failed to notice the approaching vehicle of Mr Matambo.

I should add that the basis on which Mr Matambo was found to be a bad and evasive witness

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was not apparent to us on the record. His version was



McNALLY JA

straightforward, understandable and, most importantly, consistent with the known facts. Mr Mutsago's was not.

For these reasons we allowed the appeal with costs.

Gubbay CJ: I agree.

Muchechetere JA: I agree.

*Honey & Blanckenberg*, appellant's legal practitioners

*D W Aitken & Co*, respondent's legal practitioners



## DHLEMBEU v DHLEMBEU 1996 (1) ZLR 105 (SC)

**Court** **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

23 & 30 January 1996Judgment No. S-18-96

### Flynote

Family law - maintenance - divorce - former wife - whether entitled to be provided with accommodation

Family law - husband and wife - duty of support - entitlement of wife to be provided with accommodation after marriage dissolved

### Headnote

The parties to the appeal were husband and wife, who had divorced in 1991. No order was made at the time of the divorce for the division, apportionment or distribution of the assets of the spouses or for the former husband to pay maintenance. Nonetheless, the former wife continued to live in the former matrimonial home and refused to leave it. The former husband left the property when he became entitled to an official residence provided by his employer. He applied to the High Court for an order evicting her from the property; in reply, she applied for an order declaring that she was the sole and exclusive owner of the property. The judge *a quo* granted the husband's application, on the grounds that the husband had unfettered rights of ownership and, as the person with legal title, was entitled to vacant possession.

Held, that the wife was entitled to seek an order with regard to the division of the assets at any

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time after the grant of the decree of divorce; but on the dissolution of the marriage the husband's duty to provide her with accommodation ceased. She lost her right of occupation arising from her previous status as his wife. She had no *legal* interest in the property and there was no valid basis on which she might continue in occupation. What she had was a claim in relation to the property; that claim might or might not be successful.



Cases cited:

*Masimbe v Masimbe* 1995 (2) ZLR 31 (S)

*Nyatawa v Nene* S-119-91

Statutes referred to:

Matrimonial Causes Act [*Chapter 5:13*], s 7(1)*(a)*

*G C Chikumbirike*, for the appellant

*A J Dyke*, for the respondent

## Judgment

**Gubbay CJ**: The respondent is the registered owner of the immovable property Lot 4A Welmoed, also known as 4 Wavell Road, Highlands, Harare ("the property"). It was purchased three years after he and the appellant married and was the matrimonial home prior to their divorce on 6 February 1991.

No order was made in the matrimonial proceedings for division, apportionment or distribution of the assets of the spouses, or for the payment of maintenance by the respondent. Nonetheless the appellant continued to reside at the property and steadfastly refused all requests that she vacate. In a letter of 26 August 1992, written by the appellant's legal practitioner, it was stated:

> "Our client contends that it is your client's *duty to provide accommodation* for her. In any event despite a claim in terms of section 7 of the Matrimonial Causes Act not having been made at the time of the divorce, same can be made now. Our client is contemplating doing that" (emphasis added).

In March 1993 the respondent left the property. He did so when, as an executive in the employ of a commercial bank, he became entitled to the beneficial occupation of an official residence.

On 18 May 1993 the respondent applied to the High Court for an order evicting the appellant from the property. In response, the appellant filed an opposing affidavit on 4 June 1993. Simultaneously therewith she instituted an action in the High Court, claiming that she be declared the sole and exclusive owner of the property.

The pleadings in that action have been closed but a pre-trial conference is yet to be held and dates of trial set.

The learned judge in the court a *quo* granted the application with costs. In

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GUBBAY CJ

doing so, he expressed the view that, until such time as the trial court made a determination in favour of the appellant, the respondent has unfettered rights of ownership in the property; in the interim, as the person with legal title, he was entitled to vacant possession of the property. See Silberberg and Schoeman *The Law of Property* 2 ed at pp 288-289.

The appellant's ability to bring such a claim subsequent to the termination of the marriage is undoubted. Section 7(1)*(a)* of the Matrimonial Causes Act [*Chapter 5:13*] specifically enables an appropriate court to make an order with regard to the division, apportionment or distribution of matrimonial assets and the payment of maintenance, at any time after the grant of a decree of divorce. But it must be made clear that upon the dissolution of the marriage the respondent's duty to provide the appellant with accommodation ceased. The appellant lost the right of occupation arising from her previous status as a wife. See *Nyatawa* v *Nene* S-119-91 (unreported); Hahlo *The South African Law of Husband and Wife* 5 ed at p 386.

The sole issue, therefore, is whether, in the circumstances pertaining as revealed in the affidavits of the parties, the learned judge was correct in declining to withhold from the respondent, pending the outcome of the trial, the exercise by him of the right to secure occupation of the property.

The decision of this court in *Nyatawa v Nene supra* is no authority for the proposition advanced on behalf of the appellant that an application such as this should be refused by a court if the pending decision was an action by a former spouse for a division of an immovable property acquired during the marriage. What was said was simply that there may be situations in which a court would compel a (former) husband to retain property when he is disposing of it deliberately to harass or defeat the just claims of his (former) wife. I have no difficulty in endorsing that statement. A court will always grant relief by way of interdict where the potentiality of irreparable harm or the balance of convenience so dictate.

Reliance was also placed by counsel for the appellant on the recent judgment in *Masimbe* v *Masimbe* 1995 (2) ZLR 31 (S). What was substantively in dispute, however, was whether the High Court had been justified in ordering that the interdict be given effect to, notwithstanding that an appeal had been noted against the terms upon which it had been granted. No principle favouring the appellant's contended right to remain in occupation of the property is deducible therefrom.



GUBBAY CJ

I agree entirely with the learned judge that at this juncture the appellant has no *legal* interest in the property. There is, therefore, no valid basis upon which she may continue in occupation. What she has is a claim in relation to the property which may or may not meet with success, either wholly or in part.

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I consider therefore that the appeal must be dismissed with costs.

McNally JA: I agree.

Muchechetere JA: I agree.

*Chikumbirike & Associates*, appellant's legal practitioners

*Gollop & Blank*, respondent's legal practitioners



## TEDCO MGMT SVCS (PVT) LTD v GRAIN MARKETING BOARD 1996 (1) ZLR 109 (SC)

**Court** **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Civil appeal

16 November 1995 & 8 February 1996 Judgment No. S-246-95

### Flynote

Negotiable instruments - Bills of Exchange Act [Chapter 14:02] Ð s 85(1) - cheque stolen from true owner and negotiated to third person who accepted them in good faith - third person then paid out by bank - right of true owner to recover from third person in circumstances where bank not liable for loss

### Headnote

Standard Chartered Bank issued some cheques forms to the plaintiff. These cheques were crossed and endorsed "not negotiable". The plaintiff's employee fraudulently drew some of these cheques. He entered false information into the plaintiff's computer and then was able to print onto the cheques false particulars and dates, but true machine-printed signatures of the plaintiff's officials. These signatures were affixed without the authority of the officials. Once these cheques had been so printed the employee unlawfully appropriated these cheques.

The defendant, acting *bona fide* and unaware that they did not represent true debts owed by the plaintiff to the named payees, accepted and gave consideration for these cheques and the plaintiff's employee received payment in respect of these cheques. The defendant in turn obtained full value for the cheques from Standard Chartered Bank, in total amount of just under $204 818,61.

The plaintiff claimed $204 818,61 from the defendant, basing its claim on the provisions of s 85(1) of the Bills of Exchange Act [*Chapter 14:02*]. The defendant excepted to the claim. The court dismissed the exception. The defendant appealed against this decision and the plaintiff crossÐappealed against the ruling by the court *a quo* that a portion of the claim had prescribed.



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Held, that s 85(1) of the Bills of Exchange Act is designed to make payment by cheque safer by giving the true owner of a cheque a new remedy in the event of the cheque marked "not negotiable" being stolen or lost and discharged by payment. This section creates a remedy similar to the action for conversion in English law. The person who has been possessor of the cheques and who gave consideration for the cheque is liable to the true owner for the amount of his loss, provided that the cheque was paid by the bank upon which it was drawn under circumstances which do not render the bank liable to the true owner under ss 82 and 85 of the Bills of Exchange Act. The liability of the possessor is absolute and it is no defence for him to prove that he was not negligent.

Held, further, that for this provision to apply, the cheque stolen must be a completed cheque. In the present case, the plaintiff's employee had used the computer to transform cheque forms into completed cheques and had then proceeded to steal these completed cheques. The cheques were thus stolen cheques as required by s 85(1).

Held, further, that although the cheques were wholly inoperative in terms of s 23 of the Bills of Exchange Act because the inclusion of the printed signatures on these fraudulent drawn cheques had not been authorised by the plaintiff, the instruments upon which the signatures had been affixed were nonetheless cheques or bills in terms of the Act.

Held, further, that it was an essential requirement for a claim under s 85(1) that the bank was not liable to the true owner of the cheque. The claimant had failed to include in its declaration an allegation that the bank was not liable and the claim was excipiable on this basis. However, the court gave the plaintiff leave to amend its declaration in this regard.

Held, further, as regards the portion of the claim alleged to have prescribed, that the liability imposed by s 85(1) is similar to liability in delict, in the sense that the obligation is to make good a loss sustained by the true owner of a cheque. It is not an enforcement of the rights or obligations arising from the bill of exchange. It is compensation to the true owner for the handling of that instrument by a person without title, even if that person does handles the instrument innocently. The prescription period for this claim is thus three years, as it falls under s 15*(d)* of the Prescription Act [*Chapter 8:11*]; it is not six years, as it does not fall within s 15*(c)(i)* of the Act, not being "a debt arising from a bill of exchange."

Cases cited:

*Arrow Tpt Ltd v Royal Bank of Canada* et al (1971) 19 DLR (3d) 420

*Bank of England v Vagliano* [1981] AC 135



*Bank of Ireland v Trustees of Evans' Charities* (1855) 5 HL Cas 389

*Baxendale v Bennett* (1878) 3 QB 525 (CA)

*John Bell & Co Ltd v Esselen* 1954 (1) SA 147 (A)

*Big Dutchman (SA) (Pty) Ltd v Barclays National Bank Ltd* 1979 (3) SA 267 (W)

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*Broekman v TCD Motors (Pty) Ltd* 1949 (4) SA 418 (T)

*Brown v Westminster Bank Ltd* [1965] 2 Lloyd's Rep 187 (QB)

*Connock's (SA) Motors Co Ltd v Sentraal Westelike Ko-operatiewe Bpk* 1964 (2) SA 47 (T)

*Herbert v Steele* 1953 (3) SA 271 (T)

*Holzman v Standard Bank Ltd* 1985 (1) SA 360 (W)

*Lewis Sanitary Steam Laundry Co Ltd v Barclay and Co Ltd* (1906) 95 LT 444

*OK Bazaars (1929) Ltd v Universal Stores Ltd* 1972 (3) SA 175 (C)

*Pentz v Govt of the Republic of SA* 1983 (3) SA 584 (A)

*Silver v Shapiro* 1926 TPD 141

*Smith v Prosser* [1907] 2 KB 735 (CA)

*Standard Bank of SA Ltd v Kaplan* 1922 CPD 214

*Standard Bank of SA Ltd v Min of Bantu Education* 1966 (1) SA 229 (N)

Statutes referred to:

Bills of Exchange Act [*Chapter 14:02*], ss 3, 23, 25(1), 59, 82 and 85(1)

Prescription Act [*Chapter 8:11*], s 15

*M J Gillespie*, for the appellant

*H Simpson*, for the respondent

## Judgment

**Gubbay CJ**: This is both an appeal from the High Court dismissing with costs an exception brought by the defendant, the present appellant, to a declaration filed by the plaintiff, now the respondent, and a cross-appeal by the plaintiff against an order that it was only entitled to payment by the defendant of the sum of $133 766,58 with interest *a tempore morae,* the balance of its claim, in an amount of $71 052,03, being prescribed.

The facts alleged in the declaration as further particularised give rise to the following scenario:

During the period extending from 8 May 1989 to 14 May 1991 the defendant accepted, and gave consideration for, twenty-six of the plaintiff's cheques, crossed and endorsed with the words "not negotiable". These cheques had been fraudulently drawn by the plaintiff's employee, Godfrey Matake. They did not represent genuine debts owed by the plaintiff to the named payees.



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GUBBAY CJ

What Matake did was to raise false adjustment vouchers which reflected fictitious sums of money due by the plaintiff to non-existent creditors. He entered this information into the plaintiff's computer to which he had access. That done, he succeeded in having a number of cheque forms issued to the plaintiff by Standard Chartered Bank, which were crossed and marked "not negotiable" and contained the name of its branch, printed out with the false particulars and dates. These cheques, however, bore the true "machine" signatures of two of the plaintiff's officials which, in the circumstances, had been affixed without the authority of the signatories. Once each cheque had been printed out in complete form, Matake unlawfully appropriated it. Over the period aforementioned he received payment in respect of all such cheques from the defendant, which was *bona fide* and unaware that they did not represent true debts owed by the plaintiff to the named payees. The defendant, in turn, obtained full value for the cheques, in a total amount of $204 818,61, from the Standard Chartered Bank on which they were drawn.

The plaintiff based its claim for payment of the sum of $204 818,61 on the provisions of s 85(1) of the Bills of Exchange Act [*Chapter 14:02*], which reads:

> "If a cheque has been stolen or lost while it was crossed as hereinbefore provided, and while it bore on it the words not negotiable', and it has been paid by the banker upon whom it is drawn under circumstances which do not render such banker liable in terms of this Act to the true owner of the cheque for any loss he may sustain owing to the cheque having been paid, the true owner shall, if he has suffered any loss as a result of the theft or loss of the cheque, be entitled to recover from any person who has been the possessor thereof after the theft or loss and either gave a consideration therefor or took it as a donee, an amount equivalent to the true owner's said loss, but not exceeding the amount of the cheque."

The exception took two points:

> "(1) The documents stolen were not cheques for the purpose of the statutory relief prayed in that -
>
> *(a)* the particulars of payee, amount, date and signature, were endorsed thereon without authority;
>
> *(b)* the *contrectatio* by which the blank documents were converted



> to the unauthorised use occurred at a time when the documents were not cheques in terms of the Bills of Exchange Act;
>
> *(c)* the requirement of the statutory relief that a cheque' be stolen is accordingly not satisfied.
>
> (2) *(a)* It is an essential element of the cause of action relied upon that the banker upon which the cheque is drawn is not liable to the true owner for loss he may sustain owing to the cheque having been paid.
>
> *(b)* The signatures placed on the documents were placed thereon without the authority of the persons whose signatures they purport to be.
>
> *(c)* In the premises the banker is *prima facie* liable to the plaintiff."

The defendant filed simultaneously with the notice of exception a special plea in abatement. It raised the contention that of the 26 cheques twelve, dated between 8 May 1989 and 7 May

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1991, not being debts which arose out of a bill of exchange or other liquid document and amounting to $71 052,53, were governed by the standard prescriptive period of three years, which had expired prior to service of the summons upon it on 2 October 1992.

Section 85(1) of the Bills of Exchange Act is designed to make payment by cheque safer by giving the true owner a new remedy in the event of his cheque being stolen or lost and discharged by payment. See *OK Bazaars (1929) Ltd v Universal Stores Ltd* 1972 (3) SA 175 (C) at 179E. The provision imports into Roman-Dutch law a remedy similar to the action for conversion of English law, specifically with respect to cheques crossed and marked "not negotiable". See *John Bell & Co Ltd v Esselen* 1954 (1) SA 147 (A) at 153; *Standard Bank of SA Ltd v Minister of Bantu Education* 1966 (1) SA 229 (N) at 237G-H and 238B-C; Sharrock and Kidd *Understanding Cheque Law* at p 168; *LAWSA* vol 19 para 163 at p 100. Thus, the true owner of such a stolen or lost cheque may recover an amount equal to his loss, but not exceeding the amount of the cheque, against any person who has been the possessor thereof after the theft or loss, and who either *(a)* gave consideration for it or *(b)* took it as a donee; provided that such a cheque was paid by the bank on which it was drawn under circumstances which do not render the bank liable in terms of ss 82 and 85 of the Act to the true owner of the cheque for any loss he may have sustained as a result of the cheque having been paid. The fact that the





theft or the loss was caused by the negligent conduct of the true owner does not preclude his right of recovery. Liability is absolute. It is not based on fault. Proof by the possessor of the absence of negligence will not avail him. The situation is simply that a statutory right comes into existence in favour of the true owner of the cheque and a corresponding liability is imposed on the party who possessed it. See Cowen *The Law of Negotiable Instruments in South Africa* 5 ed vol I at p 206.

As foreshadowed in para 1 of the notice of exception, two submissions were advanced upon which it was urged that the protection afforded by s 85(1) of the Bills of Exchange Act was not available to the plaintiff. The first, as I understood it, was expressed by counsel as follows:

The initial requirement for liability is that the instrument stolen or lost must be a "cheque". A "cheque" is defined in s 72 of the Act as "a bill of exchange drawn on a banker payable on demand"; and a bill of exchange must, *inter alia,* be signed by the person giving it - otherwise it is not a bill of exchange (see ss 3(1) and (2)). Since Matake's initial c*ontrectatio* in each instance was not of a cheque but involved an incomplete pre-printed cheque form, what he stole was not a cheque for the purpose of s 85(1). Certainly, he did not steal a crossed and restrictively endorsed cheque signed by the drawer.

Reliance was placed by counsel on the *dictum* of Robertson JA in the Canadian case of *Arrow Transport Co Ltd v Royal Bank of Canada et al* (1971) 19 DLR (3d) 420 (British Columbia Court of Appeal) at 438, that:

> "In order to succeed on a claim of this kind the plaintiff must be the true owner of the piece of paper *qua* cheque

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and not simply the owner of the piece of paper *qua* piece of paper."

I readily accept that s 85(1) is meaningless except in the context of a complete cheque and that it has no application to the theft of an incomplete pre-printed cheque form on which the name of the payee and the amount to be paid are missing. But I am unable to agree to the proposition that Matake stole incomplete cheque forms. He manufactured what in appearance was a complete cheque by entering into the computer the desired false information relating to the fictitious payee and the amount payable to him. Thereafter he removed the completed instrument as it came out of the printer. In other words, Matake transformed, with the use of the plaintiff's computer and printer, cheque forms, already crossed, restrictively endorsed, bearing the name of the drawee bank and the signatures of the plaintiff's designated



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officials, into complete cheques. The addition by him of the name of the payee and specified amount converted these cheque forms, or inchoate instruments, into complete cheques. And what Matake manufactured into a tangible entity, he stole. He stole nothing before the cheque form with the false information entered upon it emerged from the printer. His unlawful appropriation occurred at that time. He took possession of the complete cheque without the plaintiff's consent and without ownership therein passing.

In support of his second submission counsel for the defendant relied heavily on s 23 of the Bills of Exchange Act, which reads:

> "Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative and no right to retain the bill or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:
>
> Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to forgery."

It was averred in the declaration that the signatures printed on the 26 cheques by the computer were genuine but unauthorised by the plaintiff. Clearly, before such signatures could be effective there must have been an intention on the part of the signatories that the cheques be issued. The signatories never intended that an unauthorised person should use the cheque forms for creating cheques binding upon the plaintiff. They never intended that the signatures on any particular cheque form should be valid unless the cheque form was legitimately completed with the name of an authentic payee and an amount owed to him by the plaintiff. Since they had not been so completed, the signatures, though visibly on the cheque forms, were not present in any authorised capacity or sense. See *Silver v Shapiro* 1926 TPD 141 at 146-147; *Herbert v Steele* 1953 (3) SA 271 (T) at 275A-C; *Baxendale v Bennett* (1878) 3 QB 525 (CA) at 531; *Smith v Prosser* [1907] 2 KB 735 (CA) at 749; Malan *Bills of Exchange, Cheques and Promissory Notes* 2 ed para 132 at p 206.

Yet does it necessarily follow that, although the signatures of the plaintiff's designated officials "were wholly inoperative" as being unauthorised, the instruments upon which they had been

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affixed are not to be regarded as "cheques"?



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An affirmative answer is given in Sharrock and Kidd *op cit* at p 161 n 1, where it is said, albeit somewhat cryptically, that:

> "The instrument is also not a cheque because a forged or unauthorised signature is wholly inoperative."

Malan *op cit* para 36 at p 46 n 82 disagrees. He expresses the opinion that:

> "an instrument on which the signature of the drawer is forged (or unauthorised) is a bill",

and points out that ss 52*(b)(i)* and 53(2)*(b)* of the South African Act (the counterparts to our ss 53*(b)(i)* and 54(2)*(b)*) seem to assume this.

I consider, with respect, that Professor Malan's view is to be preferred.

Although a forged or unauthorised signature is wholly inoperative and no right to enforce payment on a bill against any party thereto can be acquired through or under that signature, there are certain exceptions which preclude parties to the instrument, when sued by a "holder in due course" (he is not a real "holder" because he acquires title through a forged or unauthorised signature) from denying the genuineness of certain signatures:

*(a)* s 53*(b)(i)* provides that an acceptor of a bill is precluded from denying to a holder in due course the existence of the drawer, the genuineness of his signature and his capacity and authority to draw the bill;

*(b)* under s 54(2)*(b)* an endorser of a bill, by endorsing it, is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous endorsements.

Thus, the drawer can rely on the forgery or lack of authority of any signature; the acceptor can rely on the forgery of any signature except in an action instituted by an apparent holder in due course; and an endorser cannot invoke s 23 against a holder in due course and argue that, because a signature before his was forged or unauthorised, the bill is a nullity.

There are, I think, additional indications that the legislature did not intend that the effect of the wholly inoperative forged or unauthorised signature upon a bill would render it non-existent as such:



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*(c)* A person who signs the bill without authority is personally liable as if he signed his own name (see the proviso to s 25(1)).

*(d)* Section 59 provides that if a bill payable to order or demand is drawn on a bank, and the

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bank pays it in good faith and in the ordinary course of business, the bank need not show that the endorsement of the payee or any subsequent endorsement was made by or under the authority of the person whose endorsement it purports to be, and the bank is deemed to have paid the bill in due course, even though the endorsement was forged or unauthorised. See Malan *op cit* para 209 at pp 351-352.

*(e)* The party against whom it is sought to claim or to enforce payment may be precluded by his prior conduct from setting up the forgery or want of authority. See *LAWSA op cit* para 38 at p 30 n 9.

*(f)* Section 23 significantly uses the phrase "signature on a *bill*", not "... on an *instrument*", and then stipulates that what is wholly inoperative is not the *bill* but "the forged or unauthorised signature".

*(g)* An unauthorised signature to a bill that does not amount to a forgery may be ratified (see the proviso to s 23).

In so deciding, I have not overlooked that s 3 specifies that to be a bill of exchange the instrument must be "signed by the person giving it".

It seems to me that s 3 is concerned with the essential elements of *form* a bill must take. It must have the appearance of an order in writing; it must enjoin the person to whom it is addressed to pay it; it must state a sum certain in money; it must be payable to, or to the order of, a specified person or to bearer. And, as already mentioned, it must have the *characteristic* that it is signed by the person giving it.

This latter requirement, when construed in the context of the other provisions of the Act to which reference has been made, cannot mean that where the signature of the drawer is forged or unauthorised the instrument is not a bill. For it does not follow that if a matter of form on an instrument is forged or unauthorised the instrument cannot be a bill. In my view, an instrument may nevertheless be a bill despite the drawer's signature thereon being forged or unauthorised.

Accordingly, I hold that there is no merit in either submission in support of the first exception to the plaintiff's declaration.

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Paragraph 2 of the notice of exception attacks the declaration for its omission to make the essential allegation that the drawee banker, Standard Chartered Bank, which discharged payment of the 26 cheques notwithstanding that the signatures thereon were unauthorised, did so under circumstances that did not render it liable to the plaintiff in terms of the Act. Stated otherwise, it is fundamental that the true owner of a stolen cheque, wishing to invoke the protection of s 85(1) against a possessor of the cheque, must establish that no cause of action lies for the recovery of the loss against the bank upon which the cheque was drawn and which discharged payment thereunder. See *Standard Bank of SA Ltd v Minister of Bantu Education supra* at 231H-232B.

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The general rule in South African law, when the signature of the drawer of a cheque has been forged or placed thereon without authority, is that the bank pays the cheque at its own risk. It may not debit the account of its customer (the drawer), or recover the amount so paid. See *Standard Bank of SA Ltd v Kaplan* 1922 CPD 214 at 222; *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 (3) SA 267 (W) at 283A-B; *Holzman v Standard Bank Ltd* 1985 (1) SA 360 (W) at 363H-I; Malan *op cit* para 208 at pp 345-346; Pretorius *1985 Annual Survey of South African Law* at p 344. The skilfulness or otherwise of the forgery is entirely irrelevant. The sole ground of liability is that the bank made payment without the authority of its customer.

There are, however, exceptions to the rule. In certain circumstances a customer may be precluded from relying on the forgery or lack of authority and so the drawee bank may debit his account with the amount of the forged or unauthorised cheque. The customer will be estopped in circumstances where:

*(a)* He adopts the forged or unauthorised signature as his own. See Malan *op cit* para 208 at p 346; *Brown v Westminster Bank Ltd* [1964] 2 Lloyd's Rep 187 (QB) at 200.

*(b)* Knowing of or suspecting the forgery or lack of authority, he fails to notify the bank timeously. See *Broekman v TCD Motors (Pty) Ltd* 1949 (4) SA 418 (T) at 425; *Connock's (SA) Motors Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk* 1964 (2) SA 47 (T) at 51B-F; *Universal Stores Ltd v OK Bazaars (1929) Ltd* 1973 (4) SA 747 (A) at 761D-G; *Big Dutchman supra* at 283A.

*(c)* He breaches the duty owed to his bank to draw cheques with reasonable care in order to prevent forgery or alteration, and such negligence is the immediate cause of the bank being misled. See *Standard Bank of SA Ltd*

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*v Kaplan supra* at 223-224; *OK Bazaars (1929) Ltd v Universal Stores Ltd supra* at 288E-G. In *Holzman v Standard Bank Ltd supra* at 364F-H Nicholas J (as he then was) quoted with approval the following passage from the judgment of Kennedy J in *Lewis Sanitary Steam Laundry Co Ltd v Barclay & Co Ltd* (1906) 95 LT 444 at 447:

> "(In) order to relieve the banker from the consequence of paying money upon a forged cheque, it is not enough for the banker to show that the conduct of his customer, wilful, careless or wasteful, or all, enabled the fraud to be committed. He must show that the customer caused him to pay the money upon the forged cheque. It is not enough to show that the customer gave occasion for his so paying - that different conduct would have prevented the fraud and the payment by the banker: see *per* Lord Bramwell in *Bank of England v Vagliano* [1891] AC at 135. And the case of *Bank of Ireland v Trustees of Evans' Charities* (1855) 5 HL Cas 389 establishes the proposition that negligence to make an estoppel must be in, or immediately connected with, the transaction itself which is complained of. The carelessness of the customer or neglect of the customer to take precautions unconnected with the act itself, cannot be put forward by the banker as justifying his own default' (*per* Lord Halsbury in *Bank of England v Vagliano (ubi sup* at 115).)".

Thus, as put by Malan *op cit* para 208 at p 350, the drawer of a cheque has no duty to the

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bank to take reasonable precautions to supervise his employees, to run his business carefully, to detect forgeries, to examine bank statements or to inform his bank of incorrect entries made thereon.

An examination of the declaration in the light of the principles outlined, reveals that the prerequisite for entitlement to the remedy afforded by s 85(1) of the Act was not pleaded. Absent is the specific allegation of the non-liability of the Standard Chartered Bank. On the contrary, the averments that the signatures imprinted on the cheque forms were genuine but were unauthorised in the circumstances pertaining, and that the bank discharged payment thereunder, is *prima facie* inferential of its liability to the plaintiff. In short, on the facts disclosed, the bank would appear to be liable to its customer, the plaintiff, for the loss sustained. Whether it will be able to avoid liability is dependant upon it proving an estoppel against the plaintiff.

In my view, therefore, the second exception was sound and ought to have been allowed by the learned judge.

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Since it is possible that the plaintiff may be able to allege facts which disclose a cause of action against the defendant, it will be given leave to amend the declaration. In the result:

1. The appeal against the dismissal of the exception is allowed with costs.

2. The order of the court *a quo* is altered to read:

" *(i)* The exception to the declaration is upheld with costs.

(ii) The plaintiff is given leave to amend the declaration within fourteen days, if so advised."

Although the conclusion reached in respect of the appeal is that the exception was well taken, it is nonetheless necessary to consider the fate of the cross-appeal. For, in the event of the plaintiff being able to amend its declaration by the formulation of a valid cause of action, it will be essential for the parties to know whether or not the court *a quo* was correct in holding that portion of the plaintiff's claim is prescribed.

It was common cause that the dates upon which the defendant received value for the 12 stolen cheques, and the date, in each instance, when the plaintiff became aware of the debt due to it by the defendant, all fell between 8 May 1989 and 7 May 1991. Accordingly, what has to be decided is whether in terms of the Prescription Act [*Chapter 8:11*], the extinctive period is the residual three years in the case of "any other debt" under s 14*(d)*, or six years under s 14*(c)(i)* as being "a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract".

As was envisaged, the defendant's counsel relied heavily on the judgment of the South African Appellate Division in *Pentz v Government of the Republic of South Africa* 1983 (3) SA 584 (A) as authority for his submission that the plaintiff's cause of action does not arise from a bill of exchange, but is rather a statutory cause *sui generis* for damages.

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In *Pentz's* case, an employee of the Department of Bantu Education and Development had fraudulently misrepresented to his employer that an amount of R52 950 was owed by the Department to a company, AM (Pty) Ltd. A cheque, dated 14 September 1977, in this amount had been validly drawn in consequence of the misrepresentation, payable to the said company, which did not exist. The employee then appropriated the cheque and, after signing it on behalf of the fictitious payee, passed it on to the appellant for him





to deposit it for collection. The cheque was duly paid. Thereafter, the appellant reimbursed the employee, but retained an amount of R10 000 for his personal use. The trial court (Vermooten J) was of the opinion that the cheque had been stolen and that a claim under s 81 of the Bills of Exchange Act 34 of 1934 lay at the instance of the Department; that, as the appropriate period of prescription was six years, the claim was not prescribed. See *Government of the Republic of South Africa v Pentz & Anor* 1982 (1) SA 553 (T).

On appeal Nicholas AJA, writing for an unanimous court, held that the debt on which the Department had sued "clearly" did not arise from a bill of exchange but was in respect of a liability to compensate the true owner of a lost or stolen cheque crossed and marked "not negotiable", which liability arose from s 81(1) of the Bills of Exchange Act (see at 593D-E). Consequently s 11(1) of the Prescription Act 1969, providing for a period of prescription of six years in respect of a "debt arising from a bill of exchange or other negotiable instrument", did not apply and the period of prescription was three years (see at 593F).

In 1982 *Annual Survey of South African Law* at p 332, Professor Sinclair advances a further argument in support of the judgment of Nicholas AJA. It is based on the use of the word "debt" and not "action" in s 11(1) of the Prescription Act and is to this effect. Since s 81(1) of the Bills of Exchange Act in essence provides a method of obtaining compensation for damage suffered resulting from the theft or loss of a certain type of cheque, rather than a means of recovery of a debt, a claim under s 81(1) would fit uncomfortably within the ambit of the term "debt" as used in s 11(1). See also Visser 1983 *Annual Survey of South African Law* at p 328; Malan *op cit* para 185 at p 286; Christie *Law of Contract in South Africa* 2 ed at p 578.

I respectfully approve of the construction accorded to s 11(1) and s 81(1) of the two South African statutes. These provisions identify closely with ss 14*(c)(i)* and 85(1) of the comparative Zimbabwean legislation. I would merely emphasise that there is no justification for reading into the phrase "arising from a bill of exchange" in s 14*(c)(i)* of the Prescription Act any implied reference to the Bills of Exchange Act. The liability imposed by s 85(1) is similar to a liability in delict, in the sense that the obligation is to make good loss sustained by the true owner of a cheque. It is not an enforcement of rights or obligations arising from the bill of exchange. It is compensation to the true owner for the handling of that instrument by a person, even be he innocent, without title. It is a strict liability, akin to the liability for conversion in English law. If the legislature had intended to fix



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a period of six years for the extinctive prescription of a debt arising from the liability imposed by s 85(1), it would have expressly said so. The language of s 14*(c)(i)* cannot be stretched to embrace such a liability on the ground that the existence of a cheque is a *sine qua non* of it being incurred or because it is imposed by an enactment concerned with bills of exchange.

It is for these reasons that I would dismiss the cross-appeal with costs.

McNally JA: I agree.

Ebrahim JA: I agree.

*Surgey, Pittman & Kerswell*, appellant's legal practitioners

*Coghlan, Welsh & Guest*, respondent's legal practitioners



## STANDARD CHARTERED BANK ZIMBABWE LTD v MATSIKA 1996 (1) ZLR 123 (SC)

**Court** **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Appeal against determination of Labour Relations tribunal

18 January & 8 February 1996 Judgment No. S-23-96

### Flynote

Employment - contract - termination - application to labour relations officer to dismiss employee - employee already suspended pending application - grounds relied on by employer in application different from grounds on which employee suspended - whether grounds for application should be same as grounds for suspension

### Headnote

The appellant company employed the respondent as a bank manager. After some two years in his post, he was suspended, on full pay, after police investigations had been begun into allegations that travellers cheques had been fraudulently issued with his connivance. Over four months after his suspension, he was placed on remand on an allegation under the Prevention of Corruption Act [*Chapter 9:16*]. Shortly after that, the bank then told him that his suspension was to continue, but now without pay. A further six weeks later, the bank applied to a labour relations officer for an order terminating the respondent's employment. The grounds for the application were that the respondent had committed an act inconsistent with the fulfilment of the express or implied conditions of his contract, in that, in recommending the grant of an overdraft to a client, the respondent had made incorrect representations, some deliberately, others through failure to verify the truth.

The labour relations officer granted the bank's application, but the respondent appealed to a

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senior labour relations officer, who remitted the matter to another labour relations officer for further investigation. In the meantime, the respondent was acquitted of the criminal charges. The labour relations officer ordered the respondent's reinstatement. His decision



was upheld by a senior labour relations officer on appeal. The bank appealed to the Labour Relations Tribunal, which dismissed the bank's appeal, on the ground that the reasons relied on by the bank in its application to the labour relations officer differed from those for which the respondent had been suspended without pay.

Held, that the common law principle - that an employer may defend a dismissal on any objective ground in existence, even if he was at the time unaware of it - was not relevant. The Regulations envisaged a substantive application for relief on defined grounds subjectively known to the employer and objectively proved to have existed. It would be incompetent for a labour relations officer to order the termination of employment on a ground that was only relied on or arose after the date of suspension and was different from either that which had motivated the suspension, together with the application made forthwith, or that upon which the application alone was based, where the employee had not been suspended.

Held, further, that by failing to make its application for the respondent's dismissal "forthwith", in the sense of "as soon as reasonably possible in the circumstances", the suspension without pay was a nullity. The bank then had two choices. It could suspend the respondent again on the same ground or on another ground specified in the Regulations and forthwith apply on that ground for his dismissal. Alternatively, it could make an application on any specified ground, which need not necessarily be the same as the original ground for suspension, without re-suspending him. In either event, it was obliged to pay him his salary and other benefits from the date of the invalid suspension. But its failure to formally lift the invalid suspension and reinstate the respondent did not affect the bank's right to make an application.

Cases cited:

*Abernethy v Mott, Hay & Anderson* [1974] ICR 323 (CA)

*Flemmer v Ainsworth* 1910 TPD 81

*J Pintusewitz (Pty) Ltd v SA Pharmacy Council* 1994 (2) SA 68 (C)

*Kahari v International Construction Co (Zimbabwe) Ltd* HH-49-91

*Nourse* v *Farmer's Co-op Ltd* (1905) 19 EDC 291

*R v West & Wild* 1953 SR 199; 1953 (2) SA 675 (SR)

*Rashayi v Bakasa African Council* 1978 RLR 389 (A)

*Sleightholme Farms (Pvt) Ltd v National Farmers' Union Mutual Ins Soc Ltd* 1966 RLR 467 (G)

*Sterling Products International Ltd v Zulu* 1988 (2) ZLR 293 (S)

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Statutes and regulations referred to:

Employment Protection (Consolidation) Act [*Chapter 44*] (England), s 57(1)*(a)*

Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371/1985), s 3(1)

*A J Dyke*, for the appellant

*M J Gillespie*, for the respondent

## Judgment

**Gubbay CJ:**

**INTRODUCTION**

This is an appeal by Standard Chartered Bank Zimbabwe Limited and a cross-appeal by Mr Lovemore Matsika against a determination of the Labour Relations Tribunal ("the Tribunal"), both of which are brought pursuant to s 92(2) of the Labour Relations Act [*Chapter 28:01*], on questions of law only. It is convenient to refer to the parties as "the Bank" and "Matsika".

On 20 September 1994 the Bank appealed to the Tribunal in terms of s 97(1)*(a)* of the Act against the determination of a senior labour relations officer, which in turn had upheld a determination of a labour relations officer directing the Bank to reinstate Matsika in employment without loss of pay and other benefits from the date of his suspension.

In a judgment handed down on 10 April 1995 the Tribunal dismissed the Bank's appeal with costs, yet declined to order the reinstatement of Matsika in employment. Instead it held that the Bank was liable in damages, the precise *quantum* to be awarded at a later date after the reception of evidence from the parties.

**THE CHRONOLOGY**

In order to decide the issues in this matter, which were so persuasively argued on behalf of the parties, it is necessary at the outset to trace the relevant historical events. They were these:

1. On 25 October 1990 Matsika commenced duty as manager of the newly opened Chitungwiza branch of the Bank. It was his specific mandate to compete strongly for business with the already established financial institutions in the area, and to give preference in the grant of loans to



emerging indigenous businesses. The Bank was not averse to making a loss at that branch

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for the year 1991.

2. On 28 October 1991 Matsika submitted to the Bank's head office an application by a Mrs Tsitsi Mutewere for an overdraft facility of $50 000. Approval was granted within two days and communicated to Matsika on 5 November 1991.

3. During the period 23 to 25 November 1991 sales of travellers cheques occurred at the Chitungwiza branch which were suspected of being irregular.

4. On 7 January 1992 investigations were undertaken by both the Bank's personnel and members of the Criminal Investigation Department into the fraudulent issue of travellers cheques at the Chitungwiza branch to persons with expired, invalid or stolen passports. Matsika and a foreign exchange teller were interrogated.

5. On 14 January 1992 Matsika received a favourable assessment on performance as manager from the Bank's head of personnel, Mr P E Mandioma, and was awarded a seven-and-a-half *per centum* increment.

6. Two days later Matsika was requested by Mr Mandioma to take a few days off in order to facilitate the continuing investigation into the suspected traveller cheque irregularities.

7. From 16 January 1992 to 4 March 1992 Matsika made several requests to be allowed to return to work.

8. On 3 March 1992 Matsika advised Mr Mandioma in writing that he was alleged by police to have connived with the foreign exchange teller to fraudulently issue travellers cheques amounting to R93 700 during the period 23 to 26 November 1991, and was to be charged accordingly.

9. The following day Matsika was informed by letter that he was suspended with immediate effect on full pay, but the motor vehicle assigned to him was to be returned.

10. The reasons for Matsika's suspension were provided to his then legal practitioners by the Bank in its answering letter of 20 March 1992. After referring specifically to the charges facing Matsika, it was stated:



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> "In these circumstances, in accordance with our usual practice, we could not allow your client to continue running the Branch while police investigations were in progress. We hasten to add, however, that the suspension in itself is not a conclusion on your client's guilt or otherwise and should he be cleared from any involvement in the matter, we would be willing to consider reinstating him into his employment with the Bank.
>
> In respect of your client's prospects for being allowed to return to work, this will depend on how soon the police conclude their investigations and the outcome thereof as aforesaid. We need hardly add that we have no control over police investigations and therefore are in no position to expedite same.
>
> Finally, we would like to add that we are as anxious as your client to see a speedy conclusion of this unsavoury matter as it has a bearing on the Bank's reputation with the public and the Exchange Control Authorities. There

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never has been any intention on our part to cause undue anxiety to your client."

11. On 17 July 1992 Matsika was placed on remand on a charge of contravening s 3(1)*(c)* of the Prevention of Corruption Act [*Chapter 9:16*], alternatively, fraud.

12. Five months after the initial suspension, precisely on 3 August 1992, the Bank wrote to Matsika intimating that as he had now been charged, it had decided that he should "remain on suspension WITHOUT PAY, with effect from 1 August 1992 pending the disposal of the case".

13. Almost six weeks later on 11 September 1992, the Bank applied to a labour relations officer in terms of s 3(1)*(a)* of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 ("the Regulations") for an order or determination terminating Matsika's employment, on the ground he had committed an "act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract". In essence, it was alleged that, in recommending to the Bank's head office that Mrs Mutewere's application for an overdraft facility of $50 000 be approved, Matsika had made incorrect representations, some of which he knew to be false and others the truth of which he could easily have verified, but had neglected to do so.



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14. The Bank's application was submitted four days after Matsika's legal practitioner had informed a labour relations officer that although his client had been on suspension with full pay from 4 March 1992 and without pay from 3 August 1992, the Bank had not applied for permission to dismiss him.

15. The Bank's application was heard by a labour relations officer on 23 November 1992 and was granted on 24 December 1992. The determination was appealed against to a senior labour relations officer who, on 9 September 1993, ordered that the dispute be remitted to another labour relations officer for further investigation.

16. In the interim, on 22 March 1993 Matsika was tried in the regional magistrate's court on the criminal charges. He was acquitted the next day.

17. On 23 February 1994 the labour relations officer, Mr J T Mawire, ordered the reinstatement of Matsika with no loss of pay or other benefits with effect from 1 August 1992.

18. Aggrieved by that determination, the Bank applied for the dispute to be referred to a senior labour relations officer for consideration. On 24 May 1994 Mr C J Vusani upheld the determination of Mr Mawire.

19. On 7 June 1994 the Bank noted an appeal to the Tribunal.

**THE ISSUES**

The substantive issues argued before this court, as foreshadowed in the notices of appeal and

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cross-appeal, were whether:

1. The Tribunal had erred in law in holding that it was obliged to dismiss the appeal on the ground that the reasons relied upon by the Bank in its application of 11 September 1992 to the labour relations officer differed from those for which he had been suspended without pay and other benefits.

2. The Tribunal's factual determination that Matsika's actions and omissions did not constitute dishonesty, negligence or incompetence, and thus were not in contravention of s 3(1)*(a)* of the Regulations, was not based on reasonable grounds, being one which no reasonable Tribunal could arrive at.



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3. The Tribunal had erred in law in holding that the Bank was only entitled to obtain under the Regulations an order terminating Matsika's contract of employment on the ground specified in s 3(1)*(a)* thereof, if the penalty for such misconduct provided for in the Bank's unregistered Code of Conduct was dismissal. Put otherwise, whether the Tribunal was correct in its view that it was not permissible for the Bank to obtain from the official hearing structure rights more favourable to itself than it enjoyed under the disciplinary procedure laid down in the unregistered Code of Conduct.

4. In declining to order that Matsika be reinstated in employment, the Tribunal had misdirected itself in law.

It is to a consideration of these issues that I now turn.

**THE FIRST ISSUE**

It was not in dispute that on 11 September 1992 the Bank had applied for permission to terminate Matsika's contract of employment on a ground different from that on which he had been suspended without pay and other benefits on 3 August 1992. Thus, in contention was whether it was permissible under s 3(1) of the Regulations for the Bank to suspend Matsika without pay and other benefits on one of the specified grounds, namely *(d)*, and then, after a lapse of six weeks, apply to a labour relations officer for an order or determination terminating the contract of employment on another ground, namely *(a)*; and for it to do so without first withdrawing the suspension and paying Matsika's salary and benefits to date.

In support of an argument that the Bank had acted lawfully, Mr *Dyke* relied on the well-settled principle of the common law that in an action by a servant for wrongful dismissal, an employer may defend the dismissal on any objective ground in existence at the time, but of which he was not aware. See *Nourse & Ors v Farmer's Co-op Ltd* (1905) 19 EDC 291; *Flemmer v Ainsworth* 1910 TPD 81 at 90; *Rashayi v Bakasa African Council* 1978 RLR 389 (A) at 393C; *J Pintusewitz (Pty) Ltd v South African Pharmacy Council* 1994 (2) SA 68 (C) at 77E. It was emphasised that it is not necessary under the Regulations for an employer to suspend an employee before applying to a labour relations officer for an order terminating the contract of employment - the ability to suspend without pay and other benefits being a right exercisable at

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the discretion of the employer. Counsel went on to submit that in effect what the Bank did on 11 September 1992 was to impliedly withdraw



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the suspension of Matsika; and, without suspending him again, it had applied to dismiss him on the ground specified in s 3(1)*(a)* of the Regulations. Its action amounted to an acknowledgement of liability to pay Matsika his salary and benefits in full up to 11 September 1992, which, thereafter, he was to receive until a determination was made upon whether the contract of employment was to be terminated. If such determination were favourable to the Bank, Matsika would be obliged to reimburse what had been paid him from 11 September 1992. See *Kahari v International Construction Co (Zimbabwe) Ltd* HH-49-91 (not reported).

I do not consider the common law principle of relevance where the procedure laid down in the Regulations is resorted to. I am inclined to agree with Mr *Gillespie,* who appeared for Matsika, that the provisions of s 3(1) are indicative of a substantive application for specific relief based upon defined grounds subjectively known to the employer and proven objectively to have existed. In my view, it would be incompetent for a labour relations officer to order the termination of a contract of employment on a ground that was only relied upon or arose after the date of the application; and was different from either that which had motivated the suspension of the employee, together with the application made forthwith, or that upon which the application alone was based, where the employee had not been suspended.

The position under s 3(1) appears somewhat analogous to that in s 57(1)*(a)* of the Employment Protection (Consolidation) Act [*Chapter 44*] for England and Wales, which obliges the employer to establish the reason for the dismissal of the employee. Commenting on the provision in *Abernethy v Mott, Hay & Anderson* [1974] ICR 323 (CA), Lord Denning MR said at 329:

> "The employer has ... to show the reasons for the dismissal ... It must be a reason in existence at the time when he is given notice. It must be the principal reason which operated on the employer's mind ... It should, I think, be known to the man already before he is given notice, or he must be told it at the time."

In *Sterling Products International Ltd v Zulu* 1988 (2) ZLR 293 (S) at 302C-E, I ventured the view that:

> "The object behind the requirement of s 3(1), that upon suspension of an employee without pay and other benefits the employer is to apply forthwith to a labour relations officer for an order or determination



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> terminating the contract of employment, is predominantly the protection of the interests of the employee. The common law remedy of summary dismissal on the ground of misconduct is no longer permissible, save in the few prescribed situations. Summary suspension is the remedy available to the employer, but the determination of whether the employee has been guilty of misconduct is placed in the hands of an independent third party, the labour relations officer. He must be informed forthwith of the suspension in order that he may embark upon the investigation and come to a decision with the minimum of delay, thereby achieving certainty for the parties and involving as little disruption of their lives as possible. Otherwise the employee is prejudiced by remaining without

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payment of salary during the period of suspension and unable to assume other employment. And the employer is prejudiced by being obliged not to fill the employee's position until such time as a favourable determination has been made."

It seems to me beyond question that having suspended Matsika without pay and other benefits on 3 August 1992 the Bank, either by design or oversight, failed to apply *forthwith* to a labour relations officer. The word "forthwith", though not as peremptory as "immediately", means "as soon as is reasonably possible in the circumstances". See *R v West & Wild* 1953 SR 199; 1953 (2) SA 675 (SR) at 677-678; *Sleightholme Farms (Pvt) Ltd v National Farmers' Union Mutual Ins Soc Ltd* 1966 RLR 467 (G) at 471H-I; *Zulu v Sterling Products International Ltd* 1988 (2) ZLR 110 (H) at 114 *in fine* - 115A. The delay of six weeks between the suspension and the application rendered the suspension inoperative. It was a nullity, with the consequence that the Bank was left with two options: it could suspend Matsika again either on the same or another ground specified in s 3(1) and apply forthwith on that ground to a labour relations officer for his dismissal; or it could apply to a labour relations officer on any of the specified grounds without re-suspending him. In either event, the Bank was liable to pay Matsika his salary and other benefits with effect from the date of the invalid suspension; and if it did not re-suspend him, to reinstate him in employment. Yet, was the Bank compelled under the Regulations to do so before it applied to the labour relations officer on 11 September 1992? In other words, is it a prerequisite for an employer, who suspends an employee without pay but does not apply forthwith, to formally withdraw the suspension and make good to the employee - to wipe the slate clean as it were - before being permitted to utilise the procedure under s 3(1)?

The Tribunal was of the opinion that if an employer were permitted to allow the



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suspension to lapse and then to apply on a different ground for the termination of the employee's contract of employment, the latter would be prejudiced in the preparation of his defence before the labour relations officer. With respect, I do not agree. The employee would be no worse off than if he had been suspended on one day and the application made on the same or the next day. Any ground for dismissal relied upon in an application not preceded by suspension would be brought to the attention of the employee, if not immediately by the employer, then by the labour relations officer. He would set the date of hearing sufficiently ahead in order to allow the employee a resaonable time to prepare a defence.

In the present matter the application was first heard on 23 November 1992, affording Matsika over two months to meet the charge. Indeed there is no suggestion that he was prejudiced in so doing.

The Tribunal's second reason for holding as it did was that to allow employers to change their grounds for suspension or dismissal at will would threaten the finality of litigation. Again I regret my inability to share that view. I have no difficulty in accepting that where an application for an order terminating a contract of employment is made forthwith after the suspension of the employee, the ground must not be different. I do not, however, understand why the ground should be the same where the suspension is rendered invalid by a failure to make the requisite

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application forthwith. It seems to me that once the application is not proceeded with forthwith there is no longer any necessity for the ground on which the employee was suspended to identify with the ground on which the application is subsequently made. With effect from the date of re-suspension or of the employer's application, the employee may be faced legitimately with the same ground that prompted the invalid suspension or an entirely new ground, or indeed both.

Nor do I think that the Bank's failure to formally lift the invalid suspension of 3 August 1992 and reinstate Matsika with full pay and benefits affected its right to make the application it did on 11 September 1992. Matsika was not left without a remedy. He could have applied to the High Court for an order directing the Bank to reinstate him to the position occupied with full pay and benefits as from the date of suspension. See *Zulu v Sterling Products International Ltd supra*.

In sum, then, if the suspension of an employee is nullified by the omission of the employer to apply forthwith to a labour relations officer for an order of





termination, the employer is not precluded from re-suspending the employee and applying forthwith on the same ground as before, or on a different ground, or from simply applying to the labour relations officer, without re-suspending the employee, on any of the grounds specified in s 3(1) of the Regulations.

For these reasons, I consider the procedure adopted by the Bank on 11 September 1992 to be in conformity with the Regulations, save that as Matsika was not again suspended, he ought to have been reinstated and paid his salary and benefits from 1 August 1992.

[His Lordship then dealt with the remaining issues and concluded]:

In the result:

1. The appeal is dismissed with costs.

2. The cross-appeal is upheld with costs.

3. Paragraph 2 of the Tribunal's order is deleted and substituted by the following -"The appellant is directed to reinstate the respondent in his employment without loss of pay and other benefits from the date of his suspension without pay."

Korsah JA: I agree.

Ebrahim JA: I agree.

*Gill, Godlonton & Gerrans*, appellant's legal practitioners

*Coghlan, Welsh & Guest*, respondent's legal practitioners



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## S v MABHENA 1996 (1) ZLR 134 (HC)

**Court** **High Court, Harare**

Chidyausiku J & Adam J

Criminal appeal

2 October 1995 & 14 February 1996 Judgment No. HH-16-96

### Flynote

Criminal procedure (sentence) - general principles - first offender - duty of court to consider imposing community service where court decides that effective sentence of 12 months of less is appropriate

### Headnote

The appellant, a first offender, was convicted of stealing a motor vehicle cylinder head valued at $6 000. The trial magistrate sentenced him to 18 months' imprisonment with labour, of which 8 months was suspended on condition of good behaviour.

On appeal the court stressed that whenever a court intends to impose an effective sentence of 12 months' imprisonment or less upon a first offender, it must seriously consider imposing a sentence of community service in order to keep the offender out of prison in the interests of rehabilitation. The court altered the sentence by suspending an additional period of 10 months on condition that the appellant perform 300 hours of community service. The appellant would thus not go to prison provided that he did not breach the conditions.

Cases cited:

*S v Chikomo* HH-107-94

*S v Chitima* HH-157-94

*S v Jera & Anor* HH-242-90

*S v Khumalo & Anor* HB-10-92

*S v Maas* S-49-91

*S v Mumvuri* HH-106-94

*S v Ndhlovu* S-28-94



*S v Nyamkapa* HH-108-94

*S v Santana* HH-110-94

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*S v Turnball* S-187-90

*S v Watmugh* S-100-94

Statutes referred to:

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 336 and 358(1)*(b)*

*D P Carter*, for the appellant

*N Mashumba*, for the respondent

## Judgment

**Adam J**: The appellant and his co-accused were convicted of theft of a motor vehicle cylinder head valued at $6 000. The magistrate's sentence was l8 months' imprisonment with labour of which 8 months was suspended for 5 years on the usual condition of "good behaviour".

In his grounds of appeal the appellant regarded the sentence as being manifestly excessive inducing a sense of shock and that the trial magistrate failed to give due weight to the rehabilitative aspects of punishing a first offender by imposing a custodial sentence as against a non-custodial sentence given the alternative of community service. Before us Mr *Carter* for the appellant only argued for the alternative of community service.

In his reasons for sentence the trial magistrate indicated that this was not a case where community service would be ideal as he was of the view that this offence required a custodial sentence in excess of 12 months.

In the appellant's heads of argument it was submitted that the trial magistrate erred in concluding that community service was not appropriate. It was urged that the appellant was aged 31 years, married with two children with a fixed abode and had lost his job as a mechanic. It was submitted that the circumstances of this case were such as to warrant serious consideration of community service in lieu of an effective custodial sentence. Even a short term of imprisonment could be so destructive and our prisons are over-crowded that this court should substitute community service and depart from past similar cases where effective terms of imprisonment was imposed - *S v Ndhlovu* S-28-94 at 4-5 and *S v Watmugh* S-100-94 at 4. It was further submitted that since the appellant was under financial pressure according to his statement of mitigation, community service could be appropriate even in a case of theft from an employer - *S v Santana* HH-110-94. It was submitted





that community service should be imposed where the offender is likely to be deterred from his criminal tendencies and accordingly, "community service is an ideal vehicle for reforming petty offenders without subjecting them to the trauma of incarceration" - *S v Chitima* HH-157-94. It was also submitted that the present case satisfied the guidelines and general principles of the National Committee on Community Service's "Approach to be adopted by the magistrates courts in imposing sentences suspended on condition that the accused carries out community

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service".

In the respondent's heads of argument it was submitted that the sentence imposed by the trial magistrate was not out of line with the sentences imposed in cases of a similar nature - *S v Maas* S-49-91, *S* v *Turnball & Anor* S-187-90, *S* v *Jera & Anor* HH-242-90, *S v Khumalo & Anor* HB-10-92. It was also submitted that the trial magistrate did not err in his conclusion that the circumstances in this case did not merit consideration of community service. His circumstances could not compare with those in *S* v *Santana supra*. Also, it was asserted that most of the authorities cited on behalf of the appellant are distinguishable from this case.

In *S v Ndhlovu supra*, the appellant had been convicted of two contraventions of s 39*(b)* of the Firearms Act [*Chapter 10:09*] and of common assault. For the Firearms Act offences he was sentenced by the magistrates court to 5 months' imprisonment with labour of which 3 months was suspended on appropriate conditions and for the common assault he was fined $80 or in default 6 days' imprisonment with labour. The appellant, armed with a loaded 12-bore shotgun, in the company of his father, about midnight woke up the first complainant, branded him a thief, pointed the gun threatening to shoot him if he did not disclose the whereabouts of his 37 goats. Having been informed that the first complainant had not seen them he force-marched him to the second complainant's homestead who had been awakened by the barking of her dogs. The gun was also pointed at her with the threat that she would be shot if she did not disclose the whereabouts of his goats. This behaviour caused his father's intervention who struggled to disarm him. In that case the sentence was altered with the consent of the Attorney General by substituting a condition community service of 60 hours for the effective custodial term of two months.

Korsah JA regarded this as a serious offence, and, at first blush, he was inclined to uphold the sentence, which was merited, as not out of the ordinary. However, he was motivated by the complaints about over-crowded jails (plus the fact that a short prison term could be so destructive) to give serious



consideration to the imposition of a very short term of effective imprisonment for an offence which may never be repeated if the appellant were put to community service and a part suspended on condition of good behaviour as a deterrent.

Mr *Mashumba* for the respondent tried to minimise the appellant's conduct in that case by suggesting that this had been occasioned by the fact that he had lost his goats, that what he had done was not for gain and that a short term of imprisonment would have an adverse effect on him.

In *S v Watmugh supra*, an unemployed appellant was convicted of the contravention of s 57*(l)(a)* of the Postal & Telecommunication Services Act [*Chapter 12:02*]. He was sentenced to 8 months' imprisonment with labour of which 4 months was suspended on condition of "good behaviour" without any reasons being given by the magistrate for the sentence. On appeal the High Court altered the sentence to 5 months' imprisonment with labour of which 2 months was

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suspended on condition $600 was paid to the complainant and another 2 months suspended on condition of "good behaviour". The appellant tore the receiver from the cord of a public telephone during a telephone conversation in a fit of temper due to a misunderstanding with his wife.

Korsah JA felt that the vandalism in this case was not clandestine having been committed in full view of many people at a bus terminus and done on the spur of the moment in a fit of rage. These facts along with the over-crowdedness in the prisons militated against the imposition of the effective l month's imprisonment. Instead he ordered that the l month's imprisonment be suspended on condition of community service of 24 hours.

Mr *Mashumba* suggested that the appellant's moral blameworthiness in that case was not too high due to the fact that his conduct had been irrational and motivated by emotions and did not involve dishonesty.

In *S* v *Chitima supra* the accused had been convicted of assault with intent to do grievous bodily harm and sentenced by the magistrate to l5 months' imprisonment with labour of which l0 months was suspended on condition of 300 hours of community service and a further 5 months suspended for 5 years on condition of "good behaviour". In this case the accused at night went to the complainant, who was 3 months pregnant and asleep. He forced open the door and in the house brutally assaulted her believing that she had caused the closure of his illegal liquor outlet. The assault was severe enough to cause



ADAM J

the complainant bleeding and unconsciousness resulting in her subsequently aborting. Chatikobo J regarded the assault as callous, brutal and uncalled for which merited a sentence of about 24 months' imprisonment with 6 months suspended on condition of "good behaviour". He felt strongly that community service was inappropriate, that this court in *S v Mumvuri* HH-106-94, *S v Chikomo* HH-107-94 and *S v Nyamkupa* HH-108-94 had impressed upon the need for magistrates to be cautious in sentencing persons to community service in order not to undermine public confidence in it. He was also of the view that community service should be imposed so that the offender can be deterred from his criminal tendencies and that it is an ideal vehicle for reforming petty offenders without the need for an effective custodial sentence.

Although Mr *Mashumba* had cited *S v Maas supra*, *S v Turnball & Anor supra* and *S* v *Khumalo & Anor supra*, as examples of previous sentences imposed in similar cases to the present, it is not disputed by him that at the relevant times a court could not suspend all or part of a sentence on condition of community service.

It is crucial to restate that s 336 of the Criminal Procedure and Evidence Act lays down the nature of punishments that may be imposed. While s 358*(l)(b)* provides that whenever a person is convicted of any offence, other than Sixth Schedule offences of murder; any conspiracy or incitement to commit murder; any offence that has a prescribed minimum sentence and any conspiracy, incitement or attempt to commit such an offence, the court may in its discretion pass sentence but suspended the whole or any part of it for a period not exceeding 5 years on such

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conditions as the court may specify. Section 358(3)*(d)* states that one of the conditions specified in the order may relate to doing service for the benefit of the community or a section of it.

Therefore, it is abundantly clear that the legislature has only precluded very limited type of offences from the use of the provisions of s 358.

Further, it has been emphasized on countless occasions by this court and the Supreme Court that an effective custodial sentence of imprisonment is a severe and harsh form of punishment which should be imposed on first offenders only if no other punishment would be appropriate. Needless to say there are certain crimes to which the foregoing does not apply because of their nature and magnitude which necessitates the imposition of an effective term of imprisonment. Accordingly such serious crimes as attempted murder, rape, attempted rape, armed robbery, car thefts and aggravated type of assault

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ADAM J

with intent to cause grievous bodily harm are some examples of serious offences which generally require a magistrate to impose an effective custodial term. Clearly fines, compensatory orders and suspended sentences including those on condition of community service would normally be out of question for them.

In previous judgments reference has been made to the "Approach to be adopted by the magistrates courts imposing sentences suspended on condition that the accused carries out community service", *Legal Forum* (l994) vol 6 at p l7 - distributed by the National Committee on Community Service. It must be stressed that those are merely guidelines.

In *S v Ndhlovu supra*, Korsah JA observed at p 5:

> "Community service is considered a fine on leisure time and is particularly appropriate for persons who exhibit anti-social behaviour. It gives the opportunity for constructive activity as well as a possible change of outlook on the part of the offender. The essentials of an order for community service, all of which must co-exist to render it meaningful, are to punish the culprit, to make him pay reparation by way of his service to the community and to reintegrate him into society".

He undoubtedly had in mind a first offender facing an effective custodial sentence of 12 months or less where such a term of imprisonment would meet the circumstances of the case. Factors there that have to be considered along with the particular facts of the case by a court are those in mitigation of sentence including individual circumstances, over-crowdedness in prisons, as well as offenders who may be unnecessarily adversely affected by incarceration particularly with hardened criminals. Nothing will be gained by imprisoning such first time offenders, On the other hand, over-crowdedness may be controlled if not reduced. Such offenders may well be deterred. Certainly the community or a section of it would benefit. The criminal justice system in this country would have chosen a compassionate approach towards those who have strayed for the first time from the correct path.

The overall purpose of s 358 is to give the court a discretion to keep offenders who should not be there in the first place from being imprisoned. It is said that our prisons are being inhabited more by offenders who could not pay their fines and those who are serving less than 12 months

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than by other offenders. The increased use of the options given in s 358 including community service would alleviate that situation.



ADAM J

Needless to say, community service can only succeed if presiding officers carry out their functions properly, efficiently and effectively. Too often magistrates shrug their responsibilities by imposing effective jail terms and by using such glib phrases like "community service in this case would bring it into disrepute" or "community service in this case tends to trivialise this offence" without providing full reasons for the way in which public's confidence would be compromised or how the offence is trivialised. Yet many of the same magistrates are too happy to suspend part of that sentence on condition of "good behaviour" - as if having such a sentence hanging over the accused's head is necessarily more onerous than having him do community service as the condition of suspension.

It must be reiterated that it is of vital importance that all presiding offices should, when dealing with first offenders, initially consider what would be an appropriate sentence in the circumstances of that particular case. Once a magistrate comes to the conclusion that a sentence of 12 months' effective imprisonment or less would be adequate in such a case, he should then, if he is exercising his discretion properly under s 358, give due consideration to the options provided under that section. Failure to do so including providing specious reasons will result in this court either altering the sentence or declining to certify the proceedings as being in accordance with real and substantial justice.

There is little doubt that in this case the magistrate erred about community service. The sentence he imposed was l8 months' imprisonment with labour of which 8 months was suspended on condition of good behaviour, leaving an effective sentence of l0 months' imprisonment. This court has on a number of occasions indicated in the past that for first offenders in appropriate cases where a sentence a court imposes of 12 months' effective imprisonment or less then community service should be considered and sound reasons given for not imposing it. I do not take Chatikobo J as stating that community service is only reserved for petty offenders. That would be unnecessarily restrictive and contrary to the judgments from this court and the Supreme Court.

In the appellant's grounds of appeal one of the grounds was that the magistrate failed to give due weight to community service. The magistrate was given an opportunity to comment on this. But his response was that he had nothing to add to his written reasons for sentence. Therefore his reasons for not suspending part of the sentence on condition of community service are those given in his reasons for sentence.



ADAM J

It follows from the foregoing that this court is at large in imposing an appropriate sentence since there has been a misdirection on the part of the magistrate. In this case the offender is aged 31 years, married with 2 children, with no savings, employed by ZIMOCO (Pvt) Ltd,

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earning at that time $3 200 per month. Theft was committed because they wanted to make some money. He pleaded guilty and was a first offender. He has been on bail. The motor vehicle cylinder was fortuitously recovered when it was brought for repairs to ZIMOCO (Pvt) Ltd by the person who eventually acquired it.

Accordingly the sentence is altered as follows:

> "l8 months' imprisonment with labour, of which 8 months are suspended for 5 years on condition Keeper Mabhena does not commit during that period any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine. A further l0 months' imprisonment with labour are suspended on condition that he performs 300 hours of community service, to be completed within 6 months of the commencement of the community service".

The matter is remitted to the Provincial Magistrate at Mbare for him to make the necessary arrangements for the due performance of the community service.

CHIDYAUSIKU J: I agree.

*Scanlen & Holderness*, appellant's legal practitioners



## CHIRONDA v SWIFT TRANSPORT 1996 (1) ZLR 142 (SC)

**Court** **Supreme Court, Harare**

McNally JA, Korsah JA & Muchechetere JA

Appeal against decision of Labour Relations Tribunal

29 January & 15 February 1996 Judgment No. S-28-96

### Flynote

Employment - contract - termination - dismissal - misconduct - wilful failure to comply with lawful order - what constitutes "wilful" failure

### Headnote

The appellant was employed as a delivery messenger by the respondent company. Over the Christmas period of 1991, messengers like the appellant were instructed to place parcels returned from customers who had closed down for the holiday period in a particular box on the floor of the parcels hall, until the customer reopened. This practice was different from the normal one. Shortly after Christmas, a parcel got lost. The appellant's explanation was that he had followed the standard procedure of handing the parcel to his supervisor. The Labour Relations Tribunal found that the appellant had been given a lawful order to place the parcel in the box set aside for the purpose, which he did not do, and thus "wilfully" disobeyed a lawful order. It accordingly authorised his dismissal.

Held, allowing the appeal, that an act is wilful which is deliberate and intentional, and not

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occasioned by ignorance, inadvertence, accident, physical disability or the like. Not only is knowledge present, but volition is brought into activity. Disobedience must be intentional, not inadvertent. The mere failure to comply with the instruction did not prove wilfulness. Unless the proved facts lead irresistibly to an intention to hold authority at defiance, it is a serious misdirection to hold that failure to comply with an order is wilful.



Cases cited:

*Aberdare Cables Ltd v SAR&H* 1959 (2) SA 406 (E)

*Chikasu v National Foods Ltd* S-100-95

*Horabin* v *British Overseas Airways Corp* [1952] 2 All ER 1016 (QB)

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

*Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S)

*National Foods Ltd v Magadza* S-105-95

*R v Tosela* 1942 EDL 175

*Sirdar's Mfrs (Pvt) Ltd v Chinya* 1995 (1) ZLR 368 (S)

Regulations referred to:

Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371/1985), s 3(1)*(b)*

*J R Devittie*, for the appellant

*E T Matinenga*, for the respondent

## Judgment

**Korsah JA:** On 27 August 1995 the appellant, then a self-actor, noted an appeal against the entire judgment of the Labour Relations Tribunal ("the Tribunal"), wherein the respondent was authorised to dismiss the appellant from its employment in terms of s 3(1)*(b)* of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations ("the Regulations"), SI 371 of 1985.

On 24 January 1996 the appellant, now represented by counsel, filed an application for reinstatement of his appeal and for leave to amend the grounds of appeal to render valid what was before invalid, in the sense that the former grounds raised no question of law for determination by this court: *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S); *Chikasu v National Foods Ltd* S-100-95. Mr *Matinenga,* quite properly, raised no objection to the applications and the appellant's prayers were accordingly granted.

The amended grounds of appeal alleged:

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*(a)* that the Tribunal erred in holding that the appellant's disobedience was sufficiently serious as to justify his dismissal;

*(b)* that the Tribunal's finding that the respondent had given an order to the appellant is grossly unreasonable; and

*(c)* that the Tribunal's finding that the appellant's conduct constituted disobedience was grossly unreasonable.



KORSAH JA

The facts, as found by the Tribunal, were that during the Christmas period in 1991 the respondent gave specific instructions to its delivery messengers, inclusive of the appellant, to place returned parcels, belonging to customers who had closed for Christmas or annual shut-down, in a particular box standing on the floor of the parcels' hall until that customer had reopened. This was a procedure different from the norm and introduced for that period.

On 27 December 1991 the appellant returned with a starter motor destined for a customer who had shut down. The starter motor got lost and could not be found in the box for returned parcels.

The appellant's explanation was that when he brought back parcels for two customers who had closed down business for the duration of the Christmas period, he followed the normal procedure of handing over the parcels, one of which contained the starter motor, to the supervisor.

The supervisor, who was not called to testify before the Tribunal, was alleged to have denied receiving any returned parcels from the appellant. Nor was there any evidence adduced in substantiation of the allegation that the appellant returned one of the parcels, and not the other, to the box. The appellant's assertion that he returned both parcels to the supervisor without signing any document to evidence their return was not disproved.

The Tribunal found as a fact that the appellant was given a lawful order to place returned parcels in a particular box. The appellant did not place the starter motor in question in the particular box set aside for the purpose, resulting in the loss of the starter motor. *Ergo,* the appellant *wilfully* disobeyed a lawful order given by his employer.

I observe, in passing, that the appellant had been employed as a messenger by the respondent for fifteen years prior to this occurrence, and that it was admitted by the respondent that the instruction to place returned parcels in a particular box was not only a departure from the normal procedure to which the appellant was accustomed, but covered a specific period alone. Is it not conceivable that the appellant's omission to comply with the order introducing an improvisation in delivery procedures during the stated period and his adherence to the age-old practice was the result of a mental aberration?

Accepting, as I do, that findings arrived at by the Tribunal on matters of fact are not open to challenge in this court, for the simple reason that appeals to this court against determinations of

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the Tribunal lie only in respect of issues of law, I also appreciate, and it was graciously conceded by Mr *Matinenga*



KORSAH JA

in the respondent's heads of argument, that the conclusions arrived at by the Tribunal on the facts as found may, on occasions, result from misdirections so gross as to culminate in errors of law. See the remarks of Ebrahim JA in *National Foods Limited* v *Magadza* S-105-95 at pp 4-5 and the authorities therein cited.

The Tribunal concluded, as above stated, that the appellant had been guilty of wilful disobedience to a lawful order. To my mind, there is little or no difference between the terms "wilful disobedience" and "wilful misconduct". Whichever term is employed the element common to both is the *mens rea* which the word "wilful" connotes.

Lansdown JP observed in *R v Tosela* 1942 EDL 175 at 176 that -

> "In general, apart from any particular context, an act is wilful which is deliberate and intentional and not occasioned by ignorance, inadvertence, accident, physical disability or like causes: not only is knowledge present, but volition is brought into activity."

So also did de Villiers JP in *Aberdare Cables Ltd v SA Railways & Harbours* 1959 (2) SA 406 (E) at 409G-H approve of and adopt the following statement by Barry J in *Horabin v British Overseas Airways Corporation* [1952] 2 All ER 1016 at 1022E:

> "To be guilty of wilful misconduct the person concerned must appreciate that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the results may be."

The *locus classicus* in our jurisdiction on the issue of "wilful disobedience to a lawful order" is undoubtedly *Matereke v C T Bowring & Associates (Pvt) Ltd* 1987 (1) ZLR 206 (S) wherein Gubbay JA (as he then was), dealing with the same provisions of the Regulations as in the instant case, said at p 211G of the report:

> "The requirement of wilful disobedience' is not defined in the Regulations. But, having regard to the purpose of this piece of legislation as well as to the common law grounds for summary dismissal for wilful disobedience or wilful misconduct, the words in my view connote a deliberate and serious refusal to obey. Knowledge and deliberateness must be present. Disobedience must be intentional and not the result of mistake or inadvertence."



KORSAH JA

It was not alleged that the appellant acted in wilful defiance of instructions given by the respondent. That was never in issue. Indeed, the labour relations officer who first determined this matter commented that -

> "... though Chironda would argue that he forgot to place the starter motor into the box since it was a new system such an excuse though holding some water cannot be a defence strong enough to exonerate him."

It is clear from the above comment that it was accepted by all that the appellant had not

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intentionally defied the instructions of his superiors, but had merely omitted, for the reason he advanced, to comply with the order. Thus wilfulness on his part was never considered at the various stages of the enquiry, including the determination by the Tribunal.

The Tribunal reasoned thus:

> " ... we find as a fact proved that the appellant was given a lawful order to place the returned starter motor in a particular box. (The) appellant wilfully disobeyed that lawful order resulting in the loss of the starter motor in question."

By such reasoning it is obvious that, in the absence of any evidence supportive of wilfulness on the part of the appellant, the Tribunal was of opinion that the mere failure by the appellant to place the starter motor in the designated box was tantamount to wilful disobedience. That is not so. The requisite *mens rea* of "wilfulness" on the part of the appellant ought to have been established to warrant such a conclusion. It was not.

Surely, the omission to comply with a lawful order is not necessarily born out of a defiance of authority. Unless the proved facts lead irresistibly to an intention to hold authority at defiance, it is a serious misdirection to hold that the appellant's omission to comply with an order was wilful.

Before concluding, I would draw attention once again to the comments made in *Sirdar's Manufacturers (Pvt) Ltd v Chinya* 1995 (1) ZLR 368 (S) at 370. This is another case where the record is so scanty that it is very difficult to draw conclusions or make findings on the basis of what is in the record. The recommendations made at p 371 of that judgment would help to avoid those difficulties in future cases.

In the result, the appeal is allowed. The order of the Labour Relations Tribunal is set aside. In place thereof, it is ordered:



KORSAH JA

(1) That the appellant be reinstated in the employ of the respondent with full benefits.

(2) That the respondent is to bear the costs of this appeal.

McNally JA: I agree.

Muchechetere JA: I agree.

*Masunga & Associates*, appellant's legal practitioners

*Winterton, Holmes & Hill*, respondent's legal practitioners



**S v MUROPA 1996 (1) ZLR 148 (HC)**

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**Court** **High Court, Harare**

Adam J

Criminal review

16 February 1996 Judgment No. HH-18-96

## Flynote

Criminal law (statutory offences) - Miscellaneous Offences Act [Chapter 9:15] - s 6(1)*(a)* - unlawful possession of implement for use in breaking into motor vehicles - whether pair of scissors such an implement

## Headnote

The accused was found by the police in possession of a broken handled, twisted pair of scissors. He was in the company of a person known by the police to be a criminal and in an area known for the number of cars broken into. The accused, when searched, was co-operative, but remarked that he used the scissors to break into cars, though denied having broken into any cars. The scissors were such that they could not be used for cutting cloth.

Held, that on the facts of the case there was clear evidence from which an inference could be drawn that the pair of scissors were intended to be used for purposes of breaking into motor vehicles and the accused had been correctly convicted of the offence charged.

Cases cited:

*Mallalieu v Drummond* [1983] 1 All ER 801 (CA)

*R v Alick* 1953 SR 241

*S v Dangarembizi & Anor* 1987 (2) ZLR 196 (H)

*R v Stephen* 1968 (2) RLR 101 (G)

*Watt* (or *Thomas*) v *Thomas* [1947] 1 All ER 582 (HL)

Statutes referred to:

Miscellaneous Offences Act [*Chapter 9:15*], s 6



## Judgment

**Adam J:** The accused was charged with and convicted of contravening s 6*(l)(a)* as read with s 6(2) of the Miscellaneous Offences Act [*Chapter 9:15*] in that he was found in unlawful possession of an implement for use in breaking into motor vehicles, namely a pair of scissors. It is not clear from the record of proceedings but it appears that the trial magistrate referred the matter to the Attorney General in terms of s 54(2) of the Magistrates Court Act [*Chapter 7:10*]. The Office of the Attorney General has written to the Registrar of the High Court asking that the record of proceedings be put before a judge of this court since he is unable to support the

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conviction. He writes that the mere fact that persons breaks into motor vehicles using scissors does not necessarily make scissors intrinsically a harmful instrument - *R v Alick* l953 SR 241 and *R v Stephen* l968 (2) RLR l0l (G).

At the trial in his defence outline the accused said that he met the police on the road when they were searching every person that was passing. At that time the police found him in possession of a pair of scissors. He told them that the broken scissors were his wife's and there was a piece that had to be mended. The State relied on the evidence of two police officers. Constable Ndoro testified that he was with three other constables around l0 am along Park Lane, Harare. They stopped the accused along with two others. This was because they suspected them since the accused was in the company of a known criminal. He conducted a search of the accused and recovered in the right hand trouser pocket a pair of broken scissors only. This was produced in court by him as an exhibit. The accused was very co-operative and the reasons he gave was - "Well officer you know the use of this scissors" and went on to elaborate that he had not opened any cars then but he used it to open cars. He denied when it was put to him that the accused would state that he had informed him that he was taking the scissors for repairs for his wife. Under cross-examination by the accused he refuted that when the accused tried to give an explanation for carrying the scissors he was told that this could be given at the police station. He indicated that they waited a long while - about 30 minutes - together for the police car at which time the accused told him about the scissors.

Constable Chandakuda gave evidence that he along with others was on patrol. He suspected these persons by the way they were walking and looking around. This location was known for breaking into cars. Constable Ndoro searched the accused. While Constable Chandakuda searched one of the others and also found on that person a pair of scissors. He testified that the accused told Constable Ndoro who was about 5 to 6 metres from the witness "You know what the scissors are used for" but that at this moment the accused



had not opened any motor vehicles. He denied that the accused had informed Constable Ndoro that his wife's scissors were being taken for repairs. He indicated that they were there for about 30 minutes.

In his evidence the accused adopted his defence outline. He indicated that he was alone when he was arrested. At that time he had come from Parirenyatwa Hospital proceeding to Kaguvi and Pioneer Street with the broken scissors and the broken piece in order to have it stuck together with Trinepon. He resided at Waterfalls and left home at 7 am to go and see his sister-in-law at that hospital but did not manage to do so as he was late. He said he was self-employed as a plumber. He answered that he wanted the handle of the scissors repaired. He maintained that the tip of the scissors was slightly bent but disagreed that the blade was twisted as shown in court. His wife used the scissors to cut cloth. It was put to him that he was with others who had been arrested, one of whom was also found with a pair of scissors and he replied that this had nothing to do with him, that he did know that person found with the scissors and that it was only a coincidence that he was arrested at the same time on the same road.

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In her evidence the wife testified that she stayed in Waterfalls but forgot the address. She said that she gave him her scissors on Friday so that he could take it for repairs. Under cross-examination she indicated that she only resided at Waterfalls for a month having come from the communal lands. On that particular day she said that her husband (the accused) had gone to town to bank some money at the post office, that they discussed he go and collect his tablets for tuberculosis from Nazareth House. She said she left home at 6 am as she started work at 7.30 am. She informed the court that the children had played with it and so it got broken and the broken piece was not there. She indicated that she wanted her husband to go and look for people who would take off the broken part and have it replaced with another part.

In his reasons for judgment the trial magistrate indicated that the matter hinges on the credibility of witnesses. He accepted the evidence of the two police officers. They corroborated each other's evidence, stuck to it and were not shaken under cross-examination. On the other hand, the accused and his wife did not impress him. Their evidence was tailored, that it was muddled with inconsistencies and contradictions. In his evidence, the accused indicated that he was given the broken piece along with the scissors so that it could be stuck together with Trinepon. His wife testified that the broken piece was not there and that the broken part was to be replaced with another part. She said that she was ignorant about the whereabouts of the broken piece. The trial



ADAM J

magistrate continued that looking at the scissors themselves there is no doubt that the pair of scissors was used for something else besides cutting cloth.

In *R v Alick supra*, Beadle J (as he then was) said that a screwdriver can be used for housebreaking but is in itself an intrinsically harmless implement. He held that a person merely found in possession of a screwdriver at night walking in a sanitary lane would not constitute sufficient evidence from which to draw the inference that the screwdriver is likely to be used for housebreaking. Evidence was led that a number of housebreakings had taken place recently with screwdrivers having been used.

In *R v Stephen supra*, the accused was found at 3.50 am in Strathaven, Harare in possession of a bunch of keys, two torches and a mask. Lewis J (as he then was) found that such keys were not intrinsically an instrument of housebreaking. But the position would be different if there was evidence showing some act of preparation or other circumstances from which an inference could be drawn that such implements as screwdrivers or a bunch of keys were intended to be used for housebreaking purposes.

In this case the trial magistrate made certain adverse findings against the accused and his witness. Those findings were based on the facts before him as well as his observation of all the witnesses that appeared before him.

It must not be forgotten that this court has before it only the written record of the evidence which is only part of it.

"What is lacking is evidence of the demeanour of the witnesses, their candour or their partisanship, and all the

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incidental elements so difficult to describe which make up the atmosphere of an actual trial. This assistance the trial judge possesses in reaching his conclusion, but it is not available to the appellate court." - *Watt (or Thomas)* v *Thomas* [l947]1 All ER 582 (HL) at 590.

It follows that before this court can disturb findings of fact and of credibility it must be shown that there was no evidence to support it or that the evidence was materially inconsistent, inaccurate and contradictory of such a determination or that the true and only reasonable conclusion contradicts that determination - *Mallalieu v Drummond* [l983]1 All ER 80l (CA) at 803. The trier of fact may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved, or otherwise to have gone completely wrong - *Watt (or Thomas) v Thomas supra* at 590.



ADAM J

There was no misdirection by the trial magistrate on his findings and it has not been established that his decision on findings of fact and of credibility was completely wrong.

The accused in the company of others was searched by police officers. The police found the accused and one other with scissors in their possession. The accused admitted being in possession of the scissors. He also informed the police that the scissors were for purposes of breaking into motor vehicles but that he had not yet opened any motor vehicles. It could not be maintained as the accused did that it is was matter of coincidence that he was found with another person with scissors on that particular road and at that same time in an area where motor vehicles had been broken into.

The situation in this case is distinguishable from *R v Alick supra* and *R v Stephen supra*, in that there was evidence that the broken handled twisted pair of scissors found in the accused's possession were intended to be used for breaking into motor vehicles. In fact there were such circumstances in this case from which an inference could be drawn by the trial magistrate that the pair of scissors found in the accused's possession were intended to be used for purposes of breaking into motor vehicles.

The Attorney General has incorrectly applied the case law in this matter and erred when he said that there was insufficient evidence to sustain the conviction and so he was unable to support it. Accordingly this court declines to set aside the conviction. The matter is remitted to the trial magistrate for him to rectify the record of proceedings and proceed in accordance with the provisions of the Magistrates Court Act: *S v Dangarembizi & Anor* l987 (2) ZLR 196 (H).



## MUCHAKATA v NETHERBURN MINE 1996 (1) ZLR 153 (SC)

**Court** **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

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Appeal against decision of Labour Relations Tribunal

8 & 20 February 1996 Judgment No. S-31-96

## Flynote

Employment - contract - termination - dismissal - wilful disobedience to lawful order - what constitutes a lawful order - requiring an employee to preside over disciplinary hearings when his status and rank did not entitle him to do so - such an order unreasonable and ultra vires

Appeal - grounds - point of law - when may be raised - may be raised for first time on appeal if its consideration involves no unfairness to the other party

## Headnote

The appellant was employed as a security sergeant at the mine run by the respondent. Under him were a number of security guards. On a number of occasions, there were breaches of company rules by various employees. Following these incidents, the assistant personnel manager instructed the appellant to take disciplinary action against the employees concerned, but he refused to do so. He tried to explain that it would be improper for him to preside over disciplinary cases. The disciplinary code bore out his contention; a person at his level was not authorised to preside over disciplinary cases.

Held, that what the appellant was being required to do did not fall within the parameters of his contract of employment. It was *ultra vires* that contract; the management had no authority to give such orders and the appellant was under no duty to obey them, even if they had not been so blatantly unreasonable. But it was unreasonable to order the appellant to preside over disciplinary cases, as he was in a supervisory role only over the guards under him. If there was any case against his juniors, he was



in effect the complainant and a party in the case. For him to preside over the case would be to act as judge in his own cause.

Held, further, that it was proper to raise a point of law, which went to the root of the matter, at any time, even for the first time on appeal, if its consideration involved no unfairness to the party against whom it was directed. If the order was void *ab initio*, it was void at all times and for all purposes and the question of its validity could be raised at any time. The appellant's wilful disobedience to an unlawful order gave the respondent no right to dismiss him.

Appeal allowed.

Cases cited:

*MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC)

*Mohaklehle v Springs Municipality* 1928 TPD 50

*Morobane v Bateman* 1918 AD 460

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*Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A)

*R v Qumba* 1930 CPD 396

*S v Khuzwayo* 1969 (1) SA 70 (N)

Regulations referred to:

Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371/1985), s 3(1)*(b)*

Appellant in person

*A G Matika*, for the respondent

## Judgment

**Korsah JA:** The appellant appealed against the determination of the Labour Relations Tribunal ("the Tribunal") reversing a determination by the Labour Relations Board ("the Board"), wherein the Board directed the respondent to reinstate the appellant without loss of salary.

The matter commenced with an application, on 20 November 1986, by the respondent to the responsible Ministry for permission to dismiss the appellant for wilful disobedience to a lawful order given by the employer in terms of s 3*(b)* of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations ("the Regulations"), SI 371 of 1985.

Early in its determination the Tribunal properly appreciated the issue germane to the dispute between the parties. It remarked that:

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KORSAH JA

> "The bulk of the facts upon which the allegations of wilful disobedience were founded are not in dispute. *What is in dispute is the lawfulness or otherwise of the order*" (emphasis added).

To my mind, whether or not an order is lawful is clearly a question of law, the determination of which, when appealed, falls within the purview of this court.

The facts which give rise to the question of law are as follows. The appellant was employed by the respondent at its mine as a security sergeant. Under him served two security corporals and an undisclosed number of security guards.

The Tribunal found the following facts to be common cause.

On 29 May 1986 some company employees invited a woman with a baby strapped on her back into a beerhall against company rules. The security guard on duty expelled the woman from the beerhall. One of the employees who had invited the lady took umbrage and engaged the security guard in a fracas. The following day the assistant personnel officer ordered the appellant to take disciplinary action against the employees, but the appellant bluntly refused to comply with his order.

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On 1 June 1986 the appellant was asked to preside over various cases of indiscipline in the mine compound. Again the appellant refused to obey that order.

On 10 June 1986 both the mine manager and the assistant personnel officer instructed the appellant to take disciplinary action against employees involved in illegal hunting contrary to company rules. The appellant again refused to comply with that order.

On 14 and 15 June 1986 some mine employees fought at a gambling school in the mine compound. When asked by the assistant personnel officer to take disciplinary action against the culprits, the appellant refused to do so.

On 20 June 1986 the appellant sent the following minute to the mine manager:

> "**Presiding of Cases by Security Sergeant**
>
> The Sergeant is prepared to do the work as long as his demands are met."

This culminated in his suspension pending dismissal.

The Tribunal held the view that, at the hearing before the Board, the Board

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KORSAH JA

raised the legality of the orders given by his employer to the appellant *mero motu.* The appellant then adopted that argument and went on to say that in terms of the Mine Disciplinary Code he was not one of those persons authorised to preside over disciplinary cases.

This is not a reflection of what actually transpired; for in the senior labour relations officer's report on this case is the following:

> "It was heard from management that Cde Muchakata [the appellant] has since 1985 reported cases to management that deserved some action but due to pressure of work from the personnel assistant, some cases were not dealt with. As a result, management decided to delegate Cde Muchakata to assist Cde Chiweshe, the personnel assistant, to hear cases and take appropriate action against defaulters.
>
> Cde Muchakata categorically refused to carry out the duty but constantly referred cases to the personnel assistant and yet he complained that cases were taking too long to be heard. His argument was that management wanted to bring him into disrepute by the workers by making him carry out the hearings which would certainly be resented by the workers."

From the above, it seems to me that what the appellant all along sought to articulate was that it would be improper for him to preside over cases as requested by management. Being a layman, he could not put across in legal terms what he felt and thought was wrong with the order he was requested to obey. The Board took pains to understand the unrepresented appellant. It called for the *Group's Disciplinary Code and Grievance Procedure* and satisfied itself that a security sergeant was not one of the persons therein vested with authority to preside over cases. In other words, the order was *ultra vires* the company's code for want of authority, as the code did not empower management to clothe a person in the appellant's position with the mantle of a judicial officer.

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A solemn pact arrived at between the parties on a basis, inclusive of the *Group's Disciplinary Code,* was covertly being unilaterally altered by the respondent, without the prior consent of the appellant, so as to shift the goal posts, in order to compel the appellant to perform a task he had not contracted to do. What the appellant was being requested to do did not fall within the parameters of his contract of employment. It was *ultra vires* the contract between them. Management had no authority to give such orders and the appellant was under no duty to obey them, even if the orders had not been so blatantly unreasonable.



KORSAH JA

Provided it is not one which is required by a definitive law to be specially pleaded, a point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed: *Morobane v Bateman* 1918 AD 460; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-G.

If the order was void *ab initio* it was void at all times and for all purposes. It does not matter when and by whom the issue of its validity is raised; nothing can depend on it. As Lord Denning MR so exquisitely put it in *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 at 1172I:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad ... And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

If the appointment of the appellant to preside over cases was *ultra vires* the company's code, was it reasonable to order the appellant to assume such a mantle? Plainly, management was irked by complaints from the appellant that cases requiring disciplinary action, which his department had reported to the personnel department, had gone unattended. Plagued with these insistent demands by the appellant for disciplinary action to be taken, the assistant personnel officer, whose duty it was to preside over cases which the security department referred to him, piqued by the appellant's accusation of incompetence or bias, turned on the appellant and, with the assistance of management, purported to appoint the appellant to preside over the very cases which had been referred to him for discipline by the appellant's department.

It is true, as was found by the Tribunal, that the appellant, as the head of the security guards, was in a supervisory position. But he was in a supervisory role only *vis-ˆ-vis* the guards under him. It was his responsibility to see to it that his subordinates performed efficiently. It was not proper to request him to preside over cases which his department had referred to the assistant personnel officer for disciplinary action to be taken. He was the head of the department laying a complaint that required investigation and possible punishment. He was, as such, a party in the case requiring resolution. A salutary principle of justice is that no man shall be a judge in his own cause. The order requiring him to preside over cases reported by his department not only demonstrated bad faith, but was such gratuitous interference with his rights, and the rights of those he was expected to preside over in respect of the



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company's disciplinary code, as could find no justification in the minds of reasonable men. The company's disciplinary code never gave authority to make such orders. The order was, therefore, unreasonable and *ultra vires* the code.

I take the meaning of "lawful" from Vol 3 of W*ords and Phrases Judicially Defined* to be:

> "Lawful is what is in conformity with (or frequently not opposed to) the principles or spirit of the law whether moral or judicial."

On the basis of the above definition, and from the aforegoing, the order which the appellant was requested to comply with was clearly not lawful.

In *Mohaklehle v Springs Municipality* 1928 TPD 50 at 53 it was held that no offence is committed in disobeying an order which is unlawful. And in *R v Qumba* 1930 CPD 396 the court held that it was not an offence to refuse to obey an unreasonable order, and that such an order is not a lawful order. Likewise, in *S v Khuzwayo* 1969 (1) SA 70 (N) Kennedy J, with the concurrence of van Heerden J, held that an unlawful order is not one that a person is obliged to obey.

I must add this caveat: in respect of invalid orders of court, it may be expedient not to treat them with insolence, but to apply to the court to have them set aside, lest one's disobedience to them renders one guilty of contempt.

Having regard to the conclusion that the Tribunal misdirected itself in holding that the order given to the appellant was lawful, it follows that the appellant's wilful disobedience to the respondent's unlawful order bestows on the respondent no right to dismiss him in terms of the section of the Regulations under which the application to dismiss him was made.

Accordingly, the appeal is allowed. The determination of the Labour Relations Tribunal is hereby set aside and the following substituted therefor:

> "The respondent (Muchakata) is to be reinstated without loss of salary, benefit and position."

Gubbay CJ: I agree.

Ebrahim JA: I agree.

*Scanlen & Holderness*, respondent's legal practitioners

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## NATIONAL FOODS LTD v MIDLANDS MILLING CO (PVT) LTD 1996 (1) ZLR 159 (HC)

**Court** **High Court, Harare**

Smith J

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Civil application

1 & 21 February 1996 Judgment No. HH-17-96

## Flynote

Delict - unfair trade practice - passing off - get-up - requirements - likelihood of deception - what must be shown - not only must distinctive features be looked at, but likelihood of confusion

## Headnote

The parties were both millers of grain products, including mealie meal. For over 25 years, the applicant had sold "super-refined" mealie meal in a light blue package which bore the brand name of "Pearlenta" and a logo consisting of a device of a red seal with the words "Red Seal" superimposed on it. Some years later, the respondent started to produce super-refined mealie meal. Initially this was marketed in a white pack. The respondent believed that this confused customers, as one of its other products was also marketed in a white pack, so the colour of the package was changed to blue. The super-refined meal was described on the package as "Pearl White". On the pack appeared a logo, consisting of the initials of the respondent (MMC), drawn in such a way as to resemble a coronet. The logo was dark blue in colour. The respondent argued that there was no difficulty in distinguishing the two brands.

Held, that in order to establish a claim of passing-off, it was necessary to show that the defendant's get-up was calculated to deceive, that is, that there was a reasonable likelihood that members of the public might be confused. The likelihood is a matter for the court to decide. The decision must not be surrendered to any witnesses. In considering whether the respondent's product was calculated to deceive or cause confusion, the court had to look not only at the distinctive features, but also at what the purchaser would be likely to be guided by, that is, the general appearance



and the whole get-up of the article. Where, as here, the colours of the containers were similar, but the prominent design marks were distinctively different, not only in shape but also in colour, there was no reasonable likelihood of confusion.

Application dismissed.

Cases cited:

*Adcock-Ingram Products Ltd v Beecham SA (Pty) Ltd* 1977 (4) SA 434 (W)

*Agriplas (Pty) Ltd & Ors v Andrag & Sons (Pty) Ltd* 1981 (4) SA 873 (C)

*Capital Est & General Agencies (Pty) Ltd & Ors v Holiday Inns Inc & Ors* 1977 (2) SA 916 (A)

*John Craig (Pty) Ltd v Dupa Clothing Industries (Pty) Ltd* 1977 (3) SA 144 (T)

*Lennon Ltd v Sachs* 1906 TS 331

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*National Foods Ltd v Blue Ribbon Foods Ltd* HH-68-92

*Reckitt & Colman SA (Pty) Ltd v S C Johnson & Son SA (Pty) Ltd* 1993 (2) SA 307 (A)

*Williams v Bronnley* (1909) 26 RPC 765 (CA)

*J C Andersen SC*, for the applicant

*D P Carter*, for the respondent

## Judgment

**Smith J:** This is a "passing-off" claim. The applicant is seeking an order preventing the respondent from continuing to use the get-up it has adopted for the packaging of its super-refined mealie meal. Both parties carry on business as millers and wholesale suppliers of grain products, including maize meal. For at least 25 years the applicant has marketed throughout Zimbabwe its super-refined maize meal in a light blue packaging of a distinctive nature under the brand name "Pearlenta" combined with a logo consisting of a device of a red seal with the words "Red Seal" superimposed on the device. The applicant markets its roller meal in a white pack with the red seal logo prominently displayed on the top half of the pack. The respondent produced roller meal and in l987 started to produce super-refined maize meal. Both products were marketed in white packs. When it first started marketing the super-refined maize meal, it described the product as "extrafine" maize meal and the roller meal as "superfine". The respondent says that it was felt that these descriptions might confuse the customer and so the words "Pearl White" were substituted to describe the super-refined meal. The respondent decided to market its super-refined meal in a blue pack and started to do so in April l984.



SMITH J

The applicant believes that the respondent changed from its previous distinctive form of packaging to the new packaging, which included the following features, in order to confuse customers and pass off their product as that of the applicant:

*(a)* the packaging was changed from the predominantly white package to the same shade of blue as used by the applicant;

*(b)* the respondent had matched the printing with the identical dark blue and red colourings that had long been used by the applicant for its Pearlenta pack;

*(c)* the respondent had used its logo in the same manner, position and size as the Red Seal logo on the applicant's pack;

*(d)* the applicant had copied the features which the respondent had introduced some years ago on the bottom of its packs to facilitate better viewing by consumers when packs were stacked on the sides on shelves.

The applicant claims that it has, for more than twenty years, continuously and extensively used

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the distinctive blue colour and get-up of its Pearlenta pack in Zimbabwe and has built up a substantial reputation therein, such that members of the public associate the get-up as emanating from the applicant and as being connected in the course of trade with the applicant. The respondent's new pack for its super-refined product is calculated to confuse or deceive people into believing that its product is that of the applicant or is connected with the applicant. Therefore the respondent is wrongfully passing off its product as being a product of the applicant. The respondent denies that the blue pack has become distinctive of the applicant's super-refined meal. It also denies that it incorporated any features or get-up in its new packaging with an intention, actual or constructive, to confuse customers or to pass off its product as that of the applicant.

Mr *Andersen* submitted that the applicant's claim was not based only on the colour of the packs. The applicant had, over the past 25 years, established a market for its super-refined meal with the blue pack. Blue was synonymous with its product. Why did the respondent change from a white pack to a blue pack for its super-refined meal? There were many other colours or combinations of colours it could have chosen. The explanation given by the respondent for changing to blue was transparently unacceptable. There was no good reason for using the words "Pearl White" to describe the super-



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refined meal other than to associate the product with the "Pearlenta" produced by the applicant. There was a reasonable likelihood of confusion. Mr *Carter* submitted that it was the overall impression made by the two packs that was crucial. There was no difficulty in distinguishing the two packs. The predominant feature of the applicant's pack was the Red Seal logo, whereas in the case of the respondent's pack it was the coronet emblem. The coronet is formed by two "M"s joined together over a capital C that is almost a closed circle. The letters MMC are the initials of the company name, Midlands Milling Company.

In *Williams v Bronnley* (l909) 26 RPC 765(CA) Cozens Hardy MR in dealing with a passing-off action said at p 771:

> "What is it necessary for a trader who is plaintiff in a passing-off action to establish? It seems to me that in the first place he must in order to succeed, establish that he has selected a peculiar - a novel - design as a distinctive feature of his goods and that his goods are known in the market and have acquired a reputation in the market by reason of that distinguishing feature and that unless he establishes that, the very foundation of his case fails. If he takes a colour and a shape which are common to the trade, the only distinctive feature is that which he has added to the common colour and the common shape and unless he can establish that there is in the added matter such a similarity as is calculated to deceive, I think he must fail."

See too *Agriplas (Pty) Ltd & Ors v Andrag & Sons (Pty) Ltd* l98l (4) SA 873 (C) at 877-8.

In South Africa the definition of the delict of passing-off was given in *Capital Estate & General Agencies (Pty) Ltd & Ors v Holiday Inns Inc & Ors* l977 (2) SA 916 (A) by Rabie JA (as he then was) at 929 as follows:

> "The wrong known as passing-off consists in a representation by one person that his business (or merchandise, as the case may be) is that of another, or that it is associated with that of another, and, in order to determine

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whether a representation amounts to a passing-off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with, that of another."

The learned Judge of Appeal went on to hold that the test to be applied in



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determining the matter is whether there is a reasonable likelihood that members of the public may be confused. These views were cited with approval by Sandura JP in *National Foods Ltd v Blue Ribbon Foods Ltd* HH-68-92.

The subject was dealt with at length by the South African Appellate Division in *Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd* l993 (2) SA 307 (A). Harms AJA (as he then was) said at p 315:

"The essential issue on the question of passing off in the present case is whether the respondent, by using the Brillo get-up in relation to a brass polish, is representing to the public that Brillo is the appellant's product (ie a deception as to trade source) or that it is connected in the course of trade with the appellant's business (ie a deception as to business connection). In both cases it must be established that the Brillo get-up was calculated to deceive ... That means that there was a reasonable likelihood that members of the public would so be deceived by the representation ...

In considering whether there was an imitation of the distinctive Brasso get-up, it should be remembered that the likelihood of confusion or deception is a matter for the court and that the judgment of the court must not be surrendered to any witness."

At p 318 he continued:

"Reliance was also placed on the respondent's expressed intention to compete head-on with Brasso and its conscious choice of the Brasso-type tins. It was submitted that the respondent had entered the market with the deliberate intention of passing off its product as Brasso and that a court, under those circumstances, should not be astute to find that the respondent had not achieved its object ... The respondent's intention in this case was to compete and an intention to compete must not be confused with an intention to deceive. The choice of the Brasso-type containers, in the belief of the respondent that these containers had become generic and that the public had come to expect metal polish to be sold in containers of that general shape, was not fraudulent.

That brings me to the real issue and that is the essence of the appellant's get-up. I am of the view that what does catch the eye and what is



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imprinted on the mind is the white colour of the container, the Brasso name in red, and the sun-ray device in blue and red. The essence of the Brillo get-up is the Brillo name in blue and red, the shooting star with yellow as its dominant colour, all against a white background ... The white background, in my view, cannot be a cause of confusion. It must be pointed out that the Brillo colours and the Brillo script on the white background has formed part of the respondent's reputation in the field of household cleaners since that general get-up has been used, prior to the introduction of the brass polish, on other Brillo products.

To conclude this aspect of the case: I am of the view that there is not a reasonable likelihood of confusion between the Brasso and the Brillo polishes because each container is clearly marked with the respective trade

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> marks which are not deceptively or confusingly similar and, in addition, the prominent design marks are not only distinctively different in shape but also in colour."

When one looks at the two packs what does one see? Admittedly both packs are blue. Although the shades of blue may not be identical, they are similar, in that both are a light blue. Both parties have conceded that their own packs are not always the same shade of blue because their suppliers cannot supply the identical shade of blue all the time. The difficulty in achieving a uniformity of colour is attributable to variations in the batches of ink which the suppliers import from time to time from different sources and variations in the flow of ink in the course of production runs. What does catch the eye and what is imprinted on the mind when one looks at the two packs is the light blue colour of the pack and the logo which is splashed across the top half of the pack. The applicant's logo is the red seal with the words "Red Seal" in white lettering superimposed on the seal. Above the logo in dark blue print is the word "Pearlenta" and a smaller imprint of the red seal logo. On the other hand, the respondent's logo consists of the coronet formed by two Ms joined together over a capital C that is almost a closed circle. It is printed in dark blue. There is nothing significant printed above the logo. Below the logo the word "Victoria" is printed in dark blue and then under that, in red lettering, appear the words "Pearl White Mealie Meal".

In *John Craig (Pty) Ltd v Dupa Clothing Industries (Pty) Ltd* l977 (3) SA 144 (T) at 155-6 King AJ said:

> "The parties' get-up must be looked at in their entirety to ascertain whether the respondent's get-up is or is not a colourable imitation of the



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> applicant's get-up. It must be remembered, however, that copying of a get-up is legitimate so long as the respondent takes care to distinguish its product so that an intending purchaser is not likely to be deceived ...
>
> Once a get-up has been published it becomes common property which can be appropriated by trade rivals provided they do not mislead the public and make it perfectly clear that the goods in the get-up are not his but theirs ... Russell J in *Dunhill*'s case *supra* at p 438 said:
>
> > Apart from monopolies conferred by patents, and apart from protection afforded by registration, it is open to anyone to adopt the ideas or devices of his neighbours and to apply them to his own goods provided he clearly distinguishes his goods from those of his neighbour.'"

At 156G he continued:

> "A trader who introduces a new feature into the get-up of his goods does not thereby acquire any proprietary interest in it so as to be able to prevent its use by competitors until it has become so identified with his goods that its use by others is calculated to deceive."

In dealing with the test to be applied, the learned judge said that the first impression on looking at the two get-ups as a whole is "of great importance". The question of the likelihood of deception or confusion is for the court to decide, looking at the two get-ups, but in the absence of cases of actual deception in regard to the get-ups, as opposed to the trade mark, the evidence adduced must be of the most cogent sort.

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In considering whether the respondent's product is calculated to deceive or cause confusion one has to look not only at the distinctive features, but at what the purchaser himself or herself would be likely to be guided by, that is to say, the general appearance and whole get-up of the article - see *Adcock-Ingram Products Ltd v Beecham SA (Pty) Ltd* l977 (4) SA 434 (W) at 439. In *Lennon Ltd v Sachs* l906 TS 331 at 335 Mason J pointed out that the question was not whether there were differences but whether the general appearance was such that a person looking casually at the marks would be likely to be deceived.

I am of the view that there is not a reasonable likelihood of confusion between the two packs. The red seal logo is so distinctive and stands out so prominently that it ensures that there can be no confusion. The red seal appears three times



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on the applicant's pack. Whilst the coronet logo of the respondent also appears three times on the respondent's pack, it is dark blue, not red, and it does not have the same visual impact because the dark blue colouring is not so startling a contrast on the light blue background as is the red seal.

Although the respondent, in its opposing affidavit, asked for the application to be dismissed with costs on the higher scale, Mr *Carter* wisely did not try to advance any submissions supporting the claim for costs on the higher scale.

The application is dismissed with costs.

*Kantor & Immerman*, applicant's legal practitioners

*Atherstone & Cook*, respondent's legal practitioners



## S v SIMBI & ORS 1996 (1) ZLR 167 (HC)

**Court** **High Court, Harare**

Adam J

Criminal review

21 February 1996 Judgment No. HH-20-96

### Flynote

Criminal procedure (sentence) - common law crimes - public violence - stern deterrent sentences needed

### Headnote

The accused had committed the crime of public violence by interfering with persons

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campaigning for the election of certain candidates for the office of mayor of Mutare. They had taken posters away from the campaigners, torn up the posters and forced the campaigners to depart from the area.

On review, the court declined to interfere with effective prison sentences of five months' imprisonment imposed on a number of young first offenders. The court pointed out that with the crime of public violence, the consideration of deterrence must be given greater prominence proportionally than factors personal and subjective to the offender. The magistrate had correctly decided that persons who resort to public violence during election campaigns must be dealt with in a stern manner. He had correctly decided that community service was not a suitable punishment for this sort of public violence.

Cases referred to:

*A-G v Mushonga* 1974 (2) RLR 96 (A)

*R v Cele & Ors* 1958 (1) SA 144 (N)

*R v Clarke & Ferreira* 1961 R & N 652 (SR)

*R v Kashion* 1963 (1) SA 723 (SR)

*S v Muyambo & Anor* 1980 ZLR 408 (A)

*R v Mzwakala* 1957 (4) SA 273 (A)



Statutes referred to:

Miscellaneous Offences Act [*Chapter 9:15*], s 7*(c)*

## Judgment

**Adam J:** The unrepresented accused were convicted on their guilty pleas of public violence, with the exception of Binzi, were sentenced to 12 months' imprisonment with labour, of which seven months' imprisonment with labour were suspended for five years on the usual conditions of "good behaviour". Binzi, aged l6 years, was to receive moderate correction of three strokes.

The statement of facts accepted by the accused were that they were residents of Sakubva in Mutare and were the youth supporters of the independent elected Executive Mayor of Mutare, Lawrence Mudehwe. ZANU(PF) women and other supporters were campaigning for ZANU(PF) candidates Mvundura and Matare by distributing posters to people in that suburb. The accused, acting in concert, snatched campaign posters from those persons campaigning for Mvundura and Matare and tore them into pieces, shouted slogans "down with Mvundura and Matare, forward with Mudehwe" ("*Pasi na Mvundura naMatare, pamberi naMudehwe*"). They then forced the supporters of Mvundura and Matare to stop campaigning and to depart from that area. The value of damage caused to property was $500. The accused admitted that they violently and with intent and in common purpose disturbed the peace and invaded the rights of other persons

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and that they had no right to do so.

Simbi and Kudya were employed by the Mutare City Council, Mwasembura was employed by Sales House and the others were unemployed. Simbi was aged 25 years, single, with savings of $500 but no assets. Kudya was also aged 25 years, single, with no money and assets. Binzi was a Form 2 pupil, staying with his parents, with no savings. Mandeya was aged 29 years, single, unemployed with no valuable assets. Mwasembura was aged 23 years, single, staying with his parents with no money and assets.

In his reasons for sentence the trial magistrate observed that the accused caused a commotion in the high-density suburb of Sakubva when they clashed with the supporters of Mvundura who was the rival of Mudehwe, snatched their campaign posters and tore them and violently prevented Mvundura's supporters from campaigning. It was very obvious to him that this was a serious situation that should be nipped in the bud. Political violence if not checked could lead to anarchy. The political danger to the peace-loving public in the high-density areas cannot be understated. He referred to *Attorney-General v Mushonga* l974 (2) RLR 96 (A) at 99 and *S v Muyambo & Anor* l980 ZLR 408 (A). These cases indicate the question of the interests



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and security of the public must outweigh considerations purely personal to the defendant. Also, the public must be protected from unlawful violence and they must feel that they are being given protection. This calls for a effective deterrent sentence. The trial magistrate toyed with the idea of imposing a term of imprisonment suspended on condition that community service be performed but concluded that this would not be a sufficient deterrent and a travesty of justice.

In terms of s 59*(l)* of the Magistrates Court Act [*Chapter 7:10*] a written statement setting out grounds or reasons why the sentence was excessive was submitted on behalf of the accused by their legal practitioners. The grounds relied upon were that *(a)* the trial magistrate failed to properly consider the facts before passing sentence; *(b)* he failed to properly advise the accused on the nature and purpose of mitigation and so they did not literally mitigate and without careful consideration and determination of both the aggravating and mitigatory features he handed down a severe term of imprisonment for young first offenders; *(c)* the trial magistrate ought to have taken into account the following factors: *(i)* the accused were young and so easily excitable; (ii) they were first offenders; (iii) whether they were married or not and employed or not; (iv) only campaign posters were damaged and no other valuable property; (vi) nobody was injured and no other serious consequences followed the incident; (vi) the accused did not assault anyone; (vii) a fair prosecutor would probably have charged the accused with the contravention of s 7*(c)* of the Miscellaneous Offences Act [*Chapter 9:15*] rather than public violence; (viii) all the accused did was to tear campaign posters and prevent the other faction from campaigning, as opposed to the usual circumstances of public violence where people are killed and injured, property burnt, damaged and destroyed; *(d)* the trial magistrate made no reference to current sentencing trends or policy and gave not a single reason for the severe penalty; *(e)* the accused could have been appropriately punished with deterrent effect without incarceration; and *(f)* the current case is distinguishable from most previous cases which tended

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to be quite serious.

The crime of public violence is committed when a considerable number of persons acting in concert intend forcibly to disturb the public peace or security or to invade the rights of others. This type of conduct is not restricted to a public place. But where the numbers are small and the locality and nature of the disturbance is private and restricted the acts will not constitute public violence: *R v Cele & Ors* l958 (l) SA l44 (N). Where a small number of persons acting in concert in a public place throw things at passers-by or at



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motor vehicles or at shops, when such actions are likely to cause a breach of the public peace, the crime of public violence is also committed: *R v Clarke & Ferreira* l96l R & N 652 (SR) at 654.

In *Attorney-General v Mushonga supra* a crowd of l0 to 20 were gathered near the Rufaro Football Stadium in Harare. The accused, aged 20 years, was part of this crowd and he threw two stones at motor vehicles. One struck a motor vehicle which dented the driver's door. The evidence did not indicate that there was any serious damage to property or injury to persons. Lewis JA stated that the age of 20 years cannot be given too much weight in such offences and that it is persons of this age group who are prone to indulge in this type of hooliganism. He referred to *R v Kashion* l963 (l) SA 723 (SR).

In *R v Kashion supra* at 727-8 Lewis J (as he then was) had said:

> "The stage appears to have been reached, in cases such as these, where consideration of the public interest and public safety must outweigh those of the individual, and that the only way to stop young hooligans like the appellant from continuing to commit these breaches of law and order, whether on their own initiative or at the instigations of adults, is to make an example of them."

In *S v Muyambo & Anor*, the accused were part of a group of some 20 supporters of ZANU (PF) in Mufakose, Harare, who assaulted six persons including five women. The accused persons were only involved in removing a skirt and a T-shirt from one woman and T-shirts from two women and one man. None of the assaults on the six persons were serious. Fieldsend CJ observed at 411 that there were three main reasons (only two of which are relevant for our purposes) -

> "... why the courts have to take a very firm line in cases of this nature.
>
> First, the public must be protected from unlawful violence and they must feel that they are being given protection. Secondly, the police who have a very difficult task, must be shown that they have the support of the courts ...
>
> For all these reasons, sentences that will be effectively deterrent must be imposed in appropriate circumstances."

In *R v Mzwakala* l957 (4) SA 273 (A) at 277 Schreiner ACJ asserted that



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factors personal to an accused may be entitled to relatively less weight where the crime is one that endangers public safety. In those cases the factor of deterrence should be allowed greater weight, proportionately, than it is generally accorded. But this does not mean that it is proper to disregard the history and circumstances of the accused and the subjective aspect of the crime.

The record of proceedings discloses that in all eight persons were charged with public violence, including the five accused. Three of the others pleaded not guilty. All the accused were first offenders, one was an unemployed 29-year-old, two were employed 25-year-olds, one was an employed 23-year-old and one was a 16-year-old pupil. With the exception of the 16-year-old who was a juvenile, the other accuseds cannot be said to be very young persons. It is clear from the record of proceedings that the trial magistrate was aware of the ages of the accused, whether they were employed or not, whether they were married or single as well as the other factors now mentioned by their legal practitioners.

It must not be forgotten that s 7*(c)* of the Miscellaneous Offences Act [*Chapter 9:15*], which covers conduct in a public place, provides for a penalty of a fine not exceeding $200 or to imprisonment not exceeding 12 months. The legislature no doubt had in mind conduct in a public place which interfered with the comfort, convenience, peace or quiet of the public or adversely affected their safety which may or may not have constituted the crime of public violence and which called for a penalty not in excess of that prescribed under s 7*(c)*.

It has not been shown on behalf of the accused that the trial magistrate erred by not applying proper principles of sentencing or imposed a sentence that was so severe as to induce a sense of shock. The authorities clearly indicate that consideration of deterrence must be given greater prominence proportionately than factors personal and subjective to the offender.

In this matter the trial magistrate intended to convey to would-be transgressors during election campaigns that public violence and public disorder would be dealt with in a stern manner. As clearly pointed out, the seriousness of the damage caused or the injuries that are not the sole criteria on which heavy punishment is predicated; the circumstances under which the public violence or public disorder takes place are also to be considered. Considerations of public interest and public safety outweigh those of the individuals in such cases.



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The trial magistrate even thought about a sentence suspended on condition of community service. He correctly decided that offences of public violence only in exceptional cases would be deserving of such a sentence. Personal deterrence in such cases must be looked at tandem with general deterrence.

It follows that the trial magistrate cannot be faulted in the sentence he imposed on the accused. His convictions and sentences are confirmed as being in accordance with real and substantial justice.



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## MOYO v FORESTRY COMMISSION 1996 (1) ZLR 173 (HC)

**Court** **High court, Bulawayo**

Malaba J

Application to set aside decision of an administrative tribunal

23 February 1996 Judgment No. HB-10-96

### Flynote

Administrative law - disciplinary proceedings in respect of allegations of misconduct - proceedings in absence of person accused - whether inquiry held - whether applicant required first to exhaust his domestic remedies

Practice and procedure - application - application to set aside proceedings of disciplinary tribunal made in terms of r 230 of the High Court Rules 1971 - whether applicant obliged to bring proceedings before court by way of review rather than as applicant

### Headnote

The applicant had been dismissed from employment by his employer, the Forestry Commission, because of alleged misconduct. Under the code of conduct governing this employment, a person could only be dismissed if there had been an enquiry into the matter. The applicant argued that there had been no such enquiry and that therefore his dismissal from employment was unlawful.

The respondent maintained that there had been a hearing. It also argued that the applicant had used the wrong procedure in bringing the application, as he should have proceeded by way of review under rr 257 and 259 of the High Court Rules, rather than by way of ordinary court application. The respondent further argued that the applicant should have exhausted his domestic remedies first before approaching the court.

Held, that no inquiry was held as required by the code of conduct.

Held, further, that although the ordinary court application was engrafted onto and made an integral part of the review procedure through rr 256 and 258



of the High Court Rules 1971 and these provisions are peremptory, in the circumstances of the case the failure of applicant to comply with the requirements of rr 256, 257 and 259 was not so inappropriate as to prevent the court from granting the relief sought. The decision to dismiss was null and void *ab initio* because of the failure to hold an inquiry and the failure to comply with Order 33 would have been condoned as a matter of course.

Held, further, that a court will not insist on an applicant first exhausting domestic remedies where the appeal created by the code of conduct does not confer on the aggrieved party better and cheaper benefits than its remedies or where the decision appealed against undermined the domestic remedies. In the present case the domestic remedy was not better and cheaper than

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the court remedy and the failure to hold an inquiry and to keep a record of proceedings undermined the domestic remedies themselves. Additionally, the respondent had not been prejudiced by the applicant bringing the matter to court without first exhausting his domestic remedies

Held, further, the court could order re-instatement of the applicant in his employment as this was not a case where there has been a breakdown of the working relationship between the parties such that the court should exercise its discretion not to order re-instatement.

Cases cited:

*Adfin (Pty) Ltd* v *Durable Eng Works (Pty) Ltd* 1991 (2) SA 366 (C)

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

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

*Admin, Tvl & Ors* v *Traub & Ors* 1989 (4) SA 731 (A)

*Coin Securing Group (Pty) Ltd* v *Smith NO & Ors* 1992 (3) SA 333 (A)

*Commercial Careers College (1980) (Pvt Ltd* v *Jarvis* 1989 (1) ZLR 344 (S)

*Deputy Min of Tribal Authorities* v *Kekana* 1983 (3) SA 492 (B)

*Federated Trust Ltd* v *Botha* 1978 (3) SA 361 (T)

*Fisher & Ors* v *Air Zimbabwe Corporation* HH-306-88

*Golube* v *Oosthuizen & Anor* 1955 (3) SA 1 (T)

*GrŸndling* v *Beyers & Ors* 1967 (2) SA 131 (W)

*Jockey Club of SA* v *Forbes* 1993 (1) SA 649 (A)

*Johnson* v *Shrewsbury & Birmingham Railways Co* (1853) 22 LJ Ch 291

*Lawson* v *Cape Town Municipality* 1982 (4) SA 1 (C)

*Mabuza* v *Tjolotjo District Council* HB-52-92

*Motaung* v *Mukebela & Anor; Motaung* v *Mothiba NO* 1975 (1) SA 618 (O)

*Musandu* v *Chairperson of Cresta Lodge Disciplinary & Grievance Cttee* HH-115-94



*Rampa* v *Rektor, Tshiya Onderwyskollege* 1986 (1) SA 424 (O)

*S* v *Baleka & Ors* 1986 (1) SA 361 (T)

*SAFCOR Forwarding (Jhb) (Pvt) Ltd* v *National Tpt Commission* 1982 (3) SA 654 (A)

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*Schierhout* v *Min of Justice* 1926 AD 99

*Sec for the Interior* v *Scholtz* 1971 (1) SA 633 (C)

*Seloadi & Ors* v *Sun International (Bophuthatswana) Ltd* 1993 (2) SA 174 (B)

*Shah & Anor* v *Min of Education & Culture* 1989 (4) SA 560 (D)

*Sibanda & Anor* v *Mugabe & Anor* HH-102-94

*Tutani* v *Min of Labour & Ors* 1987 (2) ZLR 88 (H)

*Welkom Village Mgmt Bd* v *Leteno* 1958 (1) SA 490 (A)

*Winterton, Holmes & Hill* v *Paterson* 1995 (2) ZLR 68 (S)

*ZTIC* v *Gwinyai* S-150-95

The following rules of court were referred to by the court:

High Court of Zimbabwe Rules 1971 (RGN 1047/71), rr 230, 256, 257, 258, 259

*W Sansole,* for the applicant

*J K Stirling*, for the respondent

## Judgment

**Malaba J:** On 28 June 1995 the applicant instituted these proceedings by way of an ordinary court application under Order 32 Rule 230 of the High Court Rules 1971 to have the decision of the respondent (the Forestry Commission) by which it found him guilty of misconduct and dismissed him from employment on 22 June 1993 set aside. In addition the applicant prayed for the following relief:

"1. That respondent re-instate the applicant to his original post without any loss of salary and benefits with effect from the date of the unlawful dismissal to date of re-instatement,

**ALTERNATIVELY**

That respondent pay applicant all unpaid salary and benefits due to him from the date of the unlawful dismissal to date of payment. And a further payment of three months' salary and benefits in lieu of notice.

2. Payment of interest *a tempore morae* from the date of unlawful dismissal to date of payment.

3. Costs of this application."

The application was opposed by the Forestry Commission on three grounds:



MALABA J

*(i)* the applicant's dismissal was lawful; (ii) the applicant used an incorrect procedure to initiate these proceedings and (iii) he should have exhausted the domestic remedies under the

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Forestry Commission's code of conduct before approaching the court.

The facts of the matter, as appear from the affidavits filed by the parties in support of the application as well as against it, are these. The applicant was employed by the Forestry Commission as an A Division manager in charge of Katombora Camp in the Matetsi Concession Safari Area in Hwange. He was answerable to the manager of Ngamo Camp, also situated within the Matetsi Concession Safari Area.

The applicant's duties involved the management of the Forestry Commission's business of organising hunting safaris for professional hunters and arranging game viewing tours for tourists. It was his duty to ensure that the facilities at the camp were adequate and the services rendered therein of high standard.

The hunting season normally runs from May to October whilst the low season begins in November of one year ending in April of the other year. There is usually brisk business during the hunting season, so much that the facilities are fully utilised and members of staff unable to go on leave.

In 1993 the applicant was away from work visiting Botswana from 1 to 24 April. The applicant's supervisor contacted his wife on 21 April 1993 asking for the whereabouts of the applicant and alleged that he left work without official leave. On his return to work on 29 April 1993, the applicant was suspended without pay. In the letter of suspension, the head office alleged that the applicant had committed certain offences specified in the Forestry Commission's code of conduct.

The following charges were preferred against the applicant:

"**Table 3**

1. Serious neglect of duty or serious inefficiency in performing your duties, in that you were aware that the camp and area needed substantial preparation for the hunting season yet chose to be absent from 1 April to 24 April 1993 without leave.

2. Misrepresentation of circumstances or facts pertaining to unauthorised persons making use of the camp and facilities under your control.



MALABA J

**Table 4**

1. Absence without official leave for a period of five or more working days without reasonable excuse. The date in question being 1 April 1993 to 24 April 1993.

2. Theft, fraud and embezzlement in that,

   *(a)* Satisfactory explanations have not been received from you on numerous accounting queries raised by the auditors.

   *(b)* Various items of property belonging to the Commission were converted to your own use.

   *(c)* Persons were allowed by you to use the camp and facilities under your control without due monies

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being accounted for by you to the commission.

*(d)* Monies derived from sale of Commission products was not accounted for by you."

The applicant denied all the charges levelled against him. On the allegations that he was absent from work without official leave, he said he had taken the days as "time-off" on the authority of his supervisor, Mr Ngwarai. On the other charges, which were clearly vague and embarrassing for lack of particularity, he challenged the Forestry Commission to provide him with further particulars. There is no evidence on the papers of the particulars requested by the applicant having been provided.

The Forestry Commission set up a disciplinary inquiry, in terms of the rules in its code of conduct, to investigate the allegations of misconduct levelled against the applicant. On 8 June 1993 the applicant was advised by means of a letter, that the disciplinary inquiry would be held in Bulawayo on 14 June. He travelled from Victoria Falls to attend the inquiry.

Before the commencement of the inquiry, the applicant asked the investigation panel whether he would be re-imbursed the travel and subsistence expenses incurred by him when attending the inquiry. The question elicited from the applicant's supervisor a curt reply to the effect that he would not be re-imbursed the expenses. The applicant took the view that he was being treated unfairly and walked out of the office where the inquiry was to be held.

On 22 June 1993 he received a letter from the head of office to the effect that his contract of employment with the Forestry Commission had been terminated. By means of that letter the Forestry Commission advised the applicant that he had been found, by the disciplinary inquiry, guilty of the following offences:



MALABA J

(1) serious neglect of duty;

(2) misrepresentation of facts;

(3) absence from work without leave;

(4) insubordination to the inquiry.

The charge of insubordination apparently arose from the applicant's conduct of walking out of the office where the inquiry was to be held. By means of the letter of dismissal, the applicant was advised that he had a right, under the code of conduct, to appeal against the decision of the disciplinary inquiry within 5 working days of being served with the letter of dismissal. The applicant returned the letter of dismissal to the head of office saying he intended to appeal against the decision to dismiss him from employment. At the same time he indicated that he had handed the matter to his lawyers.

He had indeed handed the matter to his lawyers. There followed correspondence between the applicant's lawyers and the Forestry Commission's legal and administration officer who often replied to the letters on behalf of the General Manager. The essence of the position taken by

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the applicant was that there was no inquiry that was held by the investigation panel after he had walked out of the office where the inquiry had been scheduled to be held. He argued that without an inquiry having been held in accordance with the rules creating the disciplinary procedure in the code of conduct, the decision finding him guilty of misconduct was null and void. The applicant's position was made known to the Forestry Commission by his lawyers in a letter dated 23 November 1993, in these terms:

> "Our client felt that the panel was being unfair and quite hostile. Consequently he walked out in protest and the panel investigation did not, as a result, take place ...
>
> Since the panel investigation did not take place, the panel could not come to a decision in respect of the guilt or otherwise of the alleged offender ...
>
> (See r 6.4 of your code)
>
> Therefore in the absence of a decision what would have been the basis of an appeal? Indeed, it would be surprising if the panel ever complied with rr 6.6, 6.7 and 6.8 of your code.

The Forestry Commission alleged in a letter dated 10 December 1993 that the



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investigation panel had gone ahead with the inquiry after the applicant had walked out. It said:

> "After your client had walked out' the panel went ahead with the enquiry. It used the evidence which was available to it. This included evidence from the complaining officer and documentary evidence. We are not sure of what you mean when you say the panel investigation did not take place ... There was a decision. The panel complied with rr 6.6, 6.7 and 6.8 of the code save to that extent that required the co-operation of your client."

The battle lines had been drawn: either there was an inquiry or there was none.

It is important for purposes of completeness to look at the Forestry Commission's code of conduct to the extent it bears upon the determination of the issues raised in this application. Mr *Sansole* suggested in argument that the code of conduct was not registered in terms of the Labour Relations [*Chapter 28:01*]. I disagree. The lay out of the different parts of the code of conduct followed the requirements of s 101(3) of the Labour Relations Act. Each page of the code of conduct bore a stamp dated 19 January 1993 by the Registrar of Labour Relations as a mark of its registration in terms of s 101(1) of the Act. The provisions of the code of conduct were therefore binding on the applicant and the Forestry Commission (SI 379/90; *ZTIC v Gwinyai* S-150-95 p 2).

The code of conduct specified offences that constituted misconduct and classified them under "Tables", according to their degrees of seriousness and the disciplinary action to be taken in respect of each class of offences. The offences were under Tables 1, 2, 3 and 4 whilst the corresponding disciplinary actions available were: a verbal warning, written warning, final written warning and dismissal.

Dismissal was only available as a disciplinary action where the alleged offender had committed a Table 1 offence for the fourth time; a Table 2 offence for the third time; a Table 3 offence for the second time and a Table 4 offence for the first time. A disciplinary inquiry had to be held

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where an employee was charged with an offence punishable by dismissal from employment. Rule 8.7 provided that "dismissal shall not be imposed without an enquiry first having been held".

Rule 6.1 provided that there should be a recorder of proceedings at the



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inquiry. Rule 6.3 prescribed the procedure to be followed by the disciplinary inquiry in hearing evidence from the supervisor making the complaint, the alleged offender and any other witnesses. The investigation panel was obliged under rule 6.3 to consider the subject matter of the inquiry by first hearing the supervisor making the complaint elaborate on the charges and then ask the alleged offender to answer the charges. He was, however, not obliged to answer. The investigation panel had a discretion whether or not to question the supervisor or the alleged offender to clarify issues raised by their evidence. It was obliged to allow the supervisor and the alleged offender to question each other. The investigation panel could then listen to oral evidence from other witnesses.

After that the disciplinary inquiry was obliged to come to a decision in respect of the guilt or otherwise of the alleged offender. It was also obliged to come to a decision on the appropriate disciplinary action, if the alleged offender was found guilty of the offences charged. The decision was then to be communicated to the head of office who would inform the alleged offender, at the same time advising him or her of the right to appeal to the appeals panel, within 5 days of service of the notice of the decision.

Under rule 6.7 the recorder of the proceedings of the disciplinary inquiry was obliged to compile a report with particular reference to-

"*(i)* the facts of the matter;

(ii) extenuating and aggravating features;

(iii) the findings of the enquiry and the disciplinary action imposed;

(iv) any disagreement of any member with either the finding or the disciplinary action imposed."

Rule 6.8 provided that the report had to be signed by the alleged offender and he had to be given a copy of it.

An appeal against the decision of the disciplinary inquiry lay to an appeal panel arranged by the divisional head in consultation with the personnel division. The employee had to lodge a notice of intention to appeal with the divisional head. The notice was required to state what the employee was appealing against, giving reasons why he felt the decision was wrong.

The divisional head was obliged to place before the appeal panel minutes of the previous hearing, notification of the intention to appeal by the employee and any other documents relevant to the case. Rule 7.6 provided that:

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> "The appeal hearing shall be confined to the record of the enquiry held previously and to the grounds of appeal. However, any additional facts which were not taken into account at the enquiry may be introduced."

The appeal panel could affirm the decision of the investigation panel or reverse the same or redirect the investigation panel to re-investigate the matter.

If the employee was aggrieved by the decision of the appeal panel he or she could exercise his or her rights under the Labour Relations Act by appealing to the Labour Relations Tribunal.

With this preview of the facts I now consider the contentions advanced in argument.

The first point taken by Mr *Stirling* was that the applicant used an incorrect procedure to institute these proceedings. He ought to have used the review procedure under Order 33 rr 256, 257 and 259.

It was clear that the objection was directed against the form in which the applicant instituted the proceedings. It is important to note that the form of a court application under Order 32 r 230 was engrafted onto the review procedure through rr 256 and 258. When it was used to institute proceedings in which the complaint was that which ordinarily fell within the ambit of the review procedure and the relief sought was susceptible to review, the court application should incorporate the particular requirements of Order 33 rr 256, 257 and 259.

The requirements to be incorporated are: the short and clear statements in the founding affidavit of the grounds of complaint; the institution of the proceedings within 8 weeks of the decision to be set aside and the lodgement by the administrative tribunal of the original record and two copies with the registrar within 12 days of service of the application.

The requirements are peremptory. A court application that omitted to incorporate these particular requirements for review is liable to being set aside for being a nullity: *Secretary for the Interior v Scholtz* 1971 (1) SA 633 (C) at 636A-637D; *SAFCOR Forwarding (Jhb) (Pvt) Ltd v NTC* 1982 (3) SA 654 (A) at 673B; *Deputy Minister of Tribal Authorities v Kekana* 1983 (3) SA 492 (B) at 496-7.



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Courts are however not captive to the Rules. Rules were made for the benefit of litigants. The engrafting of the ordinary court application onto the review procedure through rr 256 and 258 made it an integral part of the form of the review procedure. It was therefore *prima facie* a competent form for instituting proceedings to set aside the administrative decision.

It was upon the examination of its content revealed by the supporting affidavits that a decision could be made whether or not the use of the court application instituting proceedings to set aside the administrative decision, without incorporating the particular requirements of rr 256, 257 and 259, was so inappropriate in the circumstances of the case, that it would be legally

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incompetent to grant the relief sought.

There are, however, decided cases in South Africa in which reliefs that were susceptible to review were granted in proceedings initiated by way of ordinary court applications not incorporting the review procedure. Rule 53 of the South African Uniform Rules of Court is substantially similar in its provisions to our r 256, whilst r 6 is similar to our r 230.

In *S v Baleka & Ors* 1986 (1) SA 361 (T) at 397I-398B Eloff DJP said:

> "The second procedural question is whether the applicants are not confined to review proceedings under r 53 of the Rules of Court should they wish to question the validity of the order issued by the Attorney-General under s 30 as indeed they do. I do not think so. Rule 53 was designed to facilitate the review of administrative orders. It created procedural means whereby persons affected by administrative or quasi-judicial orders or decisions could get the relevant evidential material before the Supreme Court. It was not intended to be the sole method by which the validity of such decisions could be attacked. There are numerous decisions in our own courts in which the validity of administrative rulings were considered and adjudicated on in proceedings other than conventional review proceedings and I see no reason why we should not do so in the present case. The issues were properly ventilated; the parties all contributed to the presentation of the factual components and I consider that we are free to consider the grounds of attack on the validity of the order of the Attorney-General."

The same sentiments were echoed by Kriegler AJA in *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A). In that case, the respondent instituted proceedings by way of an ordinary application under r 6, to have the decision

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of the appellant by which it found him guilty of misconduct set aside. It was argued on behalf of the appellant that the failure by the respondent to use review proceedings under r 53 was fatal to his case because the particular requirements of r 53 were peremptory.

Dismissing the argument, Kriegler AJA said at 661E-662H:

> "Counsel for the Jockey Club made much of the peremptory language in which r 53 is couched, for example all proceedings ... shall be' in subrule (1) and the repeated use of shall' in the succeeding subrules. Clearly that use of language cannot be overlooked but equally clearly it is to be understood conceptually and contextually. The primary purpose of the rule is to facilitate and regulate applications for review. On the face of it the rule was designed to aid an applicant, not to shackle him. Nor could it have been intended that an applicant for review should be obliged, irrespective of the circumstances and whether or not there was any need to invoke the facilitative procedure of the rule, slavishly and pointlessly to adhere to its provisions. After all:
>
> > Rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts ...'"

(*Per* van Winsen AJA in *Federated Trust Ltd v Botha* 1978 (3) SA 645(A) at 654C-D).

I am in full agreement with the view expressed by Eloff DJP in *S v Baleka & Ors* 1986 (1) SA 361 (T) at 397 *in fine* - 393A:

> "Rule 53 was designed to facilitate the review of administration orders. It created procedural means whereby persons affected by administrative or quasi-judicial orders or decisions could get the relevant evidential material before the Supreme Court. It was not intended to be the sole method by which the validity of such decisions could

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be attacked."

I am also in agreement with the observation of the learned judge in the succeeding sentence:

"There are numerous decisions in our own courts in which the validity of administrative rulings was considered and adjudicated on in proceedings other than conventional review proceedings ..."



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(See also *Motaung v Mukubela & Anor NNO*; *Motaung v Mothiba NO* 1975 (1) SA 618 (O) and *Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd* 1991 (2) SA 366 (C) at 368E-H). The most recent example is the case of *Administrator, Natal & Anor v Sibiya & Anor* 1992 (4) SA 532 (A), where an administrative decision to retrench provincial employees was successfully challenged without any resort to r 53.

See also *Coin Securing Group (Pty) Ltd v Smith NO & Ors* 1992 (3) SA 333 (A) and *Administrator, Transvaal & Ors v Traub & Ors* 1989 (4) SA 731 (A), likewise cases where administrative decisions were set aside in proceedings initiated by notice of motion under r 6.

"... The purpose of r 53 is not to protect the decision-maker' but to facilitate applications for review and to ensure their speedy and orderly presentation. Such benefits as it may confer on a respondent, in contra-distinction to those ordinarily enjoyed by a respondent under r 6, are incidental and minor. It confers real benefits on the applicant, benefits which he may enjoy if and to the extent needed in his particular circumstances."

Decided cases show that the following are some of the situations in which relief would be granted in proceedings instituted by way of an ordinary application not incorporating the particular requirements of Order 33 (the list is not meant to be exhaustive but illustrative):

1. Where good cause has been shown in an application for condonation of non-compliance with the particular requirements of Order 33.

2. Where there has been no formal application for condonation but the proceedings (or decision) sought to be set aside are *ex facie* the papers null and void so that condonation would have been granted as a matter of course had an application been made.

   Refusal to grant the relief prayed for, for the simple reason that an incorrect form for instituting the proceedings was used, would in such circumstances amount to condonation of the perpetuation of the nullity and gross injustice.

   In *Mabuza v Tjolotjo District Council* HB-52-92 the respondent dismissed the applicant from employment, following a finding that he was guilty of misconduct, without having held an inquiry in compliance with the provisions of s 34(2)*(a)* and *(b)* of the District Council (Conditions of



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Service) Regulations 1981 (SI 22 of 1981). The respondent argued that the applicant be non-suited because the application instituting the proceedings to set aside the decision to

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dismiss him from employment did not comply with the provisions of Order 33 r 257.

Dismissing the argument Muchechetere J (as he then was) said at p 4 of the cyclostyled judgment:

> "On the question of the non-compliance with the rules of court I agree that this was a procedural matter which could have been resolved by an application for condonation. Such an application would in the circumstances have succeeded because the respondent would not have been inconvenienced by it and because of the injustice it would have caused the applicant - denying him redress in a matter he had been done injustice because of a procedural matter."

It is important to note that the learned judge had earlier on in the judgment made a specific finding that there was gross irregularity in the failure by the respondent to observe the *audi alteram partem* rule and not to hold an inquiry in terms of s 34(2)*(a)* and *(b)* of District Councils (Conditions of Service) Regulations.

3. Where the issues have been fully ventilated and the facts contained in the affidavits supporting as well as opposing the application disclosed all that the court needed to know to reach a just decision and there would be no prejudice to the respondent arising from the court considering the complaint about the proceedings or decision.

In *Rampa v Rektor, Tshiya Onderwyskollege* 1986 (1) SA 424(O) the Secretary for Education for Qwaqwa revoked the admission of students to a teachers' training college, without having given the students an opportunity to be heard on the matter which affected their rights. The students instituted proceedings to have the decision set aside on an ordinary court application not incorporating the particular requirements of the review procedure under r 53.

The judgment is in Afrikaans but the head note states at 425H that:

> "The court further found that the incorrect procedure followed by the applicants (an ordinary application instead of a review under rule of court 53) should be condoned where it appeared that the parties had



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> placed all the relevant facts before the court in their affidavits and that the fact that rule of court 53 had not been complied with did not cause any prejudice."

The same approach was adopted by Kriegler AJA in *Jockey Club of South Africa v Forbes supra*, where he held that the case had been rightly considered on its merits in the court below and that the "procedural argument advanced on behalf of the Jockey Club propounds no more than sterile formalism". The learned Acting Judge of Appeal said at 662I-683B:

> "Forbes was in possession of the records of the hearings before each of the three tribunals and needed production of no more to enable him to put his case fully before the court. He knew what had been submitted to those tribunals, what they had decided and could infer on what grounds they had done so. His founding affidavit set out his complaints in detail and indicated with precision what his basic legal contentions were. The nub of the case he advanced was straight forward: he had been charged under the wrong rule and in the result there had been a consistent failure to consider the substance of his defence and a consistent avoidance of an enquiry into the real issue, namely whether the specimens, when taken from the horses, had contained Naproxen. By the time the application was launched in February 1990 the Jockey Club had in any event long since been fully apprised of every point made in the founding papers. After the papers were served the Jockey Club had every opportunity to

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join issue with Forbes on the facts to furnish reasons for the action taken and to indicate its stance on the law."

To borrow from Kriegler AJA, the nub of the case advanced by the applicant in this case was straight forward. He charged that his dismissal was unlawful because there was no inquiry held in which a finding was made of the fact that he had committed the offences he was charged with. He made the charge in correspondence addressed to the Forestry Commission. He repeated the charge in the founding and answering affidavits. He blatantly challenged the Forestry Commission to produce the record of proceedings of the disciplinary inquiry or the report that ought to have been compiled under r 6.7 of the code of conduct. Rule 8.7 of the code of conduct prohibited any dismissal from employment without an inquiry having been held. By the time the application was lodged, the Forestry Commission was aware of the ground upon which its decision to dismiss the applicant from employment was being challenged.



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The provisions of the rules requiring a recording of the proceedings of the disciplinary inquiry and a compilation of the report are peremptory. The two documents form part of the evidence of the fact that an inquiry was held in terms of the code of conduct.

In *Secretary for the Interior v Scholtz* 1971 (1) SA 633 (C) Steyn J considered the question whether the failure by an administrative tribunal to produce a record of proceedings should justify the applicant instituting proceedings by way of an ordinary court application not incorporating the particular requirements of the review procedure under r 53. Although the learned judge held that the particular requirements of r 53 were peremptory to permit non-compliance with them for failure to produce the record of proceedings, he however held that failure to produce a record of proceedings where the administrative tribunal was required by law to do so constituted a gross irregularity. The learned judge said at 636H-637D:

"I am however, obliged to point out further that this rule does not limit the applicability of its provisions to proceedings but extends their operation also to embrace decisions. Decisions do not necessarily comprehend proceedings neither does it follow that because a decision has been taken there would necessarily be a record of proceedings. The provisions of r 53(1)*(b)* dealing with the despatch of a record of proceedings seem to me to cater for the situation that where such a record has been kept it should be despatched in accordance with the procedural requirements enumerated in that sub-section and in the other appropriate sub-sections of the rule. In support of what I have said, I would point to the fact that if this were not correct it would lead to the anomalous result that where, for example, a statute enjoins upon an officer or a board a duty to keep a record of proceedings and he fails to do so, a party who wished to have a decision taken by such board or officer set aside in view of this irregularity in its or his proceedings would not be obliged to initiate his complaint in accordance with the provisions of r 53. I say this is anomalous because, clearly, the example cited would be a classic illustration of an irregularity in proceedings which, both at common law and having regard to the object the draughtsman of the rule had in mind, would most properly be brought by way of notice of motion. It also seems illogical to me that the rule should lose its peremptory force merely because, in a given case, the decision which it is sought to attack has not been accompanied by proceedings of which a record has been kept."

It is important to note, however, that in the South African review procedure



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under r 53, the applicant is obliged, in the same application for review directed at the administrative tribunal, to call upon it to despatch to the registrar the record of the proceedings sought to be corrected or set aside. Rule 260(1) of the High Court Rules 1971 requires the administrative tribunal to lodge with the registrar the original record and two copies within 12 days of being served with the application instituting the proceedings to set aside its proceedings or decision. The applicant does not have to call upon the administrative tribunal in his application, to lodge the record of proceedings with the registrar. The duty to do so is imposed by the operation of law once the application is served on the tribunal.

The application being served on the administrative tribunal does not have to comply with the particular requirements of Order 33 rr 256 and 257 before the tribunal despatched the record of proceedings to the registrar.

In light of the subsequent decisions, the *obiter dictum* in *Secretary for the Interio v Scholtz supra* on the use of the ordinary application reflects a rigid use of rules of court. An ordinary application instituting proceedings to set aside a decision (without reference to the particular requirements of Order 33), on the ground that the administrative tribunal failed to create a record of proceedings is unlikely not to be condoned especially where its nub is that the decision was null and void *ab initio* because the inquiry which should have formed the heart of its validity was not held at all, in breach of the mandatory provisions of the rules in accordance with which the disciplinary inquiry ought to have been held and the record of its proceedings kept. In such a case the complaint would not be that the record of proceedings was not produced, but that it was not created because there was no inquiry held.

Apart from the mere say-so by the Forestry Commission's legal adviser and administration officer in the opposing affidavit, there was no iota of evidence of the disciplinary inquiry having been held before the decision to find the applicant guilty of misconduct was made. Not much weight could attach to what was said by the Forestry Commission's legal adviser and administration officer on this aspect of the complaint by the applicant. He was not a member of the investigation panel. He did not produce the record of proceedings to support his averments. He did not produce the report that ought to have been created in terms of r 6.7 of the code of conduct. Affidavits were not recorded from members of the investigation panel. The legal adviser and administration officer was able to find and annex to the opposing affidavit documents of lesser importance than a record of the proceedings of a disciplinary inquiry.



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His failure to annex the record of the proceedings or the report under r 6.7, as evidence of the inquiry having been held, shows that these documents were not created because no disciplinary inquiry was held.

The summary manner in which the applicant was dismissed contrary to the peremptory provisions of r 8.7 of the code of conduct was clear from the way the applicant was charged with and found guilty of insubordination. He was not served with the charge and given an opportunity to defend himself against the allegations of misconduct levelled against him in respect of that charge. The principles of natural justice that impact upon the exercise by an

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employer of powers to discipline employees under a code of conduct were not observed in that the applicant was condemned without having been afforded an opportunity to be heard. In *Administrator, Transvaal & Ors* v *Zenzile & Ors* 1991 (1) SA 21 (A) Hoexter JA said at 36I-37C:

> "The fact that by the law of contract an indisputable right may have accrued to an employer to dismiss his employee does not for the purposes of administrative law, mean that the requirements of natural justice can have no application in relation to the actual exercise of such right. And when as here the exercise of the right to dismiss is disciplinary, the requirements of natural justice are clamant. Mureinik (1985) 1 *SA JHR* 48 points out (at 50) that:
>
> > ... perhaps pre-eminent amongst the qualities of a power that attracts natural justice is its susceptibility to be characterised as "disciplinary" or "punitive".'"

The learned author explains that the reasons for this are rooted both in history and in principle but that the latter are crucial. At 50-1 he summarises the reasons of principle thus:

> "Where the power is disciplinary all the usual reasons for importing natural justice generally apply, and generally apply with more than the usual vigour: the gravity of the consequences for the individual, consequences both concrete and such as affect his reputation, the invasion of the individual's rights, that fairness postulates inquiry, and so on. But more than this, there is a reason of principle, peculiar to disciplinary or punitive proceedings: that even if the offence cannot be disputed, there is almost always something that can be said about sentence. And if there is something that can be said about it, there is something that should be heard ...



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> It is trite, furthermore, that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing."

If one takes into account the fact that the applicant was under no obligation to attend the disciplinary inquiry and that the Forestry Commission's duty was to afford him an opportunity to be heard, which he had the right to decline, one fails to understand how his conduct of "walking out" of the office where the inquiry was to be held and before the proceedings had commenced, could have been interpreted to mean that he was insubordinate to the investigation panel. If the investigation panel considered the applicant's behaviour to constitute insubordination, it ought to have served on him the additional charge of insubordination and afforded him the opportunity to deny or admit it.

In my view, all these features of the decision to dismiss the applicant show that it was null and void *ab initio* and the applicant's use of the ordinary court application, without incorporating the particular requirements of the review procedure under Order 33, would have been condoned, as a matter of course, to have the injustice that had occurred redressed.

The next point taken by Mr *Stirling* was that the applicant should have exhausted the domestic remedies of appeal under the code of conduct before approaching the court. He relied on the decision of Smith J in *Musandu v Chairperson of Cresta Lodge Disciplinary and Grievance Committee* HH-115-94.

The general principle is that the mere provision of domestic remedies in the code of conduct does not *ipso facto* preclude the aggrieved party from approaching courts for relief before exhausting the domestic remedies. In *Shah & Anor v Minister of Education and Culture & Ors*

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1989 (4) SA 560 (D) at 573G-I Bristowe J said:

> "In *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 503 Ogilvie Thompson AJA referred to *Golube v Oosthuizen & Anor* 1955 (3) SA 1 (T) and said:
>
> > In the course of his judgment the learned judge expressed the view that:
> >
> > > "The mere fact that the legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to a court of law should be barred until the aggrieved person has exhausted his statutory remedies." ' "



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The *locus classicus* on the approach to be adopted by a court in deciding whether, in a given case, the employee should have first exhausted the domestic remedies before approaching courts is the decision of Comrie AJ in *Lawson v Cape Town Municipality* 1982 (4) SA 1 (C), where the learned acting judge said at 6H-7A:

> "In considering the question whether, on the proper construction of a statute, judicial review is excluded or deferred, courts have regard to a number of factors. Among these are: the subject matter of the statute (transport, trading licences, town planning and so on); the body or person who makes the initial decision and the bases on which it is to be made; the body or person who exercises appellate jurisdiction, the manner in which that jurisdiction is to be exercised, including the ambit of any re-hearing' on appeal; the powers of the appellate tribunal, including its power to redress or cure' wrongs of a reviewable character, and whether the tribunal, its procedures and powers are suited to redress the particular wrong of which an applicant complains."

These principles have been applied by our courts with different results, depending on the circumstances of each case. In *Tutani v Minister of Labour & Ors* 1987 (2) ZLR 88 (H) Mtambanengwe J applied them and concluded at 95D that:

> "I also find that the domestic remedies provided by the legislation in question are capable of providing effective redress in respect of the complaint and secondly that the unlawfulness alleged has not undermined the domestic remedies themselves.
>
> See Baxter *op cit* p 721. The appeals provided for in the regulations are a rehearing of the matter in the fullest sense of the word in which both the regional hearing officer and/or the board will consider the matter *de novo*, see *Hamman en 'n Ander v Algemene Komitee, Johannesburgse Effektebeurs en 'n Ander* 1984 (2) SA 383 (W)."

The same conclusion was reached by Smith J in *Musandu v Chairperson of Cresta Lodge Disciplinary and Grievance Committee supra* where the learned judge said at p 7 of the cyclostyled judgment:

> "The appeals provided for are a rehearing of the matter in the fullest sense of the word in which the matter will be fully considered by the Disciplinary and Grievance Appeals Committee and then by the Labour Relations Tribunal if there is a further appeal. In my view, this court should not be



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> prepared to review the decision of a domestic tribunal merely because the aggrieved person has decided to apply to court rather than to proceed by way of the domestic remedies provided. The factors mentioned by Mtambanengwe J in *Tutani*'s case *supra* should be carefully considered before a decision is made. A litigant

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should exhaust his domestic remedies before approaching the courts unless there are good reasons for approaching the court earlier."

A court will not insist on an applicant first exhausting domestic remedies where the appeal system created by the code of conduct does not confer on the aggrieved party better and cheaper benefits than its remedies or where the decision to be appealed against undermined the domestic remedies themselves, for example, where the tribunal had no power to make the decision in question: *Fisher & Ors v Air Zimbabwe Corporation* HH-306-88; *Mabuza* v *Tjolotjo District Council supra*; *Sibanda & Anor v Mugabe & Anor* HH-102-94.

The code of conduct in this case did not provide for a rehearing of the case by the appeal panel in the sense that it could hear the matter *de novo*. The appeal panel had no power to hear evidence afresh as if no hearing had taken place before and arrive at its own decision on the matter. It was required instead to confine its deliberations to the record of proceedings of the disciplinary inquiry. It had also to consider the notice of intention to appeal and the grounds of appeal submitted by the aggrieved party. Whilst the appeal panel might consider facts that had not been considered by the disciplinary inquiry, it had no power to hear evidence to prove those facts. It had to consider already proven facts. The appeal panel could confirm the decision appealed against, or reverse it or re-direct the disciplinary inquiry to carry out further investigations. It could not, for example, set aside the decision of the disciplinary inquiry and substitute in its place what it considered was the correct decision apart from a reversal. It is clear that the appeal system under the code of conduct did not confer better benefits to the aggrieved party than the courts.

I am also satisfied that the failure by the disciplinary inquiry to hold an inquiry and keep a record of proceedings thereof undermined the domestic remedies themselves. There were no rights conferred on the Forestry Commission by the nullity. It was not prejudiced by the applicant approaching the courts before he had exhausted the domestic remedies.

The applicant must therefore succeed. The Forestry Commission's decision finding him guilty of misconduct and dismissing him from employment was unlawful. It is set aside.

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The applicant prayed for re-instatement or alternatively payment of damages for unlawful dismissal.

As the applicant chose to approach the court instead of taking the route prescribed by statute he could not claim re-instatement *ipso facto* a finding of unlawful dismissal. At common law the court has a discretion not to order re-instatement even if it found that the dismissal was unlawful.

See *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344 (S).

The factors a court should bear in mind in exercising its discretion whether to order re-instatement or not were referred to by Gubbay CJ in *Winterton, Holmes & Hill v Paterson* 1995 (2) ZLR 68 (S) where he said at p 74:

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"In *Commercial Careers College (1980) (Pvt) Ltd* v *Jarvis 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 ton 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 *Schierhout v Minister 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 *Seloadi & Ors v Sun International (Bophuthatswana) Ltd* 1993 (2) SA 174 (B) Lawrence AJ at 188, 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.

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MALABA J

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 J in *Johnson v Shrewsbury & Birmingham Railway Co* (1853) 22 LJ 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."

The statement was quoted with approval by Trollip J (as he then was) in *GrŸndling v Beyers & Ors* 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:

> "Meiring 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 seems obvious too that he is also *persona non grata* with the general council. In view of that, the history of the events leading up to his dismissal, and his launching these proceedings, his submission that he could still work in harmony with those bosses, if Beyers' influence were removed, seems unduly optimistic."

The attitude of the employer to the re-instatement of the employee is of paramount importance to the court's exercise of its discretion whether to order reinstatement. The Forestry Commission has not expressed unwillingness to take the applicant back into its employment. It was aware that the applicant was seeking reinstatement should its decision to dismiss him be found to have been unlawful. There was no evidence that the applicant had a bad working relationship with his immediate supervisor. He said they worked well and the legal adviser and administration officer conceded on behalf of the Forestry Commission that the applicant enjoyed

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a good working relationship with his supervisor. The Forestry Commission is a big employer. Its employees do not necessarily have to perform their duties in conditions that require close personal relationship as is the case in a legal firm. The applicant expressed willingness to be reinstated to his job with full pay and benefits. In the absence of any indication of the unwillingness by the Forestry Commission to re-employ him the court has no good reason for not ordering his reinstatement. It is therefore so ordered.



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It is therefore ordered as follows:

(1) That the decision of the disciplinary inquiry finding the applicant guilty of misconduct and dismissing him from employment with the Forestry Commission be and is hereby declared unlawful and set aside.

(2) That the Forestry Commission be and is hereby ordered to reinstate the applicant to his position of manager A Division with full pay and benefits from 29 April 1993 to the date of reinstatement.

(3) That the Forestry Commission is to pay the costs of the application.

*Sansole and Senda*, applicant's legal practitioners

*Coghlan Welsh & Guest*, respondent's legal practitioners



## TENESI v PUBLIC SERVICE COMMISSION 1996 (1) ZLR 196 (HC)

**Court** **High Court, Harare**

Malaba J

Application for review of administrative decision

28 February 1996 Judgment No. HH-14-96

### Flynote

Review - powers of court on review - substitution of court's discretion for that of administrative body - when permissible - unreasonableness of administrative body's decision as ground for review - only when body can be said to be completely unreasonable can its decision be reversed on grounds of unreasonableness

Public service - public servant - disciplinary proceedings - determination of guilt of public servant by head of ministry - limitations on head's right to make such determination

### Headnote

The applicant was an immigration officer whose task it was to process visa applications. At that

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time visas had to be paid for. Part of the procedure was that receipt numbers had to be endorsed on visa applications before they were forwarded to immigration headquarters for approval. On a number of occasions the applicant approved the issue of visas, even though no receipt numbers were endorsed on the application forms. This was contrary to clear instructions given to the applicant. He was suspended on allegations of misconduct, one relating to his failure to ensure that receipt numbers were endorsed before he issued visas. He declined an offer to inspect the documentary evidence, but submitted a written statement in reply to the allegations of misconduct. Thereafter, the head of his ministry, the Secretary for Home Affairs, submitted the papers to the Public Service Commission, along with a statement that he -

" strongly endorsed that [the applicant] be found guilty as charged ..."



The Commission considered all the papers, which included a further statement from the applicant, determined that he was guilty of the misconduct relating to the visa applications, and discharged him from the Public Service. It was argued on the applicant's behalf that the Secretary for Home Affairs had decided the applicant's guilt, although he had no power to do so. It was also argued that the Commission should have ordered an inquiry in terms of s 7*(b)* of the Public Service (Officers) (Misconduct and Discharge) Regulations 1986, as there were disputes of fact which it could not resolve on the papers, and that its failure to do so constituted a gross irregularity.

Held, that, although the head of a ministry could determine allegations of misconduct against an officer below the rank of assistant secretary (which the applicant was), he could not do so where he instituted the investigation into the allegations of misconduct, preferred the charges and received the officer's reply. In that situation, the head of ministry was obliged to prepare a report and submit the report, together with all the relevant papers, to the Commission, which would make the determination. In the present case, the Secretary had caused the institution of the investigation and had preferred the charges. He was thus the accuser and was precluded from making the determination of guilt.

Held, further, that the Secretary's comments to the Commission did not amount to a finding that the applicant was guilty. It was merely a recommendation that the applicant be found guilty by the Commission.

Held, further, that under the 1992 Regulations, which were those applicable, the Commission had a discretion whether or not to hold an inquiry. It also had a discretion to direct that further investigation be carried out before deciding to hold an inquiry. There was no obligation on it to do so.

Held, further, that the court could not interfere with the Commission's exercise of its discretion unless it were shown that the Commission did not apply its mind to the facts or acted *mala fide* or out of ulterior motives or that the Commission's decision was outrageous in its defiance of logic or accepted moral standards. The question was not what decision the court would have reached. It would have to be said that the Commission's decision was completely wrong and that no reasonable person could have taken the view that it did. On the facts of this case, this could not be said of the decision. A sensible man, acting carefully, might have reached the

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same decision. The onus resting on a litigant to set aside the exercise of a discretion on the grounds of unreasonableness is considerable, and had not been discharged by the applicant.

Application dismissed.



Cases cited:

*Chrmn, PSC & Anor v Marumahoko* 1992 (1) ZLR 304 (S)

*CCSU & Ors v Min for the Civil Service* [1985] AC 374; [1984] 3 All ER 935 (HL)

*Mhlanga v Muranda & Ors* HH-136-92

*Mudyariwa v Chrmn, PSC* HH-79-95

*Mukono v Min of Health & Anor* S-99-90

*Mutare, City of v Mlambo* 1992 (1) ZLR 17 (S)

*Muzonda v Min of Home Affairs & Anor* 1993 (1) ZLR 92 (S)

*Oskil Properties v Chrmn, Rent Control Bd & Ors* 1985 (2) SA 234 (SE)

*PSC & Anor v Mutsonziwa* S-40-89

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

*Ramhewa v Sec, PSC* 1988 (1) ZLR 257 (H)

*Sec for Tpt & Anor v Makwavarara* 1991 (1) ZLR 18 (S)

*SA Defence & Aid Fund & Anor v Min of Justice* 1967 (1) SA 31 (C)

*ZBC v Chiweshe & Anor* HH-23-92

Statutes and regulations referred to:

Public Service (Disciplinary) Regulations 1992 (SI 65/1992), ss 4, 7*(d)*, 16(2), 17(1) and 18; 2nd Schedule, paras 12 and 23

Public Service (Officers) (Misconduct and Discharge) Regulations 1986 (SI 161/1986), s 7

*A Thompson*, for the applicant

*G S Wernberg*, for the respondent

## Judgment

**Malaba J:** This is a review of the determination by the respondent (the Commission) dated 31 December 1993, by which it found the applicant (Mr Tenesi) guilty of misconduct and

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discharged him from the Public Service.

Mr Tenesi seeks an order setting aside the determination and directing that he be re-instated in the post of Senior Immigration Officer on full pay and benefits from the date of his suspension from duty on 3 February 1993. He attacked the decision by the Commission on two grounds of irrationality and procedural impropriety.

What happened is as follows. Mr Tenesi was employed in the Immigration Department of the Ministry of Home Affairs from June 1991 until his suspension from duty on 3 February 1993. During the relevant period he worked in the visa section at Immigration Headquarters.



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The immigration headquarters comprised three sections: the accounts; the registry and the visa sections. Mr Tenesi's duties involved the processing and issuing of visas on application forms referred to his section from the other two.

The application forms emanated from three sources: the border posts; the Zimbabwe Trade Mission in South Africa; and Zimbabwe itself. It was a requirement under the Immigration (Amendment) Regulations (No. 10) (SI 19 of 1991) that all visas had to be paid for before issue.

Applicants at border posts surrendered their application forms and their fees for the visas to immigration officers at the border posts. The immigration officers forwarded the application forms, with receipt numbers recorded on them, to Immigration Headquarters.

Those who applied from South Africa surrendered their application forms and the visa fees to officials at the Trade Mission, who would forward the application forms bearing the receipt numbers to Immigration Headquarters.

Local applicants took their application forms and the visa fees to the accounts section at Immigration Headquarters, where receipts were issued and their numbers endorsed on the forms.

The visa application forms were in two parts, joined together by a perforation. The top part was the "cut off" whilst the bottom part was where the visa was stamped. All application forms received at Immigration Headquarters were taken by clerks to a supervisor in the registry section. The registry section kept files of people who had previously applied for visas. Files for new applicants were also opened in the registry section. In the registry section the application forms were therefore linked to personal data files.

The application forms and files were taken to the visa section, where they were given to the Principal Immigration Officer who distributed them amongst the three Senior Immigration Officers, one of whom was Mr Tenesi.

It was Mr Tenesi's duty to examine the details in each portion of the application form and satisfy himself that the information on each part was identical. He also had to check the file data to see whether or not the applicant was a prohibited immigrant or a security risk. When satisfied that the applicant qualified for the visa, Mr Tenesi would issue it by franking the visa portion of the

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application form with a rubber stamp bearing the visa. After signing the visa Mr Tenesi would tear the visa from the cut off and send it to the applicant. The cut off would be sent to the registry section for filing.



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It is common cause that during the period extending from May to August 1992, Mr Tenesi processed and issued 85 visas, when there were no receipt numbers on the application forms to show that they had been paid for.

On 3 February 1993, Mr Tenesi was suspended on the suspicion that he had committed an act of misconduct in that he had acted in a manner inconsistent with and prejudicial to his discharge of official duties. On 12 February 1993, he was advised that investigations into his suspected act of misconduct had commenced. He was invited to attend a meeting, on 15 February 1993, of the departmental board set up to carry out the investigations. Mr Tenesi's legal practitioners advised him to attend the meeting.

Following the investigations by the Board, Mr Tenesi was charged, on 22 August 1993, with three acts of misconduct as defined in paras 12 and 23 of the Second Schedule of the Public Service (Disciplinary) Regulations (SI 65 of 1992). As Mr Tenesi was later acquitted of the other two acts of misconduct involving the contravention of para 12 of the Second Schedule of the Regulations, it is not necessary for the purposes of this judgment to repeat them.

The allegations of misconduct on the third and pertinent charge were that he "processed and issued visas without receipt numbers on them well knowing that it was a violation of the procedures". Paragraph 23 of the Second Schedule of the Regulations prescribes as an act of misconduct: "any act or omission which is inconsistent with or prejudicial to the discharge of official duties, including the abuse of authority."

Attached to the charges of misconduct sent to Mr Tenesi was a schedule showing the numbers of the visas forming the subject of the charge; their dates of issue and the names of their holders. The schedule included a sample of seven visas processed and issued by Mr Tenesi when their application forms had no receipt numbers to show that they had been paid for. He was then advised that the rest of the visas similarly processed and issued and forming the subject of the allegations of misconduct were available for his scrutiny at head office. He was invited to head office to inspect the documentary evidence against him if he wished to do so before answering the allegations of misconduct. In terms of s 4(3)*(a)* of the Regulations, Mr Tenesi had 14 days within which to submit his reply to the allegations of misconduct.

Mr Tenesi did not, however, avail himself of the opportunity to inspect the documentary evidence said to incriminate him in the commission of the acts



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of misconduct. On 30 April 1993, he submitted a detailed reply to the allegations of

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misconduct. He admitted that on assumption of duties in the visa section in June 1991 he was given oral instructions on the duties, by the principal immigration officer.

In para 5 of the reply Mr Tenesi said:

> "While processing applications, I noticed that there was a lack of uniformity in relation to receipt numbers. Local applications originating from the accounts section usually bore the same receipt number in two places at the top of the cut-off and at the top of the visa. Applications from border posts usually bore a receipt number on the cut-off but not on the visa. Applications from the Trade Mission in Johannesburg frequently bore no number at all."

In para 16 of the reply he admitted that he processed and issued visas when there were no receipt numbers on the application forms. He said:

> "It is perfectly true that I processed and issued visas without receipt numbers. See paras 4 and 5 above. This was in accordance with the procedure which I had been taught. I do not believe it to be a violation of procedure to issue a visa without a receipt number. Quite the reverse, it would have been a violation of procedures if I inserted a receipt number on a visa. Since the receipts had been issued at the Trade Mission, the border post or in the accounts section, I should have no knowledge (other than any number already put on the application before it reached me) of what the receipt number was."

On 3 June 1993, the Secretary for Home Affairs (the Secretary) submitted the papers in the case to the Commission. The officer who wrote the accompanying letter on behalf of the Secretary concluded by saying:

> "The Secretary for Home Affairs therefore endorses that Mr Tenesi be found guilty as charged and strongly recommends his discharge from the Public Service in terms of s 18(1) *(a)* of the Public Service (Disciplinary Regulations 1992."

Before the Commission had considered the evidence on the papers, Mr Tenesi submitted to it, on 15 October 1993, a supplementary reply to the allegations of misconduct. In the supplementary reply, he acknowledged the fact that he knew the terms of the Immigration (Amendment) Regulations



(No. 10) (SI 19 of 1991) to the effect that all visas had to be paid for before issue. He also conceded that:

> "All officers in the visa section were instructed verbally to process any application as long as they were satisfied that payment had been made, that is to say, if they bore the receiving office's date stamp and the hand written receipt number."

The position Mr Tenesi now took on the allegations of misconduct, was that he processed and issued visas, without the evidence of their having been paid for, contrary to his knowledge of the requirements of the Immigration Regulations and oral instructions on the proper procedure.

On receipt of the papers, including Mr Tenesi's supplementary reply, the Commission considered the evidence on the papers and determined that he was guilty of the act of misconduct charged and discharged him from the Public Service under s 18 (1) of the Regulations.

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The first point taken by Mr *Thompson*, was that it was, in fact, the Secretary for Home Affairs who made the determination of Mr Tenesi's guilt. According to Mr *Thompson*, the Secretary, as head of the Ministry, had no power to make the determination.

Mr *Wernberg* argued that the Secretary had the power under the Regulations to make the determination of Mr Tenesi's guilt. He submitted that the head of ministry derived that power from s 16(2) of the Regulations which provides that -

> "the head of ministry shall determine all allegations of misconduct against a member who is an officer and who is below the rank of assistant secretary or the equivalent at the time the allegation is made."

Mr Tenesi was of a rank below that of assistant secretary at the time the allegations were made against him.

On a casual perusal of the regulations the submission by Mr *Wernberg* appears attractive. On a closer examination of the regulations, I however accept the purport of Mr *Thompson*'s submission. If the Secretary for Home Affairs determined Mr Tenesi's guilt he would have usurped the power vested in the Commission. See *City of Mutare v Mlambo* 1992 (1) ZLR 17 (S).

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MALABA J

The answer to the question of who had the power to determine Mr Tenesi's guilt lies in the proper construction of the provisions of the Regulations. The starting point is s 4. It prescribes two procedures for the determination of the accused member's guilt. The head of ministry has to choose one of them depending on whether or not he instituted the investigations into the suspected acts of misconduct; preferred the charges of misconduct against the member; and received his reply.

If the head of ministry instituted the investigation of misconduct, informed the accused member of the allegations against him; and received the reply under s 4(4)*(a)* of the Regulations, he is obliged to prepare a report on Form PSDI and submit it, together with the charge, the member's reply and all the relevant papers to the Commission. This he has to do regardless of the rank of the accused member.

The power under s 16(2) of the Regulations to determine the accused member's guilt is not available to the head of ministry in these circumstances. The determination of the accused member's guilt becomes the prerogative of the commission exercisable under ss 7*(d)* and 17(1) of the Regulations. The provisions of s 4(4)*(e)* are peremptory. The accused member has a right to expect that his case will be referred to the Commission for determination of his guilt. The reason behind the procedure is that the head of ministry, being the accuser, cannot be a judge in his own cause in breach of a fundamental principle of natural justice,

The second procedure depends upon the receipt by the head of ministry, in terms of s 4(4)*(d)*, of a report on Form PSDI together with the charge; the accused member's reply and all the relevant papers in the case, from the head of department. The head of ministry, in these circumstances, would not have instituted the investigations into the suspected acts of

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misconduct. He would not have charged the member with misconduct, nor would he have received the accused member's reply directly from him under s 4(4)*(a)* of the Regulations. In this second situation, the head of ministry is not an accuser. He is an independent and impartial arbiter.

The head of ministry is then obliged to do one of two things. If the accused member is an officer of a rank below assistant secretary, the head of ministry must proceed to determine whether or not he is guilty of misconduct or direct that further investigations be carried out.

If the accused member is an officer of a rank of assistant secretary and above



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the head of ministry must submit the papers under s 4(4)*(e)* to the Commission for the determination of the accused member's guilt under s 16(3) of the regulations.

What did the Secretary for Home Affairs do in this case? Mr *Thompson's* argument is that the Secretary received the papers in the position of an accuser. There is no doubt that the Secretary for Home Affairs caused the institution of the investigations into Mr Tenesi's alleged misconduct. He also preferred the charges of misconduct against Mr Tenesi; and received his reply to the allegations. He was the accuser.

The issue is whether the Secretary proceeded to determine Mr Tenesi's guilt in breach of s 4(4)*(e)* of the regulations. A close examination of the record shows that the Secretary complied with the Regulations.

In the record is found what Mr *Thompson* called "the Board of Inquiry report." The report is in fact the report required by the Regulations, to be prepared by the head of ministry for the Commission on Form PSDI.

In the First Schedule of the Regulations is the format to be followed by a report on Form PSDI. The format for the presentation of information on Form PSDI was closely adhered to by the Secretary in submitting papers in Mr Tenesi's case to the Commission. Given in that order were: the particulars of the officer; the details of the alleged misconduct; the comments; the accused member's reply; the relevant documents in the form of copies of visas processed and issued in the irregular manner and copies of letters from Mr Tenesi's lawyers.

Mr *Thompson* also took the letter written on 3 June 1993 to the Commission to mean that the Secretary had in fact made the determination of Mr Tenesi's guilt. I however do not share the same view of the letter. The writer said:

> "the Secretary for Home Affairs therefore endorses that Mr Tenesi be found guilty as charged."

The letter does not say the Secretary found Mr Tenesi guilty of misconduct. The meaning conveyed by the letter is, in my view, that the Secretary for Home Affairs approved or supported a recommendation that Mr Tenesi be found guilty of misconduct by another body which had the power to make that determination. The tribunal vested with the power to

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determine Mr Tenesi's guilt was the Commission.



MALABA J

Mr *Thompson* also relied on the statement by the Commission's Chairman in the affidavit filed in opposition to the application for review. The statement was to the effect that the Secretary for Home Affairs made the determination of Mr Tenesi's guilt.

In my view, what the Chairman said reflects a *post facto* view of events. There was nothing on the papers to support that observation. On receipt of the papers from the Secretary for Home Affairs, the Commission went through the evidence on each charge, considering whether it was sufficient to find a determination of guilt. Of the three charges of misconduct preferred against Mr Tenesi, the Commission found him guilty of one. He was acquitted of the other two charges of misconduct on the ground of insufficiency of evidence.

The Chairman of the Commission conceded in his affidavit that the Commission approached the evidence on the papers as a tribunal of first instance.

The mistaken *post facto* view of what the Secretary for Home Affairs did seems to have been the result of a misconception by the Commission's Chairman of the nature and extent of the powers of the head of ministry under s 4 of the Regulations. He fell into the error of believing that the head of ministry can exercise his power under s 7*(d)* to determine the accused member's guilt in all circumstances as long as the accused member was an officer of a rank below assistant secretary, by virtue of s 16(2) of the Regulations. He overlooked the important exception that the head of ministry cannot exercise that power if he is the accuser.

I find that it is the Commission, not the Secretary, that determined Mr Tenesi's guilt.

The next point taken by Mr *Thompson* was that the Commission ought to have ordered an inquiry as there were disputes of fact it could not resolve on the papers. He said the failure by the Commission to hold an inquiry constituted a gross irregularity necessitating the setting aside of its determination.

The authorities relied upon by Mr *Thompson* in support of his submissions concerned the application of the provisions of s 7*(b)* of Public Service(Officers) (Misconduct and Discharge) Regulations (SI 161/86) (the 1986 Regulations).

Section 7*(b)* of the 1986 Regulations provided specifically that where there



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was a "material dispute of fact which" the Commission was unable to "resolve on the papers before it," it had to direct that an inquiry be held in terms of s 16. The specific mention of the existence of a "material dispute of fact" as a "jurisdictional fact" to be considered by the Commission before it ordered an inquiry meant that that fact was capable of being objectively ascertained by a review tribunal without reference to the subjective view of the facts by the

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Commission.

In *Ramhewa v Secretary for PSC* 1988 (1) ZLR 257 (H) at 262B-F Greenland J quoted with approval from *SA Defence & Aid Fund & Anor v Minister of Justice* 1967 (1) SA 31 (C) where Corbett J (as he then was) said at 34H:

> "Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power (see eg *Kellerman v Minister of Interior* 1945 TPD 179, *Tefu v Minister of Justice & Anor* 1953 (2) SA 61 (T). On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event the jurisdictional fact is in truth, not whether the prescribed fact or state of affairs existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in court of law. The court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power in deciding that the pre-requisite fact or state of affairs existed, acted *mala fide* or from ulterior motive or failed to apply his mind to the matter. (See eg *Minister of the Interior v Bechler & Ors supra; African Commercial & Distributive Workers Union v Schoeman NO & Anor* 1951 (4) SA 266 (T); *R v Sachs* 1953 (1) SA 392 (A)."

In *Ramhewa's* case *supra* Greenland J held that the objective test of the



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Commission's decision not to hold an inquiry was to be applied by the court. Section 7*(a)* and *(b)* of the 1986 Regulations used the peremptory word "shall". In *PSC & Anor v Tsomondo* 1988 (1) ZLR 427 (S) McNally JA applied the objective test to the decision of the Commission not to hold an inquiry. The learned Judge of Appeal said at 441C-D:

> "I turn now to deal with the second notice of motion in which the officer claims that the Commission had no right to make a finding of misconduct without holding an inquiry. Once again one looks at the Regulations: s 7 deals with the situation in clear terms. An inquiry must be held where there is a material dispute of fact which it (the Commission) is unable to resolve on the papers before it.' In the present case there is a dispute of fact: the Commission says the officer took bribes, he says he did not. The dispute could hardly be more material."

See also *PSC & Anor v Mutsonziwa* S-40-89 at p 8.

The provisions of the 1986 Regulations were repealed by the Public Service (Disciplinary) Regulations SI 65 of 1992. Section 7*(a)* of the present Regulations conferred on the Commission the discretion to decide whether to hold an inquiry or not. The Commission "may" direct that further investigations be carried out before deciding to hold an inquiry.

The important point is that the subjective test has to be applied in reviewing the Commission's decision not to order further investigations. The permissive word "may" was used instead of "shall". It is also important to note that, when Parliament conferred on the Commission the discretion to decide whether to order further investigations and hold the inquiry thereafter, it was aware of the decisions based on the application of the objective test. It omitted from s 7 of SI 65 of 1992 the words "a material dispute of fact which it is unable to resolve on the papers before

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it." The position of the Commission is therefore governed by the common law on the attitudes courts should take in motion proceedings where there are disputes of fact.

The question is not whether the decision not to hold an inquiry is wrong or right. Even if this court could reach a different decision on the facts from that reached by the Commission, it has no power to set the decision aside if it is not shown that the Commission, in deciding not to order further investigations, did not apply its mind to the facts; acted *mala fide* or out of ulterior motives or that its decision is "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question



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to be decided could have arrived at it" (*CCSU & Ors v Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 951a-b.) See also *ZBC v Chiweshe* HH-23-92; *Mukono v Minister of Health & Anor* S-99-90.

In *Secretary for Transport & Anor v Makwavarara* 1991 (1) ZLR 18 (S) Korsah JA said at 23B-24B:

> "Accepting that the Commission acts as a quasi-judicial body in the exercise of its function of resolving disputes of fact on the papers the strict rules of evidence do not apply to it, even though it is bound to apply the rules of natural justice.
>
> In the words of Diplock LJ in *R v Deputy Industrial Injuries Commissioner* ex p *Moore* [1965] QB 456; [1965] 1 All ER 81 (CA) at p 94E:
>
> > "The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than that it must be based on material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer but he may take into account any material which as a matter of reason has some probative value in the sense mentioned above. If it is capable of having any probative value the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his.'"

After referring to the facts of the case, the learned Judge of Appeal went on to say:

> "In *Secretary of State v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1025-1026; [1976] 3 All ER 665 (CA) at 671e-h Lord Denning MR cautions that:
>
> > No one can properly be labelled as being unreasonable unless he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly take that view. All the more so when a man - be he a judge or a minister - is entrusted by Parliament with the task



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> of deciding whether another person has acted, is acting or is proposing to act unreasonably. Especially when the one who has to decide has himself his own views - and perhaps his own strong views - as to what should or should not be done. He must be very careful then not to fall into the error - a very common

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> error - of thinking that anyone with whom he disagrees is being unreasonable. He may himself think the solution so obvious that the opposite view cannot reasonably be held by anyone. But he must pause before doing so. He must ask himself:
>
> "Is this person so very wrong? May he not quite reasonably take a different view?"
>
> It is only when the answer is: "He is completely wrong. No reasonable person could take that view" that he should condemn him as being unreasonable.'"

See also *Muzondo v Minister of Home Affairs & Anor* 1993 (1) ZLR 92 (S) at 99; *Chairman, PSC & Anor v Marumahoko* 1992 (1) ZLR 304 (S) at 315.

Can it be said the decision of the Commission not to order further investigations into Mr Tenesi's case was so wrong that no sensible person who applied his mind to the facts could have arrived at that decision? There was no question of the Commission acting *mala fide*. The Commission was aware of the facts revealed by the papers and applied its mind to them. It considered the admissions of facts made by Mr Tenesi.

In the original reply to the allegations of misconduct, Mr Tenesi admitted that he processed and issued visas on application forms that did not bear evidence of their having been paid for. He admitted processing and issuing 85 such visas. His defence was not that the receipt numbers could have been on the cut-off part which would have been severed from the visa: see *Mudyariwa v Chairman, PSC* HH-79-95.

Mr Tenesi's defence was that he had the presence of memory of the fact that the application forms did not bear receipt numbers on any of the two parts at the time he processed and issued the visas but that that conduct did not breach the procedures he had been taught.

In the supplementary reply Mr, Tenesi made a damning admission. He revealed that he knew of the provisions of the Immigration (Amendment) Regulations SI 19 of 1991 to the effect that all visas had to be paid for before



issue. The immigration regulations made the payment for visas a peremptory requirement. The evidence of payment having been made was a factor Mr Tenesi was bound in the proper performance of his duties to take into account in deciding whether an application form had met all the necessary requirements before issuing the visa.

He admitted that oral instructions in what to do were given to him by his superior on assumption of duties in the visa section in June 1991. He admitted in clear terms that all officers in the visa section were instructed to issue visas when satisfied that payment for them had been made. The application forms had to bear the receiving office's date stamp and the hand written receipt numbers.

Mr Tenesi did not say why he felt compelled on the 85 occasions to process and issue visas when there was no evidence of their having been paid for, contrary to the instructions he admitted having been given on the proper procedure to be followed.

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Faced by these admissions of facts on the papers, it cannot, in my view, be said the decision of the Commission to determine Mr Tenesi's guilt on the papers was so wrong that no reasonable person who had applied his mind to the facts might have reached the same decision. The power to decide whether or not there was a dispute of fact was vested in the Commission by Parliament. The Commission was able to identify facts in dispute and decide whether or not it could resolve them without further investigations. It applied its mind to the facts on the papers and concluded that they were adequate for the determination of Mr Tenesi's guilt. There was in fact evidence in the form of admissions of fact made by Mr Tenesi on which a sensible man acting carefully might have reached the same conclusion as was reached by the Commission.

In *Mhlanga v Muranda & Ors* HH-136-92 Smith J said at 3-4:

> "In *Secretary for Transport & Anor v Makwavarara* 1991 (1) ZLR 18 at 24-25 Korsah JA said:
>
> > The High Court, in the exercise of its review powers over the determination of quasi-judicial bodies, must place itself in the position of the tribunal whose determination is being reviewed and assess the reasonableness of the determination on the basis of the evidence actually put before the tribunal.'"



MALABA J

However, the court cannot interfere merely because it is of the opinion that the decision of a quasi-judicial body is wrong. Van Rensburg J expressed the position clearly in *Oskil Properties v Chairman, Rent Control Board* 1985 (2) SA 234 (SEC) at 237:

> "It should be emphasised that a court of law will not interfere with the exercise of its discretion by a quasi-judicial body merely on grounds that it was unreasonable. To warrant interference on grounds of unreasonableness, the unreasonableness must be so gross that something else can be inferred from it. In reviewing the proceedings of a statutory or other body lawfully vested with a discretion, the jurisdiction of a court of law is limited to the question whether that body in fact exercised its discretion. It has no jurisdiction to enquire into the correctness of the conclusion arrived at by it on the evidence before it.
>
> See *Schoch NO & Ors v Bhettay & Ors* 1974 (4) SA 860 (A) at 866 E-F.
>
> The onus resting upon a litigant seeking to set aside the exercise of a discretion on grounds of unreasonableness is considerable."

The discretion lies in the Commission. The onus was on Mr Tenesi to have its exercise set aside. That is a heavy onus which he failed to discharge.

The application is dismissed with costs.

*A J A Peck*, applicant's legal practitioners

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



**MUKARATI v MKUMBU 1996 (1) ZLR 212 (SC)**

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**Court** **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

6 & 29 February 1996 Judgment No. S-36-96

## Flynote

Contract - enforceability - breach of contractual undertaking - sale of immoveable property - seller a tenant-to-buy - sale in breach of contractual undertaking not to sell without City Council's permission - such permission not obtained before sale - nature of contract - whether such contract enforceable

## Headnote

In 1980 the appellant entered into an agreement to buy from the respondent a stand in Glen View, Harare. The respondent had acquired the land, which had no improvements on it except a toilet block, from the Harare City Council under a lease-to-buy scheme. The agreement under which the respondent acquired the land provided that, until the purchase price had been paid off, she was not permitted to cede or assign the agreement without the Council's prior written consent. Such consent had not been obtained before the agreement with the appellant. The appellant took possession of the stand and erected a house on it. He claimed transfer of the stand, but this was refused in the High Court, the judge holding that the agreement between the appellant and respondent was invalid and that no rights flowed from it. On appeal:

Held, that the agreement between the parties was not totally void. The seller could validly contract to sell but could not pass title without the Council's approval. This made the contract a conditional one, with an implied term that the sale was subject to the consent of the Council. This cast an enforceable duty on the seller to seek the Council's approval. If the approval were given, transfer could take place. If it were refused, the contract would be unenforceable until such time as the seller was in a



position to pass title. The buyer would then have to elect either to seek restitution or to wait until the property was no longer encumbered and transfer could be effected without the Council's consent.

Cases cited:

*Hundah v Murauro* 1993 (2) ZLR 401 (S)

*Magwenzi v Chamunorwa & Anor* 1995 (2) ZLR 332 (S)

*Pedzisa v Chikonyora* 1992 (2) ZLR 445 (S)

*P C Paul*, for the appellant

*K Matsikiti*, for the respondent

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## Judgment

**Ebrahim JA:** The plaintiff (now the appellant) issued summons against the defendant (now the respondent), claiming:

*(a)* transfer of stand number 9258, Glen View 8, into the plaintiff's name; and

*(b)* payment of rents at the rate of $200 a month from 1 September 1986 to the date of judgment.

Alternative to *(a)*, the plaintiff claimed payment of $300, being a refund of the purchase price paid for the stand, plus $7 000, being the cost of improvements to the stand.

At the trial, part *(a)* of the claim was amended, to press for an order that the defendant should be directed to take all necessary steps to apply to the City of Harare for the right to cede title to the plaintiff and, if the application was granted, to sign all necessary documents to allow the cession to take place, failing which the Deputy Sheriff should be authorised to do so.

Although the facts were in dispute at the trial, for the purposes of this appeal they are common cause.

In July 1980 the plaintiff, through his mother, Ruth Chigwedere, entered into a verbal agreement with the defendant, whereby the defendant sold the stand in question to the plaintiff for $300. The defendant had acquired the stand under a lease-to-buy agreement with the Harare City Council in January 1980. At the time of the sale by the defendant, the stand was undeveloped, only a toilet having been built on it. However, shortly after the sale, the plaintiff erected a two-bedroomed core house and arranged for a lodger to live in it. By 1987, the plaintiff had added a further seven or eight rooms to the house.

In 1986, the plaintiff tried to get the defendant to transfer the house to him,





but she was unwilling to do so, though she offered to repay the purchase price and the cost of the improvements to date. She did not make good this offer.

From September 1986 the defendant collected rents in the amount of $200 a month from lodgers residing at the house but did not pass them on to the plaintiff. This seems to have been in retaliation for remarks made by the plaintiff's mother about the defendant to a relative of the defendant.

The plaintiff's mother was given the card on which were recorded payments made to the City Council. It seems that these were the monthly repayments to the Council for the original purchase of the stand by the defendant. According to a letter from the Council's Director of Housing and Community Services to the plaintiff's legal practitioner, dated 21 August 1987 (which was handed in by consent), the Council had sold the stand to the defendant in 1980 for $582. A deposit of $30 was paid and the balance was to be paid off over thirty years. It was a condition of the contract that at least one room had to be completed within one year and the

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whole house within ten years. In terms of clause 8 of the contract, the defendant (who was described as "the purchaser") was not permitted to cede or assign the agreement without the Council's prior written consent, though the Council had no objection to a cession to the plaintiff, provided that he met the criteria for registration on the Council's housing waiting list (a condition he has complied with). This still applied in February 1996.

The learned judge *a quo* held that she could not grant the order sought, in the light of the decision in *Pedzisa v Chikonyora* 1992 (2) ZLR 445 (S). She said that that case had held that the agreement between the plaintiff's mother and the defendant was invalid, as the prior consent of the Council had not been obtained. There was never an agreement and no rights flowed from it. In *Hundah v Murauro* 1993 (2) ZLR 401 (S) at 404-5, it was also said that such an agreement was invalid. Counsel for the plaintiff argued that these cases are incorrectly decided.

Where a contract is void *ab initio,* it confers no right of action on either party, though if one has actually made performance in pursuance of the agreement the court may grant redress by way of restoration of property or compensation in money, provided that the restoration is not precluded by the application of the *par delictum* rule: *Wille's Principles of SA Law* 8 ed pp 410 and 436-7. But is this contract totally void? Certainly it is unenforceable, in the sense that the plaintiff could not seek specific performance.

I think that the real position with these arrangements is this.



EBRAHIM JA

In terms of her agreement with the Council, the defendant cannot cede title to the property without the Council's consent. This means that she cannot, without the Council's consent, contract to pass title to the property, because she has no title to pass. But this does not mean that she cannot contract to sell the property. It would, I think, be legally quite possible for her to enter into a contract of sale, conditional on the Council granting its consent. (In this case, Council does not object to the sale). She should be taken to be aware of the terms of her contract with the Council. Knowing that she is not entitled to pass ownership without the Council's consent, if she enters into a contract under which she purports to sell the property, then either -

*(a)* she has acted fraudulently, by misrepresenting that she has title when in fact she has not; or

*(b)* she has impliedly agreed that she will seek the Council's consent.

There is no suggestion of fraud in this case.

Consequently, while the would-be buyer cannot force the seller to pass title or even to give him occupancy, he is not without remedy. One thing he can do is claim the return of any purchase price paid and the cost of any improvements made. It would also, in my view, be reasonable to hold that a contract of this nature is a conditional one, with an implied term that the sale is subject to the approval of the Council. If the traditional officious bystander had said to the

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parties: "You know that the seller will need to apply to the Council for its consent to the transfer", they surely would have said: "Yes, of course, that is what she will do". This would cast a duty on the seller to seek the Council's approval. If she failed to do so, she could be compelled to, though the Council could not be compelled to give its approval. If the Council gave its approval, the transfer could take place. If the Council declined to give approval, the contract would be unenforceable until such time as the seller was in a position to pass title. The buyer would then have to elect either to seek restitution or to wait until transfer could be effected by the seller.

On the peculiar facts of this case, it seems to me that the appellant is entitled to the order which follows and it is that order I now make. (Compare *Magwenzi v Chamunorwa & Anor* 1995 (2) ZLR 332 (S)).

I would allow the appeal and make an order as follows:

"*(a)* that the defendant take all necessary steps to effect the transfer of stand number 9258, Glen View 8, to the plaintiff, subject to either party -



EBRAHIM JA

*(i)* effecting payment to the City of Harare of any amounts due and owing in respect of the said stand; and

(ii) effecting payment to the City of Harare's conveyancers of the cost of the transfer;

*(b)* that should the defendant fail to take all the necessary steps, the Sheriff or his lawful deputy be and is hereby authorised to take such steps on her behalf;

*(c)* that judgment be entered for the plaintiff in respect of rentals at the rate of $200 per month from 1 October 1986 until the date of transfer, together with interest thereon *a tempore morae;*

*(d)* that the costs of this action, including the costs of the appeal, be borne by the defendant."

Gubbay CJ: I agree.

Korsah JA: I agree.

*Winterton, Holmes & Hill*, appellant's legal practitioners

*Jackachira & Co*, respondent's legal practitioners



## MUGANGA v SAKUPWANYA 1996 (1) ZLR 217 (SC)

**Court** **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

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Civil appeal

20 & 29 February 1996 Judgment No. S-35-96

## Flynote

Family law - divorce - division of assets - wife seeking half share in house - house sold by husband - whether bogus sale intended to deprive wife of her proper share of this asset

## Headnote

Mrs Sakupwanya sued her husband for divorce. She sought half share in the matrimonial home. During the hearing it emerged that Mr Sakupwanya had sold the house to a Miss Muganga for the amount of $20 000. The house was worth at least $402 500.

Held, that the husband and Miss Muganga, who were on intimate terms, had entered into a sham contract of sale in order to take the house out of the matrimonial estate before the divorce was finalised. In this way the house would remain in the hands of the husband and his lover after the divorce. This transaction was deliberately entered into with the fraudulent intent to deprive Mrs Sakupwanya of her chance to claim her proper share in the property.

Held, that Mrs Sakupwanya was entitled to fifty per cent share of the real value of the matrimonial home.

Cases cited:

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

*Ferris v Weaven* [1952] 2 All ER 233 (QB)

*Kellerman v Kellerman* 1957 (3) SA 764 (O)

*Muzanenhamo & Anor v Katanga & Ors* 1991 (1) ZLR 182 (S)

*National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472 (HL)

*Pretorius v Pretorius & Anor* 1948 (1) SA 250 (A)



*J R Devittie,* for the appellant

*R M Fitches,* for the respondent

## Judgment

**McNally JA:** Mrs Sakupwanya sued her husband for divorce and other ancillary relief, including a half share in the matrimonial home, in proceedings which began with the issue of summons on 9 June 1988.

During the course of the hearing in July 1992 it became apparent that the main issue related to the immovable property in Mount Hampden ("the Homefield property"), which Mr Sakupwanya

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had bought on 14 April 1987 for the sum of $9 600. He announced at the hearing that he had sold it. A deeds office search revealed that it had been sold for $20 000 to a Maria Muganga, the appellant, on 12 October 1990. It was alleged that she was the girlfriend of Mr Sakupwanya. That fact, coupled with the allegedly low sale price of the property, led to an application by Mrs Sakupwanya to join Miss Muganga as a defendant, along with the Registrar of Deeds and the Small Enterprises Development Corporation ("SEDCO"), which had a bond over the property to secure an advance of $200 000.

The application was granted, along with the inevitable postponement. The declaration was amended to incorporate allegations that (*inter alia)* the transfer of the Homefield property to Miss Muganga was fraudulent, to the knowledge of Miss Muganga. It was claimed therefore that it would be just and equitable -

> "... for this Honourable Court, subject to the rights of third defendant (SEDCO) as mortgagee, to order that the Homefield property be sold, and that the net proceeds of the sale be divided between the plaintiff and the first defendant (Mr Sakupwanya) equally, or alternatively, in the event of this Honourable Court awarding a fixed sum to the plaintiff in respect of her proprietary claims, to grant leave to the plaintiff to execute against the Homefield property."

In a plea dated 21 July 1993 Miss Muganga asserted, among other things, that:

a. Mrs Sakupwanya was unknown to her;

b. She, Miss Muganga, never connived with Mr Sakupwanya;

c. She, Miss Muganga, had no intimate relationship with Mr Sakupwanya, was not married to him and had no intention to marry him.



McNALLY JA

In a plea filed on 31 May 1993 SEDCO averred that it had taken judgment against Miss Muganga and was in the process of selling the Homefield property. It undertook to pay the balance of the proceeds to the Registrar of the High Court or other nominee of the parties. (Despite this, it seems the property was still, on 20 February 1996, the date of the appeal hearing, in the name of Miss Muganga. Somehow she has managed to avert a sale in execution).

It seems to me that the relief sought by Mrs Sakupwanya against her former husband and Miss Muganga was soundly based in law. Her rights against Mr Sakupwanya flow from s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. Her rights against Miss Muganga are based on the allegation that the latter knowingly collaborated in a scheme to deprive her of her rights under the Act. If the facts are proved, the case falls squarely within the terms of the exception set out in *Muzanenhamo & Anor v Katanga & Ors* 1991 (1) ZLR 182 (S), where I said at the foot of p 186 leading on to 187:

> "I do not believe that a wife can raise such a claim (ie to stop him selling the matrimonial home) just because the husband is disposing of an asset. There must be some evidence that he is disposing of the asset at under-value to a scoundrel, the accomplice of the husband' (*Chhokar* v *Chhokar* 1984 FLR 313) or that in some way he is attempting to defeat her just rights. In England, under their far more complex and comprehensive legislation, the

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> test is Am I satisfied that the disposition was made with the intention of defeating the wife's claim for financial relief?'"

See also *Ferris* v *Weaven* [1952] 2 All ER 237 (QB).

Of course, it is for the aggrieved wife to prove that the third party is guilty of fraudulent intent. I do not dispute the point made by Wilberforce J in *National Provincial Bank* v *Ainsworth* [1965] 2 All ER 472 and approved in *Cattle Breeders Farm (Pvt) Ltd* v *Veldman (2)* 1973 (2) RLR 261 (A) that-

> "Where there is a genuine transfer, there is no reason why the wife's personal rights against her husband, which are derived from her status, should enter the field of real property law so as to clog the title of an owner."

Mere knowledge that there is a wife will normally not be enough. There must



be an intention to defeat the wife's just rights. This principle emerges also from the cases cited by Mr *Devittie,* namely *Pretorius v Pretorius & Anor* 1948 (1) SA 250 (A); *Kellerman v Kellerman* 1957 (3) SA 764 (O); and *Laws v Laws & Ors* 1972 (1) SA 321 (W) at 324H-325E.

At the resumed hearing Mr Sakupwanya was in default, though it transpired that he was now married to Miss Muganga and had a child by her, born on (so she claimed) 14 October 1992. It became apparent, from grudging admissions wrung from her, that she had had a close relationship with Mr Sakupwanya since 1989, and that she had certainly known of the existence of Mrs Sakupwanya at that time. Her plea in July 1993, that she had no intimate relationship with Mr Sakupwanya, was demonstrated to be a lie. I should add that Mr Sakupwanya did not appeal.

An estate agent, hastily summoned to value the disputed Homefield property, said it was worth $402 500 as at the date of valuation (8 or 9 July 1992) and approximately $520 000 in 1990 when it was transferred to

Miss Muganga.

Miss Muganga sought to suggest that a great deal of the improvements on the property had been brought about by her after the purchase date, but she produced no proof of this. Her evidence as a whole was disbelieved by the trial court for reasons which seem to me to be unassailable. The only reason for her lying and evasiveness over her relationship with Mr Sakupwanya, and the only reason for his failing to appear at the second hearing, must be that they were trying to conceal their concerted attempt to take the Homefield property out of the matrimonial estate before the divorce was finalised. It will be noted that the divorce summons and declaration were issued on 9 June 1988 and the property was transferred by Mr Sakupwanya to Miss Muganga on 12 October 1990. The purchase price was alleged to be $20 000, but no bond was registered. The possibility must exist that no money actually changed hands. And even if some improvements were effected after the date of transfer (and for all we know they may have been paid for by

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Mr Sakupwanya) the land alone was valued at a minimum figure of $10 000 per acre, and it was 26 acres in extent.

I am satisfied on all the evidence that the learned judge was entirely correct in coming to the conclusion that Mr Sakupwanya and Miss Muganga conspired in a scheme to ensure that the Homefield property should be theirs after the divorce. They deliberately entered into a transaction designed to deprive Mrs Sakupwanya of the chance to claim a share in the property. The



McNALLY JA

learned judge found that she was entitled to a 50% share. He took the lower valuation of $402 500 and awarded her $201 250 with costs.

[The remainder of this judgment is immaterial to this report - *Editor.*]

Ebrahim JA: I agree.

Muchechetere JA: I agree.

*Gula-Ndebele & Manase*, appellant's legal practitioners

*Honey & Blanckenberg,* respondent's legal practitioners



## MITCHELL v ESTATE AGENTS COUNCIL 1996 (1) ZLR 222 (SC)

**Court** **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Appeal against decision of Administrative Court

12 February & 4 March 1996 Judgment No. S-39-96

### Flynote

Estate agents - discipline - disgraceful conduct - what is - failing to deposit money received into trust account - "disgraceful conduct" not limited to conduct in person's capacity as an estate agent - term can cover any conduct by a professional person which is regarded by Estate Agents Council as sufficiently reprehensible to be regarded as disgraceful - Council's discretion in this regard - penalty of cancellation of registration - when appropriate

### Headnote

The appellant was an estate agent. She was charged before the Estate Agents Council with six counts of disgraceful conduct, alternatively negligence. On three counts she was acquitted, and on a fourth the penalty imposed by the Council was reduced by the Administrative Court to a

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caution. The most serious remaining allegation was that, having received two deposits of money totalling nearly $650 000, which were intended to be spent on the purchase of a town house, she failed to deposit them in her agency's trust account within six days, but instead deposited them in its ordinary business account, which was, at the time, overdrawn to the extent of nearly $432 000. On this count the Council ordered the cancellation of her registration as an estate agent. It was argued on her behalf that it was not obligatory for her to deposit the money in her trust account because the client himself did not object to what she did. It was also argued that the fact that the money was paid for the purchase of a specific property did not necessarily make it trust money. Finally, it was argued that the Council misdirected itself in not considering a lower penalty.



On the other count, she was alleged to have entered into an arrangement with the mortgage manager of a building society relating to the acquisition of a block of flats, their conversion to sectional title and their resale. There was a vaguely expressed joint venture agreement. The manager did not contribute what he had agreed to, and the appellant claimed that he had agreed to regard his investment as a loan, which he had not. She claimed to have acted on legal advice, but the advice was given on the basis of a document which did not fully set out the agreement. The Council regarded this conduct as "disgraceful conduct" under s 28 of the Estate Agents Act [*Chapter 27:05*]. It was argued that the phrase should be governed by the words "in [her] capacity as an estate agent", which also appear in the section.

Held, that s 50 of the Act made it quite clear that the appellant was obliged to deposit in her trust account all moneys received by her in the course of her business as an estate agent. The trust account system, which applies to lawyers and accountants as well, has been developed to ensure the safety of clients' money. The fact that the client did not object was irrelevant; the standards for the conduct of estate agents were set by the legislation, not by the client. Because she had received the money for the purpose of purchasing a house, she must have received it in the course of her business as an estate agent, and so was obliged to deposit it in her trust account. While it was conceivable that an estate agent might be given specific permission to handle the money in another way, no such permission had been alleged.

Held, further, that the Council had not misdirected itself in regard to penalty. While the penalty was the ultimate one, it was the only appropriate one. There could be worse cases than the present, but those cases would also probably attract criminal sanctions.

Held, further, that a proper construction of s 28 showed that the words "disgraceful conduct" were not limited to such conduct in the person's capacity as an estate agent. The words could be relevant in a wider sense, which reflected in the person's professional integrity. This attitude is found in enactments dealing with other professions as well. It was for the Council, as the guardian of the professional standards of estate agents, to determine what was or was not disgraceful conduct. It had a discretion, which would not be interfered with if properly exercised.

Cases cited:

*Hughes v Architects Registration Council of the UK* [1957] 2 All ER 436 (QB)

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*Le Scroog v General Optical Council* [1982] 3 All ER 257 (PC)



*McEniff v General Dental Council* [1980] 1 All ER 461 (PC)

*Mafara v Law Soc of Zimbabwe* 1987 (2) ZLR 293 (S)

*Marten v Royal College of Veterinary Surgeons* [1965] 1 All ER 949; [1966] 1 QB 1

*Torry v Est Agents Council* 1979 RLR 364 (G)

Statutes referred to:

Estate Agents Act [*Chapter 27:05*], ss 28, 30, 50 and 53

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

*A P de Bourbon SC*, for the respondent

## Judgment

**McNally JA:** The Estate Agents Council ("the Council") held an inquiry into the conduct of Mrs Mitchell, a registered estate agent. There were six allegations of disgraceful conduct, alternatively negligence. She was found guilty on three of them. On the main allegation (count one) she was sentenced to the cancellation of her registration as an estate agent and to pay the costs of the inquiry. On the second (count two), she was fined $1 500 and costs, and on the third (count three), she was fined $500 and costs.

She appealed to the Administrative Court. She succeeded only in respect of count three, where the penalty was reduced to a caution. Otherwise the decisions of the Council were upheld.

She now appeals to this court against the findings of the Administrative Court on counts one and two.

Count one read as follows:

> "You have been guilty of disgraceful conduct or alternatively negligence in connection with your failure as the principal registered agent for Pamick Enterprises (Private) Limited (trading as Mitchell Real Estate) to ensure that two deposits paid by FMI Holdings (Private) Limited of $547 000 and $104 000 on or about 4 and 5 August 1993 held, or received by, Pamick Enterprises (Private) Limited on account of Mrs Margaret Hamer in the course of your business as an estate agent, were deposited in the trust account maintained by the said estate agency within six days of receiving such monies in compliance with s 52 of the Estate Agents Act [*Chapter 220*] and that you did permit the conversion of such monies to meet the liabilities of the agency."

The facts were not really in dispute. A Mr Mutasa wanted to buy a town



McNALLY JA

house. He did not want his name disclosed. He was a friend, or, as he more guardedly put it in a draft affidavit, "I am acquainted to (*sic*) Mrs Pat Mitchell whom I have known for the past few

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years and with whom I have had various dealings". He asked her to look out for a town house for him. He said that he had about $650 000 available, and that he wanted her to buy it in the name of a "shelf" company of which she would be a director.

Subsequently, on 4 and 5 August 1993, he sent her two cheques made out by his company, FMI Holdings (Pvt) Ltd to Mitchell Real Estate, in the amounts of $547 000 and $104 000. Mitchell Real Estate was the trading name under which she operated, but the company which she controlled and through which she operated was called Pamick Enterprises (Pvt) Ltd. I will call it "Pamick". Pamick had an ordinary business account and a trust account. The business account, at the time the cheques were deposited, was overdrawn to the extent of $431 859. She deposited the cheques in the business account, and not in the trust account. As a result, the business account showed a credit balance of $219 141.

Section 52 of the Estate Agents Act [*Chapter 220*] (now s 50 of *Chapter 27: 05*) provides:

> "(1) A person carrying on business as an estate agent shall -
>
> *(a)* open and keep a separate trust account at a bank registered in terms of the Banking Act [*Chapter 24:01*], in which he shall, within six days of receiving them, deposit all moneys held or received by him on account of any person in the course of his business as an estate agent."

Subsection (12) of s 50, and s 53 of the Act, make it clear that where a company carries on business as an estate agent the management and operation of its trust account must be under the control of a "principal" who must be a registered estate agent. Mrs Mitchell was the principal in this case. The principal is responsible for compliance with s 50.

*Prima facie*, therefore, she received money "on account of a person in the course of her business as an estate agent", and failed to pay it in to her company's trust account within six days. In fact it is common cause that she directed that it be paid into the business account.

Mrs Mitchell has put forward various justifications for this action. Her main



defence is that she received the funds in her personal capacity with a complete discretion as to what to do. While she conceded that Mr Mutasa did not know at the outset that she had paid them into a business account, he had no objection to her having done so when subsequently informed. He was paid a handsome rate of interest and his money has since been refunded.

Neither the Council nor the Administrative Court was prepared to accept this explanation as a justification.

One must begin from the premise that the purpose of enacting the Estate Agents Act in 1970 was to enforce standards of professionalism in the real estate business. The Act set up an Estate Agents Council and an estate agents compensation fund. It provided for "the registration and regulation of the practice of estate agents in Zimbabwe" and for the regulation of "the keeping of moneys held by estate agents on behalf of other persons".

Central to the whole concept of professionalism in the handling of clients' money is the trust

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account. Whether one is speaking of lawyers, accountants or estate agents, the principle is the same. Clients must know, with absolute conviction, that their money is safe. The machinery which has developed to ensure that safety is the trust account system.

Mrs Mitchell sought to draw a distinction in her evidence between herself personally and Mitchell Real Estate. "I", she said, "was the buyer's (Mr Mutasa's) agent. The selling agent was Mitchell Real Estate". This is not a valid distinction. She, personally, was the registered estate agent. It is beyond question that the money was sent to her in pursuance of an enquiry about buying a town house. It was therefore sent to her in her capacity as an estate agent. She may also have been a friend or an acquaintance of Mr Mutasa. But he sent her the money because he wanted to buy a town house. He would not have sent it to her if she had been a dentist or a greengrocer.

If further evidence were needed, we have the fact that the money was receipted in the name of Mitchell Real Estate, the name under which she conducted her estate agency business. And $1 000 was returned to him because he wanted to spend only $650 000 on the town house and he had sent a total of $651 000. If he had meant her to have the money personally as a loan, why return the $1 000?

The unwillingness of Mr Mutasa to give evidence, despite his having been subpoenaed by the Council, does not help Mrs Mitchell's case. She agreed



McNALLY JA

specifically that he sent her the money for the purchase of a town house. That is all that matters. The fact that subsequently he did not object to the way she handled his money is irrelevant. The standards for the conduct of estate agents are set by the legislation, not by Mr Mutasa.

It was suggested that the Council and the Administrative Court wrongly placed the onus on Mrs Mitchell to prove that she received the funds otherwise than in the course of her business as an estate agent. I find no substance in that contention. Given her admission that the money was sent to her for the purpose of purchasing a town house, a very strong *prima facie* case existed. She had to explain away the overwhelming evidence. She did not do so. She did not have to prove her innocence. She had merely to cast reasonable doubt on her *prima facie* guilt. She failed.

Mr *Andersen* argued that the Administrative Court ought not to have concluded that the money was trust money simply because it was paid specifically for the purchase of a specific property. That reasoning, he submitted, begged the question as to how the money was to be used pending its appropriation towards that purpose.

That argument, in my view, fails because of the clear demands of s 50 of the Act. Money held or received by Mrs Mitchell on account of any person in the course of her business as an estate agent *shall* be deposited in her, or her company's, trust account. She did receive that money on account of Mr Mutasa. She received it for the purpose of purchasing a town house, and it must

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follow that she received it in the course of her business as an estate agent.

I do not wish to suggest that there could never be circumstances in which a person in her position might be given specific permission to use such funds personally rather than put them in a trust account, in such a way as to avoid the effect of the words "in the course of (her) business ..." in s 50 of the Act. But she specifically denied having been given such specific permission.

In my view, the Council and the Administrative Court could have come to no other decision than that the sum of $650 000 should have been deposited into Mrs Mitchell's company's trust account, and that she offended against the provisions of s 50(1)*(a)* of the Act in failing to ensure that that was done. In fact, of course, she directed specifically that it should not be done.

The penalty imposed was the ultimate one. Her registration as an estate agent was cancelled.

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McNALLY JA

It was suggested that the Council and the Administrative Court misdirected themselves by not considering a lesser penalty. I do not think it should be assumed that just because a lesser penalty was not mentioned, no thought was given to the level of the penalty to be imposed. Lower penalties were imposed in respect of the other counts. So each count was treated on its merits.

As to its being grossly excessive, I must say that I can see no basis for that suggestion. We are not dealing here with a sentence of a criminal court, but with a penalty imposed by a professional tribunal: see *Mafara* v *Law Society of Zimbabwe* 1987 (2) ZLR 293 (S) at 300.

It is true there could be worse cases. But those cases would, in addition to cancellation of registration, probably also involve criminal sanctions, including imprisonment. So it is not a fair criticism of the Council to say that it has left no room for penalising worse offenders.

I certainly cannot say the penalty imposed was so unreasonable as to warrant interference. Indeed, I would agree that it was the only appropriate penalty. A substantial sum of money given to Mrs Mitchell in the course of her business as an estate agent was not only not put into her trust account within the time provided, but was actually put into an overdrawn business account. In effect she paid a business debt to the bank, with trust money.

I would dismiss the appeal on count one.

Count two relates to Mrs Mitchell's conduct in respect of a joint venture contract she entered into with a Mr Masterton, who at the time of the making of the contract was mortgage manager of the Beverley Building Society, though he was apparently later prevailed upon by his employer to resign. Her dealings with him, which concerned the acquisition of a block of flats, their conversion to sectional title, and their resale, were clearly not "in her capacity as an estate agent".

This led to the first submission, which was a point of law. It was that Mrs Mitchell's conduct, not

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arising from her actions as an estate agent, did not fall under s 28(1) of the Act.

The subsection reads:

"If, after due inquiry, the Council decides that a registered estate agent -



McNALLY JA

*(a)* is not a suitable person to remain registered; or

*(b)* has been guilty of disgraceful conduct or negligence in his capacity as an estate agent;

the Council may do one or more of the following -

*(i)* direct that his registration be cancelled ..."

The submission is therefore that the phrase "in his capacity as an estate agent" governs both "disgraceful conduct" and "negligence".

This issue was raised and left open in *Torry* v *Estate Agents Council* 1979 RLR 364 (G) at 366, by Pittman J. The Act has been amended several times since then and no attempt has been made to reword these particular phrases, despite His Lordship's invitation to do so.

It seems to me there are a number of reasons why the phrase "in his capacity as an estate agent" should *not* be interpreted as referring to "disgraceful conduct" but only to "negligence":

1. As Mr *de Bourbon* pointed out, the Legislature would have rearranged the phrases if that was what it intended. The subsection would have read-

   "has been guilty, in his capacity as an estate agent, of disgraceful conduct or negligence".

2. Ordinarily "or" is disjunctive, so the ordinary meaning of the words is that an estate agent may be penalised either for disgraceful conduct, on the one hand, or for negligence in his capacity as an estate agent, on the other.

3. It is obvious that negligence should only be a ground for action by the Council against an estate agent if it is negligence in his capacity as an estate agent. The question would not arise if he negligently broke a saucer in his kitchen or negligently hit his gatepost while reversing out of the garage.

   On the other hand, disgraceful conduct could be relevant in a wider sense. I do not wish to define the outer limits (adultery? cheating at golf?), but it must be evident that dishonesty in business dealings would



McNALLY JA

reflect on a professional person's integrity. As such it could amount to "disgraceful conduct" from the point of view of the Estate Agents Council, even if it did not occur while he was

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acting "in his capacity as an estate agent".

4. The same point can be made by reference to s 28(1)*(a)*. A person may be de-registered if he is "not a suitable person to remain registered". This is quite evidently a generalised criterion. However, this may be a neutral point, because it is arguable that while *(a)* is general, *(b)* is particular.

5. A reference to s 30 shows clearly that in that section the phrase "disgraceful conduct" is not limited by reference to conduct in the capacity of an estate agent. Indeed it can be committed by a person who is not an estate agent, or by a person outside Zimbabwe. If it has a wider meaning in that section, why would its meaning be limited in s 28?

6. Generally, the case law seems to me to lead to the same conclusion. In *Hughes* v *Architects Registration Council of the United Kingdom* [1957] 2 All ER 436 it was held that "disgraceful" is not a term of art. It must be given its natural and popular meaning. But in that case the legislation qualified it by the phrase "in his capacity as an architect". So it is not a precedent for this case. (See also *Le Scroog* v *General Optical Council* [1982] 3 All ER 257.)

   In *Marten* v *Royal College of Veterinary Surgeons* [1965] 1 All ER 949; [1966] 1 QB 1, it was specifically held that "disgraceful conduct" within the meaning of the relevant Act need not be limited to something done in the course of the practice of the profession. It may be any conduct which, because it is done by a professional man, is sufficiently reprehensible to be classed as disgraceful. That precedent is exactly in point here. The veterinary surgeon concerned was also a farmer and the charge related to his failure to care for his own animals. It was held, by Lord Parker CJ with the agreement of Marshall J and Widgery J, that his conduct was properly characterised as disgraceful.

7. Although the phraseology is different in the various statutes relating to other professions, it is significant that in none of those to which we have been referred is there a suggestion that when reference is made to "disgraceful" or "improper" conduct, the term is to be qualified by the phrase "in his capacity as a (member of the relevant profession)".

   It would surely be surprising if the intention of the legislature had been



to treat estate agents (and accountants whose governing Act is similarly worded) differently from doctors, dentists, and allied professionals, psychologists, veterinary surgeons, architects, chiropractors, quantity surveyors and lawyers.

All in all I am satisfied that the phrase "disgraceful conduct" is not governed by the phrase "in (her) capacity as an estate agent".

It is for the Council, as guardian of the professional standards of estate agents, to determine what is or what is not disgraceful conduct. It has a discretion in this regard, and so long as this discretion is properly exercised, the courts will not interfere.

The facts of the present case do not require detailed analysis. There was a somewhat vaguely

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expressed joint venture agreement. Masterton ran into financial difficulties and did not contribute as much as he had intended to the joint venture. But he was never put on terms; the agreement was never formally cancelled. The appellant was guilty of what might be termed "sharp practice" in claiming that Masterton had agreed to regard his original investment as a loan, when in fact he had not so agreed. She purported to act on legal advice. But that advice was given on the basis of the written document prepared by Masterton which did not express the full terms of their oral agreement. The appellant did not give her lawyer the full facts, and should not therefore have relied on the consequent advice. "Garbage in, garbage out", as they would say in the computer world.

The Council was entitled to take the view that this conduct was disgraceful in the context of her professional standing as an estate agent. In view of her subsequent agreement, under pressure, to pay Masterton a share of the profit which was probably more than he ever dreamed of, I would myself have imposed a more lenient penalty. But I do not think I can say that the penalty was outrageous. So I do not think we can interfere with it. Compare *McEniff* v *General Dental Council* [1980] 1 All ER 461 (PC).

I would dismiss the appeal with costs.

Gubbay CJ: I agree.

Muchechetere JA: I agree.

*Byron Venturas & Partners,* appellant's legal practitioners

*Atherstone & Cook*, respondent's legal practitioners



## BAKO & ANOR v BULAWAYO CITY COUNCIL 1996 (1) ZLR 232 (SC)

**Court** **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

12 February & 7 March 1996 Judgment No. S-40-96

### Flynote

Sale - cancellation - by seller - sale of immovable property by Municipality, on condition that improvements made - whether delay in cancellation had created a waiver of right to cancel - revival of cancelled agreement - whether cancelled sale had been revived by new agreement - estoppel - whether Municipality estopped from cancelling earlier agreement

### Headnote

The Bulawayo Municipality sold two pieces of land to the appellants. In terms of the agreement of sale, the Municipality had the right to cancel the sale and re-possess the stands if the buyers

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failed to commence the erection of dwelling houses on the stands within six months and had not completed the erection of the houses within eighteen months. In the event of cancellation, the land reverted to the Municipality, the money paid by the buyers would be forfeited to the Municipality and the Municipality was not obliged to pay any compensation for any improvements made by the buyers on the land.

After eighteen months had elapsed no building had been carried out on the stands. Some ten months afterwards, the Municipality purported to cancel these sales because of non-compliance with the building clause. However, on the plea of the buyers, the Municipality granted them a short extension to enable them to comply with the building clause. The Municipality stressed that if the new deadline was not met the sales would be cancelled and the stands would be re-possessed. The buyers again failed to comply with the building clause during the period of extension. The Municipality then resolved to affirm the previous



cancellation of the sale of these plots. However, it allowed the buyers a final opportunity to make submissions to it. Having received these submissions, the Municipality finally decided to re-affirm the previous decision to cancel the sales.

The buyers had expended considerable sums of money in carrying out developments of the stands. This construction work had been carried out after the period of extension granted to them by the Municipality after the initial cancellation of the sales. The buyers contended that there had been no valid cancellation of the sale of the stands. They argued that this was so because of the unreasonably long delay of ten months that had occurred before the Municipality had exercised its right to cancel the sales.

Held, that where there has been an unreasonably long delay in enforcing the right to resile from a contract because of breach, the other party may assume that the right to resile has been abandoned and may act to his prejudice. In this event, the party that sought to exercise its right after such delay could be met by the defence of estoppel if he sought to enforce his right. In the present case the defence of estoppel was not available. The appellants had not carried out any building during the period of delay and they had thus not acted to their detriment in reliance on the seller's action in deferring the enforcement of its right to cancel.

Held, further, that the failure to exercise the right to cancel within a reasonable period of time may give rise to an inference that the party entitled to cancel had decided to abide by the contract.

Held, further, that after a valid cancellation, a cancelled agreement could be revived by a new agreement. In order to restore the *status quo ante*, there would have to be a new consensus resulting in an acceptance that the earlier cancellation was to be withdrawn. The conduct of the Municipality subsequent to cancellation was not such that the other party, as a reasonable person, was entitled to accept that conduct as a revival of the contract. The appellants were not misled by this conduct. They were warned that they proceeded with the development of the stands at their peril. They took no heed and continued to incur expenditure in the completion of the buildings. They could not rely on the defence of estoppel.

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Cases cited:

*Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T)

*Bater & Anor v Muchengeti* 1995 (1) ZLR 80 (S)

*Collen v Rietfontien Eng Works* 1948 (1) SA 413 (A)



*Desai v Mohammed* 1976 (2) SA 709 (N)

*Laws v Rutherfurd* 1924 AD 261

*Mahabeer v Sharma Ltd NO & Anor* 1985 (3) SA 729 (A)

*Medispa (Pty) Ltd v Kroebel Tools & Products (Pty) Ltd* 1988 (4) SA 415 (W)

*North Eastern Districts Assn (Pty) Ltd v Surkhey Ltd & Ors* 1942 WLD 181

*North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T)

*Patel v Contr of C & E* 1982 (2) ZLR 82 (H)

*Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427

*Phone-a-Copy World-Wide (Pty) Ltd v Orkin & Anor* 1986 (1) SA 729 (A)

*Pienaar v Southern Ins Assn Ltd* 1983 (1) SA 917 (C)

*Resisto Dairy (Pty) Ltd v Auto Protection Ins Co Ltd* 1963 (1) SA 632 (A)

*Swart v Vosloo* 1965 (1) SA 100 (A)

*Thomas v Henry & Anor* 1985 (3) SA 889 (A)

Statutes referred to:

Contractual Penalties Act [*Chapter 8:04*], ss 4 and 8

*J C Andersen SC*, for the appellants

*J S Sayce*, for the respondent

## Judgment

**Gubbay CJ:** This is an appeal against a judgment of the High Court confirming the cancellations by the respondent of the purchase by each appellant of an immovable property in Bulawayo.

The relevant background culminating in the litigation between the parties may be conveniently tabulated as follows:

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(1) The appellants are husband and wife. On 3 November 1989 they entered into separate written agreements with the respondent whereunder there was sold to the first appellant for $4 050, Stand 276 Marvel Township 2 of Marvel A; and to the second appellant for $3 900, Stand 257 Marvel Township 2 of Marvel A.

(2) The terms of the two agreements are identical. Clause 4 required the appellants to commence to erect dwelling houses of a minimum value of $60 000 on the stands within six months and to complete the buildings within eighteen months. Clause 6 reserved to the respondent



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the right to cancel the agreements and re-take possession of the stands. It reads in relevant part:

> "If the building condition in clause 4 above is not carried out within eighteen months from the date hereof ... the Municipality reserves the right either (1) to compel fulfilment of this agreement, or (2) to cancel the sale, in which case such stand and any improvements thereon will revert to the Municipality without compensation to the purchaser and all moneys paid by him will be forfeited, or (3) to sell the stand again together with any improvements thereon. In this latter event the Municipality may, in its sole discretion, refund the whole or any portion of the moneys paid by the purchaser, but the purchaser shall not be entitled to any compensation for any improvements effected by him thereon ..."

(3) On 5 February 1990 the respondent, in writing, specifically drew the attention of the appellants to clauses 4 and 6 of the agreements of sale.

(4) When the eighteen-month period expired on 3 May 1991, the appellants had not yet commenced to build the dwelling houses on either stand.

(5) In similarly worded letters of 23 March 1992, the appellants were advised that as there had been no development on the stands, the respondent had resolved on 5 February 1992 that the agreements of sale be cancelled immediately in terms of clause 6.

(6) Consequent upon a meeting held with the respondent's Town Clerk on 26 March 1992, the first appellant sought to explain by letter the reasons for the failure to develop the stands within the stipulated time. He wrote:

> "(It) is true that the time is overdue but as things are now, the plans have already been drawn and are ready for submission to the City Council. The main stumbling block which I faced since the beginning of 1990 was that the tenant who was in my house in Harare which I intended to dispose of to pay for the construction here, unilaterally refused to vacate the house nor pay rent until he was evicted towards the end of last year. I attach documentary proof of this and must hasten that this uncalled for behaviour offset my plans greatly. As things are now, the house has been repossessed and has been sold with the result that I have the necessary funds to construct. As I am fully settled here, if I lose this property, then it will be difficult for me to start again.



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Finally, I assure the City Council that development on the sites will commence as soon as the plans have been approved by the Council. Already a lot of money has been spent in paying the architects for drawing the plans

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and the engineers for perusing and putting their stamps."

(7) The plea prevailed. By letter of 1 April 1992, the appellants were granted an extension to 31 May 1992 in which to comply with the minimum building conditions. It was emphasised that failure to meet the deadline would result in the agreements being cancelled and the stands re-possessed.

(8) The appellants failed to commence the building of the dwelling houses by 31 May 1992. They only submitted the building plans for approval and paid the requisite fees on the last working day of the month, Friday 29 May 1992.

If the assurance given in the final paragraph of the letter of 26 March 1992 was true, then the delay in submitting the plans remained unexplained and unjustified. It is more likely, however, that the statement was untrue and made simply to convince the respondent that the appellants had at least taken the preliminary steps in the development of the stands. Certainly, the lodging of the plans for approval did not accord with the terms of the extension granted on 1 April 1992.

(9) The plans were approved on 6 July 1992 and the appellants were each given a development permit valid for twelve months. It provided that the proposed development was to be implemented within that period.

(10) On 2 September 1992 the respondent resolved to affirm its previous cancellation of the agreements for non-compliance with the deadline of 31 May 1992. It decided, however, to allow the appellants a final opportunity to make submissions to the sub-committee which dealt with the allocation of stands for development.

(11) The appellants responded in a letter dated 11 September 1992. In it they falsely accused the respondent of deliberately withholding its approval of the building plans for the sole purpose of cancelling the agreements. The letter ended with the statement that if the cancellations were irreversible, it was hoped that a refund in full would be made.



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(12) On 23 November 1992 the respondent advised the appellants that, on 4 November 1992, its sub-committee had re-affirmed the previous decision of 1 April 1992 that the agreements of sale be cancelled.

(13) On 7 December 1992 the respondent demanded the payment of rates in respect of Stands 276 and 257 for the half year ended 31 December 1992.

(14) On 8 January 1993 the legal practitioner acting for the respondent wrote to the appellants informing them that the on-going construction of the buildings on the stands was unauthorised since the agreements of sale had been cancelled; that to continue construction would not assist them in enforcing the agreements, and that they would not be compensated for any work done after notification of the cancellation.

(15) A further statement for rates due for the half year ending 30 June 1993 was sent to each

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appellant in the total amount of $2 371,36. This was paid by them.

(16) By June 1993 the appellants had expended on the development of the stands between $270 000 and $300 000. The construction of the buildings thereon had been supervised by one of the respondent's building inspectors. He satisfied himself that the building work conformed with the approved plans.

(17) At some stage during the actual construction the appellants arranged for water to be connected by the respondent to both stands. This was done and the appellants duly paid the connection charges.

(18) It was not anticipated by the appellants that the dwellings on the stands would be completed and ready for occupation before the end of December 1993.

On this scenario Mr *Andersen*, for the appellants, raised several arguments in support of the basic contention that the learned judge had erred in declaring that the agreements of sale had been validly cancelled by the respondent.

The first argument was that clause 6 of the agreement enjoined the respondent at the date of the breach to elect whether to compel fulfilment thereof or to cancel the sale; for if it were entitled to defer the date on which to make its election, prejudice would result from the construction in whole or in part between the date when the eighteen month period expired and the subsequent date at which the respondent elected to cancel. Accordingly, so it was urged,



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the right to cancel automatically lapsed upon the respondent's failure to enforce it on 3 May 1991.

No authority was cited by counsel in support of the somewhat startling submission that where a contract contains a cancellation clause (*lex commissoria*) the creditor's right to cancel *must* be exercised at the date of the default and, if not, is lost.

It has been stated, correctly so in my opinion, that delay of itself and without more can never deprive a party of a contractual right, except by prescription. In *North Eastern Districts Association (Prop) Ltd v Surkhey Ltd & Ors* 1932 WLD 181 at 186, Krause J said:

> "(It) is not by mere delay that a man loses his rights, even if he is aware of the fact that another has infringed his rights. Delay or standing by', as it is called, may be taken into consideration by the Court in arriving at the conclusion as to whether or not the man did or did not lose his rights."

See also *Medisa (Pty) Ltd v Kroebel Tools & Products (Pty) Ltd* 1988 (4) SA 415 (W) at 428F; Christie *The Law of Contract in South Africa* 2 ed at p 529. Obviously the delay in enforcing the right to resile from a contract could lead to the other party assuming that the right has been abandoned and in acting upon that assumption to his prejudice. The party who had delayed for an unreasonable length of time would then be met by the defence of estoppel if he sought to enforce his right. See *North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T) at 609B; *Resisto*

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*Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at 643F-G.

Estoppel apart, the failure to exercise the right of cancellation within a reasonable time of full knowledge of the facts giving rise to such right may justify an inference of an election to abide by the contract. Such election has been regarded as a waiver in the sense of a unilateral juridical act in which the right to rescind is abandoned. See *Mahabeer v Sharma NO & Anor* 1985 (3) SA 729 (A) at 736G-I.

Christie *op cit* at p 638 neatly summates the principles relating to an election to cancel a contract in these words:

> "The law lays down no time, and it is for the defendant to show that the delay has been such as to prove the plaintiff's waiver of his rights to



> cancel for the breach or repudiation, or such as to induce the defendant to commit himself to further performance, so raising an estoppel."

It was not contended that by deferring its decision to cancel the agreements of sale until 5 February 1992 and informing the appellants thereof on 23 March 1992, the respondent should be taken to have waived its right in terms of clause 6 to do so. In other words, that the delay of ten months, in the circumstances pertaining, was such an unreasonably long time as to create a waiver by the respondent of its right to reside.

Clearly, the defence of estoppel was also not available to the appellants. Since they did not commence building operations on the stands between 3 May 1991 and 23 March 1992, there was no question of their having acted to their detriment in reliance upon the respondent's action in deferring the enforcement of its right to cancel.

In short, the appellants were bound by the election to cancel made on 5 February 1992 and conveyed in the letter of 23 March 1992.

In the event of it being held that the respondent was entitled to exercise the right to cancel at a date subsequent to 3 May 1991, counsel's next argument ran along these lines: Having agreed in its letter of 1 April 1992 to extend the period within which the appellants were to complete the buildings on Stands 276 and 257, the respondent was obliged to grant them a reasonable period within which to do so. This it omitted to do. By stipulating that such work was to be completed within a period of two months, the respondent imposed upon the appellants a condition physically incapable of fulfilment. Consequently, the extension allowed the appellants to complete must be taken to be of reasonable duration having regard to the fact that building operations had not even commenced by 1 April 1992.

I understood Mr *Sayce*, who appeared for the respondent, to concede that it was objectively impossible for the appellants to complete the building of the dwelling houses in the period allotted them. The question then is: what legal effect did the imposition of such an impossible condition have upon the respondent's agreement to withdraw its earlier cancellations of the

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agreements of sale?

In my view, the absolute or objective impossibility of the condition rendered the respondent's agreement to extend the deadline to 31 May 1992, and the appellants' tacit acceptance thereof, a nullity - "*impossibilium nulla obligatio*



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*est*". It destroyed the agreement, for the condition was incapable of being satisfied not only by the appellants but by any one else. See *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 at 434; Christie *op cit* at p 159; Wessels *The Law of Contract* 2 ed at para 1302; Zimmermann *The Law of Obligations* at p 686-687; van der Merwe *et al Contract: General Principles* para 6:1 at p 135. It is not for this court to repair the agreement or re-write the condition as Mr *Andersen* suggested, by substituting the grant to the appellants of a reasonable period from 1 April 1992 within which they had to complete the building.

It is as well at this stage to deal with the proposition that the respondent expressly purported to cancel the agreements of sale on 4 November 1992, notifying the appellants thereof in its letter of 23 November 1992. I do not consider this to be a correct analysis of what occurred.

On 2 September 1992 the respondent's council ratified the prior cancellations. It resolved that "the previous cancellation of the agreements would proceed". At the same time, without withdrawing the cancellations, it generously decided to allow the appellants to make final submissions to the appropriate sub-committee. This they did. The plea was, however, unsuccessful and on 4 November 1992, for the second time, the respondent ratified or affirmed the prior cancellations.

If this reasoning is correct as I perceive it to be, the agreements of sale were validly cancelled by the respondent upon its notification to the appellants on 23 March 1992 of the election made, pursuant to clause 6, on 5 February 1992.

Thus, it is those actions and events which occurred after 23 March 1992 to which regard must be had in determining whether the resistance to the cancellations was justified in law; for cancellation takes effect from the time it is communicated to the other party. See *Swart v Vosloo* 1965 (1) SA 100 (A) at 105 (G); *Phone-A-Copy World-wide (Pty) Ltd v Orkin & Anor* 1986 (1) SA 729 (A) at 751A-C.

I accept as sound the proposition that the defence of waiver so called after an agreement has been validly cancelled is, in reality, an allegation that the cancelled agreement has been revived by a new agreement. The distinction was made in *Desai v Mohamed* 1976 (2) SA 709 (N) where at 712H-713B Miller J said:

> "Waiver by a lessor of a right to cancel is a defence most commonly raised with reference to the lessor's conduct between the date of breach and the



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> date of his purported cancellation of the lease. Conduct during that period which clearly manifests an election not to cancel, may appropriately be said to constitute a waiver of the right to do so. That situation differs from the case with which we are now concerned, where the conduct relied on occurred subsequent to valid cancellation of the lease by reason of the breach. In such a case, if the conduct is said to constitute a waiver, the word is used not with its ordinary connotation but in the sense that the cancellation has been undone, for there is something incongruous in the notion that one may waive a right to do that which one has already done. As Innes CJ pointed out in *United Bioscope Cafes Ltd v Moseley Buildings Ltd* 1924 AD 60 at pp 67-8, it may be possible for one who has lawfully cancelled an agreement to go back upon his election', provided he does so with the concurrence of the party affected thereby. (See also *per* Steyn CJ in *Neethling v Klopper en Andere* 1967 (4) SA 459 (A) at pp 466-7). Although in both these cases reference was made to the revival (herlewing') of the previously cancelled agreement by reason of conduct subsequent to cancellation, it is implicit in both judgments that a fresh meeting and concurrence of the minds of the parties would be necessary to the restoration of the *status quo ante*".

See also *Pienaar v Southern Insurance Association Ltd* 1983 (1) SA 917 (C) at 925G-H; *Thomas v Henry & Anor* 1985 (3) SA 889 (A) at 896E-G.

In order to restore the *status quo ante* it was for the appellants to establish that a new consensus had been reached - a fresh meeting and concurrence of minds resulting in an acceptance that the earlier cancellations be withdrawn. Such an onus is certainly no less burdensome than that to be discharged in proving a waiver of rights. And it has been said repeatedly that waiver must be "clearly proved". See *Laws v Rutherfurd* 1924 AD 261 at 263; *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 436; *Patel v Controller of Customs and Excise* 1982 (2) ZLR 82 (H) at 88D-H.

To be looked at therefore is the whole of the respondent's subsequent conduct, and not merely an element thereof. There must be conduct plainly inconsistent with an intention by the respondent to persevere with the exercise of the right it elected to enforce.

The features relied upon by Mr *Andersen* as showing that a new consensus had been reached, were these:

(1) On 6 July 1992 the respondent, acting in terms of s 27*(b)* of the Regional





> Town and Country Planning Act, 1976, granted the appellants development permits authorising the construction on Stands 276 and 257 of the buildings shown on the plans submitted. The developments were to be implemented within twelve months.

(2) The on-going construction on both stands was supervised by a building inspector in the employ of the respondent.

(3) On 7 December 1992 the respondent demanded payment of rates in respect of the stands for the half year ending 31 December 1992 and, thereafter, for the half year ending 30 June 1993. The rates were paid.

(4) The respondent permitted water to be connected on both stands and accepted payment by

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the appellants of the connection charges.

On the other hand, there were contra-indications in the conduct of the respondent.

It cannot be gainsaid that the respondent ratified the cancellations of the agreements of sale on 2 September 1992 and again on 4 November 1992. And in the letter of 8 January 1993 it was firmly pointed out to the appellants that they would not be compensated for the unauthorised building operations they were carrying out on the stands. Furthermore, after the approval of the plans the respondent wrote the letter of 2 September 1992, which was received by the appellants before any, or any significant, developments had occurred on the stands. It made plain to the appellants that unless convinced by their submissions, the intention was to stand by the cancellations of the agreements of sale.

It may well have been that the respondent's one hand was not aware of what the other was about. Yet the fact remains that subsequent to 23 March 1992 the respondent, on no less than three occasions, reiterated that the agreements of sale had been cancelled.

An overall view of elements of the respondent's conduct, does not satisfy me that it was "clearly proved" that the cancellations were undone - that a tacit revival of the agreements of sale took place. To borrow the words of Christie *op cit* at p 530, the cancelling party's subsequent conduct was not such that the other party, as a reasonable man, was entitled to accept that conduct as a revival of the contract.

This conclusion effectively disposes of the defence of estoppel. In the first



place, any belief that the appellants entertained that the respondent had revived the agreements of sale was not reasonable in the light of the letters addressed to them on 2 September 1992, 23 November 1992 and 8 January 1993. See *Alfred McAlpine & Son (Pvt) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) at 335F-336A. The appellants were not misled. They were warned that they proceeded with the development of the stands at their peril. They took no heed and continued to incur expenditure in the completion of the buildings.

As the agreements of sale had been cancelled prior to 23 October 1992 when the Contractual Penalties Act [*Chapter 8:04*] was brought into operation, the respondent was not required to comply with the provisions of s 8 thereof. See *Bater & Anor v Muchengeti* 1995 (1) ZLR 80 (S) at 84. But this did not mean, as the learned judge supposed, that no protection against the imposition of the penalty stipulation in clause 6 of the agreements of sale was afforded to the appellants under the Act. It was, and still remains, open to them to persuade a competent court to grant any such relief as is set out in s 4 of the Act. See *Bater*'s case *supra* at p 83.

If the appellants are advised to seek such relief, it seems to me that this should be done by the institution of separate proceedings. Certainly there is insufficient information for any court to exercise a discretion on the information presently disclosed.

The respondent has been substantially successful in this appeal and was so in the

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proceedings below. It is entitled to its costs in both courts. In the result:

1. The appeal is dismissed with costs.

2. The order of the court *a quo* is amended by the deletion of paras 3 and 4 and all the words in para 5 after "this application".

McNally JA: I agree

Muchechetere JA: I agree

*Kantor & Immerman*, appellant's legal practitioners

*Coghlan, Welsh & Guest*, respondent's legal practitioners



## TIMNDA TRUCK PARTS (PVT) LTD v AUTOLITE DISTRIBUTORS (PVT) LTD 1996 (1) ZLR 244 (HC)

**Court** **High Court, Bulawayo**

Chatikobo J

Civil application

8 March 1995 Judgment No. HB-16-96

### Flynote

Practice and procedure - application for summary judgment - plaintiff must adduce evidence in substantiation of application

### Headnote

In an application for summary judgment the applicant must do more than simply assert that he has a good claim, that he believes that the defendant has no *bona fide* defence and that the defendant has entered an appearance to defend for the purpose of delay. The applicant is obliged by r 67 of the High Court Rules to adduce evidence in substantiation of it claim to summary judgment. That evidence must establish the facts upon which reliance is placed for the applicant's assertion that the applicant's claim is unimpeachable. The need to adduce such evidence is even stronger when the original summons lacks details of the claim against the defendant.

Cases cited:

*Chiadzwa v Paulkner* 1991 (2) ZLR 33 (S)

*Hughes v Lotriet* 1985 (2) ZLR 179 (H)

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*Microutsicos v Swart* 1949 (3) SA 715 (A)

The following rules of court were referred to by the court:

High Court of Zimbabwe Rules 1971 (RGN 1047/71), r 67

*T A Cherry*, for the applicant

*S Takundwa*, for the respondent



## Judgment

**Chatikobo J:** The applicant, whom I shall refer to as the plaintiff, instituted action against the respondent, the defendant in case number HC 1299/95, claiming payment of the sum of $64 557,50 for goods sold and delivered to the defendant at the latter's special instance and request, together with interest *a tempore morae* plus costs of suit. After the defendant had entered appearance to defend and requested certain particulars, the plaintiff applied for summary judgment in terms of r 64 of the Rules of the High Court.

The affidavit filed in support of the claim for summary judgment is an epitome of uncompromising brevity. It recites tersely that the deponent is authorised to depose to the affidavit, that he verifies the cause of action in the sum claimed and that appearance has been entered for the purpose of delay. It does no more than repeat the requirements of r 64(2): *Chiadzwa v Paulkuer* 1991 (2) ZLR 33 (S). The requirement that the cause of action must be verified means that it must be substantiated by proof. The affidavit should contain evidence which establishes the facts upon which reliance is placed for the assertion that the applicant's claim is unimpeachable. This is more so in a case like the present, where the allegations in the summons lack detail. The summons avers, in the briefest of terms, that the plaintiff's claim is for goods sold and delivered by the plaintiff to the defendant at Bulawayo in March 1995. It goes on to say that the amount is due and payable but in spite of demand the defendant fails to pay. It is difficult to imagine how a court which is confronted with such a terse pleading and such an unhelpful affidavit can satisfy itself of the verity of the cause of action proclaimed by the plaintiff.

A reading of rr 64 and 67 satisfies me that it is obligatory for a plaintiff who applies for summary judgment to adduce evidence in substantiation of its claim to summary judgment. It is for that reason that r 67 restricts the plaintiff to the evidence contained in its founding affidavit. It is helpful to refer *in extenso* to a passage in the judgment of Mfalila J in *Hughes v Lotriet* 1985 (2) ZLR 179 (H) at 185B-F:

> "In the light of these provisions, it cannot be correct to consider or treat r 64 in isolation as impliedly suggested by the respondent. If one did so, one might arrive at the same conclusion reached in the two cases cited above, namely that the applicant's affidavit should not contain any evidence but the bare assertion that he believes there is no *bona fide* defence and that entry of appearance was for the purpose of delay. In arriving at the conclusions which they did, Galgut & De Wet JJ never had to consider a provision similar to our r 67. By stating that no evidence may be adduced at the hearing by the plaintiff otherwise than by the

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CHATIKOBO J

> affidavit of which a copy was delivered with the notice, r 67 implies that the affidavit which is delivered with the notice under r 65 can contain evidence to which the applicant is confined at the hearing. The result must be that in his application for summary judgment under r 64, the applicant is allowed to include evidence in the accompanying affidavit to which r 67 restricts him at the time of hearing. Any other interpretation would render the provisions of r 67 meaningless."

It may be argued that r 67 is merely permissive, in that it simply allows a party to adduce evidence in support of an application for summary judgment but does not oblige such a party to do so. I can see no basis for such an argument. The court has power in terms of r 67*(c)* to permit the plaintiff to supplement his affidavit with a further affidavit dealing with *(i)* any matter raised by the defendant which the plaintiff could not have been expected to have dealt with in his first affidavit or (ii) the question whether at the time of applying for summary judgment he was aware of the defence put forward by the defendant. This can only mean that there is an obligation on an applicant for summary judgment to adduce evidence in his initial affidavit dealing with all relevant matters which are within his knowledge. Failure to do so would make it difficult for him to apply for leave to introduce a supplementary affidavit. It is for this very reason that Mr *Takundwa* who appeared for the defendant opposed the application by Mr *Cherry* for the plaintiff to introduce a supplementary affidavit. After hearing argument from both counsel, I admitted the supplementary affidavit. In doing so, I did not overlook the force in Mr *Takundwa*'s submission that the contents of the supplementary affidavit were known to the plaintiff before the application was launched. I nevertheless permitted the introduction of the affidavit, bearing in mind that:

> "The principle is that, in deciding whether or not to grant summary judgment, the court looks at the matter at the end of the day on all the documents which are properly before it": *per* Corbett JA in *Maharay v Barclays National Bank Ltd* 1976 (1) SA 418 (A).

The defendant's opposing affidavit shows that it is common cause that there was a contract of sale in terms of which defendant agreed to purchase ten sets of liner kits (which I assume to be motor vehicle spare parts) from the plaintiff. The defendant disputes liability on two grounds. The first is that the agreed unit price per kit was $5 675, less 15% discount. The plaintiff charged him $7 595 per kit, less 15% discount, instead. The second is that in breach of the terms of the agreement the plaintiff delivered only eight liner kits by the delivery date of 25 February 1995. The other two kits were only delivered



CHATIKOBO J

on 9 March 1995. The defendant claims that these breaches go to the root of the contract and as a consequence he has cancelled the contract and is now tendering the return of the goods.

The defendant admits receiving ten liner kits from the plaintiff. It claims that the agreed price was $5 675 per kit less 15% discount. The total for the ten sets is therefore the sum of $48 237,50. Unless I can be satisfied that there is a basis upon which the defendant can resile from the agreement then I should at the very least grant summary judgment in this amount. The

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alleged cancellation of the agreement was raised for the first time in the opposing affidavit on 3 July 1995, four months after the delivery of the last consignment and more than a month after the issue of summons. At no time prior to the issue of summons did the defendant intimate to the plaintiff an intention to cancel the contract. The defendant accepted without question delivery of the second consignment, which it says was delivered late. Such conduct is inconsistent with an intention to cancel the contract. Assuming that the deponent to the defendant's affidavit is correct when he says that delivery should have been made by 25 February 1995, then there was need on the part of the defendant to place the plaintiff on terms to perform by a given date before it could cancel. In *Microutsicos v Swart* 1949 (3) SA 715 (A) 730, Fagan AJA said:

> "For my present purpose it is sufficient to say that, where a time for the performance of a vital term in a contract has been stipulated for and one party is *in mora* by reason of his failure to perform it within that time, but time is not of the essence of the contract, the other party can make it so by giving notice that if the obligation is not complied with by a certain date, allowing a reasonable time, he will regard the contract as at an end."

I did not hear Mr *Takundwa* to argue that time was of the essence. Such a submission would derive no support from the facts and the probabilities. That being so, the defendant never acquired the right to cancel. In any event, the plaintiff could only have been put *in mora* before 9 March when the second and final consignment was delivered. Once performance was completed on 9 March the need to place the plaintiff *in mora*, which in turn was a prerequisite for cancellation, fell away. Performance by the plaintiff was complete and the defendant became obliged to pay for the goods. There is therefore no merit in the claim that the contract has been cancelled. That being so, the plaintiff is entitled to summary judgment in the admitted sum of $48 237,50. I am unable to decide on the papers if the unit price was $5 675 or $7 595. The defendant will therefore be granted leave to defend the balance of the claim.



CHATIKOBO J

In the result it is ordered as follows:

(1) The plaintiff is granted judgment in the sum of $48 237,50 together with interest as claimed.

(2) The defendant is given leave to defend the balance of the claim.

(3) Costs are reserved for determination at the trial.

*Coghlan & Welsh*, plaintiff's legal practitioners

*Lazarus & Sarif*, defendant's legal practitioners



## UNIVERSITY OF ZIMBABWE v GUDZA 1996 (1) ZLR 249 (SC)

**Court** **Supreme Court, Harare**

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Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

26 February & 14 March 1996 Judgment No. S-45-96

## Flynote

Contract - mistake - unilateral and unreasonable mistake by offeror - accepted by offeree without knowing of mistake - whether offeror allowed to rescind contract

## Headnote

The University of Zimbabwe granted a salary increase to an employee. Subsequently the University realised that it made a mistake and had paid the employee a higher percentage increase than she was entitled to receive. It sought to recover from the employee the difference between the amount she had been paid and the amount that she would have been paid had the mistake not been made.

Held, that where an offeror mistakenly makes an offer that is accepted by the offeree, the offeror will only be able to rescind the contract if *(a)* the offer was induced by fraudulent misrepresentation by the offeree; or *(b)* the mistake was a material one and the offeree knew or ought to have known that the offer had been made in error.

Held, that in the present case the University employee did not know that the salary increment granted to her was made in error and there was, in the circumstances, nothing that would have led her to believe that the increment granted to her was incorrect.

Held, therefore, that the University was not entitled to recover the additional amount it had paid as a result of its unilateral mistake.

Held, further, even if the increase granted to the employee was subject to some further Government ratification other than that which had been given, the contract was between the University and the employee and there was nothing in the contract or the legislation governing the University that made the increase conditional upon ratification by the Government.

**1996 (1) ZLR p250**

Cases cited:

*Acting Min of Industry & Anor v Tanaka Power (Pvt) Ltd* 1990 (2) ZLR 208 (S)

*Cundy v Lindsay* (1878) 3 App Cas 459

*Diederick*s v *Min of Lands* 1964 (1) SA 49 (N)

*Horty Invstms (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 (3) SA 537 (W)

*Irvine & Johnson (SA) Ltd v Kaplan* 1940 CPD 647

*National & Overseas Distributors v Potato Bd* 1958 (2) SA 473 (A)

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*Orban v Stead & Anor* 1978 (2) SA 713 (W)

*SAR&H v National Bank of SA Ltd* 1924 AD 704

*Springvale Ltd v Edwards* 1969 (1) SA 464 (RA)

*van Ryn Wine & Spirit Co v Chandos Bar* 1928 TPD 417

## Judgment

**Korsah JA**: The appellant is aggrieved and dissatisfied with the whole of the judgment of the High Court delivered on 26 July 1995, wherein it was adjudged that:

1. The salary scale according to which the respondent was paid in November 1993 should be regarded as being part of her conditions of service and the revised salary scale introduced by the appellant in December 1993 should be of no force and effect as regards her;

2. The appellant should pay to the respondent the difference between the moneys she had been paid since December 1993 and what she would have been paid had she remained on the salary scale that was introduced in November 1993, together with the moneys deducted from her salary to recover the alleged overpayment in respect of the period from 1 July 1992; and

3. The appellant should pay the respondent's costs.

I must say from the onset that, in my view, the reasoning by which the learned trial judge arrived at the above conclusions is unexceptionable.

The facts are succinctly set out in the judgment appealed against, thus:

The respondent is a member of the University Technicians' Association (UTA):

> "During 1993 UTA entered into negotiations with the appellant (UZ') on behalf of its members for salary increases. In October 1993 the UZ





> awarded a 68% salary increase to senior non-academic staff, including technicians of certain ranks. The salary increase was back-dated to July 1992. Most UTA members were not included in the exercise and so UTA made representations to the UZ. In November 1993 a 72% salary increase was awarded to most UTA members (inclusive of the respondent). This increase was also back-dated to July 1992. After the salary adjustments the UZ issued a salary key scale containing the new salary structures. In November 1993 members of UTA (the respondent included) received their bonuses, which were worked out in accordance with the new salary structures. In December 1993 the salaries of senior technical staff were cut by between $120 and $405. When members of staff queried the reduction they were told that they had been overpaid. The so-called overpayments amounted to between $7 500 and $9 500 which the UZ recovered from the members concerned. UTA wrote to the Vice Chancellor of the UZ expressing concern and objecting to the salary cuts. It also pointed out that individuals who had spent the money would be financially embarrassed because of the repayments being deducted from their salaries."

In consequence of the foregoing, the respondent sought the orders granted by the court *a quo.*

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The appellant contended unsuccessfully in the trial court that there was no bargaining agreement over salary increments between UTA and the UZ. It said that a major rationalisation exercise in respect of basic salaries for all the UZ employees was embarked upon from March 1992; and that that process was complex and involved a complicated adjustment in practically everyone's salary package.

It is, however, significant that the increments in the salaries, the subject matter of this action, were granted after certain representations were made to the UZ by UTA. As Mr *Dyke* pertinently noted in his heads of argument: "It is common cause on the papers that the increase in salary scales arose from discussion/negotiation/dispute as to what those increases should have been".

In this regard the observation by the Lord Chancellor (Lord Cairns) in *Cundy v Lindsay* (1878) 3 App Cas 459 at 464 is apposite:

> "(We) are not here embarrassed by any conflict of evidence, or any evidence as to conversation or acts done, the whole history of the (entire)



KORSAH JA

> transaction lies on paper ... Everything that was done was (reduced to) writing. What is to be judged of ... was merely the conclusion to be derived from that writing, as applied to the admitted facts of the case."

It was explained in an affidavit deposed to on behalf of the UZ that:

> "The salary bill for University employees is wholly funded by Government and it is Government which has the final say over salary increments. What the University and its employees do is to come up with a package which the University then sells' to Government. It is up to Government to reject or accept the package. The University does not agree' on, or award' any increments. It merely recommends to Government the package which is worked out during the negotiation process."

I think it eminently reasonable and justifiable to accept that the UZ would, in its dealing with the Government in respect of a sensitive issue such as the increment of salaries, not make uninformed recommendations, but tender enlightened and informed advice after weighty, deep and thoughtful consideration of all the surrounding circumstances, and that this was done. In any case, the UZ, and not the Government, is the employer of the respondent.

The deponent on behalf of the UZ frankly admitted that:

> "*Following Government Treasury's approval to the package submitted to it during the rationalisation process*, a scale which was subsequently served by the Salaries and Conditions of Service Commission on 23 December 1993 was used to pay the new salaries urgently in a bid to forestall litigation by one of the categories of staff who were suing the University for among other issues delays in the implementation of the new salaries" (emphasis added).

The deponent goes on to say that during the implementation of the new scale for senior non-academic grades it became apparent that in some cases it did not maintain the old historic relationship with the scale for academic staff. In other words, the UZ had committed an error which had been sanctioned by the Treasury and upon which the Salaries and Conditions of Service Commission had acted. Had the error been so conspicuous as to alert the respondent,

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it would surely have been picked up by one or other of these organs. The respondent is not put on her enquiry if the error is not so flagrant as to demand her attention.



KORSAH JA

Before this court, Mr *de Bourbon,* taking the most commonsensical view of the issue, submitted that in any large organisation, no matter who controls it, errors are bound to occur, and that the law would be failing in its approach to the real problems if it refused to recognise that such errors do in fact occur and deny a party the right to resile from his unsolicited error.

The law is settled. It was evolved through cases over the centuries. It makes accommodation for obvious mistakes which the other party to an agreement would undoubtedly be aware of and does not permit such a party with knowledge of the error to take advantage of the other's mistake.

It was contended by Mr *de Bourbon* on behalf of the appellant that there was no meeting of the minds of the parties in the present matter resulting in a binding offer. In the instant case, it is common cause that, after diligent negotiations, the UZ offered and paid to the respondent an increment in her emoluments back-dated to July 1992. The respondent accepted that offer without demur.

Generally speaking, an offeror cannot escape liability by establishing that he has made the wrong offer which was accepted by the offeree: *van Ryn Wine & Spirit Co v Chandos Bar* 1928 TPD 417 at 424-5. In *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704 at 715, cited with approval in *Irvine & Johnson (SA) Ltd v Kaplan* 1940 CPD 647 at 650, Wessels JA said:

> "The law does not concern itself with the workings of the minds of parties to a contract, but with the external manifestations of their minds. Even, therefore, if from a philosophical stand-point the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which courts of law can determine the terms of a contract."

Mr *Dyke* rightly conceded that the law, in certain circumstances, will permit a party to set up his own mistake in order to escape liability under a contract into which he has entered. But he rightly submitted that where the other party has not made any misrepresentation and has not, at the time of the acceptance of the offer, appreciated that the offer was being accepted under a misapprehension, the scope of the defence of unilateral mistake is very narrow, if it exists at all. To constitute a defence, at least the mistake (*error*)



KORSAH JA

would have to be reasonable (*justus)* and it would have to be pleaded: *National & Overseas Distributors v Potato Board* 1958 (2) SA 473 (A) at 479G; *Diedericks v Minister of Lands* 1964

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(1) SA 49 (N) at 54G and 55F-H.

Mr *Dyke* further rightly submitted, on the authority of *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 (3) SA 537 (W), that the law will only attach to a limited category of mistakes the quality of *justus,* and the degree of fault attributable to the person making the error is of supreme importance in the determination of whether or not a mistake is *justus.* The mistaken party will not be permitted to rely on the absence of true *consensus* if his mistake was due to his own fault. Illustrative of this assertion are the following sentiments expressed by Miller J in *Diedericks v Minister of Lands supra* at 57D-E, that:

> "The conclusion is inescapable that the defendant's overlooking' of the resumption clause was due to negligence by an official or officials acting on his behalf in connection with this very transaction. It was not a reasonable or excusable error at all; it seems to me to have been a blunder which could, with the exercise of moderate care, have been avoided. Moreover, as I have already pointed out, (the) defendant's error was not due to any misrepresentation by (the) plaintiff who neither knew of the error nor was concerned with (the) defendant's motives or reasons or beliefs in making the offer."

If further authority for the proposition that unilateral mistake of motive has no effect on the validity of the contract be required, see *Springvale Ltd v Edwards* 1969 (1) SA 464 (RA) 470; *Orban v Stead* 1978 (2) SA 713 (W) at 717B-C. Such is especially the case when no knowledge or fault can be imputed to the other party. But, as Professor Christie points out, the relationship between unilateral mistake and quasi-mutual assent has been made clear in two Appellate Division cases:

> "Actual knowledge, on the authority of *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) and *National & Overseas Distributors v Potato Board supra* obviously disables the party having knowledge of the mistake from relying on the doctrine of quasi-mutual assent, so the mistaken party will be able to rescind the contract if his mistake was material."

See Christie *The Law of Contract in South Africa* 2 ed at p 388. Indeed, such a party would be taking unfair advantage of the other in the circumstances.

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KORSAH JA

His hands would not be clean and the mistaken party ought to be allowed, if such were the facts, to rescind the contract, if his mistake was material.

The facts portrayed here indicate clearly that the appellant was not mistaken as to the class and character to which the transaction belonged. It was an exercise in the appraisal of the salaries of those members of UTA who had not benefited from the award of salary increases granted to senior non-academic staff and technicians of certain ranks. Having regard to the increment of 68% in salary granted to the earlier group, it was reasonable for the respondent to suppose that the increment of 72% in salary granted to her was justifiable and not the result of a material mistake on the part of the appellant.

There was nothing on the papers to indicate that the respondent ought to have realised that a mistake had been made and that the salary scales offered and subsequently paid were incorrect.

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The appellant was only too well aware of the contents of the document it published in this regard, and unless there was fraud by or on behalf of the respondent or material mistake by both parties, which is fundamental to the agreement, the absence of either of which is conspicuous, the appellant is bound and cannot avoid its obligations under the agreement.

As stated earlier, we are not embarrassed by any conflict of evidence. Everything was reduced to writing. And, as Mr *Dyke* forcefully submitted, the facts in this matter portray not just a simple mistake on the part of the appellant in publishing the increased salary scales but also in acting upon the publication and making payments, based on such scale, for the one month that the group in which the respondent fell was paid. The voluntary publication of the salary scales followed by unsolicited payment in terms thereof obviates the possibility that the mistake was, in the circumstances, a justifiable one. "There is no basis in the evidence for a contention that the mistake was reasonable" - *National Overseas Distributors (Pty) Ltd v Potato Board supra* at 479H.

In regard to the appellant's contention that the salary scales themselves were invalid for want of ratification by the Government, Mr *Dyke* submitted that such allegation is not established on the papers. By dint of approval from Treasury, followed by a scale which was subsequently served by the Salaries and Conditions of Service Commission, which scale was implemented by the appellant, it is difficult to fathom what further ratification by the Government was required.



KORSAH JA

I agree with Mr *Dyke* that, in any event, if any further ratification of the salary scales be necessary, it is a matter between the appellant and the Executive and does not affect the contract of employment between the respondent and the appellant. It is true that the appellant receives a subvention from the Government and ought properly, under that funding arrangement, to seek Government approval for increases in the salaries of its employees, but the legislation does not betray any obligation on the part of the appellant to seek Government approval prior to increasing salary scales.

The respondent's contract of employment is with the appellant. It is to the appellant that she looks for her salary. Where the appellant acquires the means to discharge its obligations to her is not her concern. She receives her new salary on the existence of the contractual relationship between her and the appellant and not under and by virtue of a contract of employment which provides that her salary scale will be determined by the Executive.

Even if the revised salary scales were subject to further ratification and were not complete and binding without such ratification (see *Acting Minister of Industry and Anor v Tanaka Power (Pvt) Ltd* 1990 (2) ZLR 208 (S) at 218), there is nothing in the papers or the legislation to suggest that the publication of new salary scales was, in terms of the respondent's contract of employment, subject to ratification by the Government.

Finally, according to the deponent on behalf of the appellant, the new salary scales were drawn up and issued subsequent to Government's approval of the package submitted to it. The reason he accords for their withdrawal is that they did not maintain the historical relationship

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with those of other categories of staff. If the motive of the appellant was to revise salaries of those affected in keeping with historical links but failed to achieve that purpose, the validity of the contract is not thereby affected when no knowledge or fault can be imputed to the respondent: *Diedericks v Minister of Lands supra* at 56 and 57E; *Springvale Ltd v Edwards supra* at 470B; *Orban v Stead supra* at 717B-C.

Having regard to the foregoing, the appeal is dismissed with costs.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

*Scanlen & Holderness*, appellant's legal practitioners

*Atherstone & Cook*, respondent's legal practitioners

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## MAPEDZAMOMBE v COMMERCIAL BANK OF ZIMBABWE & ANOR 1996 (1) ZLR 257 (SC)

**Court** **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

7 & 14 March 1996 Judgment No. S-50-96

### Flynote

Practice and procedure - execution - sale - sale confirmed by Sheriff - effect of confirmation - transfer effected and price paid - when sale may be set aside by court

### Headnote

A sale in execution effected in terms of the High Court Rules is, until it has been confirmed by the Sheriff in terms of r 360 of the High Court Rules, a conditional sale only and any interested party may apply to the court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. Once the sale is confirmed, however, it is no longer conditional and a court would be even more reluctant to set it aside pursuant to an application under r 359. Where the sale not only has been properly confirmed but transfer effected by the Sheriff to the purchaser against payment of the price, any application to set aside the transfer falls outside r 359 and must conform strictly with the principles of the common law. Features such as an unreasonably low price being obtained at the auction and the prospects of the debtor being able to settle his debt without having his property sold are no longer relevant, because, under common law, immovable property sold by judicial decree cannot, after transfer has been passed, be impeached in the absence of an allegation of bad faith, or knowledge of prior irregularities in the sale, or fraud.

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Cases cited:

*Erasmus v Michael James (Pty) Ltd* 1994 (2) SA 528 (C)

*Gibson NO v Iscor Housing Utility Co Ltd & Ors* 1963 (3) SA 783 (T)



*Lalla v Bhura* 1973 (2) RLR 280 (G)

*Maponga v Jabangwe* 1983 (2) ZLR 395 (S)

*Naran v Midlands Chemical Industries (Pvt) Ltd* S-220-91

*Smith & Anor v Acting Sheriff & Anor* 1995 (1) ZLR 158 (S)

*Sookdeyi & Ors v Sahadeo & Ors* 1952 (4) SA 568 (A)

*van den Berg v Transkei Development Corp* 1991 (4) SA 78 (TkG)

*Zvirawa v Makoni & Anor* 1988 (2) ZLR 15 (S)

Statutes and regulations referred to:

Magistrates Court Act 32 of 1944 (SA), s 70

Rules of the High Court 1971 (RGN 1047/1971), rr 359 and 360

*D P Carter,* for the appellant

*I A Kurawley,* for the first respondent

*F Girach,* for the second respondent

## Judgment

**Gubbay CJ**: This is an appeal against the dismissal with costs of an application brought before the High Court to set aside the sale in execution of the immovable property known as Stand 606, Northwood Township 4 of Sumben, in the district of Harare ("the property").

A writ of execution had been issued against the property by reason of a default judgment in an amount of $67 000 having been obtained by the first respondent against the appellant.

On 18 November 1994 a sale of the property by public auction without reserve was held. The sale was properly advertised and conducted. The highest bid for the property, in the sum of $330 000, came from the second respondent. Six days later the sheriff, being satisfied that the price offered was reasonable having regard to the circumstances of time and place and to the state of the property market, declared the second respondent the highest bidder in terms of r 360 of the High Court Rules 1971 ("the Rules"). He indicated that if no objections were made to the High Court within seven days, he intended to confirm the sale of the property.

On 5 December 1994 the appellant obtained from the High Court, pursuant to a chamber

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application, a provisional order temporarily interdicting the sheriff from confirming the sale. It was further provided that the appellant was to file and serve an application to set aside the sale in terms of r 359 within 21 days, failing which the provisional order would lapse and be of no force and effect.



GUBBAY CJ

The prescribed time limit was completely overlooked by the legal practitioner acting for the appellant. Accordingly, the provisional order lapsed and the sheriff duly confirmed the sale on 8 March 1995. It was only as a result of the demand made by the second respondent for the appellant to vacate the property, that an urgent chamber application was lodged on 10 March 1995.

In his founding affidavit the appellant deposed that the price of $330 000 realised at the sale by public auction was unreasonably low - substantially less than the market price. He attached a report from a valuation surveyor who had inspected the property at his instance. The valuer assessed the open market value of the property, as at 3 February 1995, at $600 000. The appellant also drew attention to the mortgage holder's appraisal of the value of the property for insurance purposes at $616 200. He also professed a prospect of being able to settle the judgment debt by the grant of a loan of $85 000 without there being the need of having recourse to the dire expedient of taking the roof over his head.

The second respondent, but not the first respondent, filed an opposing affidavit. It was her contention that the price she offered for the property, bearing in mind that it was at a forced sale, was not unreasonably low; it was fair. She pointed out that the property was valued by the City of Harare for rating purposes at $267 700. She averred that the ability of the appellant to obtain a loan of $85 000 to settle his indebtedness to the first respondent was no longer of any relevance; that, in any event, three months after it had been mentioned by the appellant in his initial application, it was still not a reality.

At the hearing, the application was also opposed by the first respondent. In dismissing it the learned judge expressed himself as follows:

> "Although the sale is still inchoate in that the property has not been registered in the name of the second respondent, I do not consider that the court can interfere merely because the sale has not been perfected by transfer of the *merx*. The second respondent has complied with the conditions of the agreement of the sale and is therefore entitled to require (the sheriff) to comply with his obligations under the agreement which are to deliver the property to her."

This court was informed that, soon after the noting of the appeal, the legal practitioner representing the second respondent wrote to the appellant advising him that if he wished to prevent his client from receiving transfer of the property from the sheriff, pending the determination of the appeal, it was necessary for him to obtain an interdict from the High Court. The invitation



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to do so was not heeded by the appellant. In consequence transfer of the property was registered into the name of the second respondent, who raised a mortgage bond and assumed occupation.

The appellant's counsel accepted, correctly in my opinion, that this new material occurrence could not be disregarded in the determination of the appeal. For, by his omission to act with knowledge of the consequences, the appellant must be taken to have tacitly acquiesced in the perfection of the sale to the second respondent.

The transfer of the property is a factor which distinguishes the present case from the situations considered in *Lalla v Bhura* 1973 (2) RLR 280 (A); *Zvirawa v Makoni & Anor* 1988 (2) ZLR 15 (S); and *Smith & Anor v Acting Sheriff & Anor* 1995 (1) ZLR 158.

Before a sale is confirmed in terms of r 360, it is a conditional sale and any interested party may apply to court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. See *Lalla v Bhura supra* at 283A-B. Once confirmed by the sheriff in compliance with r 360, the sale of the property is no longer conditional. That being so, a court would be even more reluctant to set aside the sale pursuant to an application in terms of r 359 for it to do so. See *Naran v Midlands Chemical Industries (Pvt) Ltd* S-220-91 (not reported) at pp 6-7. When the sale of the property not only has been properly confirmed by the sheriff but transfer effected by him to the purchaser against payment of the price, any application to set aside the transfer falls outside r 359 and must conform strictly with the principles of the common law.

This is the insurmountable difficulty which now besets the appellant. The features urged on his behalf, such as the unreasonably low price obtained at the public auction and his prospects of being able to settle the judgment debt without there being the necessity to deprive him of his home, even if they could be accepted as cogent, are of no relevance. This is because under the common law immovable property sold by judicial decree after transfer has been passed cannot be impeached in the absence of an allegation of bad faith, or knowledge of the prior irregularities in the sale by execution, or fraud. See *Sookdeyi & Ors v Sahadeo & Ors* 1952 (4) SA 568 (A) at 571H-572A; *Gibson NO v Iscor Housing Utility Co Ltd & Ors* 1963 (3) SA 783 (T) at 787A-B; *Maponga v Jabangwe* 1983 (2) ZLR 395 (S) at 396D-E; *van den Berg v Transkei Development Corporation* 1991 (4) SA 78 (TkG) at 80G-J; *Erasmus v Michael James (Pty) Ltd* 1994 (2) SA 528 (C) at 552F.



GUBBAY CJ

This principle of the common law has been codified in s 70 of the South African Magistrates Court Act of 1944, but not in the comparable Zimbabwean Act or Rules.

No allegation was made, let alone proof offered by the appellant, of bad faith or knowledge of any defect in title on the part of the second respondent. It follows therefore that the registration of the property in the name of the second respondent must be allowed to stand. If one has regard to the importance which attaches to the system of land registration in our law and the

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faith that the public places therein, the sense behind the rule that once perfected by transfer the transaction is virtually unassailable, is easily understood. Were one to hold otherwise, mortgage bonds and subsequent transfers might fall to be set aside.

For these reasons I would dismiss the appeal with costs.

McNally JA: I agree.

Korsah JA: I agree.

*Kantor & Immerman*, appellant's legal practitioners

*Gollop & Blank*, first respondent's legal practitioners

*Stumbles & Rowe*, second respondent's legal practitioners



## CHEGUTU MUNICIPALITY v MANYORA 1996 (1) ZLR 262 (SC)

**Court** **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

5 & 18 March 1996 Judgment No. S-49-96

### Flynote

Employment - termination - reinstatement following dismissal - meaning - whether retrospective in effect - whether reinstatement implies payment of back-pay and compensation

### Headnote

The respondent had been employed by the appellant municipality but was suspended and later dismissed on the grounds that he was responsible for the disappearance of items from the municipal workshop. He claimed that they had been sent for repair and sometime after his dismissal one of the items was indeed found at the place where he said it had been sent. The other item was not recovered. The municipality sought to make amends by reaching an agreement with the respondent, in terms of which he would, among other things, be reinstated to the position he had previously held, with effect from a date which was some two years after his dismissal had taken place. He would receive the benefits accrued from the date he was suspended until the date of dismissal. He claimed back-pay and allowances from the date of dismissal until the date of reinstatement. His claim was allowed in the High Court. On appeal,

Held, that the word "reinstatement" did not necessarily imply any sort of retrospectivity; it meant merely to put a person back in his former job. That could only be done in the present or the future; the past is covered, where necessary, by a specific arrangement for back-pay and compensation. One would expect additional words in the agreement to that effect. In the present

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case, the agreement did not signify a *restitutio in integrum*. Among other things, the question of what income the respondent had earned between the dates of dismissal and reinstatement was not discussed.



Dicta in *United Bottlers (Pvt) Ltd v Murwisi* 1995 (1) ZLR 246 (S) explained.

Cases referred to:

*Consol Frame Cotton Corp Ltd v President, Industrial Court, & Ors* 1986 (3) SA 786 (A)

*Grey v Pearson* (1857) 10 ER 1216

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

*Hodge v Ultra Electric Ltd* [1943] 1 All ER 681 (KB)

*Jackson v Fisher's Foils Ltd* [1944] 1 All ER 421 (KB)

*Rhodesian Publications Ltd v Servicemen's Reinstatement Bd & Anor* 1945 SR 72

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

Statutes and regulations referred to:

Hartley (Chegutu) Municipal Undertaking Employment Regulations 1980 (SI 416/1980), s 22(1)

Labour Relations Act 1956 (SA), s 43

Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371/1985), s 3(2)*(b)* and (3)

Urban Councils Act [*Chapter 214 of 1974*], s 90

*B T Chitsunge*, for the appellant

*J B Zengeni*, for the respondent

## Judgment

**McNally JA:** This is an appeal from a decision of Mubako J in the High Court. The issue is, on the face of it, a simple one. It concerns the interpretation of a word in an agreement.

Briefly, Mr Manyora was first suspended and then dismissed by the Municipality because he was held responsible for the disappearance of a tractor cylinder head and a pressure plate (worth $2 500 and $2 200 respectively) from the Municipal workshop.

His defence had been that these items had been sent to a firm called Mike Appel for repair. Mike Appel denied having them. Later, however, Mike Appel found the cylinder head in their premises - though not, it seems, the pressure plate.

Embarrassed by this evidence that Mr Manyora's defence had been correct, at least in part, the

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Municipality sought to make amends. It entered into an agreement with Mr Manyora, in writing, on 29 July 1993. The agreement provided that -



McNALLY JA

1. He would be refunded the money deducted in respect of the cylinder head, plus interest;
2. If the pressure plate was found, he would be refunded that money as well;
3. He would be reinstated to (*sic*) his position on the same grade;
4. He would take up his duties on 1 August 1993;
5. He would be paid "all your benefits accrued from the date you were suspended from Council service, *viz* 20 November 1990, to the date you were dismissed, 26 June 1991";
6. He would be assisted to get accommodation, "when you are reinstated".

The issue which then arose was whether or not Mr Manyora should be paid back-pay and allowances from 26 June 1991 to 31 July 1993. In short, what is the meaning of "reinstated" in the context?

There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as Lord Wensleydale said in *Grey v Pearson* (1857) 10 ER 1216 at 1234, "unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further".

The Oxford English Dictionary (we have only the 1933 edition) gives this definition:

> "To reinstall or re-establish (a person or thing) in a place, station, condition, etc ..."

I note that the word does not seem necessarily to contain an implication of retrospectivity.

I turn next to the case law on labour matters.

In *Rhodesian Publications Ltd v Servicemen's Reinstatement Board & Anor* 1945 SR 72 the word was used in the context of employees who had served in the 1939-45 war. It is quite apparent that there was no question of



McNALLY JA

retrospectivity. The particular employee had been called up for military service at the end of July 1940 and discharged in December 1944. He applied for reinstatement in his old job. An order was made that he be reinstated "from the date of discharge from military service". The question of retrospectivity was never raised. It was common cause that reinstatement, in the

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context, did not mean reinstatement with effect from the date of call-up.

In *Consolidated Frame Cotton Corporation Ltd v President of the Industrial Court & Ors* 1986 (3) SA 786 (A) the court had to consider the South African Labour Relations Act of 1956. The word "reinstatement" is used in s 43(4)*(b)*(I) - see p 795F of the report - and then at s 43(5) - see p 795I of the report. The Act contains these words:

> "When making an order under subsection (4) the industrial court shall fix the date from which the order shall operate and may make it retrospective to a date not earlier than that on which the employment of the employee or employees was suspended or terminated ..."

The significance of that wording is that the South African Legislature clearly interpreted "reinstatement" as having no inherent retrospective connotation. That is why specific provision is made to allow retrospective reinstatement. The decision of Nicholas AJA (as he then was) goes on to consider, at 798B-D, the meaning of "reinstate". But, perhaps because the point was obvious, he did not consider whether "reinstatement" necessarily meant "reinstatement with effect from the date of dismissal". No doubt this was because the legislation with which he was dealing clearly did not use the word in that sense.

In the same way, in the English cases, there seems to be an underlying assumption that the word "reinstatement" in itself carries no connotation as to the date with effect from which the reinstatement is to take effect. Thus, in *Jackson v Fishers Foils Ltd* [1944] 1 All ER 421 the person concerned was dismissed on 11 December 1942 and an order was subsequently made that he be reinstated with effect from 12 January 1943.

In *Hodge v Ultra Electric Ltd* [1943] 1 All ER 681 a woman was dismissed because there was not enough work for her. It was ordered that she be reinstated as from a specified day, some two months after she was dismissed.

I turn finally to our own legislation to see if any special meaning is given to the word "reinstate" or "reinstatement" which might indicate that the Municipality of Chegutu was entitled to use the word with the same meaning.



McNALLY JA

I find no use of the word in the relevant section (s 90) of the Urban Councils Act [*Chapter 214 of 1974*], as amended.

The Hartley (now Chegutu) Municipal Undertaking Employment Regulations 1980 (SI 416 of 1980), use the word "re-engaged" in s 22(1), where it is stated:

> "Provided that an employee who is discharged and re-engaged by the Council within two months of such discharge shall be deemed not to have broken his continuous service."

It is perhaps arguable that by using the word "reinstate" rather than "re-engage" in the letter under consideration, the Municipality must have meant something different from "re-engage". But this does not seem to me to be a strong indication.

The Labour Relations (General Conditions of Employment) (Termination of Employment)

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Regulations 1985 (SI 371 of 1985) do not, of course, apply to municipal employees - see *Gumbo v Norton-Selous Rural Council* 1992 (2) ZLR 403 (S) at 409F. Nevertheless, in those Regulations the word "reinstate" is used in s 3(2)*(b)*, and clearly does not carry any retrospective meaning, because s 3(3) then goes on to provide specifically for back-pay to be ordered where appropriate. In other words, to reinstate a person means in effect to put a person again into his/her former job. That can only be done in the present or the future. Not in the past. The past is covered, where necessary, by an order for back-pay and compensation.

In *United Bottlers (Pvt) Ltd v Murwisi* 1995 (1) ZLR 246 (S) I think I may have gone too far in a remark I made at p 250 of the judgment which implied (though it did not actually say) that reinstatement necessarily meant reinstatement from the date of dismissal or suspension. The remark was unnecessary and *obiter* because the Tribunal had specifically ordered his reinstatement "with effect from the date of suspension without any loss of benefits". In other words, the Tribunal had exercised its discretion in regard to back-pay and compensation. It might equally have directed reinstatement with effect from the date of its order without any back-pay or other compensation. The issue of back-pay was not actually before us, and it may be that it involved a question of fact and was thus not appealable. But, insofar as that judgment might be taken to have expressed an opinion that "reinstatement" necessarily implies "reinstatement as from the date of termination/suspension", I would withdraw from that view. Clearly, in the



McNALLY JA

light of s 3(3) of SI 371 of 1985, "reinstatement" means only "putting a person again into his former job as of the present or some future date". The question of back-pay then has to be considered as a separate step in the proceedings.

I may say that none of this argument, and none of these cases, were referred to in argument either before Mubako J or before this court.

I conclude, therefore, that "reinstatement" in the employment context means no more than putting a person again into his previous job. You cannot put him back into his job yesterday or last year. You can only do it with immediate effect or from some future date. You can, however, remedy the effect of previous injustice by awarding back-pay and/or compensation. But mere reinstatement does not necessarily imply that back-pay and/or compensation automatically follows.

I return then to the facts of this case. Is there anything in the letter of 29 July 1993 to suggest that the reinstatement was intended automatically to include all lost benefits?

I would begin by saying that the facts of this case were somewhat unusual in that Mr Manyora was partially but not wholly exonerated from blame. If he had been completely forgiven he would have been refunded the amount deducted in respect of the missing pressure plate. But he was not. So we are not involved in a *restitutio in integrum.*

Secondly, there is some significance in the fact that there was specific agreement that he would be given all his benefits from the date of suspension (26 November 1990) to the date of

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dismissal (26 June 1991). No mention was made of the 25-month period from the date of dismissal to the date of resumption of duty (1 August 1993).

Thirdly, there was no discussion about whether or not he had found alternative employment during that period or part of it. If he had, there would have been no justice in paying him in effect twice for the same day's work. If it had been intended to give him back-pay for the twenty-five months, there would surely have been questions about whether he had found an alternative source of income during that period.

Finally, although it is only a makeweight, the offer to try to find him accommodation "when you are reinstated" shows that reinstatement was seen as taking place on the date he resumed duty.

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McNALLY JA

I conclude therefore that the word "reinstate" or "reinstatement" carries no automatic retrospective connotation, either in ordinary language or in our legislation. Normally it means simply that the person concerned will be placed again in his/her former job. If retrospectivity is intended, one would normally look for additional words such as "with effect from the date of dismissal" or "with effect from (a particular date in the past) or "with back-pay and all benefits from ... (date)."

In the absence of any such words, the Municipality's interpretation was correct. The application should have been dismissed. The appellant has not asked for the costs of appeal.

The appeal is allowed. The order of the court *a quo* is amended to read:

> "The application is dismissed with costs."

Gubbay CJ: I agree.

Korsah JA: I agree.

*Chihambakwe, Mutizwa & Partners,* appellant's legal practitioners

*Muvingi & Machaya*, respondent's legal practitioners

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## INDUSTRIAL EQUITY LTD v WALKER 1996 (1) ZLR 269 (HC)

**Court** **High Court, Harare**

Bartlett J

Civil claim

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29 January & 20 March 1996 Judgment No. HH-30-96

## Flynote

Delict - fraud - defendant receiving shares sent to him in error and selling shares - whether knew that had no right to shares and sold them knowing had no right to do so

Unjust enrichment - whether general action for unjust enrichment exists - requirements for such action - defendant receiving shares sent to him in error and selling shares - whether defendant had been unjustly enriched at plaintiff's expense

## Headnote

The plaintiff was a company registered in Australia. A monumental error by the plaintiff's share registry led to the allocation to the defendant of a far larger number of shares than he was entitled to receive. The defendant subsequently sold these shares through a firm of stock brokers in England and used the proceeds thereof. The plaintiff claimed damages against the defendant on the basis of fraud and, alternatively, on the basis of unjust enrichment.

On the claim under the head of fraud, the court held that the defendant dishonestly took advantage of what he must have known was bad error in allocating him a far larger number of shares than he was entitled to receive. The defendant actually knew that the share allocation to him was in error or he consciously and wilfully abstained from taking such steps as would have led him to discover the truth because he did not want to have his suspicions confirmed. His subsequent negotiation of the sale of the shares wrongly allocated to him was fraudulent, in that it involved a representation that the shares belonged to him and had not been allocated



to him in error. He must have been aware that this deceitful conduct would cause harm to the plaintiff.

On the claim under the head of unjust enrichment, the court held that the time has arrived to recognise the existence of a general action of unjust enrichment in our law. This action will not open the floodgates for judicial intervention whenever the distribution of property does not seem to be consonant with equity. The requirements for liability for this action would have to be present and the courts can further control the ambit of this action by exercising a discretion to circumscribe liability according to the general sense of the justice of the community and the legal convictions of society. The requisites for liability for this action are:

*(a)* the defendant must be enriched;

*(b)* the plaintiff must have been impoverished by the enrichment of the defendant;

*(c)* the enrichment must be unjustified;

*(d)* the enrichment must not come within the scope of one of the classical enrichment actions;

*(e)* there must be no positive rule of law which refused an action to the impoverished

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person.

All the requirements for this action had been satisfied in relation to the plaintiff's claim. Because of the fraudulent conduct of the defendant and notwithstanding the negligence of the plaintiff's registry, the enrichment was unjustified on the basis of the general sense of justice and the legal convictions of the community and there was no reason why the claim should be refused.

The damages awarded on the main claim were calculated in pounds sterling and the damages on the alternate claim were calculated in Australian dollars. The court used its discretion given to it in terms of s 6 of the Prescribed Rates of Interest Act [*Chapter 8:10*] to order the interest on the amounts awarded to run from the date of service of summons. Rates of interest were to be at the rates of interest applicable in England and Australia respectively.

Cases cited:

*Atlas Organic Fertilizers (Pty) Ltd & Ors v Pikkewyn Ghwano (Pty) Ltd & Ors* 1981 (2) SA 173 (T)

*BB & H Eng v First National Bank of SA Ltd* 1995 (2) SA 279 (A)

*Blesbok Eiendomsagentskap v Cantamessa* 1991 (2) SA 712 (T)

*da Costa* v *Bank of Ceylon* (1970) 72 New Law Reports (Ceylon) 457

*Guthrie Overseas Invstm v GMHL Hldgs (Pvt) Ltd* HH-54-87

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



*Min of Police v Ewels* 1975 (3) SA 590 (A)

*Mutendi v Muramba* 1994 (2) ZLR 41 (H)

*National Employers General Ins Co Ltd* v *Jagers* 1984 (4) SA 437 (E)

*Nicols v Pearl General Ins & Anor* 1994 (1) ZLR 193 (H)

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

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

*Pretorius v van Zyl* 1927 OPD 226

*R v Meyers* 1948 (1) SA 375 (A)

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

*Standard Bank Financial Services Ltd v Taylam (Pty) Ltd* 1979 (2) SA 383 (C)

*Tobacco Finance (Pvt) Ltd v Zimnat Ins Co Ltd* 1982 (1) ZLR 47 (H); 1982 (3) SA 55 (ZH)

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*Walker v Industrial Equity Ltd* 1995 (1) ZLR 87 (S)

*Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & Anor* 1992 (4) SA 202 (A)

*Zimnat Insurance Co v Chawanda* 1990 (2) ZLR 143 (S)

Statutes referred to:

Prescribed Rate of Interest Act [*Chapter 8:10*], ss 5 and 6

*M J Gillespie*, for the plaintiff

*A P de Bourbon SC*, for the defendant

## Judgment

**INTRODUCTION**

**Bartlett J:** This trial commenced a number of years ago before the late Mr Justice Chinengundu. At the conclusion of the plaintiff's case the defendant applied for absolution from the instance. The late Mr Justice Chinengundu refused absolution but allowed the defendant to appeal against his decision to the Supreme Court before the matter proceeded to the defendant's case.

To set the scene and summarise the history of the matter I can do no better than to quote the first 5 pages of the judgment of Gubbay CJ in the appeal against the refusal to grant absolution - *Walker v Industrial Equity Ltd* 1995 (1) ZLR 87 (S). The learned Chief Justice stated as follows at 90G-94B:

> "[The plaintiff] sued [the defendant] in the High Court for damages in the sum of A$574 065 or the equivalent thereof in Zimbabwe dollars at the date of judgment, upon a main cause of action based on fraud or





> negligence; and, alternatively, for payment of the sum of £266 855,30 (Sterling) or the equivalent thereof in Zimbabwe dollars at the date of judgment, on the ground of unjust enrichment. Interest at an annual rate of ten *per centum* from the date of judgment and costs of suit, were also claimed.
>
> In his plea the defendant denied that he had acted fraudulently or negligently, and that he had been unjustly enriched or the plaintiff impoverished. In addition, he raised the specific defences of estoppel to the main claim and prescription to the alternative.
>
> The trial was presided over by the late Mr Justice Chinengundu. At the close of the plaintiff's case, counsel for the defendant applied for absolution from the instance in respect of both the main and alternative claims. The application was refused with costs. Against that order the defendant, with leave granted by the learned judge, now appeals.
>
> The facts established by the evidence adduced on behalf of the plaintiff, were these:
>
> *(l)* The plaintiff is a public company incorporated with limited liability according to the laws of the State of Victoria, Australia, with its registered office in Melbourne. It employed an agent, Registry Managers (Australia) (Pty) Ltd ("Registry Managers"), of Sydney, New South Wales, to manage its share register,

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issue share certificates, and record the transfer and transmission of shares.

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

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

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



BARTLETT J

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

(6) On 11 January 1985, share certificate 76620 was printed by Registry Managers reflecting the issue to the defendant of 104 bonus shares calculated on a holding of 209 ordinary shares. This share certificate bore the seal of the plaintiff and was signed by a director and secretary. It had endorsed upon it 1.2 Bonus entitlement. 11.1.85'. The error was, however, detected and the share certificate cancelled. Instructions were given to issue a new certificate. The defendant was only entitled to receive an allotment of 78 fully paid up ordinary shares valued at approximately A$500.

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

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

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

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



BARTLETT J

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

(12) On 3 June 1985, the shares were sold by a firm of stock- brokers in London. The amount realised was £266 855,30 or about £3,48 per share. Payment was made to the defendant.

(13) On 13 September 1985, the plaintiff was called upon by the Australian stockbroker, Patersons Securities Ltd ("Patersons") of Perth, to register the transfer of 76542 of its ordinary shares (being 76620 less 78).

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Initially it refused to do so on the ground that share certificate 77945 had been invalidly issued.

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

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

(16) On the date aforementioned the plaintiff wrote to Registry Managers claiming reimbursement of the total amount of A$579 466,50 for the loss suffered as a result of its negligence in issuing the erroneous share certificate to the defendant. Registry Managers acknowledged and discharged its liability in return for an assignment by the plaintiff of ***any*** rights of action it may have against either the defendant or any of the stockbrokers employed by him in the course of the transaction. A formal deed of assignment, dated 12 March 1987, to the above effect was signed on behalf of the plaintiff but not by Registry Managers.

Mr Michael Christie, a member of the Bar of New South Wales and an expert in the fields of commercial law and equity, was called to testify as to the plaintiff's legal obligation to sue the defendant. He said that the





deed of assignment, though lacking formal legal validity, constituted an equitable assignment according to the law of New South Wales. He explained further that, even in the absence of an equitable assignment, the principle of subrogation applied. In order to exercise its rights against the defendant, Registry Managers, as the indemnifier of the loss suffered by the plaintiff, was entitled to compel the plaintiff to render its name to any proceedings brought by subrogation; that the date of the institution of such litigation was irrelevant; and that the fruits thereof would belong to the indemnifier, Registry Managers, or its insurer. Mr Christie also proffered the opinion that if, for some technical reason, there was no right of subrogation, an Australian court would not permit the plaintiff to retain for itself the fruits of the litigation awarded against the defendant. For to do so would be to unjustly enrich the plaintiff at the expense of its indemnifier, Registry Managers. On this basis, as well, the plaintiff was under an obligation to sue the defendant."

The learned Chief Justice then considered the evidence and dismissed the appeal against the late Mr Justice Chinengundu's refusal to grant absolution from the instance.

The matter on being returned to the High Court was referred to myself and both parties agreed that the matter should not commence *de novo* and that it should proceed on the record, with the defendant's case commencing.

In view of the fact that a fully transcribed record had been prepared for the appeal in the Supreme Court, I was prepared to proceed as the parties requested.

The defendant's case consisted of the evidence of the defendant himself, of his business associate Mr Augustus, and of his legal practitioner Mr Masterson.

**WALKER'S EVIDENCE**

The substance of the defendant's evidence was that he had been employed as an expatriate teacher in Zambia from 1969-1982 and had used some of the money he was allowed to remit to purchase shares. He described himself as following in his father's footsteps in purchasing

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shares to provide for his future - as he was not entitled to a pension. He stated that he left Zambia in 1982 and came to Zimbabwe where he taught until 1987.

He described purchasing the shares in question for £175.00 in 1973 - the



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shares originally were in the name of a company called "Acmex". But in the late 1970s this company was taken over by the plaintiff company - and on the takeover the defendant's 1 000 shares in Acmex became 156 shares in the plaintiff company.

He stated that being in Zambia he was not privy to knowledge of the progress of the company - but that he did endeavour to look at English newspapers when possible. He accepted that in 1984 he signed papers agreeing to receive a bonus share entitlement of one for two - which would entitle him to a further 78 shares. He stated that when in March 1985 he received a share certificate telling him that he held 76 620 shares in the plaintiff company he was overjoyed with the windfall and thought that it was as a result of the restructuring of the company's capital. He accepted, however, that he had received no information from the plaintiff, that it was restructuring its capital in any way. He also accepted that he would normally have expected to receive such information if there was to be a capital restructuring. He agreed that he received the Annual Reports of the plaintiff company each year sent to him at his address in Harare. He also accepted that he would expect to receive information concerning the shares, dividends, possible allotments and restructuring in such Annual Reports. He said that he read the reports, glancing at them, but did not keep them. His share certificate was retained at his bank in England.

He stated that at a braai at his home he asked Mr Augustus, who was a Financial Consultant and a personal friend, and a Mr Dreyer of Standard Finance, whether the share certificate was valid. They looked at the share certificate, said that it was audited and appeared to be a valid and genuine certificate. He stated that he then asked his bank in London to check on the value of the shares and was overwhelmed when told of their value. He accordingly asked his bank to sell the shares on his behalf and transfer the proceeds to South Africa. His friend (Mr Augustus) whom he had consulted about the validity of the share certificate wished him to invest in an enterprise in which Mr Augustus was involved. This involved the purchase of plant and equipment in South Africa and the transfer of this plant and equipment to Zimbabwe.

It was Mr Walker's evidence that he arranged for £250 000 (some R619 000) of the proceeds of the sale of the shares to be transferred to South Africa - the remainder of some £16 000 remained in his account in England. R348 000 of the money transferred to South Africa was invested in Mr Augustus's operations.



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Before doing so, he and Mr Augustus went to South Africa and approached a firm of legal practitioners in South Africa to show them the share certificate to confirm its validity. It was

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Walker's evidence that in September on returning from a holiday at Kariba he received a letter from his bank in London telling him that the share certificate had been issued in error and that repayment would be required. He wrote to his bank expressing disquiet at the news but indicating at the end of the letter that he would need time to disinvest the proceeds of the sale.

He stated he subsequently received a series of rude and indeed threatening phone calls from Australia. He then consulted his legal practitioner and also went to see the plaintiff's Zimbabwean-based legal practitioners. He also had further correspondence with his bank and travelled to England in October to see both his bank (which he felt seemed to be sided against him) and the Humberside Fraud Squad. In England he spoke both to his Bank Manager and to a Detective Sergeant of the Humberside Fraud Squad and then returned to Zimbabwe.

He stated that on the advice of his legal practitioner he transferred all his financial holdings outside Zimbabwe outside of his name. In particular he transferred the balance of the English bank account into his wife's name and the remaining rands in South Africa (an amount in excess of R220 000) he transferred to Mr Augustus. He also transferred his house in Zimbabwe out of his name into his wife's name. In regard to the proceeds of the sale of the shares he stated that the R348 000 invested in Augustus's plant and equipment was still so invested. He described the remainder of the money as having been "blown against the wall". He spent all the remaining money on paying for his eldest son's sixth-form education in England, paying for various trips outside Zimbabwe for his youngest son, and paying for various holidays around the world for himself and his family.

**MASTERSON'S EVIDENCE**

Mr Masterson, the defendant's legal practitioner, gave evidence on the defendant's behalf. The effect of his evidence was that he did instruct the defendant to transfer assets held outside Zimbabwe into other person's names - so that the plaintiff would not be able to attach assets to found jurisdiction outside Zimbabwe. The rationale, as explained by Mr Masterson was that he was seeking to ensure that any litigation that took place, would take place in Zimbabwe - and not outside Zimbabwe where the defendant would be financially disadvantaged.



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**AUGUSTUS'S EVIDENCE**

Mr Augustus, the defendant's friend and financial adviser, also gave evidence. The effect of Augustus's evidence was that he was shown the share certificate at a braai and advised the defendant that the share certificate was apparently valid. He accepted that he was not told the background of the defendant's shareholding in the plaintiff company. He stated that he went with the defendant to South Africa and that they saw a legal practitioner in South Africa, with whom they also queried the validity of the share certificate. He accepts that that legal practitioner was also not told the background of the defendant's shareholding in the company. Augustus accordingly indicated that he advised the defendant as to the validity of the share certificate and wished the defendant to invest in his venture. He stated that he had been trying for two years to obtain financial assistance in the venture that he was contemplating - but that if

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the defendant had not assisted he was sure that he would have within one to three months at the most made alternative arrangements.

Augustus's evidence was that the defendant's present interest in Augustus's company was in the form of a large loan account.

**ASSESSMENT OF EVIDENCE**

At the conclusion of the defendant's case on 29 January, counsel agreed that it would be appropriate to present written argument as opposed to making oral submissions. It was agreed that Mr *Gillespie* would submit written argument on behalf of the plaintiff by 2 February, that Mr *de Bourbon* would submit written argument on behalf of the defendant by 8 February, and that Mr *Gillespie* would submit his reply by 13 February. This was done. I am grateful to learned counsel for the provision of their detailed written submissions. I turn now to assess the evidence and argument.

In assessing the evidence led by the plaintiff I simply reiterate the facts found established by the Chief Justice in the cyclostyled Supreme Court judgment to which I have referred. I am quite satisfied that those facts were clearly established in the plaintiff's case. Mr *de Bourbon* did not suggest otherwise.

**ASSESSMENT OF THE CREDIBILITY OF WALKER**

I turn now to assess the credibility of the defendant. In assessing the



credibility of Walker, I will endeavour to adopt the approach to the assessment of a witness's evidence as laid down in *National Employers General Insurance (Pvt) Ltd v Jagers* 1984 (4) SA 437 (H) at 440-1 (which approach I also followed in *Nicols v Pearl General Insurance & Anor* 1994 (l) ZLR 193 at 195C-196C.) I would emphasise, as stated in *Jager*'s case, that the estimate of the credibility of a witness is inextricably bound up with a consideration of the probabilities of the case and that it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.

Walker was a quiet-spoken man who gave his evidence clearly. No particular criticism can be directed at his demeanour. The content of his evidence, is, however, in my view so wildly improbable as to completely erode his credibility.

Walker accepts that he was experienced in the purchase of shares. He stated that his father had purchased shares on a regular basis in order to finance his retirement and that he followed in his father's footsteps. He in fact stated that his first investment in the share market was when he was aged 18. At the time of the events concerning this case he would have been some 43 years of age and would have had 25 years of experience of investing in stocks and shares. I accept his statement that his investments were not made regularly and that most of them occurred during his time in Zambia when he had ready access to foreign currency. It is,

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however, clear that he was not a naïve first-time investor and that he was well aware of the nature of investments in share equity. He was also a mature, educated man at the time of the events of this matter and indeed on his own evidence taught amongst other things Business English and Commerce.

He also accepted that he regularly received annual reports from the plaintiff company which he glanced at. He accepted that these reports would deal with dividends, share allotments and would have dealt with aspects such as share restructuring. The defendant also accepted that he was well aware in early 1985 that he held approximately 150 shares in the plaintiff's company and also well aware that the bonus share issue which he had accepted would entitle him to a one for two entitlement - that is a further 78 shares.

He accordingly accepted that he well knew that his shareholding in the plaintiff company prior to receiving the share certificate in question was just over 200 shares. He also stated that his valuation of these shares at this time was in the vicinity of A$1 000.

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Against this background for the defendant to seriously suggest that he believed that he had received the 76 000-odd shares worth in excess of £265 000 or A$500 000 as a result of a corporate restructuring is to my mind (as already indicated) so wildly improbable as to be completely destructive of any credibility the defendant might have hoped to attach to himself. To put it bluntly, I am quite satisfied that the defendant was not being honest. I am satisfied that he well knew when he received the share certificate that he was the beneficiary of a clear error by the plaintiff and that he subsequently decided to take advantage of the apparent validity of the share certificate to turn the matter to his very significant financial advantage.

His efforts to explain his belief in such a windfall being legitimate were lamentably vague and unconvincing. In simple terms he knew from his own evidence that he had just in excess of 200 shares worth just about $1 000. To state that he believed that a corporate restructuring had taken place resulting in those shares multiplying to in excess of 76 000 in number and £265 000 in value (some A$574 000) is simply ridiculous. I am surprised that the defendant could put such palpable nonsense before the court and expect to be regarded as credible. He did not even attempt to describe how he thought a corporate restructuring would result in shares worth A$l 000 suddenly becoming worth A$574 065. Such things do not happen in the real world. Although I would like to be charitable and say that Walker was staring through the looking glass with rose-tinted spectacles, in fact I have little doubt that he was dishonestly taking advantage of what he must have known to be a monumental error in the accounting system of the plaintiff's share registry. He was to quote the newspaper headline from the Sunday Telegraph which he produced as an exhibit making a "Sublime profit from the ridiculous". Even Walker seemed sometimes to realise the sheer improbability of the version he was hoping the court would be naïve enough to believe. For example, when asked if he actually believed that a corporate restructuring would change 200 shares into 76 000 his hesitant answer was - "I suppose so. Yes". He later conceded that with the benefit of hindsight it was easy to "see his mistake", but maintained that at the time he thought it was genuine windfall.

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I have considered the defendant's evidence with care and I am satisfied that his evidence was totally unworthy of belief. His actions subsequent to the receipt of the share certificate are also consistent with a dishonest and fraudulent approach on his part - or at the very least a fraudulent diligence in ignorance. On his own evidence (and on the evidence of his Financial Consultant, Augustus) he did not tell Augustus or the attorney in South Africa





the full facts when querying the validity of the share certificate. He did not tell either of them that prior to the issue of the share certificate he was of the view that he held only just over 200 shares at a value of A$l 000. He did not tell either of them that he had received no indication of any share restructuring exercise by the plaintiff company. All he did was ask them whether what was *prima facie* a valid share certificate appeared to be valid. If he had told them the background there is little doubt that at least the attorney in South Africa, would have counselled caution and suggested contacting the plaintiff company to clarify the position.

If the defendant genuinely believed that he was the beneficiary of a windfall, he would, to my mind, have clearly stated the full facts to the persons from whom he was seeking advice. By concealing the critical relevant facts - which to my mind an honest person in the position of the defendant would have mentioned - he was providing further evidence of the dishonesty of his stance.

A further aspect which to my mind confirms the complete lack of credibility on the part of the defendant and his apparent dishonesty relates to his conduct in regard to the proceeds of the sale on finding out that there was a mistake. An honest man, to my mind, realising that there was a mistake, would also realise that there would be at least a substantial possibility of a repayment being ultimately ordered. In those circumstances an honest man, although he might seek the matter to be resolved in court, would not, I believe, have made it as difficult as possible for the plaintiff to recover any proceeds should the litigation be successful.

This is precisely what the defendant has done. While I can understand the defendant wishing to ensure that litigation took place at his home base in Zimbabwe, I do not think that an honest person in the defendant's position would have spent very substantial portions of the proceeds of the sale after finding out about the mistake and realizing the possibility of litigation. In this regard it is the defendant's own evidence that some R220 000 (or more than a third of the proceeds) was "blown against the wall" - been spent on educating children and the various holidays around the world for the defendant and his family. The defendant has also transferred his house out of his name into his wife's name in view of a will he had drafted and also, in his own words, "in case he lost the litigation". To my mind an honest person in the defendant's position would at least in regard to the proceeds not invested in Augustus's venture have ensured that such proceeds were placed in an interest-earning account to await the result of the litigation.



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The effect of the defendant's stance is that he has done his best to place himself in a position where, were the plaintiff to win, it would be very difficult for it to recover the proceeds from him. The defendant indicated that his attitude might have been different if the plaintiff had treated him differently. The plaintiff might not have been as polite in its approach towards the defendant as it should have been - in view of its own serious negligence - but even if the defendant did receive a series of phone calls from Australia which became threatening, that would not, to my mind, justify his actions in divesting himself as far as possible of the proceeds of the sale.

A further factor which goes substantially against the credibility of the defendant's version is his failure given the background factual situation (knowing that he had previously owned only just over 200 shares worth $l 000) to contact the plaintiff to confirm the correctness of the certificate. The plaintiff's address and phone numbers were emblazoned across the documents sent to the defendant and to my mind an honest person in the defendant's position, given the facts of which he was aware, would have contacted the plaintiff to establish whether the certificate was correct.

I am aware of Mr *de Bourbon's* submission that the defendant's holding onto the shares for just under three months before selling them, indicates a genuine belief that they properly belonged to him. I do not consider that aspect goes anywhere near outweighing all the other aspects I have pointed to and which emphasise the contrary.

I have also carefully considered the submissions made by Mr *de Bourbon* in regard to the defendant's credibility and have taken full account of them in making my findings. I accept that Walker did not lie and pretend that he thought he had more than 200 shares; that he did not lie and say that he thought they were worth more than $l 000; that he did not lie and suggest that he did not receive the annual reports; that he did not dispute that such reports would refer to any possible restructuring; that he did not suggest that he had no understanding or experience of dealing in shares. If he had chosen such a route he, to my mind, would probably have found the gullies and crevasses he would have had to face under cross-examination difficult to cross without slipping. I emphasise, however, that it is the content of Walker's evidence which I have found destructive of his credibility.

A factor which Mr *de Bourbon* might, to my mind, have mentioned but did not, is Walker's visit to the Humberside Fraud Squad as being indicative of his honest approach. I also, however, do not consider that this outweighs all



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the other factors I have endeavoured to analyse. The fraud, if the criminal aspect of it had been pursued, would very likely have been the concern of the Australian authorities. It was an Australian company which had been prejudiced by a misrepresentation in regard to its shares. The only English connection was that the shares were sold by a firm of stockbrokers in London. A visit to England would very probably be of extremely limited interest to any English fraud squad. If the defendant had gone to Australia to see the plaintiff and the relevant Australian

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Fraud Squad, that may have been a matter which would have enhanced the defendant's credibility.

Overall, I am quite satisfied that the defendant was not a truthful witness.

**THE CREDIBILITY OF MASTERSON**

The defendant's legal practitioner Mr Masterson's evidence, as I have indicated, was to the effect that he instructed his client to make sure that all assets he held outside Zimbabwe were held in the name of another person in order to prevent litigation taking place on foreign soil. While that approach is understandable, it has as its converse side (as Mr Masterson conceded) the effect of hiding assets from creditors.

As I have already indicated, the overall actions of the defendant, to my mind, go far beyond simply following the advice of his legal practitioner. I accept, however, Mr Masterson's evidence of the advice he gave and have taken that into account in assessing my view of the credibility of Walker.

**CREDIBILITY OF AUGUSTUS**

Augustus was, and is, a close personal friend of the defendant and his evidence needs to be considered against that background. Augustus's initial role was to advise the defendant on the validity of the share certificate. He was, not, however, informed of the defendant's previous shareholding in the company and its previous value. He was also not informed that the Annual Reports and the documentation from the company had not referred to any proposed share restructuring.

Augustus's advice was limited to the apparent validity of the shareholder certificate - a certificate which it is common cause was *prima facie* valid. Augustus was, however, it is apparent, well aware of the windfall nature of the accrual to the defendant. He apparently, however, made no effort to establish the background of the matter - that is the number of shares the





defendant previously had and any indication (from Annual Reports or other documents) as to whether a capital restructuring was envisaged. It is perhaps surprising that given this background knowledge of the defendant's surprise and joy that such a basic query did not come to Augustus's mind. Augustus, like Walker, tended to emphasise the audit stamp and the apparent validity of the certificate. As indicated, he apparently did not seem to see the need to go further. The visit to the attorney in South Africa undertaken by Augustus and Walker further indicated the determination to limit the amount of information put in front of other people. Augustus agreed that the attorney was shown only the share certificate and not advised of any background factors such as, the previous shareholding, the value of the previous shareholding and the absence of any indication of capital reorganisation.

Augustus's evidence is also coloured by the fact that he, at the time of Walker's "windfall", was in need of financial participation in the venture he was undertaking. He very clearly perceived of

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Walker's new wealth as an opportunity to be turned to his (and in fairness) Walker's financial advantage. Augustus himself stated that he had spent some two years trying to arrange the finance for the project he wished to undertake. His suggestion that if Walker's money had not been available he would have obtained financing within one to three months is, to my mind, decidedly improbable. For example, at the end of his evidence under cross-examination, when he was asked whether Walker would have been able to disinvest in order to repay the plaintiff, Augustus very emphatically stated that there was no possibility of Walker getting the money back from him. If the project was so attractive and Augustus and Walker were as close as they apparently were, it is difficult to understand why given a period of time alternative financing could not have been put in place.

The overall impression I clearly formed from Augustus's evidence was that his concern went little further than the apparent validity of the share certificate and the financial advantage that could be obtained for his friend and himself from the utilisation of the shares. Augustus did not give the impression of being an objective and careful financial adviser fully considering all the possibilities and making sure that full instructions were received. Indeed, even the defendant's own counsel effectively thought as much when he stated as follows in written argument:

> "In any event, it must be considered whether in fact the motivator in this matter was the defendant, and not perhaps Augustus. This is the line that was suggested to Augustus when he was cross-examined. It is a very



> probable version of what transpired. Augustus had been looking for some years for an investor to go with him into the brick-making business. Although Augustus anticipated another possible investor within a short period of time, his friend, the defendant, had the capital with which to invest in the business. Having ascertained the value of the shares, it is not difficult to envisage that Augustus - bearing in mind his personality and his background, and his worldliness - was able to persuade the defendant to encash his windfall as a means of investing in the brick-making business."

Since I am satisfied that Walker did not give full instructions to Augustus, I am satisfied there is no basis on which Walker could sensibly and honestly have sought to rely on Augustus's advice. But the firm impression I obtained from Augustus's demeanour was that he saw an opportunity inherent in the apparent validity of the certificate and was little concerned with anything else. He did not impress as an independent or reliable witness. Walker, I am satisfied, tended to use him as a buttress to fortify Walker's dishonestly formed view that the share certificate was valid. While it cannot be specifically stated that Augustus also knew it was invalid (though in view of the friendship of the two and the discussion of the huge windfall the probabilities do point that way), I have no doubt that Augustus served as a willing buttress - certainly not asking any of the awkward questions which an objective and thorough financial adviser would have and which would have led to a differing conclusion as to the validity.

**APPROACH TO BE ADOPTED IN VIEW OF FINDINGS ON CREDIBILITY**

The approach to be adopted in view of my findings on credibility is as set out by Gubbay CJ in *Walker v Industrial Equity Ltd supra* at 96E:

> "If it can be shown, however, that the shareholder actually knew that the representation contained in the share

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certificate was false, or consciously and wilfully abstained from doing that which as a matter of business he would do, being afraid of discovering the truth, he would be prevented from setting up an estoppel. See *Parbury*'s case (1895) 1 Ch l00 at l06; *Bondi & Anor v Wood NO* AD 74/75 (not reported).

The principle that in civil proceedings fraud is not lightly to be inferred is well established and unquestionably correct. See *Gates v Gates* 1939 AD 150 at 155; *Gilbey Distillers & Vintners (Pty) Ltd and Ors v Morris*



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*NO & Anor* 1990 (2) SA 217 (SEC) at 225J-226A. It is applicable, however, in relation to an alternative likely innocent explanation proffered by the litigant against whom the allegation was made and the inferential evidence led. It is at that stage that the explanation is to be balanced against the evidence and caution exercised ...

It need not be the only inference or indeed the readiest inference. The court is not required to weigh up different possible inferences, but merely to determine whether one of the reasonable inferences is in favour of the plaintiff. See *Marine & Trade Insurance Co Ltd* v *van der Schyff* 1972 *(l)* SA 26 (A) at 38H; *du Toit v Vermeulen* 1972 (3) SA 848 (A) at 855D."

Mr *de Bourbon* also accepted in his written argument that this was the correct approach to adopt.

Mr *de Bourbon* further accepted that the approach to establishing fraud as suggested by Mr *Gillespie* for the plaintiff was correct. This approach is as set out by Greenberg JA in *R v Myers* 1948 *(l)* SA 375 (A) at 382:

"I think it can be summed up, for the purposes of the present case, by saying that if the maker of a representation which is false has no honest belief in the truth of his statement when he makes it, then he is fraudulent. (There may be other factors, such as materiality or inducement, but they are not relevant to the point I am discussing). At p 374 of the report in *Derry* v *Peek*, Lord Herschell said:

> ... fraud is proved when it is shown that a false representation has been made *(l)* knowingly or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in its truth.'

But the passage which follows this quotation limits the essentials of fraud to the second requirement, with the additional qualification that the belief must be honest; it reads:

> To prevent a false statement being fraudulent, there must, I think, always be an honest belief in the truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief.'



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The affirmative manner in which this statement is made does not mean that the onus rests on the person charged with making a fraudulent representation to prove his honest belief; the onus is on the party making the charge to disprove it. The requirement that the belief should be honest is referred to in Halsbury (2 ed, vol 23, s 59), where it is said that a belief is not honest which,

> though in fact entertained by the representor may have been itself the outcome of fraudulent diligence in ignorance - that is, of a wilful abstention from all sources of information which might lead to suspicion, and a sedulous avoidance of all possible avenues to the truth, for the express purpose of not having any doubt

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thrown on what he desires and is determined to, and afterwards does (in a sense) believe.'"

**FINDINGS OF FACT IN CONSEQUENCE OF APPROACH TO BE ADOPTED**

From my analysis of the credibility of Walker, I am satisfied that it has been established at the very least on a balance of probabilities by the plaintiff that the defendant actually knew that the representation contained in the share certificate was false, or consciously and wilfully abstained from doing that which as a matter of business he would do, being afraid of discovering the truth. The failure to contact the plaintiff in view of his background knowledge as to his "previous" holding and his failure to tell any of his "advisers" anything like the full facts are hallmarks of the latter aspect.

Furthermore as stated above "the inference of fraud need not be the only inference or indeed the readiest inference. The court is not required to weigh up different possible inferences, but merely to determine whether one of the reasonable inferences is in favour of the plaintiff." I have no doubt that one of the reasonable inferences is that the defendant's conduct was fraudulent. I should emphasise, however, that my clear view from my assessment of the credibility of the defendant is that he actually knew that the representation contained in the share certificate was false.

Applying the test laid down in *R v Myers supra* I am satisfied that the plaintiff has established once again at the very least on a balance of probabilities that the requisite false representation was made knowingly or without belief in its truth or recklessly, careless whether it be true or false.

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BARTLETT J

If those criteria were not met (and I am satisfied that they have been), I am satisfied that fraud in the sense of a "fraudulent diligence in ignorance" as also outlined in *R v Myers supra* has been proven. Accordingly, the requisite fraudulent intent has been established by the plaintiff and the defendant cannot seek to raise the question of estoppel based on the apparent validity of the share certificate.

I am also satisfied that Mr *Gillespie* is correct when he argues that Walker could not possibly have held any honest belief that the share certificate was correct and that his decision to negotiate it was fraudulent, in that it involved a representation that he did hold the shares reflected on the certificate. Similarly, I am satisfied that Mr *Gillespie* is correct when he states that Walker undertook the sale in circumstances where he could not possibly have been unaware of the consequence of harm to third parties, and particularly to the plaintiff, which consequence was the inevitable result of his deceitful conduct.

On the basis of my findings, the plaintiff is entitled to judgment on its main claim for damages under the head of fraud. The amount of damages and the rate of interest and date from which it should run, I will consider after dealing with the alternative claim.

**UNJUST ENRICHMENT**

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I turn now to consider the alternative claim based on unjust enrichment. I do this should my findings on the main claim be found to be incorrect.

The first aspect I need to consider in relation to the question of unjust enrichment is prescription. As Gubbay CJ pointed out on p 91 of *Walker v Industrial Equity Ltd supra* the defences of denial and of prescription were raised in respect of the alternative claim of unjust enrichment.

The cause of action arose in June 1985, and summons was served in March l986. But the amendment to the declaration introducing the claim of unjust enrichment was only made in about February l992 - and this arguably (as submitted by Mr *de Bourbon* before the late Chinengundu J) amounted to making a claim which had prescribed. However, the late Chinengundu J in his judgment refusing absolution did not deal with the question of enrichment or the question of prescription relating to the enrichment claim. The learned Chief Justice dealt with this by stating at pp 98 of *Walker vB Industrial Equity supra* that -



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

The learned Chief Justice then proceeded to deal with the enrichment claim, saying:

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

Accordingly, no mention was made in the Supreme Court's decision of the plea of prescription to the alternative claim and indeed the learned Chief Justice commented at some length on the possible cogency of the unjust enrichment claim. It would therefore appear from the Supreme Court's judgment that the plea of prescription in respect of the alternative claim of unjust enrichment was not proceeded with by the defendant. Certainly, there was not a whisper of prescription in the evidence or argument at the resumed trial. (And I was not referred to or asked to consider the argument addressed to the late Chinengundu J). Although I am in something of a quandary and had expected the matter to be dealt with in the written submissions, it is not my function to raise such a question. Accordingly, I consider I can only assume that I am correct that the question of prescription was disposed of in the Supreme Court hearing.

I now turn to consider the question of the alternative claim of unjust enrichment. Mr *de Bourbon* did not raise in argument the question of the applicability of the English law of enrichment - accordingly the matter will be resolved on the basis of whether a general action for unjust enrichment exists under the Roman-Dutch law. Mr *de Bourbon* elected not, in his written submissions, to enrich "this forum" with argument on the existence or otherwise of such an action. I hope I am not being unjust to Mr *de Bourbon* but I would have thought that if he wished,

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on behalf of the defendant, to argue as to the non-existence of a general enrichment action in Roman-Dutch law, he should have done so in this court. This is not a matter where the





defendant can wait until the Supreme Court before deciding to argue the matter. This court although regarding the leading South African decision on the existence of a general enrichment action - *Nortje en 'n Ander v Pool NO* l966 (3) SA 96 (A) - as extremely persuasive, is not bound to follow that decision. Mr *de Bourbon* did not seek to argue otherwise. It is therefore surprising, if the defendant sought to dispute the existence of a general enrichment action in Roman Dutch law, that his counsel chose not to respond to the very detailed submissions made as to the existence of such an action by Mr *Gillespie* on behalf of the plaintiff. Accordingly, without the benefit of having before me an argument to counter the submissions put forward by Mr *Gillespie*, I must proceed with particular caution and care in assessing Mr *Gillespie's* submissions as to the existence of a general enrichment action in Roman-Dutch law.

**THE DECISION IN *NORTJE EN 'N ANDER v POOL***

The starting point is consideration of the leading decision in *Nortje en 'n Ander* v *Pool supra* which has now stood as the law in South Africa for close on 30 years. In regard to unjust enrichment the majority of the court (Botha JA, Williamson JA and Wessels JA) held "in so far as the appellant's reliance upon a general enrichment action was concerned, that our law does not regard the rule against unjust enrichment as creating a legal obligation independently of one or other recognised enrichment action and regardless of particular circumstances". Ogilvie Thompson JA dissented on other grounds, but did not decide the general enrichment point.

The remaining judge, Rumpff JA, gave a dissenting judgment on the general enrichment point but did not reach a final opinion on the issue since he considered that an action lay under a *condictio sine causa generalis* and also since he held that inadequate argument had been advanced on the general enrichment action.

As Mr *Gillespie* pointed out in his written argument, Rumpff JA cited with approval (at p 119E-G) the statement by de Villiers JP in *Pretorius v van Zyl* l927 OPD 226 at 229 as follows:

> "The doctrine against enrichment is well established as a part of the Roman-Dutch law, but I hesitate to make any general statement as to the scope of its application. The doctrine has been recognised by the Appellate Division in several cases, for instance, *Rubin v Botha* 1911 AD 568; *Fletcher v Bulawayo Waterworks* 1915 AD 636; *Lechoana*





> *v Cloete* 1925 AD 536. It is true that these three cases deal with the occupation of land, but the doctrine against enrichment is in them applied in circumstances where the law as to compensation for improvements on landed property does not apply; in other words, in circumstances which would equally well have warranted its application to any other cases of enrichment. On general reasoning, too, it seems reasonable to suppose that the doctrine against enrichment, as it exists at all, must necessarily be of general application."

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Rumpff JA (at p 119C-E) also approved the statement by Professor Scholtens in the *Annual Survey of South African Law* 1956 at p 185 where the learned Professor stated:

> "Unjust enrichment was recognised as a source of obligation in the Roman-Dutch law, although the requirements for a general action on unjust enrichment had not yet been worked out. (Besides Grotius 3.30, van Leeuwen *Romeinse Hedendaegse Reg* 4.1.9 mentions obligations as arising out of *baattrekking*'. For the practice of the law, see *Obs.Tum.*303 and 2751. Barels, *Advysen over den koophandel en zeevaert* contains various legal opinions in which the rule *neminem debere locupletari cum alterius injuria* is invoked. The rule is even referred to as one of the best-known rules of law; Vol.11, pp. 32, 49, 79, 135, 156 and 173; *cf* also *Holl. Cons.* 1.255)."

The learned Judge of Appeal (as Mr *Gillespie* pointed out) also made a cogent call for the recognition of a general enrichment action in our law saying at p 117 A-B:

> "I refer both to the development in Europe and beyond and to the development in South Africa since I consider that there is there to be found good support for the argument that a general action can be distinguished and the decisions wherein it is found that no such action exists are to be approached with great caution. I also refer to the development in support of my finding that an appeal may properly be made to the enrichment action in the case at hand."

(The translation from Afrikaans is Mr *Gillespie*'s, with which I concur).

In Zimbabwe, Gubbay CJ in *Walker v Industrial Equity Ltd supra* referred to *Nortje en 'n Ander v Pool supra* at p 98H stating:

> "The majority judgment of the Appellate Division of South Africa held

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

I would add, from my researches, *Guthrie Overseas Investment* v *GMHL Holdings (Pvt) Ltd* HH-554-87 to the list of the learned Chief Justice. In that case Greenland J accepted without hesitation the earlier decisions mentioned by the learned Chief Justice. Ironically in *Guthrie*'s case Mr *de Bourbon* was arguing for the acceptance of the claim on the basis of unjust enrichment. The learned Chief Justice at 99D of *Walker* v *Industrial Equity Ltd supra* after referring to the trenchant criticism of the restrictive approach in *Nortje en 'n Ander v Pool* by leading academics, observed that Botha JA (in *Nortje*'s case at 139E) was nevertheless of the opinion that the time may come when South African law will be ripe to accept and integrate a general enrichment action.

**ACADEMIC CRITICISM OF THE MAJORITY DECISION IN *NORTJE EN 'N ANDER v POOL NO***

As Gubbay CJ pointed out, the tide of criticism that has built up against the majority decision in *Nortje en 'n Ander v Pool supra* is considerable - see Scholtens l966 *SALJ* 391-402, van der

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Walt (l966) 29 *THR-HR* 374 *et seq*; van Zyl l992 *Acta Juridica* at 115-130; de Vos *Verrykingsaanspreeklikheid in Suid-Afrikaanse Reg* 3 ed at 311 *et seq*; Zimmerman *The Law of Obligations* at 886-887 and (1985) l8 *CILSA* 1 *et seq*; Eiselen and Pienaar *Unjustified Enrichment - A Casebook* at 22-23. See also Scholtens l969 *SALJ* 131; De Vos l969 *SALJ* 227; *Annual Survey of South African Law* l966 150-155. The nub of the criticism is summarised by Scholtens in the l966 *Annual Survey of South African Law* at p 150 where the learned Professor states:

> "The learned Judge of Appeal (Botha JA) only cursorily dealt with the position in the old Roman-Dutch law, confining himself to the statement that in his opinion Professor Wouter de Vos *(Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (l958), p 76), on a survey of the specific



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> enrichment actions as formulated by the Roman-Dutch authors, had rightly concluded that in the Roman-Dutch law of the seventeenth and eighteenth centuries there had been no question of a general enrichment action. However, since Professor de Vos wrote his excellent thesis, further Roman-Dutch authorities have come to light, especially in W. Pauw's *Observationes Tumultuariae Novae. Obs. Tum.* nos. 227, 303, 2751, and *Obs. Tum. Nov*., nos. 12, 196 and 558, clearly show that the Hooge Raad recognized unjust enrichment as a general source of action. Pauw (*Obs. Tum. Nov.* No. 12) emphasized that, failing another action, an action based solely in equity would lie in order to prevent the enrichment of one person to the detriment of another".

Professor de Vos himself acknowledges his error (on which Botha JA relied) in the l969 *SALJ* at p 230 where the learned Professor stated:

> "Finally reference must be made to the case reported in *Observationes Tumultuariae* No. 303 ... Contrary to the view originally put forward by the present writer, this case can no longer be considered as an isolated instance of the granting of a general enrichment action in the classical Roman-Dutch law. It is submitted that Professor Scholtens is undoubtedly right when he contends that as a consequence of the further cases where a general enrichment action was granted, which have now become known as the result of a publication of *Pauw's Observationes Tumultuariae Novae*, it must be accepted that the Roman-Dutch law had, in practice, advanced beyond the point of a mere patchwork of specific actions and that a general action on unjustified enrichment had developed".

Professor Scholtens demonstrates in the l966 *SALJ* at 391-402 that Grotius acknowledged a general action for unjust enrichment (see also Zimmerman *The Law of Obligations* 885). The learned Professor also outlines how the decisions of the Hooge Raad of Holland collected by Bynkershoek & Pauw can be demonstrated to consist of a number of precedents understandable only on the basis of acceptance by the Hooge Raad of a general enrichment action. The learned Professor concludes his analysis of the Roman-Dutch authorities by pointing out that in regard to the recognition of the general enrichment action "from the above cases reported by Bynkershoek & Pauw it is clear that the Roman-Dutch law of the l8th Century had advanced far on this road of progress, nay, that it had arrived at its destination."

Van Zyl in the "General Enrichment Action is Alive and Well" l992 *Acta Juridica* l992 p 115-30 traces the development of the general enrichment



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action through Roman law, Medieval Roman law and its acceptance by the Roman-Dutch writers (Grotius, Huber, van Bynkershoek and Pauw). He also analyses the acceptance of the general enrichment action in French and German law. He concludes by submitting that:

> "The time has indeed arrived to give full recognition to a general enrichment action in South African law. I respectfully believe that, if the court sitting in *Nortje* v *Pool* had had the benefit of a more complete argument on the existence of this action in Roman-Dutch law, it would not have hesitated to accept it as part and parcel of our law. In this regard its existence in a number of modern European legal systems would certainly have presented additional cogent and persuasive authority for its acceptance in a legal system which prides itself on its long and illustrious traditions."

Accordingly the clamour from the most respected of academic writers for recognition for the incorrectness of the majority decision in *Nortje v Pool* is overwhelming. It is also based on an analysis of the classical and ancient authorities which is both impressive and, to my mind, unimpeachable (which in fairness to Mr *de Bourbon* is the probable reason why he chose not to enter the fray).

**JUDICIAL CRITICISM OF THE MAJORITY DECISION IN *NORTJE v POOL***

As Mr *Gillespie* pointed out there has been considerable judicial pressure, as well as academic pressure, to depart from the majority decision in *Nortje v Pool*. In *Blesbok Eiendomsagentskap v Cantamessa* l99l (2) SA 712 (T), van Zyl J (the author of the article in *Acta Juridica* l992) stated as follows - as summarised in the headnote:

> "*Semble*: The time has arrived for recognising a general enrichment action as it existed in our common law. Not only is there a degree of artificiality involved in clinging to the so-called recognised enrichment actions' created to cater for special circumstances, but the continuing *ad hoc* extension of the principle of enrichment to provide for new cases clearly demonstrates that there is a need for a general enrichment action."

Then in *Kommissaris van Binnelandse Inkomste en 'n Ander* v *Willers en Andere* l994 (3) SA 283 (A) the Appellate Division observed as follows, quoting from the headnote:





> "The words of Innes CJ in *Blower v van Noorden* l909 TS 890, as quoted in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & Anor* 1992 (4) SA 202 (A) at 220E-G, give rise to the idea that the majority of the court in *Nortje en 'n Ander* v *Pool NO* 1966 (3) SA 96 (A) was possibly inimical to the recognition of a general enrichment action because the determination and laying down of general and universally applicable norms in order to establish and limit liability was regarded as an undertaking of a legislative rather than a judicial nature. Such a view of the matter cannot mean, however, that the court is precluded from accepting liability for enrichment in a particular case merely because liability has not previously been recognised in the same, or even similar, circumstances. In such a case attention will naturally have to be given to the question whether the extension or new development is necessary or desirable, and in addition consideration will have to be given to existing precedents, both old and new, and obviously also to the contributions of academic writers who have devised proposals of general criteria for the establishment and limitation of liability. (At 333B/C-E/F, read with 333A-B/C.)"

Furthermore in *B & H Engineering* v *First National Bank of SA Ltd* 1995 (2) SA 279 (A) 295B-D the Appellate Division (albeit *obiter*) recognised the existence of an enrichment action on equitable grounds in circumstances where a bank, unable to proceed on a *condictio sine*

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*caus*a against the payee of a cheque countermanded by the drawer, ought nevertheless to enjoy a right of recovery against the drawer. In this regard Grosskopf JA stated at 295A-D:

> "The result is that the Bank was not entitled in this case to claim repayment from the payee. In principle the Bank would, however, in my view, have had a claim in enrichment against the drawer. As a result of the Bank's payment to the payee, the drawer has been unjustifiably enriched at the expense of the bank. Stassen and Oelofse (*op cit* at 145) suggest that the remedy available to the Bank in such circumstances arises from *quasi negotiorum gestio*. In this regard they refer to *Odendaal v van Oudtshoorn* 1968(3) SA 433 (T), *du Preez v Boetsap Stores (Pty) Ltd* 1978 (2) SA 177 (NC) and *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd* 1979 (2) SA 383 (C). See also *Blesbok Eiendomsagentskap v Cantamessa* l99l (2) SA 712 (T) at 717J - 718F and *Kirsten & Anor* v *Bankorp Ltd & Ors* 1993 (4) SA 649 (C) at 6591. It is not necessary toconsider whether the principles of *quasi negotiorum gestio* are strictly and literally applicable to facts such as the present. Even if they are not, this case is so closely analogous, and the need for equitable relief so clamant, that an action on



> the grounds of unjustified enrichment should lie (*cf Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere* 1994 (3) SA 283 (A) at 333C-E."

Further afield in Sri Lanka, the existence of the general enrichment action in the Roman Dutch law was positively recognised as long ago as 1970. In *da Costa v Bank of Ceylon* (1970) 72 New Law Reports (Ceylon) 457 Weeramantry J specifically disapproved of *Nortje's* case on the basis that it led to a principle "vibrant with life and struggling for growth being locked ... in tight compartments, a prisoner of the past" (as cited in Zimmerman, *The Law of Obligations* at 887).

In addition to the academic pressure there is therefore also a more than respectable build up of judicial support for the existence of a general enrichment action.

A related factor, as pointed out by Mr *Gillespie,* is the continued expansion of the traditional enrichment actions. For example, the *condictio indebiti* has been enlarged so as to admit an action for enrichment where the mistake is one of law - see *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A) at 220E-221C and 224B-C. Similarly, the *actio negotiorum gestorum contraria* has been extended to allow relief on the grounds of unjust enrichment to a gestor who has managed *sui lucra causa* the affairs of the *dominus* - *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd* 1979 (2) SA 383 (C), van Zyl, Negotiorum Gestio *in the South African Law* 85 at 90-99. Mr *Gillespie*'s argument is that the time is accordingly ripe to recognize not only *ad hoc* extensions of existing actions, but the existence of a general enrichment action. And as van Zyl J pointed out in *Blesbok Eiendomsagentskap v Contamessa supra,* the continuing *ad hoc* extension of the principle of enrichment to provide for new cases clearly demonstrates that there is a need for a general enrichment action.

**RECOGNITION OF GENERAL ENRICHMENT ACTION**

I am satisfied that, echoing the words of van Zyl J in *Blesbok Elendomsagentskap* v *Cantamessa supra*, the time has indeed arrived for recognising the general enrichment action as it existed in our common law. I am of the view that the detailed research and analysis of the Roman Dutch writers, particularly as encapsulated by Scholtens in "The General Enrichment Action That Was" (l966) *SALJ supra*, and van Zyl "The General Enrichment Action is Alive and

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Well" *Acta Juridica* 1992 *supra*, establishes



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that the general enrichment action had developed in the Roman-Dutch law by the l8th Century. (see also Lotz *Law SA* Vol 5 p 46; Weeramantry *The Law of Contract* Vol 2 1025 and van Zyl *Negotiorum Gestio in the SA Law* 85).

It is accordingly my most respectful view that the majority decision in *Nortje v Pool supra* was incorrect in stating that our law does not regard the rule against unjust enrichment as creating a legal obligation independently of one or other recognised enrichment action and regardless of particular circumstances. I am of the view that if the full research as particularised in the articles to which I have referred had been before the court in *Nortje*'s case that a contrary decision would have been reached (see the editor's comments 1969 *SALJ* at 230). I am satisfied that the correct view of the law is as stated by Rumpff JA in the minority decision in *Nortje*'s case.

I am also accordingly with the utmost deference respectfully of the view that the upholding of the majority decision in *Nortje v Pool* by this court in *Polwarth & Company (Pvt) Ltd v Zanombairi & Ors* 1972 *(l)* RLR 112 (G), *Skywork (Pvt) Ltd v Peter Scales (Pvt) Ltd* 1978 RLR 416 (G), and *Guthrie Overseas Investment v GMHL Holdings (Pvt) Ltd* HH-554-87, was incorrect. The learned judges in those cases were not referred to the trenchant academic criticism of the majority decision in *Nortje* as I have been in this matter. Had they been referred to the detailed analysis of the development of the general enrichment action in Roman-Dutch law as described by Scholtens, van Zyl and de Vos, I feel sure their decisions would have been different.

I am most grateful to Mr *Gillespie* for his detailed written submissions tracing the development of the general enrichment action through the various authorities to which I have referred.

**THE REQUIREMENTS AND LIMITS OF THE GENERAL ENRICHMENT ACTION**

As pointed out by Gubbay CJ in *Walker v Industrial Equity Ltd supra,* one of the principal reasons given in the majority judgment of *Nortje v Pool* for holding that Roman-Dutch law does not yet recognise the existence of a general enrichment action was that such an action would open the floodgates for judicial intervention whenever the distribution of property does not seem to be in consonance with equity. The view was also expressed, in *Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere supra,* that *Nortje v Pool* was possibly inimical to the recognition of a general enrichment



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action because the determination and laying down of general and universally applicable norms in order to establish and limit liability was a difficulty.

It is important therefore, as far as possible, to specifically define and limit the requirements of the general enrichment action. In this regard, as stated in *Kommissaris van Binnelandse*

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*Inkomste supra* it is of assistance to have regard to the contributions of the academic writers who have devised proposals of general criteria for the establishment and limitation of liability.

I am of the respectful view that the principal prerequisites for a general action on enrichment can be regarded as aptly summarised by Wouter de Vos in *Verrykingsaanspreeklikheid in die Suid Afrikaanse Reg* (1958) as stated by Scholtens in the 1996 *Annual Survey of South African Law*, 150 at 152 as:

> "*(a)* the defendant must be enriched; *(b)* the enrichment must be at the expense of another (ie the plaintiff must be impoverished and there must be a causal connection between enrichment and impoverishment); *(c)* the enrichment must be unjustified; *(d)* the case should not come under the scope of one of the classical enrichment actions; *(e)* there should be no positive rule of law which refuses an action to the impoverished person. Obviously these requirements can only be fulfilled if in any given case the action is based on a defined set of circumstances."

In regard to the fear that a general unjust enrichment action would open the floodgates for judicial intervention whenever the distribution of property does not seem to be consonance with equity, I am in agreement with the view expressed by Mr *Gillespie*. This view is that in our law in areas other than that of unjust enrichment, there has been a marked tendency to develop in such a way as to permit an action based upon a judicial discretion as to what is just and in accordance with the legal standards of society. As pointed out by Mr *Gillespie* in the field of wrongfulness in delict the question of liability for omissions, previously hidebound by special categories and exceptions, is now to be judged according to the legal convictions of the community as to what conduct should or should not be condemned (*Minister van Polisie v Ewels* 1975 (3) SA 590 (A)). Also in matters of pure pecuniary loss, the existence of wrongfulness is determined according to public policy bearing in mind matters of practicality and circumstance: *Tobacco Finance (Pvt) Ltd v Zimnat Insurance Co Ltd* 1982 (3) SA 55 (ZH) at 63-5. Similarly wrongfulness for the purposes of the delict of unlawful competition is determined according to the general sense of justice of the community: *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173



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(T) at 187. With developments such as these, I am in agreement with Mr *Gillespie*, that it is appropriate that the limits of the general enrichment action should be based on the court exercising its discretion according to the general sense of the justice of the community and the legal convictions of society as to liability in any circumstances. This approach, allied with the prerequisites for the action as have been referred to *supra,* should, to my mind, allow the general enrichment action to develop over time without causing undue alarm and disruption.

While emphasising that the recognition of the general enrichment action is an acceptance of the law as stated by the Roman-Dutch writers (as referred to by Scholtens and van Zyl *supra*) in the l8th century, I would refer to the following apposite comments of Gubbay ACJ (as he then was) in *Zimnat Insurance Co v Chawanda* 1990 (2) ZLR 143 (S) at 153E-F:

> "Law in a developing country cannot afford to remain static. It must undoubtedly be stable, for otherwise reliance upon it would be rendered impossible. But at the same time if the law is to be a living force it must be dynamic and accomodating to change. It must adapt itself to fluid economic and social norms and values and to altering views of justice. If it fails to respond to these needs and is not based on human necessities and experience of the

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> actual affairs of men rather than on philosophical notions, it will one day be cast off by the people because it will cease to serve any useful purpose. Therefore the law must be constantly on the move, vigilant and flexible to current economic and social conditions".

(See also the classic words of Innes CJ in *Blower v van Noorden* 1909 TS 890 at 905).

I would also refer to the existence of general enrichment actions in many modern legal systems - for example, France, Germany, Italy, Switzerland and Canada (see *Acta Juridica* 1992 *supra* and *Annual Survey of South African Law* 1966 *supra*).

I would emphasise that I do not consider that the general action on enrichment should in any way be regarded as replacing the existing specific actions. I am of the opinion that the best view is that expressed by van Zyl in *Acta Juridica* 1992 *supra* at 130 where he states:

> "I believe there is a very real need for this action alongside the classical enrichment actions, which need not disappear since they have developed over a long period of time and doubtless still have a useful role to play".



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At any rate, as also pointed out by Mr *Gillespie,* the principles of the general enrichment action, expounded by Scholtens following De Vos, themselves assume the continued existence of the particular actions.

**HAVE THE REQUISITES OF THE UNJUST ENRICHMENT ACTION BEEN ESTABLISHED BY THE PLAINTIFF?**

The first prerequisite I have identified is that the defendant must be enriched. The defendant was clearly enriched by the value of the shares that he did not own. He sold the shares and received some £266 855,30, which he either spent or invested in Augustus's venture. The establishment of the first requisite is not challenged by Mr *de Bourbon* in his submissions.

The second requisite is that the enrichment must be at the expense of another (ie the plaintiff must be impoverished and there must be a causal connection between the enrichment and impoverishment). I am satisfied that this criterion has also been met - see paras 13-16 and the summary of the evidence of Mr Michael Christie in the learned Chief Justice's summation of the evidence led in *Walker v Industrial Equity Ltd supra* at pp 97. This aspect was also not challenged by Mr *de Bourbon* in his submissions.

The third requirement is that the enrichment must have been unjustified. It is with this requirement that Mr *de Bourbon* takes issue. He argued that if there were a general enrichment action it would be an essential element of such an action for the plaintiff to prove that the enrichment was unjust - that is inequitable bearing in mind all the facts of the matter. Mr *de Bourbon* further argued that in particular, and in keeping with the approach of the Appellate Division in a similar matter, the plaintiff must show that it did not cause the enrichment by palpable negligence. Mr *de Bourbon* referred to *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & Anor supra* p 224E-F where Hefer JA said:

> "It is not possible nor would it be prudent to define the circumstances in which an error of law can be said to be excusable or, conversely, to supply a compendium of instances where it is not. All that need be said is that, if the

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payer's conduct is so slack that he does not in the court's view deserve the protection of the law, he should, as a matter of policy, not receive it. There can obviously be no rules of thumb; conduct regarded as inexcusably slack in one case need not necessarily be so regarded in others and vice versa."



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Mr *de Bourbon* pointed out that it was common cause that Registry Managers had been grossly negligent and suggested that the policy of the law was not to protect those who had been grossly negligent - and that a man who commits gross negligence cannot complain if someone else benefits from that gross negligence. It accordingly was Mr *de Bourbon's* submission that even if the general action for enrichment was found to exist, the plaintiff had failed to prove that the enrichment was unjust.

Mr *Gillespie* in reply accepted that the negligence on the part of Registry Managers (who issued the incorrect share certificate) is not irrelevant. He accepted that the finding whether the enrichment was unjust was a determination to be made in all the circumstances. He argued, however, that there was no basis to suggest that a decision against the defendant would amount to rewarding Registry Managers for its negligence. He emphasised that a decision against the defendant would do no more than redress the imbalance caused by the enrichment without cause of the defendant. He stated that the defendant would not be impoverished by an order in terms of the summons, but would be restored to his former situation prior to his taking unfair advantage of the error of Registry Managers. Mr *Gillespie* further argued that the common man's notion of justice could not tolerate a result that would leave the defendant enriched at the expense of Registry Managers, the negligence of the latter notwithstanding. Put another way, the legal convictions of the normal man would be offended at the notion that such an enrichment should go unreimbursed - or simply "finders keepers" is not a principle of fairness. Mr *Gillespie* also emphasised that even the defendant's first reaction immediately after the disclosure of the matter was to acknowledge by implication the liability to repay (in the letter he wrote to his bank in England), and that in his evidence, at the close of cross-examination, he could give no reason for justifying his retention of his ill-gotten gains.

I have given careful consideration to Mr *de Bourbon*'s argument. Certainly the negligence of the plaintiff is a factor which is of substantial relevance in deciding whether the enrichment is unjustified. It seems to me that the passage quoted from *Willis Faber Enthoven (Pty) Ltd supra* is apposite. To alter its wording slightly to cover the situation in this case - it is not possible, nor would it be prudent to define the circumstances in which negligence on the part of the plaintiff in an unjust enrichment action can be said to be excusable or, conversely, to supply a compendium of instances where it is not. All that need be said is that, if the plaintiff's conduct is so slack that he does not in the court's view deserve the protection of the law he should, as a matter of policy, not receive it. There can obviously be no rules of thumb;



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conduct regarded as inexcusably slack in one case need not necessarily be so regarded in

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others and *vice versa*.

The matter, to my mind, needs to be determined taking into account the general sense of justice of the community and deciding whether based on the legal convictions of society, liability should arise in these circumstances. I am in agreement with Mr *Gillespie* that the common man's notion of justice could not tolerate a result which would leave the defendant enriched at the expense of the plaintiff - the negligence of the latter notwithstanding. He received by mistake shares a little less than l000 times greater than his legitimate entitlement. He then sold them earning an amount well in excess of 500 times greater than his legitimate shareholding would have entitled him to receive. I am entirely satisfied that the general sense of justice of the community and the legal convictions of society would take the view that the enrichment was unjustified. It may be that the negligence of a plaintiff in other circumstances would be such as not to make the enrichment unjustified in applying the criteria I have referred to. I am satisfied, however, this is not such a case. I would also like to emphasise that the fraudulent approach of the defendant in this matter is another factor which indicates that the enrichment was unjustified and that the balance should be redressed.

The fourth requirement is that the case should not come under the scope of one of the classical enrichment actions. It is common cause that this case does not come under the scope of any of the classical enrichment actions - otherwise the plaintiff would have sought to rely on one of those actions.

The fifth requirement is that there should be no positive rule of law which refuses an action to the impoverished person. Mr *de Bourbon* does not suggest that this requirement has not been met.

I have already found that a general enrichment action providing relief where just, according to the principles expounded by de Vos, in cases of unjustified enrichment not covered by any existing enrichment action, exists. I am also satisfied that the requirements for such an action have been met and that accordingly the plaintiff has also established its alternative cause of action.

**QUANTUM**

I must turn to consider the quantum to be awarded under the main and alternative claims.



BARTLETT J

In respect of the main claim Mr *Gillespie* submitted that the plaintiff is entitled to judgment of damages in the sum of A$574 065. Mr *de Bourbon* submitted that the plaintiff has all along based its case on the proposition that the defendant was not entitled to any of the shares listed in the certificate at p 195 of the transcribed record - whereas in fact he was entitled to 78 shares and that the plaintiff has made no offer in respect of those 78 shares. It was Mr *de Bourbon*'s submission that the plaintiff was not entitled to approach this matter on the assumption that all 76620 shares were invalidly issued. Mr *de Bourbon* further submitted that there has been no suggestion that the plaintiff had subsequently sent a certificate for 78 shares to the defendant and therefore what is in issue is not 76620 shares but 76542 shares and their

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value. It was accordingly Mr *de Bourbon*'s submission that this was an aspect on which no evidence was led by the plaintiff and that the plaintiff was seeking judgment for the amount received for all the shares expressed in British pounds or Australian dollars, with the precise calculation never having been made clear.

Mr *Gillespie's* reply was to the effect that it was inaccurate to claim that no account had been taken of the 78 shares to which the defendant was truly entitled. He submitted that an examination of the share register and the markings shows quite clearly that those 78 shares were duly transferred to purchasers of the purported 76620 shares. He argued that the balance of shares shown on the register can be seen to reduce to a minus figure, after which the exercise of purchasing shares commenced and no further endorsements were made on the register. He argued the evidence was that it was the balance of the shares which was needed to be acquired by the brokers in order to fulfil the obligations. He also argued that the evidence disclosed that the amount expended in order to acquire those shares was the amount claimed in damages. It was therefore Mr *Gillespie*'s submission that there was no validity in the argument put forward on behalf of the defendant. His alternative submission was that even if by oversight no account had been taken of the 78 shares, it would be a very simple arithmetical process to calculate the damages in respect of 76542 shares and to order that marginally lesser amount.

I am satisfied that the submission made by Mr *Gillespie* was correct. In addition to the observations made by Mr *Gillespie*, I am of the view that the letters on p 222-3 of the transcribed record indicate that proper account was taken of the 78 shares. If I am wrong in this regard I agree that the amount claimed can be corrected by the adjustment as suggested by Mr *Gillespie*. (It appears to be common cause from the pleadings that the shares were



purchased by the plaintiff at A$7.50 so if any adjustment were necessary it would involve only a simple arithmetical calculation). Accordingly on the main claim the plaintiff is awarded damages in the sum of A$574 065.

In respect of the alternative claim, in argument, Mr *Gillespie* asked for payment of A$574 065 or £266 855.30, whichever is the lesser. The A$574 065 is the amount expended by (or on behalf of) the plaintiff in purchasing the 76542 ordinary shares on the market to satisfy the demands of all the transferees, while £266 855.30 is the amount realised by the defendant on the sale of the shares on the incorrect share certificate. The prayer in the declaration, however, only referred to the £266 855.30. I am not able to see in the record of the matter before the late Mr Justice Chinengundu any amendment to the alternative prayer - and no such amendment was made in the proceedings before me. Mr *de Bourbon*, however, in his written submission does not dispute the order requested on this basis. His submissions on the amount in regard to the alternative claim are the same as his submissions in regard to the amount on the main claim.

My view, assuming I have not misread the pleadings or misunderstood the transcribed record (probably a dangerous assumption), is that the shares sold in London included the 78 to which the defendant was entitled. Accordingly the unjust enrichment was on my understanding the

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amount received less the value of the 78 shares to which the defendant was entitled. As Gubbay CJ stated in para 12 of his summation of the evidence (p 3 *supra*), the shares were sold in London at an average of £3.48 per share. Accordingly the unjust enrichment is £266 855.30 minus £3.48 x 78 = £266 583.86.

I do not consider that Mr *Gillespie*'s claim for the payment of A$574 065 or £266 855.30, whichever is the lesser, is necessary or appropriate. He has at any rate not applied to amend his declaration (except by implication). Accordingly in respect of the alternative claim the plaintiff is awarded the amount of £266 583.86.

I emphasise, however, that any payment of the alternative claim would be conditional on my findings on the main claim being found to be incorrect.

**DATE FROM WHICH INTEREST TO RUN**

In respect of both the main and alternative claims Mr *Gillespie* claims on behalf of the plaintiff interest at the prescribed rate from the date of summons.

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BARTLETT J

Mr *de Bourbon* argued that interest can only run from the date of judgment with an interest rate of 10%, because that is what is claimed in the declaration. He points out that no application was made to amend the declaration and that it would now be too late for the plaintiff to attempt to do that.

Mr *Gillespie*'s reply is to rely on *Mutendi v Muramba* 1994 (2) ZLR 41 (H). He argues that this case establishes that a court may order interest to run from an earlier date than the date of judgment and even do so *mero motu*. He points out that it is by no means immaterial that interest, or other income, from the amount realised on the negotiation of the certificate had accrued to the defendant from the date of the transaction. Mr *Gillespie* accordingly submitted that no amendment to the declaration was required - but that if it was considered to be required, he was applying (in his written reply to the defendant's written argument) for such amendment in order to bring the declaration into line with his submissions in his written argument on behalf of the plaintiff. He submitted that there would no prejudice to the defence in such application.

It may well have been prudent for Mr *Gillespie* to have applied during the defendant's case for the plaintiff's declaration to be amended in regard to the date of claiming interest. The issue could then have been resolved and any confusion avoided. I am satisfied that Mr *Gillespie*'s written reply to the defendant's written submissions is not the time to apply for amendment to the declaration. An application at that late stage does not give the defendant the opportunity to respond. I am therefore satisfied that Mr *Gillespie's* claim to an amended date and rate of interest must stand or fall by his reliance on *Mutendi v Muramba supra*. If this case supports Mr *Gillespie's* contention then he is entitled to claim interest at the prescribed rate from the date of summons (by which I take it to mean the date of service of the summons). If the case does not support his contention then he is left with the interest as claimed in the original declaration.

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In *Mutendi v Muramba* my learned brother Smith at p 49C-50C stated as follows:

> "The plaintiff claimed damages plus interest thereon from the date of judgment to the date of payment. However, the Prescribed Rate of Interest Amendment Act 2 of 1994 was promulgated on 20 May 1994 and came into operation on that day. It inserted s 5A in the Prescribed Rate of Interest Act 30 of 1985 providing for interest on illiquid claims. The new section reads as follows:



BARTLETT J

*(1)* Subject to this section and unless otherwise agreed, every debt arising out of an unliquidated claim shall bear interest calculated at the prescribed rate on the amount of the debt from the date when the cause of action arose, whether or not the amount of the debt is fixed by agreement between the parties, by arbitration or by the judgment of a court.

(2) Where a court considers it fair and just in the circumstances of the case to do so, it may direct, in relation to a claim referred to in subsection *(l)*, that -

*(a)* no interest shall be payable on the amount of the debt; or

*(b)* interest shall be payable on only part of the amount of the debt; or

*(c)* interest shall be payable in respect of only a part of the period since the cause of action arose, or shall be calculated to run from a specified date; or

*(d)* interest shall be payable at a rate lower than the prescribed rate; or may give any two or more of such directions.

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

(4) Where, as a result of a notice in terms of section *six*, the prescribed rate of interest is altered during the period in respect of which interest is payable on a claim referred to in subsection *(l)*, the rate of interest in respect of each part of that period shall, subject to any direction in terms of subsection (2), be the prescribed rate then prevailing."

Smith J then ruled at page 51H - 52D that:

> "In my view the effect of s 5A of the Prescribed Rate of Interest Act 1985 is to provide for a prospective payment which is to be measured by antecedent facts ... Once the court fixes the amount of the debt interest thereon becomes payable. The *quantum* of the amount to be paid is then to be measured by antecedent facts, ie the period between the date when the cause of action arose and the date the amount of the debt is fixed. In my view, if the Legislature had intended that the section should apply only where the cause of action arose on or after 20 May l994 it would have expressly said so. It did not. The provision applies from the date of promulgation of the Act."

It is to be noted that the plaintiff in *Mutendi v Muramba supra* had not at any



BARTLETT J

stage applied for interest earlier than the date of judgment. Smith J applied the law as clearly laid down in s 6(1) and then exercised his discretion in terms of s 5(2) - without the plaintiff

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needing to ask him to take either step. Smith J was applying the law as he was required to do.

Mr *Gillespie* is effectively asking this court to do the same. Although Mr *Gillespie* did at least in his written submissions ask for interest taking into account the provisions of s 6(1) and 5(2), though without specifically mentioning them. I am in respectful agreement with the approach of my learned brother Smith and accordingly accept Mr *Gillespie*'s contention.

Mr *Gillespie* asks that interest be awarded to run from the date of service of the summons in respect of both the main and the alternative claims. In respect of the main claim, this is from 25 March 1986. In respect of the alternative claim, exercising my discretion in terms of s 5(2), I am of the view that interest should run from the date of service of the amended declaration introducing the claim based on unjust enrichment - this would seem to be 20 February 1992. Accordingly in respect of the alternative claim interest will be ordered to run from 20 February 1992.

**RATE OF INTEREST**

Both counsel are in agreement that I should apply the approach to the rate of interest as laid down by myself in *Nicols v Pearl General Insurance Co & Anor* 1994 *(I)* ZLR 193 at 211A-B. I should, however, point out that counsel in that matter (the same counsel as in this matter) did not reach an agreement as to the rate of interest and I was asked to give a subsequent ruling after receiving written argument. I ruled in that matter that the rate of interest be the rate of interest as applying from time to time in the Supreme Court of Judicature in England.

My view was that where a judgment is given sounding in a foreign currency the rate of interest should follow the rate of interest applicable in the country where the foreign currency is the home currency. This is because it was my view that one of the basic criteria in setting prescribed rates of interest is the prevailing economic conditions in the country to which the currency relates. It would, to my mind, be unfair to order interest to run at the Zimbabwean prescribed rate (currently 25%) on an award in pounds sterling if the rate prescribed in England for judgments in pounds sterling were, for example, 5%. The plaintiff would then be getting an excessive return. If, for example, the prescribed rate of interest on judgments given by the Supreme Court of





Judicature were 50% it would be equally unfair for this court to order interest to run at the Zimbabwean prescribed rate of 25%. The matter is, in my view, one of common sense and fairness.

I therefore propose to adopt the approach adopted in *Nicols v Pearl General Insurance supra* and agreed by counsel. Accordingly the interest awards will be at the rate applying from time to time in the Supreme Court of Judicature in England in regard to the award to be made in pounds sterling, and at the rate applying from time to time in the High Court of Australia in respect of the award made in Australian dollars.

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**ORDER**

Things that go round come round. Walker has had a merry dance. But he would, to my mind, be well advised to realise that the music has stopped and the time has come to pay the piper. Although with Walker's determination to divest himself of all things executable, I fear that the dance is not yet over - and that it won't be long before the pipes are calling again and the last waltz begins.

It is ordered as follows:

(1) On the main claim of fraud, the plaintiff is awarded damages in the sum of A$574 065 with interest from 25 March 1986 to the date of payment at the rate prevailing from time to time in the High Court of Australia.

(2) In regard to the alternative claim on unjust enrichment (the other alternatives having fallen away in view of the Supreme Court judgment), the plaintiff is awarded £266 583.86 together with interest from 20 February 1992 to the date of payment at the rate prevailing from time to time in the Supreme Court of Judicature in England.

(3) Costs of suit are awarded to the plaintiff (subject to any interim orders as to wasted costs made by the late Chinengundu J). I am also satisfied, on reading the record, that the qualifying expenses in respect of the expert witnesses who travelled from Australia were properly and necessarily incurred.

An order is accordingly made allowing the qualifying expenses of Messrs Bahen and Christie.

*Honey & Blanckenberg*, plaintiff's legal practitioners

*Coghlan, Welsh & Guest*, defendant's legal practitioners

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## S v TABA 1996 (1) ZLR 309 (HC)

**Court** **High Court, Harare**

Smith J

Criminal review

20 March 1996 Judgment No. HH-29-96

### Flynote

Criminal procedure (sentence) - jurisdiction - magistrates court - sentence of imprisonment imposed as alternative to payment of fine - whether affects magistrate's jurisdiction in respect of sentence of imprisonment simpliciter

Magistrates court - jurisdiction - criminal case - sentence of imprisonment imposed as alternative to payment of fine - additional sentence of imprisonment without option of fine - latter sentence at upper limit of

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magistrate's sentencing jurisdiction - magistrate's power to impose sentence of imprisonment as alternative to fine not affected

## Headnote

A magistrate's power to impose a sentence of imprisonment in default of payment of a fine derives, not from the Magistrates Court Act [*Chapter 7:10*], but from s 347(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Where the offence is a statutory offence, the period of imprisonment imposed as an alternative may not, either alone or together with any sentence of imprisonment *simpliciter*, exceed the maximum sentence of imprisonment provided by the enactment. In the case of common law offences, there is no such restriction. Where a magistrate imposes two sentences for a common law offence, one of a fine and one of imprisonment, and the latter is at the limit of his sentencing jurisdiction, he is not thereby precluded from imposing a sentence of imprisonment as an alternative to the fine, even if the two sentences of imprisonment, when added together, exceed the limit of his sentencing jurisdiction.

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**1996 (1) ZLR p310**

Cases referred to:

*National Assistance Bd v Wilkinson* [1952] 2 QB 255

Statutes referred to:

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 347(1)

Magistrates Court Act [*Chapter 7:10*], ss 49 and 50

## Judgment

**Smith J:** The accused was charged with theft by conversion. She pleaded not guilty but was duly convicted. She was sentenced to a fine of $600 or, in default of payment, 30 days' imprisonment and, in addition, to 12 months' imprisonment, of which six months were suspended on condition she paid restitution and six months were suspended on condition of good conduct. In sending the record for review, the magistrate submitted that he had exceeded his jurisdiction in that he had sentenced the accused to more than 12 months' imprisonment, which was the maximum sentence he could impose.

I considered that the sentence did not exceed the magistrate's jurisdiction. I referred the matter to the Attorney-General and asked for his opinion. The Attorney-General's Office responded as follows to my request for its opinion:

> "Section 50*(l)* of the Magistrates Court Act [*Chapter 7:10*], as substituted by Act No 15 of 1994, provides in respect of jurisdiction as to punishment as follows -
>
> ... in respect of punishment for any offence shall be -
>
> *(i)* imprisonment for a period not exceeding 12 months;
>
> (ii) a fine not exceeding $2 000.'

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Section 50(5) thereof provides as follows -

> Subject to *this Act* and *any other enactment*, a court may impose upon a person convicted of any offence a punishment of both a fine and imprisonment'.
>
> If one considers the two sections standing alone, the learned magistrate did indeed exceed his jurisdiction (punitive) by 30 days because s 50(1)(1) limits the punitive jurisdiction to 12 months and no more. Section 50(1)(ii) does not provide for imprisonment in default of a fine.

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SMITH J

> Before ss 49 and 50 of the Act were repealed and substituted by Act No. 15 of 1994, s 49(2) read as follows in respect of jurisdiction as to punishment -
>
> ... the jurisdiction of the court in respect of punishment for any offence when exercised by a magistrate ... shall be -
>
> *(a)* on summary trial -
>
> *(i)* imprisonment for a period not exceeding 12 months ...;
>
> (ii) a fine not exceeding $l 000 or, *in default of payment*, *such period of imprisonment as aforesaid;*
>
> (iii) ...'

If the new section were worded as the repealed section was, no question would arise as to whether the magistrate went beyond his jurisdiction.

The question is where does the magistrate get the power to impose a punitive punishment in default of payment of a fine'? It is submitted that he derives that power, not from s 50*(l)* of the Magistrates Court Act but from s 347*(l)* of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which reads:

> *(1)* Whenever a court has convicted an offender of any offence punishable by a fine (whether with or without any other direct or alternative punishment) it *may* in imposing a sentence of a fine upon the offender, impose, as a punishment alternative to such fine, a sentence of imprisonment with or without labour, of any duration within the limits of its punitive jurisdiction:
>
> Provided that, subject to the provisions of subsection (3), the period of such alternative sentence of imprisonment shall not, either alone or together with any period of imprisonment imposed as a direct punishment, exceed the longest period of imprisonment prescribed by *any enactment as a punishment* (whether direct or alternative) *for such offence*.
>
> (2) ... (not relevant).'
>
> Applying the section to the present case, it is observed that the proviso only applies to those offences in respect of which an enactment prescribes

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SMITH J

> a sentence. In the case *in casu*, theft by conversion is a common law offence. There is no enactment which prescribes a sentence for the offence. Therefore s 347 (1), standing alone, applies and the proviso is not

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> applicable. It follows that the alternative of 30 days' imprisonment with labour if the $600 is not paid is a competent order within the magistrate's jurisdiction.
>
> The above hopefully clears the issue and constitutes the opinion of this Office."

I agree with the views expressed by the Attorney-General. Section 49(2) of the Magistrates Court Act [*Chapter 7:10*], prior to its repeal and substitution by s 4 of Act No 15 of 1994, clearly expressed the intention that the maximum period of imprisonment that could be imposed by a magistrate was to be calculated with regard to any period of imprisonment imposed in default of payment of a fine. The new s 50(1) inserted by Act No 15 of 1994, which replaced s 49(2), dealing with jurisdiction, does not indicate any intention to depart from the principle expressed in s 49(2) that the maximum jurisdiction in relation to imprisonment was entirely different from the maximum jurisdiction in relation to a fine. Accordingly, I do not think that the court should be astute to introduce a new principle when not compelled to do so by the altered wording of the new provision.

In Bennion's *Statutory Interpretation* at p 317 the learned author says:

> "It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not change either common law or statute law by a sidewind, but only by measured and considered provisions. In the case of common law, or Acts embodying common law, the principle is somewhat stronger than in other cases. It is also stronger the more fundamental the change is.
>
> The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. The court should therefore strive to avoid adopting a construction which involves accepting that Parliament contravened the principle."

One of the authorities relied upon by the learned author in support of this principle is *National Assistance Board v Wilkinson* [1952] 2 QB 648 where Lord Devlin said:



SMITH J

> "It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion".

For the reasons set out above, I consider that the trial magistrate did not exceed his jurisdiction in imposing the sentence which he imposed in this case. The proceedings are confirmed as being in accordance with real and substantial justice.



## MADZIVA v MADZIVA 1996 (1) ZLR 314 (HC)

**Court** **High Court, Bulawayo**

Chatikobo J

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Civil application

8 & 22 March 1996  Judgment No. HB-18-96

## Flynote

Family law - divorce - division of assets - wife entitled to half share of value of house after it had been valued - whether outstanding bond amount to be deducted from value and wife then to be given half the residue

## Headnote

The proprietary consequences of a divorce were to be governed by a consent order filed by the parties. This order the matrimonial home was to be valued by a registered valuer and that the husband would pay his former wife half the value of the house. The costs of the valuation were to be shared equally between the two parties.

The house was valued and the former wife paid the cost of the valuation. She then applied for judgment for her half share of the value of the property and for half the costs of the valuation.

Held, that further proceedings were required to establish the amount payable to the applicant as the original order did not settle this amount.

Held, further, that all the applicant needed to have done was to ask for judgment to be entered in her favour for a sum which represents her half share of the value of the house and the costs of the valuation.

Held, further, that the consent order did not lay down that the former wife's share was one half of the net value of the property after deduction of the amount outstanding on the outstanding mortgage bond; it simply laid down that the former wife was entitled to one half of the value placed on the property by the valuer. Although a divorce settlement embodied in a court order could be rectified in a proper case, the respondent in the averments made did not meet the requirements of a claim for rectification.



Held, therefore that the applicant was entitled to one half of the amount that the valuer had decided that the house was worth.

Cases cited:

*de Crespigny v de Crespigny* 1959 (1) SA 149 (N)

*Hailmer v Hailmer* 1964 (1) PH A14 (A)

*Miller v Roussot* 1975 (1) RLR 324 (G)

*Zimbabwe United Freight Co Ltd v S & T Import & Export (Pvt) Ltd* 1981 ZLR 361 (H)

## Judgment

**Chatikobo J:** The parties were granted a decree of divorce by this court on 25 November 1994. It was ordered that the same time that the proprietary aspects of the marriage, including the

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division of the matrimonial estate, were to be governed by a "consent order filed by the parties". The current dispute concerns the enforcement of para 6 of that consent order, which is in these terms:

> "6. The immovable property known as 17 Simon Mazorodze Drive being Stand 1619 Gweru Township shall be valued by a registered valuer and defendant shall pay plaintiff *one half of the value of the said house* in a lump sum within a reasonable time on receipt of the valuation, with the costs of the valuation to be shared equally. plaintiff's half share of the costs of the valuation shall be deducted from the amount payable to her by defendant" (emphasis added).

The house was subsequently valued by a registered valuer agreed between the parties who concluded that its value was the sum of $135 000. The costs of the valuation, which have since been paid by the applicant, amounted to $606.56. It is contended by the applicant that her half share is the sum of $67 500. She also claims half the costs of valuation which is $303.28. The total amount she claims from the respondent is $67 803.28. In this application applicant says that judgment be entered in her favour in that sum.

The claim is no doubt based upon the realisation that the judgment does not speak for itself so as to enable a writ to be issued without further proceedings to establish the amount payable. In this regard I respectfully associate myself with the remarks of Holmes J (as he then was) in *de Crespigny* v *de Crespigny* 1959 (1) SA 149 (N) at 150F-G:

> "The civil administration of justice provides machinery *inter alia* for the enforcement of rights. It provides amongst other thing*(s)* for litigation, judgment and execution. As execution is a process for enforcing



CHATIKOBO J

> judgments, it seems to me axiomatic that it is only available when the claim or *lis* has been judicially resolved. And it seems to me clear that a *lis* has not been judicially resolved if the amount payable under the judgment can only be ascertained after a further problem of law has been decided. It is not within the province of the plaintiff to decide such problems. In such a case, failing agreement between the parties, a plaintiff's remedy, at any rate in the Supreme Court, would, I think, be to apply for a definition of his rights under the judgment. Whether this should be done by way of an application for a declaration, or in the course of applying for leave to execute, I need not decide."

Unfortunately for me, unlike Holmes J, I have to decide whether the procedure adopted by the applicant in this case is the correct one. She seeks on application a judgment for a claim sounding in money, not a declarator or leave to execute.

Generally, the courts do not look favourably upon a party who resorts to this procedure where the claim is a straightforward one for money and interest *a tempore morae*. In such a case a claimant should proceed by way of summons. As Beadle ACJ stated in *Miller v Roussot* 1975 (1) RLR 324 (H) at 325D-E:

> "It is a most unusual and expensive procedure to proceed by way of notice of motion for a claim which is simply a straightforward claim for money and interest. The usual practice is to proceed by way of an endorsed summons under r 13 of Order 3 of the High Court (General Division) Rules. There is authority, however, for the proposition that in certain circumstances the courts will permit this procedure to be followed. See, for example, such cases as *Arnold v Viljoen* 1954 (3) SA 322 (C); *London & Lancashire Insurance Company Ltd v Puzyra* 1955 (3) SA 240 (C) and *Regal Trading Company (Pty) Ltd v Coetzee* 1956 (1) SA 766 (O)."

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In *Zimbabwe United Freight Co Ltd v S & T Import & Export (Pvt) Ltd* 1981 ZLR 361 (H), Waddington J went so far as to say that this form of procedure should not be adopted unless a strong case for doing so is made out.

In the present case, however, the only error made by the applicant was to ask for judgment to be entered in her favour for a sum which represents her half share of the value of the house and the costs of valuation. She already has a judgment in her favour to that effect. All she need have done is to ask the court to declare that the amount of the half share she was awarded in November

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CHATIKOBO J

1994 has been ascertained to be $67 803,28 so as to enable her to execute upon that judgment. As this is alternative relief which I can order on the same papers, it would be unjust if I were to penalise her for adopting this procedure.

What of the merits then? The respondent, in a somewhat inelegant affidavit deposed to by her legal practitioner, says that the understanding between the parties at the time of agreeing the consent order was that if he failed to pay the applicant's half share the house would be sold and the parties would share the proceeds equally. Although he stops short of saying the agreement was that the parties would share the net proceeds, he nevertheless says it is logical that before the parties can share the proceeds of the sale, the amount outstanding on the mortgage bond must be deducted and paid to the building society. The applicant, on the other hand, says this construction of the consent order is untenable. The terms of para 6 of that order are clear and unambiguous. It is half of the market value of the house which should be paid to her, not the net residue thereof. I have to accept that para 6 of the order means what it says. The applicant is entitled to be paid half the market value of the house not the net value. On the face of it this sounds unjust but that is beside the point. The respondent agreed to the order in that form and once he agreed the court was entitled to incorporate it as an order of court in terms of s 7(4) of the Matrimonial Causes Act [*Chapter 5:13*]. Spouses on the threshold of a divorce are perfectly entitled to settle the question of division of the matrimonial estate by mutual agreement and the court in the exercise of its discretion may embody such an agreement into the order which it makes. Whether an order made with the consent of the parties for the division of assets is one that can be varied in terms of s 9 of the Matrimonial Causes Act I need not decide. I have not been asked to do so.

A divorce settlement which has been embodied in an order of court can, like any other agreement, be rectified in a proper case. See *Hailmer* v *Hailmer* 1964 (1) PH A14 (A). The inelegance of the affidavit filed on behalf of the respondent makes it difficult for me to determine whether the application is being resisted on the ground that there is an error which needs to be rectified or simply that as it stands it refers to the net residue. If the latter, then I have held against the respondent. If the former, then, unhappily for respondent, the averments made do not meet the requirements for a claim of rectification as to which, see generally Christie *The Law of Contract in South Africa* 2 ed pp 404-406.

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This leaves me with only one option, that is, to grant relief to the applicant.

It is ordered as follows:



CHATIKOBO J

(1) Accordingly it is declared that the half share to which the applicant is entitled in terms of the judgment handed down by this court in case number H-93-1993 on 25 November 1994 is the sum of $67 803,28.

(2) The respondent is to pay the costs of this application.

*Coghlan & Welsh*, applicant's legal practitioners

*Tizirayi-Chapwanya & Partners*, respondent's legal practitioners

1996 (1) ZLR p318

## MOYO v PRESIDENT, BOARD OF INQUIRY & ORS 1996 (1) ZLR 318 (HC)

**Court** **High Court, Bulawayo**

Malaba J

Application for review of decision of Commissioner of Police

22 March 1996 Judgment No. HB-17-96

### Flynote

Administrative law - audi alteram partem rule - requirement to observe - board of inquiry - board's function to collect evidence but final decision made by another person on basis of evidence collected - whether board required to observe rule

Administrative law - review - application - late noting of application - condonation - principles - whether domestic remedies must be exhausted before application may be made to court

Police - discipline - discharge from Force - decision by Commissioner, after inquiry, that member not suitable to remain in the Force - whether Commissioner has any discretion as to whether to discharge the member or impose another penalty

### Headnote

The applicant was an assistant inspector in the police force. After several years of satisfactory service, he was the subject, over the next few years, of a series of disciplinary actions, culminating in his being convicted in the magistrates court of housebreaking with intent unknown. As a result of these lapses, a board of inquiry was appointed in terms of s 50(1) of the Police Act [*Chapter 11:10*]. The board recommended that the applicant be found to be unsuitable to remain in the force. The Commissioner of Police accepted that recommendation

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and discharged him from the force in June 1993. The applicant appealed to the Police Service Commission, which in May 1994 dismissed his appeal. The applicant then engaged a firm of legal practitioners, which wrote to the



Minister of Home Affairs, seeking to reverse the decision to discharge the applicant. No response was received, and the applicant engaged another firm of legal practitioners, which in March 1995 instituted an action in the High Court for review of the board's findings and the Commissioner's decision. It was necessary for him to apply for condonation of the late institution of the proceedings; the application for condonation was opposed on the grounds that there were no good grounds for the delay and that the there were no prospects of success on the merits.

Held, that the courts will grant condonation even if the delay was unreasonable and the explanation inadequate, as long as there are clear prospects of success. In the present case, 9 months of the delay could be satisfactorily explained by the fact that an appeal was made to the Police Service Commission and the Commission's decision had to be awaited. However, the subsequent attempt to reverse the Commission's decision administratively was a patently wrong procedure. No explanation was given by the firm of practitioners concerned as to why it was thought necessary to follow such a procedure, nor was there any explanation by the other firm as to why they did not institute review proceedings at the time they were consulted, instead of waiting some six months.

Held, further, that although it is generally accepted that an aggrieved party will first exhaust his domestic remedies before approaching the courts for review, there is no rule of law that by following such remedies an aggrieved party will be held to have waived his rights to appeal to the courts.

Held, further, that the Board's task was not to make a decision but to collect evidence on which the Commissioner would make a decision as to whether the applicant was suitable to remain in the Force. This did not mean that the Board was not obliged to observe the precepts of natural justice. Bodies which collect evidence upon which the decisions affecting the rights of individuals are made have a duty to act fairly. They must observe the rules of natural justice, unless there are special circumstances to the contrary or the enactment expressly excludes them. They must inform the person involved of the complaints made against him and give him an opportunity to make relevant statements with regard to those allegations.

Held, further, that the Board in this case did observe the rules of natural justice. There was no bias and the applicant was afforded the opportunity to present his case through his legal practitioner. If there were misdirections, the final decision was made by the Commissioner, who had before him the facts gathered by the Board.



Held, further, that once the Commissioner had found that the applicant was not suitable to remain in the police force, any penalties that would have had the effect of retaining the applicant in the Force were not available to the Commissioner. Such other penalties would only be available in the absence of a finding that the person was unsuitable. It would not have been

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possible for the Commissioner to ask a person found unsuitable to resign and thereby give him an opportunity to get pension benefits. Although s 50(3) of the Police Act used the word "may", the word, in this situation, imposed a duty, not a discretionary power. Even if he had such a discretion, however, his decision to discharge the applicant could not be impugned.

Held, therefore, that there were no prospects of success on the merits and the application should be dismissed.

Cases cited:

*Annison & Ors v District Auditor for St Pancras Borough Council & Anor* [1962] 1 QB 489

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

*Cassem en 'n Ander v Oos-Kaapse Komitee van die Groepsgebiederaad en Andere* 1959 (3) SA 651 (A)

*Cluff Mineral Exploration (Zimbabwe) Ltd v Union Carbide Mgmt Svc (Pvt) Ltd & Ors* 1989 (3) ZLR 338 (S)

*Commr of Police v Wilson* 1981 ZLR 451 (S)

*CCSU & Ors v Min for the Civil Svc* [1984] 3 All ER 935 (HL)

*Crow v Detained Mental Patients Special Bd* 1985 (1) ZLR 202 (H)

*Custodian of Enemy Property v Brakpan Mines Ltd* 1922 TPD 179

*Dube v Chrmn, PSC & Anor* 1990 (2) ZLR 181 (H)

*Evans v PSC & Min of Justice* 1920 TPD 170

*Logan v Morris NO & Ors* 1990 (2) ZLR 65 (S)

*Mabuye v Min of Justice, Legal & Parliamentary Affairs* HH-278-93

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

*Maxwell v Dept of Trade & Industry & Ors* [1974] 2 All ER 122 (CA)

*Mhora & Anor v Min of Home Affairs & Anor* 1990 (2) ZLR 236 (H)

*Mlilo v Chrmn, PSC & Ors* HB-51-90

*Moyo v Sec for Justice, Legal & Parliamentary Affairs* 1988 (2) ZLR 185 (H)

*Mugadza v Mahlaba* HH-59-91

*Muntondo v Oil Field Workers TU* [1961] AC 954 (HL)

*Muzonda v Min of Home Affairs & Anor* 1993 (1) ZLR 92 (S)

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*Norwest Holst v Sec of State for Trade* [1978] ChD 201

*Musandu v Chairperson, Cresta Lodge Disciplinary & Grievance Cttee* HH-115-94



Re *Pergamon Press Ltd* [1971] ChD 338

*Peri-Urban Areas Health Bd v Admin, Tvl & Ors* 1961 (3) SA 669 (T)

*R v Senate of the University of Aston*, ex p *Roffey & Anor* [1969] 2 All ER 964 (QB)

*Ridge v Baldwin* [1963] 2 All ER 66 (HL)

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

*Salisbury Financial Hldgs (Pvt) Ltd v van Niekerk* 1974 (1) RLR 333 (G)

*SA Defence & Aid Fund & Anor v Min of Justice* 1967 (1) SA 263 (A)

*Taruvinga v Sengweni Entprs (Pvt) Ltd* HH-85-94

*Transvaal Indian Congress v Land Tenure Advisory Bd & Anor* 1955 (1) SA 85 (T)

*Tshabalala & Ors v Tshabalala & Ors* 1921 AD 311

*Tutani v Min of Labour & Ors* 1987 (2) ZLR 88 (H)

*Vrystaat Ests (Pvt) Ltd v President, Administrative Court & Ors* 1991 (1) ZLR 323 (S)

*Zonke v Chrmn, PSC* S-46-93

Statutes referred to:

Police Act [*Chapter 11:10*], s 50(1)

*T A Cherry*, for the applicant

*P Ncube*, for the respondents

## Judgment

**Malaba J:** On 26 January 1993 the Commissioner of Police (the Commissioner) convened a Board of Inquiry (the Board) in terms of s 50(1) of the Police Act [*Chapter 11:10*] to inquire into the suitability or fitness of the applicant to remain in the Police Force.

The section provides that -

> "(1) A board of inquiry consisting of not less than three officers of such rank not being below that of superintendent as may be considered necessary by the Commissioner may be convened by the Commissioner to inquire into the suitability or fitness of a Regular Force member to remain in the Regular Force or to retain his rank, seniority or salary.

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(2)...

(3)If a Regular Force member other than an officer is found after inquiry by a board to be -

*(a)* unsuitable or inefficient in the discharge of his duties or

*(b)* otherwise unfit to remain in the Regular Force or to retain his rank, seniority or salary,

the Commissioner may ...

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*(i)* discharge the Regular Force member; or

(ii) impose any one or more of the following penalties -

*(a)* reduction in rank or salary;

*(b)* loss of seniority;

*(c)* withholding of an increment of salary; or

(iii) reprimand the Regular Force member."

The decision to convene the Board was a result of the applicant having been charged with and, in some cases convicted of, offences contained in the Schedule to the Police Act (ss 29 and 34). At the time the Board was convened the applicant was an assistant inspector, having joined the Police Force on 30 September 1975.

The Board sat to hear the applicant's case on 14 May 1993. The applicant was legally represented at the inquiry. No oral evidence was led but submissions were made on behalf of the applicant by his legal practitioner. The Board also had placed before it annual performance reports compiled on the applicant by members-in-charge of police stations where he worked from 1976 to 1989. The Board members also had access to the "defaulter's record" which is a summary of all the charges of misconduct preferred against the applicant and the results thereof for the period 1976 to 1993. The applicant and his legal practitioner had access to the documentary evidence.

The positive aspects of the reports on the applicant's performance as a regular member of the Police Force were that he -

*(a)* was an intelligent member of the Police Force endowed with a good memory;

*(b)* understood instructions well having acquired a sound knowledge of his duties;

*(c)* took down accurate reports;

*(d)* presented written work in a methodical and orderly manner exhibiting a good command of English. The applicant had on 27 December 1984 earned for himself a commendation from the Attorney-General for a well prepared murder docket.

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The negative aspects of the reports were to the effect that the applicant -

*(a)* was conceited;

*(b)* lacked leadership qualities;

*(c)* needed close supervision;

*(d)* often refused to obey lawful orders and, where he obeyed the orders, he did so with complaints;



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*(e)* often behaved in a manner unbecoming of a policeman, particularly towards women; for example, exposing his nudity to them;

*(f)* failed to appreciate the disrepute his conduct was bringing to the Police Force;

*(g)* was unable to maintain the standard of behaviour expected of a regular member of the Force; and

*(h)* committed the criminal offence of housebreaking with intent to commit an offence to the prosecutor unknown. The applicant signed warning memoranda on 27 July 1988 and 31 January 1990.

The defaulter's record reads as follows:

"1. On 1 May 1982 he signed a minor misconduct' for contravening para 11 of the Schedule to the Police Act [*Chapter 98*] *Without good or sufficient cause, disobey or omit or neglect to carry out any lawful order written or otherwise*.' He was ordered to perform one day extra duty'.

2. On 28 June 1982 he signed a minor misconduct' for contravening para 11 of the Schedule to the Police Act [*Chapter 98*]. *Without good or sufficient cause, disobey or omit or neglect to carry out any lawful order written or otherwise.*'

3. On 13 June 1986 at Gwanda District Headquarters, he appeared before a single officer for contravening para 13(1) of the Schedule to the Police Act [*Chapter 98*]: *Being absent from duty without leave*' for which he was sentenced to a fine of $40.

4. On 20 June 1988 at Gwanda District Headquarters he appeared before a single officer for contravening para 34 of the schedule to the Police Act [*Chapter 98*]: Act in unbecoming manner.' He was sentenced to 10 days' imprisonment.

5. On 27 July 1988 he signed a 13th year Annual Performance Report classified D' on conduct giving rise to him being served with a memorandum of warning.

6. On 7 November 1988 he signed a minor misconduct' for contravening para 34 of the Schedule to the Police Act [*Chapter 98*] as read with s 40 *Act in unbecoming manner*' and was to lose two days' time off.

7. On 21 December 1988 at Gwanda District Headquarters he appeared before a single officer for contravening para 34 of the Schedule to the Police Act [*Chapter 98*] *Acting in an unbecoming or disorderly manner*.' and was sentenced to a $50 fine.

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8. On 4 July 1989, at Criminal Investigation Department Gwanda, he



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was charged with *theft by conversion* ($200) and the case was later withdrawn by the police.

9. On 21 August 1989 at Zimbabwe Republic Police Gwanda he was charged with *Escape from lawful custody*' and the case was again withdrawn by Officer Commanding Gwanda District.

10. On 23 December 1989 he again *Acted in an unbecoming or disorderly manner*' by knocking on the door to Patrol Officer Muziri's room and appeared completely naked in front of Muziri's wife. He signed a memorandum of warning' on 31 January 1990.

11. On 30 August 1991 at Gwanda Magistrates Court he was found guilty of *Housebreaking with intent to commit an offence unknown to the prosecutor*' and was sentenced to 6 months' imprisonment with labour, of which four months was suspended for 3 years. He appealed against the sentence. The above sentence was then substituted by a fine of $300 or in default of payment two weeks imprisonment with labour."

The conviction for housebreaking with intent to commit an offence unknown to the prosecutor came after the applicant signed the memorandum of warning on 31 January 1990. The officer who administered the warning had recorded in the memorandum the following:

"4. I warned him that his poor and appalling disciplinary record for a member of his rank and service is no longer acceptable and as a result time has come for an immediate and sustained improvement in his conduct.

5. I again pointed out to him that it is apparent and obvious that regardless of previous warnings and a memorandum served on him, it appeared he had chosen to ignore all these.

6. I then emphasised to him that should he once again choose to ignore this warning and be convicted of a further offence, either criminal or under the Police Act, within the next twelve months, then there would be no hesitation in recommendations being made to the Commissioner of Police for a Board of Inquiry to be convened to consider his suitability to remain in the Force."

The applicant endorsed his signature to a declaration by him to the effect that he fully understood the meaning and contents of the warning.

In his submissions to the Board, the applicant did not challenge the accuracy of the disciplinary record. He argued that he behaved in the manner he did



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because he suffered from alcoholism. He pleaded with the Board to accept his suggestion that he be given an opportunity to consult Alcoholics Anonymous for counselling.

Having considered the evidence before it the Board found that -

"4. His conduct was initially reported good up and until his 7th year Performance Report which was a beginning of his series of misconduct.

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5. The years 1988 to 1989 saw him registering 7 counts of misconduct, which is viewed seriously.

6. Member signed memorandum of warning on two occasions, however this did not see any change in the member's behaviour which consequently led to the convening of the suitability Board.

7. His conviction of housebreaking with intent to commit an offence unknown is viewed to be a serious offence taking into account the circumstances under which the offence was committed and his present rank which bestowed him with responsibility.

8. Room for improvement is highly unlikely regardless of the assurance by the defaulter that he will forthwith attend alcoholic counselling."

The Board's recommendation was that the applicant be found unsuitable to remain in the Police Force. The record of its proceedings was transmitted to the Commissioner, who considered its contents and determined that the applicant was unsuitable to remain in the Police Force. On 14 June 1993 the Commissioner discharged the applicant from service. On 16 June 1993 the applicant appealed against the Commissioner's decision to the Police Service Commission, which dismissed the appeal on 3 May 1994.

Thereafter, the applicant consulted Gula-Ndebele and Manase, legal practitioners, who wrote to the Ministry of Home Affairs, seeking a reversal of the decision to discharge the applicant. Nothing positive came out of this attempt to use administrative procedures to solve what had become a legal problem. The applicant turned to Ben Baron and Partners who, on 15 September 1993, wrote to Gula-Ndebele and Manase asking whether they had made any progress in their attempt to have the dispute resolved administratively. There was no response to the enquiry. Ben Baron and Partners then instituted these proceedings on behalf of the applicant on 7 March 1995.

Two grounds were advanced for the review of the proceedings of the Board



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and the decision by the Commissioner. It was alleged that the Board misdirected itself and made a grossly unreasonable finding by holding that the applicant had registered 7 acts of misconduct in the years 1988 to 1989 when in truth there were three acts of misconduct. It was argued further that the decision by the Commissioner that the applicant was unsuitable to remain in the Police Force was tainted by the grossly unreasonable finding of fact by the Board. The Commissioner's decision to discharge the applicant should be reviewed on the ground that it was also grossly unreasonable, as a discharge was the most severe disciplinary action available to the Commissioner to take against an errant member of the Police Force.

The applicant had alleged bias against the members of the Board, but Mr *Cherry* properly abandoned it as a ground for review because it was patently clear from the record of proceedings that the Board postponed the commencement of the inquiry on two occasions to give the applicant an opportunity to seek legal representation and asked him on the day the inquiry commenced whether he had objections to any of the members of the Board taking part in the inquiry. He had not raised any objection to any of the members of the Board taking part in the inquiry.

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Turning to the issues, the first hurdle the applicant had to surmount was the delay in the institution of the review proceedings. Mr *Ncube* strongly opposed the application for condonation of the late institution of review proceedings. In *Ranganai v Kadir & Sons (Pvt) Ltd & Anor* HH-26-95 the law defining the approach a court should adopt in an application for condonation of late institution of review proceedings was stated at pp 4-5 of the cyclostyled judgment in these terms:

> "The party seeking to institute review proceedings outside the time limit must apply for condonation. If condonation is granted, the statutorily prescribed time limit becomes extended by the period the party was in default.
>
> The factors a court should consider in an application for condonation of late institution of review proceedings have been stated and applied in numerous decided cases.
>
> In *Bishi v Sec for Education* 1989 (2) ZLR 240 (H) the factors were summarised as being -
>
> *(a)* the degree of non-compliance with the rules;
>
> *(b)* the explanation thereof;



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> *(c)* the prospects of success on the merits;
>
> *(d)* the importance of the case;
>
> *(e)* the convenience of the court; and
>
> *(f)* the avoidance of unnecessary delay in the administration of justice."

The applicant in *Bishi*'s case had delayed the institution of review proceedings by 18 months. There were no good reasons for the delay and the court found no prospects of success on the merits in respect of the decision to have the applicant dismissed from employment. Chidyausiku J condoned the late institution of the review proceedings in respect of the punishment imposed on the applicant because of gross irregularity in the failure by the disciplinary committee to afford the applicant an opportunity to be heard in mitigation of the punishment.

In *Mlilo v Chairman, Public Service Commission* HB-51-90 the applicant was dismissed from the public service by the respondent for misconduct. He accepted the terminal benefits sent to him by his employer and waited for 11 months before instituting review proceedings challenging the respondent's decision. Condonation was refused on the grounds that no reasonable and acceptable explanation for the delay had been given; the delay was unreasonable and there were no prospects of success on the merits.

Authorities show that courts will grant condonation even if the delay is unreasonable and the explanation of it is not good enough, as long as there are clear prospects of success on the merits. In *Vrystaat Estates (Pvt) Ltd* v *President Administrative Court & Ors* 1991 (1) ZLR 323 (S) at 329G-H McNally JA said:

> "I turn then to consider the question of delay. But I pause to observe that in deciding whether or not to condone delay the courts traditionally consider not only the reasonableness of the explanation for the delay but the

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prospects of the applicant on the merits."

See also *Mabuye v Minister of Justice, Legal and Parliamentary Affairs & Ors* HH-278-93 at p 4.

The peremptory provisions of r 259 of the Rules of the High Court 1971 require that review proceedings be instituted within eight weeks of the termination of the proceedings or decision in which the irregularity complained of occurred. The date of termination of the proceedings or decision to be reviewed for purposes of calculating the delay in instituting the review





proceedings is the date when official notice of the decision was communicated to the party concerned. See *Cluff Mineral Exploration (Zimbabwe) Ltd v Union Carbide Management Service (Pvt) Ltd & Ors* 1989 (3) ZLR 338 (S) at 344D; *Vrystaat Estates (Pvt) Ltd v President, Administrative Court & Ors supra* at 330C.

The decision to discharge the applicant from the Police Force was made on 7 June 1993 and he received official notification of it through a radio signal message on 14 June. It was on 14 June 1993 that the applicant knew that the Commissioner had determined that he was unsuitable to remain in the Police Force. The period of delay in instituting the review proceedings, calculated after eight weeks from 14 June 1993, was 18 months 26 days.

Two explanations were given for the delay. The applicant said he spent part of the period exhausting domestic remedies, whilst the rest of the delay was due to his legal practitioners who were either negotiating an administrative solution to the dispute with the Ministry of Home Affairs or doing nothing about the matter.

Mr *Ncube* argued that the applicant did not have to first exhaust domestic remedies before instituting the review proceedings. Although the provision of domestic remedies does not in itself preclude the aggrieved party from approaching the courts before exhausting them, it is generally expected that the aggrieved party will first exhaust the domestic remedies before approaching the courts for review. Baxter in *Administrative Law* p 588 observes that:

"Provision is often made for an administrative appeal against administrative decisions which have given cause for complaint. It is usually expected that such remedy should be exhausted before the complainant applies to court in order to have the decision set aside on review."

Courts have indeed denied aggrieved parties the review remedies where the domestic remedies involved the hearing of the case *de novo*. See *Tutani v Min of Labour & Ors* 1987 (2) ZLR 88 (H); *Musandu v Chairperson, Cresta Lodge Disciplinary & Grievance Committee* HH-115-94.

In the watershed decision of *Ridge v Baldwin* [1963] 2 All ER 66 (HL) a chief constable of some 33 years of service with the Brighton Police Force was found unfit to remain in the Police Force and discharged from it by a watch committee (the police authority) which purported to act in terms of s 191(4) of the Municipal Corporation Act 1882. The chief constable appealed to the



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Home Secretary against the watch committee's decision under the Police (Appeals) Act 1927. The Home Secretary dismissed his appeal. The chief constable then commenced an action against the watch committee, claiming that his purported dismissal was void, in that he had no notice of the grounds on which the committee proposed to act and no opportunity to be heard in his own defence. The Court of Appeal held that, by appealing to the Home Secretary under the Police (Appeals) Act 1927, the chief constable had waived his right to bring the action to the courts.

Reversing that decision, Lord Reid, who delivered the leading speech in the House of Lords, said at 81H:

> "There are many cases where two remedies are open to an aggrieved person, but there is no general rule that by going to some other tribunal he puts it out of his power thereafter to assert his rights in court, and there was no express waiver because in appealing to the Secretary of State the appellant reserved his right to maintain that the decision was a nullity."

Mr *Ncube*'s argument was that, by appealing to the Police Service Commission, the applicant waived the right to invoke the review procedure against the decision of the commissioner. In *Ridge v Baldwin supra*, the House of Lords did not have to decide what the effect of the decision of the appellate tribunal was on the review procedure, because the Secretary of State did not make a decision of his own on the merits of the case. He simply rubber stamped the decision of the watch committee.

It is, however, a general principle of law that an appeal is not an act of approbation for the decision appealed against. In *Muntondo v Oil Field Workers TU* [1961] AC 954 (HL), Lord Denning said that an appeal was not an act of affirmance but was a disaffirmance - a complaint. The answer to the question of whether the aggrieved party should invoke the review procedure after exhausting the domestic remedies will depend on the form of the appeal available or the procedures and powers of the appellate tribunal. Baxter *Administrative Law supra* points out at pp 589-590 that -

> "It is important to draw a distinction between the type of appellate proceedings which allows for a complete rehearing *de novo*, totally superseding the original decisional process and appellate proceedings which are self-contained and not a replacement of the original proceedings. In the case of the former, it is possible for the appellate tribunal, by observing the precepts of natural justice, to gather completely fresh





> evidence in a fair manner and to weigh it objectively and impartially. To this extent the injustice of the first hearing can be remedied. In the latter type of appeal it might not be possible for the taint' of the first hearing to be eliminated by the second. The appellate tribunal might have no power to consider the alleged illegality of the first decision. It might be confined to a record which is already distorted by the failure to comply with natural justice."

Where the legislature has prescribed a time limit within which the review proceedings ought to be instituted on termination of the proceedings or decision in which the irregularity complained of occurred, the party that seeks to institute review proceedings outside the prescribed period bears the onus of satisfying the court that it was reasonable in the circumstances of the case to

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first exhaust the domestic remedies before approaching the courts for review.

The court has, of course, a discretion after considering all the circumstances of the case to find the explanation that the delay in instituting review proceedings was caused by the pursuit of domestic remedies as being reasonable and acceptable for purposes of condonation of the delay.

The Police Service Commission had no power to hear the case of the applicant's suitability to remain in the Police Force *de novo*. It confined its deliberations to the record of proceedings before the Board and the basis of the Commissioner's decision. In my view, the explanation that 9 months of the period of delay to institute these review proceedings was caused by the fact that the applicant had to await the decision of the Police Service Commission to which he had appealed in terms of s 51 of the Police Act constituted a reasonable and acceptable explanation for that part of the period of delay.

That leaves a further delay of 9 months. In *R v Senate of the University of Aston* Ex p *Roffey & Anor* [1969] 2 All ER 964, a period of 9 months' delay in instituting review proceedings was held to be fatal to the application. The explanation advanced by the applicant in the founding affidavit for part of the delay was that Gula-Ndebele and Manase had written to the Ministry of Home Affairs seeking to have the decision of the Commissioner reversed by the executive. It was properly conceded by Mr *Cherry* in argument that a patently wrong procedure was followed by the applicant's legal practitioners in their attempt to have a legally binding decision reversed administratively.



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In *Mabuye*'s case *supra* Mtambanengwe J held at pp 3-4 of the cyclostyled judgment that -

> "Even if applicant had alleged, which he does not do, that he had been promised or assured or led to believe that the dispute would be resolved administratively that would be no explanation for the delay."

No affidavit was recorded from the legal practitioner who handled the applicant's case in the firm of Gula-Ndebele and Manase as to why it was found necessary to seek an administrative reversal of the Commissioner's decision to discharge the applicant from the Police Force.

There was dead silence on the failure by Ben Baron and Partners to institute the review proceedings at the time they were consulted by the applicant. A court is unable to decide whether an explanation for the delay is reasonable and acceptable when no explanation is advanced. Mr *Cherry* was unable to resist the force of Mr *Ncube*'s argument that the applicant cannot escape the lack of diligence on the part of his legal practitioners. He had to swim or sink with the legal practitioners of his own choice: *S v McNab* 1986 (2) ZLR 280 (S); *Taruvinga v Sengweni Enterprises (Pvt) Ltd* HH-85-94. I find that no reasonable and acceptable explanation was given for the delay of 9 months from the time the applicant received official notice of the dismissal of the appeal by the Police Service Commission to 7 March 1995 when the review proceedings were instituted.

Are there prospects of success on the merits of the application? The first point taken by Mr

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*Cherry* was that the Board misdirected itself in the finding of facts in that it said "the years 1988 to 1989 saw him registering seven counts of misconduct that is viewed seriously". He argued that the "defaulter's record" showed that the applicant was convicted of three counts of misconduct in the years 1988 and 1989. Mr *Cherry* further argued that, because of the misdirection, the Board took a more serious view of the applicant's disciplinary record than he really deserved and led to the imposition of a more severe penalty than ought to have been imposed.

Mr *Ncube*'s argument was that, even if it was found as a fact that the Board misdirected itself in the finding of facts, it did not make the decision that affected the applicant's rights in the employment. According to Mr *Ncube*, the Board's task was to collect evidence without adjudicating on the applicant's rights and it was not obliged to obey the rules of natural justice. What the Board did was therefore not reviewable - so went the argument.

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There is no doubt that the Board's task in this case was to collect evidence on which the Commissioner based the decision whether or not the applicant was suitable to remain in the Police Force and the disciplinary action to be taken should he be found unsuitable.

Two aspects of a single process were involved: the collection of evidence and the making of the decision on the applicant's suitability to remain in the Police Force. Although both duties would ordinarily vest in the Commissioner, he had a discretion under s 50 of the Police Act to convene the Board to perform the function of collecting of evidence for him. Baxter *op cit* at p 585 states that -

> "Ideally the decision-maker should also be the person who elicits the information upon which his decision is to be based. But since this is usually not practical the decision-maker is often obliged to appoint others to make inquiries on his behalf."

In a dissenting judgment in *SA Defence & Aid Fund v Minister of Justice* 1967 (1) SA 263 (A) at 278H Williamson JA said:

> "The making of decisions by Ministers of State or by Senior Administrative Officials under the complex conditions of a modern state has resulted in the necessity, in many cases, of there being different stages involved in the whole process prescribed for the making of any such decision."

It does not, however, necessarily follows, as Mr *Ncube* suggested in argument, that because the decision to discharge the applicant from the Police Force was to be made by the Commissioner, the Board was not obliged to observe the principles of natural justice in the process of collecting the evidence on which the commissioner's decision was based. Mr *Ncube* relied on the following decisions for the general proposition that a body whose task is to collect evidence and not make decisions affecting the rights of the individual concerned is not under a duty to observe the rules of natural justice: *Cassem en 'n Ander* v *Oos-Kaapse Komittee van die Groepsgebiederaad en Andere* 1959 (3) SA 651 (A); *Maxwell* v *Department of Trade & Industry & Ors* [1974] 2 All ER 122; *Norwest Holst v Secretary of State for Trade* [1978] ChD 201. Add to these decisions the majority decision in *South African Defence and Aid Fund & Anor v*

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*Minister of Justice supra*.

These decisions went against a general principle running through numerous decided cases to the effect that bodies that collect evidence upon which



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decisions affecting the rights of individuals are made are under a "duty to act fairly" which means, in other words, they are bound to observe the rules of natural justice unless there are special circumstances to the contrary or the statute expressly excludes them.

In *Ridge v Baldwin supra* at 84G-85A Lord Evershed said:

> "It has been said many times that the exact requirements in any case of the so-called principles of natural justice cannot be precisely defined, that they depend in each case on the circumstances of that case. According to Sir Frederick Pollock the meaning of the phrase natural justice is the ultimate principle of fitness with regard to the nature of man as a rational and social being' and he went on to point out that the origin of the principles could be traced to Aristotle and the Roman Jurists ... I am, however, content to assume that the invocation should not be limited to cases where the body concerned, whether a domestic committee or some body established by a statute is one which is exercising judicial or quasi-judicial functions strictly so called; but that such invocation may also be had in cases where the body concerned can properly be described as administrative - so long as it can be said, in Sir Frederick Pollock's language, that the invocation is required in order to conform to the ultimate principle of fitness with regard to the nature of man as a rational and social being. On the other hand, it is (as I venture to think) no less plain now that Parliament may by appropriate language in a statute make it clear that the activity or discretion of the body constituted by the statute is not to be subject to any control or interference by the courts."

In Re *Pergamon Press Ltd* [1971] ChD 338, it was argued that inspectors conducting an inquiry into the affairs of a company in terms of s 165 *(b)* of the Companies Act 1948 were not bound to observe the rules of natural justice because they were not under a duty to come to a decision of some kind or other. Dismissing the argument, Lord Denning said:

> "I cannot accept Mr *Fay*'s submission. It is trite, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing, they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a *prima facie* case.
>
> But this should not lead us to minimise the significance of their task.



MALABA J

> They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some, they may condemn others; they may ruin reputations ...
>
> Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them as on many other bodies even though they are not judicial nor quasi-judicial but only administrative. The inspectors can obtain information in any way they think best, but before they condemn or criticise a man they must give him, a fair opportunity for correcting or contradicting what is said against him."

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In *Evans v Public Service Commission & Minister of Justice* 1920 TPD 170 Bristow J held that "an inquiry involves informing the applicant of the complaints that are made against him and giving him an opportunity of submitting or making any relevant statements with regard to those allegations which he may think fit to make."

See also *Tshabalala v Tshabalala* 1921 AD 311 at 316; *Transvaal Indian Congress v Land Tenure Advisory Board* 1955 (1) SA 85 (T) at 91; *Peri-Urban Areas Health Board v Administrator Transvaal* 1961 (3) SA 669 (T); *Crow* v *Detained Mental Patients Special Board* 1985 (1) ZLR 202 (H) at 222F-223B; *Logan v Morris NO & Ors* 1990 (2) ZLR 65 (S) at 69E-F.

The case of *Maxwell v Department of Trade & Industry & Ors supra* was a sequel to Re *Pergamon Press Ltd supra*. Maxwell was the director of the company being investigated and had been given an opportunity to give evidence at the hearing by the inspectors. The case did not decide that the inspectors were not under a duty to observe the rules of natural justice. It decided that the inspectors' duty to act fairly did not extend to them having to inform Maxwell of their initial impressions before compiling a report critical of him and affording him the opportunity to make representations to them before the final report was produced. See also *Crow*'s case *supra* at 211B-G.

Baxter *op cit* at 573 says that the majority decision in *SA Defence & Aid Fund v Minister of Justice* approving of the decision in *Cassem's* case was "perhaps one of the most criticized decisions in South African administrative law." Add to this criticism by the profession, the fact that two strong dissenting judgments co-exist with the majority decision, the authority of the decision in *SA Defence & Aid Fund* is diminished.

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MALABA J

Lastly, in *Moyo v Secretary for Justice, Legal & Parliamentary Affairs* 1988 (2) ZLR 185 (H) Mtambanengwe J approved of the view of *Cassem's* case by Rose Innes *Judicial Review of Administrative Tribunals in South Africa* to the effect that it departs from earlier cases in South Africa where the courts regarded the proceedings of fact-finding and advisory bodies at a preliminary enquiry as quasi-judicial and subject to the *audi alteram partem* rule.

It is, however, not necessary to decide whether in fact the Board observed the principles of natural justice. Mr *Cherry* accepted that it did. There was no bias on the part of the Board and the applicant was afforded the opportunity to present his case through his legal practitioner. The only question is whether the Board misdirected itself in the finding of facts to the extent of prejudicially influencing the Commissioner's decision to discharge the applicant from the Police Force.

The Board did not say the applicant was convicted of seven acts of misconduct in the years 1988 to 1989. It said he registered seven *counts* of misconduct which means, in my view, he was accused or charged with having committed seven acts of misconduct, whether he was subsequently convicted of all or some of them. The applicant was convicted of four counts of misconduct in the relevant period. Two more charges of misconduct were preferred against him but later withdrawn. The misdirection on one count cannot be described as a "gross irregularity"

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in the proceedings of the Board.

In any case, it was not argued that the misdirection by the Board prejudicially affected the determination by the Commissioner that the applicant was unsuitable to remain in the force. The Board had no power to decide whether the applicant was suitable to remain in the Police Force. The Commissioner had before him facts contained in the record of proceedings before the Board. He said he applied his own mind to the facts in deciding that the applicant was unsuitable to remain in the Police Force. He said:

> "The applicant's case was brought before me for consideration. I did consider the applicant's record of employment together with the Board's recommendations. The applicant's record revealed that on many occasions he was charged with misconduct. On these charges various forms of punishment were imposed on the applicant. (See Annexure "F" to applicant's founding affidavit.)
>
> On 30 August 1991 the applicant was found guilty of housebreaking with intent unknown to the prosecutor' (*sic*). This is a very serious offence.



MALABA J

> It was then my considered and independent opinion that the applicant was not a proper person to be retained in the force. Most forms of punishment had been imposed on the applicant. He failed to reform as a member. I therefore ruled that the applicant be discharged from the service."

It was not suggested that the Commissioner acted out of malice or ulterior motives. The argument was not that the Commissioner's decision that the applicant was unsuitable to remain in the Police Force was grossly unreasonable. The Commissioner properly considered the applicant's service and disciplinary record; his rank; the nature of the acts of misconduct; their consequences in discrediting the reputation of the Police Force and the failure by the applicant to heed the previous warnings.

The applicant failed to discharge the heavy onus of showing that the misdirection by the Board in the finding of facts caused the Commissioner to arrive at an unreasonable decision that he was unsuitable to remain in the Police Force: *Muzonda v Minister of Home Affairs & Anor* 1993 (1) ZLR 92 (S) at 100; *Zonke v Chairman, Public Service Commission* S-46-93 at 5-6; *Commissioner of Police v Wilson* 1981 ZLR 451 (S) at 476H. The applicant directed the attack against the decision by the Commissioner to discharge him from the Police Force on the ground that it failed to consider the gravity of its consequences such as loss of pension benefits after twenty years of service. The argument assumed that once the Commissioner decided that the applicant was unsuitable to remain in the Police Force he could impose any of the penalties prescribed under s 50(3) of the Police Act other than the discharge from the Police Force.

A proper construction of the provisions of s 50(3) of the Police Act shows that once a determination has been made that a member is unsuitable or unfit to remain in the Police Force the penalties that have the effect of retaining him in the Police Force are not available to the Commissioner. The only available penalty is the discharge from the Police Force. There is no provision for the Commissioner to ask the member to resign thereby giving him an opportunity to get pension benefits.

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The use of the permissive word "may" gives the Commissioner a discretion in selecting the appropriate penalty where the member is found inefficient in the discharge of his duties or unfit to retain his rank, seniority or salary.

Where the Commissioner has decided that the member is unsuitable or unfit

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MALABA J

to remain in the Police Force the word "may" imposes on him an obligation to discharge him from the Police Force. It is not uncommon for the legislature to use "may" in a statute to impose on a public official a duty to act in a particular manner once the pre-condition for the exercise of the power exists.

In *Custodian of Enemy Property v Brakpan Mines Ltd* 1922 TPD 179, s 5 of Proclamation 7 of 1920, issued under the Treaty of Peace Act 1919, provided that "the Custodian of Enemy Property may, out of the property rights or interests of German nationals vested in him," pay any debt owing by a German national to certain British subjects, "upon proof being furnished to the satisfaction of the custodian by the claimant or creditor" of certain conditions.

The question was whether, by using the permissive word "may", the legislature intended to give the Custodian of Enemy Property a discretionary power to refuse to pay the money to British subjects who had satisfactorily proved to him their claims against German nationals. Wessels JP said at p 188:

> "Mr *van Hoytema* has argued that the word may' is wholly discretionary and he has referred to English decisions to show that the word may' never does mean must'. That of course is perfectly true and no one in his senses would ever suggest that may' means must'. But there is no doubt that the legislature has in the past used and no doubt will in the future use the word may' for the purpose of conferring an enabling power upon an official. ... Sometimes the legislature uses the formula may and shall'. At other times it uses the term may' as an abbreviated form of may and shall' and then the officer enabled to do an act is in fact obliged to do the act if the required conditions are fulfilled. At the other times the legislature uses the formula may and it shall be lawful', or simply may' with the intention that the power and a discretion to exercise it should be conferred upon the official. It is only considering the general provisions of the law in question and the purview of the whole legislation on the subject (to use the words of Mr Justice Ward in *Chief Pass Officer v Mashamba* 1917 TPD 399 that we can tell whether may' confers a discretionary power or an obligatory duty. No definite rule can be laid down as to when may confers a discretion and when a duty'."

Where there would be no good reason for not doing the prescribed act, an officer with the power to act is required to do it. In this case it is in the public interest that a member who is found after an inquiry by the Board to be unsuitable or unfit to remain in the Police Force be discharged from service.

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MALABA J

In *Masiyiwa v TM Supermarket* 1990 (1) ZLR 166 (S) the question was whether the use of the word "may" in s 3(2) of Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985) conferred on the Labour Relations Officer,

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Board or Tribunal a discretion not to authorise the dismissal of an employee once the grounds for his suspension were proved.

McNally JA said at p 170B-171A:

> "It seems to me although it is not necessary to decide the question for the purposes of this case, that there is no discretion in the matter. The use of the word may' in s 3(2) of SI 371 of 1985 seems to suggest a discretion but a closer reading of the section indicates to me that that suggestion is illusory. ... I consider that this is a case where the words of Bennion *Statutory Interpretation* p 27 apply.
>
> Where a court or tribunal is given in terms a power to exercise a certain jurisdiction this may be construed as imposing a mandatory duty to act. This will arise where there is no justification for failing to exercise the power. In such cases as it is often put, may' is held to mean shall'.
>
> And see *Salisbury Financial Holdings (Pvt) Ltd v van Niekerk* 1974 (1) RLR 333 (G) at 335D-E; *Annison & Ors v District Auditor for St Pancras Borough Council & Anor* [1962] 1 QB 489; *Craies on Statute Law* 7 ed p 285. Thus in the case of s 3(2) the Labour Relations Officer has to determine whether the grounds of suspension are proved or not proved. If they are proved he must proceed in terms of subpara *(a)*, if they are not proved, he must proceed in terms of subpara *(b)*; to put it another way, he has a choice, but that choice is governed not by his discretion but by his finding. If he finds the grounds proved he must choose *(a)*; if not proved *(b)*."

See also *Mugadza v Mahlaba* HH-59-91 at p 9; *Mhora & Anor v Minister of Home Affairs & Anor* 1990 (2) ZLR 236 (H) at 247. Upon a finding after the inquiry by the Board that the applicant was unsuitable to remain in the Police Force the Commissioner was obliged to discharge him from the Police Force. The decision to discharge the was a result of the finding that he was unsuitable to remain in the Police Force.

Even if I am wrong in my view of the use of the word "may" in s 50(3) of the Police Act and assuming that the Commissioner had discretionary power not



MALABA J

to discharge the applicant following a finding that he was unsuitable to remain in the Police Force, I am still unable to conclude that the decision to discharge the applicant was "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" (*CCSU & Ors v Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 951a-b). See also *Dube v Chairman, Public Service Commission & Anor* HH-178-90; *Zonke v Chairman, Public Service Commission* S-46-93 p 6.

In the respondent's heads of argument, Mr *Ncube* made the following pertinent observation:

> "Applicant was not only a policeman but a Senior Police Officer for that matter and one cannot envisage such a person being a protector of the public or a law enforcement agent or put in other words one cannot envisage criminals being serving members of the Police Force. With respect the public would simply lose confidence in the force."

The Commissioner applied his mind to all the facts material to the decision to discharge the applicant from the Police Force. It is not for the High Court to question the Commissioner's decision on the grounds that he placed too much weight on the bad aspects of the applicant's

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service and disciplinary record. The weight he placed on any of the factors he considered was entirely within his discretion.

There are no prospects of success of the application on the merits. The application for condonation of late institution of review proceedings is dismissed with costs.

*Ben Baron & Partners*, applicant's legal practitioners

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



## JESSE v CHIOZA 1996 (1) ZLR 341 (SC)

**Court** **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Civil appeal

11 & 25 March 1996 Judgment No. S-53-96

### Flynote

Appeal - right of - from High Court - civil case - when exists - interlocutory order or judgment - what is - order directing that matter be referred to trial - such order merely a procedural ruling - orders directing that, pending determination of trial, disputed property remain in possession of respondent and that costs be costs in the cause - only appealable with leave of court a quo

### Headnote

The respondent, as applicant in the High Court, obtained a provisional order in the High Court against the appellant. On the return day, the judge found himself unable to decide the matter on the papers and ordered that it be referred to trial. He also ordered that the property in dispute should remain in the possession of the person who currently had possession of it. Finally, he ordered that the costs of the application be costs in the cause. On appeal, the question arose as to whether an appeal lay against the judge's order. Section 43 of the High Court Act [*Chapter 7:06*] provides that an appeal lies as of right against a judgment of the High Court, but that no appeal lies from an interlocutory order or judgment unless leave to appeal is granted. In this case, leave to appeal had not been granted.

Held, that the order referring the matter to trial was not a judgment, as it did not decide the rights of the parties or have the effect of disposing of the whole, or at least a portion of, the relief claimed by one of them. It was merely a procedural ruling that oral evidence was necessary before the factual disputes could be determined.

Held, further, that the grant of the interim interdict was interlocutory, for the order was designed to maintain, for the time being, the status quo. This being so, leave to appeal was required.

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Held, further, that the order that the costs of the application be costs in the cause fell within s 43(2)*(c)*(ii) of the Act and was only appealable with leave.

Appeal struck off.

Cases cited:

*African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A)

*Carlis v Hertz's Trustee* 1904 TS 584

*Charugo Development Co (Pty) Ltd v Maree NO* 1973 (3) SA 759 (A)

*Chrmn, National Tpt Comm & Anor v Safcor Forwarding (Jhb) (Pty) Ltd* 1981 (3) SA 504 (T)

*Davis v Press & Co* 1944 CPD 108

*Dickinson & Anor v Fisher's Exors* 1914 AD 424

*Engar & Ors v Omar Salem Essa Trust* 1969 (2) SA 423 (D)

*Engar & Ors v Omar Salem Essa Trust* 1970 (1) SA 77 (N)

*Kimberley Waterworks Co v Kimberley Town Council* (1902) 19 SC 135

*Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A)

Ex p *Lewis & Marks* 1904 TS 281

*Loggenberg v Beare* 1930 TPD 714

*Lombard v Lombardy Hotel Co Ltd (in liq)* 1911 TPD 866

*Mears v Nederlandsch ZA Hypotheek Bank* 1908 TS 1147

*Nxaba v Nxaba* 1926 AD 392

*Pfizer Inc v SA Druggists Ltd* 1987 (1) SA 259 (T)

*Setlogelo v Setlogelo* 1914 AD 221

*Stevenson v MacIver* 1922 AD 413

*Tropical (Commercial & Industrial) Ltd v Plywood Products Ltd* 1956 (1) SA 339 (A)

*Union Govt (Min of the Interior) & Registrar of Asiatics v Naidoo* 1916 AD 50

*van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A)

*Wallach v Lew Geffen Ests CC* 1993 (3) SA 258 (A)

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*Western Johannesburg Rent Bd & Anor v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A)

*Zweni v Min of Law & Order* 1993 (1) SA 523 (A)

Statutes referred to:

High Court Act [*Chapter 7:06*], s 43

Appellant in person

*I Mabulala*, for the respondent

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## Judgment

**Gubbay CJ:** On 23 February 1995 the now respondent, as the applicant, obtained from the High Court (Chidyausiku J), pursuant to a chamber application lodged under a certificate of urgency, a provisional order calling upon the appellant, who was the first respondent, and AA Auctioneers (Pvt) Ltd, then the second respondent, to show cause why a final order should not be granted in these terms:

> "1. That the first respondent be interdicted from selling, disposing or dealing with the property he removed from Rothberry Farm in any manner that will destroy the property or prejudice the applicant.
>
> 2. That the second respondent be ordered to return the goods it took from Rothberry Farm to the said farm.
>
> 3. That in the interim the second respondent is interdicted from selling or releasing to the first respondent the goods it took from Rothberry Farm pending the return day.
>
> 4. That the first respondent be and is hereby ordered to pay the costs of this application."

On the return day before Sandura JP, the application was opposed by both the respondents. Affidavits with annexures numbering in excess of 250 pages were placed before the learned Judge President. After careful consideration of the papers he found that there were a number of issues - he specified five in particular - which he was unable to determine without the reception of *viva voce* evidence. Accordingly he ordered that -

1. the matter was to be referred to trial;
2. the applicant was to file his declaration within one month and thereafter the other pleadings were to be filed in conformity with the times prescribed in the Rules of the High Court;
3. pending determination of the trial the property in dispute and in the possession of the second respondent was to remain with it;
4. the costs of the application were to be costs in the cause.

Shortly before this hearing the parties were requested to prepare argument on whether an appeal lay against the above order (I use the word "order" in a loose and non-technical sense). At the conclusion of the arguments on what was in essence a point *in limine*, judgment was reserved. It was felt that a more in-depth research into the authorities was necessary.

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Part VIII of the High Court Act [*Chapter 7:06*] ("the Act") is headed



GUBBAY CJ

"Appeals From High Court" and s 43 therein is concerned with the right of appeal from the High Court in civil cases. Subsection (1) reads:

> "Subject to the provisions of this section, an appeal in any civil case shall lie to the Supreme Court from any *judgment* of the High Court, whether in the exercise of its original or its appellate jurisdiction" (emphasis added).

Subsection (2) refers to *orders.* Paragraphs *(a) (b)* and *(c)(i)* thereof disallow an appeal against the orders specified. Paragraph *(c)*(ii) provides that an order as to costs only requires the grant of leave before it is appealable. Paragraph *(d)* states:

> "(No appeal shall lie) from an *interlocutory order* or *interlocutory judgment* made or given by a judge of the High Court without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, except in the following cases -
>
> *(i)* ...
>
> (ii) where an interdict is granted or refused;
>
> (iii) ..." (emphasis added)."

Subsection (3) is of no present relevance.

In order to resolve whether the appeal was properly brought it is incumbent to consider the three aspects of the decision of the court *a quo* as embodied in its order, namely, *(a)* the referral to trial; *(b)* the interim interdict which, though not challenged by the second respondent, affects the first respondent; *(c)* the provision made in respect of costs.

**THE REFERRAL TO TRIAL**

The question is whether the "order" referring the matter to trial for the hearing of oral evidence amounts to a "judgment" (defined in s 2 of the Act to include "a decision or order"), and is decisive or definitive of the rights of the parties and has the effect of disposing of the whole, or at least a portion, of the relief claimed by one of them. See *van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 at 586I-J. Or is it a mere ruling which is a direction as to the manner in which the case should proceed? See *Dickinson and Anor v Fisher's Executors* 1914 AD 424 at 427-428; *Tropical (Commercial and Industrial) Ltd v Plywood Products Ltd* 1956 (1) SA 339



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(A) at 344F-G (an appeal from the High Court of Southern Rhodesia); *Zweni v Minister of Law & Order* 1993 (1) SA 523 (A) at 536B-C.

The judgment of Innes CJ in *Union Government (Minister of the Interior) & Registrar of Asiatics*

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*v Naidoo* 1916 AD 90 affords the second hypothesis direct support. In that case the respondent had applied to a judge in chambers to set aside a deportation warrant, to interdict his deportation and for other specified relief. The application was opposed on the ground, *inter alia*, that the court had no authority to hear the matter. The judge felt that the court had authority to go into the question, but was unable to settle it upon the affidavits before him. He therefore directed that oral testimony should be adduced and adjourned the case for that purpose. The Government applied to the Appellate Division for special leave to appeal. In rejecting the application the learned Chief Justice remarked at 51-52:

> "Is there under these circumstances any decree in existence against which we should be justified in granting leave to appeal? In *Dickenson*'s case (1914 AD 424) a ruling upon evidence was held not to be an order against which leave to appeal could be granted, because it did not constitute a decision upon an application for specific relief. This is a converse case. There has been an application for relief, but no decision upon it. The prayer of the petition falls under nine separate heads, and in regard to none of them has any order been made. The application has merely been postponed for further evidence. When the enquiry is resumed the judge may decide in favour of the present applicants on the facts; or he may possibly, though very improbably, revise his view of the law upon further argument. But if he does neither; if he finds against the applicants on the law and the facts, and grants the relief prayed for, it will then be competent for them to appeal and to raise every point upon which they now wish to rely. The fact is that the present application is for leave to appeal not against the order of the learned judge - for he has made none - but against his reasons. It is entirely premature, and must at this stage be refused."

Some fifty years later in *Engar & Ors v Omar Salem Essa Trust* 1969 (2) SA 423 (D) at 425G-H, Miller J (as he then was) restated the principle in these words:

> "There seems to me to be a great deal to be said for the view that, where the court does refer a matter in regard to which there is a dispute on facts for the hearing of evidence, it does no more than the learned judge of first instance did in *Union Government v Naidoo* (1916 AD 50): it postpones the further hearing and defers its decision on the merits until it has heard



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> evidence, and by so doing it gives no definitive or final or even interim judgment in regard to the relief claimed. In *Heyman v Yorkshire Insurance Co* 1964 (1) SA 487 (A), following other decisions which had been given in the Appellate Division, it was emphasised that to be appealable at all an order had necessarily to deal with the relief actually claimed."

And on appeal (1970 (1) SA 77 (N) at 80E-F) Harcourt J said:

> "In my judgment, it is clear that the decision of Miller J, in regard to the application, so far as it related to the female respondents, amounted to no more than a ruling and was as such not appealable (cf *Naidoo's* case *supra* at pp 51-2). No final word was said and none of the relief prayed for in the application was granted or refused. In truth, the direction was merely that further evidence, in this case oral, was to be given (cf *Commissioner for Inland Revenue v Niemand* 1965 (4) SA 780 (C)). No decision was given *quoad* the two common defences which would be binding on the female respondents."

See also *Pfizer Inc v South African Druggists Ltd* 1987 (1) SA 259 (T) at 262C-263D; *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) at 40H-41H; *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 263B-C.

On this well settled expression of the law, with which I respectfully agree, it is clear that the directive given by Sandura JP was not a judgment. It did not decide the merits. It was merely a

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procedural ruling that oral evidence was necessary before the factual disputes could be determined. Consequently, and by virtue of s 43(1) of the Act, it was not appealable.

**THE GRANT OF THE INTERIM INTERDICT**

The refusal or grant of a final interdict is, of course, appealable as of right. See s 43(2)(ii) of the Act; and *Setlogelo v Setlogel*o 1914 AD 221 at 226. So too is the *refusal* of an interim interdict. See Ex p *Lewis & Marks* 1904 TS 281 at 282; *Carlis v Hertz's Trustee* 1904 TS 584 at 585. This is because if the interim relief is refused, it irreparably anticipates or precludes some of the relief which would or might have been granted at the ultimate hearing. If it were not appealable there might be no way of preserving the status quo in regard to the subject matter of the action. See *Mears v Nederlandsch ZA Hypotheek Bank* 1908 TS 1147 at 1150; *Davis v Press & Co* 1944 CPD 108 at 113; Harms *Civil Procedure in the Supreme Court* at para S20, N2.

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GUBBAY CJ

On the other hand the *grant* of an interim interdict is interlocutory, for the order is designed to maintain for the time being the status quo. This proposition is supported by ample respectable authority. See *Kimberley Waterworks Co v Kimberley Town Council* (1902) 19 SC 135; *Lombard v Lombardy Hotel Co Ltd (in liquidation)* 1911 TPD 866 at 881; *Loggenberg v Beare* 1930 TPD 714 at 722 and 723; *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 47C-D and H; *Chairman, National Transport Commission & Anor v Safcor Forwarding (Jhb) (Pty) Ltd* 1981 (3) SA 504 (T) at 508F. Leave to appeal is therefore required in terms of s 43(2) of the Act. In this case no such leave was requested or granted.

**THE ORDER RELATING TO COSTS**

By ordering that the costs of the opposed application be costs in the cause of the trial, the learned Judge President did not decide which of the parties to the abortive application was immediately liable to pay such costs. In effect he directed that the costs were to be paid by the party against whom judgment would ultimately be given at the trial. Standing alone, as it does, the order falls within s 43(2)*(c)*(ii) of the Act. It was only appealable with the leave of the court *a quo*, which was not obtained.

Initially I took the view that because of the respondent's failure to dispute the appealability of the "orders" of the court *a quo*, he was not entitled to the costs of the appeal. However, such cases as *Stevenson v MacIver* 1922 AD 413 at 414*, Nxaba v Nxaba* 1926 AD 392 at 394, *Western Johannesberg Rent Board & Anor v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355 and *Charugo Development Co (Pty) Ltd v Maree NO* 1973 (3) SA 759 (A) convince me that where a point is successfully raised by the court itself on appeal, the usual order is that the loser pays the costs of the appeal. In any event, it was for the appellant to satisfy himself that the appeal could properly be heard by this court. The respondent is accordingly entitled to an order for costs.

The appeal is struck off the roll with costs.

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Korsah JA: I agree

Muchechetere JA: I agree

*Gula-Ndebele & Manase*, respondent's legal practitioners



## MUTUKWA v NATIONAL DAIRY CO-OPERATIVE LTD 1996 (1) ZLR 348 (SC)

**Court** **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

19 March & 2 April 1996 Judgment No. S-58-96

### Flynote

Court - High Court - review - court's powers on review - powers granted under s 26 of High Court Act [Chapter 7:06] - limitations on powers

Employment - contract - termination - on notice by employer - incapacitation due to accident or illness - whether ministerial approval required before employer may terminate on notice on grounds of incapacitation

### Headnote

Under s 26 of the High Court Act [*Chapter 7:06*], the High Court is vested with jurisdiction and authority to review all proceedings and decisions of inferior courts, tribunals and administrative bodies within Zimbabwe. Any decisions or proceedings of any such body may be impeached in the High Court on the grounds of lack of jurisdiction on the part of the body concerned. Lack of jurisdiction is a ground that can be raised by the High Court *mero motu*, for jurisdiction cannot be conferred on the lower tribunal by consent. The High Court's powers on review are unlimited. It may decide the matter *de novo*. It possesses not only the powers of review in the legal sense, but has the functions of an appeal court with the privilege of being able to deal with the whole matter on fresh evidence as though it were a court of first instance.

Where an employer is unable, because of illness or an accident, to fulfil the conditions of his contract of employment, s 14*(b)* of the Labour Relations Act [*Chapter 28:01*] entitles the employer to terminate the contract on



due notice given to the employee. This provision must, however, be read together with s 2(1)*(a)* of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985), which requires that the employer must also obtain the prior written approval of the Minister. The Minister has delegated his powers in this regard to labour relations officers. Where a dispute about employment arises, a labour relations officer is

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empowered under s 109(1) of the Act to redress it.

Cases cited:

*A-G, Tvl v Additional Magistrate for Johannesburg* 1924 AD 421

Ex p *Commr for Child Welfare:* In re *Adoption Volezer* 1960 (2) SA 312 (O)

*Johannesburg Consol Invstm Co v Johannesburg Town Council* 1903 TS 111

*Loxton v Kenhardt LLB* 1942 AD 275

Statutes and regulations referred to:

High Court Act [*Chapter 7:06*], ss 26 and 27(1)*(a)*

Labour Relations Act [*Chapter 28:01*], ss 14, 17(3)*(r)* and 93(1)

Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371/1985), s 2(1)*(a)*

*T Nyambirai*, for the appellant

*H Simpson*, for the respondent

## Judgment

**Korsah JA**: On 26 May 1994, Mr Mupandaguta, a Labour Relations Officer, made a determination in which the Ministry of Labour, Manpower Planning and Social Welfare, ordered the respondent to re-instate the appellant in its employ without loss of remuneration and other benefits. Aggrieved and dissatisfied with that determination, the respondent successfully applied to the High Court to have the determination of the Labour Relations Officer set aside. It is against the order of the High Court, setting aside the determination of the Labour Relations Officer, that this appeal has been launched.

A resumé of the events concluding in the order of the High Court are that the appellant was employed by the respondent as a bulk milk tanker driver in December 1987. On 17 June 1992, the appellant, in the course of his employment, was involved in a road accident as a result of which he sustained injuries and was hospitalized from that date up to December 1992.



KORSAH JA

Upon his discharge from hospital, the appellant produced a note from his doctor which recommended that he be assigned light duties. Clerical duties were accordingly allotted to the appellant as an interim measure, without a change in salary, pending the submission by him of a medical report. Despite constant reminders the appellant did not furnish the respondent with the medical report until May 1993.

The medical report assessed the appellant's disability as 25%. He was informed by the

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respondent that the degree and extent of his disability would preclude him from performing his duties as a tanker driver and so the respondent had no choice but to terminate his employment unless he, in consideration of his disablement, opted instead to resign.

The appellant asked for time to consider the matter. When in June 1993 he had not indicated his preference, he was informed by the respondent that it would invoke the provisions of s 14 of the Labour Relations Act [*Chapter 28:01*] (the Act) in order to terminate the appellant's employment. The relevant part of the said section reads:

> "14. Except where more favourable conditions have otherwise been provided for in the contract of employment concerned or in terms of any relevant enactment -
>
> *(a)* where an employee becomes temporarily incapacitated by reason of illness or accident not self-inflicted he shall, notwithstanding such incapacity, be entitled to receive his wages and all other benefits provided for expressly or impliedly in his employment contract for a period of not less than, in any one year of service, twenty-two working days in relation to a five-day working week, or twenty-six working days in relation to a six-day working week;
>
> *(b)* where, owing to illness or accident, an employee is unable for a period exceeding one month to fulfil the conditions of his employment contract, the employer shall be entitled to terminate the contract on due notice, and in such event the employee shall be entitled to all the benefits provided for expressly or impliedly in his employment contract up to the date of termination."

On 17 June 1993, the respondent wrote a letter to the appellant confirming



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that his employment would terminate on 30 June 1993, but he was also paid his July salary (presumably to cover the requisite notice specified in the Act). The respondent informed the Ministry of Labour of these developments in a letter dated 1 July 1993. I am of the view that the notice specified in s 14 is due notice to the employee and notification of such a step to the Ministry is not required under s 14 of the Act. I shall revert to the issue of notice to the Minister later in this judgment.

Early in July 1993, the respondent received a letter from the Ministry of Labour informing it of a complaint lodged by the appellant with a Labour Relations Officer (Mr Makoni) that he had been discharged without notice or ministerial approval.

Mr Makoni called at the respondent's offices and representations were made to him by both parties. Presumably satisfied with the explanation proffered by the respondent for acting as it had done, and possibly believing that he had no jurisdiction under s 14 of the Act to entertain the matter, Mr Makoni took no action regarding the complaint. At any rate, there was nothing in the records of the Ministry to indicate that any further action was taken by him.

It was not in dispute that the appellant had received his full salary as a tanker driver during the whole period that he had been hospitalised as well as the period when, on the recommendation of his doctor, he was put on light duty, doing clerical work, up to the time his employment was terminated. There is no evidence extant that there was a re-negotiation of the employment contract or any change in employment.

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Upon the termination of his employment in terms of s 14 of the Act, he co-operated with the respondent in the lodging of claims for his compensation culminating on 6 October 1993 in a disability award by the Workers' Compensation Fund in the form of a temporary pension in the sum of $2 537,51 together with a monthly pension of $210,19 and a children's allowance of $68,32 a month. Further evidence of compliance with s 14 of the Act is afforded by the payment to the appellant in the month of February 1994, of the sum of $18 070,74 by the respondent's insurers in respect of permanent disablement award.

The matter appeared to have been resolved to the satisfaction of all parties until the respondent was served with a notice on 22 April 1994, signed by Mr Mupandaguta, summoning it to attend a hearing on 5 July 1994, regarding a complaint lodged in the Ministry by the appellant.



KORSAH JA

Notwithstanding the respondent's attendance at the hearing and its explanation that the appellant's contract of employment had been terminated by reason of his incapacitation in terms of s 14 of the Act, Mr Mupandaguta made the determination which was the subject of attack by the respondent in the High Court.

The attack was founded on the jurisdiction, or the lack of it, of the labour relations officer to meddle in the termination of an employee's contract of employment on the ground of incapacitation in terms of s 14 of the Act.

In the amended grounds of appeal filed with the leave of this court, the first ground reads:

> "The Honourable Judge erred in interfering with the decision of a labour relations officer when the respondent had not alleged or proved any grounds upon which the court *a quo* could *review* the decision of the labour relations officer" (emphasis added).

By this ground of appeal, counsel undoubtedly appreciated that it was in the exercise of its review powers that the trial court entertained the respondent's application.

By s 26 of the High Court Act [*Chapter 7:06*], the court is vested with jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe. Any proceedings or decisions of the above enumerated bodies may properly be impeached in the High Court for want of jurisdiction by the tribunal or authority concerned - see s 27(1)*(a)* of the High Court Act. See also *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111; *Attorney-General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 438; *Loxton v Kenhardt Liquor Licensing Board* 1942 AD 275 at 281; and Ex p *Commissioner for Child Welfare:* In re *Adoption Volezer* 1960 (2) SA 312 (O) at 312H.

The trial court was quick to appreciate that the respondent had applied for a review of the determination of the labour relations officer on the ground that the latter had exceeded his jurisdiction in purporting to interfere with matters falling under s 14 of the Act. In this respect the following remarks by Innes CJ in *Johannesburg Consolidated Investment Co supra* at p 117 are apposite:

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"... when a court of law is charged with the duty of examining or considering a matter already dealt with by an inferior court, and no



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restrictions are placed upon it in so doing, it would appear to me that the powers intended to be conferred upon it are unlimited. In other words it may enter upon and decide the matter *de novo*. It possesses not only the powers of review in the legal sense, but it has the functions of a court of appeal with the additional privileges of being able, after setting aside the decision arrived at by the lower tribunal, to deal with the whole matter upon fresh evidence as a court of first instance."

In para 28 of the respondent's founding affidavit it is alleged that the labour relations officer exceeded his powers in hearing a matter over which he had no jurisdiction. There is thus no substance in the accusation that the trial court had entertained a matter on review where no ground for review had been alleged. In any case, a question of jurisdiction is one that a court imbued with review powers may raise *mero motu*; for parties cannot confer jurisdiction on an adjudicating authority where such jurisdiction has not been conferred on that adjudicating authority by statute.

The second ground of appeal alleges that the trial court fell into error in holding that ministerial approval was not necessary before the respondent could terminate the employment of the appellant under s 14 of the Act. I now return to the question of notice.

By s 14*(b)*, "... the employer shall be entitled to terminate the contract on due notice ..." It seems to me that the reference to "due notice" in that section, without reference to any other party, can only mean notice to the other party to the contract. A contract of employment cannot, generally, be properly determined without bringing to the attention of the other contracting party that the contractual relationship has been terminated. That, however, is not the end of the matter.

Section 17 of the Act empowers the Minister to "make regulations providing for the development, improvement, protection, ... and control of employment and conditions of employment". The Labour Relations (General Conditions of Employment) (Termination of Employment Regulations) SI 371 of 1985 (the Regulations) were promulgated under the authority of s 17 of the Act. Section 2(1)*(a)* of the Regulations stipulate that:

"No employer shall, summarily or otherwise, terminate a contract of employment with an employee unless -

*(a)* he has obtained the *prior written approval* of the Minister to do so."



KORSAH JA

Reading s 14 of the Act together with s 2(1)*(a)* of the Regulations, it becomes abundantly clear that, apart from the *due notice* to be given to the employee under s 14 of the Act, the respondent also had to obtain the prior written approval of the Minister, which can only be granted upon due notice to the Minister, in order to terminate legally the appellant's contract of employment. I agree with counsel that the learned judge fell into error in holding that Ministerial

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approval was not necessary under s 14.

It was not alleged by the respondent, nor is there any evidence of it in the record, that the prior written approval of the Minister was obtained before the termination of the appellant's contract of employment. In the absence of such prior written approval it seems to me that the termination of the appellant's contract of employment was unlawful.

The last ground of appeal urged on behalf of the appellant was that the learned judge again fell into error in holding that the labour relations officer did not have the jurisdiction to entertain the dispute between the parties.

By s 17(3)*(r)* of the Act, it is provided that:

> "(3) Without prejudice to the generality of subsection (1), the Minister may make regulations in terms of that subsection providing for -
>
> *(r)* specifying or otherwise restricting the circumstances in which contracts of employment may be terminated *summarily or otherwise*." (emphasis added)

Section 2(1)*(a)* of the Regulations, made in consequence of s 17(1) of the Act, forbade an employer from *summarily or otherwise* terminating a contract of employment with an employee without the prior written approval of the Minister. Section 5 of the Regulations empowered the Minister to delegate his powers under the Regulations to any official as he deems fit.

By s 93(1) of the Act, a Labour Relations Officer is authorised to redress *any dispute* or unfair labour practice. The interpretation section of the Act as amended defines a dispute as "a dispute relating to any matter concerning employment which is governed by this Act."

The respondent itself maintains that the termination of the appellant's employment was in accordance with s 14 of the Act. It follows that any dispute resulting therefrom concerns employment which is governed by the Act and the labour relations officer is competent to entertain and settle it.

For the above reasons the appeal is allowed with costs.

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**1996 (1) ZLR p355**

KORSAH JA

The order of the High Court dated 10 January 1995 is accordingly set aside and in its place is substituted the following:

> "The application is dismissed with costs."

Ebrahim JA: I agree

Muchechetere JA: I agree

*Kantor & Immerman*, appellant's legal practitioners

*Coghlan, Welsh & Guest*, respondent's legal practitioners

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## FSI HOLDINGS LTD v RIO TINTO ZIMBABWE LTD & ANOR 1996 (1) ZLR 356 (HC)

**Court** **High Court, Harare**

Smith J

Application to set aside arbitrator's award

2 & 10 April 1996 Judgment No. HH-42-96

### Flynote

Arbitration - award - setting aside of - court reluctant to interfere with arbitration proceedings but may interfere if arbitrator has misconducted proceedings - what constitutes misconduct - arbitrator hearing each party separately - whether arbitrator had breached rules of natural justice and had overlooked or misconceived what he was required to determine

### Headnote

The applicant sought to have arbitration proceedings set aside on the basis that the arbitrator had misconducted the proceedings. The applicant argued that the arbitrator had breached a fundamental principle of natural justice and had overlooked or misconceived what he was required to determine. The arbitrator had indicated to both parties that he intended to hear the evidence and arguments from each party separately, in the absence of the other. No specific objection had been raised, nor did either party refuse to attend a meeting. When one party said that it had not been given an opportunity to hear the other's representative, the arbitrator said he was willing to arrange a meeting. The party's representative then decided that such a meeting was not necessary. The submissions and arguments raised by each party were made known to the other party, which was given an opportunity to respond.

Held, that where the parties have agreed that their dispute be settled by a chosen arbitrator, the courts are very reluctant to interfere with arbitration proceedings. However, the court may interfere where the arbitrator has misconducted the proceedings.

Held, further, that ordinarily all proceedings before an arbitrator must be



conducted in the presence of the parties to the dispute and it will be a breach of the *audi alteram partem* rule for evidence to be heard from one party without the other being present. The parties to a dispute submitted for arbitration are, however, free to agree to any procedure which they think is appropriate to the settlement of their dispute. In the present case the arbitrator indicated clearly to both parties the procedure that he intended to adopt. As the applicant's representatives had agreed to the procedures adopted by the arbitrator, the applicant could not now complain about those procedures.

Held, further, that the arbitrator had not overlooked or misconceived what he was required to

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determine.

Cases cited:

*Chelsea West (Pty) Ltd v Roodebloem Invstmts (Pty) Ltd* 1994 (1) SA 837 (C)

*Cone Textiles (Pvt) Ltd v Commercial Union, Fire, Marine & General Ins Co Ltd* 1989 (2) ZLR 152 (S)

*Cone Textiles (Pvt) Ltd v Redgment & Ors* 1983 (1) ZLR 88 (S)

Re *Hopper* (1867) LR 2 QB 367

*Landmark Construction (Pvt) Ltd v Tselentis* 1971 (1) RLR 56 (G)

*Shippel v Morkel & Anor* 1977 (1) SA 429 (C)

*Wilton v Gatanby & Anor* 1994 (4) SA 160 (W)

Statutes referred to:

Arbitration Act [*Chapter 7:02*], s 12(2)

*A P de Bourbon* SC, for the applicant

*J C Andersen* SC, for the respondent

## Judgment

**Smith J:** The applicant (hereinafter referred to as "FSI") entered into an agreement of sale with the lst respondent (hereinafter referred to as "RTZ"), in terms of which FSI bought from RTZ the latter's beneficial share-holding in a company known as Tinto Industries Limited (hereinafter referred to as "TI"). In terms of the agreement of sale FSI was required to pay RTZ $40 million for the shares and cession of the loan accounts, of which $13 million was payable on the effective date of the agreement and the balance one year later. RTZ gave certain warranties in clause 7 of the agreement which were referred to as essential warranties. FSI claimed that RTZ had breached certain of the express warranties, in that the values of stocks and debtors in the balance sheet of TI as at l January l994 had been overstated and creditors understated, and claimed compensation for a shortfall in a fixed asset to the





extent, in total, of $7 064 065,15. RTZ accepted $512 000 of the amount claimed as being valid, it being the cost of a new crane to replace one not handed over to FSI, but did not accept the balance of the claim.

Although the agreement of sale does not contain an arbitration clause, FSI and RTZ agreed that the dispute on whether there was a breach of the express warranties should be referred to arbitration. The lawyer for RTZ suggested that the dispute be settled by a single arbitrator

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agreed by both parties, the arbitration be conducted in an informal manner, both parties being represented by their accountants, that there be no formal pleadings but that two letters between the parties be treated as defining the matters in dispute; and that the arbitrator's decision should be final. The lawyer for FSI responded by accepting the proposals subject to certain qualifications, one being that the second respondent (hereinafter referred to as "Bailey") was to be the arbitrator and another being that the arbitrator would have wide and unfettered discretion in the procedures to be adopted and in regard to the nature and extent of the evidence that he may require to be led, as well as in relation to any decisions or determinations which he may deem fit. The lawyer for RTZ accepted the qualifications and added the additional qualification that RTZ would be permitted to adduce evidence and to argue that "by reason of the manner in which the deal was structured, the various points taken by (FSI) are not relevant". The lawyer for FSI responded by saying that FSI would not wish to fetter the broad discretion given to the arbitrator by stipulating the nature and extent of the evidence which the arbitrator would be required to hear. He therefore did not agree to the additional condition, saying that FSI would prefer to give the arbitrator the broadest possible mandate in regard to the nature and extent of the evidence he may require to be led and as to the procedures which he may choose to follow. He added that RTZ would be free to suggest to the arbitrator that it was entitled to adduce the evidence suggested and the arbitrator would be able to agree or refuse to allow the evidence to be adduced. The final response from the lawyer for RTZ was to say that RTZ was happy to proceed with arbitration without further ado as long as FSI undertook that it would not oppose RTZ adducing the evidence necessary to establish the manner in which RTZ alleged the "deal was structured". If FSI intended to oppose the introduction of such evidence, then RTZ declined to follow the arbitration path and would proceed by way of action for the recovery of the amounts allegedly due to it. FSI agreed that RTZ would be "free to show, by evidence, that the transaction was structured in such a way that the individual items which form the basis of (FSI's) case cannot be considered in isolation, but must be looked at in the context of the structuring of the deal as a whole".



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Bailey was duly appointed arbitrator and was sent copies of the correspondence between the parties which set out the contentions of the parties and his mandate. By letter dated 5 September l995 he advised the parties that he would meet representatives from FSI at 9.30 a.m. on Monday ll September and representatives from RTZ at 2.05 p.m. on the same day. He also fixed l0.00 a.m. on Tuesday, 12 September, for a provisional meeting with FSI representatives to hear further representations and 11.30 a.m. on the same day for a similar meeting with RTZ representatives. He said that, if necessary, a further meeting could be held in the afternoon.

Two meetings with representatives of FSI and two with representatives of RTZ were held by Bailey at which verbal submissions were made and questions asked concerning the dispute. Bailey also held a brief meeting with Mr Vincent to receive submissions from him because RTZ wanted his views to be made known. Thereafter Bailey, in a letter dated 19 September l995, handed down his decision. After dealing with the background to the dispute, his terms of reference and impartiality, the submissions by the parties and the consideration of the sale

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agreement, he concluded that the only claim FSI had against RTZ was for $512 000 (relating to the crane) because both parties agreed that that was the case, but the balance of the claim by FSI, amounting to $6 552 065,15, could not be sustained by the sale agreement as worded.

Bailey filed an affidavit saying that he had no interest in the outcome of the application but wanted to respond to the allegations made against him. In his affidavit he made the following statements. He had considerable sympathy towards FSI and felt that a number of its claims were persuasive and deserved consideration but, ultimately, he felt that the sale agreement did not give it the protection it sought. He felt that a strict interpretation of the agreement prevented him from making any award in favour of FSI. He did interview the two parties separately but he had no intention of causing prejudice or favouring one party above the other. He decided to interview the representatives of each party separately so that he could understand exactly what the contentions of each party were and what the claim was. Having made a preliminary inquiry, he would then show each party the contentions of the other and give it an opportunity to reply. The preliminary inquiry was held with representatives of FSI and RTZ on Monday ll September and the follow-up meetings were held on the morning of Tuesday 12 September. It was his intention that, if the parties felt that there should be a further hearing, it would be held on the Tuesday afternoon, with both parties present together. However this did not appear to be necessary. One of the representatives of FSI did say that they had not had the chance to actually hear what the



representatives of RTZ had said, they had merely been told by him what they had said. He had replied that he would be very happy to arrange a session where both sides sat and discussed the question of FSI's claim. The representatives of FSI then said that they did not think it was necessary to hold a further meeting with representatives from both parties present together.

Section 12(2) of the Arbitration Act [*Chapter 7:02*] provides that where an arbitrator has misconducted the proceedings, the Court may set aside the award. FSI has filed an application seeking an order setting aside the award made by Bailey, alleging technical or legal misconduct on his part. Mr *de Bourbon* submitted that Bailey had erred in two respects. Firstly, the manner in which the proceedings were conducted was contrary to the agreement between the parties and contrary to the rules of natural justice. Secondly, the award did not deal with the matters or issues placed before the arbitrator for arbitration and Bailey had overlooked or misconceived what he was required to determine.

The attitude to be adopted by the court in an application of this nature was expressed by Fieldsend CJ in *Cone Textiles (Pvt) Ltd v Redgment & Ors* l983 *(l)* ZLR 88 (S) at 92 as follows:

> "There was little dispute as to the law. The starting point is that the parties have chosen to go to arbitration instead of resorting to the courts, they have specifically selected the personnel of the tribunal, and they have agreed that that award shall be final and binding: *Clark v African Guarantee and Indemnity Co Ltd* l9l5 CPD 68 at 77. It is for these reasons that a court will always be most reluctant to interfere with the award of an arbitrator."

However, the court is required to interfere where the proceedings have been misconducted. The position of the arbitrator was expressed as follows by Seligson AJ in *Chelsea West (Pty) Ltd v*

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*Roodebloom Investments (Pty) Ltd* l994 *(l)* SA 837 (C) at 845:

> "The position of an arbitrator in the true sense is very different. He acts in a quasi-judicial capacity and must conduct himself accordingly. Whilst not obliged to observe the precision and forms of a court of law, the arbitrator must proceed in such a manner ... as to ensure a fair administration of justice between the parties'. (*Clark v African Guarantee and Indemnity Co Ltd* l9l5 CPD 68 at 77 *per* Gardiner J). This includes the duty to afford the parties a proper hearing. Inherent therein is that the arbitrator must not examine parties or witnesses or conduct a hearing in



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> the absence of one or other of the parties. If he does so he commits an irregularity which will result in his award being set aside. This rule has been established in a long line of cases. See *Lazarus v Goldberg & Anor* l920 CPD 154; *Burns & Co v Burne* 1922 NPD 461; *Gafoor* v *Mahomed* l926 WLD 188; *Adamstein v Adamstein* l930 CPD 165; *Field v Grahamstown Municipality* l920 EDL 135; *Grant Brothers v Harsant* 1931 NPD 477; *von und zu Bentheim v von Oppen & Ors* l938 SWA 54; *Shippel v Morkel & Anor* l977 *(l)* SA 429 (C). As was said in *Adamstein's* case *supra* at 168:
>
> > Courts of law jealously guard the rights of a person to be present at and heard at proceedings to which he is a party, and will only tolerate a departure from the rule which recognises this right in very special circumstances'".

In the case of *Wilton v Gatanby & Anor* l994 (4) SA 160 (W), where one of the parties refused to attend before the arbitrator, the court refused to make the award of the arbitrator an order of court because the arbitrator had considered that no evidence was necessary for the purpose of enabling him to make an award since one of the parties to the arbitration refused to submit to arbitration and to attend the hearings. The court held that the arbitrator was entitled to proceed in the absence of a party in wilful default but he could not simply issue an award similar to a default judgment in terms of the Rules of Court. He was required to hear evidence and to bring his mind to bear on the issues. Likewise in *Landmark Construction (Pvt) Ltd v Tselentis* l971 *(l)* RLR 56 (G) the court set aside the award of an arbitrator because the requirements of natural justice were not observed. At p 60 Beck J (as he then was) said:

> "As has already been indicated, the agreement arrived at between the arbitrator and the parties to the arbitration when the meeting of 3 June l97l was terminated left to the decision of the arbitrator the question whether further evidence should be received before making his award. In deciding whether or not to receive further evidence, the arbitrator was obliged to observe the requirements of natural justice. The manner of reception was governed by the special agreement that evidence could be taken without the presence of both parties at its taking; but the need to take evidence, and the need to apprise the parties of its content so as to afford to both a suitable opportunity for rebutting it or otherwise dealing with it, remained undisturbed, if this was required in order to arrive at a proper judicial decision, and in order to act in fairness to both parties, as was contemplated would be the case.



SMITH J

> Without burdening this judgment with details of the many disputes which arose out of the execution of the building contract, it is sufficient to say that a perusal of the contentions advanced by the applicant, and of those advanced in Acavalos's reply thereto, discloses that, in a number of instances, evidence, dehors the documentary material which was before the arbitrator, exists which is relevant to the proper determination of the matters in question, and which, if true, would disturb the situation indicated to the arbitrator by the documentary material taken by itself. To have concluded that none of this evidence need be received shows a total want of that judicial capacity which is

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required even of an ordinary fair-minded layman appointed to adjudicate by the parties to the dispute'".

In that case the arbitrator had received written submissions from both parties. He made his award without seeking any further information, except in respect of one matter, where he obtained an explanation from one of the parties in regard to an item in its submission without advising the other party of that fact or of the explanation given. The court held that, despite the agreement between the parties as to the manner in which the evidence was to be taken, the arbitrator was still obliged to observe the requirements of natural justice in deciding whether or not to receive further evidence, and must apprise the parties of the contents of such evidence so as to afford to both a suitable opportunity for rebutting it or otherwise dealing with it.

In *Shippel v Morkel & Anor* l979*(l)* SA 429 (C) van Winsen J at 434D said:

"It can thus be said with confidence that it is well established by the cases in our courts that the procedural rules applicable in an arbitration require that the proceedings should not be conducted in the absence of one of the parties. This appears from numerous cases in the South African courts ... ".

In that case the applicant had applied for an order setting aside an award made in arbitration proceedings, on a number of grounds, the major one being that the arbitration had on one day been conducted in his absence. He had telephonically informed the arbitrator's office that he would not be available on that one day. He had, however, requested and been furnished with a summary of the evidence given on that day. At the resumed hearing the arbitrator asked him whether he wished to raise any matter arising from such evidence. He replied in the negative. The court held that he had acquiesced in the situation arising from his absence at one of the hearings. At p 436-7 the learned judge said:



SMITH J

"Although the principle is clear each case must be decided on its own merits. Applicant's conduct, in my opinion, affords clear evidence that he acquiesced in the situation arising from his absence at one of the hearings. I consider that in this connection it is worthy of note that applicant enjoyed the support and advice of an attorney, a Mr Potash, at least one of the hearings before the arbitrator. He must also be taken to have been aware that the submission to arbitration signed by him applied the provisions of s 15 of Act 42 of l965 to the arbitration. The arbitrator informed applicant by letter dated 30 September that the hearing had taken place. Applicant did not protest against this procedure even after he had received a resume of Faulman's evidence, nor did he do so at the meeting of 27 October. On the contrary he replied in the negative to the enquiry of the arbitrator as to whether he wanted to raise any matter in connection with the evidence led on 30 September. He at no stage asked for the recall of Faulman.

I find it very difficult to avoid the conclusion that his telephonic objection to the arbitrator after the hearing in question was in the nature of anything other than a tactical move and not a genuine effort to have the prejudice, if any, suffered by him on 30 September repaired.

I do not think it is open to a party to lie by and take no action until he sees which way the award goes. Such conduct is difficult to reconcile with an intention to enforce his rights. I conclude that on this ground, too, respondents have a good defence to applicant's claim."

In this case Bailey indicated clearly to both parties the procedure he intended to follow. Mr Fraser, one of the representatives of FSI, said in the founding affidavit that when he received the letter from Bailey about the meetings that were to be held, he always assumed that, in

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hearing the matter, Bailey would require the representatives of both parties to meet together in his presence so that their respective contentions, representations and arguments could be properly challenged. It was only when he went to the first meeting with Bailey on Monday ll September that it became apparent to him that Bailey had decided not to hear the parties together but rather to hear them separately. However, he does not go on to say why he did not object at that stage to the procedure that was being adopted. Why? I agree with the statement by Bailey in his affidavit that it must have been obvious from the letter he sent to FSI and RTZ that he intended to hear the evidence and arguments from each party separately. The letter refers to a provisional meeting with FSI representatives at l0.00 a.m. on 12 September and a later meeting at ll.30 a.m. with RTZ



SMITH J

representatives. It seems clear to me that the FSI representatives must have known what procedure was going to be adopted by Bailey and raised no objection thereto when informed of the programme. At the second meeting between FSI representatives and Bailey, one of the former did raise the question that they had not been given an opportunity to actually hear the RTZ representatives put forward and argue their case. Bailey then said that he was willing to arrange a meeting at which both parties were represented so that they could sit down together and discuss the matter. The FSI representatives then decided that such a meeting was not necessary.

Ordinarily, all proceedings before an arbitrator must be conducted in the presence of the parties to the dispute. However, the parties to a dispute submitted to arbitration are free to agree to any procedure which they think is appropriate for the settlement of their dispute. The courts will not impose any specific procedure on the parties. I am satisfied that in this case FSI and RTZ agreed to the procedure that Bailey proposed to adopt. Neither of them raised any objection or refused to attend any meeting. When the FSI representatives discussed with Bailey the fact that they had not been afforded the chance to hear the arguments raised by RTZ they were offered an opportunity to do so but they decided that that was not necessary. As van Winsen J said in *Shippel's* case *supra* it is not open to a party to lie by and take no action until he sees which way the award goes.

Accordingly, on the first point raised by FSI, whilst I agree that the rules of natural justice require adherence to the *audi alteram partem* rule, it is also true that the parties may agree to a procedure in which the principles of that rule are not strictly adhered to. The procedure adopted by Bailey, which as I say was accepted by the parties, meant that the submissions and arguments raised by each party were made known to the other party and it was given an opportunity to respond. A similar procedure was accepted by the Court as being acceptable in the *Landmark Construction* case *supra.* The difference in that case was that the arbitrator did not apprise the other party of the evidence adduced. Although FSI subsequently raised the point that the evidence from RTZ had not been given in its presence, its representatives felt that a joint meeting of the parties was not necessary. A similar attitude was adopted by the applicant in the *Shippel* case *supra.* Accordingly I find that there was no misconduct in the proceedings insofar as the *audi alteram partem* rule was not strictly adhered to. Bailey did apprise each party

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of the evidence led by the other and gave it an opportunity to rebut or otherwise deal with the evidence.



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On the second issue raised by FSI, Mr *de Bourbon* submitted that Bailey overlooked or misconceived what he was required to determine. He was required to determine whether there had been a breach of the express warranties given by RTZ. There can be no doubt that if an arbitrator overlooks or misconceives a submission he would have misconducted the proceedings within the meaning of a s 12(2) of the Arbitration Act [*Chapter 7:02*], thereby allowing a court to intervene - see *Cone Textiles (Pvt) Ltd v Commercial Union Fire, Marine and General Insurance Co Ltd* l989 (2) ZLR 152 (S) at 155 D. Did that happen in this case? Admittedly FSI did allege that RTZ had breached the express warranties. However that was not the full allegation. In the letter from FSI to FTZ dated l0 February l995, which was referred to Bailey as setting out the issues between the parties, FSI set out the claims it had against RTZ and the amount due in respect of each claim. RTZ responded by letter dated l4 March l995 refuting each claim and stating that it followed and continued to follow its stated accounting policies in the preparation of its year-end accounts. FSI then sent RTZ a cheque for $20 742 585,74 representing the amount owing at 31 March l995 in terms of the agreement of sale less the disputed amount of $5 745 414,26 and the reduction for the crane amounting to $512 000. RTZ responded by stating that it had been short-paid $5 745 414,26 which was then overdue. It disputed the right of FSI to deduct such amount. FSI responded, saying that the deduction was due and that the basis for the deduction was the breach of the express warranties. Perusal of the award handed down by Bailey shows that he was well aware that the principal issue between the parties was whether there had been a breach of the express warranties set out in clause 7 of the agreement of sale such as would entitle FSI to a reduction of the purchase price, whether by way of damages or otherwise. His mandate was to determine whether the deductions were permissible. There would be little point in him deciding that there had been a breach of the express warranties if he did not go on to determine the consequences of such a breach. In the award Bailey analysed each of the express warranties in the context of the agreement of sale. Some, he felt, were not relevant to the dispute or to the business taken over. One, he felt, could not give rise to any claim for damages because FSI had not suffered any loss as a result of any breach thereof. There was only one warrant (clause 7.5 of the agreement) which he felt was relevant. If there was a breach of that warranty he considered that FSI would be entitled to cancel the agreement. But the breach could not, in his opinion, give rise to any claim for damages or a reduction in the purchase price. That being the case, he felt that there was little point in him investigating the question of whether or not there had been a breach. In the circumstances he performed his mandate. Whether or not he was correct in his determination



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is not for this court to decide. The court could only interfere if the error was so gross as to in

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reality amount to misconduct - see Jacobs *The Law of Arbitration in South Africa* at p 143. Mr *de Bourbon* did not attempt to submit that the award should be set aside on the grounds of gross error on the part of Bailey. There are indeed no grounds on which he could have based such a submission.

For the reasons set out above, I agree with the submission by Mr *Andersen* that Bailey dealt with the mandate he was given which was to determine whether there had been a breach of the express warranties in clause 7 of the agreement of sale such as would entitle FSI to a claim for damages or a reduction of the purchase price. He concluded that no breach thereof would give rise to such an entitlement.

In *Re Hopper* (l867) LR 2 QB 367 Cockburn CJ said:

> "I would observe that we must not be over-ready to set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceedings.'

The courts of this country and of South Africa have concurred wholeheartedly with the views so ably expressed by the learned Chief Justice. Where parties to a dispute decide that, rather than taking their dispute to a court for decision they would prefer to have the dispute settled by an arbitrator of their choice, the courts are very reluctant to interfere. The parties are at liberty to determine the procedure they want followed and are free to select any person acceptable to both as being fit and suitable for the purpose of settling their dispute. Once they have made their choices they must abide by the consequences. I would emphasise what Fieldsend CJ said in the *Cone Textile* case *supra*:

> "a court will always be most reluctant to interfere with an award of an arbitrator".

The application is dismissed with costs.

*Winterton, Holmes & Hill*, applicant's legal practitioners

*Gill, Godlonton & Gerrans*, lst respondent's legal practitioners



## S v MUTANDI 1996 (1) ZLR 367 (HC)

**Court** **High Court, Harare**

Gillespie J

Criminal review

17 April 1996 Judgment No. HH-43-96

### Flynote

Evidence - identification - approach to be taken by court where State case depends on identification - single witness - cautionary rule - need for court to demonstrate that it actually observed the rule, not merely make a

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statement to that effect - alibi - whether any onus lies on accused to prove defence based on an alibi

## Headnote

Where there is direct or circumstantial evidence which points to the accused as the criminal, the most satisfactory form of rebuttal is for him to show that he could not have committed the crime because he was somewhere else. This is known as the defence of alibi, but it is a straightforward denial of the prosecution's case on the issue of identity. There is no onus on the accused to prove his alibi; if on all the evidence there is a reasonable possibility that the alibi evidence is true, there must be the same possibility that he did not commit the crime, and the accused is entitled to be acquitted.

If the prosecution case relies on identification by a single witness, it is not enough to find that the witness honestly believes that he has correctly identified the accused. Confidence, a good demeanour and sincerity are not enough. The witness might be honestly mistaken. The reliability of his observation must be tested, for there are numerous factors and circumstances which affect that reliability. These factors must be weighed against one another, in the light of all the evidence (including the accused's), and the probabilities. For these reasons, a cautious approach is needed. Caution is not demonstrated by a mere statement by the judicial officer that he is aware of the need for caution. It is not even



necessary for such an utterance to be made. What is necessary is a demonstration, in his reasoning, of a cautious approach and of alertness to the real dangers which the cautionary rule seeks to address.

Cases cited:

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

*S v Dhliwayo & Anor* 1985 (2) ZLR 101 (S)

*S v Mthethwa* 1972 (3) SA 766 (A)

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

*S v Nkomo* 1989 (3) ZLR 117 (S)

## Judgment

**Gillespie J:** This matter comes before me in chambers by way of review of the decision of the senior magistrate who convicted the accused on a charge of theft by false pretences. The evidence for the State consists of the testimony of a single witness, the complainant. She recounts how on the 16 June 1995 she arrived in Harare from her home in Bindura in order to do some shopping when she met a person who offered to sell her certain material and a knitting machine. She allowed herself to be persuaded by this smooth talker to buy the machine from him for a purchase price of $2 000. The glib salesman accompanied the complainant to her bank where she withdrew the funds and handed them over to him, whereupon he seems to

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have performed some sort of vanishing act. She says:

> "I withdrew some money and gave it to him. At that point some people came and I did not even see what was really happening. I then realised my money had been stolen. I did not report because I did not even know him."

Many months later, on 2 March this year, the complainant was once again in the same part of town. She saw the accused and engaged him in conversation whilst she looked around for police. As soon as a constable hove into view she caused the accused's arrest, purporting to identify him as the man responsible for the unreported theft some nine months earlier. The basis of this claim to have identified the accused as the wrongdoer is that the accused is said to be dark in complexion, short of stature and possessed of a round head. The accused in his evidence denied involvement in any deception of the complainant. He claimed that at the relevant time he was still in his communal home in Chipinge, having only come into Harare in January of this year.

The magistrate, having very properly made reference to a need for caution against the dangers of relying upon the evidence of a single witness, nevertheless went on to make the following observations which cause me concern:

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> "However having been alive to the cautionary rule, the court found that complainant's evidence was clear and straightforward in all material respects. She was composed and remained unshaken during cross-examination. She struck the court as a credible witness and as such the court found no reason to doubt the authenticity of her evidence.
>
> Accused on the other hand raised an alibi and whenever one does that the onus of proof stays on him to prove it on a balance of probabilities. Accused did no such thing. All he did was to make a bald statement that he was in the communal lands and had people who could verify that. The court was however taken aback when it asked accused if he wished to call any witness he indicated he did not wish to. Why not call his relatives who were with him or his uncle in Mbare who knew that accused only came to Harare recently? The only irresistible inference to be drawn from this failure is that no-one could [corroborate] accused's alibi because he was in fact here in Harare."

This betrays error in many disturbing respects. First, as to the magistrate's treatment of the accused's defence of alibi. In the case of *R v Biya* 1952 (4) SA 514 (A), the magistrate against whose decision an appeal was noted, was criticised for having said of the alibi raised that-

> "When the accused gave evidence and initiated his defence as an alibi, had he proved the alibi then most conclusively the Crown case must fail. The accused has failed to prove his alibi."

In his judgment on appeal Greenberg JA said, at 521C-D, the following of this approach to the defence of alibi:

> "The treatment, in the rest of the passage, of the appellant's alibi is also open to the objection that it required the appellant to prove his alibi'. We were referred by counsel for the Crown to a passage in the judgment of Juta AJA, in *R v Dube* 1915 AD 557 at p 582, where the learned judge is reported to have said: Where the defence is an alibi it lies on the accused to prove it', but, with great respect, this statement cannot be supported. If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is

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true it means that there is the same possibility that he has not committed the crime."



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Similarly, in *South African Law of Evidence* 4 ed by Hoffmann & Zeffertt, the following appears at p 619:

"If there is direct or circumstantial evidence which points to the accused as the criminal, the most satisfactory form of rebuttal is for him to show that he could not have committed the offence because he was somewhere else at the relevant time. This is called the defence of alibi, but it is a straightforward denial of the prosecution's case on the issue of identity. Courts have occasionally fallen into error by treating it as though it raised two separate issues: *(a)* did it look as if it was Smith who broke into Jones's shop at midnight, and *(b)* was Smith really at home in bed? Splitting up the inquiry in this way leads the judge to say that if the prosecution adduces strong evidence on the first issue, the onus should be on the accused to prove his alibi. But the reasoning is fallacious because the prosecution has to prove beyond reasonable doubt that Smith is the burglar, and if the court considers it reasonably possible that he may have been at home in bed, it must acquit."

There is no question but that the magistrate has misdirected himself on this question of onus. In my judgment this misdirection has in addition affected his assessment of the evidence as a whole.

As the extracts above show, the true enquiry is whether or not the accused is the person who accosted and cheated the complainant. That is to say, that the real issue is whether or not the complainant's evidence of identification of the accused was reliable. The extract from his judgment shows that the magistrate was obviously prepared to believe the complainant and indeed good reasons are given tending to show the genuineness of her belief and the truthfulness of her evidence. It is not enough, however, to be able to find that the complainant honestly believes that she has correctly identified the accused. She might be honestly mistaken. This is the true danger which the magistrate, although he uttered words of caution to himself, failed to appreciate or to consider. As was said by Holmes JA in *S v Mthethwa* 1972 (3) SA 766 (A) at 768A-C (and approved by Dumbutshena CJ in *S v Dhliwayo & Anor* 1985 (2) ZLR 101 (S) at 107A-D):

"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for



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observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as *R v Masemang* 1950 (2) SA 488 (A); *R v Dladla & Ors* 1962 (1) SA 307 (A) at 310C; *S v Mehlape* 1963 (2) SA 29 (A)."

The present Chief Justice of this country, Gubbay CJ, drew attention to the same need for

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caution when, in *S v Ndhlovu & Ors* 1985 (2) ZLR 261 (S) at 263G-264E, he said:

> "Confidence and sincerity are not enough. The possibility of a mistake occurring in the identification, especially where a witness has not known the person previously, demands that the greatest circumspection be employed. As Williamson JA warned in *S v Mehlape* 1963 (2) SA 29 (A) at 32F-G:
>
> > The often patent honesty, sincerity and conviction of an identifying witness remains, however, ever a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence.'
> >
> > ...
> >
> > Hence a cautious approach is necessitated, not only because a conviction is sought upon the evidence of a single witness, but also because the identification of an accused person is a matter notoriously fraught with error. It is an area wherein the potential for honest mistake looms large."

Caution is not demonstrated by the mere statement that one is aware of the need for caution, where the subsequent assessment shows no more than a superficial comparative assessment of demeanour. The shibboleth that the identifying witness was "composed and remained unshaken during cross-examination" is wholly inadequate as a demonstration of caution. The uttering of any cautionary words must be supported by the demonstration in the reasoning of a cautious approach; paradoxically, that utterance itself becomes unnecessary where the judgment shows alertness to the real dangers concerning which the cautionary rule in question seeks to address. The properly cautious approach is, I suggest with great respect, exemplified in





cases of issue as to identification by the passage from the judgment of McNally JA in *S v Nkomo* 1989 (3) ZLR 117 (S) at 120F-123D.

Returning to the instant matter. The magistrate placed considerable emphasis upon the extended opportunity for observation which the complainant was said to have enjoyed whilst the malefactor was in her company on the day on which the offence was committed. This is undoubtedly a proper consideration. Any weight it might otherwise have carried is to my mind, however, outweighed by other factors. The absence of any contemporaneous description or report is a factor that must detract from the description that is subsequently given once the suspected perpetrator is thought to be recognised. The vague and featureless description given by the complainant of the accused, as short and dark in complexion, is not one which serves to distinguish him from countless other short and dark skinned people. The considerable lapse of time between the offence and the purported identification of the accused leaves enormous room for error. How often does one, on the basis of a chance resemblance, mistake perfect strangers for one's acquaintances and friends, particularly if they have not been seen for some time?

In my judgment, therefore, the evidence of the State goes no way towards establishing the guilt of the accused. In these circumstances it is difficult to see how even a false alibi by the accused might remedy the deficiency. There is, however, no basis upon which the alibi can be said to be false. Nowhere in the record, despite the magistrate's remarks, does it appear that the accused was asked to call witnesses; far less was it explained to him that any failure to call witnesses

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who might be available would be held against him; and to suppose that there was any examination of whether any such witness was available at the time would be to suppose too much. In the absence of this sort of caution it would generally be most inappropriate for a judicial officer to be drawing inferences against an unrepresented accused who fails to call witnesses.

In the result I set aside the conviction and sentence.

Bartlett J agrees.



## S v KAMPOTA 1996 (1) ZLR 373 (HC)

**Court** **High Court, Harare**

Adam J

Criminal review

17 April 1996 Judgment No. HH-44-96

### Flynote

Criminal procedure (sentence) - statutory offences - Dangerous Drugs Act [Chapter 15:02] - s 9 - possession of 38.68 grams of dagga - first offender - whether fine appropriate

### Headnote

The accused was convicted on his guilty plea of possession of 38.68 grams of Indian hemp (dagga) in contravention of s 9 as read with s 19(1) of the Dangerous Drugs Act [*Chapter 15:02*]. The accused was a first offender. He was sentenced to four months' imprisonment of which one month was conditionally suspended.

On review, the court, after referring to the relevant case law, found that the sentence imposed was manifestly excessive and induced a sense of shock. The court altered the sentence to a fine of $400 or in default of payment one month's imprisonment with labour.

Cases cited:

*A-G v Moyo* A-64-79

*A-G v Mantwana* S-20-82

*A-G v Chagwiza* 1982 (2) ZLR 165 (S)

*S v Gwarada* 1981 ZLR 17 (A)

*S v Jackson* 1980 ZLR 190 (G)

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*S v Julius* GS-269-80

*S* v *Lunga* HB-14-81

*S* v *Mabhena* 1996 (1) ZLR 17 (H)

*S* v *Mangena* GS-53-81

*S v Mapurisa* HB-95-93



*S v Mashingaidze* HH-404-87

*S v Masoka; S v Sibanda* HB-41-94

*S v Mugabe* HH-192-86

*S v Mutize* 1978 RLR 148 (A)

*S v Nkomo* HB-53-84

*S* v *Nyoni* HB-72-89

*S v Siziba* 1990 (2) ZLR 87 (H)

*R v Zvondai* GS-84-80

## Judgment

**Adam J:** The accused was convicted on his guilty plea of possession of 38.68 grams of Indian hemp in contravention of s 9 as read with s 19(1) of the Dangerous Drugs Act [*Chapter 15:02*]. He was sentenced to 4 months' imprisonment with labour of which 1 month was conditionally suspended for 5 years, which prompted the Acting Regional Magistrate at Masvingo to point out to the trial magistrate that even where this offence was prevalent did he not think that in such cases for first offenders a fine was appropriate - *S v Nkomo* HB-53-84 and *S v Masoka* HB-41-94. In his reply the trial magistrate at Chiredzi indicated that hardly a day passed without their courts trying persons for the contravention of the Dangerous Drugs Act, that the incidence of drug offences in the Lowveld called for meaningful punishment, that "a fine of $150 or $300 in 1984 let alone in 1994 would not be equitable to $150 in 1996" since our currency has been tremendously eroded and so a custodial sentence was justified.

The trial magistrate seems to have forgotten that a proper approach to sentencing must be applied to an accused as laid down by this court and the Supreme Court - *S v Julius* GS-269-80; *S v Gwarada* 1981 ZLR 17 (A); *A-G v Mantwana* S-20-82; *S v Marongwe* HH-67-88; *S v Kadowe* HH-93-90; *S v Siziba* 1990 (2) ZLR 87 (H) and *S v Mabhena* HH-16-96.

In *S v Mutize* 1978 RLR 148 (A) the appellant was convicted of selling 83 grams of dagga and sentenced to two years' imprisonment with labour of which six months was conditionally suspended for five years. The appeal court said that in general selling prohibited drugs was more serious than possession but possession of such drugs is as serious as dealing or

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trafficking in them when the quantity is such that the only reasonable inference was that it was intended for trafficking and that in most cases this inference could be drawn when the amount is more than 60 grams. The sentence was reduced by a further 12 months being suspended, so the total suspended was 18 months of the two years' imprisonment with labour.

In *S v Jackson* 1980 ZLR 190 (G) the accused was convicted of possession



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of 21 twists of dagga weighing four grams and sentenced to five months' imprisonment with labour of which two months was conditionally suspended. On review the sentence was reduced to a fine of $15 or in default of payment two weeks' imprisonment with labour. In addition two months was conditionally suspended for five years.

But in *S v Lunga* HB-14-81, for the cultivation of one dagga plant the sentence of eight months' imprisonment with labour of which five months was conditionally suspended for five years was reduced to a fine of $440 and in addition three months' imprisonment with labour conditionally suspended for five years. Gubbay J (as he then was) on review was of the view that as the accused was a first offender there was sound reason to grant him a fine.

In *S v Mangena* GS-53-81 the accused was convicted of cultivating 16 dagga plants and was sentenced to 12 months' imprisonment with labour of which eight months were conditionally suspended for five years. The dagga plants were accepted by the State as being for personal consumption. Dumbutshena J (as he then was) on review, since the accused was a first offender, reduced the sentence to a fine of $50 and in addition he gave six months' imprisonment with labour conditionally suspended for five years.

In *S v Nkomo supra* the accused, also a first offender, was convicted of cultivating 10 dagga plants for personal consumption for which he was sentenced to 15 months' imprisonment with labour of which six months was conditionally suspended for five years. On review the sentence was reduced, relying on *S v Mangena supra*.

In *S v Mugabe* HH-192-86 the accused was convicted of unlawful possession of 399 grams of dagga. His sentence of a fine of $400 was confirmed on review but the alternative period of imprisonment in default of payment of the fine was reduced to three months' imprisonment with labour.

In S v *Mashingaidze* HH-404-87 the accused was convicted of unlawful possession of 38 grams of dagga and as a first offender he was sentenced to 6 months' imprisonment with labour of which two months was conditionally suspended for five years. That sentence was reduced on review to a fine of $50 and in addition one month's imprisonment with labour was conditionally suspended for five years.

In *S v Nyoni* HB-72-89 the accused was convicted of possession of 13 twists of dagga weighing 18 grams, for which, as a first offender, he was sentenced

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ADAM J

to 10 months' imprisonment with labour of which four months was conditionally suspended for five years. On review the sentence was reduced to a fine of $50 and in addition 1 month's imprisonment with labour conditionally suspended.

In *S v Siziba* 1990 (2) ZLR 87 (H) the accused was convicted of possession of 85 grams of prepared Indian hemp and sentenced to four months' imprisonment with labour of which two months was conditionally suspended for five years. In that case the accused was a female first offender, married with two children and a husband not in good health. She was not employed but earned about $450 per week selling green maize cobs. She indicated that it was for some elders who smoked it. The trial magistrate in his reasons for sentence said that she was going to give it to other people. It appears there was no suggestion of trafficking. On review the sentence was reduced to a fine of $250 and in addition two months' imprisonment with labour was suspended conditionally for five years.

In *S v Mapurisa* HB-95-93 the appellant was convicted of unlawful possession of 35 cobs of dagga weighing 611 grams for which he was sentenced to 14 months' imprisonment with labour, half of which was suspended conditionally for five years. The State did not challenge the accused's assertion, although the quantity was high, that it was to be used to appease his ancestral spirits. This led to the sentence being altered on appeal to a fine of $1 000 and in addition three months' imprisonment with labour conditionally suspended for five years since the accused was a 50 year old first offender.

In *S v Masoka*; *S v Sibanda* HB-41-94 Masoka received 70 grams of dagga from another person which he passed on to Sibanda. Thereafter, Sibanda passed on the same 70 grams to a buyer. There was no suggestion that Masoka, other than passing it to Sibanda, was trafficking. But it is clear that when Sibanda gave it to the buyer he was supplying it for gain. The two accused were charged and tried separately but each was sentenced to seven months' imprisonment with labour of which four months was conditionally suspended for five years. On review, Cheda J, with whom Manyarara AJ concurred, after referring to *S* v *Siziba*, *supra*, reduced both the sentences to a fine of $400 and in addition two months' imprisonment with labour was conditionally suspended for five years. Masoka was married with two children earning $668 a month. Sibanda was also employed and married with three children. Cheda J, after accepting that a distinction had to be made between possession and supplying of dagga went on to state that, taking into



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the account that possession of a small amount of dagga usually attracts a fine, supplying a small amount should not attract a severe custodial sentence just because supplying is involved.

With the greatest respect to Cheda J and Manyarara AJ, the facts in *S v Siziba supra* can be clearly distinguished from these two cases dealt with by them. According to the facts accepted in *S v Siziba supra* the "giving it to the elders" was for personal consumption and not supplying

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for purposes of gain. In other words Siziba was not trafficking in dagga. In S v *Masoka supra* it was not clear what the purpose was for Masoka passing it on to Sibanda. However in *S v Sibanda supra* the supplying by him to a buyer was for the purpose of trafficking. In the light of this, as stated by Fieldsend CJ in *A-G v Chagwiza* 1982 (2) ZLR 165 (S) at 169:

> "Once it is accepted that a person is dealing in dagga in any quantity an effective sentence of imprisonment is usually called for."

In *A-G v Moyo* A-64-79 the appellant had cultivated seven plants of dagga which were for the purpose of sale when harvested. On appeal the Appellate Division said that an appropriate sentence was 15 months' imprisonment with labour with seven months of it conditionally suspended for five years. In *R v Zvondai* GS-84-80 the accused had cultivated 11 plants which the court found that on it being harvested it was for the purpose of trafficking. The sentence imposed was 11 months' imprisonment with labour of which four months was conditionally suspended for five years.

In view of the trial magistrate's error in imposing a sentence which is manifestly excessive so as to induce a sense of shock, this court is at large as to sentence. Accordingly the conviction is confirmed but the sentence is altered to a fine of $400 or in default of payment 1 month's imprisonment with labour. Since the accused has already served his sentence he shall not pay the fine.

Smith J agrees.

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## ZAMBEZI PROTEINS (PVT) LTD & ORS v MINISTER OF ENVIRONMENT & TOURISM & ANOR 1996 (1) ZLR 378 (HC)

**Court** **High Court, Harare**

Garwe J

Civil application

22 February & 24 April 1996 Judgment No. HH-49-96

### Flynote

Administrative law - review - grounds - unreasonableness of decision - whether decision by Minister to limit number of fishing permits to be held by an operator and to introduce sliding scale of fees grossly unreasonable - whether ground of allowing others to enter kapenta fishing industry justifiable ground for decision

### Headnote

The applicant companies had been involved in the kapenta fishing and distribution business since 1978. They had built up a fairly complex business and this business had required considerable capital investment. Since 1978 the first two applicants had held ten and nine fishing permits respectively.

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In terms of s 94 of the Parks and Wildlife Act [*Chapter 20:14*], the Minister of Environment and Tourism is empowered to issue and withdraw permits. In terms of s 96 of the Act the Minister is empowered by written notice to prohibit any person fishing if he considers this necessary or desirable in the interests of the preservation, conservation, propagation or control of any fish.

In 1995 a notice was issued to all persons engaged in the kapenta fishing business that the Minister was withdrawing all current commercial fishing permits and that all permit holders had six months in which to cease commercial fishing operations. The notice also indicated that the maximum number of permits which could be held by an operator was to be reduced and that a sliding scale of fees was to be introduced that would take account of number of permits issued to operators. The new provisions were based on two grounds, namely that *(i)* Kariba was being



overfished and (ii) there was a need to "indigenise" the kapenta fishing industry.

The applicants applied to the High Court on review for an order setting aside the Minister's decision to limit the number of permits and to introduce a sliding scale of fees for permits. It was contended that the Minister had acted in a grossly unreasonable manner.

Held, that, in exercising his discretion the Minister is obliged to do so reasonably and in good faith and the court can, on review, interfere with the exercise of this discretion if the discretion was exercised in a manner that is grossly unreasonable.

Held, further, that the limitation imposed upon the number of permits that could be held by operators was not grossly unreasonable. Permits were originally issued when demand was low. There had been a decrease in the overall catch, whatever its cause. There was a moratorium agreement with Zambia setting maximum number of permits and this maximum had been reached. There were others who were now wishing to participate in the kapenta fishing industry. The reduction in the number of permits to be held by operators and the introduction of sliding scale of fees was a way of ensuring that others would be able to participate in the industry.

Held, further, that the sliding scale fees were not so unreasonably high as to amount to effective prohibition. The reason for this scheme was to discourage permit holders from holding too many permits and perhaps hoarding. The scheme applied to everyone, even though primarily it affected established big fishing companies.

Held, further, that the applicants would have been on firmer ground if all permits had been cancelled or they had requested a longer period within which to regulate their affairs.

Cases cited:

*Assoc Provincial Picture House Ltd v Wednesbury Corp* [1948] 1 KB 223; [1947] 2 All ER 680

*Breen v Amal Engineering Union* [1970] 2 QBD 179

*Clan Tpt Co (Pvt) Ltd v Swift Tpt Svcs & Ors* 1956 R & N 120 (FS); 1956 (3) SA 480 (FS)

*Delew v Brakpan Town Council* 1937 TPD 439

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*Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S)

*Roncarelli v du Plessis* (1959) 16 DLR (2d) 689

*Satellite Television Users' Assn v PTC* 1991 (2) ZLR 226 (H)

*Sec of State for Education v Tameside Metropolitan Borough Council* [1977] AC 1014; [1976] 3 All ER 665 (HC)

*Union Govt v Union Steel Corp* 1923 AD 220



The following statutes were referred to:

High Court Act [*Chapter 7:06*], ss 26 and 27

Interpretation Act [*Chapter 1:01*], s 20

Parks and Wild Life Act [*Chapter 20:14*], ss 94, 96 and 129

Parks and Wild Life (General) Regulations 1990 (SI 362/1990), s 97

*A J Dyke,* for the first and second applicants

*A P de Bourbon SC,* for the third and fourth applicants

*J Musimbe,* for the respondents

## Judgment

**Garwe J**: After hearing argument in this matter, I reserved judgment but further ordered, by consent, that pending my decision, the applicants be authorised to continue operating the fishing permits held by them as at 31 December l995.

On 15 January l996, Sandura JP issued an order to the following effect:

> "1. That the respondents show cause why an order should not be made in the following terms:
>
> *(a)* that the respondents be and are hereby directed to issue to the applicants commercial fishing permits entitling the first applicant to ten (l0) units and the second applicant to nine (9) units for l996, against tender by the applicants of a licence fee of $5 000 in respect of each unit issued.
>
> *(b)* that in the event that the respondents fail within fourteen (l4) days of tender of the requisite licence fees aforesaid, to comply with the terms of para l of this order, then this order shall stand as a permit entitling the first and second applicants to operate ten and nine units respectively until such time as the respondents so comply.
>
> *(c)* that the costs of this application be borne jointly and severally by the first and second respondents, the one paying the other to be absolved."

In terms of the same order, the applicants were granted the authority to continue exercising their rights in respect of the fishing permits held by them until 29 February l996.

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On 2 February l996 Bartlett J made an order in Case No. HC 846-96 for the joinder of Irvin & Johnson Ltd and Kapenta Producers Association as applicants in this matter. The relief sought was the same.



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The background leading to the present proceedings is outlined in the affidavit of Robert Roland Beaton, a director of the first applicant. The Minister of Environment and Tourism is responsible, in terms of s 94 of the Parks and Wild Life Act [*Chapter 20:14*] for the granting of commercial fishing permits. The Acting Director of the Department of National Parks and Wild Life Management is responsible for the formal issue and administration of commercial fishing permits granted by the Minister.

The applicant companies have been involved in conducting business as Kapenta fisheries and distributors since l978. They have, over the years, built up fairly complex businesses, employing large numbers of people and entailing considerable capital investment running into millions of dollars. The first two applicants estimate their capital investment to be in the region of 20 million and 19 million dollars respectively. The first applicant has, since l978, been the holder of ten fishing permits whilst the second applicant has been the holder of nine permits. It is unclear from the third applicant's founding affidavit in case HC 846/96 how many permits it has been operating. The fourth applicant is an association of commercial fishing operators of which the first, second and third applicants are members.

The commercial fishing permits held by the applicants and other operators have, over the years, been renewed annually. In May l995, the respondents forwarded a minute to all operators advising that with effect from l January l996, the Minister would be "withdrawing and terminating all current commercial fishing permits" and that renewal fees for the year l996 would not be accepted. The minute further gave all permit holders six months within which to cease commercial fishing operations but advised that information would be made available to the public on the re-issuing of commercial fishing permits. On 5 December l995, the second respondent forwarded another minute to all operators advising of a reduction in the number of permits held by each. The minute further advised that fees on a sliding scale were to be introduced, which scale would take into account the number of permits issued to any one operator.

In the founding affidavit, the applicants state that the termination was made on two grounds. The first was that Lake Kariba was being overfished and the second that there was need to ensure the indigenisation of the kapenta fishing industry in this country. With regards to the first ground, the applicants have attached a research document prepared by Dr J M Hutton in l99l for the Department of National Parks and Wild Life Management. The report states, *inter alia*, that-



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"At the present time there is no evidence that the kapenta stock is suffering from overfishing ... On the basis of

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> what is already known about the kapenta stock, the present restrictive policies regarding the issue of fishing licences could be relaxed to some extent. This would allow new fishermen to participate in the industry and, provided an adequate statistical record is maintained, enable a more accurate assessment of the potential yield to be made".

The report further makes the following observation:

> " ... there is now sufficient information available for the authorities to make an informed decision on increasing the fishing effort on the lake. Such an increase will almost certainly result in an increased overall yield but at some stage, increased overall effort will result in a decrease in the catch per individual rig".

On the basis of this report, the applicants argue that the respondents could adequately implement indigenisation policies without reducing current permits and that new permits could be issued to new operators without the need to withdraw permits from current operators. The applicants also contend that in the absence of any reason for the reduction, the decision to reduce the number of permits is unreasonable and indicative of an improper exercise of discretion. As regards the fees pegged on a sliding scale, the applicants argue that there is no reasonable basis for such differentiation in the fees payable by operators and that the decision onstitutes an improper exercise of discretion. The applicants concede however that the current licence fee (presently $2 500 per unit) is low and that it should be increased. The applicants suggest a fee of $5 000 per unit *per annum,* which they tender.

In their opposing papers, the respondents submit that the decision whether to issue a permit or not and the conditions applicable thereto are entirely at the discretion of the first respondent. They submit that they have to ensure that the resource is equitably distributed, that the fishing projects are viable and most importantly that the fish is not depleted. To guard against mismanagement of resources, over the years all permit holders have been required to apply for renewal of fishing permits annually. By this measure, a permit may be refused if there is evidence of overfishing or over-investment. Conditions might also be attached to the permit.

The respondents argue that the fishing patterns on the lake are still the subject



of study. The official statistics however show that whilst the number of rigs going out onto the lake has increased, the catch has decreased.

The respondents submit that they have received an increasing number of applications for fishing permits by other people who wish to venture into fishing projects on the lake. It was the view of the respondents that if new permits were to be granted to these applicants there would be an increased number of rigs operating on the lake at a time when there is evidence of overfishing. The result would be that only the large companies would survive as the smaller operators would not be able to sustain the expenditure. For this reason, it was decided to terminate all existing fishing permits and all affected parties were advised in May l995 that there would be adjustments to the number of permits held by any one company if the number exceeded four. Realising that there had been considerable investment in the fishing industry and that hundreds of jobs were at stake, a number of consultative meetings were held between the respondents and the fourth applicant representing the interests of the kapenta producers.

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Following these negotiations, the Kapenta Producers Association recommended the reduction by thirty percent in the number of fishing permits above four and this recommendation was accepted by the respondents.

As regards the report by Dr Hutton, the respondents submit that this report was prepared by a consultant. The findings by the consultant cannot override the conclusion reached by expert officials in the Ministry and in any event the report covers the period only up to l99l. It is the years between l99l-l995 that have seen evidence of overfishing. The respondents further submit that the annexures attached by the applicants confirm that an increase in the number of rigs will cause a decrease in the catch. It is this situation which the respondents are seeking to avoid.

As regards the sliding scale for fees, the respondents submit it is one of the ways of regulating and controlling fishing activities. The main reason was to discourage a person from holding too many units. This would be a financial disincentive to discourage overfishing and the possible hoarding of permits.

The respondents further submit that in terms of a moratorium under the SADCC Zimbabwe/Zambia Joint Fisheries Project, Zimbabwe cannot unilaterally increase the fishing effort on the lake. The maximum effort pending completion of studies is 283, which has been reached.

In the answering affidavit, the applicants maintain that the capacity of the



lake is sufficient to sustain the issue of new permits to new operators without the need to withdraw permits from current holders. In this regard the applicant companies have attached an affidavit by Dr Brian Eric Marshall, a zoologist and Associate Professor in the Department of Biological Sciences at the University of Zimbabwe. He was, in l985, employed by the second respondent and based at the Lake Kariba Fisheries Institute. In the affidavit, Dr Marshall states that the idea of removing permits from established operators was first mooted as early as l983 purely for policy considerations. He states that kapenta is an extremely resilient species. He further notes that there is a clear correlation between the inflow of water into the lake and the percentage change in catch per unit effort, from which one may conclude that the inflow of water into the lake determines the kapenta catch and that the fishing effort is not the primary determinant of fluctuations in the catch per unit.

The applicants further deny that the catch has decreased "at an alarming rate" and state that the decrease has been due to variables such as droughts which affect water inflow into the lake and the length and severity of winter. There is also the additional factor of theft of catches off fishing vessels. The applicants also submit that the respondents are unable to submit evidence of an increasing number of applications'. To the contrary, the respondents even placed an advertisement in the paper in December l995 calling for applications for the issue of permits in the Binga and Sengwa areas of Lake Kariba. This, the applicants argue, shows that the respondents could not have been inundated with applications. The applicants further submit that there are current operators such as Trade Winds (Pvt) Ltd who have placed their operations

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on the open market for sale but which have not been purchased. On the meetings that took place between respondents and the Kapenta Producers Association (the fourth applicant), the first, second and third applicants submit that the latter had no mandate, power or authority to represent their interests nor bind them by way of recommendations. The fourth applicant has not commented on the issue.

The applicants deny that an increase in effort will cause a decrease in catch but rather will result in a decreased catch per fishing rig.

On the moratorium between Zimbabwe and Zambia, applicants state that the number of permits issued to Zimbabwe is unclear. In l992, the number was reflected as 231 in a report prepared by the Lake Kariba Fisheries Institute. Paragraph ll of the opposing papers reflect the number as 283. Annexure C to the opposing papers reflects a figure of 261. Annexure "O" to the



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answering affidavit reflects the number of permits issued in l993 as 354. Information produced by the fourth applicant shows that a total of 298 permits have been issued to its members. The applicants argue that in the light of these discrepancies, the first respondent could not have made an informed decision. The decision to withdraw a portion of the permits was therefore uninformed, unreasonable, arbitrary and therefore unlawful. The applicants therefore apply for confirmation of the provisional order.

Shortly before the hearing of this matter, the respondents filed four annexures containing lists of persons they say have applied for commercial fishing permits.

**STATUTORY PROVISIONS**

In terms of s 94 of the Parks & Wild Life Act [*Chapter 20:14*], the Minister may issue a permit to any person to carry on the business of catching fish. In terms of s 96, the Minister, if he considers it necessary or desirable to do so in the interests of the preservation, conservation, propagation or control of any fish, may by notice in writing, prohibit any person from fishing in any waters. The order may be either absolute or subject to conditions and either indefinitely or for a specified period. It is noted that in terms of s 96(3), the Minister shall not be obliged to give any reasons for issuing any such notice.

It is clear therefore that in terms of s 94 of the Act the Minister has the discretion to issue and withdraw a permit.

**JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS - THE LAW**

The issue is, given that the Minister has the discretion to issue and withdraw permits, in what circumstances can the court interfere with the exercise of such discretion? That the court has the jurisdiction to review an administrative decision is clear. Sections 26 and 27 of the High Court Act [*Chapter 7:06*] empower the court to review all decisions of, amongst others, administrative authorities in Zimbabwe. The grounds for review are absence of jurisdiction on the part of the authority concerned, interest, bias, malice or corruption on the part of the

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authority concerned and lastly gross irregularity in the decision.

Whilst it is clear that the Minister has the discretion under the Act to issue permits and withdraw them, his discretion is not absolute but is subject to



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general legal limitations. In exercising his discretion, the Minister is required to do so reasonably and in good faith. He must take into account only relevant consideration and there must be no malversation of any kind. The decision must not be arbitrary or capricious. The Legislature can never be taken to have intended to give anyone statutory powers to act in bad faith or to abuse his powers. Nor does the conferrment of a discretion empower a man to do what he likes merely because he is minded to do so. Lord Denning MR aptly summed up the position in *Breen v Amalgamated Engineering Union* [l97l] 2 QB 175 at l90 when he remarked:

> "The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside ..."

Similar remarks were made by Rand J in *Roncarelli v du Plessis* (l959) 16 DLR (2d) 689, 705 when he stated:

> "Discretion necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; any clear departure from its lines or objects is just as objectionable as fraud or corruption ...".

Whilst the law is clear that an authority must exercise its statutory powers reasonably, the position is now settled that the court is not empowered to usurp the discretion of the public authority. In his book, *Administrative Law* 6 ed, H W R Wade states:

> "Within the bounds of legal reasonableness is the area in which the deciding authority has genuine free discretion. If it passes these bounds, it acts *ultra vires*. The Court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the Legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate. *But if the decision is within the confines of reasonableness, it is no part of the Court's* function to look into its merits ... two reasonable persons can *perfectly reasonably come to opposite conclusions on the same set*



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> *of facts without forfeiting their title to be regarded as reasonable*" (the emphasis is mine).

In other words, not every mistaken exercise of judgment is unreasonable and not every reasonable exercise of judgment is right. As stated by Lord Diplock in *Secretary of State for Education v Tameside Metropolitan Borough Council* [l977] AC 1014 at 1064:

> "The very concept of administrative discretion involves a right to choose between more than one possible course

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of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred".

The question not infrequently arises what is meant by "reasonable". In this regard Lord Green MR remarked in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [l948] I KB 223 at 229:

"Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.

Warrington LJ in *Short v Poole Corporation* gave the example of a red-haired teacher dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and in fact all these things run into one another".

That the above is the law in this country is without doubt. Professor Feltoe, in his book *A Guide to Zimbabwean Administrative Law* remarks at p 31:

"As the function of the Court is not to delve into the substantive correctness of administrative decision, but only to ascertain whether there have been any procedural irregularities or action of an *ultra vires* nature, it would



seem to follow that on review the Court has no power to overturn a decision simply because it considers it to be unreasonable. If it was to do so, it would in effect be substituting its own decision in place of the decision of the body empowered to make this decision".

The learned author remarks further:

"In certain circumstances, however, the courts will set aside decisions of a grossly unreasonable nature. A well-recognized ground for doing this is where the decision is not only grossly unreasonable but is so grossly unreasonable that it is only explicable on the basis of *male fides*, ulterior motive or failure of the decision-maker to apply its mind to the decision it had to make".

Similar remarks have been made in the cases cited by respondent. These cases stress that for a decision to be interfered with on the ground of unreasonableness, the unreasonableness must be gross. See, for example, *Union Govt v Union Steel Corp* l923 AD 220 at 237; *Associated Provincial Picture Houses* v *Wednesbury Corporation* [l947] 2 All ER 680; *Clan Transport Co v Swift Transport Services & Ors & Clan Transport Co v Rhodesia Railways & Anor* l956 (3) SA 480 (FS).

The main dispute on these papers has been whether or not there is evidence of overfishing on the lake. The applicants say there is no such evidence and that new permits can be issued although this might result in a reduced catch per rig. The respondents submit that results of studies undertaken show that the catch has been decreasing during the past few years.

Perusal of the papers does confirm that there has been a decline in the total catch. Indeed the applicants admit that there is such a decrease although for different reasons, that is the

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reduced inflow of water into the lake which determines the amount of nutrient and also theft of a portion of the catch.

For purposes of the present application, it is not necessary for me to determine which of the reasons is correct. The fact of the matter is that there has been a decrease in the catch in recent years.

That the drought would have had an impact goes without saying. Despite a relatively better season this year, there is nothing to suggest that the situation has improved significantly. Indeed, reports appearing in the press at the



beginning of the year were to the effect that because of the reduced inflow the level of the water in the lake had gone down to such an extent that even electricity generation was being threatened.

Whether the reason for the decrease in the catch is the reduced inflow of water into the lake, or theft of part of the catch or an increase in the effort, the position remains that there has been a decrease in the catch in more recent years. Whether or not the decrease could be described as "alarming" is not necessary to determine but it is clear that the decrease is a matter which the lst respondent would have been required to take into account.

That there is a moratorium between Zambia and Zimbabwe in terms of the SADCC Joint Fisheries Project is not disputed. In terms of the moratorium, neither country can unilaterally increase fishing effort on the lake. It is true that there is confusion on the number of permits that can be issued to Zimbabweans. There is no suggestion that some of the permits previously issued remain unutilised. Clearly the existence of the moratorium is a feature which the first respondent would need to take into account.

The other issue raised by the respondents was that there is a large number of other people who have also applied for permits. The matter has not been adequately substantiated by the respondents. Four annexures containing a list of "applicants" was filed. The annexures were however not verified by affidavit. I agree with Mr *Dyke*, for the first and second applicants, that the list is just a list of persons who are said to be applicants.

Although this aspect has not been adequately substantiated, this court cannot say on the papers that the claim is without foundation.

**THE DECISION TO REDUCE THE NUMBER OF PERMITS**

The decision was to reduce the number of permits and not to revoke them completely.

The first respondent says this became necessary as a result of evidence that there was a decrease in the catch and the need to accommodate new applicants.

Was this decision so grossly unreasonable as to warrant review by this court? In my view, the answer must surely be "no". The decision cannot be said to have been so grossly improper, or

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unreasonable or irrational, or arbitrary that it is only explicable on the basis of *mala fides*, ulterior motive or failure by



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the Minister to apply his mind to the facts of the case. To hold otherwise would in my view amount to substituting the decision of the court in place of that of the Minister. As already noted, two people can have different views on how a particular matter should be handled. That would not render their conduct unreasonable. Is there anything wrong with the first respondent saying: "Your permits were initially issued at a time when demand was low. Because of changes that can take place in this industry, it was necessary that the permits be reviewed and renewed annually. There are other persons who also want to participate in the industry. There is however evidence of a decrease in the total catch. There is also a moratorium between Zimbabwe and Zambia. I am therefore reducing the number of permits you have in order to accommodate others."

In my view, the above cannot be described as being unreasonable. Had the Minister revoked all the permits completely, then the applicants would have been on firmer ground. Had the applicants been saying they should have been given a longer period within which to regulate their affairs, they also would have been on firmer ground.

**SLIDING SCALE OF FEES**

Section 129 of the Act empowers the Minister to make regulations providing for, amongst other things "the fixing and altering of fees to be paid for any permits issued in terms of the Act, including the fixing of different fees to be paid by residents and non-residents."

In terms of s 97 of the Parks & Wild Life (General) Regulations SI 362/1990, the fixing of the fees has been delegated to the second respondent, but subject to approval by the first. Subsection (2) authorises the second respondent to fix different fees for residents and non-residents.

Two issues have been raised. The first is that there has been improper delegation of ministerial function and the second is that the decision to fix fees on a sliding scale is so unreasonable and arbitrary as to be void.

Dealing with the first issue, it is true that in terms of s 20 of the Interpretation Act [*Chapter1:01*], a statutory instrument shall only come into operation on the date of its publication or on a later date if it so provides. The fixing and altering of fees to be paid for any permit should therefore be by regulation by the Minister, which regulation must be gazetted. By simply allowing the second respondent to fix the fees payable for any permit, the first respondent



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has done away with the need to gazette the fees - which he is not empowered to do. This is a

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matter which the respondents will need to look into.

I have commented on this matter because it has been raised in argument. The submission does not however affect the substantive application as the issue does not arise from the papers. The provisional order does not call upon the respondents to show cause why the fixing of the fees by the second respondent should be declared null and void. In any event the respondents have not been given adequate opportunity to present their case in this regard. I accept that a point of law, which goes to the root of the matter may be raised at any time, even for the first time on appeal if its consideration involves no unfairness to the party against whom it is directed: *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S). But this is not the position in this matter. The relief sought in this application is the issue of fishing permits against tender of a licence fee of $5 000 in respect of each unit. The argument now raised does contradict the relief sought.

The second issue is whether the decision to fix the fees on a sliding scale, taking into account the number of permits issued to each individual, is so unreasonable and arbitrary as to warrant interference by this Court. The case of *Satellite Television Users Association v Posts and Telecommunications Corporation* l991 (2) ZLR 226 (H) cited by the third and fourth applicants in the heads of argument is clearly distinguishable and does not support such a contention. The case of *Delew v Brakpan Town Council* l937 TPD 439 however appears to be pertinent. In that case the applicant applied for an amending by-law to be declared *ultra vires* for the reason that the Council wanted to discourage combination shows in the Municipality by asking applicants for such shows to pay more. The court held that it could not interfere with the decision on the ground that the licence fees were excessive. The court however accepted that the size of the fee might in certain cases be a factor in considering whether the Council genuinely exercised its powers of licensing or whether it acted *mala fide* in the sense that it used such power for achieving an ulterior object such as a prohibition. The court further held that it could not interfere with the Council's decision to differentiate the fees payable.

In the present case, there is no suggestion that the sliding scale of fees is so unreasonably high as to suggest a prohibition that a fee so outrageously high the only reasonable inference is that the object was to prohibit the business in question entirely. The fees for l to 2 permits is $5 000 per unit *per annum* whilst for 9 to l0 units the fee payable per unit (which is the maximum)



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is $15 000. The fee for the maximum number of permits cannot be described as so outrageously high as to suggest a prohibition.

I find no basis therefore for holding that the decision to introduce fees on a sliding scale is so unreasonable and arbitrary as to warrant interference. The reason given by the respondent discouraging permit holders from holding too many permits and perhaps even "hoarding" them appears reasonable, given all the circumstances. Whilst there can be no doubt that the sliding scale primarily affects the big commercial fishing companies, the scale will apply to any other person who acquires a similar number of permits. The scale will apply to all and sundry and does not discriminate on any basis other than the number of permits issued. If the decision had been to make the sliding scale of fees apply only to established operators but not to the new or

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emergent operators, even though they might hold the same number of permits, then such a decision would have been clearly arbitrary and unreasonable and no doubt interference would have been completely warranted.

I find no basis for interfering with the decision by respondents to introduce fees on a sliding scale.

The provisional order must therefore be discharged. In the result I make the following order:

1. That the provisional order granted by this Court on 15 January l996 be and is hereby discharged.

2. That the costs of this application as well as in case No. HC 846-96 be paid by all applicants jointly and severally, the one paying the others to be absolved.

*Coghlan, Welsh & Guest*, first and second applicants' legal practitioners

*Gill, Godlonton & Gerrans*, third and fourth applicants' legal practitioners

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



## HUGHES & ANOR v CHAIRMAN, EXECUTIVE COMMITTEE, HEALTH PROFESSIONS COUNCIL 1996 (1) ZLR 393 (HC)

**Court** **High Court, Harare**

Smith J

Application to set aside decision of committee of Health Professions Council

26 March & 24 April 1996 Judgment No. HH-47-96

### Flynote

Medicine - discipline - Health Professions Council - committees established by Council - Preliminary Inquiry Committee established by Council's Executive Committee - power of Executive Committee to establish sub-committees - limits to powers of such sub- committees - Disciplinary Committee of Council - functions

Practice and procedure - parties - locus standi in judicio - when established - citation of parties - complaint against decision made by a committee of Health Professions Council - Council should be cited, not chairman of committee

### Headnote

The first applicant, who was the wife of the second, lodged a complaint with the Health Professions Council about the conduct of a medical practitioner when she sought to have her husband admitted to hospital. The Council referred the complaint to the Preliminary Inquiry Committee, which had been established by the Council's Executive Committee. The Preliminary Inquiry Committee, after some months, interviewed the medical practitioner, then

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recommended to the Executive Committee that the allegation should not result in disciplinary action. The applicants were told that the Preliminary Inquiry Committee had decided that there was no case to refer to the Council's Disciplinary Committee for further inquiry. The applicants sought a court order setting aside the finding of the Preliminary Inquiry Committee Executive finding and directing the Committee to refer the matter to the Disciplinary Committee.



It was argued on behalf of the respondents that the applicants had no *locus standi in judicio*. The respondents also made the point that the applicants had cited the wrong person as respondent, in that they should have cited the Council, not the chairman of the Preliminary Inquiry Committee. They also argued that no civil action lies against the Council except in accordance with Part VII of the Medical, Dental and Allied Professions Act [*Chapter 27:08*], which deals with discipline, and that where the Council or one of its committees does anything in terms of Part VII it cannot be sued on the basis of the action taken or thing done.

Held, that a person who had the right to appear before an administrative tribunal, whether as applicant or objector, would have *locus standi* to take the proceedings on review. In addition, the respondents, in their evidence, did not question the applicants' *locus standi*, and at least some evidence should have been proffered if the objection was to succeed. The applicants accordingly had estabished their *locus standi*.

Held, further, that the Health Professions Council should have been cited as respondent, not the chairman of a committee. The chairman of a committee alone can do little without the support of a majority of the members of the committee. Section 3(1) of the Act provides that the Council is a body corporate, capable, in its own name, of suing and being sued.

Held, further, that the present action was not brought on the basis of something done by the Council or one of its committees, but on the basis that the Executive Committee did not act in accordance with the provisions of Part VII of the Act. If it did not act in accordance with those provisions, it could not shelter behind the immunity granted by s 62(1).

Held, further, that s 58(1) of the Act did not empower the Executive Committee to establish any committee, although the Council itself was empowered to establish committees. Where the Act imposes duties or functions on a committee established by the Council, it is expected that that committee will perform those functions or duties itself, not appoint a sub-committee.

Held, further, that where the Executive Committee receives a complaint alleging misconduct on the part of a registered person, it may call for evidence and cause such investigations as it thinks fit. It may appoint a sub-committee to investigate, but that sub-committee may not hijack the proceedings and assume the functions of both the Executive Committee and the Disciplinary Committee by making decisions. After investigation, the Executive Committee must refer the matter to the Disciplinary Committee for inquiry, unless the Executive Committee considers either that the conduct complained of would not, even if substantiated, constitute



improper or disgraceful conduct or that, for any other reason, the allegation should not be the subject of inquiry. In that event, the Executive Committee must take such other action as it

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thinks fit. The Preliminary Inquiry Committee had not had regard to either of these considerations, but had decided that the evidence did not substantiate the complaint. It had acted *ultra vires* and usurped the function of the Disciplinary Committee. The Executive Committee had not, therefore, complied with the provisions of s 58. Its failure to refer the matter to the Disciplinary Committee would entitle an aggrieved party to appeal to the High Court in terms of s 60(1).

Held, further, that the Executive Committee should refer the complaint to the Disciplinary Committee, which in turn should inquire into the allegation as soon as possible.

Case cited:

*Scott & Ors v Hanekom & Ors* 1980 (3) SA 1182 (C)

Statutes referred to:

Medical, Dental and Allied Professions Act [*Chapter 27:08*], ss 3, 13, 55, 56, 58 and 60

*A P de Bourbon SC*, for the applicants

*E W W Morris*, for the respondent

## Judgment

**Smith J:** On 22 October l994 the first applicant (hereinafter referred to as "Mrs Hughes") noticed that her husband, the second applicant, (hereinafter referred to as "Mr Hughes") was showing symptoms that he was having a heart attack. She took him to the clinic. She alleges that when they got to the clinic the doctor who was on duty (hereinafter referred to as "Dr X") initially refused to attend to Mr Hughes. Another doctor, who happened to be visiting the clinic at the time, offered to attend to Mr Hughes. Mrs Hughes contacted the matron at the clinic and thereafter Dr X and the matron attended to Mr Hughes, who was subsequently admitted to the intensive care unit and finally released from hospital l5 days later. Mrs Hughes lodged a complaint against Dr X with the Health Professions Council (hereinafter referred to as "the Council"). The complaint was made by letter dated 4 November l994 and was received by the Council on l0 November. The complaint was referred to the Preliminary Inquiry Committee, which has been set up by the Executive Committee of the Council in terms of s 58*(l)* of the Medical, Dental and Allied Professions Act [*Chapter 27:08*] (hereinafter referred to as "Chapter 27:08"). The Chairman of the Preliminary Inquiry Committee





is Mr Danso, a registered medical practitioner, who filed the opposing affidavit. It is not clear why the Chairman of the Executive Committee, who was cited as respondent, did not himself file an affidavit. According to the papers, the Preliminary Inquiry Committee corresponded with "various medical people involved" and finally interviewed Dr X on 9 June l995. It then recommended to the Executive Committee of the Council that the allegation should not result in a disciplinary inquiry against Dr X. There is nothing in the papers to show what the Executive Committee did. However, in a letter dated 4 July l995, which was received by the applicants'

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legal practitioner on l0 July, the applicants were advised that Dr X had appeared before the Preliminary Inquiry Committee and "as a result of that interview" the committee decided that there was no case to refer to the Disciplinary Committee for further inquiry. The legal practitioners responded in a letter dated l August, pointing out what they considered to be shortcomings in the deliberations of the Preliminary Inquiry Committee and asking some questions. They asked for an urgent response so that the applicants could decide what further action, if any, they could take. The response from the Council was dated l4 September, some 6 weeks later.

The applicants filed this application on 19 October, seeking an order that the finding of the Preliminary Inquiry Committee be set aside and that that committee be directed to refer the matter of the complaint against Dr X to the Disciplinary Committee of the Council for further inquiry within l4 days of the date of the order. The applicants concede that the application is out of time and seek condonation. When the applicants' legal practitioners were notified of the decision of the Preliminary Inquiry Committee they queried it, which was the natural course to adopt rather than rushing into legal proceedings. It took the Council 6 weeks to respond. I think that it would be unconscionable to allow the delay on the part of the Council to put the applicants out of court. It is clear that there was no inordinate delay on the part of the applicants. Accordingly the late filing of the application is condoned.

Mr *Morris* argued that the applicants had no *locus standi in judicio*, in that they have no personal interest in the legality of the action taken by the Executive Committee of the Council or the Preliminary Inquiry Committee. Mr Danso, in his opposing affidavit, did not question the *locus standi* of the applicants. In *Scott & Ors v Hanekom & Ors* l980 (3) SA 1182 (C) at ll90E-F, Marais AJ said:

> "In cases in which the respondent in motion proceedings has put the authority of the applicant to bring the proceedings in issue, the courts



> have attached considerable importance to the failure of the respondent to offer any evidence at all to suggest that the applicant is not properly before the court, holding in such circumstances that a minimum of evidence will be required from the applicant: *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* l957 (2) SA 347 (C) at 352B; *Divisional Council, Cape* v *Mohr* l973 (2) SA 310 (C) at 314H. This approach is adopted despite the fact that the question of the existence of authority is often peculiarly within the knowledge of the applicant and not his opponent. *A fortiori* is this approach appropriate in a case where the respondent has equal access to the true facts".

In Rose-Innes' *Judicial Review of Administrative Tribunals in South Africa* the learned author says:

> "A review of administrative proceedings, like any kind of litigation, lies at the instance only of a person who has a sufficient interest in the proceedings. The policy of the law is to exclude from litigation persons whose interest is academic or indirect and who are not themselves touched by a direct and real grievance which needs to be remedied".

At p 25 the learned author goes on to say:

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"As a general rule, a person who had the right to appear before an administrative tribunal, whether as an applicant or an objector, will have *locus standi* at common law to take the proceedings on review".

It seems to me that the applicants satisfy these criteria. They submitted a complaint to the Council, which the Council was required to deal with in terms of Part IV of Chapter 27:08. In their view their complaint was not handled properly in terms of the law. Surely they have a real grievance which needs to be remedied. I am satisfied that the applicants have *locus standi in judicio*.

In the opposing affidavit, Mr Danso made a number of submissions which I shall deal with before dealing with the main issue. He said that he was advised that the respondent should be cited as the Health Professions Council by virtue of s 3*(l)* of Chapter 27:08. I agree with that submission. That section provides that the Health Professions Council shall be a body corporate and shall, *in its corporate name,* be capable of suing and being sued. There is nothing in the papers to show that the Chairman of the Preliminary Inquiry Committee or of the Executive personally acted in an untoward manner.

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SMITH J

Furthermore, there is little that the Chairman of either committee alone can do. Chapter 27:08 confers functions and powers on the Council or on the Executive Committee. The Chairman of the Executive Committee can himself do little without the support of the majority of members of the Executive Committee. It is the Executive Committee which must act to correct any irregularities. I am prepared to condone the error in this case. The Council has accepted that it is the party that is being sued and has opposed the application on its merits. Mr Danso could well have objected to the application on the grounds that the Chairman of the Executive Committee should not have been cited as the respondent. The Council should have been cited.

The next submission by Mr Danso was that by virtue of s 62*(l)* of Chapter 27:08, no civil action lies against the Council, the Executive Committee or the Disciplinary Committee save in accordance with Part VII of the Act, which deals with discipline. Section 62*(l)* provides that, save as otherwise provided in the Act, no legal proceedings shall lie against the Council, Executive Committee or Disciplinary Committee, or any member thereof, in respect of any act or duty performed in accordance with the provisions of Part VII of the Act. That means that where the Council or the Executive Committee does anything in terms of Part VII of Chapter 27:08 it cannot be sued on the basis of the action taken or thing done. The basis of this application is, however, that the Executive Committee did not act "in accordance with the provisions" of Part VII. If the Executive Committee has not complied with the provisions of Part VII it cannot shelter behind the immunity granted by s 62*(l)*.

Mr Danso said that the Preliminary Inquiry Committee was set up by the Executive Committee in terms of s 58*(l)* of Chapter 27:08. That section does not empower the Executive Committee to establish any committee. Section 13 of Chapter 27:08 provides for the establishment of committees of the Council. It provides that the Council shall establish an Executive Committee, a Practice Control Committee and a Disciplinary Committee, and may establish such other committees as it considers to be necessary or desirable in which may be vested such of the

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functions and powers of the Council as the Council may direct. There is no power conferred on the Executive Committee to establish committees or sub-committees of the Executive Committee. Where Chapter 27:08 imposes functions or duties on the Executive Committee or the Disciplinary Committee, then it is expected that that committee will perform the functions or duties and not appoint a sub-committee to do so on its behalf.



SMITH J

As I have said earlier, Part VII of Chapter 27:08 deals with discipline. Section 55 thereof sets out the functions of the Disciplinary Committee which are to inquire into allegations referred to it by the Executive Committee in terms of s 58 that a registered person has been guilty of improper or disgraceful conduct or is grossly incompetent. In terms of s 56, the Disciplinary Committee may take evidence and summon witnesses to appear before it. The functions of the Executive Committee in relation to disciplinary offences are set out in s 58. That section provides as follows. Whenever there is brought to the notice of the Executive Committee an allegation that a registered person has been guilty of improper or disgraceful conduct, it shall have power to call for information and to cause such investigation to be made as it thinks necessary. After investigation, the Executive Committee shall refer the matter to the Disciplinary Committee for inquiry. There is a proviso, however, to the effect that if the Executive Committee considers that the conduct complained of would not, even if substantiated, constitute improper or disgraceful conduct or that, for any other reason, the allegation should not be the subject of inquiry by the Disciplinary Committee, the Executive Committee shall take such other action as it thinks fit. One of the problems in this case is that there is no affidavit from the Chairman of the Executive Committee or any other person saying what the Executive Committee did in relation to the complaint by the applicants. In his affidavit, Mr Danso says that the Preliminary Inquiry Committee investigated the matter and recommended that the allegations against Dr X should not result in a disciplinary inquiry. He does not say that the Executive Committee actually met to consider the recommendation and accepted it.

In terms of s 58*(l)* of Chapter 27:08, when the Executive Committee receives a complaint alleging misconduct on the part of a registered person, it may call for evidence and cause such investigations to be made as it thinks fit. Obviously any such investigation would have to be made by an employee of the Council or the Executive Committee may appoint some of its members to make the investigations. Accordingly, the Executive Committee may, in my opinion, establish a sub-committee to investigate the allegations made in the complaint. Such sub-committee may not, however, hijack the proceedings and assume the functions and powers of both the Executive Committee and the Disciplinary Committee. That is what appears to have been done in this matter. In a letter dated l0 July l995, signed on behalf of the Registrar and addressed to the applicants' legal practitioner, it is said that Dr X "was requested to appear before the Preliminary Inquiry Committee of council and as a result of that interview the committee decided that there was no case to refer to the Disciplinary Committee for further inquiry". No mention is made



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of the Executive Committee. In a later letter dated l4 September and signed by the same official on behalf of the Registrar, it is said that in reaching its decision the Committee (clearly the Preliminary Inquiry Committee, not the Executive Committee) considered the reports from various named persons and also interviewed Dr X. It went on to say:

> "It must be appreciated that there were a number of conflicting statements in the reports received, but the Committee was of the view that an interview with Mrs Hughes would only collaborate (*sic*) what had already been submitted in her statement."

It is also clear from the above that the Preliminary Inquiry Committee not only investigated the issues but also conducted an inquiry and decided that no misconduct was proved. In his affidavit Mr Danso says that his committee "had regard to the totality of the evidence" in making its findings. He said "quite plainly there is a severe divergence between the reports of Dr X and the two sisters who were on duty at the relevant time as contrasted with those of Mrs Hughes and another doctor who was present". He went on to say "we had regard to the corroboration between the three former reports and our assessment of the evidence led us to recommend to the Executive Committee that no further steps be taken". It seems clear to me from the above that the Preliminary Inquiry Committee had arrogated to itself the functions of the Disciplinary Committee.

The provisions of Part VII of Chapter 27:08 make it clear that the intention of the legislature was that allegations of misconduct on the part of a registered person are to be inquired into and determined by the Disciplinary Committee, the composition of which varies depending on the discipline in which the registered person concerned is registered. This intention is clearly expressed in s 58(2), which states that after the Executive Committee has investigated an allegation "which might be the subject of inquiry by the Disciplinary Committee", it *shall* refer the matter to the Disciplinary Committee for inquiry. In terms of the proviso to s 58(2) the Executive Committee may decline to send the case to the Disciplinary Committee only if it considers that the conduct complained of would not, even if substantiated, constitute improper or disgraceful conduct or for any other reason it should not be the subject of inquiry by the Disciplinary Committee. Mr Danso has not said in his affidavit that the Preliminary Inquiry Committee had regard to either of these considerations. It is obvious from his affidavit and the two letters from the Council which I have mentioned above that that committee actually considered the "evidence" that was received from various persons and then





decided that the allegations against Dr X had not been substantiated. It is not the function of the Executive Committee to determine whether or not the allegations of misconduct against a registered person are substantiated by the statements or other evidence before the committee. Paragraph *(a)* of proviso *(i)* to s 58(2) provides that it is only if the Executive Committee considers that the conduct complained of "would not, *even if substantiated*, constitute improper or disgraceful conduct" that it may take action other than referring the complaint to the Disciplinary Committee. It appears that the Preliminary Inquiry Committee did consider that the

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conduct of Dr X which was complained of would have constituted improper or disgraceful conduct if substantiated, because it made its recommendation to the Executive Committee having regard to the totality of the evidence and to the nature of the complaint.

For the reasons set out above, I am satisfied that the Executive Committee has failed to comply with the requirements of s 58 of Chapter 27:08. In terms of s 60*(l)* of Chapter 27:08, any person who is aggrieved at the finding of or penalty imposed by the Council, Executive Committee or Disciplinary Committee under Part VII may, within three months, appeal to the High Court. A refusal by the Executive Committee to refer a complaint to the Disciplinary Committee would, I consider, entitle an aggrieved party to appeal in terms of s 45*(l)*. As I have pointed out earlier, there is no evidence at all on the papers that the Executive Committee even dealt with the matter. Even though the Chairman of the Executive Committee, who is also the President of the Council, was cited as respondent, he did not file an affidavit. In the correspondence from the Council to the applicants' legal practitioner, the employee of the Council referred only to the acts done by, and the decisions of, the Preliminary Inquiry Committee. She made no reference to the Executive Committee. Accordingly the applicants could only bring this application by way of review rather than of appeal in terms of s 45 of Chapter 27:08.

The applicants have applied for an order setting aside the finding of the Preliminary Inquiry Committee and directing that committee to refer the complaint against Dr X to the Disciplinary Committee within fourteen days. For the reasons set out above, I consider that the Preliminary Inquiry Committee has acted *ultra vires* in regard to the complaint against Dr X. It has usurped the functions of the Disciplinary Committee. Accordingly, it follows that its findings in relation to the complaint are null and void. Furthermore, the Preliminary Inquiry Committee is an unofficial committee. It cannot refer the complaint to the Disciplinary Committee. It is only the Executive Committee which is empowered to do so. In my opinion, the



SMITH J

Executive Committee should be required to refer the matter to the Disciplinary Committee. In appointing members of the Disciplinary Committee in terms of s 16 of Chapter 27:08, the President of the Council must ensure that no person who was a member of the Preliminary Inquiry Committee which considered the complaint against Dr X is a member of the Disciplinary Committee.

The complaint was received by the Council on l0 November l994. The Preliminary Inquiry Committee did not reach a decision in the matter until 9 June l995, seven months later. It is highly undesirable that the Council takes so long to investigate matters of this nature. It took seven months for the Preliminary Inquiry Committee to look into the matter and reach a decision. That decision should have been referred to the Executive Committee. If the Executive Committee had referred the matter to the Disciplinary Committee it would have meant that approximately nine months would have elapsed before the Disciplinary Committee started its inquiry. One wonders why there should be such an inordinate delay. Mr Danso, in his affidavit, says that the time taken to conclude the investigation stemmed from the need to correspond with the various "medical personnel" involved. As the persons concerned were "medical personnel", presumably they are registered with the Council. The Council should have taken

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steps to ensure that the "medical personnel" responded more expeditiously if that was the cause of the delay. As it took the Council six weeks to reply to the letter dated l August l995 from the applicants' legal practitioner, it would appear that the Council did not treat this matter as one which required any degree of expedition.

Mr *de Bourbon* submitted that it was vitally important that members of the public are assured that matters of professional conduct - whether it be in the medical profession, the legal profession or any other profession - are dealt with properly. I agree wholeheartedly with that submission. I would add that it is equally important that any complaint lodged by a member of the public against a professional person be investigated expeditiously and, if an inquiry is necessary, that such inquiry be conducted as quickly as possibly. The person lodging the complaint is anxious to see that his complaint is treated seriously and properly. The professional person who is the subject of the complaint is equally concerned to see that the matter is investigated properly and swiftly so that his name is cleared if the complaint is not justified.

As the applicants have been successful they are entitled to their costs.

It is ordered that-



SMITH J

1) the Executive Committee of the Health Professions Council refer the complaint received from the applicants in relation to Dr X to the Disciplinary Council within twenty one (21) days of the date of this order;

2) the Disciplinary Committee of the Health Professions Council inquire into the allegations referred to it as soon as possible;

3) the Health Professions Council pay the costs of the applicants.

*Atherstone & Cook*, applicants' legal practitioners

*Scanlen & Holderness*, respondent's legal practitioners



## ZVORWADZA v ZVORWADZA 1996 (1) ZLR 404 (SC)

**Court** **Supreme Court, Harare**

McNally JA, Korsah JA & Muchechetere JA

Civil appeal

29 February & 25 April 1996 Judgment No. S-71-96

### Flynote

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Family law - child - custody - interests of child paramount both in customary law and general law - need to ascertain views of the child where neither parent unsuitable and child old enough to express a proper opinion

## Headnote

The parties, who were married in terms of the Customary Marriages Act [*Chapter 5:07*], had obtained a divorce. The woman appealed against the award of custody of one of the minor children, a boy aged about twelve and a half, to the man. She also appealed against the decision of the court regarding the distribution of the immovable property.

As regards the custody issue, during the divorce proceedings the father had at no point even said that he desired custody of this child. He had led no evidence that it would be in the best interests of the child for custody to be awarded to him. The wife, on the other hand, gave evidence as to why it was in the best interests of the child for custody to be awarded to her. The trial judge had ordered that custody be awarded to the father because he apparently was of the view that under customary law the custody of a male minor had to go to the father. The trial judge declined the opportunity offered to ascertain the wishes of the minor child about with which of the parents he would like to live. The Supreme Court upheld the appeal and awarded custody to the appellant. It pointed out:

(1) It was difficult to see any proper basis for the trial court's decision in the absence of any specific evidence from the father about the best interests of the child.



(2) Both in general law and customary law, the interests of the child are paramount when it comes to custody.

(3) The court should ascertain the child's preferences about with which parent it wishes to live where neither parent can be said to unsuitable to be awarded custody and the child in question is of sufficient age and intelligence to be able to express a proper opinion.

(4) The fact that one party has more earning power, which would enable him to afford superior accommodation and amenities, is not the crucial aspect in a matter of this nature.

As regards the distribution of property:

Held, that the share of the wife in the matrimonial home was too low. Taking into account the respective financial contributions of the parties and other factors the wife was entitled to a forty per cent share in the matrimonial home. Although the wife should not be given a share in the house built in the communal lands because the property was difficult to value and sell and she had now been awarded an adequate share in the immovable property, in the absence of specific evidence that the parties built the home for the extended family, it must be held that the home was built for the parties and their own children.

Cases cited:

*Byrom* v *Byrom* HS-70-82

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*Clarke* v *Clarke* 1939 (1) PH B29 (SR)

*Gondo* v *Gondo* S-147-94

*Jeche* v *Makovo* 1989 (1) ZLR 364 (S)

*Matombo* v *Matambo* HH-272-84

*Moyo* v *Moyo* HB-84-92

*Ncube* v *Ncube* HB-88-91

*Nyathi* v *Nyathi* HB-77-89

*Nyoni* v *Nyoni* HB-74-90

*Shahwe* v *Shawhe* HH-142-92

*Siyaya* v *Siyaya* 1958 (2) PH B17 (C)

*Takafuma* v *Takafuma* S-93-94

*G S Wernberg,* for the appellant

*F Girach,* for the respondent

## Judgment

**Muchechetere JA:** This is an appeal against those portions of the judgment of the High Court, Harare, handed down on 31 December 1993 wherein custody of the minor child, Nomutsa Isaiah Zvorwadza, was awarded to the respondent and wherein the former matrimonial home,



MUCHECHETERE JA

No. 670 Glen Close, Glen Lorne, Harare (hereinafter referred to as "the matrimonial home") was also awarded to the respondent.

The facts in the matter are that the parties had lived together as husband and wife since 1973 and they were officially married to each other under the Customary Marriages Act [*Chapter 5:07*] on 11 January 1980. There are three children of the marriage, namely, Heritage Zvorwadza (born on 14 May 1974), Nomutsa Isaiah Zvorwadza (born on 1 May 1981), and Kudzayi Tanyaradzwa Zvorwadza (born on 2 September 1989).

Before the matter was heard in the court *a quo,* it had been agreed between the parties that the marriage had irretrievably broken down and that custody of the minor child, Kudzayi Tanyaradzwa Zvorwadza, should be awarded to the appellant. In the circumstances, there were only three issues which remained for the court to decide. These were custody of the remaining two minor children and their maintenance, the maintenance of the appellant, and the division of the matrimonial assets.

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As indicated above, custody of Nomutsa Isaiah Zvorwadza was eventually granted to the respondent. Heritage had become a major by the time the matter came to court and in the circumstances the question of his custody fell away.

I shall consider first the question of the custody of Nomutsa Isaiah Zvorwadza. The learned judge in the court *a quo* stated the following in granting custody to the respondent:

> "As far as Nomutsa Isaiah is concerned, he is now over the age of twelve-and-a-half years old. He is soon approaching the age of puberty. In my view, he needs the proper guidance of his father and in addition he will be in the company of his elder brother Heritage at the father's home. This is convenient and desirable under the circumstances. I feel that custody of Isaiah should be awarded to the plaintiff (now the respondent)."

In this connection, it was submitted by Mr *Wernberg,* for the appellant, that the respondent laid no basis in his evidence for the claim for custody of any of the minor children and that at no point did the respondent himself even say that he desired custody of the minor child, Nomutsa Isaiah. He also did not give any evidence as to why it would be in the best interests of the minor child that custody be granted to him. The only reference to custody of the minor





children by the respondent was when he was asked during evidence-in-chief about the maintenance of Kudzayi Tanyaradzwa, whose custody it had been agreed would be awarded to the appellant. The respondent then agreed that he would be obliged to pay maintenance for that child. I agree with those submissions.

The appellant, on the other hand, gave evidence in support of her claim. She indicated that she was very averse to her children being brought up by another woman - the appellant had alleged that the respondent was living with another woman. The appellant also stated that the respondent habitually came home late and therefore spent very little time with the children; that the children of the marriage did not enjoy an intimate relationship with their father, suggesting that they therefore desired to remain with her; that she did not want the minor children split up but preferred that they remain within one home; and that she was solely responsible for attending to the children's religious needs. These contentions were not challenged.

In my view, it is, with respect, difficult on the facts of this case to see a proper basis upon which the learned judge accepted, in the absence of any specific evidence by the respondent, and against the background of the appellant's evidence as to her suitability as custodian, that custody of older boys should invariably be granted to their father. The learned judge's finding appears to have been based on some general rule applied *in vacuo.*

It might have been that the learned judge applied the above general rule because he was of the view that customary law principles of custody applied in this case - the marriage was under the Customary Marriages Act. I say this because amongst the questions he put to the appellant was the following: "... isn't it customary that he is the rightful heir and was to be with the father in order to be told what to do and you know to look after the home, should he go?" In the first instance, the respondent did not, in his evidence, state that his claim to custody was based on the principles of customary law. Secondly, even under customary law it has been held that the

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interests of the children are paramount when it comes to custody. See *Jeche* v *Makovo* 1989 (1) ZLR 364 (S), where the following is stated in the headnote:

> "In customary law, as in general law, in any case relating to the custody of children the interests of the children are the paramount consideration. The fact that the father may have paid *roora* or *chiredzwa* or any other customary payment is irrelevant, as are such questions as whether the father can afford to pay maintenance to the mother for the upkeep of the





> children or whether the mother might marry a man who could not afford to look after the children. Because it is the child's best interests which remain paramount until the child attains its majority, presiding officers at community courts should not issue orders that the mother should deliver custody of her minor child to the father when the child reaches a certain age."

The learned judge also declined, improperly in my view, the opportunity offered to find out about the child's desire as to which parent he would like to live with and also to state his relationship with the respondent. The following occurred when the learned judge was putting questions to the appellant:

> "Q. Well, we don't know about that one (a trip to Canada not revealed to the respondent by the child), it's hearsay? A. Okay, so it's that relationship which they don't have Your Honour, well it's better to ask the children themselves, I don't know.
>
> Q. The court can only ask the children in very serious matters of either abuse or irresponsibility, but from the evidence that you two people have given, certainly I cannot say either you or the plaintiff is irresponsible. From the evidence given so far it is difficult for the court to come to the conclusion that either party is irresponsible and he is not a fit and proper person to have custody of these two children ..."

The learned judge misdirected himself on the matter. For it is proper to canvass the views of the minor children on their preference when the court is considering the best interests of the children. It would have been much more preferable in a case such as the present one, where the infant in question is of sufficient age and intelligence to be questioned on the matter, and where both parents cannot be said to be irresponsible. See *Clark* v *Clark* 1939 (1) PH B29 (SR) where, in a judicial separation, Blakeway J awarded custody of the minor child to the husband. One of the reasons why custody was granted to the husband was because the minor child had said that he wanted to remain with his father and that he was afraid of his mother. In *Siyaya* v *Siyaya* 1958 (2) PH B17 (C), where Rosenow J awarded custody in accordance with the preference of the children, it was held that:

> "The interests of the children could not be measured purely in terms of superior accommodation and amenities. A child required, above all, care and affection. The court had been influenced particularly, in coming to a decision, by the preference shown by the children themselves. Although





> the applicant might not be able to offer as much luxury and comfort as they would have with (the) respondent, there was the evidence that she was able to look properly after them, and the five youngest children themselves would be happier if in the meantime they were allowed to remain in the care of the party for whom they themselves

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had shown a preference ..."

See also *Byrom* v *Byrom* H-S-70-82 at p 7 of the cyclostyled judgment, where McNally J (as he then was) said:

> "It seems to me that when a highly intelligent and articulate boy of fifteen expresses himself so clearly, the court must give a great deal of weight to his statement and actions in determining what is in his best interests. No doubt if the merits of one parent and the demerits of the other are glaring one might not be swayed by a fifteen year old's view. *But where either parent, or either household, is adequate, I regard the wishes of an intelligent fifteen year old as of considerable importance"* (the underlining is mine).

And in *Matombo* v *Matombo* HH-272-84, where two children declined to go to their mother in terms of a custody order, the same learned judge said at p 1 of the cyclostyled judgment:

> "Moreover, the wishes of the sixteen year old son are not lightly to be disregarded."

All in all, I am of the view that the learned judge erred in awarding custody of Nomutsa Isaiah to the respondent. He should have instead awarded custody to the appellant, who had given proper and acceptable reasons as to why it was in the best interests of the child that she be awarded his custody. The fact that the respondent has more earning power, which would enable him to afford superior accommodation, amenities and to send the child to school, is not the crucial aspect in a matter of this nature. It is worthy of note that both counsel informed the court during the hearing that Nomutsa Isaiah is still living happily with the appellant.

In view of the above finding, the respondent will of necessity be ordered to pay maintenance for Nomutsa Isaiah and also provide for all his medical and school fees, including uniforms, in the same manner as he was ordered to provide for Kudzayi Tanyaradzwa.

In connection with the division of the matrimonial property, the parties were



MUCHECHETERE JA

not concerned with the court *a quo's* decision regarding the movable property. Most of that had in any event been divided by consent before the hearing.

However, the appellant's submission in respect of the immovable property was that the learned judge's order had been most inequitable in the circumstances. Mr *Wernberg* submitted that by awarding the matrimonial home, whose value was put at $500 000, to the respondent and awarding the flat, No. 41 Pine Banks, Fife Avenue, Harare, whose value was put at $100 000, to the appellant the share of the immovable property awarded to the appellant was 16.67%.

If, however, the communal home, valued at $190 000, was brought into the picture - the appellant contends that as the money used to build the communal home came from the savings which accrued to the parties during the subsistence of the marriage the home ought therefore to be taken into account in the exercise - her share would drop to only 14.94%. The communal home would in any event belong to the respondent because it was built in his communal area and the appellant would not have access to it after the divorce.

Mr *Wernberg* also pointed out that account should be taken of the fact that the matrimonial

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home was valued on the instructions of the respondent for the purpose of distribution in a matrimonial division and that in the circumstances the value placed on it is below its market value. In the circumstances, the share awarded to the appellant would fall further.

Mr *Wernberg a*rgued that the share awarded to the appellant was too low even if account is taken of the fact that at all material times the respondent earned much more than the appellant and that at certain times the appellant was not in formal employment. He stated that it was not in dispute that the appellant contributed virtually all her earnings during such time as she was employed in the maintenance of the family. She also made improvements to the matrimonial home, in that she had the swimming pool repaired and lined with glitterstone. Further, she also contributed as a wife in many areas such as cooking, looking after the children and buying their clothes, keeping house, and other family chores. He submitted that the court should also bear in mind court decisions to the effect that where the level of the parties' respective contributions cannot be established, as a general rule the matrimonial assets will be divided in equal shares between them. See *Ncube* v *Ncube* HB-88-91; *Nyathi* v *Nyathi* HB-77-89; *Nyoni* v *Nyoni* HB-74-90; *Shahwe* v *Shahwe*



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HH-142-92; and *Moyo* v *Moyo* HB-84-92. He, however, conceded that although in the present case the actual value of the parties' respective contributions could not be established, it was clear that financially the respondent contributed more than the appellant. But he contended that, as was held in *Gondo* v *Gondo* S-147-94, the question of financial contributions was only one of seven factors to be considered in s 7(3) of the Matrimonial Causes Act [*Chapter 5:13*]. He considered the situation of the parties in this case to be similar to that in *Gondo supra,* where the immovable property was shared 60-40% in favour of the husband. He therefore submitted that a similar award would be just and proper in this case, in that it would place the parties, as nearly as possible, in the positions they would have been in had a reasonable marriage relationship continued.

Mr *Girach,* for the respondent, submitted that it was too simplistic and incorrect to adopt the view that all that the appellant got by way of division was the flat. He stated that the following must be taken into account: that the respondent paid the appellant's tuition fees and thereby placed her in the position where she was able to earn substantially more than she would otherwise have been able to; that the bulk of the household assets were left by the respondent for the appellant's use; and that she was left with a motor vehicle.

I do not consider that the submissions have any substance. With regard to the tuition fees, it should be stated that after her education the appellant used her increased earnings for the benefit of the family. Further, if the appellant had not been sufficiently educated to earn her keep after the divorce the appellant's claim for the maintenance of herself would most probably have been pursued and succeeded. As it was, he saved himself that claim and, in my view, he cannot now be heard to complain.

As for the household assets, my view is that this matter was resolved by consent, with the respondent taking whatsoever he considered was reasonable. In fact, the appellant's claim in

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that respect was not opposed or put into issue, either in the pleadings or during the hearing. There was also no intimation in the court *a quo* to the effect that the court should take into account those assets when considering the division of the immovable property.

In connection with the award of the motor vehicle to the appellant, it is clear this was done after the respondent admitted that he had sold a Mercedes Benz motor vehicle and a Spitfire motor vehicle during the subsistence of the marriage and had not accounted for the proceeds to the appellant. Again it



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was never contended in the court *a quo* that the share of the appellant in the immovable property should take into account that she had been awarded the motor vehicle.

The proceeds of the sale of the two motor vehicles would, in any event, more than compensate the respondent for the household assets and the motor vehicle retained by the appellant.

Mr *Girach* also submitted that the communal home should not be taken into account in the distribution of the matrimonial assets. In his view, the communal home was put up in the communal lands for the benefit of the respondent's extended family. He also stated that this is something which the parents of the respondent are entitled to expect and one which the respondent felt morally obliged to provide. He also submitted that, in the circumstances and against that background, the respondent himself will receive no financial or other benefit from the home in the communal lands.

There is, however, no evidence on record to support Mr *Girach's* submission. All that was canvassed was that the parties built a communal home from their savings. The presumption in the circumstances is that the home must belong to the parties and their immediate family. It is not correct to assume that when a communal land dweller builds a home in the communal lands it is for the use of the extended family. It is for the use of the builder and his immediate family, that is, his wife and children and his dependants. The parents and other grown up members of the extended family are expected to have or build their own homes. The term "communal home", when used in the present context, does not mean a home communally lived in by the extended family. It simply means a home in the communal lands. Indeed, there is no reason why the respondent cannot sell and lease the home if he wants to. Its value, however, will be affected by the fact that no title deeds would pass to the purchaser. If he does not sell it, it will, after the divorce, be available for his use to the exclusion of the appellant.

In the circumstances, in the absence of specific evidence that the parties built the home for the extended family, it must be held that the home was for the parties and the family. It must therefore be taken into account in the division of the property.

The only submission by Mr *Girach* which has some substance is that account had not been taken of the fact that there is a mortgage bond of $130 000 on the matrimonial home which is being serviced by the respondent. I agree that

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the value of the matrimonial home is reduced by that amount. However, this would be cancelled by the fact that the respondent will acquire the communal home. At the end, it would still mean that the appellant's share in the immovable property would be between 16.67% and 14.94%.

In all the circumstances, I agree with Mr *Wernberg*'s submission that the share awarded to the appellant by the learned judge is too low. Consideration should have been taken of the fact that, in addition to the parties' relevant contributions to the family, the parties lived together as husband and wife for nearly twenty years. And, as stated above, the court is enjoined to place the parties, as nearly as possible, in the position they would have been in if the marriage had continued. See *Gondo supra* and *Takafuma* v *Takafuma* S-93-94. I consider that a 60-40% division of the immovable property in favour of the respondent is, in the circumstances, equitable. I would, however, exclude in the computation the communal home which would, in addition to the 60% share, remain as the sole property of the respondent. This is because it is difficult to value and sell, and the appellant's share is, in my view, adequate even if she loses the benefit of the communal home.

The above means that the appellant has been substantially successful, and is entitled to her costs.

In the result, the following order is made:

1. The appeal in relation to custody of the minor child, Nomutsa Isaiah, is allowed. Items 2, 3 and 4 of the court *a quo*'s order are deleted and the following is substituted instead

"2. That the defendant be and is hereby awarded custody of both minor children, namely, Nomutsa Isaiah Zvorwadza and Kudzayi Tanyaradzwa Zvorwadza.

3. That the plaintiff shall pay for all the educational (including uniforms) and medical needs of the said minor children until such time as both children attain the age of eighteen years, and in addition shall pay maintenance to the defendant in the sum of $300 per month per child for such period as the respective children are residing with the defendant, that is, exclusive of the periods either of the children is at boarding school."

2. The appeal in relation to the division of the immovable property, that is,



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No. 670 Glen Close, Glen Lorne, Harare, and Flat No. 41 Pine Banks, Fife Avenue, Harare, is allowed. Items 6 and 7 of the court *a quo*'s order are set aside and instead it is ordered as follows:

"6. That the immovable properties, being Flat No. 41 Pine Banks, Fife Avenue, Harare and No. 670 Glen Close, Glen Lorne, Harare, be sold to best advantage and the net proceeds are to be divided so that the respondent, Paddington Zvorwadza, receives 60% thereof and the appellant, Abigail Zvorwadza, receives

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40% thereof."

3. The costs of the appeal are to be paid by the respondent.

McNally JA: I agree.

Korsah JA: I agree.

*McNaught Wickwar,* appellant's legal practitioners

*Coghlan, Welsh & Guest,* respondent's legal practitioners



## WILLOWVALE MAZDA MOTOR INDUSTRIES (PVT) LTD v SUNSHINE RENT-A-CAR (PVT) LTD 1996 (1) ZLR 415 (SC)

**Court** **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

21 March & 25 April 1996 Judgment No. S-72-96

### Flynote

Appeal - record - appellant's obligation to provide copies of record to respondent - Rules of the Supreme Court, r 34(3) - whether Rules impose such obligation

Estoppel - issue estoppel - whether part of Roman Dutch law or of Zimbabwean law - doctrine embraced under general rule of public policy that there should be finality in litigation - whether issue estoppel can be invoked even where principle of res judicata cannot

### Headnote

The provisions of the Rules of the Supreme Court which deal with the supply to the respondent of copies of the record of the proceedings in the lower court are less than satisfactory. Rules 34(4), as it now stands, suggests that the Registrar of the High Court is obliged to supply copies of the record only if the respondent has been granted leave to oppose the appeal *in forma pauperis*. There is no specific provision requiring copies to be provided to the respondent in other cases, either by the Registrar or by the appellant.

The parties to the appeal had previously been involved in litigation, which concluded on appeal (judgment No. S-180-93). The litigation had determined the nature of the relationship between the parties, which was contractual; the terms and obligations of the contract; and the exchange rate to be applied to the payment for the motor vehicles, which were the subject of the contract. The present respondent had then demanded payment in respect of other vehicles which were acquired on

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identical terms, basing its demand on the decision of the Supreme Court in the previous litigation. Judgment was entered in its favour by the High Court, together with interest on the legal practitioner and client scale. On appeal, it was argued that the matter was *res judicata*.

Held, that this was not a situation where the principle of *res judicata* could be applied. Even though the matter was between the same parties and involved the same issues of law, the *merx* demanded was different. The subject matter was not the same in both proceedings.

Held, further, that even though the principle of *res judicata* could not be applied, this did not prevent the court from considering the question of issue estoppel. The doctrine of issue estoppel does not require for its application that the same thing must have been demanded. The requirements are that *(i)* the same question has to be decided; (ii) the judicial decision was final; and (iii) the parties are the same.

Held, further, that although some doubts have been expressed as to whether the doctrine is part of Roman-Dutch law at all, the Supreme Court, in the wider application of existing law in the light of current modes of thought, has found the artificiality of limiting estoppel to the same subject to be unproductive of justice and has embraced the doctrine of issue estoppel under the general rule of public policy that there should be finality in litigation.

Held, further, that there had, in any event, been no reason advanced as to why the transaction which formed the subject of the second litigation should be treated in any other way than the previous transaction had been treated, nor had any new material relevant to the issue become available which could not have, with reasonable diligence, been adduced before the trial court.

Cases cited:

*African Farms & Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A)

*Carl Zeiss Stiftung v Rayner & Keeler* [1967] 1 AC 853 (HL)

*Dempsey v Shambo* 1936 EDL 330

*Horowitz v Brock & Ors* 1988 (2) SA 160 (A)

*Kashiri v Muvirimi* 1988 (1) ZLR 270 (S)

*Mills v Cooper* [1967] (2) All ER 100

*Munemo v Muswera* 1987 (1) ZLR 20 (S)

*Willowvale Motor Industries (Pvt) Ltd v Sunshine Rent-a-Car (Pvt) Ltd & Anor* S-180-93

*Wolfenden v Jackson* 1985 (2) ZLR 313 (S)



Statutes and rules of court referred to:

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Civil Evidence Act [*Chapter 41 of 1974*], s 33

Civil Evidence Act [*Chapter 8:01*]

Supreme Court Rules 1964 (RGN 380/1964), rr 29(1)*(e)* and 34(4)

*D P Carter*, for the appellant

*A P de Bourbon SC*, for the respondent

## Judgment

**Korsah JA:** This is an appeal against the determination of the High Court, Bulawayo, contained in a judgment handed down on 18 August 1995, entering judgment in favour of the respondent against the appellant in the sum of $319 982,75, together with interest thereon in the sum of $81 981,72 up to 30 November 1993 and thereafter, at the prescribed rate, to date of payment, together with costs of suit on the scale of legal practitioner and client.

At the hearing of this matter, Mr *Carter*, for the appellant, sought leave of the court to amend the notice of appeal by the insertion of a prayer, which was conspicuous by its absence in the original notice of appeal, that-

> "The appellant will pray that the appeal be allowed and that the order of the court *a quo* be substituted to read that the application is dismissed with costs; alternatively, that the matter be referred to trial."

The failure to specify the exact nature of the relief sought amounts to non-compliance with r 29(1)*(e)* of the Rules of the Supreme Court. Although condonation of the non-observance of the rules of the court is not a mere formality, in the instant case it was evident from the tenor of the notice of appeal that the relief the appellant sought was a reversal of the order of the trial court and an order entered in its favour. Moreover, Mr *de Bourbon*, who appeared for the respondent, raised no objection to the application and the court, in the exercise of its judicial discretion, condoned the appellant's non-compliance with the Rules and allowed the amendment.

Mr *de Bourbon* applied for and obtained condonation for the late filing of the respondent's heads of argument outside the time prescribed in r 43(3). Mr *de Bourbon* opined that the reason for the delay in filing heads of argument on behalf of the respondent highlights a deficiency in r 34 of the Supreme Court Rules. He stated the deficiency thus:

> "In its original form, r 34(3) required the appellant in a civil appeal from





> the High Court to supply two copies of the record free to each respondent, whereas the present r 34(4) only requires the Registrar of the High Court to supply an original plus those copies to the Registrar of this Honourable Court. *No provision in made for the parties to obtain copies, and no obligation is imposed on an appellant in that regard*" (emphasis added).

In its original form the relevant part of r 34(3) reads:

> " ... If the respondent has been granted leave to oppose the appeal *in forma pauperis* the appellant shall deliver

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two copies of the record to the respondent, *otherwise* the appellant shall deliver to the respondent such copies as shall have been required in writing *against payment for copies in excess of two*" (emphasis added).

The present r 34(4), which amends the corresponding part of the original Rules, reads:

" ... If the respondent has been granted leave to oppose the appeal *in forma pauperis*, the Registrar of the High Court shall deliver two copies of the record to the respondent".

The rule, as amended, appears to suggest that the Registrar of the High Court is obliged to furnish the respondent with two copies of the record only if the respondent has been granted leave to oppose the appeal *in forma pauperis*.

It was said, but for whatever reason is not stated, that the respondent was unable to obtain a copy of the record until late in December. Counsel was only briefed on 3 January 1996 to prepare heads of argument and it is said that in the circumstances, the ten day period specified in r 43(3) could not be complied with on behalf of the respondent.

Mr *de Bourbon* respectfully suggested that r 34 be amended to require the appellant in a civil appeal from the High Court to provide at least one copy of the record to each respondent as soon as possible after the record has been certified by the Registrar of the High Court. As this issue falls within the purview of the Law Development Commission, I propose to voice no opinion on the matter, save to reiterate that the court had no difficulty in granting the respondent's prayer for condonation.

The circumstances in this appeal are, as submitted by Mr *de Bourbon*, identical to those dealt with by this Court in *Willowvale Motor Industries (Pvt) Ltd* v *Sunshine Rent-a-Car (Pvt) Ltd & Anor* S-180-93.



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The respondent placed an order for twenty three Mazda 323 hatchback motor vehicles (whereof twenty were actually purchased), four Mazda 626 sedan motor vehicles and six Mazda B1600 pick-up trucks.

There was no difficulty with regard to the actual delivery of the twenty Mazda 323 hatchback motor vehicles. Difficulties arose in respect of the other ten vehicles, and the present respondent applied to the High Court in case No. HC 1403/92 to compel the delivery of these ten vehicles. Delivery was in fact effected against payment under protest and what remained to be determined was *(a)* whether or not the present respondent could successfully maintain an action against the present appellant, since the present appellant asserted in those proceedings, as it does in the present proceedings, that it had no contractual relationship with the present respondent, and *(b)* the issue as to the exchange rate to be used in the calculation of the conversion of the deposit paid in respect of the vehicles. It is significant that the deposit for all of the vehicles, and not just the ten which were the subject matter of the first action, had been paid on one occasion.

Also significant is the statement, in the second paragraph of judgment No. HH-30-93, which

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concluded the first trial, wherein the learned trial judge set out the issues for determination thus:

> "It is agreed between both counsel that the issue to be determined is the precise nature of the relationship between the three parties to these proceedings, the terms and *obligations of any contract arising out of the relationship and the exchange rate to be applied to the payment for CKD kits*" (emphasis supplied).

The High Court found in favour of the present respondent on both issues and granted a declarator. The decision of the High Court was confirmed in judgment No. S-180-93 of this court, that a contractual relationship existed between the parties herein and that the delivery date of the vehicles by the appellant to the respondent was when the respondent first placed the appellant *in mora*, that is, 18 February 1992. Thus 18 February 1992 was the date for the determination of the prices of the vehicles, and it follows, therefore, that the Zimbabwe dollar credit to be given in respect of the foreign exchange component already paid was to be determined or calculated by reference to the bank rate prevailing as at the date of delivery of the vehicles.

In consequence of that declarator the respondent prepared a schedule, reflecting the following:



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*(a)* The date of delivery of each vehicle listed next to the date;

*(b)* The amount of the Zimbabwe dollar credit actually received (under "TA Motors Forex") in respect of the applicable vehicle by reference to the foreign currency paid;

*(c)* The foreign currency paid (reflected under "Yen") in respect of the said applicable vehicle;

*(d)* The rate actually used (by the appellant) to establish the Zimbabwe dollar credit (reflected under "rate used");

*(e)* The prevailing bank rate at the date of delivery (reflected under "bank rate"); and

*(f)* The amount by which the conversion at the prevailing bank rate at the date of delivery exceeds the conversion at the rate used by the appellant (reflected under "amount owed back") in respect of the calculation of the Zimbabwe dollar credit for the foreign currency paid in respect of the applicable vehicle.

By a letter dated 6 December 1993, to which was attached the above schedule, the respondent's legal practitioner made demand of the appellant for payment of the amounts therein specified together with interest thereon. The letter referring to the earlier case, reads in part:

> "Clearly, the relief or declaratory order in respect of the six vehicles that formed the subject of the litigation applies equally to the other twenty four vehicles. We enclose a self-explanatory schedule prepared by our client reflecting, *inter alia*, the amounts in excess of the purchase price that should have been paid by our client in respect of the twenty Mazda 323 motor vehicles and the four Mazda 626 motor vehicles, had the foreign currency amount paid by our client been credited at the rate that pertained as at the date upon which the vehicles were delivered.
>
> It will be perceived that the capital amount of the excess paid by our client (and therefore refundable) totals $319

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928,75.

Our client considers (and we agree with it) that it is entitled to interest at the prescribed rates on the amounts of the respective overpayments and, in this regard, the schedule attached also reflects the interest calculated from the date of payment of the excess to 30 November 1993 and which totals $81 981,72."

The letter ends with a demand for the payment of the sum of $401 910,47 within fourteen days, failing which proceedings would be instituted to enforce the claim.



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Section 14 of the High Court Act [*Chapter 7:06*] empowers the Court, in its discretion, at the instance of any interested person to inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination. It is in the exercise of the discretion bestowed upon it by this section that the trial court granted the declarator as to the relationship and obligations of the parties. In that case the question at issue involved the existing rights and interests of the parties and it was within the jurisdiction of the court to grant the declarator which was confirmed on appeal.

I am in no doubt that this was not a case to which the principle of *res judicata* could be applied; for even though the matter was between the same parties and involved the same issues of law, the merx demanded was different. Mr *Carter* was right in submitting that *res judicata* did not apply because the same subject matter was not the issue in the earlier and the present proceedings. See *African Farms & Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562B-E; *Wolfenden v Jackson* 1985 (2) ZLR 313 S.

The doctrine of issue estoppel does not require for its application that the same thing must have been demanded. Some reservation was expressed over the applicability of the doctrine of issue estoppel in this jurisdiction by Mr *Carter*. In *Horowitz* v *Brock & Ors* 1988 (2) SA 160 (A) at 179, Smalberger JA acknowledged that "there is a strong body of academic opinion which proclaims that it is not, or at least that it should not be part of Roman Dutch Law". The learned Judge of Appeal, however, observed that: "It remains a vexed question whether issue estoppel is part of our law". The doctrine has received mention in cases in South Africa no less than in Zimbabwe. Mention of it was made by this court in *Munemo* v *Muswera* 1987 (1) ZLR 20 (S), at 22D; and it was applied by the court in *Kashiri* v *Muvirime* 1988 (1) ZLR 270 (S) at 274D.

In *Carl Zeiss Stiftung* v *Rayner & Keeler* [1967] 1 AC 853 at p 933 Lord Guest expressed the view that the doctrine of estoppel *per rem judicatem* "is reflected in two Latin maxims (1) *interest rei publicae ut sit finis litium*, and (2) *nemo debet bis vexari pro uno et eadem causa*. The former is public policy and the latter is private justice." The learned Law Lord makes the point at p 934 of the report that issue estoppel was referred to -

"as early as 1776 in *The Duchess of Kingston's Case* 20 St Tr 355, as interpreted in *Reg* v *Hartington Middle Quarter (Inhabitants)* 4 E & B 780. It has been approved recently by Lord Denning MR and Diplock



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LJ in *Fidelitas Shipping Co Ltd* v *V/O Exportchleb* [1966] 1 QB 630 at 640-1. Although not described as issue estoppel' it is inferentially approved in the most recent text-book on *Res Judicata* by Spencer Bower at p 98 where he speaks of a judicial decision which involved a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised."

The learned Law Lord identified the requirements of issue estoppel to be -

"*(i)* that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final; and (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised".

In *Mills* v *Cooper* [1967] 2 QB 459 at 469 Lord Diplock was at pains to emphasise that -

"Whatever may be said of the other rules of law to which the label of estoppel' is attached, issue estoppel' is not a rule of evidence. True, subject to the qualification I have stated, it has the effect of preventing the party estopped' from calling evidence to show that the assertion which is the subject of the issue estoppel' is incorrect, but that is because the evidence of the issue estoppel' results in there being no issue in the subsequent civil proceedings to which such evidence would be relevant. *Issue estoppel is a particular application of the general rule of public policy that there should be finality in litigation*" (emphasis added).

Quite apart from what is enunciated in s 33 of the Civil Evidence Act [*Chapter 41 of 1974*] (now repealed and substituted with the Civil Evidence Act 15 of 1992, now [*Chapter 8:01*]), the principles of public policy adopted by the courts in this country have always followed the principles applied in the Supreme Court of Judicature in England until the promulgation of Act 15 of 1992. The cases of *Munemo* v *Muswera supra* and *Kashiri* v *Muvirime supra* were both decided before Act 15 of 1992 came into force.

I merely note with interest, without saying more, that Gutsche J expressed the following view, when dealing with a contract in restraint of trade, in *Dempsey* v *Shambo* 1936 EDL 330 at 333 that-

"In wide language public policy' in so far as it relates to personal



contracts and more particularly to those which are concerned with professions, trades and industries, is the same in South Africa as in England, and consequently our courts have consistently followed the principles elaborated by the English judges."

I do not know whether the policy of Roman-Dutch law in bringing litigation to finality differs from that of English law.

While the doctrine of issue estoppel may not be part of Roman-Dutch law and may not as yet have found a berth in South African law, it seems to me that this court, in the wider application of existing law in the light of current modes of thought, has found the artificiality of limiting estoppel to the same subject to be unproductive of justice, and has embraced the doctrine of issue estoppel under the general rule of public policy that there should be finality in litigation.

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The doctrine is succinctly stated thus by Lord Diplock in *Mills v Cooper supra* at 468 thus:

> "A party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him."

The adoption or non-applicability of the doctrine of issue estoppel notwithstanding, sight must not be lost of the fact that in the previous case the parties sought a declaration regarding the precise nature of the relationship between them and the terms and obligations of *any contract* arising out of that relationship. This court pronounced upon those issues in case No. S-180-93. Mr *de Bourbon* rightly contended that the appellant has raised the same points that it raised in the previous appeal. He submitted that there is no basis whatsoever to deal with the twenty Mazda 323 motor vehicles on a different basis than the other ten Mazda vehicles. This court declared that, in respect of the dealings concerning the motor vehicles, there was a direct contractual



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relationship between the appellant and the respondent, and that upon a proper construction of the arrangement between the parties the foreign credit component had to be converted into Zimbabwe dollars as at the time for delivery.

I entirely agree with Mr *de Bourbon* that no reason has been advanced in support of the contention that the transaction between the appellant and the respondent in respect of the remainder of the vehicles should be treated otherwise than the transaction between them in respect of the ten vehicles the subject of the same contract, the rights and obligations under which had been pronounced upon.

As far as I am able to discern, no new material relevant to the correctness or incorrectness of the assertion which could not by reasonable diligence have been adduced by the appellant before the trial court has since become available to the appellant. The suggestion to send the matter to trial is, therefore, not sustainable.

There was no reasonable basis, as found by the learned trial judge, for the refusal of the appellant to accept the declaration of rights confirmed in the decision of this Court. The trial court's discretion to award costs on the higher scale cannot, in the circumstances, be impugned.

Accordingly, the appeal is dismissed with costs.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

*Honey & Blanckenberg*, appellant's legal practitioners

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*Atherstone & Cook*, respondent's legal practitioners



## S v CHIWESHE 1996 (1) ZLR 425 (HC)

**Court** **High Court, Bulawayo**

Cheda J & Chatikobo J

Appeal against sentence

1 & 26 April 1996 Judgment No. HB-25-96

### Flynote

Criminal procedure (sentence) - general principles - suspended sentence - conditions of suspension - community service - information which must be available before court can consider imposing community service - where accused is legally represented, duty lies on legal representative to provide information

Criminal procedure (sentence) - statutory offences - Road Traffic Act [Chapter 13:11] - s 55(1) - drunken driving - third conviction - prison sentence - appropriateness of

### Headnote

The appellant was convicted, for the third time in six years, of driving under the influence of alcohol, contrary to s 55(1) of the Road Traffic Act [*Chapter 13:11*]. He was, as required by the Act, prohibited from driving motor vehicles for life, and sentenced to three months' imprisonment, of which one month was suspended on conditions relating to future good conduct. On appeal against sentence, it was argued that the sentence was excessive, when consideration was given to the overall punishment. It was also argued that, though a prison sentence might once have been considered appropriate for such an offence, it was no longer so, because of the new dispensation which community service should play in the sentencing system. Although at the trial the appellant's legal representative had argued for the imposition of community service, he did not place before the court any indication that the authorities at the hospital where it was suggested that he perform community service were actually willing for him to do so, nor was it suggested what type of work he could do.



Held, that the appellant was a danger to the public and to himself, as he had, after his first conviction, continued to drive without a licence and under the influence of alcohol. The penalties meted out to him in the past had not deterred him. The severity of the prohibition, which would last at least ten years, was not in itself a sufficient deterrent, nor was a monetary penalty. The sentence imposed was not out of line with those imposed in similar cases.

Held, further, that community service, which is a relatively new concept, depends for its efficacy on the co-operation of institutions which are unconnected with the criminal justice system. Before a court can consider the imposition of community service, it must be advised of the

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existence of an institution which is willing to take the offender and of details of the nature of the work that is available at the institution. Such information is a vital tool with which a trial court must be armed before it can properly determine an appropriate sentence. Where the accused is legally represented, the legal practitioner is under a duty to furnish the court with the information upon which it can exercise its discretion properly. Where necessary, he can enlist the help of the prosecutor or the court to facilitate a meaningful enquiry to be made. Where the accused is not represented, the court and the prosecutor must take it on themselves to make the necessary inquiries.

Held, further, that the adequacy of community service as an alternative to imprisonment depends on the component or nature of the service to be rendered. Community service is an alternative form of punishment, which must leave the offender under no illusion that he is being punished for a criminal wrong committed by him on society. The court would not be in a position to consider community service as a suitable option unless it has the information referred to.

Held, further, that in the absence of the necessary information it could not be said that the magistrate had misdirected himself.

Appeal dismissed.

Cases cited:

*Barr v A-G* 1985 (2) ZLR 97 (H)

*S v Chipato* HH-202-90

*S v E* 1992 (2) SACR 625 (A)

*S v Labuschagne* 1995 (2) SACR 200 (W)

*S v Mabhena* 1996 (1) ZLR 134 (H)

*S v Mtsi* 1992 (2) SACR 206 (W)

*S v Ndhlovu* S-28-94



*S v Nyathi* HB-1-95

*S v Ramushu & Ors* S-25-93

*S v Sabawo* HH-189-94

*S v Tachiona & Anor* 1994 (2) ZLR 402 (H)

Statutes referred to:

Road Traffic Act [*Chapter 13:11*], s 55(1)

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*D P Carter*, for the appellant

*N M Wamambo*, for the respondent

## Judgment

**Chatikobo J:** The appellant is an electrical engineer in the employ of the National Railways of Zimbabwe.

On 27 August 1994, at dusk, the appellant was driving a Mazda 323 motor vehicle proceeding due north along Herbert Chitepo Street in Bulawayo. Ahead of him was a Datsun 120Y motor vehicle driven by one Sipiwe Sibanda. While Sibanda was stopped at the traffic lights at the intersection of Herbert Chitepo Street and Khami Road, the appellant failed to bring his vehicle to a stop and he rammed into the rear end of Sibanda's motor vehicle.

The police details who attended at the scene detected the smell of alcohol on appellant's breath and suspected that he had been driving under the influence of alcohol. They took him for a breathalyser test. He was found to have not less than 306 mg of alcohol per 100 ml of blood. He was subsequently charged with contravening s 46(1) of the Road Traffic Act [*Chapter 13:11*] (the Act). He subsequently appeared before a magistrate and pleaded guilty to and was duly convicted of that offence. Consequent upon that conviction, he was sentenced to 3 months' imprisonment with labour, of which 1 month was suspended on condition of future good conduct. He was also prohibited from driving all classes of motor vehicles for the rest of his life. He has now appealed to this court against the severity of that sentence on several grounds, some of which were not pursued in argument by Mr *Carter* who appeared on behalf of the appellant before us but did not appear in the court *a quo*.

This was not the appellant's first conviction for contravening s 46(1) of the Act. He was convicted of the same offence, as well as one for refusing to submit to a breathalyser test in contravention of s 67(2) of the Act, on 1 November 1989. He escaped with a monetary penalty for both offences. On that occasion he was prohibited from driving for 6 months and his licence was cancelled. On 17 July 1990, after the prohibition had expired, but it seems





before he obtained another licence, the appellant was again convicted of contravening s 46(1) of the Act. He was once more ordered to pay a fine and was also prohibited from driving for 6 months. That explains why on his third conviction he was prohibited from driving all classes of motor vehicles for life. Although the notice of appeal claims that it was incompetent to prohibit the appellant from driving for life, Mr *Carter* did not address any argument in that regard. He was undoubtedly right in not doing so. The magistrate was obliged by the terms of s 46(4) *(b)*(ii) of the Act to prohibit the appellant from driving during his lifetime, since he had been convicted of the same offence within the prescribed period of ten years. What Mr *Carter* submitted was that because s 56(4) of the Act provides that prohibition from driving and cancellation of a driver's licence forms part of the sentence imposed on the offender, the overall severity of the sentence must be regarded in this light. He submitted that prohibition from driving for life is an enormous punishment in this day and age, especially for a professional man. In terms of s

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56(10) of the Act a prohibition from driving during one's life can only be reviewed by the High Court after ten years. Thus the appellant has been prohibited from driving for at least ten years and potentially for life, if after ten years he fails to satisfy the High Court that he has sufficiently been reformed to be trusted with a motor vehicle on the road: *Barr v Attorney-General* 1985 (2) ZLR 97 (H).

That the appellant is a danger to the public and to himself admits of no doubt. On the occasion of his first conviction he lost his licence and he was prohibited from driving. This did not have any effect on him. Not only did he continue to drive under the influence of alcohol, but he did so without a licence, as evidenced by the fact that on each of the two subsequent infractions he was driving without a licence. The second conviction and the penalty imposed on that occasion also failed to bring home to the appellant the need to mend his ways. The penalties that have been meted out to the appellant in the past have not deterred him from his perilous habits. While the severity of the prohibition is self-evident, it is not a sufficient deterrent, nor is a monetary penalty for a man who has consciously broken the law for six years. It is my view, therefore, that the sentence of 3 months, 1 of which was suspended, when coupled with the order of prohibition does not induce a sense of shock. It is in line with sentences passed in similar cases, such as S v *Nyathi* HB-1-95 and *S v Chipato* HH-202-90. In the latter case it was said at p 3-4 of the cyclostyled judgment:

> "People who drive motor vehicles whilst under the influence of alcohol must be warned that they risk going to prison if they are convicted of contravening s 46(1) of the Act. The offence is a very serious one and that



> is why the legislature provided that the penalty for this offence is a fine not exceeding $2 000, or imprisonment for a period not exceeding 10 years or both such fine and imprisonment."

I did not understand Mr *Carter* to submit that the sentence passed was out of proportion with sentences passed in similar cases. His submission, if I understood him well, was that whereas in the distant past such a sentence would have been considered appropriate, it is no longer so because of the new dispensation in which community service should play a pivotal role in the sentencing system. He further argued that the two months' imprisonment should have been suspended on condition the accused is ordered to perform community service.

Mr *Carter* himself readily appreciated that for an appellate tribunal to interfere with the trial court's sentencing discretion there should be a misdirection. Compare *S v Ramushu & Ors* S-25-93. It was his submission, however, that the trial court misdirected itself when it held that an order of community service would not stop the appellant from "doing the same whilst he is performing community service", and that "it was only imprisonment which was the appropriate sentence on the circumstances of this case". This statement should not be taken out of its context. In his address in mitigation, the appellant's legal practitioner told the trial court that his client (the appellant) had told him that he lives near Parirenyatwa Hospital in Harare and he can perform community service there. In his reply, the appellant's legal practitioner made repeated calls for the suspension of the prison term on the condition that the appellant performs community service. At no time during the course of that peroration did the appellant's legal practitioner apprise the court whether the hospital authorities have indicated their willingness to

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accept the appellant to do community service at the hospital, nor did he have any idea what type of work the appellant would do at the hospital.

Community service is a relatively new concept in this country's penal system. It depends for its efficacy on the cooperation of institutions which are unconnected with the criminal justice system. Before a court can consider the imposition of an order of community service it must be advised of the existence of an institution which is willing to take in the offender. Details should be provided of the nature of the work that is available at the institution. It is only when a sentencing court is in possession of this information that it can, in the exercise of its discretion, decide whether or not community service is a suitable option to adopt. These courts have stressed times without number that such information is a vital tool with which a trial court must be armed

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before it can properly determine an appropriate sentence. Most of the cases dealing with the concept of community service are conveniently collected in Adam J's recent judgment in *S v Mabhena* HH-16-96*(5).

*In casu*, how was the magistrate to know if the appellant would be welcomed at Parirenyatwa Hospital? How was he to determine the number of hours to be served unless he knew what work the appellant would be told to perform? For example, if appellant were to be told to be on standby at the hospital just in case the hospital generator breaks down, would that be adequate punishment? If he were to be stationed in the casualty department to wheel in victims of traffic accidents, the punishment might be adequate. The point is that, inasmuch as a person who asks for a monetary penalty must tell the court of his means, he who asks for community service must do the same. I said in *S v Sabawo* HH-189-94 at p 2-3 and I repeated it in *S v Tichaona & Anor* HH-202-94 reported under the name *S* v *Tachiona* 1994 (2) ZLR 402 (H) at 409:

> "There is no hard and fast rule about these guidelines. A court is free to depart from them in an appropriate case but that does not mean to say such court is free to set such hours of community service arbitrarily. There must be a basis for doing so. For example, it is not inconceivable that the centre at which the community service is to be performed does not have work of a sufficiently demanding nature to amount to an effective punishment. In such a case it would be quite appropriate to increase the number of hours in order to compensate for the lightness of the work. But before departing from the set guidelines the facts warranting such departure must be established and placed on record; otherwise the sentencing court's exercise of discretion would cease to be a judicial one."

Therein lies the pith of my concern. Where an accused is legally represented the legal practitioner concerned is under a duty to furnish the court with information upon which it can exercise its discretion properly. The effect of what the trial court was being asked to do was to say to the accused "you go to Parirenyatwa Hospital and ask the Superintendent if he is willing to give you some work to do. If he is, let him ask you to work for so many hours." Had the magistrate acceded to such a request the appellant would no doubt have thought that the criminal justice system in this country is a disgrace. It is no wonder that the magistrate was compelled to say that if he did the appellant would have seen his way clear to continue drinking and driving

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while he was performing community service because the system would have shown that it was unable to punish or reform him.

As Korsah JA said in *S v Ndhlovu* S-28-94:

> "The essentials of an order of community service, all of which must co-exist to render it meaningful, are to punish the culprit, to make him pay reparation by way of his service to the community and to reintegrate him into society."

I will be the first to accept that if properly administered community service can serve as adequate punishment, even for serious offences such as the present one. Community service in this country bears a close resemblance to correctional service in South Africa. Of the latter, it was said in *S v E* 1992 (2) SACR 625 (A) at 633b:

> "Correctional supervision is no lenient alternative. It can, *depending on the circumstances*, involve an exacting regime, even virtual house arrest. Its advantage is that it is geared to punish and rehabilitate the offender within the community, leaving his work and domestic routines intact and without the obvious negative influences of prison" (my emphasis).

In *S v Labuschagne* 1995 (2) SACR 200 (W) at 204f, Goldstein J referred with approval to the remarks of Strydom J in an earlier case that -

> "It is quite clear that it is now possible for a trial court to impose severe punishment upon even very serious offences without making use of imprisonment (and without thereby sometimes if not most of the time destroying whatever good characteristics remain as far as the offender or prisoner is concerned). It is now possible to impose a severe punishment and to serve the interests of the community by imposing a deterrent and strict sentence other than imprisonment ... "

The same judge (Goldstein J) repeated in similar vein in *S v Mtsi* 1992 (2) SACR 206 (W) at 209a:

> "In my view the court *a quo* overlooked the fact that, *depending on the content of* a sentence of correctional supervision, this kind of sentence can constitute very severe punishment. See *S v R* 1993 (1) SA 476 (A) at 488 I-J where Kriegler AJA (as he then was) states that a sentence of correctional supervision can be more oppressive to an accused than one of short term imprisonment" (emphasis supplied).



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The common thread shared by these *dicta* and those from our own jurisdiction, as I perceive it, is twofold. Firstly, the adequacy of community service as an alternative to imprisonment in each case depends on the component or nature of the service to be rendered. Secondly, community service is an alternative form of punishment, the assessment of which must leave an offender under no illusion that he is being punished for a criminal wrong committed by him upon society. The difference between community service in Zimbabwe and correctional supervision in South Africa is that in the latter jurisdiction the legislature has, through the medium of the Correctional Services and Supervision Matters Act 122 of 1991, tabulated the forms of correctional services that a court can order such as monitoring, community service, house arrest, placement in

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employment, *etcetera*. In Zimbabwe the court is simply empowered by s 337(1) and (1a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] to suspend a sentence of imprisonment on the ground, among others, that the accused renders service for the benefit of the community or a section thereof. The condition is so wide that no court could be better placed to consider community service as a suitable option unless it is furnished with information as to the availability of a centre at which the offender can render service as well as the nature of the service to be rendered.

As I said earlier on, where the accused is legally represented the duty to furnish such information to the court lies on the legal practitioner. Where necessary he can enlist the help of the prosecutor or the court to facilitate a meaningful inquiry to be made on the alternatives available. Where the accused is not legally represented, then in that event, the court and the prosecutor must take it upon themselves to make the necessary inquiries. I am advised that this is in fact the current practice. I also know it to be the case from review cases that come before me.

From the foregoing it is apparent that the trial court did not misdirect itself when it rejected out of hand the plea for community service. There was no realistic suggestion upon which it could have conducted a proper judicial inquiry. Had there been material upon which the trial court could be satisfied that the objective intended to be achieved by incarcerating the appellant could still be attained by an order of community service, the result might have been different. I may say that even at the hearing of the appeal, Mr *Carter* was unable to suggest any details of any inquiry to persuade us to order community service. All he could say from the bar was that his instructing legal practitioner had advised him on the morning of the hearing that the appellant had personally contacted Parirenyatwa Hospital and had been





advised that they would be willing to take him on. The question "To do what?" remained unanswered. There is therefore no basis upon which we can interfere with the trial court's discretion.

Accordingly the appeal is dismissed.

Cheda J: I agree.

*Coghlan & Welsh*, appellant's legal practitioners

*Attorney-General's Office*, respondent's legal practitioners



**KHUMALO v MANDISHONA 1996 (1) ZLR 434 (HC)**

**Court** **High Court, Bulawayo**

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Malaba J

Civil action

26 April 1996  Judgment No. HB-24-96

## Flynote

Damages - amount - action injuriarum - adultery - factors to be taken into account - loss of consortium - factors to be taken into account

Family law - husband and wife - adultery - evidence - whether court can rely upon uncorroborated evidence of a single witness who is innocent spouse

## Headnote

In a case where a person is claiming damages for adultery, the court is entitled to rely upon the evidence of a single witness who is the innocent spouse, if it is satisfied that he or she is a credible witness. But in order not to be misled by a plausible witness, the court has the discretion to seek some form of corroboration.

In deciding upon the amount of damages to be awarded, factors to be considered include:

*(a)* the character of the woman involved;

*(b)* the social and economic status of the plaintiff;

*(c)* whether the defendant has shown contrition and has apologised;

*(d)* the need for deterrent measures against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse; and

*(e)* the level of awards in similar cases.

The defendant, who was a family friend and a fellow worker of the plaintiff's wife, had committed adultery with her on one occasion. The court decided that an appropriate award of damages was $4000.

The court also awarded $1000 for loss of consortium. The court found that, although undoubtedly the marriage had broken up as a result



of the defendant's adultery with the wife, at the time the adultery took place the marriage was no longer a very happy and stable one. There was also no evidence that the wife had left the plaintiff because of the defendant's enticement.

Cases cited:

*Chapman* v *Chapman* 1977 (4) SA 142 (NC)

*Curtis* v *Curtis* (1905) 21 TLR 676

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*Doyle v Salgo (1)* 1957 R & N 840; 1958 (1) SA 36 (FS)

*Fuller v Fuller* 1949 (3) SA 852 (GW)

*Gates v Gates* 1939 AD 150

*Grobbelaar v Havenga* 1964 (3) SA 522 (N)

*Gumunya v Munyanyi* HB-130-89

*Harris* v *Harris & Anor* 1946 (2) PH B 99 (N)

*Kaseke v Ndulukula* HB-72-94

*Katsumbe v Buyanga* 1991 (2) ZLR 256 (H)

*Kleinwort v Kleinwort* 1927 AD 123

*Louw v Louw* 1946 CPD 128

*Maplanka v Dladla* HB-83-93

*Merber v Merber* 1948 (1) SA 446 (A)

*Miles v Miles* 1949 (2) SA 360 (D)

*Min of Defence & Anor v Jackson* S-61-90

*Money & Eaton v Money* 1911 EDL 241

*Mtungwazi v Sibanda* HB-61-90

*Ncube v Mguni* HB-77-90

*Ngavazi v Marimbire* HH-98-92

*Rahman v Vermaak* S-103-88

*Reith v Antao* 1991 (2) ZLR 317 (S)

*Ricketts v Richetts* 1922 CPD 63

*Steytler v Steytler* (1907) 17 CTR 925

*Strydom v Saayman* 1949 (2) SA 736 (T)

*Swart v Swart* 1946 CPD 382

*Thomson v Thomson* 1949 (1) SA 445 (A)

*Thomson v Thomson* 1948 (1) SA 958 (D)

*Truter* v *Truter & Anor* 1938 NPD 250

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*Viviers v Killian* 1927 AD 449

## Judgment

**Malaba J:** On 5 May 1992 the plaintiff instituted action against the defendant claiming damages of $10 000 for adultery; interest *a tempore morae* and costs of suit. The plaintiff alleged in the declaration that the defendant committed adultery with his wife Sithabile Khumalo (nee Masina)



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"in August 1991, March 1992 and on divers occasions". The defendant pleaded to the declaration without seeking further particulars on where the acts of adultery were alleged to have been committed.

Adultery is, of course, the *factum probandum* whose establishment does not require proof of the time and place where it was committed. It is nonetheless necessary, to avoid embarrassment to the defendant, for the plaintiff to state, in the declaration, the time and place where the adultery is alleged to have been committed. That is more so if the defendant and the co-respondent are not living together in adultery.

In *Thomson v Thomson* 1949 (1) SA 445 (A) at 456 Greenberg JA said:

> "... it is sufficient if it is proved that adultery has been committed without proof of time or place or the person with whom it was committed. In pleading the commission of adultery it is necessary to give these particulars but that is only in order that the other party should not be embarrassed in answering the alleging."

Hahlo *The South African Law of Husband and Wife* 4 ed p 379 states that:

> "The declaration in an action for divorce on the ground of adultery must contain sufficient specific allegations as to time and place to enable the defendant to plead properly to them and prepare a defence."

See also *Ricketts v Ricketts* 1922 CPD 63 at 64; *Swart v Swart* 1946 CPD 382 at 383-384.

True, these cases were concerned with adultery as a ground for divorce. The requirement that the declaration should contain specific allegations of the times and places for the alleged adultery also applies to actions for adultery damages *per se*.

The defect in the plaintiff's declaration was, however, cured by the admission, by the defendant, at the pre-trial conference, of the fact that he and Sithabile were found by the plaintiff in the bush in Richmond at 3.30 pm on 22 March 1992. The evidence given by the plaintiff at the trial was directed at proving that the defendant was committing adultery with Sithabile at the time and place he admitted being found in her company.

[The learned judge dealth with the detailed facts and continued:]



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That is all the evidence led. Before answering the question whether or not the defendant

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committed adultery with the plaintiff's wife on 22 March 1992, it is necessary to state the law I have to apply in considering the evidence adduced in proof of the adultery.

The onus is on the plaintiff to establish the fact of adultery on a balance of probabilities. This is one of those rare cases where the act of adultery does not have to be found proved by inferences from circumstantial evidence. Although Mr *Mathonsi* submitted that the conduct of the defendant and Sithabile, on the occasions before the plaintiff came upon them in the bush, cannot be ignored in deciding whether or not they had sexual intercourse on 22 March 1992, he did not ask the court to find as a fact that adultery was also committed, on those previous occasions, on the basis of inferences from the circumstantial evidence of their intimate association. Mr *Mathonsi* asked the court to find, on the direct evidence of the plaintiff, that adultery was committed by the defendant and Sithabile on 22 March 1992.

In *Truter v Truter & Anor* 1938 NPD 250 at 253-254 Selke J revisited previous decisions in which the law on proof of adultery was stated. Having referred, in passing, to the judgment by Innes CJ in *Kleinwort v Kleinwort* 1927 AD 123 at 124 the learned judge delivered himself of the following:

> "It is therefore advisable now to consider in greater detail what was said in *Kleinwort*'s case. The learned Chief Justice there classifes the adultery cases under two general heads so far as proof of adultery is concerned. First, there is the class in which there exists direct evidence of misconduct. This is relatively a simple type of case, in the respect that the court is concerned merely with the question of the credibility of the evidence tendered, and the proof of adultery is not dependent upon inference in the sense we are now considering. This class of case is comparatively rare as has been remarked more than once. Then there is the class of case in which the court is asked not merely to decide upon the credibility of the evidence but also to find by inference from the facts and circumstances established that adultery has occurred. The evidence thus relied on may relate to one or more specific occasion or it may be less definite in its scope and relate generally to association, or conduct extending overa period of time. This is usually much the more difficult of the two classes of case."

It was emphasised by Watermeyer JA in *Gates v Gates* 1939 AD 150 at 154-155 that the standard of proof required in cases of adultery is one of a



preponderance of probabilities, thereby dispelling a suggestion in a line of cases starting with *Steytler v Steytler* (1907) 17 CTR 925, followed in *Money & Eaton v Money* 1911 EDL 241, that the standard of proof in adultery cases equated with proof beyond reasonable doubt. That view of the burden of proof which a plaintiff, in an action for adultery damages, had to discharge had been held and espoused in those decisions because adultery was, in those days, an immoral and criminal conduct. The learned Judge of Appeal said:

> "Now in a civil case the party on whom the burden of proof (in the sense of what *Wigmore* calls the risk of non-persuasion) lies, is required to satisfy the court that the balance of probabilities is in his favour but the law does not attempt to lay down a standard by which to measure the degree of certainty of conviction which must exist in the court's mind in order to be satisfied. ... Nor does the law require a minimum volume of testimony. All that it requires is testimony such as carries conviction to a reasonable mind."

See also *Louw* v *Louw* 1946 CPD 117 at 128, *Merber* v *Merber* 1948 (1) SA 446 (A) at 451 and *Thomson v Thomson* 1948 (1) SA 958 (D) at 964.

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The court is entitled to rely on the uncorroborated evidence of a single witness who is the innocent spouse, if it is satisfied that he or she is a credible witness. For the exercise of caution against the possibility of being misled by a plausible witness the court is, as a general rule, required in the exercise of its discretion, to seek some form of corroboration for the evidence of a single witness with interest in the outcome of the case.

Hahlo *The South African Law of Husband and Wife* 4 ed p 382 states that:

> "The court may act on the uncorroborated evidence of the plaintiff provided it is satisfied that his or her story is true and that there is no collusion but as a rule some corroboration will be required."

One of the cases cited as authority for this statement of law is *Miles v Miles* 1949 (2) SA 360 D where Selke J delivered the following at pp 361-362:

> "Mr *Hoskings*, who appeared for the plaintiffs, drew my attention to the case of *Welthagen* v *Welthagen* 1921 WLD 79, which came before Mason J, who gave a considered judgment as follows:
>
> > This is an action by the husband against his wife for divorce on



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> the ground of her adultery. The only evidence as to adultery adduced is that of the plaintiff and Mr *Evans* contends the uncorroborated evidence of the plaintiff is sufficient proof of adultery. I have consulted the case cited by Mr *Evans* and it appears that the English courts may in their discretion act on the petitioner's uncorroborated evidence of the respondent's adultery with the co-respondent. But there is no similar authority in our law and after consulting my brother judges on this point I am satisfied that it is a well-established practice in our courts not to act on such uncorroborated evidence but to require corroboration as in the case where there is a confession of adultery, *Reid v Reid* 1908 TS 470, the main object being to guard against collusion.'"

So far as I can discover, the English law seems to be correctly and succinctly stated in the head note to *Curtis v Curtis* (1905) 21 TLR 676 thus:

> "As a general rule of practice the court will not go upon uncorroborated evidence of a petitioner, but there is no rule of law which prohibits it from acting on such evidence if it is satisfied that the story put forward is a true one, and that there is no collusion: cf *Getty v Getty* (1907, p 334), *Weinberg v Weinberg* (1910) 27 TLR 9, and *Riches v Riches & Clinch* (1918) 35 TLR 141. As I understand it, the law is, as Mason J said, that the court has a discretion to require further testimony or corroboration but if it is satisfied that the story told by the plaintiff is true and that there is no collusion, it is at liberty to act upon the plaintiff's testimony, even though it be the only testimony and there is no corroboration."

In *Rahman v Vermaak* S-103-88 Korsah JA held that in civil cases the evidence of one witness suffices if he is a credible witness and the court had to look at the quality of the evidence and decide whether there is anything which makes what one party asserts more probable than that of the other.

See also s 52 of the Civil Evidence Act [*Chapter 8:01*].

Applying these principles of law to the evidence adduced in this case, I find that the balance of probabilities supports the plaintiff's evidence that the defendant and Sithabile were having sexual intercourse at the time he came upon them in the bush. The plaintiff gave evidence well

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and was not shaken under cross-examination. He gave the impression he found the evidence of what he saw that day embarrassing to relate so much that he could not have



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taken the trouble to fabricate a story of that nature. He shed tears of deeply hurt feelings as he gave evidence under cross-examination.

His ability to describe the exact positions the two took, what they were doing, the condition of their clothing and how they behaved when he approached them, gave credence to his story.

The plaintiff's evidence received support from the admitted conduct of the defendant. The defendant admitted that he ran from the scene without having looked in the direction whence the plaintiff approached them to satisfy himself that he was armed with a gun. The plaintiff said the defendant quickly sprang up from his wife and took to his heels. The evidence shows that the defendant had no time to look at the plaintiff. Even on his own account, the defendant was prepared to risk being shot, rather than remain where he claimed he was standing, aiming a shot at a dove with a catapult.

The evidence of the plaintiff suggests that the defendant bolted from the scene as a result of the irresistible impulses from the fear of the consequences of being caught *in flagrante delicto* having sexual intercourse with the plaintiff's wife. It was not out of fear of the consequences of merely being found in her company.

The defendant admitted in evidence that Sithabile confessed her adultery with him. He sought to reduce the probative value of the confession by saying it was induced by assaults committed on her by the plaintiff. The plaintiff denied the assaults. Sithabile was not called by the defendant to support his allegations. The evidence of the assault was therefore hearsay and without foundation.

The probabilities, however, support the plaintiff when he said he did not have to assault his wife to get the confession of adultery with the defendant. It was not denied by the defendant that the plaintiff took the pair of pants that Sithabile had removed to make way for him to carnally know her.

I cannot shut my eyes to the evidence of the conduct of the defendant and Sithabile on previous occasions. Although the circumstantial evidence of their association on previous occasions does not lead to an inference of their having committed adultery on those occasions, it establishes the fact that they had cultivated an intimate relationship, making it more probable than not that they indulged their passion on 22 March 1992. The evidence of the intimate association on previous occasions also puts lies to the defendant's evidence



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that they were not meeting for amorous reasons on 22 March 1992. It shows that the meeting

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that day was in fulfilment of a tryst that went abysmally wrong.

The defendant admitted that from the time he started preparing the monthly reports on the financial affairs of Sizimisele Co-operative he was in the company of Sithabile from 7.00 pm on Friday to 6.30 am on Sunday once a month. There was the credible evidence from the plaintiff to the effect that Sithabile developed the habit of disappearing from the matrimonial house from 2.00 pm until 7.00 pm on each Saturday when she and the defendant were not out on a business trip.

The defendant's lies corroborated the plaintiff's evidence of the fact that he saw the defendant and Sithabile committing adultery. The defendant fabricated the story of being found shooting at a dove with a catapult. It was not mentioned in his plea. He did not refer to it in the synopsis of evidence recorded on 8 July 1993 for the purposes of the pre-trial conference.

The plaintiff's evidence contains an explanation for the defendant's conduct of running away from the place where he was found with Sithabile. On the other hand, there is no foundation in the defendant's evidence for the reason he gave for his conduct. The plaintiff explained the defendant's conduct by saying he had found him committing adultery with his wife and he bolted from the scene because of the fear of the consequences of being caught *in flagrante delicto.*

The truthfulness of the evidence was tested by the cross-examination of the plaintiff. On the other hand the reason given by the defendant was based on hearsay evidence. He said he ran away because plaintiff's wife said her husband was armed with a gun. The plaintiff denied being armed. The defendant did not see the gun. Sithabile was not called to give testimony to the allegation that plaintiff was armed with a gun. There was therefore no foundation for the alleged reasons by the defendant for his conduct. The acceptable reason for the defendant's conduct is that given by the plaintiff.

Mr *Nyoka* for the defendant argued that the story told by the plaintiff should be rejected because it is strange. He submitted that it was unbelievable that a married woman would consent to having sexual intercourse on a big flat rock in the bush in broad daylight, risking being seen by members of the public. In *Viviers v Killian* 1927 AD 449 a witness testified to seeing the





appellant and respondent's wife having sexual intercourse at night from a standing position with a fence wire between them and next to a public street. It was argued on behalf of the appellant that the story adduced to by the eye-witness was so strange that it had to be rejected as being untrue.

Dismissing the argument Solomon CJ said at p 454:

> "But then we are asked to say that Hughes's evidence is so grossly improbable that it should not have been accepted by the court below. That however is an argument that cuts both ways. It is true that the circumstances deposed to by Hughes are exceedingly strange. That Mrs Killian should not have noticed him as she passed near him on her way to meet the appellant, and that the alleged adultery should have taken place in the manner described by him on a bright moonlight night within a few yards of where he was sitting and the border of a public

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> street does seem highly improbable ... Moreover, the very improbability of the story is to some extent evidence of its truthfulness. Truth, we know, is sometimes stranger than fiction. Had the story been concocted it it is difficult to believe that it would have taken the form which it did."

The truthfulness of the story deposed to by the plaintiff is revealed by the inclusion in it of matters which are inherently embarrassing and demeaning of the deponent. It is a story whose events could not be the products of his imagination.

I am satisfied that the plaintiff has proved on a balance of probabilities that the defendant committed adultery with his wife on 22 March 1992. I reject the defendant's evidence of denial of adultery. I also find that the plaintiff has not adduced sufficient evidence to prove that the defendant committed adultery on the other occasions alleged in the declaration.

I now come to the question of damages. The right to damages for adultery arises from the proof by the plaintiff of damages under two separate and distinct heads of *contumelia* and loss of *consortium*. *Contumelia* incorporates the injury, insult and indignity suffered by the plaintiff whilst loss of *consortium* relates to the loss of comfort, society and service of the wife as a result of the adultery committed by the defendant (*Viviers v Killian supra* at pp 455-456.)

The plaintiff claimed $10 000 damages for the adultery committed by the defendant but it is necessary to bear in mind that what the plaintiff subjectively



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perceived to be the monetary value of the damages he suffered should not be allowed to affect the exercise by the court of the broad discretion it enjoys in the estimation of the quantum of damages: *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 (S).

It is, of course, always a daunting task for a court to try and place monetary value on the pain and suffering inflicted on the plaintiff by the adultery. In *Fuller v Fuller* 1949 (3) SA 852 (GW) at p 855 Bok J expressed the position thus:

> "It is clear that the plaintiff has suffered intensely from the conduct of his wife and the defendant. Of course no amount of money can compensate the plaintiff for the mental distress which he has suffered. He will understand that my judgment does not mean that in my opinion the sum which I shall award to him can be regarded as making up for what he has suffered. I can only assess the damages in the light of the circumstances and try to apply the same measure which I, in this court, have in the past applied in assessing damages in such cases."

These sentiments were echoed by Colman J in *Muller v Vink* 1972 (1) PH B2. After referring to the losses suffered by the plaintiff as a result of his wife's adultery with the defendant the learned judge delivered himself thus:

> "These losses and humiliation cannot be truly measured in money; and the practice of our courts has been to make rough and ready assessments whose amounts vary according to the circumstances of particular cases. In no sense can the award, in any case, be regarded even approximately as an assessment of the value of a happy marriage which has been broken up or the value of the faithless wife."

Goldin J sounded the same note in *Hickley v Hickley & Anor* GS-28-79 at p 6 when he said:

> "It has often been pointed out that it is not possible to convert with any exactitude or at times at all, the damages

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suffered through *contumelia* and loss of *consortium*, into hard cash. The general approach of the courts has been summarised by van den Heever J in *Chapman v Chapman & Anor* 1977 (4) SA (NC) at 142."

An estimation of the quantum of damages must be based upon a proper assessment of those damages. I turn therefore to assess the damages for *contumelia*.



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I consider the relationship that existed between the plaintiff and the defendant at the time the adultery was committed with Sithabile. The defendant was a close family friend. He worked with plaintiff's wife. The plaintiff, naturally, reposed trust in the defendant whom he often welcomed into his home in the belief that he was assisting his wife with her books of account. It must have come as a severe shock to plaintiff on discovering that the man he took to be a brother and perhaps protector of his wife had cuckolded him. Breach of trust is a factor of aggravation in the assessment of damages in this case: *Katsumbe v Buyanga* 1991 (2) ZLR 256 (H) at 259C.

So is the fact that the defendant took advantage of the work relationship that existed between himself and the plaintiff's wife to indulge his passion with her. Married women nowadays spend more time at work and brush shoulders with their male counterparts, often going together on business trips. The male counterparts must see these women for what they are - workmates. They should not see them as objects of their debauchery.

The work relationship lulled the plaintiff into believing that the defendant and his wife were involved in an innocent association. It is therefore a factor against the defendant that he took advantage of the work relationship with plaintiff's wife to commit adultery: *Harris v Harris & Anor* 1946 (2) PH B99 (N).

The manner the plaintiff came to know about the adultery was intensely traumatic to him. He personally witnessed the defendant having sexual intercourse with his wife. He said he was greatly shocked and for a moment seemed to be in a dream. Had he, perhaps, been out looking for his wife to confirm a suspicion of her infidelity, the damages for *contumelia* would reduce on the ground that he had brought the injury upon himself. The plaintiff came upon the defendant and his wife accidentally and was unexpectedly hit right on the face by the pair's gross indecency. His feelings towards Sithabile and his view of her as a faithful wife were shattered by the traumatic experience. So intense was the shock from what he witnessed that he lost his mind for some time thereafter.

It does also appear that by having sexual intercourse with the plaintiff's wife on a big flat rock from which position they could be seen at a distance of 25 metres by a person walking along the foot path, in the bush, the defendant had taken leave of any sense of decency and showed contemptuous disrespect for the plaintiff.

It is however important to consider the character of the woman involved. It



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would appear to me that Sithabile was a woman of low moral character approximating that of a prostitute. She was, of course, not a prostitute; but a married woman possessed of some sense of self-respect would hardly surrender her body with such complete abandon that she copulated at a public place in broad daylight perhaps spurred on by the coo of a lonely dove. The dishonour such a wife brings to her husband by indulging in such immoral conduct cannot score for him much by way of assessment of damages for the *contumelia* inflicted on him by the defendant: *Strydom v Saayman* 1949 (2) SA 736 (T) at 742.

In *Viviers v Killian supra* at 456 Solomon CJ made the following observations in a case of adultery involving a wife whose sense of moral decency was adjudged to have taken leave of her:

> "There remains, however, the claim for sentimental damages due to the injury or *contumelia* inflicted upon him by the person who has committed adultery with his wife. And it is evident that the estimate of the damages recoverable on this ground may vary greatly. Take, for instance, the case of a refined woman to whom her husband is greatly attached and who has been debauched by some designing profligate. The husband out of his affection for her is prepared to forgive her and condone her misconduct but if he nevertheless decides to proceed against her seducer there is no reason why substantial damges should not be awarded. Again an extreme case on the other side would be where the husband is married to a prostitute. In such a case it is difficult to conceive of a court awarding any damages. The present case falls between these two extremes though it approximates more nearly to the latter. For though Mrs Killian can in no sense be described as a prostitute she certainly was a woman, as I have already said, of low moral character and of a very coarse nature, who had very little idea of faithfulness to her husband. The dishonour done to a husband by adultery with a woman of that nature cannot be estimated at a high degree."

Later on in the judgment at p 457 the learned Chief Justice opined that damages for *contumelia* still had to be awarded against the seducers in such circumstances because "it is only right that profligate men should realise that they cannot commit adultery with married women with impunity".

The social and economic status of the plaintiff is relevant. A man or woman's reputation is to a certain extent dependent upon the fame his wife or her husband is able to command from those who know them. The plaintiff



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was active in the civic affairs of his community. He was the secretary of the Richmond Residents Association and a member of the Neighbourhood Watch Committee. He said the residents of Richmond came to know about his wife's adultery with the defendant. There is however no evidence of change of the attitude of the residents towards the plaintiff. Judging by the ignominy of the circumstances in which the adultery was committed, I am satisfied that the plaintiff justifably felt humiliated in the eyes of other residents and his reputation must have taken some knocks as would be the case with any cuckold in his position in society.

I also consider the behaviour of the defendant after the adultery.

In *Chapman v Chapman & Anor supra* at p 144H van den Heever J said the fact that "the adulterous co-respondent is grossly impudent and unrepentant will aggravate damages".

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Where the defendant shows contrition and tenders an apology to the plaintiff for the injury he inflicted, the apology constitutes a balm for the plaintiff's injured soul. The plaintiff's feelings are, however, not assuaged by an impertinent seducer who does not show any contrition and forces him to go to court and relive the traumatic experience when giving evidence to prove the adultery. The defendant here showed no contrition. He did not tender an apology for the adultery. The plaintiff was forced to relive the trauma of having seen the defendant committing adultery with his wife when he gave evidence in court.

There is nowadays the factor of AIDS to be considered in the assessment of damages for *contumelia*. Mr *Nyoka* argued that the factor of AIDS should not be considered because there was no evidence that the defendant was HIV positive. He said it was unfair that the plaintiff should be compensated for an injury he did not suffer. I, however, agree with Mr *Mathonsi*'s submission that damages are awarded for the factor of AIDS as a deterrent measure to protect the innocent spouses from the risk of contracting the virus from the errant partner.

In *Katsumbe v Buyanga* 1991 (2) ZLR 256 (H) at 258H-259A, Robinson J

said:

> "Accordingly unless they are prepared to take a strong and principled stand in this regard in support of the vital institution of marriage, the courts will only be party to society's further slide down the slippery slope



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> to the unlicensed promiscuity which scoffs at the spiritual prohibitions against pre-marital and extra-marital sex and which has landed the world in the sexual morass over which the monster AIDS now presides in all its frightening aspects."

See also *Kaseke v Ndulukula* HB-72-94.

Finally, under this head of *contumelia*, I consider damages awarded in other cases. In doing so, I bear in mind that no two cases are based on identical circumstances. Awards of damages in other cases are considered for guidance as to the range of damages awarded in broadly similar claims. In *Chapman v Chapman & Anor supra* at 144C van den Heever J said:

> "... comparisons with other cases are useful only in finding notional boundaries within which an assessment would be reasonable, since each case must of necessity depend upon its own facts."

In considering the damages awarded in other cases I bear in mind the decreased value of the dollar. See *Hickley v Hickley & Anor supra* p 10; *Chapman v Chapman & Anor supra* at p 145F.

In *Gumunyu v Munyani* HB-130-89 $3 000 was awarded for adultery committed on many occasions on a weekly basis by an acquaintance on the plaintiff's wife. The plaintiff was a welfare manager at Wankie Colliery and the love affair had become known to plaintiff's colleagues and subordinates. The defendant had not apologised.

The dollar has decreased in value since 1989. The plaintiff in Gumunyu's case did not personally witness any of the acts of adultery. The defendant in that case was not a family

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friend as such although he was a relation of the plaintiff's next door neighbour.

In *Mtungwazi* v *Sibanda* HB-61-90, the defendant persisted in committing adultery with plaintiff's wife despite pleas that he should stop the affair. The plaintiff and his wife continued to live together as husband and wife for the sake of children. Sexual relation between them had ceased. Damages of $5 000 were awarded for *contumelia*. The action for adultery damages in this case was not defended.

In *Ncube v Mguni* HB-77-90, $3 000 was awarded for adultery committed by the defendant with plaintiff's wife for one year. As a result of the affair the



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plaintiff, a shed engine man employed by the National Railways of Zimbabwe, was for some time unable to carry out his duties properly at work. It is important to note that the action for adultery damages was not defended.

In *Katsumbe v Buyanga supra* the defendant ensnared the plaintff's wife by means of a ploy, betrayed plaintiff's friendship by committing adultery with his wife and showed brazen contempt for his feelings and did not show any contrition. The plaintiff was humiliated before his business colleagues. Damages of $3 000 were awarded for *contumelia*. The amount awarded is what the plaintiff had claimed. Considering the terms in which Robinson J expressed the view he took of the defendant's conduct, a higher figure of damages for *contumelia* would probably have been awarded had the plaintiff claimed more than $3 000.

In *Ngavazi v Marimbiri* HH-98-92, $5 000 was awarded for *contumelia*. The plaintiff's husband was a well known business man. The defendant was an unrepentant adulteress bent on wrecking the plaintiff's marriage and had turned her into a laughing stock. The court had regard to the much declined value of money. The award in this case also followed a default judgment. The plaintiff did not have to undergo the trauma of giving evidence in court and be cross-examined. The court did not have the benefit of having matters fully ventilated as is the case in a defended action.

In *Kaseke v Ndulukula supra* the defendant had an affair with the plaintiff's husband even sleeping with him at their house, causing the plaintiff substantial embarrassment and blood pressure. The court considered the factor of the AIDS menace and awarded $5 000 damages. Again the award followed a default judgment. It is not clear from the judgment what portion of the damages relates to *contumelia*. It appears that the $5 000 stood for damages under both heads.

Taking into account the circumstances of this case, the range of damages awarded in the cases referred to and considering that the quantum of damages is estimated not calculated, I estimate the quantum in this case at $4 000 for *contumelia* as being a fair and adequate recompense for the plaintiff.

I now turn to assess damages for the loss of *consortium*. The most important factor under this head is that there should be proof of actual loss of *consortium*. In other words the wife should

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be shown to have left the matrimonial home as a result of the adultery.

Damages for loss of*consortium* are aggravated where the adultery has led to



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the break up of the marriage. The plaintiff should not only show loss of *consortium*. He should also show that the loss was as a result of the adultery the defendant committed with his wife and that he suffered damages as a result of the loss of *consortium*.

Where the defendant is not shown to have enticed the errant spouse to abandon his or her duties of providing the plaintiff with comfort, society and services the damages reduce. The damages will also be low where the marriage is shown to have broken down in all but name at the time the adultery was committed: *Reith v Antao* 1991 (2) ZLR 317 (S) at 319A.

This is because the damages awarded constitute an estimated value of the comfort, society and service the guilty spouse would have continued to give to the plaintiff but for the adultery with the defendant. The award of damages seeks to put the plaintiff in monetary re-compense as near as is reasonably practicable to the position he would have been had his wife not left him as a result of the defendant's adultery with her.

The principles to be borne in mind in assessing damages for loss of *consortium* were stated by Harcourt J in *Grobbelaar v Havenga* 1964 (3) SA 522 (N) where, after quoting with approval from a speech by Lord Justice Scrutton in *Place v Searle* [1932] 2 KB 497 at p 512 to the effect that "a husband has a right to the *consortium* of his wife and the wife to the *consortium* of her husband", the learned judge delivered himself as follows at 525D-526F:

> "The decision in *Searle*'s case was specifically approved by the House of Lords in the case of *Best v Samuel Fox Co Ltd* [1952] 2 All ER 394, and this concept of *consortium* is, as I appreciate it, an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage. It was in my judgment well described by Lord Justice Birkett in *Best*'s case in the Court of Appeal [1951] 2 KB 639 at p 665 as follows:
>
> > Companionship, love, affection, comfort, mutual services, sexual intercourse - all belong to the married state. Taken together they make up the *consortium*; but I cannot think that the loss of some element, however grievous it may be, as it undoubtedly is in the present case can be regarded as the loss of the *consortium* within the meaning of the decided cases. Still less could any impairment of one of the elements be so regarded.



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> > *Consortium* I think is one and indivisible. The law gives a remedy for its loss but for nothing short of that.'"
>
> Now this was approved by the House of Lords in *Best*'s case when it proceeded as far as that tribunal. Thus Lord Porter in his speech said the following :
>
> > As however Birkett and Cohen LJJ decided the case in the Court of Appeal on a different ground, namely, that *consortium* is one and indivisible and the wife has not lost it as a whole and as Lord Justice Asquith agreed with this contention, I think it desirable that I should express a tentative opinion on it. My Lords, I think there is much to be said for this view and indeed, I found it difficult to draw the boundary between

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what is and what is not loss of *consortium* or to divide it into its component parts.'

A more definitive expression of view was given by Lord Goddard where at pp 399-400 he delivered himself as follows:

> But as all the members of the Court of Appeal dealt with this matter and it was elaborately argued at the bar, I think, one ought to express an opinion and I am in agreement with the Court of Appeal. *Consortium* seems to me to be essentially an abstraction. Where the exercise of a profession or the call of duty involves prolonged absence abroad of one of the spouses there is not an interruption of *consortium* nor is there because one of them may become a permanent invalid to be waited on and nursed by the other. Again there may be loss of affection, but, provided the spouses continue to live together as man and wife it seems to me that it still exists however different life may be from the days of the honeymoon. Sexual relations are doubtless a most important part of the marrage relation, but, if age or illness or even disinclination impairs the potency of either of the spouses who continue to live together as husband and wife, I do not think the *consortium* is affected. It would be only if on this account one of them withdrew and decided to live apart.' ...

In *Pearce* v *Kevan* 1954 (3) SA 910 (N) here specifically referred to with approval, Selke J propounded the position as follows:

> As I understand it the law material for the purposes of my decision may be stated briefly as follows: It is the duty of a wife to reside and consort

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> with her husband, and any third person who intentionally causes her to violate this duty commits a wrong against the husband for which the latter is entitled to recover damages, unless the third person acted from lawful motives eg to protect her from her husband's ill-treatment, real or genuinely supposed. It is obvious that there must be a causative connection between the conduct of the third person and the dereliction by the wife of the duties she owes her husband and the law as I endeavoured to state it potentially embraces the conduct of a man who, whatever his immediate objects may be, perseveres in behaving towards another man's wife in a way which he realises is having the effect of alienating her affection from her husband and which ultimately produces that result and brings about an estrangement.'"

Although the case dealt with enticement as a delict the principles are applicable to the assessment of damages for loss of *consortium*. Applying these principles to the facts of this case, I have no doubt that the parties were a happy family before the defendant appeared in the life of the plaintiff's wife. The plaintiff used to enjoy the *consortium* of his wife. They shared a common home. They lived together happily having a social life. Sithabile worked and swelled the family's income. They attended church together every Saturday morning and remained in each other's company thereafter.

Things changed when the defendant intruded into the marriage relationship. Sithabile withdrew her affection from the plaintiff and spent more time away from the matrimonial home. Three days after she was caught committing adultery with the defendant, she left the matrimonial home. For four months thereafter she lived separately from the plaintiff. There was no sexual relationship between them. Attempts at reconciliation failed until she subsequently divorced the plaintiff.

The marriage clearly broke up as a result of the defendant's adultery with Sithabile. There is

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however no evidence that he deliberately committed adultery in order to break up the marriage.

In *Maplanka v Dladla* HB-83-93 Cheda J said at p 3 of the cyclostyled judgment:

> "Where an act of adultery leads to the break-up of a marriage the level of damages certainly ought to be at a much higher level than where there is no such result."



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The general statement of principle needs the qualification found in *Reith v Antao supra* at p 319A where McNally JA said:

> "What is to my mind absolutely clear is that the courts have always in the last thirty years drawn a very sharp distiction between adultery which breaks up a happy and stable marriage on the one hand, and adultery which ensues after an unhappy and unstable marriage has broken down in all but name, on the other."

It seems to me that, whilst the break-up of a marriage is a factor certainly deserving recognition in the assessment of damages for loss of *consortium*, the weight to be placed on it depends on the state of the marriage relationship at the time the adultery is committed. In light of the evidence of the plaintiff, his relationship with Sithabile at the time the adultery was committed on 22 March 1992 cannot be described as being a very happy and stable marriage. He certainly had become an unhappy man. She was leaving him alone at home every Saturday afternoon from 2 to 7 pm. She was probably now indifferent whether he was happy or not. For these reasons the marriage was no longer stable. It is true that the marriage relationship had not deteriorated to the extent of being a mere shell as in *Reith v Antao supra* where damages of $700 ended up being awarded for loss of *consortium*.

There is also no evidence that the plaintiff's wife left the matrimonial home at the enticement of the defendant or in order to continue living in adultery with him. I have already found that Sithabile was a woman of low moral character. In *Chapman v Chapman & Anor supra* at 144F-G van den Heever J said:

> "*(b)* What it is that the plaintiff has lost is relevant:
>
> (1) If the spouse that has strayed was in any event a poor bargain plaintiff cannot expect substantial damages *Doyle v Salgo (1)* 1958 (1) SA 36 (FS) at p 39."

In *Muller v Vink supra* it was stated that damages for loss of *consortium* are tending to the lower side in modern times because courts frown at the idea of placing too much monetary value on the loss of a woman as if she were a chattel. Colman J said:

> "The tendency with the passage of time and with the recognition of women as free agents rather than as chattels has been for the courts to



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> award lower amounts than were formerly thought appropriate and it is my duty while giving proper regard to the circumstances of the case before me to fix an amount which is within proper limits in accordance with prevailing

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trends."

See also *Reith v Antao supra* at 318H where McNally JA quoted with approval the remark by Boberg *The Law of Persons and the Family* at p 184 note 15 that "contemporary awards tend to be relatively small".

Taking all the factors referred to in the assessment of damages for loss of *consortium* I estimate the quantum of damages under this head at $1 000 as being a fair and adequate recompense for the loss suffered by the plaintiff.

Judgment is therefore granted to the plaintiff and it is ordered that the defendant pay the plaintiff the sum of $5 000 as damages for adultery with interest thereon at the prescribed rate from 19 May 1992 to the date of full payment. The defendant is to pay the costs of suit.

*Webb, Low and Barry*, plaintiff's legal practitioners

*Ndlovu, Mhangami and Partners*, defendant's legal practitioners



## DZANGARE *v* CHIVARE & ANOR 1996 (1) ZLR 454 (HC)

**Court** **High Court, Harare**

Smith J

Civil claim

19 & 20 March & 8 May 1996 Judgment No. HH-60-96

### Flynote

Damages - assessment - delictual - principles - personal injuries and loss of amenities arising out of assault - damages for loss of eye - apportionment of damages

### Headnote

The plaintiff had tried to enter premises when he had no right to do so. The first defendant, a security guard employed by the second defendant, was guarding the premises that the plaintiff tried to enter. In trying to prevent the plaintiff from entering, the first defendant had used excessive force against the plaintiff. The plaintiff had been hit in the eye by a slasher wielded by the first defendant and he had lost that eye.

The court awarded the plaintiff general damages in the amount of $18 000 but found that the first defendant and the plaintiff were equally at fault and thus found that the plaintiff was entitled to half of the amount awarded, namely $9 000.

Cases cited:

*AA Onderlinge Assurance Assosiasie Bpk v Sodoms* 1980 (3) SA 134 (A)

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*Mabatapasi v John* HH-265-82

*SA Eagle Ins Co Ltd v Hartley* 1990 (4) SA 833 (A)

*M T Chitsunge*, for the plaintiff

*A J Dyke*, for the defendants

## Judgment

**Smith J:** The plaintiff (hereinafter referred to as "Dzangare") is claiming $50 000 damages from the defendants. He alleges that on 1 January 1992 he was unlawfully assaulted by the first defendant (hereinafter referred to as



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"Chivare") who was a security guard employed at the Mawonera Shopping Centre, Domboshawa, by the second defendant (hereinafter referred to as "Mawonera"). It is common cause that on the night of 31 December, 1991 Chivare was on duty as a security guard at the shopping centre in Domboshawa. During the early hours of the morning, there was an altercation between Dzangare and Chivare and the former fell to the ground. He sustained an injury to his eye. He was taken to the clinic the following morning and his eye was surgically removed the next day.

Dzangare gave evidence to the following effect. He was walking past the shopping centre with his friend Francis at about 1.00 am. As he passed the shopping centre he heard a radio from within the premises. There was a dance going on and there were sounds of people enjoying themselves. He was about to pass the gate giving entry to the premises when Chivare stopped him and told him that he was not allowed to pass by. Chivare was shouting and was holding a slasher which was bent at the tip. There was an argument and suddenly he felt something piercing his eye. He fell to the ground and lost consciousness. He did not come round until he was at home and his eye was being bathed. He did not know why Chivare tried to bar him from walking past the shopping centre. He and his friend, Francis, did not try to climb the gate to get into the property. He was carrying a beer bottle at the time but he did not try to use it to assault Chivare. There was no exchange of blows, Chivare simply attacked him. As a result of the assault he lost his right eye. Under cross-examination, Dzangare admitted that he had visisted a number of places to celebrate New Year's Eve and that he had had some beers, he couldn't remember how many. He was walking past the take-away shop when Chivare confronted him. Chivare raised his hand which was holding the slasher and then hit him in the eye with it. He had been in a jovial mood at the time and was not beliigerent.

The second witness, Jawet Mapfumo, gave evidence to the following effect. He was passing the Mawonera shopping centre when he saw a crowd of people. He noticed that his friend Dzangare was lying on the ground, face upwards, and was bleeding from one eye. Chivare got some water which he poured over Dzangare and when the latter came round he helped him walk to this house. He arrived at the scene after Dzangare had been hit. He noticed that Chivare had a slasher which was about 2 feett long, with a handle, and it was bent at the tip. He asked

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Chivare what had happened and Chivare told him that he, Chivare, had punched Dzangare because the latter had wanted to enter the premises. Under cross-examination he repeated that he had definitely seen Chivare holding a slasher. Francis had been shouting



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at Chivare and Chivare said to Francis "if you want to come, do so, and I'll also strike you." The plaintiff's case was then closed.

Chivare gave evidence to the following effect. He was employed by Mawonera as a security guard. He had been so employed for seven months when this incident occurred. He and Matthew were on duty on New Year's Eve, 1991. He saw Dzangare and Francis approaching the shopping centre. Francis climbed over a small gate near the take-away shop. Matthew blew his whistle, then unlocked the gate and followed Francis into the premises. Dzangare also tried to climb over the gate and so he grabbed himm by the shirt. He retaliated in self defence and hit Dzangare in the face with his fist. Dzangare fell headlong to the ground and he, Chivare, went to help Matthew who was trying to apprehend Francis. He was not holding a slasher. He had a baton which was tucked in his belt and he did not use it. Jawet Mapfumo had then come and after he gave Jawet some water to pour over Dzangare the two of them left. Francis was detained until the following morning because he had climbed over the gate and entered the fenced premises. They did not try to detain Dzangare because he had not managed to het inside the fenced area. Some four days later he heard that Dzangare had lost his eye. He was subsequently arrested and taken to court. He gave evidence but did not know the result of the trial. Chivare was not shaken in cross-examination and struck closely to what he had said in his evidence-in-chief.

The next witness was Matthew Nyamakanya who had been on guard duty with Chivare. His evidence was as follows. He had a baton. He noticed Francis and Dzangare approaching the business centre. Francis climbed over the fence. He asked Francis where he was going and then unlocked the gate and entered the premises and grabbed Francis. There was a tussle and he blew his whistle to summon Chivare. Chivare came to his assistance and they handcuffed Francis and left him inside the premises. Dzangare had at that stage been hit by Chivare. That had happened whilst he was grappling with Francis. When he blew his whistle he turned to see if Chivare was coming and he saw Dzangare punch Chivare and then Chivare hit Dzangare in the face and Dzangare spun round and fell to the ground. It appeared to him that Francis and Dzangare were drunk. There was music coming from within the premises and they must have thought that there was a party in progress which they wanted to join. Under cross-examination, Matthew said that Dzangare did not try to clim over the gate. He was at the gate and complaining to Chivare, asking why he was banning entry. Later he said that he did not see what happened initially. He only saw them fighting. Both Dzangare and Francis were drunk at the time.



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The last witness was Mawonera who testified as follows. He was at the shopping centre until it closed at 8 pm. On New Year's Eve. He employed Chivare and Matthew as security guards and they were on duty that night. He returned the next day soon after 6 am and found Francis on the premises. He was handcuffed. After receiving a report from the two security guards he spoke to Francis. Francis started to cry and asked for forgiveness, saying that he had been drunk and had climbed over the gate without permission. He then told the guards to release Francis, which they did.

The medical report that was produced (Exhibit 1) described the injury suffered by Dzangare as follows:

> "The eyelids of right eye were swollen with haematomas, the right eyeball was horizontal (*sic*) ruptured with large iris and uveaprolysis from a wound of 20 mm. There were (*sic*) no perception of light at this time. Evisceration of the globe was necessary and performed on the 2nd January, 1992."

It is common cause that Chivare assaulted Dzangare and that Dzangare lost an eye. I cannot accept Dzangare's evidence that he was merely walking past the shopping centre when Chivare barred his progress. Why should Chivare do so? It has been established that Francis was apprehended and spent the rest of the night in handcuffs until released by Mawonera. Why was he apprehended and handcuffed if he had not done anything wrong? Having regard to that and to the fact that Dzangare and Francis were probably under the influence of alcohol and probably looking for another party to join, I consider that it is safe to assume that they acted as alleged by Chivare and Matthew. That is that Francis climbed over the gate and entered the fenced premises and Dzangare tried to follow him. Dzangare did say that there were sounds of a party in progress within the premises so it is logical to assume that he and Francis wanted to continue celebrating. If it was the case that Dzangare was trying to enter the premises, how was he assaulted? Chivare says that he hit Dzangare once in the face with his fist. However, if Dzangare had been hit with a fist there would have been injuries around the eyes, such as on the check or on the nose or the eye-brow whereas according to the medical report the only injuries sustained by Dzangare were to the actual eyeball and the eye lids. A 20 mm laceration of the eyeball without injury to surrounding tissues is consistent with the use of a slasher as described by Dzangare and Mapfumo. Although Chivare and Matthew deny that the former had a slasher, I consider that the evidence of Dzangare and Mapfumo is more cogent. Mapfumo gave his evidence well and did not try to exaggerate. If he



had wanted to help Dzangare, to whom he is related, he could easily have said that he had arrived on the scene a little earlier and had actually seen Chivare assault Dzangare. No one would have been able to contradict him. However, he said that he arrived after the assault and candidly said that he had been moderately drunk. He was adamant that Chivare had a slasher.

I accordingly find that Dzangare had tried to enter the Mawonera business centre by trying to climb over the gate. Chivare tried to stop him and in the process used a slasher which injured Dzangare's eye. Thus Dzangare was at fault in trying to enter premises when he had no right to do so and Chivare used excessive force to prevent him doing so. I would apportion the fault equally between the two. Mr *Dyke* conceded that Mawonera would be vicariously liable for the

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acts of Chivare.

With regard to *quantum*, Dzangare said that he feld great pain at the time. He could not sleep after returning to his home. The loss of his eye has restricted his sporting activities. He cannot play football or volley ball, as he used to do, neither can he swim. He is self-conscious about his artificial eye and sometimes he injures himself and causes an infection when he is inserting it in the eye socket. When marking work of his pupils he sometimes finds that his left eye suffers from strain and he cannot continue. There is no electricity at the school and he finds the candle-light very trying. He cannot see people approaching from his right which sometimes causes embarrassment. At present, he cannot see things clearly if they are more than three metres away. In *AA Onderlinge Assurance Associate Bpk v Sodoms* 1980 (3) SA 134 (A) the court considered an appeal against the award of damages arising out of a collision in which the plaintiff lost the sight of his one eye. The court assessed the plaintiff's general damages at an all-embracing amount of R10 000. In this country, in *Mabatapasi v John* HH-265-82 the plaintiff had lost the vision in his right eye as a result of an injury inflicted by the defendant and claimed $6 000 for "severe pain, suffering, discomfort and *contumelia*." Squires J found that there had been no *contumelia* but held that the injury was a serious one. At p 3 of the cyclostyled judgment he said:

> "Even at the meanest level and in the ordinary acts of each day, the limitations and inconvenience of single-eye vision suddenly imposed on a person who hitherto had enjoyed sight in both eyes, must be very noticeable, if not drastic. Whether it be the additional turning of the head to see properly on the blind side, or the extra burden of general awareness cast on someone who has lost the full range of vision afforded by two sound eyes, or the imperfect residual ability to judge distances, heights



> or depths, or the enhanced fear of anything ever happening to the remaining eye, the result is a marked diminution in the quality of life."

He gave judgment in the sum of $6 000.

In *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833 (A) at 841 Grosskopf JA said:

> "As stated by Lord Diplock in *Wright v Railways Board* [1983] 2 All ER 698 (HL) at 699j, non-economic loss is not susceptible of measurement in money. Any figure which is awarded cannot be other than artificial and, if the aim is that justice meted out to all ligants should be even-handed instead of depending on the idiosyncrasies of the assessor, the figure must be basically a conventional figure derived from experience and from awards in comparable cases' (*Ward v James* [1965] 1 All ER 563 (CA) at 576E). The need for even-handedness requires that, when comparing awards in cases, regard must be had to purchasing power of the currency at the time when such cases were decided, otherwise one would not be comparing comparables. This does not offend against the principle of currency nominalism. In assessing general damages one is dealing, not with a monetary debt, but with the valuation of a non-monetary loss. Such a valuation must obviously be made in terms of currency values as they are at the time of valuation, and not in terms of the values of an earlier time. In the same way, as it was put in argument, a valuer determing the present value of a farm would not use the currency values of the past."

Applying the principles enunciated in this case, Mr *Chitsuke* submitted that the monetary equivalent today of an award of $6 000 made in 1982 would be in the region of $20 000 to $25 000, whereas Mr *Dyke* submitted that the appropriate figure today would be in the region of $15 000. However, neither legal practitioner adduced any evidence to substantiate his submission.

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Having given the matter careful consideration, I consider that an award of $18 000 for general damages would be appropriate. As I have apportioned liability on the basis that each party is equally to blame for the damages arising out of the incident. Dzangare is entitled to be paid half that amount.

As Dzangare has had to come to court to get his compensation, and as he has been successful in his claim, he is entitled to his costs.

It is ordered that the defendants pay to the plaintiff-



SMITH J

1. $9 000 with interest thereon at the prescribed rate (ie 121/2% per annum to 9 September 1993 and 25% per annum from 10 September 1993) from 2 January 1992 to date of payment;

2. his costs of action.

The liability of the defendants is joint and several, the one paying the other to be absolved.

*Chihambakwe, Mutizwa & Partners,* plaintiff's legal practitioners

*Winterton, Holmes & Hill,* defendant's legal practitioners



## FORUM PARTY OF ZIMBABWE & ORS v MINISTER OF LOCAL GOVERNMENT, RURAL & URBAN DEVELOPMENT & ORS 1996 (1) ZLR 461 (HC)

**Court** **High Court, Harare**

Adam J

Civil application

9 April & 8 May 1996 Judgment No. HH-58-96

### Flynote

Statutes - regulations - validity - regulations made under Presidential Powers (Temporary Measures) Act [Chapter 10:20] - requirements for validity - situation of urgency - can encompass inability of Government to proceed with legislative plans due to incompetence or inefficiency of those persons responsible for producing the legislation - general public interest - legislation can be in general public interest even if applicable only to a section of the population - delegation of powers under regulation to a Minister - whether President may delegate his powers

Local authority - election - election of mayor - requirements for validity - failure to specify date for election of mayor when specifying date for election of councillors - effect of such failure - lack of valid nominations by

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close of nomination date - town clerk's and Minister's power to extend nomination date

## Headnote

In his speech at the opening of Parliament on 2 May 1995, the President had mentioned what was already known to the town clerks and secretaries of urban councils in Zimbabwe: that the Government proposed to introduce a new system of local government elections, based on an extended franchise. The system would provide for the direct election of executive mayors. It was the Government's intention that the system would be in place for the holding of municipal elections throughout Zimbabwe. Such elections were due in August 1995, when the terms of office of the serving councillors and mayors were due to expire.

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**1996 (1) ZLR p462**

By June 1995 it was apparent to the Government that the legislation introducing the new system would not be ready to pass through Parliament in time for the elections. On 18 July 1995, the Presidential Powers (Temporary Measures) (Urban Councils) Regulations 1995 (SI 148A of 1995) were promulgated in terms of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*]. The Regulations stated in their preamble that it was intended to introduce a bill to replace the Urban Councils Act [*Chapter 214 of 1974*], that the bill would extend the franchise in the forthcoming elections and that it was desirable to postpone the election of councillors. The Regulations detailed the qualifications for mayors and councillors, but did not set out the powers, tenure of office and other matters relating to the mayors. They allowed the first respondent, the Minister of Local Government, to set a date for the holding of elections.

On 24 September, the third respondent (the town clerk of Bulawayo) published a notice in the Bulawayo *Chronicle*, requiring nominations for the posts of mayor and councillors to be filed not later than 4 pm on 5 October. No valid nomination for the post of mayor was submitted by the appointed time, and on 7 October the third respondent published a notice which purported to extend the time for submitting nominations to 10 am on 11 October. On 11 October he issued a notice stating that the seventh respondent had been duly elected.

On 26 September, the the second respondent, the town clerk of Harare, published a notice in the Harare *Herald*, giving 5 October as the nomination date for councillors. The notice was repeated in the *Sunday Mail* of 1 October. There was no mention of nominations for the post of mayor. The publication gave 9 days' notice of the nomination day, not the 10 days required by s 4(1)*(d)* of the Urban Council (Election) Regulations 1987 (SI 210 of 1987). Although nominations were received for the post of mayor, they were not signed by the requisite number of voters from each ward. On 12 October it was announced that the town clerk had unilaterally extended the nomination date for executive mayor for Harare to 13 October, though on that date he did not publish the names of the candidates submitted at the close of nominations on 5 October.

On 22 September, the fourth respondent (the town clerk of Gweru) published a notice under s 4 of the Urban Council (Election) Regulations, giving the date of the elections in Gweru. The date he gave was 28 and 29 October, more than 35 days later.

On 2 October, the Minister issued a notice under the Regulations, the Presidential Powers (Temporary Measures) (Nomination of Mayors) Notice (SI 267E/1995), detailing the format of

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the nomination papers for executive mayors.



The applicants were a political party, its vice-president, and other members of the party who were rate payers in urban council areas. They sought an order declaring -

(1) that the Presidential Powers (Temporary Measures) (Urban Councils) Regulations were *ultra vires* the Act and that elections held under them were invalid and should set aside; alternatively

(2) that the election to office of all mayors and councillors should be set aside and postponed until the passage through Parliament of an Act to repeal and replace the Urban Councils Act [*Chapter 214 of 1974*]; alternatively

(3) that ss 6(1) and (3) and 8(1) of the Presidential Powers (Temporary Measures) (Urban Councils) Regulations, in terms of which the President had delegated certain powers to the Minister, were *ultra vires* the Act and that the elctions held under them were invalid; alternatively

(4) that the Notice issued by the Minister was *ultra vires* the Act, as the Minister had no power under the Act to make regulations; alternatively

(5) that the actions of the town clerks of Harare and Bulawayo in extending the nomination period were unlawful and that special vacancies should have been declared; and that the election in Gweru was invalid because improper notice was given.

The applicants argued that they had *locus standi* in the matters, as a registered political party has a direct and substantial interest in any form of elections. In any event, the other applicants, as ratepayers in their respective cities, themselves had *locus standi*. They also argued that there were three pre-conditions which had to be fulfilled before the President could lawfully make regulations under the Act:

*(a)* a situation had arisen which needed to be dealt with urgently in, *inter alia*, the general public interest;

*(b)* the situation could not be dealt with in terms of any other law; and

*(c)* it was inexpedient to wait the passage through Parliament of an Act to deal with the situation.

The situation under which the Government was not ready with the legislation to hold the elections under the new system was entirely due to their own inefficiency. The legislation could have been introduced into Parliament earlier. The situation was also not one that affected the general public interest, as opposed to the interests of the citizens of the ten designated urban areas. The postponement of the elections could have been achieved under the existing law. The Regulations also required the elections to be held in accordance with the provisions of the forthcoming Bill, which had not yet been presented to Parliament and whose terms were unknown.

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It was also argued that the Act was a delegation to the President of the powers of Parliament, and he could not further delegate them to anyone else. The Minister was therefore not empowered to issue the notice regarding the election of mayors. Nor could the Minister, or the town clerk, extend the nomination dates once they were set. If no valid nominations were received, then a special vacancy had to be declared.

The respondents argued, firstly, that the first applicant had no *locus standi*, as it had no interest in the elections, not having fielded any candidates. They also argued that, in all the circumstances, a situation of urgency did exist with regard to the council elections; that the broadening of the municipal franchise was in the general public interest, even though it applied only to a section of the population. The Act did not give the President delegated powers, but legislative powers, and it was permisible for him to delegate functions to other persons.

Held, that the phrase "general public interest" does not mean that legislation must apply to everyone in the country; it would be permissible to hold that something was in the general public interest even if applied only to section of the population.

Held, further, that there was nothing to show that the Regulations were not made in good faith. The fact that the Government had evinced the intention in March 1995 to amend the existing Urban Councils Act and had not been able to do so by 18 July due to the incompetence of the public servants charged with the responsibility to produce the legislation did not mean that there was no situation of urgency on 18 July.

Held, further, that the Minister was entitled under the existing Act, and by implication under the Regulations, to make provision for the form of the nomination papers for mayor and councillors.

Held, further, that the town clerk of Bulawayo, not having received a valid nomination for the post of mayor by 16h00 on the nomination date, had no power under the Act or Regulations to extend the nomination date, nor did the Minister have any power to ratify what the town clerk had done. Thus the town clerk's declaration of the seventh respondent's election was void.

Held, further, that there having been no notice at all published for the election of the mayor of Harare and accordingly there had not been compliance with the legislative requirements. The election held was thus void.

Held, further, that in respect of the notice given for the elections in Gweru, there had been substantial compliance with the legislative requirements and so there was not sufficient reason to set aside the election.



Cases cited:

*Admin Cape v Xabanisa* 1940 EDL 198

*Chiroodza v Min of Local Govt* 1992 (1) ZLR 77 (H)

*Executive Council, Western Cape Legislature & Ors v President of the Republic of SA* 1995 (4)

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SA 867 (CC)

*Gerdener v Returning Officer & Anor* 1976 (2) SA 663 (N)

*Liverpool Bank* v *Turner* (1861) 30 LJ Ch 379

*Maharaj & Ors v Rampersad* 1964 (4) SA 638 (A)

*Mayor of Harare & Anor* v *Magama & Anor* 1992 (2) ZLR 75 (S)

*Morgan v Simpson* [1974] 3 All ER 722 (CA)

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

*Nyambirai* v *NSSA & Anor* 1995 (2) ZLR 1 (S); 1996 (1) SA 636 (ZS)

*Pio* v *Smith* 1986 (2) 1986 (3) SA 145 (Z); 1986 (2) ZLR 120 (S)

*Putter v Tighy* 1949 (1) SA 1070 (T)

*R v Ngati* 1948 (1) SA 596 (C)

*Shidiak v Union Govt* 1912 AD 642

*Woodward v Sarsons* (1875) LR 10 CP 735; [1874-80] All ER Rep 262

*Zimbabwe Teachers' Assn v Min of Education* 1990 (2) ZLR 48 (H)

The following statutes and regulations were also referred to:

Consitution of Zimbabwe 1980, ss 32(2) and 32H(3)

National Social Security Authority Act [*Chapter 17:04*]

National Social Security Authority (Pensions and Other Benefits Scheme) (Registration and Contribution) Notice 1994 (SI 146A/1994)

Presidential Powers (Temporary Measures) Act [*Chapter 10:20*], ss 2(1), 6, and 8(1)

Presidential Powers (Temporary Measures) (Nomination of Mayors) Notice 1995 (SI 267E/1995)

Presidential Powers (Temporary Measures) (Urban Councils) Regulations 1995 (SI 148A/1995), ss 3, 4, 5, 6, 7, 8, 10 and 11

Urban Councils Act [*Chapter 214 of 1974*], ss 38, 39, 40, 42(1), 43, 53*(b)*, 54(2), 184(1)*(a)* and 262(1); Part IV

Urban Councils Act [*Chapter 29:15*], s 49(1)

Urban Councils (Election) Regulations 1987 (SI 210/1987), ss 4, 6(2) and 8(2)

*A P de Bourbon* SC for the applicants

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*P Chinamasa, Attorney-General*, with him *J Musimbe*, for the first, ninth and tenth respondents

*E W W Morris*, for the second respondent

No appearance for the third, fourth, sixth and seventh respondents



## Judgment

**Adam J:** This court issued a provisional order on 26 January l996 calling upon the respondents to show cause why a final order should not be made in the following terms:

*(l)* the Presidential Powers (Temporary Measures)(Urban Councils) Regulations, l995, (SI 148A of l995) be and are hereby declared *ultra vires* the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*] and consequently the election to office of all mayors and councillors as a result of the general election held on 28 and 29 October l995 be and is hereby set aside;

(2) alternatively, the election to office of all mayors and councillors throughout Zimbabwe as a result of the general election held on 28 and 29 October l995 be and is hereby set aside and postponed *sine die* pending the introduction into law of an Act of Parliament to repeal and replace the Urban Councils Act [*Chapter 214, 1974*];

(3) alternatively, s 6*(l)* and (3) and s 8*(l)* of the Presidential Powers (Urban Councils) Regulations, l995 be and are hereby declared *ultra vires* the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*] and consequently the election of office of all mayors and councillors throughout Zimbabwe as a result of the general election held on 28 and 29 October l995 be and is hereby set aside;

(4) alternatively, the Presidential Powers (Temporary Measures) (Nomination of mayors) Notice l995 (SI 267E of l995) be and is hereby declared to be *ultra vires* the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*] in so far as it applies to the election of mayors throughout Zimbabwe;

(5) alternatively, the action of the third respondent in extending the nomination period in respect of the mayoral candidates in the Municipality of Bulawayo be and is hereby set aside and a special vacancy be declared in terms of s 54(2) of the Urban Councils Act [*Chapter 214*];

(6) alternatively, the action of the second respondent in extending the nomination period in respect of the mayoral candidates in the Municipality of Harare be and is hereby set aside and a special vacancy declared in terms of s 54(2) of the Urban Councils Act [*Chapter 214*];

(7) alternatively, the election for the mayor in the cities of Harare and Gweru be and are hereby set aside pending fresh elections being organised in terms of the Urban Councils Act [*Chapter 214*];

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(8) the first respondent be and is hereby ordered to pay the costs of this application.



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Interim relief that was sought was also granted after all the respondents had been duly served and no opposition filed to such interim relief.

At the hearing, all the applicants and only the first, second, ninth and tenth respondents were represented.

**THE APPLICANTS' ALLEGATIONS**

In the founding affidavit relied upon filed originally, the second applicant averred that-

*(a)* that he is the Vice President of the first applicant, duly authorised to represent it;

*(b)* the first applicant was prepared to contest seats in the cities of Harare, Bulawayo and Gweru in the election set for August l995;

*(c)* it was prepared to contest some seats in the election rescheduled to 28 and 29 October l995;

*(d)* the first respondent has *locus standi* to attack the administrative action of the respondents in that it has a sufficient interest in ensuring that the elections to elect city councillors and mayors are conducted in accordance with the laws of Zimbabwe, that the first applicant has been adversely affected by the unlawful actions of the first, second, third and fourth respondents and so the first applicant has *locus standi* to apply to set aside the various decisions made by those four respondents.

On 30 March l995 the Senior Secretary for Local Government, Rural and Urban Development wrote as follows to all town clerks and secretaries of urban councils:

> "1. All urban councils would now be aware that it is my Ministry's intention to amend the Urban Councils Act [*Chapter 214*] in order to, among other things introduce a new system for the election of mayors in municipal and city councils.
>
> 2. In accordance with the provisions of s 38 of this Act, the next general election for urban councils are due in August this year since the last ones were held in l99l.
>
> 3. All councils are expected as usual, to go ahead in terms of Part IV



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> of the Act and prepared for this year's election notwithstanding the fact that the Act will be amended as aforesaid. It is anticipated that the amendment will go through the First Session of the Fourth Parliament in time for the elections as provided for in the Act."

On l8 July l995, the Presidential Powers (Temporary Measures) (Urban Councils) Regulations l995 (hereinafter referred to as "Presidential Powers Regulations l995") were made. The

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preamble states that it is intended to introduce a Bill to replace the Urban Councils Act [*Chapter 214*], that the forthcoming Bill will extend the franchise in council elections and provide for direct election of mayors of municipalities, and that it is considered desirable to postpone the election of councillors to be held in August l995 under the Urban Councils Act [*Chapter 214*] and to make provision for them to be held as soon as possible in accordance with the provisions of the Bill.

On or about 22 and 24 September l994, the second, third and fourth Respondents published notices in terms of the Urban Councils Act [*Chapter 214*] and the Presidential Powers Regulations l995. Whilst the Presidential Powers Regulations l995 detail the qualifications for election of councillors and mayors, there is no legislation promulgated which sets out the powers of, tenure of office, remuneration and responsibilities of the Executive Mayors so the electorate is being asked to elect them without the slightest notice of their authority. Section 6*(l)* of the Presidential Powers Regulations l995 allows the first respondent to set a date for the holding of elections, but it is subject to the Regulations. The holding of general urban council elections is subject to the promulgation of the Bill. Any election held before this and so not in accordance with it will be *ultra vires* the Presidential Powers Regulations l995.

The Presidential Powers (Temporary Measures) Act [*Chapter 10:20*] (hereinafter referred to as the "Presidential Powers Act") confers on the President powers to make regulations in the circumstances set out in that Act. It does not give him the power, either express or implied, or the authority to delegate his powers. In terms of s 6*(l)* and (3) and s 8*(l)* the President delegated certain powers to the first respondent which contravenes the *delegatus non protest delegare* principle and is *ultra vires* the Act. In any event, even if the first respondent was lawfully given power to make directions in terms of s 6(3), this power cannot and does not include the power to amend and override the provisions of the Urban Councils Act [*Chapter 214*].

On 2 October l995, the first respondent, purporting to act under s 8*(l)*, issued



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the Presidential Powers (Temporary Measures) (Nomination of mayors) Notice l995 (hereinafter the "Nomination of mayors Notice l995"), detailing the format for the nomination papers for Executive Mayors. He did not have the power to make regulations under the Presidential Powers Act, even if the President has purported to delegate his powers to the first respondent. The Presidential Powers Act l986 in s 2*(l)* sets out when the President may make regulations under it. The format of the nomination papers (issued two months later) should be dealt with more adequately in an amendment to the Urban Councils Act [*Chapter 214*]. In any even, it is not urgent. The elections in August were postponed indefinitely, and there is no legal or other requirement that the general council elections be held on 28 and 29 October l995.

On 24 September l995 the third respondent published a notice in the *Bulawayo Chronicle* in terms of s 4 of the Urban Council (Election) Regulations l987 and s 6 and 8 of the Presidential Powers Regulations l995 that nomination for candidates for post of executive mayor and city councillors had to be filed not later than 4 pm on 5 October l995. On 7 October l995 the third respondent published a notice purporting to act in terms of the Urban Councils Act as read with

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the Presidential Powers Regulations l995 that, "in order to give aspiring candidates more time to complete nomination papers in order to comply with the Act, nominations for the post of Executive Mayor of Bulawayo have been extended to l0 am on llth October l995".

On ll October l995, purporting to act in terms of the Presidential Powers Regulations l995, the third respondent, issued a notice stating that the seventh respondent had been duly elected and his term would expire at the end of the municipal year 2000. The Presidential Powers Act does not permit the President to delegate his powers to the third respondent in this manner and any actions taken by the third respondent purporting to act in terms of the Presidential Powers Act or the Presidential Powers Regulations l995 are of no force and effect. In the event that the President does have power to delegate, s 6(2) of the Presidential Powers Regulations l996 states that Part IV of the Urban Councils Act shall apply, *mutatis mutandis*, to the general council elections, subject to the regulations set out in the Presidential Powers Regulations l995 and any written directions given by the first respondent. In terms of s 43 of the Urban Councils Act and s 6(2) of the Urban Councils (Elections) Regulations l987 (SI 210 of l987), if at the close of nominations the number of candidates is less than the number of councillors to be elected, the remaining vacancies shall be treated by special vacancies, so a by-election should have been held in terms of s 54(2) of the Urban Councils Act in respect of the Bulawayo mayoral election. The third respondent did not



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have the power to extend the nomination period unilaterally and he was obliged in terms of s 6(2) of the Presidential Powers Regulations as read with the Urban Councils Act to declare a special vacancy.

If the President has power to delegate authority to the first respondent, then the first respondent, in terms of s 6(3) of the Presidential Powers Regulations, had to give written directions, but such written directions must be given by the first respondent prior to the close of nominations on 5 October l995. In any event the third respondent could not notify the seventh respondent that he had been elected executive mayor for Bulawayo to the year 2000 without any legislative authority for such a declaration.

On 12 October l995 it was reported that the second respondent had unilaterally extended the period for nominations for executive mayor for Harare to 13 October l995, but as of 13 October l995 the second respondent had not published the names of the mayoral candidates at the close of nominations on 5 October l995. It follows that the extension of the period of nominations by the second respondent should be set aside and that only those nominations which were valid at 4 pm on 5 October l995 be accepted.

On 22 September l995, the fourth respondent published a notice in terms of s 4 of the Urban Councils (Election) Regulations 1987. However, in terms of that section and s 39 of the Urban Councils Act the fourth respondent is obliged to publish a notice not more than 35 days and not less than 28 days before the first day of election, so the notice on 22 September l995 was 36 days prior to the first day of election (28 October).

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In his affidavit the third applicant request that he be joined as a party to these proceedings as an applicant since he is a registered voter and ratepayer in Gweru and that the other fifth to tenth respondents be added as respondents. He also avers the Presidential Powers Regulations l995 are *ultra vires* the Presidential Powers Act l986.

In her affidavit, filed subsequently, the fourth applicant avers that she be joined as an applicant since she is a registered voter in Harare. She says that a notice was published on 26 September l995 in the Harare *Herald* announcing the City of Harare "Municipal General Elections l995". Another was published on l October l995 in the Harare *Sunday Mail* to the same effect. These notices only related to the election of councillors for Harare, but she says that she has not been able to find any notice relating to the election of the mayor. The publication of the notice on 26 September l995 gives 5 October l995 as being the appointed nomination day, which only gave 9 days' notice, not the l0 days



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required by s 4*(l)(d)* of SI 210 of l987. It appears that the second respondent purported to extend the nomination period to 13 October l995, but this extension was not published at all, and so it did not comply with SI 210 of l987. It appears that the reason why the first respondent purported to extend the period was because the two candidates had not filed nomination papers signed by no fewer than 5 voters from each ward and this meant that the proviso to s 8(2) of the Presidential Powers Regulations l995 had not been complied with. In those circumstances the second respondent should have declared a special vacancy in terms of s 8(2) of SI 210 of l987 and thereafter have made arrangements for holding of a by-election in terms of s 54(2) of the Urban Councils Act [*Chapter 214*].

**THE RESPONDENTS' ALLEGATIONS**

In his opposing affidavit filed in response, the first respondent avers that the voters' qualification for electing councillors was restricted by the Urban Councils Act to persons who occupied or owned rateable property within an urban council area and therefore the franchise was too narrow and that it discriminated against residents who did not own property. The councils in existence obtained their mandate from the l991 general council elections. Realising that council elections were due in August l995, it became urgent for the Government to provide for a more democratic system for election of councillors and mayors, based on an extended franchise. It was imperative also to provide for the election of the mayors based on direct election. The Government felt that it was undesirable and undemocratic to hold the next general council elections under the limited franchise. To achieve this amendments had to be made to the Urban Councils Act. It was hoped that the amendments would be finalised in time for the l995 general council elections. Sometime in June l995 it was discovered that the amendments could not be finalised in time for the August l995 elections. To avert a crisis the President invoked the l986 Act and made the Presidential Powers Regulations l995. The major object of these regulations were to empower returning officers to prepare new voters rolls in an extended franchise, to enable elections to be held under the extended franchise in anticipation of the new amended laws coming into effect and to ensure that existing councillors do not serve any longer than was necessary. It was in the general public interest to broaden the franchise so as to accommodate

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a larger section of the population that hitherto had been disenfranchised and to initiate municipal reforms which were designed to streamline and straighten the management of all urban areas and ensure that powers of local government were reposed in a democratically elected council.



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The first applicant, says the respondent, has no real and substantial interest in instituting these proceedings as it did not field any candidates to contest the elections. The first applicant has not been prejudiced at all by its own failure to contest the Harare, Gweru and Bulawayo elections.

In his letter of 30 March l995 the Senior Secretary stated that it was expected that the Bill would go through Parliament but sometime in June l995 it became apparent that this was not going to be achieved. On l8 July l995 the elections for August l995 were accordingly postponed. The first applicant was not prejudiced by this postponement. The obligation to hold the elections do not depend on the amendments to Urban Councils Act but the elections are to be held in terms of the Presidential Powers Regulations as read with the Urban Councils Act. It is the assumption of office by mayors and councillors which is dependent on the date of the commencement of the forthcoming bill as an Act of Parliament. It is in the new Act that the authority, tenure of office, and responsibilities will be spelt out and the electorate is not in any way misled by the Presidential Powers Regulations. There is not one iota of evidence in the Presidential Powers Regulations which provides for holding of the elections subject to the promulgation of the Bill. The Presidential Powers Act only empowers the President to make regulations and he cannot delegate this general power to make regulations. He did not delegate this power to the first respondent to make regulations. The delegation of residual powers to the first respondent to fix a date by written notice of an election, to prescribe the form of the nomination paper for the election of a mayor and to give written directions for facilitating and expediting the holding of an election is proper and lawful. The first applicant cannot prescribe parliamentary business for the Government.

Around 4.30 pm on 5 October l995 the first respondent received a call from the third respondent advising him that by close of nominations he had not received any valid nomination at all and that the third respondent had announced an extension of the nomination to ll October l995. The first respondent ratified the third respondent's actions and promised that he would issue the appropriate direction pertaining to the extensions. This he did on ll October l995. In order to sustain a proper challenge, the first applicant should bring evidence that the mistake or non-compliance with the Act by the third respondent affected the results of the election. The third respondent confirms that he received a call from the second respondent and he authorised the extension. There is no evidence, he says, that the first applicant was prejudiced and it does not state why it did not contest the election.



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In his affidavit, the second respondent avers that following a publication of a notice of "Municipal General Elections" nominations were received on 5 October l995 from the fifth and sixth respondents. On verifying the nomination papers it emerged that neither had complied with the nomination requirements. As a returning officer, he discussed the issue with both of them. They agreed to rectify their nomination papers. Before the close at 4 pm of nominations, he advised the first respondent of the need to extend the nomination date to allow aspiring candidates to submit their nominations (which was granted by the first respondent on the 13 October l995). Before the close of nominations, he announced date that the nomination had been extended to 13 October l995, by which date the fifth and sixth respondents had submitted their correct nomination papers. The first applicant again failed to submit a candidate for election.

In his opposing affidavit, the third respondent avers that the first applicant did not sponsor any candidates for the vacancy of Mayor of Bulawayo. On 5 October l995, at or immediately after 4 pm, he became aware that the seventh respondent was the only candidate for the office of Mayor. He scrutinised the nomination papers and was satisfied they were invalid. He took the decision to extend the nomination day to ll October l995 and made a public announcement to that effect. He did this because he did not perceive there was any prejudice to any person, political party or other organisation that could be caused by his extension and that he considered that the extension could afford other persons the opportunity to submit their nominations. As the returning officer, the third respondent reasoned that he was tasked with the responsibility of determining and publishing the dates on which nominations could be submitted so it lay within his power to extend the dates of nomination. The third respondent informed the first respondent, who informed him that he would issue an appropriate directive which would ratify and validate the third respondent's action. By the close of nomination on ll October l995 the only candidate for mayor of Bulawayo was the seventh respondent. He concedes that in the notice he published on ll October l995 there was no need to spell out the term of office of the mayor. He acted in good faith and published all the actions he did.

The fourth respondent in response in his opposing affidavit agrees that he published, 36 days prior to the municipal general elections, the notice in question in *The Times* of Gweru. He claims that he substantially complied with the notice requirements.

In his second opposing affidavit for the second respondent, the Acting Town



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Clerk of the City of Harare admits that, no notice was published for the election of the executive mayor of Harare. He says that no such notice was required in law and in any event there was little the second respondent could do between 12 October l995, when the directive was received, and l3 October l995. He further avers that this matter has to be considered in light of the Urban Councils Act [*Chapter 29:15*] which came into force on 22 December l995. He says that the fourth applicant appears to have overlooked s 53*(b)* of the Urban Councils Act [*Chapter 214*] dealing with irregularities and that the applicants have failed to point to any prejudice suffered or to show how the elections were influenced in any way by whatever non-compliance

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is alleged.

In his opposing affidavit, the eighth respondent states that he was properly nominated for the mayoral post for the City of Gweru on 5 October l995. He says that the giving of 36 days notice instead of 35 days did not make the giving of notice *ultra vires* the Urban Councils Act [*Chapter 214*]. His affidavit is that this error was just a technical non-compliance with the time limits which did not prejudice anyone and so minor that it cannot affect the validity of the entire electoral process.

The seventh respondent avers that he intended to submit nomination papers for the post of mayor of the City of Bulawayo, but was unable to do so because by 5 October l995 he had not obtained 5 voters from each of the twenty-five wards in Bulawayo to support his nomination. No nominations were received by the third respondent by 4 pm on 5 October l995, and the third respondent then extended the date for the submission of nominations to l0 am on ll October l995. Subsequently he submitted his nomination prior to the extended date. He believes that the third respondent was legally entitled to extend the nomination date.

The second respondent, in his further affidavit, avers that it is made in support of the notice of opposition on behalf of the fifth respondent, who is not able to deal with the administrative issues raised on the matter. These issues can only be dealt with by the second respondent in his capacity as the Returning Officer. He had already covered them in the affidavit filed by him and others on his behalf. I should indicate that the chamber application filed on 19 December l995 was served on all the respondents, as were the provisional order granted on 26 January l996 and notices of set down for this hearing. Before this court ordered that notice, by means of publication in *The Herald* and *The Chronicle*, be given to all persons, not already parties to these proceedings, who were elected or sought nomination for election as councillor



or executive mayor, proof that such publication was filed of record. The terms of the final order only seeks the setting aside of both the elections of mayors and councillors in paras *(l)*, (2), (3) and (4).

**APPLICANTS' WRITTEN ARGUMENTS**

In the applicants' heads of argument, Mr *de Bourbon* submits that the first applicant, as a registered political party, has a direct and substantive interest in any form of elections in Zimbabwe. The way in which elections are conducted and the validity of legislation in terms of which they are conducted are at the very heart of political activity. The applicants meet the test laid down in *Zimbabwe Teachers Association & Ors v Minister of Education & Culture* 1990 (2) ZLR 48 (H) and *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* l988 (3) SA 369 (A). The fact that the first applicant did not put up candidates in the nomination process is quite irrelevant to its interest in this matter, since it could not on one hand field candidates in what it alleges is an illegal process and, on the other hand, seek to challenge the process itself. The second to fourth applicants have *locus standi* as ratepayers. See *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General of Zimbabwe and*

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*Ors* l993 (l) ZLR 242 (S) at 250.

The Presidential Powers Act [*Chapter 10:20*] empowers the President, subject to three qualifications, to make regulations. These qualifications are: *(a)* a situation which has arisen that needs to be dealt with urgently in the public interest, *(b)* such situation cannot be dealt with in terms of any other law and *(c)* it is inexpedient to await the passage through Parliament of an Act dealing with the situation.

Mr *de Bourbon* submits that there is nothing in the Presidential Powers Regulations l995 to show that these three preconditions have been met. The preamble to it does not meet the prerequisites laid down. The absence of urgency is established by the first respondent's affidavit, since on 30 March l995 the intention to deal with matters had already been established. On 2 May l995 it was the stated intention of the Government to introduce legislation to provide for election of executive mayors. So it is impossible to understand how by l8 July l995 the President needed to act urgently to deal with the matter. To claim, as the first respondent does, that a crisis had to be averted is not worthy of acceptance. The situation was undoubtedly due to inefficiency of the Executive Branch in not having the legislation ready for Parliament. There was no urgency and the Bill could readily have been



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introduced into and passed through Parliament. The urgency has not arisen as a result of a situation, but as a result of a failure to introduce the legislation at an earlier stage. The "general public interest" that is to be considered is the general public interest which relates to all persons within the country and not the interest of certain persons who live in the ten designated urban areas. The concept of a democratic franchise is only of "general public interest" in the elections for Parliament. One of the objects was to postpone the elections scheduled for August l995. This could have been done in terms of s 38(4) of the Urban Councils Act [*Chapter 214*] by the first respondent. In terms of s l84*(l)(a)* of that Act the first respondent can make regulations relating to elections, including the application, non-application or suspension of s 39 to 52 of the Act. There is thus sufficient power under that Act to deal with the situation without the necessity of the Presidential Powers Regulations, l995.

Furthermore, the preamble requires the elections to be held in accordance with provisions of the forthcoming Bill, but no such Bill had been presented to Parliament by October l995. The electorate is being asked to vote for the office of an executive mayor that does not exist under the law, since the Presidential Powers Regulations l995 does not purport to create the post of executive mayor but merely provides for an election. Until there is amended legislation for that post, there can be no purpose in such an election. In any event, the terms of office and powers as proposed in the Bill might well be changed by Parliament during passage of the Bill through Parliament. The way the present Presidential Powers Regulations l995 have been framed is to introduce legislation which is vague and dependant on a document at some future date which does not itself have legislative force. The qualification of a candidate could be changed by Parliament. Under s 42*(l)* of the Urban Councils Act [*Chapter 214*] a councillor takes office immediately after the election, but under the Presidential Powers Regulations l995 the new

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councillors and executive mayors cannot take office until the Bill becomes law.

The Presidential Powers Act is a delegation to the President of the powers of Parliament in terms of s 32(2) of the Constitution of Zimbabwe. Parliament having conferred legislative function on the President, this means that he has no power to delegate that power to any other person. In terms of s 32H(3) of the Constitution there is no provision for the President to delegate his powers. Indeed s 3lH(6) specifically makes it clear that only Parliament may confer or impose functions on persons and authorities other than the President. Accordingly, the power given to the first respondent in s 3*(l)(a)*, 6*(l)*, (2) and (3) of the Presidential Powers Regulations l995 is an unlawful delegation by



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the President. It follows that the first respondent did not have the power to make the Presidential Powers (Temporary Measures) (Nomination of mayors) Notice l995. In any event, the President is not entitled to allow the first respondent to amend legislation. The President cannot authorise the first respondent in terms of s 6 of the Presidential Powers Regulations to depart from the clear provisions of existing legislation.

Section 39 of the Urban Councils Act [*Chapter 214*] requires the returning officer, not more than 35 days and not less than 28 days before the date of election, by publication in a newspapers, to notify the date of election and to appoint a date to be the nomination date. That date must be not less than 7 (increased to l0 by s 4 of SI 210 of l987) and not more than 14 days from the date of publication.

On 25 September l995, the notice in terms of s 39 was published in *The Chronicle* with the nomination date fixed as 5 October l995. No candidate was nominated for the post of executive mayor of Bulawayo. Accordingly, Mr *de Bourbon* submits that in terms of s 43 of the Urban Councils Act [*Chapter 214*], as read with s 6(2) of SI 210 of l987, that vacancy should have been treated by the returning officer as a special vacancy and should have been dealt with in terms of s 54 of the Act. The first respondent purported to issue instructions to extend the nomination date to ll October l995. This would have been l7 days after the publication of the notice in terms of s 39 of that Act and accordingly invalid date for the nomination date. In any event, neither the returning officer nor the first respondent had the power in terms of s 39 or any other provision of that Act to extend or change the date fixed for nomination. Section 6(3) of the Presidential Powers Regulations l995 merely allows the first respondent to give written directions. It does not permit him to amend existing legislation. There would in principle be nothing wrong with the first respondent giving written directions to the returning officer as to the date he should fix for the nomination date but once that date has been fixed in terms of s 39 of that Act, the first respondent cannot give him written directions to change that date, let alone to change that date once a special vacancy has occurred or to change it to a date which is beyond the limits fixed by s 39 of that Act. The first respondent has treated s 6(3) of the Presidential Powers Regulations l995 as a licence to ignore the provisions of the Urban Councils Act [*Chapter 214*]. The first respondent can do no more than give written directions; he cannot override the law.

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The third respondent claims he took the action to extend the nomination, since the seventh respondent's nomination was invalid. He had no power



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under the Urban Councils Act [*Chapter 214*] or the Regulations to do this. The first respondent's directive came after this, which was again without any authority of law. The law is clear: a special vacancy should have been declared so far as Bulawayo is concerned, since there was no duly nominated candidate for the position of executive mayor on 5 October l995, the duly appointed nomination date, and so there had to be a special vacancy to be dealt with in terms of s 54 of the Urban Councils Act [*Chapter 214*].

It is clear, Mr *de Bourbon* submits, that the notice published on 26 September l995 in *The Herald* did not confirm with the period required in terms of s 39 of the Urban Councils Act [*Chapter 214*] as read with SI 210 of l987, in that the notice did not allow l0 days. That notice applied only to councillors and made no mention of a mayor. The nomination date fixed was invalid. Further, no further notice was published in respect of Harare. The point made concerning Bulawayo about the invalidity of such is repeated with respect to Harare. It is clear that the first respondent purported to issue a direction altering the nomination date for Harare to 13 October l995. Again, there was no valid nominations at close of the original nominate date in Harare.

As far as Gweru is concerned, the notice was published on 22 September l995 in terms of s 39 of the Urban Councils Act [*Chapter 214*], but the number of days was 36 after publication and not 35 required by s 39 of the Urban Council Act [*Chapter 214*]. Accordingly no valid notice was given for Gweru.

**RESPONDENTS' WRITTEN ARGUMENT**

In his heads of argument, the *Attorney-General*, representing the first, ninth and tenth respondents, submits that the Presidential Powers Regulations l995 satisfy all the requirements of s 2*(l)* of the Presidential Powers Act. As of l8 July l995 the following state of affairs or set of circumstances was prevailing:

*(a)* serving councillors' and mayors' terms of office were due to expire in August l995;

*(b)* the Government had announced over a period its intention to hold the elections due in August l995 on the basis of an extended franchise and with an executive mayor directly elected;

*(c)* it remained the Government's intention to hold these general council elections in August l995 or soon thereafter as announced previously;

*(d)* given the fact that serving councillors and mayors had been elected on a narrow franchise the Government considered it undesirable to extend their mandate for a period that would be longer than necessary;

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*(e)* a mere postponement of the elections would not help bring about the elections due in August l995 within the shortest possible time, as the voters' roll could not be prepared as early as July l995 on the basis of the extended franchise;

*(f)* the existing law did not provide for a voters' roll to be prepared on the basis of the extended franchise or for qualifications for the proposed executive mayor;

*(g)* the amendments to the law to effect the policy objectives of the Government could not be passed through Parliament in time to hold the elections due in August l995; and

*(h)* it was envisaged that the new Bill would become law by the time of the elections or so soon thereafter.

The *Attorney-General* further submits that the first respondent's affidavit clearly establishes the "general public interest". It is in the "general public interest" to create local government institutions which are accountable to ratepayers notwithstanding the fact the institutions duly apply to a section or a fraction of the population. The extension of a franchise and the holding of municipal elections on the basis of an extended franchise are clearly matters in the general public interest. He further submits that extending the franchise to a majority of a section of a population that was hitherto disenfranchised is in itself a "general public interest". Further, to repose power in a democratically elected council or individual, must be viewed as a general public expectation meeting the requirements of the "general public interest" - *Nyambirai v NSSA & Anor* 1995 (2) ZLR 1 (S); l996 (l) SA 636 (ZS).

He also submits that the broadening of the franchise and the direct election of the mayor with wider powers and the councillors could not be dealt with in terms of any other law. He submits that at the time the Presidential Powers Regulations l995 were made it became apparent that amendments which had been envisaged would not go through Parliament in time for the August l995 elections. Faced with the need to broaden the franchise, to create an office of the mayor directly elected and to empower the returning officers to prepare new voters' rolls on the extended franchise, it was inexpedient to await the passage through Parliament of an Act to deal with the situation. He also submits that it is immaterial to the determination of the matter how the urgent situation came about. He further submits that once the validity of Presidential Powers Regulations l995 is upheld it follow that anything done thereunder is competent. It is only the new Act that will provide the term and other ancillary issues pertaining to the office of the mayor.



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In terms of the Presidential Powers Act it is the President only who can make regulations and cannot delegate this power to any authority. But in regulations made under the Act by the President, he may assign specific functions to any appropriate authority, as long as the functions are connected or incidental to the situation to be dealt with. In terms of s 2(2) of the

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Presidential Powers Act, the regulations made by the President may provide for any matter or thing, for which Parliament can make provisions in an Act of Parliament. An Act of Parliament can provide for certain persons to perform certain function. The powers granted to the first respondent in terms of ss 6*(l)*, 6(3) and 8*(l)* of the Presidential Powers Regulations l986 are matters for which Parliament can make provision in an Act. It is therefore the *Attorney-General's* submission that the President acted competently in empowering the first respondent to discharge the functions set out in ss 6*(l)*, 6(3) and 8*(l)* of the Presidential Powers Regulations l995.

In respect of Gweru the challenge is on the extra day's notice not being in compliance with the 35 days' notice but he submits the first respondent substantially complied with the requirement and the applicants were not prejudiced. He also submits that the mere non-compliance did not affect any person, political party or organisation and the results of the election. The technical non-compliance does not prejudice any party and it is *bona fide* in the circumstances of the case. Further the technical non-compliance does not amount to a valid ground for annulling an election in terms of s 53 of the Urban Councils Act [*Chapter 214*]: *Pio v Smith* l986 (3) SA 145 (Z); *Gerdener v Returning Officer & Anor* l976 (2) SA 663 (N) and *Putter v Tighy* l949 (l) SA l070 (T).

The *Attorney-General* submits that the first respondent, in terms of s 6(3) of the Presidential Powers (Urban Councils) Regulations l995 has an unfettered discretion to give such written directions as he considers necessary for the purpose of facilitating and expediting the holding of an election. He submits that in terms of s 5 of the Presidential Powers Act the regulations made shall, to the extent of any inconsistency, prevail over any other law to the contrary. In any event, he submits the first respondent has power in terms of s 262*(l)* of the Urban Councils Act [*Chapter 214*] to rectify any anomalies or acts of commission or omission arising from the electoral process. He also submits that the applicants have failed to establish that the non-compliance by the third respondent with the provisions of the Act affected the results of the election of the Mayor of Bulawayo see s 53*(b)* of the Urban Councils Act [*Chapter 214*], which provides that an election is not to be set aside because of a triviality. In order for the court to set aside the results of an election, the



objection relied on must be substantial, in that it was calculated to affect the results of the election. He submits that the first respondent used the powers contained in s 6(3) of the Presidential Powers Regulations l995 to extend the nomination date. He submits that there was no evidence from the applicants to suggest that they were prejudiced by the election or that the extension is likely to affect the result of the Harare election for the mayor to invalidate it. He accordingly submits that these two respondents have substantially complied with the provisions of the Urban Councils Act [*Chapter 214*] and the Presidential Powers Regulations l995 in conducting both the nominations and elections for mayors.

In the second respondent's heads of argument, Mr *Morris* submits that the test to be applied as to whether the first applicant has *locus standi* is whether it has a direct and substantial interest in the outcome of the case: *Zimbabwe Teachers Association v Minister of Education* l990 (2)

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ZLR 48 (H). The first applicant has not shown such direct and substantial interest. The first applicant argues that it has been adversely affected by what it perceives as the unlawful activities by the respondents. But the applicants would have in any event have to show an unfairness, not merely illegality of procedure. He submits that only persons with *locus standi* to bring these proceedings would be actual candidates or ratepayers themselves: *Mayor of Harare & Anor v Magama & Anor* l992 (2) ZLR 75 (S).

The applicants seek a permanent interdict, so they must show that they will suffer irreparable loss, without any other practical remedy being available: *Chiroodza v Minister of Local Government* l992 (1) ZLR 77 (H). The applicants have not shown that they will suffer any loss since they had no candidates. They have another remedy, which is to have the elections set aside if they have been improperly conducted: s 53 of the Urban Councils Act [*Chapter 214*]. In any event, the applicants have not shown that the elections were not held substantially in accordance with the principles laid down in the Urban Councils Act [*Chapter 214*] or that the result of the election would be effected by their complaints.

Mr *Morris* submits that the applicants ignore the provisions of s 2*(l)* of the Presidential Powers Act which states "whenever it appears to the President" and so the test is subjective. The sole arbiter of the urgency, "general public interest", inadequacy of other laws and inexpediency is the President; it is not for the courts to second guess the President, nor to tell him how he ought to have exercised a particular discretion. It is not for the applicants to know the exigencies of State, the pressure of work Parliament faces and all sorts of



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other factors that would have to be taken into account in the President exercising the discretion in terms of s 2 of the Presidential Powers Act.

Furthermore, Parliament cannot bind itself as to future actions. Accordingly, even if a Minister or Parliament itself indicates that it is going to do something in the future it is not bound to do it and until it is done, matters must continue. This precludes the right of any person to seek to compel Parliament to introduce legislation. It also precludes the right of any person to take any action against the Government based on the stated intention by the Government that legislation will be introduced. This disposes of the argument that the electorate are voting for officials whose powers and terms are unknown. In any event, a person votes for a particular incumbent. There would be nothing to prevent, for example, the Government from holding elections and subsequently introducing legislation altering the powers of those elected. An applicant would have no right to set aside elections on the basis that when he was elected he had a different tenure of office.

In terms of s 2(2) of the Presidential Powers Act Parliament has given the President the right to make, by regulation, any law that Parliament could have made. Parliament can make laws giving certain discretions, powers or functions to Ministers or others and there is no reason why the President cannot do the same. The rule *delegatus non potest delegare* is a rule of agency and not of administrative law. Under the latter it is a presumption, rather than a rule, and relates to the delegation of a *delectus personae*: *Shidiak v Union Government* l9l2 AD 642;

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*Administrator, Cape v Xabanisa* l940 EDL l98 and *R v Ngati* l948 *(l)* SA 596 (C). The delegated powers objected to by the applicants are no more and no less administrative, whereby the first respondent has power to set dates and to prescribe forms.

In the fifth respondent's heads of argument, he associates himself with the heads of argument filed on behalf of the first, ninth and tenth respondents.

The seventh respondent's legal practitioners wrote to the registrar of this court informing him that the seventh respondent concurred with the arguments to be put forward on behalf of the third respondent and in the circumstances there would be no separate appearance by him at this hearing.

**ORAL SUBMISSION**

At the hearing Mr *de Bourbon* submitted that the validity of the Presidential Powers Regulations l995 depended on the preconditions laid down in the Presidential Powers Act being satisfied. It must not be forgotten that the



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Urban Councils Act [*Chapter 214*] gave the first respondent wide powers. Further, there was a difference in the qualifications for a mayor in s 7(2) of the Presidential Powers Regulations l995 and those in s 49*(l)* of the Urban Councils Bill l995, which relate to a person being ordinarily resident and to the holding of academic and professional qualifications. In other words, certain persons would qualify under the Presidential Powers Regulations l995 but would not do so under the Urban Councils Bill l995. He reiterated that the Presidential Powers Act did not allow delegation and so ss 3*(l)*, 6*(l)* and (3) of the Presidential Powers Regulations l995 were *ultra vires* the powers granted to the President.

As for s 53*(b)* of the Urban Councils Act [*Chapter 214*], this was not re-enacted in the Presidential Powers Regulations l995 and so it did not apply. That section relates to any mistake or non-compliance with the provisions of the Urban Councils Act [*Chapter 214*]. In the case of Bulawayo and Harare, the Presidential Powers Regulations l995 have not been complied with and those elections for the mayor were not conducted substantially in accordance with the principles laid down in the Urban Councils Act [*Chapter 214*]. In the case of Gweru, the provisions of s 53*(b)* were applicable.

The *Attorney-General* at the hearing countered that s 32 of the Constitution of Zimbabwe presently gives Parliament the authority to confer legislative functions on any person or authority. Section 2 of the Presidential Powers Act does not confer powers of subsidiary legislation but gives authority to the President to legislate. The first respondent's affidavit deals with the issue of "general public interest": *Nyambirai v NSSA & Anor supra*. The Urban Councils Act [*Chapter 214*] could not provide for the direct election of executive mayors and the extension of franchise. The Urban Councils Act [*Chapter 29:15*] was passed on 22 December l995. The previous councils' lives were continued after l August l995. The first respondent was given subsidiary legislative power under ss 3*(l)*, 6*(l)* and (3); he has not over-ridden the Urban Councils Act [*Chapter 214*] or the Presidential Powers Regulations l995. From l8 July l995 to 22

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December l995, the Presidential Powers Regulations l995 was the law in force. The new Act that replaced the Presidential Powers Regulations l995 did not necessarily have to follow them. The law governing during the currency of the Presidential Powers Regulations l995 was the Urban Councils Act [*Chapter 214*], together with the Presidential Powers Regulations l995. Where there was any inconsistency the Presidential Powers Regulations l995 prevailed. Section 53*(b)* of the Urban Council Act [*Chapter 214*] was not inconsistent with those Presidential Powers Regulations l995.



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It is accepted that in terms of s 39 of the Urban Councils Act [*Chapter 214*] in the case of Gweru 36 days instead of 35 days were given, but s 53*(b)* covered this. It is true that, third respondent did not have power to extend the nomination date but s 53*(b)* cures this and the first respondent in terms of s 262*(l)* can regularise this. Section 39 gives the third respondent, as the returning officer, power to appoint a date as the nomination day. The third respondent complied by making the publication, but did not do so within the time periods concerned.

Mr *Morris,* for the second respondent, argued that, under the Presidential Powers Act, the President had power to legislate and not to regulate. It is clear that the Urban Councils Act [*Chapter 214*] would not be adequate to provide for the extension of the franchise and for the direct election of the executive mayor. As for s 53*(b)* of the Urban Councils Act [*Chapter 214*] it did not serve to ratify non-compliance of that Act, but it allowed the courts to interfere if some person participating in the election suffered prejudice as a result of the mistake or non-compliance.

In reply, Mr *de Bourbon* asserted that under the Presidential Powers Act, the President exercised primary legislative power: *Executive Council, Western Cape Legislature & Ors v President of the Republic of South Africa* l995 (4) SA 867 (CC) at 899 and 930-932. The *Attorney-General* concedes that urgency was due to incompetence in not having legislation in place for August l995 elections. This means that the preconditions of the Presidential Powers Act had not been complied with. That Act gave the President power to legislate and so he could not delegate legislative power to the first respondent. As far as Bulawayo and Harare were concerned, at the close of nomination on 5 October l995 there were no valid nominations, so under s 43 of the Urban Councils Act [*Chapter 214*], the returning officer was required to treat those as special vacancies since the word "shall" is used. Section 54(2) laid down how such by-elections should be conducted for those special

vacancies. In the case of Harare, no nomination day for the election of the executive mayor was appointed and so there was no nomination date. If nothing at all is done, one cannot speak of substantial compliance. In the case of the election of the executive mayor for Bulawayo, again there was no valid nomination and so s 43 also came into play.

**FACTS WHICH ARE COMMON CAUSE**

It is common cause that the elections due to be held in August l995 were not held. Instead on l8 July l995 the President made the Presidential Powers

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Regulations l995 in terms of s 2 of the Presidential Powers Act. That section provides that whenever it appears to the President that -

*(a)* a situation has arisen or is likely to arise which needs to be dealt with urgently in the general public interest;

*(b)* such situation cannot be adequately dealt with under any other law; and

*(c)* because of the urgency, it is inexpedient to wait for an Act of Parliament dealing with the situation,

then, subject to the Constitution and the Act itself, the President may make such regulations as he considers will deal with the situation. The regulations made may provide for any matter or thing for which Parliament can make provision in an Act, subject to certain exceptions provided in s 2(2).

It is common cause, and accepted by the third and seventh respondents, that, in the case of Bulawayo, at the close of nomination day at 4 pm on 5 October l995, there were no candidates for a general election to elect the executive mayor for the Municipality of Bulawayo to be held on the 28 and 29 October l995. A notice in terms of s 4 of SI 210 of l987, as read with s 6 and 8 of the Presidential Powers Regulations l995, was published in *The Chronicle* on 25 September l995.

It is common cause, since it is accepted by the second respondent, that on 26 September l995 a notice was published in *The Herald* that in terms of s 38(4) and s 39 of the Urban Councils Act [*Chapter 214*], as read with s 4 of SI 210 of l987, a general election to elect councillors would be held on 28 and 29 October l995 and that the appointed nomination day was 5 October l995 before 4 pm. It is not disputed by the second respondent that no notice was published for the election of the executive mayor of Harare.

The *Attorney-General*'s submission was that the situation which had arisen which had to be dealt with urgently was for the holding of the general municipal elections with the extended franchise and the direct election of the executive mayors, that this situation could not be adequately dealt with under the Urban Councils Act [*Chapter 214*] which was the law applicable and that because of this urgency it was inexpedient to wait for an Act of Parliament to be passed.

It is not a matter of dispute that the extension of the franchise and the direct election of the executive mayor could not be adequately dealt with any other



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law in existence. It is accepted that s 2 of the Presidential Powers Act uses the words "whenever it appears to the President", but it cannot be denied that what appears to the

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President must surely accord with a true state of affairs ascertainable and "not manifestly without reasonable foundation" that a situation has arisen or is likely to arise which needs to be dealt with urgently. A situation cannot be said to have arisen if it is not so factually. Parliament has set certain preconditions before the President may make regulations which may provide for any matter or thing for which Parliament may make provision. It is also true that Parliament has reserved to itself the authority to revoke or amend the regulations, but until that is done those Presidential regulations shall prevail over any other law. It follows that this court, as it does with regard to other delegations of legislative authority, is competent to decide whether there has been a proper exercise of that legislative authority. In so doing the, court is not substituting its view but determining whether there has been a correct application of the provisions of the legislation. Further, there is nothing to indicate to this court that the making of the Presidential Powers Regulations l995 was contrived or that they were not made in good faith. In these circumstances, the fact that the Government had evinced the intention in March l995 to amend the Urban Councils Act [*Chapter 214*] and had not been able to do so by l8 July l995 even, for example, due to the incompetence of those public servants charged with the responsibility to have them in place, cannot mean that there was no urgency by the l8 July l995.

Mr *de Bourbon*'s contention is that, from the preamble, there is nothing to show that a situation has arisen or is likely to arise that needed to be dealt with urgently by the Presidential Powers Regulations l995. His focus seemed to be on the issue of urgency and not really on whether a situation had arisen or was likely to arise. As correctly pointed out by the *Attorney-General* a situation had arisen by l8 July l995 which concerned the holding of the general municipal elections that were due to be held in August l995 on the basis of an extended franchise and for the direct election of the executive mayors. The mention by the President in his speech at the opening of Parliament on 2 May l995 merely confirmed what was already known by all the town clerks and secretaries of urban councils. The averment by the first respondent that by June l995 it was apparent that legislation was not ready merely reflected the state of affairs as of that date, which in the eyes of the first respondent, meant that measures needed to be taken. There is nothing to suggest the first respondent was not *bona fide* about this. The necessity for the President to make the regulations under the Presidential Powers Act arose because according to the first respondent, the legislation the Government





thought would be in place was not there. Surely what was evinced in March l995 cannot alter the fact that urgent measures were required in July l995 in order to set in motion the process for the general elections that were due to be held.

The Presidential Powers Act did not define the "general public interest", but it clearly does relate to the interest of all persons throughout the country. The issue is whether the "general public interest" is so confined. Mr *de Bourbon*'s contention is that it does not encompass those persons disenfranchised that live in the ten designated urban councils. The *Attorney-General* argues that the extension of the franchise and the holding of direct elections for executive mayors is in the "general public interest". Also, he says, to extend the franchise to those in the urban areas that were disenfranchised is in itself in the "general public interest". Further, to

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have a democratically elected council must be seen as a general public expectation that is in the the "general public interest". I am satisfied that the "general public interest" covers not only all the people throughout the country but also others. It must not be forgotten that s 2*(l)(a)* refers to "needs to be dealt with urgently in the interests of defence, public safety ..." which means that the "general public interest" must be interpreted in the context of that particular para *(a)*.

In *Nyambirai v NSSA & Anor supra* at 9-10 (644 of the South African report) Gubbay CJ observed:

> "I do not doubt that because of their superior knowledge and experience of society and its need, and familiarity with local conditions, national authorities are, in principle, better placed than the judiciary to appreciate what is in 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 margin of appreciation, unless convinced that the assessment is manifestly without reasonable foundation. See *James* v *United Kingdom* (l986) 8 EHRR 123 at para 46; *Mellacher v Austria* (l989) 12 EHRR 391 at para 51; *United States Railroad Retirement Board v Fritz* 449 US 166 (l980) at 175; *Schweiker v Wilson* 450 US 221 (l98l) at 230.
>
> The Minister has proclaimed that 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".

The reference to the "public interest" by the learned Chief Justice there must necessarily mean the the "general public interest". That case concerned the National Social Security Act [*Chapter 17:04*] under which the Minister responsible in terms of the National Social Security Authority (Person and Other Benefits Scheme) (Registration and Contribution) Notice l994 (SI 146A of l994) specified that every gainfully employed person in any profession, trade or occupation, other than those employed in the service of the state or a domestic worker must register and make contribution as employees. This regulation did not cover all the persons throughout the country, but it did not prevent the Supreme Court from considering it as covering the "general public interest". It follows that the "general public interest" is not confined to all the people in the country, as argued by Mr *de Bourbon*.

I accordingly decline to hold that the Presidential Powers Regulations l995 are *ultra vires* the Presidential Powers Act.

> The Presidential Powers Regulations l995 provides as follows:
>
> "3 *(1)* Notwithstanding any provision of the Act or any other law-
>
> *(a)* the general election of councillors that was to have taken place in August l995, shall be held in each council area on such date as the Minister may fix in terms of subsection *(l)* of section 6;
>
> ...

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(2) Notwithstanding section 54 of the Act, unless the Minister otherwise directs, no by-election to fill a special vacancy on any council shall be held before the date fixed by the Minister in terms of subsection *(l)* of section 6.

...

6 *(1)* Subject to these regulations, an election shall be held-

*(a)* for the office of mayor in every municipal area; and

*(b)* for councillors in every council on such date as may be fixed by the Minister by written notice to the council concerned.



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Provided that the Minister may fix different dates for different elections.

(2) Subject to these regulations and to any directions given by the Minister in terms of subsection (3), Part IV of the Act shall apply, *mutatis mutandis*, to the elections referred to in subsection *(l)*.

(3) The Minister may give any council such written directions as he considers necessary for the purpose of facilitating and expediting the holding of any election referred to in subsection *(l)*, and the council concerned shall comply with every such direction.

...

8.*(1)* The nomination paper for the election to the office of mayor shall be signed by no fewer than ten persons whose names are enrolled on the voters' roll referred to in paragraph *(a)* of subsection *(l)* of section 4 for the municipal area concerned:

Provided that, if the municipal area is divided into wards, the nomination paper shall be signed by no fewer than five such persons who are enrolled on the voters' roll for each ward.

...

l0. A councillor or mayor who is deemed or declared to have been duly elected at an election held in terms of these regulations shall assume office on the date of the commencement of the forthcoming bill as an Act.

11. Subject to section 6 of the Presidential Powers (Temporary Measures) Act, l986, these regulations shall cease to have effect on the date of commencement of the forthcoming Bill as an Act."

It also provides in s 4*(l)(a)* and *(b)* for the preparation of a voters' roll for the election of the mayor and for the election of councillors; in s 5(2) and (3) for voter qualifications for the election of the mayor and for the election of councillors; and in s 7*(l)* and (2) for the candidates, qualification for the election as a mayor and for election as councillors.

What is abundantly clear is that Part IV of the Urban Councils Act [*Chapter 214*] shall apply, *mutatis mutandis*, to election of the mayors and councillors and Part IV was subject to what was provided in the Presidential Powers Regulations l995 and to any written directions given by the Minister for the purpose of facilitating and expediting the holding of those elections.



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There is little doubt that the absence of s 8*(l)* would not have prevented the Minister from prescribing the form of the nomination paper for election of mayors, since s 40*(l)* of the Urban Councils Act [*Chapter 214*] makes provision for the nomination paper for the election of councillors in the form prescribed by the Minister and that s 40, *mutatis mutandis*, could have been made applicable for prescribing the form of the nomination paper for election of mayors.

In any event, the prescribing of forms and setting of dates are matters of administration which do not necessarily have to be done by the President himself; he can assign others to do so. I decline to hold that the President acted *ultra vires* as it pertained to those sections mentioned by Mr *de Bourbon*.

It is common cause that the Minister by written notice had fixed the dates of 28 and 29 October l995 for election of councillors and mayors.

In Part IV, s 39 of the Urban Councils Act provided that not more than 35 days and not less than 28 days before the date appointed for election of councillors and mayors - 28 October l995 - the returning officer shall, by notice published in a newspaper and posted at the council office, notify the election date and appoint a date (being not less than 7 days and not more than l4 days from the date of publication of that notice) as the nomination for election. Section 4*(l)* of SI 210 of l987 required not less than l0 days (instead of 7 days) and not more than l4 days from the date of publication of that notice.

The purpose of the legislative framework - the Presidential Powers Regulations l995 and Part IV of the Urban Councils Act [*Chapter 214*] - was to make provision for the forthcoming elections that were to be conducted on an extended franchise and for the direct election of the executive mayors who would assume office on the date of the commencement of the new Act that would be replacing the Urban Councils Act [*Chapter 214*]. Compliance with the provisions of that legislative framework was mandatory. Section 40*(l)* required a candidate as a councillor to be nominated on separate nomination paper that was prescribed. Section 40(4) required the returning officer to reject the nomination of any person if he is satisfied that that person is disqualified or that the nomination does comply with the requirements laid down as to the proper completion of the nomination paper. Section 40(5) required the returning officer to post and keep posted at the council



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office, until the conclusion of the election, a list of candidates for mayor and councillors. Section 40(6) required the returning officer, before 4 pm, on the day following nomination day, to post a notice at the council office, the names of the candidates, if any, who are deemed to have been duly elected as mayor and as councillors. Section 43 provided that if, at the close of the period allowed for nomination the number of persons who have become candidates is less than the number of councillors or mayor, the remaining vacancies shall be treated as if they were special vacancies. Section 54(2) provided that in the event of a special vacancy occurring, a by-election to fill the vacancy shall be held. The Presidential Powers Regulations l995

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envisaged special vacancies. It made specific provision that, notwithstanding s 54, no by-election shall be held before the date fixed for the election of mayors and councillors, unless the Minister otherwise directs. In other words by-elections must be held where special vacancies occur.

It is common cause that there was no candidate for the election of mayor for Bulawayo by 4 pm on 5 October l995, the appointed nomination day. The third respondent admits that he became aware at or immediately after 4 pm on 5 October l995 that the one candidate - the seventh respondent - who had submitted his nomination papers had an invalid nomination paper. Section 40(4) states that the returning officer shall reject that nomination. There is no provision under Part IV of the Urban Councils Act [*Chapter 214*] or the Presidential Powers Regulations l995 that permitted the third respondent, as he deposed, to take the decision to extend the nomination to ll October l995. His public announcement of this and the publication in *The Chronicle* on 7 October l995 that "notice is hereby given in terms of the Urban Councils Act as read with the Presidential Powers (Temporary Measures) Regulations" was not correct in terms of those particular legislative enactments. The third respondent's authority came from Part IV of the Urban Councils Act [*Chapter 214*] and the Presidential Powers Regulations l995. He acted *ultra vires,* that is beyond the powers granted to him. The first respondent did state that around 4.30 pm he received a telephone call from the third respondent, that he ratified the third respondent's action and promised to issue the appropriate directions. Neither Part IV of the Urban Councils Act [*Chapter 214*], nor the Presidential Powers Regulations l995 gave the first respondent either the authority or the power to ratify an unlawful act of the third respondent. Also, Annexure A, dated ll October l995, to the third respondent's affidavit does not state that nomination day of 5 October l995, appointed by the third respondent, was being extended to the ll October l995. In it, the Acting Minister purports to give ll October l995 as the nomination day in terms of s 6(3) of the Presidential Powers Regulations l995. The written directions that the Minister was allowed to give was for the purpose of "facilitating and expediting" the holding of an election. It cannot be said that an election was being facilitated and expedited when mandatory provisions of



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Part IV of the Urban Councils Act [*Chapter 214*] were being violated by the third respondent. What the President envisaged by making s 6(3) was that the Minister would not negate Part IV of the Urban Councils Act [*Chapter 214*] which contemplated a nomination day in terms of s 39 being appointed and not a proliferation of nomination days or an extension of a nomination day for the election of a mayor or, for that matter, councillors.

The third respondent justified his action by asserting that the first applicant was not prejudiced by his unlawful extension of the nomination day and that he made a public announcement about this. Surely acting outside the law is itself prejudicial. The law required the third respondent at 4 pm to reject nominations that did not comply with those provisions of Part IV of the Urban Councils Act [*Chapter 214*] that were applicable to that election and, at the close of the period of the nomination, to treat the remaining vacancy as a special vacancy. It is under those circumstances that the third respondent's conduct has to be scrutinised.

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In the case of Harare, there was no notice published at all in a newspaper for the election of the mayor of Harare. Section 6 of the Presidential Powers Regulations l995 made specific provision that an election of mayors shall be held on a date fixed by the Minister and that such election was subject to those Regulations and to written directions given by the Minister only for the purpose of facilitating and expediting the holding of such election. Those Regulations provided for a separate election for the office of mayor. Even then, no written directions were given by the Minister about the notice of election and of nomination day and about newspaper publication in terms of s 39 pertaining to the election of the mayor. In Annexure A to the opposing affidavit of the Deputy Town Clerk on behalf of the second respondent, the written direction of the Acting Minister merely gives the nomination day and does not indicate that publication in a newspaper was not to be carried out by him.

It would appear that s 39 of the Urban Councils Act [*Chapter 214*], as read with the Presidential Powers Regulations l995 was something that escaped the Acting Town Clerk of Harare.

In the submissions made on behalf of the second respondent, reliance was placed on s 53*(b)* of the Urban Councils Act [*Chapter 214*], which provides:

> "An election shall not be declared invalid or set aside by any court by reason only of-
>
> ...



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> *(b)* any mistake or non-compliance with the provisions of this Act if it appears to the court that the election was conducted substantially in accordance with the principles laid down in this Act and that such mistake or non-compliance is not likely to have affected the result of the election".

It would appear the "mistake or non-compliance" as it relates to the mayoral elections in Harare. Gweru and Bulawayo clearly concerns the provisions of ss 39, 40, 43 and 54 of the Urban Councils Act [*Chapter 214*] as read with the Presidential Powers Regulations l995.

In *Woodward v Sarsons* (l875) LR 10 CP 735; [1874-80] All ER Rep 262 at 266 Lord Coleridge CJ said at 266:

> " ... the true statement is that an election is to be declared void ... if it is so conducted that the tribunal which is asked to avoid it is satisfied, as a matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting laws."

In *Morgan v Simpson* [l974] 3 All ER 722(CA) at 725, 726 and 728, when considering s 37*(l)* of the Representation of the People Act, Lord Denning MR observed:

> "That section is expressed in the negative. It says when an election is not to be declared invalid ...
>
> I think that the section should be transformed so as to read positively ... I have come to this conclusion from the history of the law as to elections...
>
> Then in 1872 Parliament passed the Ballot Act 1872. It revolutionised the system of voting at elections. It provided for voting by secret ballot. It prescribed rules and set out forms of ballot papers. It contained a provision as to non-compliance with the rules...

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A little later, the Act was considered by Grove J in l874 in the Hackney Case, *Gill v Read and Holmes* (1874) 2 O'M & H 77. In that case there were 19 polling stations, but two were closed all day, and three were only open part of the day. The result was 5000 persons (out of 41 000) were unable to vote. Grove J held (at 85) that the election was not conducted in accordance with the principles laid down in the body of the Act' and was therefore void.



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He said that the object of the provision was this:

> ... an election is not to be upset for an informality or for a triviality, it is not to be upset because the clerk of one of the polling stations was five minutes too late, or because some of the polling papers were not delivered in a proper manner ... The objection must be something substantial ...'

Collating all these cases together, I suggest that the law can be stated in these propositions: *(l)* If the election was conducted so badly that it was not substantially in accordance with the laws as to elections, the election is vitiated, irrespective of whether the result was affected, or not. That is shown by the Hackney Case ... (2) If the election was so conducted that it was substantially in accordance with the laws as to elections, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the result of the election ... (3) But, even though the election was conducted substantially in accordance with the laws as to elections, nevertheless if there was a breach of the rules or a mistake at the polls - and it did affect the result - then the election is vitiated".

It follows that in relation to s 53*(b)* of the Urban Councils Act [*Chapter 214*], to couch it in the positive, it would have to read as follows:

"An election shall be declared invalid or set aside by any court by reason only of - ... *(b)* any mistake or non-compliance with the provisions of this Act if it appears to the court that the election was not conducted substantially in accordance with the principles laid down in the Act and that such mistake or non-compliance is likely to have affected the result of the election".

Further, in s 39; in s 40*(l)* as read with s 8(2) of the Presidential Powers Regulations l995; in s 40(4), (5) and (6); in s 43 and in s 54(2), as read with s 3(3) of the Presidential Powers Regulations l995, the word "shall" was used. In *Liverpool Bank v Turner* (l861) 30 LJ Ch 379 Lord Campbell said:

"No universal rule can be laid down as to whether a mandatory enactment shall be considered as directory only or obligatory with an implied nullification of disobedience. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed".



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In *Nkisimane and Ors v Santam Insurance Co Ltd* l978 (2) SA 430 (A) Trollip JA at 433-434 proffered the following:

"Preliminarily I should say that statutory requirements are often categorized as peremptory' or directory'. They are well-known, concise and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them, (the former requiring exact compliance and the latter substantial compliance) now seems to have become blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non-or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirements in particular (see the remarks of van den

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Heever J in *Lion Match Co Ltd v Wessels* l946 OPD 376 at 380). Thus, on the one hand, a statutory requirement construed as peremptory usually still needs exact compliance for it to have the stipulated legal consequences and any purported compliance falling short of that is a nullity. (See the authorities quoted in *Shalala v Klerksdorp Town Council and Another* l968 *(l)* SA 582 (T) at 587A-C). On the other hand, compliance with a directory statutory requirement, although desirable, may sometimes not be necessary at all, and non-or defective compliance therewith may not have any legal consequences (see, for example, *Sutter v Scheepers* l932 AD 165). In between these two kinds of statutory requirements it seems that there may now be another kind which, while it is regarded as peremptory, nevertheless only requires substantial compliance in order to be legally effective (see *JEM Motors Ltd v Boutle & Anor* l961 (2) SA 320 (N) at 327 *in fine*-328B and *Shalala's* case *supra* at 587F-588H, and *cf Maharaj & Ors v Rampersad* l964 (4) SA 638 (A) at 646C-E). It is unnecessary to say anything about the correctness or otherwise of this trend in such decisions. Then, of course, there is also the common kind of directory requirement which need only be substantially complied with to have legal effect (see, for example, *Rondalie Versekeringskorparasie Bpk v Lemmer* l966 (2) SA 254 (A) at 257H-258H)."

Bearing in mind the foregoing observations and propositions I turn now to consider our relevant legislative provisions. Their purpose was clearly spelled out in the Presidential Powers Regulations l995, as read with Part IV of the Urban Councils Act [*Chapter 214*], which was to postpone the



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August l995 elections and to make provision for the holding of general council elections as soon as possible with an extended franchise and direct election of mayors in accordance with those Regulations as read with Part IV. Section 39 of the Urban Councils Act [*Chapter 214*] was enacted for the benefit of the general public so that they would get to know about the date of the election for mayors and councillors, as well as the nomination day for those elections. This required publication in a newspaper as well as posting of a notice at the council office within the prescribed time limits. The notification of the election date and the appointment of a nomination day by the returning officer by publication in a newspaper have to be regarded as being peremptory and so exact compliance, as far as publication was concerned, was required, in the sense that non-publication in a newspaper would mean that a nomination day had not been appointed by the returning officer as mandated by s 39. The public announcement and publication in a newspaper are fundamental to the whole electoral process. The newspaper publication is the way the appointed nomination day is made known and permits aspiring candidates sufficient time to file their nomination papers by the close of the period set for nominations. Unless this was complied with by the returning officer there is no way an election for mayors and councillors could be held.

Again the returning officer was required to reject the nomination of any candidate if he was satisfied that that person was not qualified, or the nomination did not comply with the requirements as far as completion of the prescribed nomination papers were concerned. This provision was also peremptory in the sense that a fatally defective prescribed nomination paper must be rejected by the returning officer. Non-compliance would mean a valid election could not be held.

Also, if at the close of the period for nominations there were no candidates or the number of persons who had become candidates were less than the number of councillors, the returning officer must treat the remaining vacancies as if they were special vacancies. The returning

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officer cannot conjure up candidates once there are none at the close of the period for nominations. This provision was again peremptory, in the sense that the legislation contemplated special vacancies occurring and made specific provision for by-elections.

In *Maharaj and Ors v Rampersad supra*, at 646 van Winsen AJA said:

> "The enquiry, I suggest, is not so much whether there has been exact' adequate' or substantial' compliance with this injunction, but rather





> whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that, even though the position is not identical with what ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question whether this object has been achieved are of importance".

The object was clearly to conduct mayoral elections in Harare, Bulawayo and Gweru in accordance with the provisions of the Presidential Powers Regulations l995 as read with Part IV of the Urban Councils Act [*Chapter 214*]. The position was that a so-called "election" was held in Harare and Bulawayo for the office of mayor. Those elections ought to have been held in accordance with the laws governing elections. The enquiry would have disclosed that there had been absolutely zero compliance with the above-quoted peremptory provisions of the Presidential Powers Regulations l995 as read with Part IV of the Urban Councils Act [*Chapter 214*].

There was a reference to s 262 of the Urban Councils Act [*Chapter 214*] and to s 51 of SI 210 of l987, whereby the Minister was empowered to rectify matters. Those provisions, in my view, do not assist the second, third, fifth and seventh respondents, as there was nothing done by the Minister to rectify matters, other than Annexures "A" to the two opposing affidavits filed by the second and third respondents, previously alluded to by me in this judgment. In any event, the first respondent could not have validated the so-called "elections" in those two cities.

Coming to the election of the mayor in Gweru, Mr *de Bourbon* correctly conceded that there was substantial compliance. Section 53*(b)* of the Urban Councils Act [*Chapter 214*] clearly covered that situation as it pertained to the number of days which, in my view, is completely different from an absence of any publication in a newspaper. The dates of the election were given in the newspaper and so was the nomination day appointed by the fourth respondent as the returning officer. This breach could clearly be regarded as a technical one. It gave an extra day to potential candidates. It did not deprive them of anything. I am satisfied that this mistake or non-compliance of s 39 is not sufficient reason for me to set aside that election for the mayor of the City of Gweru. It was conducted substantially in accordance with the principles laid down and such mistake or non-compliance was not



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likely to have affected the result of the election. I decline to set aside the general election for the mayor of the City of Gweru.

With regard to the election of the mayor of the City of Harare, s 39 was not complied with at all. The fourth applicant as a registered voter in Harare challenged that election. It was not necessary, in my view, for her to have been a candidate in that election before she could seek relief from this court. The second, third and fourth respondents are charged with certain statutory duties under the Presidential Powers Regulations l995 as read with the Part IV of the Urban Councils Act [*Chapter 214*]. The so-called "election" for the mayor of the City of Harare was a nullity. It has to be set aside. The notice published in *The Herald* on 26 September l995 stated that general elections would be held to elect councillors. That notice did not mention the election of the mayor of the City of Harare and so did not cover that election which was a separate election in terms of the Presidential Powers Regulations l995. The second respondent did not appoint a nomination day for the election of the mayor of the City of Harare which was published in the newspaper. In the light of this, there could not have been an election for the mayor of the City of Harare. This is akin to what Lord Denning MR postulated "If the election had been conducted so badly that it is not substantially in accordance with the laws as to elections", in such a case, "the election is vitiated, irrespective of whether the result was affected, or not".

The voters and ratepayers of the Municipality of Harare were done a disservice by the Town Clerk of Harare who is a professional person, having been in that position for some considerable period of time. The fifth and sixth respondents were led to believe by him that they were participating in "general election for the mayor of the City of Harare". The Town Clerk of Harare even sought an extension from the first respondent for a "nomination day" which he had not appointed by publication in a newspaper. This action again by him was contrary to the law that governed such elections.

With regard to the election of the mayor of the City of Bulawayo, the second applicant as a registered candidate challenged it. The Town Clerk of Bulawayo was required to reject the nomination papers of the seventh respondent at the close of the period of nomination on 5 October l995. He could not "extend" the nomination day after 4 pm on 5 October l995, the date he had correctly, in terms of s 39, appointed as the nomination day, so he was obliged to act in terms of s 43 and treat it as a special vacancy. The purported "election" for the mayor of the City of Bulawayo was also a nullity. It has to be set aside. Once more the voters and ratepayers of the Municipality of





Bulawayo were done a disservice by the Town Clerk of Bulawayo. The seventh respondent was led to believe by him that the nomination day had been "extended" and that he could file his nomination papers by a "fictitious" extended date. His purported notice in *The Chronicle* on 7 October l995 was not in terms of the legislation that govern the conduct of elections.

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It becomes necessary for this court to say something about the costs expended so far (and that may have to be further spent) as it pertained to the general elections for the mayors of the Cities of Harare and Bulawayo. In addition there are the legal costs. I would not have hesitated for a moment, had the Town Clerk of Harare and the Town Clerk of Bulawayo been cited in their personal capacity, in making an order that they personally bear the legal costs. Since they are cited in their official capacity I am precluded from doing so. Applicants should consider this aspect carefully when instituting proceedings. These large costs that will have to be borne by the Municipalities of Harare and Bulawayo are as a result of the conduct of the Town Clerks of Harare and Bulawayo. This is a matter that the two city councils will have to ponder.

In the result it is ordered that:

1. the purported "general election" for the mayor of the City of Harare be and is hereby set aside and the returning officer shall fix a date for the election to the office of mayor for the City of Harare in terms of the Urban Councils Act [*Chapter 29:15*];

2. the purported "general election" for the mayor of the City of Bulawayo be and is hereby set aside and the returning officer shall fix a date for the election to the office of mayor for the City of Bulawayo in terms of the Urban Councils Act [*Chapter 29:15*];

3. the applicants' costs shall be paid jointly and severally by the first, second and third respondents, one paying the others to be absolved; and

4. the application against the fourth and eight respondents be dismissed with costs, which costs shall be paid by the first, second and third applicants, one paying the others to be absolved.

*Scanlen & Holderness*, applicant's legal practitioners

*Office of the Attorney General*, first, ninth and tenth respondent's legal practitioners



## COX v CHIEF IMMIGRATION OFFICER & ANOR 1996 (1) ZLR 500 (HC)

**Court** **High Court, Harare**

Gillespie J

Chamber application

10, 11 & 12 April & 8 May 1996 Judgment No. HH-56-96

### Flynote

Immigration - detention of person suspected of committing offence under Immigration Act [Chapter 4:02] - warrant of detention under s 8(1) - purpose and period of validity of warrant - remand - effect on warrant placing detained person on remand and admitting him to bail

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## Headnote

A warrant issued in terms of s 8(1) of the Immigration Act [*Chapter 4:02*] is issued for the sole purpose of detaining a person whilst enquiries are pursued into the person's identity antecedents, nationality and immigration status. These factors having been established, the purpose of the detention has been fulfilled and there is no further justification for confined detention under the warranty.

Where a person detained under such a warrant is placed on remand he become subject to the protection of the courts and the validity of the warrant ceases. In particular, a person so detained, and placed on remand and admitted to bail, may not be further detained on the validity of the warrant.

In any event, the maximum period of validity of the warrant is fourteen days.

Cases cited:

*Barrows & Anor v Min of Home Affairs & Ors* 1995 (2) ZLR 139 (H)

*Bull v A-G & Anor* 1986 (1) ZLR 117 (S)

*Holden v Min of the Interior* 1952 (1) SA 98 (T)

*Philipstown Divisional Council v du Toit* 1964 (4) SA 796 (C)

Statutes referred to:



Constitution of Zimbabwe 1980, s 18

Immigration Act [*Chapter 4:02*], ss 8, 10 and 14

Immigration Regulations 1979 (RGN 373/1979), s 47

*A J Dyke*, for the applicant

Miss *B Machira*, for the respondent

## Judgment

**Gillespie J:** On 25 March 1996, the applicant was arrested by an immigration officer by virtue of powers given in terms of s 8 of the Immigration Act [*Chapter 4:02*], and was detained initially in police cells. Thereafter, because of his impaired health, he was admitted to the Parirenyatwa Hospital where he was kept under guard. On 4 April he was taken before a magistrate in order to be placed on remand on a charge involving allegations that he had entered or remained in the country in contravention of the provisions of the Immigration Act. Bail was granted, duly paid and a warrant of liberation issued by the magistrate. Despite this judicial intervention, the applicant was taken into custody at the Harare Central Remand and Holding Centre.

On 9 April in the late afternoon, this application came before me in chambers on a certificate of

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urgency. Mr *Dyke*, presenting the application, advised me that there had been no service upon the Director of the Civil Division although service had been effected upon the respondents, a copy of the application having been handed to a receptionist at the offices of each of the respondents approximately an hour before the appearance in chambers. The form of the relief prayed was a provisional order allowing the immediate effective release of the of the applicant from custody and an interdict against further interference with his liberty, together with an order that the respondents show cause why certain final relief, including a restraint from any further interference with his liberty pending the conclusion of the prosecution, should not be granted. The papers showed a *prima facie* cause for the release of the applicant from custody. This cause arises from the following.

The enactment under which the immigration officer may effect the arrest and detention of a person provides the following power:

> "8.(1) Subject to the provisions of section *nine*, an immigration officer may arrest any person whom he suspects on reasonable grounds to have entered or to be in Zimbabwe in contravention of the provisions of this Act and may detain such person for such reasonable period, not exceeding fourteen 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 to be noted from this provision that the power to detain is subject to a maximum period of detention of 14 days. In no circumstance, then, could a detention under a warrant issued in terms of this law exceed that maximum duration. Assuming that the basis for the continued detention of the applicant was the warrant of 25 March then that ground would provide no justification for the continued incarceration of the applicant after 8 April.

Despite the apparent validity of the cause of action I did not find myself persuaded to act in the absence of representation for the respondents. It appeared to me that insufficient time had been given for the respondents to contact and instruct the Director of the Civil Division and to secure their representation. It was also entirely possible that some other act might have been performed which would have clothed the detention of the applicant with validity. I therefore directed that I would hear submissions from both parties the following morning at 10.00 am and instructed the registrar and the applicant's attorneys to ensure that this direction was communicated to the Director of the Civil Division. I also demanded production of all warrants and orders issued or made concerning the liberty of the applicant.

Mr *Dyke* did not move the mandatory interdict *de libero homine exhibendo*. Had he done so, I would most likely have issued an order *ex parte* requiring the production of the applicant before me at a specified time and that the respondents show cause why he should not be released from detention, at the same time giving directions as to the service of the order. This would have been the appropriate relief to have claimed. See *Bull v Attorney-General & Anor* 1986 (1) ZLR 117 (S) at 118E-F and 124D-F. The directions I did give, however, probably had much the same effect as would have been the result of such an order.

On the following morning the officer appearing for the Director of the Civil Division had still not

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been given sufficient warning to permit the taking of instructions and accordingly I postponed the hearing until 2.00 pm and directed the presence of officers of both respondents at that time. In the afternoon there accordingly appeared before me Mr *Dyke* with his instructing attorney, for the applicant, and Miss *Machira* for the respondents, together with Superintendent Mutaramuswa of the Prison Service and Mr Chirume of the Department of Immigration.



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On appearance, it was submitted that the parties were in agreement that the applicant ought to be released but that there was certain debate between them as to the conditions upon which such release ought to be ordered. This made it evident to me that there was still insufficient thought given by the parties as to whether or not the detention were unlawful and to the consequences of a finding on that point. I therefore invited argument on the question of the legality of the detention despite the concurrence that it ought not to be continued.

Mr *Dyke*'s submissions were in summary as follows. The detention was unlawful because the period of fourteen days, being the maximum period of validity of a warrant in terms of s 8(1) of the Immigration Act, had expired prior to the making of the application. In any event, the purpose of detention under this law is, in terms, in order to enable certain investigation into the question whether or not the detained person is a prohibited person and for no other purpose. The detention ceased to be lawful, therefore, once the applicant was taken before a magistrate for remand on a charge of contravening the Act, since that approach to the courts presupposed the conclusion of the investigations required under s 8. In addition, said Mr *Dyke*, the submission of the matter to judicial process in any event removed the matter from the jurisdiction of the immigration officer and *ipso facto* brought about the termination of the detention under the immigration officer's warrant.

The response of Miss *Machira* was to concede the validity of each of these points. Before accepting this concession I have taken pains to ensure that it was made advisedly, on instructions from the officers of the respondents who were present, and that it is correct. I am satisfied on each of these points for the following reasons. The concessions having been made I questioned the representatives of the respondents, with the consent of all involved. Mr Chirume advised me that he and his department administered the Act on the basis that the procedure of taking a person, detained under s 8, before a magistrate for the purpose of placing him on remand for an offence allegedly disclosed under the Act, removed that person from the authority of his department. He assured me that in this case, he and his department had been unaware, before the bringing of this application, that the applicant had not been released immediately upon the magistrate's granting of bail. I believe Mr Chirume.

Superintendent Mutaramuswa, for his part, told me that the Prison Service of which he is an officer had always regarded the warrant of an immigration officer as valid and effective until cancelled by the officer by whom it had



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been issued. He drew attention to the fact that on the face of the warrant no term or period is expressed for its validity. The institutional view of the Prison Service, therefore, was that before effect could be given to the order of a magistrate, releasing on bail a person in the position of the applicant, the s 8 warrant had to be cancelled. Until that were to happen detention in terms of s 10 remained valid. In the face of the concession by Miss *Machira* and Mr Chirume, he requested that I give a judgment correcting this error and explaining the true situation. Superintendent Mutaramuswa's explanation, too, I accept.

It follows that it is clear to me that the concession by Miss *Machira* was both advised and on instruction. I wish, however, before I act upon it, to determine whether the concession is correct. Subsection (1) of s 8 of the Act, reproduced above, is unequivocal that detention under that provision is for a maximum of fourteen days. As a matter of administrative procedure a warrant issued under this enactment is in a standard form which merely directs an officer in charge of a prison or police cell to take the person affected by the warrant into custody in terms of s 10 of the Act. Section 10 of the Act provides as follows:

> "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 *eight* 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."

Since neither this provision nor the warrant itself refers to any period of validity of the warrant or of any detention under it, it is easy to see the source of the error into which the officers of the Prison Service have fallen. The correct position is that s 8(1) and s 10 must be read together and that the maximum period of validity of any warrant in connection with these provisions, whether or not it is imprinted as a term upon the warrant itself, is fourteen days. Since no other ground for holding the applicant was asserted, it follows that Mr *Dyke's* first submission was valid and that the continued detention of the applicant after the fourteenth day from his arrest was unlawful.

The second point raised for the applicant is equally valid. The provisions of the first subsection of s 8 are as pefectly clear as to the purpose of the detention as they are concerning its duration. The purpose is unequivocally in order to allow enquiries to be made as to whether or not the affected person is a prohibited person. The definition of prohibited person is as follows:



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> "prohibited person' means any person who, in terms of this Act, is or is deemed or declared to be a prohibited person'.

Among those deemed to be prohibited persons is:

> any person who has entered or remained in Zimbabwe in contravention of the provisions of this Act or a repealed Act, whether or not he has been prosecuted for such contravention."

(*Vide* s 14(1)*(j)*). It follows, therefore, that the purpose of detention under s 8(1) includes the making of investigations into the question whether a person has entered or remained in the

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country contrary to the provisions of the Act. The apparent conclusion to be reached, then, is that, once it has been determined by officers that a contravention has been disclosed sufficient to allow the object of the investigations to be placed on remand, the purpose of the detention has been fulfilled and no further justification may be relied upon for continued detention, even if the fourteen day maximum period has expired.

This conclusion is supported by the succeeding provisions of the Act. Subsection (2) of s 8 provides a further ground for detention which is set out below together with the more extended context of these provisions.

"(2) Subject to subsections (5) and (6), an immigration officer may-

*(a)* subject to subsection (3), remove or cause to be removed from Zimbabwe any prohibited person; and

*(b)* pending completion of arrangements for the removal of a person in terms of paragraph *(a)* and such removal, subject to the provisions of section *nine*, detain that person.

(3) [provides for the means of effecting deportation]

(4) Whenever-

*(a)* [provides for the giving of a notice in writing to a person who is refused leave to enter the country or informed that he is prohibited]

*(b)* any person is arrested or detained in terms of subsection (1)



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or (2), he shall be informed forthwith of the reason for his arrest or detention, as the case may be.

(5) [provides for certain exemptions from detention or removal in terms of subsection (2)]

(6) [provides for an opportunity to make representations or to appeal prior to removal in terms of subsection (2)]

9 (1) Subject to the provisions of subsection (2), a person may be detained in terms of section *eight* in a prison, police cell or other convenient place.

(2) Subject to the provisions of subsection (3) and to such other conditions as he may fix, the Minister may permit a person detained in terms of subsection (1), with or without sureties, to enter into a bond for his release in an amount approved by the Minister and may require such person to deposit such sum as he may fix to satisfy any judgment which may be given on the bond.

(3) [provides for conditions of a bond]

(4) Upon any breach of any condition of a bond entered into in terms of subsection (2) any magistrates court may, on the application of the Minister, give judgment against the person referred to in that subsection or his sureties in accordance with the provisions of the bond, and such person may be arrested and detained in a prison, police cell or other convenient place until any inquiries have been completed or, if he is found to be a prohibited person, until he is removed from Zimbabwe."

The conclusions to be drawn from a scrutiny of these provisions are, in my judgment, these. First, there are two different species of interference with liberty provided for. One is the arrest and detention under subs (1) for the purpose of making enquiries as adumbrated above. The

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second is a detention under subs (2) for the purposes of removing a prohibited person from the country. In respect of each of these two different grounds of interference a person is required to give reasons and may be entitled to release on bond. They are each separate and distinct causes. Arrest and detention on the grounds set out in subs (1) is not, and does not automatically convert itself into, detention in terms of subs (2). This must be the case because there are



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entirely different grounds for each interference: the first is justified by the need to make enquiries, the second by the exigencies of deportation, it being known that a person is prohibited. Further, the first ground is expressed to justify detention for no longer than fourteen days, there is nothing which permits of the extension of that period. When the fourteen days have elapsed, the detention under subs (1) must cease.

This strict and literal interpretation of the provisions of s 8 is entirely in accordance with the approach in similar circumstances of Adam J in the matter *Barrows & Anor v Minister of Home Affairs & Ors* 1995 (2) ZLR 139 (H). This approach is demonstrated at p 145 of the judgment. I consider the meaning of the legislation to be clear and unambiguous. Even if I felt otherwise I would still adopt the meaning which I have found to be the correct one since I am in any event satisfied that if there were any ambiguity a presumption *in favorem libertatis* would properly be resorted to.

It follows that if a person who has been dealt with under subs (1) is found to be prohibited and is desired to be deported then an administrative act must intervene if he is to be detained, beyond the fourteen days justified by his original arrest, in order to have him removed from the country. This act must at least take the form of advice to himself that he is deemed to be prohibited in terms of s 14, together with the giving of a notice to prohibited persons in terms of s 8(4)*(a)* giving reasons as prescribed in para *(b)* of that subsection, and that he is to be removed from Zimbabwe and detained pending that removal. The distinction between these two grounds is exemplified by the provisions of s 9(4) which allows the arrest and detention of a person who has defaulted on the conditions of a bond "until enquiries have been completed or, if he is found to be a prohibited person, until he is removed from Zimbabwe." This provision, as distinct from s 8(1), does not put a period to the time for making enquiries and allows continued detention until removal from Zimbabwe.

Mr *Dyke*'s third submission was that the bringing before a magistrate of any person itself must terminate any detention under s 8(1). The following ought to be apparent from what has gone before. Even once a person has been arrested in terms of the provision under examination there remain many decisions to be taken, each involving the fair exercise of a discretion consequent upon an immigration officer forming the view that a person arrested in terms of s 8(1) is deemed to be prohibited. It may or may not be determined that he is deemed to be prohibited. If it is so determined then it may or may not be considered desirable as soon as possible to remove him

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from the country. For instance: it may be considered appropriate to exempt the person in terms of s 16; or it may be considered proper to obtain a conviction against that person if the grounds for deeming him to be prohibited relate to his suspected entry into or presence in Zimbabwe in contravention of the Act. Even if it is considered proper to remove him, then still it is to be determined whether or not he should be detained in terms of s 8(1); or released on bond in terms of s 9; or allowed to remain at liberty on conditions set out in a notice to prohibited persons issued in terms of s 8(1). The need for fairness, honesty and reasonableness in the exercise of a discretion in all these matters was emphasised by Adam J in *Barrows* (*supra*) at 164G, where the learned judge said:

> "The grant of a discretion is one thing but its exercise requires an official to act in a correct and *bona fide* manner."

That being the case, once a decision is made - as it was, and properly so, in this instance - to seek the decision of a court as to whether an offence had been committed, and to place the applicant on remand for that purpose, then it would seem fair and just to conclude that the immigration officer retained no further discretion on the subject of whether or not to deport, or to detain pending deportation, or to release on bond or conditions, the person who has been subjected to judicial process.

I would hesitate, in the absence of full argument on the point, to hold the official to be *functus officio*. It is true that a decision, one that can be said to be favourable to the individual, has been made and that authority, for instance *Holden v Minister of the Interior* 1952 (1) SA 98 (T), is to the effect that such decisions once made cannot be reversed. On the other hand, perhaps it cannot be said that this is a final decision since it may be that a deportation could follow even where there is no conviction. It is only final decisions which, on such authority as *Philipstown Division Council v du Toit* 1964 (4) SA 796 (C), cannot be reversed. I nevertheless feel confident that one can, for the reasons that follow, place great importance on the making of the decision to refer the matter to judicial determination.

Inasmuch as the Constitution of Zimbabwe makes provision in s 18 of the Declaration of Rights to secure for the individual the protection of law it cannot be immaterial to the question of the detention of a person in terms the Immigration Act that it has been decided to prosecute him. The very act of the State in bringing such a person before a court of law is a submission to the rule of law in order to permit of the protection given by subsections (2)



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and (9) of s 18 of the Declaration of Rights, which respectively entitle every person to a fair hearing within a reasonable time by an independent and impartial court in the determination of his guilt of a criminal offence or the existence or extent of his civil rights or obligations. In the case of a court seized of a complaint of a criminal offence laid to the charge of the person before it, the court is empowered not only to determine guilt or innocence on the charge but also the question of the liberty of the individual pending the court's verdict. Where, therefore, the

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State elects to subject to judicial process a person arrested in terms of s 8(1) of the Immigration Act, and to that end causes him to be brought before a magistrate and placed on remand, it is making a decision which is fundamentally inconsistent with the alternative course of action - namely, the detention of that person by administrative act pending his removal from Zimbabwe. Should it be dissatisfied with a decision by a magistrate to release such a person on bail, its remedy lies in the relevant judicial processes. For as long as those procedures are pending the State may not resort, by way of a stratagem, to a power to detain which is applicable only to the situation of a person whom it has already been decided to deport and which has no operation where the writ of the court has been extended.

This conclusion is confirmed, if further confirmation is needed, by the provisions of the Immigration Regulations 1979 (RGN 373 of 1979). These regulations provide by s 47 that if a person who is being detained in terms of s 8(1) of the Act is arrested on a criminal charge, he shall be handed over to the custody of an immigration officer at the conclusion of proceedings or at the expiration of a period of imprisonment imposed upon him and thereafter be detained subject to the provisions of the Act. This fortifies the view not only that a distinction is properly to be drawn between the court proceedings and the administrative acts but also that the latter must abide the former. The provision in its terms by necessary implication acknowledges that the jurisdiction of the court holds sway from the time of the arrest (or in cases such as this, the arraignment) on a criminal charge until the verdict is handed down or sentence served.

I therefore hold that the concessions made by the representatives of the State in this case were valid and properly made. I find that where a person has been arrested in terms of s 8(1) of the Immigration Act, the validity of the warrant for his detention may in no circumstances exceed a maximum period of fourteen days and will expire even before that period and as soon as the prescribed enquiries have been made or the person affected has been brought before a court and placed on remand. It follows that the detention of the



applicant has been unlawful from the time that he was ordered by the magistrate to be released on bail. For that reason I was satisfied at the time of the hearing that I could properly order his immediate release.

In addition to release, however, the Mr *Dyke* moved an order restraining the respondents from any further interference with the applicant in any way. I was by no means assured that such an order would be proper or necessary. I accordingly enquired of Miss *Machira* whether the respondent intended to interfere in any way with the applicant. I received her assurance, given on the instructions of Mr Chirume, that no interference was intended and that the only dealing the first respondent envisaged with the applicant was the issue of a temporary permit such as would regularize his presence in Zimbabwe pending the prosecution. Mr *Dyke* conceded in the circumstances that such action would be perfectly proper and that no interdict would be required. This issue accordingly fell away.

Miss *Machira* acknowledged in addition that since the continued detention of the applicant had been wrongful and that recourse to this court had been necessary in order to obtain relief, the

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applicant was entitled to its costs of suit. The real cause of the breach of the applicant's rights, however, was not any perverse conduct on the part of the first respondent. It was the fault of the second respondent. This fault was, moreover, aggravated by the fact that the individual's liberty had been seriously infringed and that an order of court had been ignored. Mr *Dyke* submitted, and I agree, that costs would properly be awarded on the higher scale.

At the conclusion of proceedings in Chambers on 10 April I made the following order which, save in respect of the scale upon which costs were awarded, met the consent of both parties:

1. that the applicant be released from custody forthwith.
2. that the first respondent will issue to the applicant a temporary permit regularizing his presence in Zimbabwe pending the completion of proceedings against him.
3. that the second respondent will pay the costs of this application on the attorney and client scale.

Thereafter, on 12 April I received an urgent message through my clerk to the effect that my order was being flouted by the first respondent. I directed that



the complaint be placed on affidavit together with a certificate of urgency supplementing the original papers and that this be served on the first respondent and the matter heard at 2.15 pm the same day.

At that time there appeared Mr De Klerk - who previously had instructed Mr *Dyke* - together with the applicant himself who had been released, and also Miss *Machira* for the respondent together with a Mr Shoniwa of the Department of Immigration. This organ of State was the only respondent on this occasion, no further complaint having been made against the Prison Service. It transpired that the cause of the complaint was that the respondent wished to issue to the applicant a document in Form IF20. This is a form which is prescribed, by s 48 of RGN 373 of 1979, as the notice to be handed to prohibited persons in terms of s 8(4)*(a)* of the Act - the notice informing them that they are prohibited persons. The respondent wished also to issue to the applicant Form IF 9. This is a document in terms of s 49 of the regulations and is described as a temporary permit permitting the release on conditions of a prohibited person pending his removal from Zimbabwe.

These actions, it was submitted by Mr De Klerk, were in contravention of the undertaking given by Mr Chirume and Miss *Machira* in the previous proceedings and their execution would constitute a contempt of my order. The reason given for this submission was that these steps involved a further administrative act, the decision to notify the applicant, despite the fact that the prosecution was not complete, of his being prohibited, and the imposition of various conditions upon his continued presence in Zimbabwe. Miss *Machira*, having had an opportunity to satisfy herself that the documents in question could only be issued to a prohibited person and that they did seek to apply certain conditions to the applicant's presence, conceded that they

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contravened the undertaking given.

This concession is not necessarily to say that in the absence of the undertaking given the issue of these documents would have contravened the order, nor that the documents could not properly be issued in a case where a person arrested in terms of s 8(1) was taken before a magistrate and released on bail. Once again, therefore with the consent of all concerned, I questioned the respondent's officer, on this occasion Mr Shoniwa. Mr Shoniwa found himself in somewhat of a quandary. He manifestly wished to act in accordance with the undertakings given and in accordance with my order and had no idea that he might have been trespassing. Indeed my order had specified the issue of a "temporary permit" which in the language of the respondent actually



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means form IF 9. These words had not been used by me in a specific sense but rather generically, referring to a permit of temporary effect which would allow the applicant to remain in the country lawfully pending the determination of the criminal charges against him. Mr Shoniwa in addition perceived that the issue of forms IF 20 and IF 9 involved a declaration of the applicant as a prohibited person and could have the effect of prejudging any decision of the magistrate on the criminal charges or any decision on his department as to whether or not to deport. He wished to avoid any such action not only because he acknowledged that to be contrary to the undertaking given but also because he properly considered it inherently inappropriate.

Faced with this dilemma, he proposed the issue of a permit popularly known as a 30 day restriction and more formally called a provisional restriction permit. This is the permit referred to in s 44 of the Regulations and which may be given to person arriving in Zimbabwe where it is suspected that they might be prohibited persons. He undertook that the only condition to be attached to that permit would be a condition of its temporary validity, and that it would be extended to remain in force until the conclusion of criminal proceedings. Mr De Klerk having no objection to this course, it appeared that once again confrontation had been averted by mature discussion.

I was satisfied that the notice proposed could properly be issued, that to do so would not infringe any rights of the applicant nor hinder the respondent in the execution of its duties. I was also satisfied, despite Mr De Klerk's claim for costs of these proceedings, that neither party was predominantly to blame for the proceedings and that each could have avoided litigation by earlier resort to the civilised debate which attended the issue in chambers. I accordingly made by consent - save in respect of costs which remained a matter of dispute - the order which I set out below.

I wish to make it clear, however, that this order is not to be taken as a precedent suggesting that the issue of forms IF 20 and IF 9 is necessarily wrongful in cases where a person has been arrested under s 8(1) of the Act; has been placed on remand on charges, the gravamen of which would render him a prohibited immigrant, and admitted to bail by a magistrate; and is awaiting the determination of those proceedings. This order is given solely on the strength of a

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previous undertaking not to interfere with the applicant and an acknowledgement by all parties that the issue of the forms in this case would be inconsistent with that undertaking.

It is ordered:



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1. that a provisional restriction permit be issued by the respondent to the applicant.
2. that the only condition to be attached to the permit shall be a condition of its temporary validity deemed fit by the respondent.
3. that the permit shall not be withdrawn or fail to be renewed prior to the conclusion of the prosecution of the applicant.
4. that each party shall pay its own costs of proceedings on 12 April 1996.

*Atherstone and Cook*, applicant's legal practitioners

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



## CROPLINK (PVT) LTD v JESSE & ORS 1996 (1) ZLR 514 (HC)

**Court** **High Court, Harare**

Smith J

Civil action

19 April & 8 May 1996 Judgment No. HH-56a-96

### Flynote

Contract - arbitration clause - claim arising out of contract - whether matter had to be referred for arbitration where one party is attacking validity of contract on the basis of false reprentations by other party

### Headnote

There was a clause in a contract between the plaintiff and the defendants obliging the referral to an arbitrator of disputes arising under the agreement as to the interpretation of the terms and conditions of the agreement or the extent to which a party may be in breach of any term, condition or undertaking. The plaintiff sued the three defendants for damages, alleging that two of the defendants had induced it to enter into the contract by using a fraudulent misrepresentation. One of the defendants filed a special plea in terms of s 6 of the Arbitration Act [*Chapter 7:02*] seeking an order that the action be stayed pending the determination of the dispute by arbitration.

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Held, that as the plaintiff was attacking the validity of the contract itself on the basis of the false representation and was not alleging any breach of any term or condition of, or undertaking made in terms of or under, the agreement, the dispute did not fall within the terms of the arbitration clause.

Held, further, that even if the dispute fell within the terms of the arbitration clause, as two of the defendants were not parties to the agreement, the action against those parties could not, without their consent, be referred to arbitration in terms of the agreement.

Cases cited:



*Allied Mineral Development Corp (Pty) Ltd v Gemsbok Vlei (Edms) Bpk* 1968 (1) SA 7 (C)

*Heyman & Anor v Darwins Ltd* [1942] 1 All ER 337 (HL)

*Independence Mining (Pvt) Ltd v Fawcett Security Ops (Pvt) Ltd* 1991 (1) ZLR 268 (H)

*Scriven Bros v Rhodesia Hides & Produce Co Ltd & Ors* 1943 AD 393

*F Girach*, for the plaintiff

First defendant in person

No appearance for the second and third defendants

## Judgment

**Smith J:** The plaintiff (hereinafter referred to as "Croplink") has instituted an action against the three defendants claiming damages in the sum of $400 000. Croplink alleges that the first and second defendants fraudulently induced it to enter into a contract on 7 March l994 with a person or company called D I Jefferies in terms of which Jefferies would supply it with 400 tonnes of soya beans. On 7 March l994 Croplink gave the second defendant a cheque for $400 000, being an advance payment purportedly due in terms of the contract referred to above. The cheque was made out in favour of the third defendant. Croplink wants its money back.

The first defendant (hereinafter referred to as "Jesse") filed a special plea in terms of s 6 of the Arbitration Act [*Chapter 7:02*] (hereinafter called "Chapter 7:02") seeking an order that the action be stayed pending determination of the dispute by arbitration. The contract in question contains a clause which provides as follows:

> "In the event of a dispute arising under this agreement, whether as to the interpretation of any of the terms and/or conditions of this agreement or as to the extent to which a party may be in breach of any term, condition or undertaking, such dispute shall be submitted to a single arbitrator".

Jesse applied for leave to file a supplementary affidavit in support of his special plea. Mr *Girach* objected on the grounds that the affidavit introduced contentious matters which were not relevant to the special plea. I agreed with his contentions and refused the application.

Jesse argued that the arbitration clause was wide enough to include questions of jurisdiction

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and related to any question arising out of or under the contract. Furthermore, if the matter were not referred to arbitration there would be a multiplicity of actions all arising from the agreement. The latter submission



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is based on the fact that he has instituted three actions against Croplink and other parties - cases Nos HC-1805-96, 2333-96 and 2334-96. The order sought by Jesse in his supplementary affidavit was to the effect that these three cases should also be referred to arbitration. Mr *Girach* argued that Croplink's claim was for damages arising out of a fraud perpetrated upon it. It did not seek to rely on the agreement in any respect and accordingly the terms of the agreement were not applicable.

In *Heyman & Anor v Darwins Ltd* [l942] l All ER 337 (HL) the House of Lords considered the case where a contract containing an arbitration clause had been repudiated. It was held that the dispute between the parties was a dispute within the arbitration clause and the appellant's action ought to be stayed and that where there has been a total breach of a contract by one party so as to relieve the other of its obligations under it, an arbitration clause, if its terms are wide enough, still remains effective. That was so even where the injured party had accepted the repudiation and, in such circumstances, either party could rely on the clause. At p 343 Viscount Simon LC said:

> "An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.
>
> If, however, the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged both parties from further performance, such differences should be regarded as differences which have arisen in respect of,' or with regard to,' or under' the contract, and an arbitration clause which uses these, or similar, expressions, should be construed accordingly. By the law of England (though not, as I understand, by the law of Scotland), such an arbitration clause would also confer authority to assess damages for breach, even though it does not confer upon the arbitral body express power to do so.



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> I do not agree that an arbitration clause expressed in such terms as above ceases to have any possible application merely because the contract has come to an end,' as, for example, by frustration. In such cases it is the performance of the contract that has come to an end."

Similar views were expressed by Lord Macmillan at p 345-6:

> "Where proceedings are instituted by one of the parties to a contract containing an arbitration clause and the other party, founding on the clause, applies for a stay, the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the

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arbitration clause. Then sometimes the question is raised whether the arbitration clause is still effective or whether something has happened to render it no longer operative. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration clause and the clause having been found to be still effective, there remains for the court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration.

Arbitration clauses in contracts vary widely in their language, for there is no limitation on the liberty of contracting parties to define as they please the matters which they desire to submit to arbitration. Sometimes the reference is confined to practical questions arising in the course of the execution of the contract; sometimes the most ample language is used so as to embrace any question which may arise between the parties in any way relating to the contract. Consequently, many of the reported cases are concerned with the interpretation of the scope of the terms of reference, for an arbitrator has jurisdiction only to determine such matters as, on a sound interpretation of the terms of reference, the parties have agreed to refer to him. In the ordinary case the ascertainment of the nature of the dispute and the interpretation of the terms of reference are matters of no special difficulty.

...

I may clear the ground by disposing of one or two simple cases. If it appears that the dispute is as to whether there has ever been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been as part of it an agreement to arbitrate; the greater includes the less. Further, a claim to set aside a contract on



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such grounds as fraud, duress, or essential error cannot be the subject matter of a reference under an arbitration clause in the contract sought to be set aside. Again, an admittedly binding contract containing a general arbitration clause may stipulate that in certain events the contract shall come to an end. If a question arises whether the contract has for any such reason come to an end, I can see no reason why the arbitrator should not decide that question. It is clear, too, that the parties to a contract may agree to bring it to an end to all intents and purposes and to treat it as if it had never existed. In such a case, if there be an arbitration clause in the contract, it perishes with the contract. If the parties substitute a new contract for the contract which they have abrogated, the arbitration clause in the abrogated contract cannot be invoked for the determination of questions under the new agreement."

At p 353 Lord Wright said:

"Further the appellants are not helped by the rule that, generally speaking, a dispute whether the contract ever existed, as contrasted with the question whether it has become ended, is not within the usual form of submission of differences arising out of the contract or the like, because, if there was never a contract, there could never be disputes arising out of it - *ex nihilo nihil fit*. It is all a question of the scope of the submission. Hence, if the question is whether the alleged contract was void for illegality, or, being voidable, was avoided because induced by fraud or misrepresentations, or on the ground of mistake, it depends on the terms of the submission whether the dispute falls within the arbitrator's jurisdiction".

In *Scriven Bros v Rhodesian Hides and Produce Co Ltd & Ors* l943 AD 393 the court considered an appeal from a decision of the High Court of Southern Rhodesia to stay an action claiming money due under a contract and rescission of the contract on the ground that the defendants had by conduct repudiated the contract which contained an arbitration clause in wide terms submitting "all the questions or differences whatsoever arising out of or in relation to the contract". On appeal it was contended that the action had been wrongly stayed on the grounds that the claim for rescission went to the root of the contract and that the defendants had made charges of fraud against the plaintiffs. The court applied the principles laid down in *Heyman*'s case, *supra*, and dismissed the appeal, holding that the dispute fell within the

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arbitration clause, inasmuch as even if the contract had been prematurely terminated by repudiation by one of the parties, no attack was made on its



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validity and the arbitration cause was still operative. The question whether the repudiation was justified or not was "a question or difference arising out of or in relation to" the contract.

It was held in *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet* (*Edms*) *Bpk* l968 *(l)* SA 7(C) that a dispute as to the validity of the agreement itself fell outside the ambit of the submission contained in its arbitration clause. At p 13 Corbett J (as he then was) said -

> "Of course, if the contract is in truth illegal and void, then the arbitration clause will generally itself be void with the result that, if the arbitrator's jurisdiction is founded solely upon this clause, such jurisdiction will disappear. But the mere assertion of illegality by one party does not make the contract illegal and void. On the other hand, where such an assertion is made by one party and does not appear to be wholly unfounded, this may in itself constitute good cause for refusing an application for a stay of action on the ground of the arbitration clause. One reason for this is that there is a chance that, if the matter proceeds to arbitration, the arbitrator may decide that the contract, including the arbitration clause, is illegal and void. Not only would the proceeding then be nugatory but the arbitrator would be deciding that the very arbitration clause which founded his jurisdiction never existed and therefore he never could have had any jurisdiction to deal with that matter'".

In *Independence Mining (Pvt) Ltd v Fawcett Security Operations (Pvt) Ltd* l99l (l) ZLR 268 (H) at 270 it was said:

> "The question of whether a dispute between parties to a contract fell within the arbitration clause is primarily a question of interpretation of the agreement and in particular the arbitration clause. Perhaps before one interprets the agreement one needs to identify what the dispute is about".

In this case Croplink alleges that it has suffered damages in the sum of $400 000 because of false representations made by Jesse and others which induced it to enter into a contract with one David Jefferies. It is attacking the validity of the contract itself. It is not alleging any breach of any term or condition of, or undertaking made in terms of or under, the agreement. That being the case, I consider that the dispute does not fall within the terms of the arbitration clause.

There is another ground on which I would dismiss the application, even if the



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dispute fell within the terms of the arbitration clause. In its declaration Croplink does not allege that the second and third defendants were a party to the agreement between Croplink and Jefferies. Indeed, it is not clear whether Jesse himself was a party to the agreement, using the name David Jefferies. In his plea Jesse says that the parties to the contract were Croplink and "the firm D I Jefferies of which the first defendant (ie Jesse) was sole proprietor or alternatively a partner". It seems strange that Jesse appears not to know whether D I Jefferies was a partnership or some other entity of which he was sole proprietor. Since Croplink has instituted

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the action against the second and third defendants as well as Jesse, the dispute between Croplink and the second and third defendants cannot, without their consent, be referred to arbitration in terms of the agreement, because the second and third defendants are not parties to the agreement. Therefore if the legal proceedings against Jesse were to be stayed, the legal proceedings against the other parties would continue. In terms of s 6*(l)* of Chapter 7:02 the court has a discretion as to whether proceedings should be stayed. It will stay the proceedings "if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission". I consider that the fact that there are two other parties to the proceedings is sufficient reason why the matter should not be so referred.

Jesse referred to the possibility of a multiplicity of actions arising as a result of other actions he has instituted which are "between the same parties and which emanate from the same facts and involve the same issues' - namely cases Nos. HC-1805-96, 2333-96 and 2334-96. Although he is the plaintiff in those actions and Croplink is a defendant, there are other defendants who are legal practitioners and who are not parties to this action. Moreover, the causes of action in those cases are not similar. They are based on defamation and wrongful and unlawful arrest. Accordingly, they could not be joined and dealt with at the same time as this case, even if I thought that there was merit in his application. Those factors might well militate against any application he might make for a joinder of actions.

The special plea is dismissed with costs.

*Winterton, Holmes & Hill*, plaintiff's legal practitioners



## S v CHINGODZA 1996 (1) ZLR 521 (HC)

**Court** **High Court, Harare**

Gillespie J

Criminal review

8 May 1996 Judgment No. HH-54-96

### Flynote

Criminal procedure (sentence) - statutory offences - Concealment of Birth Act [Chapter 9:04] - s 2 - imprisonment should not be imposed except in more serious cases - accused should not be punished as though the case were an unproven one of infanticide

### Headnote

At the basis of the relatively lenient treatment of young women who commit infanticide is the recognition that the offence is one which occurs at a time when the offender cannot be expected to act in a normal, rational and balanced manner. This recognition is properly extended to cases of concealment of birth and must lead to a lenient approach in sentencing. The maximum punishment for the offence is 5 years' imprisonment, which indicates that a fairly

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serious view should be taken of the offence. The aim of the enactment would appear to be two-fold. The first is the more technical approach to ensure proper registration of births and deaths. The second is to prevent the murder of infants by insisting on the reporting of their births and the punishment of any concealment. Nonetheless, where there was no concealment of the pregnancy, there can be no possible mischief related to a prior intention not to report the birth or to harm the infant and there can be no justification for stern treatment of the offender. Conversely, if the pregnancy and birth were attended by secrecy, that would be aggravating. But in none but the most serious of cases should a substantial effective term of imprisonment be imposed. The accused should not be sentenced on the basis that what is really being dealt with is an unproved case of infanticide. The proper approach to take, where there is no serious feature of aggravation, is to



suspend the whole sentence of imprisonment on conditions of community service.

Cases cited:

*S v Bikita* HH-422-86

*S v D* 1967 (2) SA 537 (N)

*S v Lazarus & Anor* HH-419-94

*S v Moyo* HH-80-94

*R v Williams* 1921 EDL 80

Statutes referred to:

Concealment of Birth Act [*Chapter 9:04*], s 2

## Judgment

**Gillespie J:** The accused was properly convicted, on her plea of guilty, of the offence of contravening s 2 of the Concealment of Birth Act [*Chapter 9:04*]. The sentence, however, is one which immediately struck me as manifestly excessive. It is a punishment of imprisonment with labour for 2 years, of which 1 year was suspended for 5 years on condition that the accused does not within that period commit any offence involving a contravention of s 2 of the Concealment of Births Act [*Chapter 9:04*] for which she is sentenced to imprisonment with labour without the option of a fine.

The difficulty to be faced if this sentence is interfered with, however, lies in the fact that the magistrate relied specifically upon a judgment of this Court in *S v Moyo* HH-80-94. In that case, Mtambanengwe J gave judgment castigating magistrates who sentence persons for this offence on the apparently unspoken premise that what is really being dealt with is an unproven infanticide. The learned judge found, for reasons which are, with respect, unassailable, that the magistrate in that case had misdirected himself and sentenced the accused on the basis that he had convicted her of infanticide. He accordingly reduced the sentence of 3 years' imprisonment with labour, of which 18 months was suspended, to one of 2 years' imprisonment

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with 1 year suspended. He obtained the concurrence of Smith J to the alteration.

I must approach any alteration in this sentence with the diffidence and respect due to the authority of these learned judges. I have therefore carefully examined such precedents as there are relating to sentence for this offence. They are distressingly few. None, save *D* (*infra*) are reported involving sentence: all reported cases concern the question as to when a foetus can be considered a child for the purpose of the Act. No unreported judgments are



recorded in Birnie's Index nor in the Zimbabwe Law Index, save for *Moyo* (*supra*). For the two local decisions which I am able to cite, I am indebted to the personal index maintained by my brother Bartlett.

In *S v Lazarus & Anor* HH-419-84, Scott J reviewed the conviction of two sisters on a similar charge. Sentences of 4 and 5 years' imprisonment with labour, imposed respectively upon the young woman who gave birth and the older, under whose care the new-born infant was when seen to be dead, were set aside. The learned judge commented as follows:

> "It is very true when the magistrate states in his judgment that this type of offence is closely related to baby-dumping. All the same, the sentences of 4 years and 5 years are very much on the excessive side, especially the 5-year sentence, which is the maximum allowed by the Act.
>
> In decided cases age of the accused - *R* v *Williams* 1919 EDL 80, lack of previous conviction - *R* v *Matthews* 1943 CPD 8, the conditions under which the birth took place, the absence of violence to the child - *R* v *Williams* (*supra*), are all factors which have served to mitigate sentence.
>
> In *S v D* 1967 (2) SA 537 (N) 180 days' imprisonment was reduced to 3 months' imprisonment, all of which was suspended for 3 years on the usual conditions. And in *R v Williams* (*supra*) a fine of £25 or 5 months imprisonment was considered to be grossly excessive.
>
> The magistrate in this case allowed his judgment to be influenced by the fact that the offence is closely related to baby-dumping. But even in baby-dumping cases, depending on mitigating factors, an accused person may be sentenced to 2 years' imprisonment or less. I find myself shocked by the sentences passed. The two accused are first offenders aged 20 and 23, they have shown contrition by pleading guilty and none of the facts suggest there are aggravating circumstances."

The sentences were reduced and in each case there was imposed a sentence of imprisonment for 12 months, of which 3 months were suspended.

The case of *Williams* (*supra*) relied upon by Scott J was, unhappily for my own economy of research, inaccurately cited. It is in fact 1921 EDL 80. The very short judgment on review by Sampson J reads:

> "In this case which comes on review from the acting assistant magistrate



> for the district of East London, the accused, a young girl of 15 years of age, was sentenced to six months

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> imprisonment, with hard labour, for concealment of birth. The child was prematurely born. The accused was alone and in great pain. She says the child got mixed up with the after-birth, and later on she found it dead. There were no signs of external violence. I think the sentence a great deal too severe, and it will be altered to one of three weeks' imprisonment with hard labour."

I must say that my instincts are entirely with those of Sampson J. Of the other cases relied upon by Scott J, those of *Matthews* and *D*, more later.

In *S v Bikita* HH-422-86, Mfalila J altered on review the sentence of 10 months' imprisonment of which 5 months had been suspended. The offence committed by the accused was attended by the typical circumstances of the birth of a still-born child disposed of immediately after birth. The learned judge said:

> "The accused is a first offender, a young wife and mother of one child. She announced the fact of her pregnancy both to her husband and mother in law as soon as she became aware of it. It was therefore not as if she had planned from the beginning to conceal the pregnancy and later the birth. I think she was taken by surprise by the unexpected events. In addition she had spent 5 months in custody awaiting trial."

The sentence was altered to 5 months' imprisonment, all of which was suspended.

These few precedents, and in particular the need, which was perceived by both Mtambanengwe J in *Moyo* and Scott J in *Lazarus,* to draw the distinction between infanticide and concealment of birth, which it is rather surprising should escape magistrates, suggest to me that judges reviewing these matters have shown a common, and with respect entirely correct, tendency towards leniency in cases such as this. This tendency is exemplified by the following extract from the judgment of James J in *D* (*supra*) at 538C-H:

> "The accused is a girl of 18 years of age with no previous convictions, there was no evidence that the child was born alive, and the evidence shows that the body must have been abandoned in the lavatory within a comparatively short time after its birth, at a time when it is notorious that many mothers of children are under considerable physical and mental stress and are unable to act with the calm and balanced judgment which



> the circumstances require. For these reasons the reviewing judge raised a query with the magistrate asking whether the magistrate had considered suspending the whole of the sentence and intimated that the sentence caused him to feel a sense of shock. He suggested that a sentence of three months' imprisonment suspended on appropriate conditions would have been a proper sentence. The magistrate has replied to this query and stated that subsequent to this conviction he ascertained that his predecessors in office had been in the habit of imposing sentences of not more than 90 days upon first offenders for offences of this sort with suspension of the sentence in some instances. He, however, stated that he is satisfied that in the circumstances of this case the sentence was not too severe; but he nevertheless abided by the decision of this court.
>
> I, like the judge who first read the papers, find myself with a sense of shock over the sentence passed by the magistrate. None of the facts known to the court suggest there were any aggravating circumstances in this case and all the facts point to this being a case where justice should be tempered with mercy. In my judgment the conviction must be confirmed but the sentence should be altered to one of three months' imprisonment suspended for three years on condition that the accused does not contravene the provisions of s 113 (1) of Act 46 of 1935 during the period of suspension."

The points which strike me from this passage include the following. First and foremost, the recognition, which is at the basis of relatively lenient treatment of young women who commit

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infanticide, that the offence is one which occurs at a time when the offender cannot be expected to be acting in a normal, rational and balanced manner. This recognition is properly extended to cases of concealment of birth and must lead to precisely the lenient approach to sentencing espoused by James J. The modern idiom would no doubt refer, in its unhappily indelicate way, to the bodily, hormonal and emotional turmoil faced by a person who has not only just given birth, but who will in addition, have done so generally in most incongenial circumstances and who, to add to her distress, has the further grief of knowing that the infant she carried is born dead.

The second point which is evident from this passage is the fact that the common run of sentencing in the jurisdiction from which the judgment emanates seems to involve a short effective period of imprisonment. The judgments of this court which I have cited above appear to show that such a punishment is regarded as appropriate. Consideration of the enactment



shows that this perhaps ought not to be regarded as surprising. After all, the maximum sentence permitted is one of 5 years' imprisonment with labour. This seems to indicate that a fairly serious view should be taken of such offences. I ask myself why. The aim of the provision would appear to be twofold: one, a more technical approach to ensuring proper registration of the important matters of births and deaths. Underlying that, however, there must be an anxiety to prevent the murder of infants by insisting upon the reporting of births and by punishing any concealment. If this is true, then it appears to me that two principles may immediately be stated.

The first of these was mentioned by Mfalila J in *Bikita* (*supra*). Where there was no question of concealment of the pregnancy, there can be no possible mischief related to any prior intention not to report the birth or to harm the infant, and there can be no justification for any stern treatment of the offender. The second principle is the converse of this. Where the pregnancy and birth has been attended by secrecy then this might be regarded as aggravating. In no case, however, as is made clear in *Moyo* and *Lazarus*, is it appropriate to punish the offender as if the crime were an unproven infanticide.

With the benefit of this research, which was not considered by Mtambanengwe J in *Moyo*, I am able to conclude that in none but the more serious of instances should any substantial effective period of imprisonment be imposed. I believe that the altered sentence in *Moyo* would have been substantially less than it was had the authorities I have referred to been before the learned judge in that case. I have informally sought the views of all but one or two of my brethren on this point (including I might say, with the greatest respect, Smith J) and all have intimated their view that the sentence in this matter is excessive. It follows that while the principle enunciated in *Moyo*'s case is correct and must be observed, the actual sentence imposed ought not to be seen as the norm.

As to what should be regarded as an appropriate sentence in the usually occurring circumstances of such an offence as this I would say that this would range between the three weeks in *Matthews* and the five months in *Bikita*. The nine months in *Lazarus*, however, strikes

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me as a sentence very much on the severe side, and one which would require the presence of aggravating circumstances to justify.

As to whether any such sentence ought to be made effective, I respectfully approve the approach of James J in *D* and Mfalila J in *Bikita* which is to



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suspend the whole of the sentence imposed. Indeed, another review matter which crossed my table while I was considering this case exemplified to my way of thinking the proper approach to sentence in the normal case where there is no serious feature of aggravation. The sentence was a short period of imprisonment all of which was suspended on conditions of community service. I commend this option to magistrates.

In the present case, the accused has been in custody since January when the offence was discovered. She has already served one month of the sentence imposed by the magistrate on 29 March 1996. I would have considered a period of imprisonment of three months, all of which was suspended, to be appropriate. In the light of the time that has passed and the sentence that has been served, however, it does not seem to me to be fitting to impose any further conditions or burden upon the accused. She is now, in my judgment, entitled to her immediate release. I therefore alter the sentence to the following:

> "One month's imprisonment with labour."

Bartlett J concurs.



## KELLOGG CO *v* CAIRNS FOODS LTD 1996 (1) ZLR 528 (HC)

**Court** **High Court, Harare**

Chidyausiku J

Civil application

8 February & 15 May 1996 Judgment No. HH-62-96

### Flynote

Delict - unfair trade practice - passing-off - requirements - likelihood of deception - get up as well as name must be looked at

Intellectual property - trade mark - Trade Marks Act [Chapter 26:04] - s 8(1)*(b)* -infringement of registered trade mark - comparison limited to marks themselves, no regard being had to the get-ups or the circumstances of the market place

### Headnote

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The applicant, a registered American corporation, sought an interdict against respondent, a Zimbabwe-registered company, to prevent it from using a trade name for its product. The interdict was sought on two bases, namely (1) that the use by the respondent of the name "Fruit Hoops" for a cereal amounted to passing-off of the respondent's product as that of the applicant, which produced a cereal which it called "Froot Loops"; and (2) that the name constituted an infringement of applicant's trade mark registered in terms of the Trade Marks Act [*Chapter 26:04*].

On the issue of whether there had been passing off the court stated that for the applicant to succeed in establishing the delictual wrong of passing-off he must establish that:

(1) he holds some good will or reputation in the particular merchandise;

(2) it is likely that the ordinary purchaser has been or will be misled into believing that the respondent's product is that of the applicant;

(3) there must be a clear right and injury has actually been suffered or is reasonably apprehended; and

(4) there must be no similar protection offered by any other remedy.



In considering the issue of likelihood of deception, the court will examine the products from the perspective of the ordinary purchaser who will have a general idea of the appearance and characteristics of the article he wishes to buy. It will do this taking into account the circumstances of the actual market place. The purchaser does not focus simply on the trade name of the product but looks at the whole get-up of the product and this again should be taken into account.

As regards the issue of the trade mark, the applicant contended that the use of the trade name by the respondent constituted an infringement of s 8(1)*(b)* of the Trade Marks Act. In terms of this provision, unauthorised use of a mark identical to the trade mark or so closely resembling it as to be likely to deceive or cause confusion is an offence.

Held, that the applicant had failed to establish that it had, as yet, established a reputation or goodwill in respect of its product. But even if it had acquired such a reputation or goodwill, given the respective get-ups on the packages of the two products, the ordinary purchaser would not have been deceived into believing that the respondent's product was that of the applicant. The applicant had thus suffered no injury, nor was any injury reasonably apprehended.

Held, further, that for the purposes of determining an infringement under the Trade Marks Act the comparison is limited to the marks themselves and no regard is had to the get-ups and/or the circumstances of the market place. As it had not been established that the applicant had, as yet, acquired any reputation or goodwill in Zimbabwe, the use of the trade name by the respondent could not have resulted in deception or confusion. In any event, the name used by the respondent was simply a term that was descriptive of the type of cereal and did not connote its origin. The respondent's use of this term was permissible in terms of s 11(1)*(b)* of the Trade

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Marks Act.

Held, further, that as the respondent made the decision to use this trade name before it was aware of intention of the applicant to market its product under its name, it followed that the respondent did not intend to pass off its product as that of the applicant. The applicant only registered its trade mark subsequently. The fact that the respondent modelled its product on the product of the applicant that at that time was being marketed outside Zimbabwe did not change the position. Imitation of another's ideas is permissible under the law as long as the copying does not amount to a representation to purchasers that the product is that of the company marketing the product outside Zimbabwe.

Cases cited:



*Adidas Sportschuhfabriken Adi Dassler KG v Harry Walt & Co (Pty) Ltd* 1976 (1) SA 530 (T)

*Bon Marché (Pvt) Ltd v Brazier & Anor* 1984 (2) ZLR 50 (S)

*Brian Boswell Circus (Pty) Ltd & Ors v Boswell-Wilkie Circus (Pty) Ltd & Ors* 1985 (4) SA 466 (A)

*Capital Estate & Ors v Holiday Inns Inc & Ors* 1977 (2) SA 916 (A)

*Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

*Policansky Bros v L & H Policansky* 1935 AD 89

*Royal Beach-Nut (Pvt) Ltd t/a Manhattan Confectioners v United Tobacco t/a Willards Foods* 1992 (4) SA 118 (A)

*Saville Perfumery Ltd* v *June Perfect Ltd & Anor* (1941) 58 RPC 147

*Saybrook (1978) Ltd & Anor v Girdlestone* 1986 (2) ZLR 185 (S)

The following statutes were referred to:

Trade Marks [*Chapter 26:04*], ss 8(1)*(b)* and 11(1)*(b)*

## Judgment

**Chidyausiku J.** The applicant in this case is a registered American company or corporation. The respondent is a registered Zimbabwean company. The applicant is seeking an interdict to prevent the respondent from using the mark "Fruit Hoops" in marketing one of its breakfast cereals. It alleges that this mark infringes its own trade mark "Froot Loops" registered under number 1046/93. The applicant seeks the interdict on two bases. It seeks the interdict firstly on the basis that the respondent is passing off one of its breakfast cereal as that of the applicant and secondly on the basis that the respondent is infringing its trade mark contrary to the provisions of s 8(1)*(b)* of the Trade Mark [*Chapter 26:04*]. It is common cause that the applicant is the registered owner of the trade mark "Froot Loops" and that the respondent uses the mark "Fruit Hoops" to market one of its breakfast cereals. The issue is, therefore, whether

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respondent's use of the mark "Fruit Hoops" on its merchandise amounts to passing-off or an infringement of the applicant's trade mark. The respondent denies that it is passing off its merchandise. The respondent also contends that there is no trade mark infringement. In the alternative, the respondent argues that its mark is descriptive of the goods it is selling and is covered by the defence conferred on the other traders by the provisions of s 11(1)*(b)* of the Act. That section protects the *bona fide* use of descriptive words on merchandise from infringement of a trade mark. The respondent also contends that the applicant's trade mark was not properly registered therefore invalid. In a nutshell there are three issues that fall for determination namely:



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(1) is the respondent passing-off its breakfast cereal as that of the applicant by its use of the mark "Fruit Hoops"?

(2) does the respondent's use of the mark "Fruit Hoops" on its breakfast cereal constitute an infringement of the applicant's trade mark "Froot Loops" in terms of s 8(1)*(b)* of the Act and, if so, can the respondent avail itself of the defence provided in s 11(1)*(b)* of the Act?

(3) was the applicant's trade mark properly registered?

I shall deal with these issues shortly, but before then the following is the background to the dispute. On 23 November 1993, the applicant lodged an application for the registration of the trade mark "Froot Loops" (words) in class 30, which includes breakfast cereal. In April 1994, the applicant exported to Zimbabwe a consignment of a breakfast cereal under its trade mark "Froot Loops". The sales of this product under the "Froot Loops" mark has been continuous since that date. Since April 1994, 350 cases of Froot Loops breakfast cereal with 24 units per case, that is 8 400 packs, have been imported into Zimbabwe. It is not clear how many of these have since been sold and at what rate. The applicant's product is imported into the country by CI Distributors (Pvt) Ltd, who in turn distribute it to all major supermarkets, superettes and wholesalers in Zimbabwe, including TM Supermarkets, (11 outlets), Bon Marché Supermarkets (4 outlets), OK Bazaars (7 outlets), wholesalers (5 outlets) and superettes (11 outlets). That is the full extent of the applicant's penetration of the local market which, in my view, is somewhat limited. On 23 January 1995 the Trade Marks office in Harare issued the applicant with a certificate of registration for "Froot Loops" (words) in class 30. The registration was subject to the disclaimer that the applicant had no right to the exclusive use of the word "Froot" or its phonetic equivalent "Fruit".

In December 1994, after the lodging of the application for registration but before the registration of the applicant's trade mark, the applicant had observed that the respondent was selling a breakfast cereal under the trade mark "Fruit Hoops". The applicant suspects that respondents product is inferior to its own. There is however no evidence to this effect.

The respondent commenced sales of its breakfast cereal using the get-up in annexure D which includes the mark "Fruit Hoops" on 4 October 1994. The respondent's breakfast cereal was originally scheduled to be launched in April 1994. The delay was caused by a breakdown of the

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machine used to



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extrude the fruit flavoured product in its particular shape, which is the shape of a hoop. The same machinery had been used by the respondent since 1985 to produce, in exactly the same shape, a savoury snack which was marketed by the respondent. It was the respondent's contention that prior to 1993 the idea had been mooted to use this machinery to produce a fruit flavoured breakfast cereal in the hoop shape. At the time that the respondent decided to use the word "hoops" to describe the shape of its new range of breakfast cereal it was not aware of the applicant's plan to launch its product in Zimbabwe and its intention to register the word "Froot Loops" as a trade mark in Zimbabwe. The respondent only became aware of these developments in January 1995, following a letter of complaint to it by the applicant. The respondent also contends, and I have no reason to disbelieve it, that at that time the respondent was also producing and marketing different types of cereals, with various ingredients, flavourings, and shapes with different descriptive names, hence it felt the need to describe the new product about to be launched by reference to some of its essential attributes. It contends the words "Fruit Hoops" are used descriptively, to describe the fruit flavour and the circular shape of their breakfast cereal and to distinguish that product from others in its range of cereals. The internal memoranda of the respondent on this matter seem to confirm the respondent's contention in this regard.

It is, however, accepted by the respondent that at the time of internal discussion of its use of the mark "Fruit Hoops' to describe its new product it was aware through some of its staff that the applicant was marketing, in South Africa, under its "Kelloggs" brand a similar producer under the mark "Froot Loops". Indeed at one point the respondent considered calling its product "Fruit Loops" and this was changed because of the applicant's use of that identical description of its product in South Africa. The inescapable inference is that the respondent modelled its product on that of the applicant. That, as Mr *de Bourbon* correctly conceded, is permissible under the law. Indeed, when the respondent commissioned an advertising agent to prepare packaging for its product "Fruit Hoops" in June 1993 it also sent to the advertising agent a sample of the applicant's package of its product "Froot Loops'. The employee of the respondent who sent this sample has since died and the reasons for him having done so can only be surmised.

It was also contended by the respondent, and not disputed by the applicant, that it is the practice of manufacturers of breakfast cereals to use descriptive words to distinguish the various types of product in their respective ranges. For example, the following descriptions appear on products of the applicant and the respondent respectively which are displayed for sale generally in



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separate sections of shelving, in leading supermarkets in Harare and elsewhere in Zimbabwe.

| Description of those sold under | Description of those sold under |
|---|---|

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| "Kelloggs" brand name | "Willards" brand name |
|---|---|
| All-Bran Flakes | Bran Flakes |
| Coco Pops | Cocoa puffs |
| Corn Flakes | Corn Flakes |
| Froot Loops | Fruit Hoops |
| Frosties | Sugar frosted Flakes |
| Fruitful Bran | Raisin Bran Flakes |
| Hi-fibre Bran | Hi-fibre Bran Flakes |
| Rice Krispies | Crispies - Plain/strawberry/ chocolate |
| Toasted Muesli | Muesli |

It would appear from the above that the applicant and the respondent use very similar, sometimes identical, trade marks to differentiate between different ranges of their respective breakfast cereals and use the brand names "Kelloggs" and "Willards" to indicate the source or the manufacturer of the product. It is also common cause that the applicant's trade mark "Froot Loops" has been registered in numerous countries over the years.

I now turn to deal with the issues I set out at the beginning of this judgment, namely, passing off, infringement of the trade mark and validity of the registration.

For the applicant to succeed in establishing the delictual wrong of passing off, it has to establish the following:

1. that it holds some good will or reputation in the particular merchandise namely, the breakfast cereal sold under the trade mark "Froot Loops";

2. that it is likely that the ordinary purchaser has been or will be misled or deceived into believing that the breakfast cereal of the respondent "Fruit Hoops" is that of the applicant, or that there is some connection between them;

3. a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by any other remedy.

The above requirements emerge from the following line of cases: *Saybrook*



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*(1978) Ltd & Anor v Girdlestone* 1986 (2) ZLR 185 (S) at 189 A-C; *Capital Estate & Ors v Holiday Inns & Ors* 1977 (2) SA 96 (A) at 925G-929C; *Bon Marché (Pvt) Ltd v Brazier & Anor* 1984 (2) ZLR 50 (S); *Brian Boswell Circus* v *Boswell-Wilkie Circus* 1985 (4) SA (A) at 479A-E; *Policansky Bros* v *L & H Policansky* 1935 AD 89.

I will now consider the first requirement of whether or not the applicant has established that it holds some goodwill or reputation in the breakfast cereal that it is marketing under the trade mark "Froot Loops". The applicant's evidence in this regard is that it has imported for sale in this country through its distributors 350 cases of its breakfast cereal "Froot Loops". Each case

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contained 24 units, thus a total of 8 400 packs have been imported into the country for sale. This quantity of cereal was brought into the country over a period of one year, but there is no evidence of how much of the imported cereal has actually been sold. If most of it had been sold, then the applicant would have been more than anxious to brag about its product having been sold out. But even assuming, as I have done, that all the imported cereal has been sold the volume of sales is inadequate to establish that the applicant has acquired a reputation or goodwill in respect of its product Froot Loops. It may well be that the breakfast cereal Froot Loops has acquired a wide reputation outside Zimbabwe but there simply is no evidence of the same reputation or goodwill having been established in Zimbabwe.

This case is different from the usual case of passing-off where the applicant has invested a lot in money and effort and through advertisement or some other high profile marketing strategy and has acquired or established substantial goodwill or reputation in its product.

In the present case, there is no evidence that the applicant has acquired any reputation or goodwill in its breakfast Froot Loops. It certainly has not established a reputation with its product to the extent that the purchasing public might think that when those words or similar words are used by others the applicant's business or product is being referred to. In the result, I have come to the conclusion that on the papers as they stand the applicant has failed to establish that it has acquired sufficient goodwill or reputation in its product Froot Loops to found an action for passing-off.

Even if I am wrong in the above conclusion, the applicant still has to establish the second requirement for the wrong of passing-off. The applicant still needs to establish the likelihood, actual or notional, of the deception or confusion among the purchasing public arising from the respondent's conduct. Two



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issues arise here. Firstly, who constitutes the purchasing public? Secondly, in considering likelihood of deception does the court look at the trade mark and the words complained of *in vacuo* or in the context of their respective get-ups and the situation in the market place.

Dealing firstly with the issue of who constitutes the purchasing public, the court is enjoined to examine the products through the eyes of an ordinary purchaser who has in his mind's eye a general idea of the appearance and characteristics of the mechanise he wishes to buy and who looks at the article not closely but sufficiently to take in the general appearance. See *Saybrook (1978) (Pvt) Ltd & Anor supra*. That is the paragon of the ordinary purchaser whose characteristics the court must adopt in examining the issues of likelihood of deception.

Turning to the issue of whether the court examines the trade mark and the words complained of *in vacuo* or in the context of their respective get-ups and the circumstances in the market place, the authorities are very clear on the point. In an action for passing-off, the court, in considering the issue of likelihood of deception, takes into account the respective get-ups of the trade mark and the words complained of and the circumstances in the market place. However, the evidence of the get-ups and circumstances in the market place are irrelevant and inadmissible in an

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action based on infringement of a trade mark. I shall deal with the question of the irrelevance of get-ups in an action for infringement of a trade mark later on in my judgment.

The case of *Royal Beach Nut (Pvt) Ltd t/a Manhattan Confectioners v United Tobacco t/a Willards Foods* 1992 (4) SA 118 (A) is clear authority for the proposition that get-ups are a relevant consideration in considering the likelihood of deception. In that case Corbett CJ at pp 124C-125J goes into some detailed comparison of the get-ups of the two packages while considering the issue of the likelihood of deception in an action for passing-off. In a similar and earlier case, *Plascon Evans Paints Ltd v van Riebeeck Paint (Pty) Ltd* 1984 (3) SA 623 (A) at 642D-F the same judge, Corbett JA (as he then was), made the following remarks at p 643F:

> "As I have said, in cases such as this the court must transport itself to the market place and try to visualize how customers of goods in relation to which the marks are used would react."

On the basis of these authorities, I will take into account in considering the likelihood of deception, the respective get-ups of both marks and the circumstances in the supermarket where the products are sold.

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In my view, the ordinary purchaser once in the shop or supermarket does not focus his eyes on the trade mark alone, but on the whole get-up, therefore common sense demands that the whole get-up be considered in deciding the likelihood of deception in an action for passing-off.

While I accept that the marks "Froot Loops" and "Fruit Hoops" are somewhat similar both visually and phonetically the "OOs" in Froot Loops have a distinct design and colouring that make them quite prominent and distinct from the UI and OO in "Fruit Hoops". The difference in the design of those letters is such that it would not fail to make an impression on the ordinary purchaser. However, by far the most prominent and visible features on both the applicant's and the respondent's packages are the brand names. On the applicant's package the brand name "Kelloggs" dominates the get-up. It is written in fairly big letters of unusual cursive script in bright red against background. The brand name "Kelloggs" cannot fail to catch the purchaser's eye and once that has happened the origin of the product is established.

On the respondent's package, the words "Fruit Hoops" tend to command prominence but immediately above them is the brand name "Willards", written in white against a green background. Although the letters in "Willards" are not as big and as distinct as in "Kelloggs", they are nevertheless sufficiently big to catch the browsing eye of any shopper who cares to look and thus inform him of the origin of the product, namely "Willards" and not "Kelloggs". Given the prominence given to the brand names "Kelloggs" and "Willards" in the get-ups of the respective packages, I do not see how a shopper can possibly be deceived into believing that the product under the brand name "Willards" could be a product of the applicant, "Kelloggs". It is quite apparent from the appearance and the prices on both products that the Kelloggs product is an imported product while "Willards" is a local product. That difference too is apparent and is of some significance in the avoidance of deception and confusion.

As I have already said, the respondent averred and the applicant does not dispute that it is the

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practice of the manufacturers of breakfast cereals to use descriptive words to distinguish between various types of products in their respective ranges. Paragraph 18 of the respondent's replying affidavit gives examples, which I have already referred to, of about nine descriptive marks used by the applicant and respondent which are very similar. In one or two instances, identical descriptive marks. For instance, both parties use the descriptive mark "corn flakes" to describe one of their many and different



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breakfast cereals. The applicant uses the brand name "Kelloggs" to distinguish its corn flakes, while the respondent uses its brand name "Willards" to distinguish its corn flakes. No confusion is alleged in regard to the conflakes by use of identical names or marks. The differentiation is achieved by use of the brand names that are different.

In the result, I am satisfied that having regard to the respective get-ups on the packages of the two products, the ordinary purchaser would not be deceived into believing that the respondent's product is a Kelloggs product by reason of the respondent's description of its own product as "Fruit Hoops", which is somewhat similar in sound and appearance to the applicant's trade mark "Froot Loops".

On the papers as they stand, the applicant has not made out a case for injury suffered or reasonably apprehended, thus the third requirement for passing-off has not been established.

The applicant's second and alternative cause of action is based on the alleged infringement of its trade mark by the respondent in contravention of s 8(1)*(b)* of the Trade Marks Act [*Chapter 26:04*]. The applicant's trade mark is "Froot Loops" while the respondent is using the mark "Fruit Hoops" on its breakfast cereal. This, the applicant contends, is an infringement of its trade mark.

Section 8(1)*(b)* provides:

> "Subject to this section and sections *ten* and *eleven* the rights acquired by registration of a trade mark in Part A or Part B of the Register shall be infringed by-
>
> *(a)* ...
>
> *(b)* unauthorised use in the course of trade, otherwise than as a trade mark, of a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion if such use is-
>
> *(i)* in relation to or in connection with goods or services in respect of which the trade mark is registered; and
>
> (ii) likely to cause injury or prejudice the proprietor of the trade mark."



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As I said earlier, the respondent denies that its use of the words "Fruit Hoops" is an infringement of the applicant's trade mark. The respondent also contends that its use of the above words is a *bona fide* use of words that are descriptive of his product, permitted under s 11(1)*(b)* of the Act

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which reads as follows:

> "The registration of a trade mark shall not interfere with
>
> *(a)* ...
>
> *(b)* the use by any person of a *bona fide* description of the character or quality of his goods or services."

Mr *de Bourbon* for the applicant submitted that, in determining the likelihood of confusion or deception for the purposes of infringement under the Act, the comparison must be limited to the marks themselves. No regard should be had to the get-ups and/or the circumstance in the market place, which comparison, as I have already said, is permissible when considering the likelihood of deception in an action based on passing-off. He cited as authorities for this approach *Saville Perfumery Ltd v June Perfect Ltd & Anor* (1941) 58 RPC 147 at 162 and *Adidas Sportschuhfabriken Adi Dassler KG v Harry Walt & Co (Pty) Ltd* 1976 (1) SA 530 (T). The reasoning behind this approach appears to be that as far as protection against infringement is concerned, the owner of a trade mark who has used it in a particular fashion cannot be in a worse position than that of the owner of the trade mark who has not used it at all. I will adopt this approach and consider the marks only *in vacuo* or without their get-ups. I will ignore the fact that the name "Kelloggs" is used together with "Froot Loops", and equally that "Willards" is used together with "Fruit Hoops". I will only compare the two marks in determining the issue of the likelihood of deception in respect of the applicant's claim based on infringement of its trade mark.

I have already stated that there is some similarity, both visual and phonetic, between the two marks. I am, however, not satisfied that that similarity will lead to confusion and deception for the following reasons. I have previously observed that the applicant has imported into Zimbabwe only 340 cases of Froot Loops. It is not clear how much of it has been sold. There is no evidence that there has been high profile advertisement or visibility of the applicant's product. On that basis, I am satisfied that the applicant has as yet to acquire a reputation or good will in Zimbabwe under its registered trade mark "Froot Loops". Without the creation of the reputation of Froot Loops as the product



of the applicant there cannot be a confusion or deception that the product "Fruit Hoops" is that of the applicant among purchasers who do not know that the applicant is marketing that product.

The words "Froot Loops" and "Fruit Hoops" are descriptive. None of them really fall into the category of fancy words as it were, and thus acquire a reputation associated with a particular manufacturer. The words "Froot" and "Fruit" are descriptive of the flavour of the product which is alleged to be fruit like. The words "Loops" and "Hoops" are descriptive words describing the circular shape of the product. If anything, in Zimbabwe, the word "loop" would tend to be associated with a female birth control device of that shape, a far cry from a breakfast cereal emanating from the applicant. As for the word "Hoops", it tends to remind one of the circus

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where hoops are used rather than a breakfast cereal.

As I have already observed, the respondent has alleged that manufacturers of breakfast cereals in Zimbabwe use descriptive words to distinguish between various types of breakfast cereal in their respective ranges and not to indicate origin of the product. This was not seriously challenged by the applicant. There has been no evidence of which particular purchaser I should bear in mind in considering the issue of deception and confusion. I can only assume that the purchaser I should bear in mind is one who is both aware of and mindful of this manufacturer's practice that descriptive words on breakfast cereals are indicative of the range and not origin of the product.

For these reasons, I am not satisfied that confusion and deception is likely to occur arising from the respondent's use of the mark "Fruit Hoops" and the applicant's use of the trade mark "Froot Loops". Even if such deception were established no prejudice or injury has been established to have flowed or likely to flow in the future from such deception or confusion as is required by the Act before an action for infringement can succeed. See s 8(1)*(b)*(ii).

I am also satisfied that the respondent's use of the words "Fruit Hoops" is covered by the provisions of s 11(1)*(b)* and is therefore availed of the defence in that section.

I have already indicated that the respondent's mark is descriptive of the respondent's breakfast cereal in that "Fruit" refers to the flavour of the cereal and "Hoop" refers to the circular shape of the cereal. I am satisfied on the



papers that the decision by the respondents to use "Fruit Hoops" to describe its new breakfast cereal was taken before the applicant registered its trade mark or started marketing its product in Zimbabwe. I am satisfied that the respondent was not aware then of the applicant's plan to launch its product in Zimbabwe under the name "Froot Loops". It follows, therefore, that it could not have been the intention of the respondent in adopting the market, to pass-off its product as that of the applicant which was not at that time on the market. The respondent did not know that the applicant intended to market such a product at the time of its decision to use the mark "Fruit Hoops". In the circumstances, the adoption of the mark cannot but have been *bona fide* at the time. The subsequent registration of the applicant's trade mark and the subsequent launching of the applicant's product "Froot Loops" in Zimbabwe does not affect the *bona fides* of the respondent at the time it took the decision to market its cereal under the mark "Fruit Hoops".

I am satisfied, however, that when the respondent decided to launch its breakfast cereal "Fruit Hoops" it copied the applicant's concepts and ideas. Indeed, it is quite obvious that the respondent modelled its product on that of the applicant's Froot Loops which was being marketed outside Zimbabwe. Imitation of another's ideas is permissible under the law as long as the copying does not amount to a representation to the purchasers, by the party copying, that the goods copied are the product of the party it had copied from in this case the applicant. See *Saybrook (1978) (Pvt) Ltd & Anor supra*. I find that there is no representation by the respondent that its breakfast cereal "Fruit Hoops" has been produced by or is the product of the applicant

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Kelloggs. The contrary is the case, in that the "Willards" brand name appears quite prominently on the packaging, indicating the origin of the cereal. In Zimbabwe, Willards is a well known manufacturer of breakfast cereal. The applicant may certainly have an international reputation as a manufacturer of breakfast cereal but it would appear to me that it has yet to establish a similar reputation in Zimbabwe where it has only imported 850 cases.

It was also contended by the respondent that the applicant's trade mark was not properly registered. I hold the view that this issue cannot be properly adjudicated without joining the Registrar of Trade Marks as a party to these proceedings. In view of the conclusion I have reached on the other issues, it is not necessary to order the joinder of the Registrar before this matter can be resolved. I have decided to leave that point open or unresolved.



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In the result the application is dismissed with costs.

*Gill, Godlonton & Gerrans,* applicants legal practitioners

*Atherstone & Cook*, respondents's legal practitioners.



## BRIDGES & HULME (PVT) LTD *v* MAGISTRATE, BULAWAYO & ANOR 1996 (1) ZLR 542 (HC)

**Court** **High Court, Bulawayo**

Malaba J

Application for review of magistrate's decision

17 May 1996 Judgment No. HB-30-96

### Flynote

Practice and procedure - summary judgment - application - whether can be defeated by filing notice of intention to defend

Review - magistrates court proceedings - grounds for - error in law - whether may be reviewed - mistake due to failure by magistrate to ask right questions - irregularity - nature of irregularity which gives rise to review

### Headnote

A magistrate in Gweru refused to hear and determine an application for summary judgment made by the applicant against the second respondent. The applicant had entered into a lease agreement with the second respondent. It was a term of the agreement that the rental was to be paid in advance, but not later than the fifth day of the next month. It was also agreed that if the lessee should breach any term of the agreement, the applicant could terminate the agreement

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without notice.

After 11 months, the applicant cancelled the lease on the grounds that for 5 months the lessee had failed to pay the rent by the fifth day of the month. He issued summons, claiming ejectment of the lessee and costs. The lessee entered appearance to defend, and delivered a plea denying any breach. He claimed that the applicant had cancelled the lease because he had refused to pay an increase in rental. A week later, the applicant applied for summary judgment on the grounds that there was no *bona fide* defence. It alleged that the appearance to defend was entered for the purposes of delay and that the plea was filed to defeat the application for summary judgment.



At the hearing of the application for summary judgment, the lessee took a point *in limine* that a plaintiff could not apply for summary judgment after a defendant had delivered his plea simultaneously with the entry of appearance to defend. The magistrate was thus faced with a question of law, demanding of him the correct construction of Order 15 r 1 and Order 16 r 1 of the Magistrates Court (Civil) Rules 1980. The magistrate concluded that the defendant was entitled to deliver a plea in order to defeat an application for summary judgment. The questions arose *(a)* whether the magistrate's conclusion was correct; and *(b)* if he erred, whether his error was reviewable or whether an appeal was the correct procedure.

Held, that the magistrate had placed a wrong construction on Orders 15 and 16 of the Rules. He did so because he had asked himself a wrong question of law, namely, whether or not a defendant had a right to deliver a plea simultaneously with appearance to defend, in order to defeat an application for summary judgment. What he should have asked himself was whether or not the plaintiff had a right to apply for summary judgment after the defendant had delivered a plea.

Held, further, that there was nothing in Order 15 to suggest that an application for summary judgment cannot be made after a plea has been delivered. A right to apply for summary judgment had been created and could not be removed except in clear terms. Order 16, which gives a defendant the right to deliver a plea within seven days after entry of appearance to defend, contained no provision taking from the plaintiff the right to apply for summary judgment. The defendant can avoid summary judgment by satisfying the court by affidavit (which may be supported by *viva voce* evidence) that he has a *bona fide* defence. The plaintiff has a discretion whether or not to apply for summary judgment. A plea delivered with entry of appearance to defend might influence the plaintiff's decision. Even though there is a practice whereby plaintiffs do not apply for summary judgment after a plea has been delivered, there is no rule of law against such an application. Apart from the fact that a proper construction of the Orders led to the conclusion given, there was ample judicial authority in favour of the applicant's stand in this case.

Held, further, that a mistake of law is not necessarily an irregularity, entitling the proceedings to be reviewed; it is not unknown for a court to misread a statutory provision or overlook one not brought to its notice. But such a mistake could amount to an irregularity-

*(a)* where a wrong question of law is asked, so that the lower court misunderstands the

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nature of the enquiry and misdirects its mind to wrong matters;



*(b)* where an error of law causes the lower court to fail to appreciate the nature of the discretionary powers vested in it;

*(c)* where the misconstruction of the provisions of an enactment causes in the lower court a misconception of the extent of its jurisdiction, for example, by declining to hear a case which it should properly hear;

*(d)* where the decision was dependent on the error of law or was substantially or manifestly influenced by it.

Held, further, that this was a case where the wrong question was asked; where a misconstruction of the rules was the main cause of the magistrate's wrong decision; and where the lower court erroneously refused to determine a matter which it should have determined. Accordingly, the applicant was entitled to seek relief by way of review.

Cases cited:

*Anisminic Ltd v Foreign Compensation Commission & Anor* [1969] 1 All ER 208 (HL)

*Blue Ribbon Foods Ltd v Dube NO & Anor* 1993 (2) ZLR 146 (S)

*Community Development Bd v Revision Court, Durban Central* 1971 (1) SA 557 (N)

*Computer Investors Gp Inc & Anor v Min of Finance* 1979 (1)SA 879

*Cone Textiles (Pvt) Ltd v Commercial Union Fire, Marine & Gen Ins Co Ltd* 1989 (2) ZLR 152 (S)

*Doyle v Shenker & Co Ltd* 1915 AD 233

*Goldfields Invstm Ltd & Anor v Johannesburg City Council* 1938 TPD 551

*Groenewald v Min of Finance* 1927 TPD 679

*Hira & Anor v Booysen & Anor* 1992 (4) SA 69 (A)

*Johannesburg City Council* v *Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A)

*Johannesburg Consol Invstm Co v Johannesburg Town Council* 1903 TS 111

*Khan v SA Oil & Fat Industries Ltd* (1923) 44 NLR 99

*L & B Hldgs (Pvt) Ltd v Mashonaland Rent Appeal Bd & Ors* 1959 (1) R & N 490 (SR)

*Laurence v Verhoef & Ors NNO* 1993 (2) SA 328 (W)

*Lee v Showmen's Guild of Great Britain* [1952] 1 All ER 1175 (CA)

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*McKelvey v Abrahams & Anor* 1989 (2) ZLR 251 (S)

*Mabaso & Ors v Native Commissioner, Ladysmith* 1958 (1) SA 130 (N)

*Makalima v Gubanxa* 1918 CPD 58



*Mbiza v Puza* 1918 TPD 1

*Msingeleli v Edward & Mashasha* 1913 CPD 23

*Perlman v Harrow School* [1979] 1 All ER 365 (CA)

Re *Racal Communications Ltd* [1980] 1 All ER 284 (CA)

*Senior Min of National Affairs v Mupambiri & Ors* S-182-94

*SABC v Transvaal Townships Bd* 1953 (4) SA 169 (T)

*Touriel v Min of Internal Affairs (SR)* 1946 AD 535

*Union Govt v Union Steel Corp (SA) Ltd* 1928 AD 220

*van Rensburg NO v Bd of Trustees, Mining Industry Pension Fund* 1979 RLR 131 (G)

*Vesta Est Agency v Schlom* 1991 (1) SA 593 (C)

The following statutes and rules of court were referred to:

High Court Act [*Chapter 7:06*], s 27

Magistrates Court (Civil) Rules 1980 (SI 290/1980), Order 15 rr 1 & 2(1)*(c)*, Order 16 r 1

Magistrates Court Rules (SA), r 14(1)

*A Morris-Davies*, for the applicant

*S Nkiwane*, for the second respondent

## Judgment

**Malaba J**: This is an application by way of review under r 259 of the High Court Rules 1971, for an order setting aside the decision of the first respondent (the magistrate) by which he refused to hear and determine an application for summary judgment made by the applicant against the second respondent. The ground on which the decision is sought to be reviewed is one of error of law amounting to a "gross irregularity" in the decision of the magistrate.

The magistrate had filed a notice of opposition and deposed to an opposing affidavit in which he defended his decision and alleged that it was not reviewable for an error of law. In the light of decisions to the effect that presiding officers should not seek to defend their decisions in civil matters except against allegations of bias on their part, the magistrate properly withdrew his opposition to the application before it was set down for hearing by the High Court. See *Blue*

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*Ribbon Foods Ltd v Dube NO & Anor* 1993 (2) ZLR 146 (S); *Senior Minister of National Affairs, Employment Creation & Co-operatives v Mupambiri & Ors* S-182-94.

The second respondent persisted in his opposition to the application. At the commencement of the hearing on 23 November 1995, Mr *Nkiwane*, who





appeared for the second respondent on instructions from a firm of lawyers in Kwekwe, took a point *in limine*, which was that the record of proceedings did not comply with the peremptory requirements of r 260(1). Rule 260(1) requires that the record of proceedings should be prepared and certified a correct record of proceedings of the inferior court by the clerk of court. The record for review was prepared by the applicant.

Mr *Morris-Davies* argued that the second respondent was not alleging that he had suffered or would suffer any prejudice in the preparation or presentation of his defence as a result of the record not having been prepared and certified by the clerk of court. He asked the court to condone the failure to comply with r 260(1).

Mr *Nkiwane* could not say whether the record prepared by the applicant was nonetheless an accurate reproduction of what happened in the magistrates court. Before I could rule on the point raised *in limine*, the parties agreed that the hearing be postponed *sine die* for Mr *Nkiwane* to ascertain from the instructing legal practitioners whether the record prepared by the applicant was an accurate record of what happened in the magistrates court.

At the resumption of the hearing on 16 February 1996, Mr *Nkiwane* confirmed that the record prepared by the applicant was an accurate record of what happened before the magistrate. He also accepted that there was no prejudice to the second respondent in the record being used in the application for review. I then condoned the failure by the applicant to have a record of proceedings that was prepared by the clerk of court in terms of r 260(1).

On the merits of the application, Mr *Nkiwane* said he was under instructions not to vigorously oppose the application any more because the second respondent had in fact voluntarily vacated the premises whose occupation had given rise to the application for summary judgment. He argued that the application had been overtaken by events. He was, however, under instruction not to concede the point that the magistrate's decision was reviewable.

Mr *Morris-Davies,* on the other hand, argued that the application for review was still on fire for a number of reasons. The second respondent had not consented to the order setting aside the magistrate's decision. He had not withdrawn the ground of opposition to the application. It was still being contended, albeit with less enthusiasm, that the decision of the magistrate was not reviewable. The heads of argument filed of record by the second respondent's legal practitioners had not been abandoned. The application for



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review raised an important legal question that needed to be answered by the High Court, not only for the benefit of the applicant, but for the benefit of other litigants in similar circumstance in future. The magistrate's decision incorporated an order against the applicant on costs. If not set aside, the applicant would be obliged to pay the costs. In fact, the second respondent persisted in his application for an order of costs in the application for review against the applicant's legal practitioners *de bonis propriis*. I therefore heard both counsel's arguments on the merits of the application.

The facts are these. On 10 June 1994 the applicant and the second respondent entered into an agreement in terms of which it leased certain premises to him at a monthly rental. It was a term of the lease agreement that the rental was to be paid in advance or not later than the fifth day of each succeeding month. It was also a term of the contract that, should the second respondent breach any of the terms of the agreement, the applicant had a right to terminate the lease without notice to him.

On 9 June 1995, the applicant cancelled the lease on tbe ground that the second respondent had breached the terms of the agreement by failing to pay rentals for the months of February, March, April, May and June 1995 before the fifth day of each month. The applicant issued summons on the day it cancelled the lease and claimed in it an order for the ejectment of the second respondent and costs of suit.

On 28 June the second respondent entered an appearance to defend, at the same time delivering his plea to the claim. In the plea he denied that he had breached the terms of the lease agreement. He alleged that the applicant had cancelled the lease and issued summons for his ejectment out of vindictiveness caused by his refusal to accept the increase in the rental proposed by it.

On 4 July the applicant applied for summary judgment, alleging in the founding affidavit that the second respondent had no *bona fide* defence to the claim and had entered appearance to defend for purposes of delay. Annexed to the founding affidavit were receipts showing that the second respondent had not paid the rentals before the fifth day of each of the months mentioned in the summons. It was also alleged in the founding affidavit that the second respondent had delivered his plea simultaneously with the entry of appearance to defend for the purposes of defeating the application for summary judgment. The second respondent filed a notice of opposition, together with an opposing affidavit in which he alleged that he had a *bona fide* defence to the claim. In para 9 of the opposing affidavit he said:



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> "The plaintiff's application for summary judgment is not in accordance with the Magistrates Court (Civil) Rules. In terms of Order 15 plaintiff may apply for summary judgment after the defendant's entry of appearance to defend but *before* the defendant has pleaded.
>
> In the case at hand the defendant entered an appearance to defend and also filed his plea. The plaintiff therefore cannot apply to the court for summary judgment. I bring it to the attention of the court that this application for

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summary judgment is an incorrect procedure and not in accordance with Order 15" (my emphasis).

The applicant was not discouraged by the stratagem put up by the second respondent. It set down the application for summary judgment for hearing by the magistrate on 27 June.

Instead of arguing on the basis of the opposing affidavit and seeking to satisfy the magistrate, in terms of Order 15 r 2(1)*(c)*, that the second respondent had "a good *prima facie* defence to the action", the second respondent's legal practitioner took a point *in limine*. He argued that under Order 15, as read with Order 16, a plaintiff could not apply for summary judgment after the defendant had delivered his plea simultaneously with the entry of appearance to defend. The magistrate had no power to hear and determine the applicant's application for summary judgment - so went the argument. The applicant's legal practitioner argued that the applicant had a right to apply for summary judgment after the defendant had delivered his plea. He argued that the magistrate had the power to hear and determine the application on its merits.

There is no doubt that the magistrate had for his consideration and answer a question of law demanding of him an appreciation of the relevant legal issues and the adoption of the correct construction of the provisions of Orders 15 and 16 of the Magistrates Court (Civil) Rules 1980 (SI 290 of 1980).

Order 15 r 1 provides:

"(1) Where a defendant has entered an appearance to defend, the plaintiff, whether in convention or reconvention, may apply to the court for summary judgment on any claim in the summons which is only-

*(a)* on a liquid document, or

*(b)* for a liquidated amount in money, or



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*(c)* for the delivery of specified movable property or

*(d)* for ejectment, or

*(e)* for any two or more such matters as are described in paragraph *(a)*, *(b)*, *(c)* or *(d)*.

in addition to costs.

(2) An application in terms of subrule (1) shall be made on not less than seven days' notice delivered not more than seven days after the date of the defendant's appearance to defend ..."

Order 16 r 1 provides thus:

"(1) The defendant shall within seven days after-

*(a)* entry of appearance; or

*(b)* ... (not relevant)

*(c)* if application for summary judgment is made, the dismissal of such application;

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*(d)* ... (not relevant)

*(e)* ... (not relevant)

*(f)* ... (not relevant)

deliver a statement in wrtiting to be called a plea."

The question of law the magistrate posed for his consideration and answer was whether on the construction of the provisions of Orders 15 and 16, a defendant had a right to deliver a plea simultaneously with an entry of an appearance to defend for the purpose of defeating an application by the plaintiff for summary judgment. On his construction of the provisions of the orders, he concluded that the defendant had such a right. He then decided that he had no power to hear and determine the application for summary judgment.

The process of reasoning adopted by the magistrate is revealed by the following extract from his judgment:

> "If the legislature did not provide in the rules that defendant has to give plaintiff a chance to apply for summary judgment leaving the plaintiff with the risk of being blocked from applying for summary judgment by filing appearance to defend and plea then this court is not to blame for that. The fact that a separate and different remedy is provided for in the face of a plea means that the legislature meant not to allow applications for summary judgment where a plea has been filed ...



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> The objection by the defendant's counsel is thus allowed. This court cannot entertain the application for summary judgment when a plea has already been filed and served on the plaintiff."

I entertain not the slightest doubt that the magistrate placed a wrong construction on the provisions of Orders 15 and 16. He misconstrued the provisions of the Orders because he had asked himself a wrong question of law. The wrong question he asked himself was whether or not a defendant had a right to deliver a plea simultaneously with the entry of an appearance to defend in order to defeat an application by the plaintiff for summary judgment. He then construed the provisions of Orders 15 and 16 to mean that, as the legislature had granted to the defendant the right to deliver a plea under Order 16 without declaring that a plaintiff could apply for summary judgment after plea, the silence must be taken to be an indication of an intention of the legislature that an application for summary judgment could not be made after a defendant had delivered his plea.

The magistrate was wrong in writing words into the provisions of Orders 15 and 16 to found the purported intention of the lawmaker. As a result of the wrong conclusion arising out of the misconstruction of the provisions of the statute, the magistrate erroneously declined jurisdiction to hear and determine the application for summary judgment when, on a correct interpretation of the provisions of Orders 15 and 16, he had it.

The right question of law the magistrate ought to have posed for himself, in the process of determining the legal issues before him, was whether or not the applicant had a right under the provisions of Orders 15 and 16 to apply for summary judgment aftr the respondent had

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delivered a plea.

Having appreciated the legal issues he would have addressed his inquiry at the matters raised by them in order to answer the question. His task was to place on the provisions of Orders 15 and 16 a construction that revealed their true meaning and effect, bearing in mind that the interpretation of provisions of a statute is itself a question of law. The starting point was Order 15.

Order 15 gives a plaintiff the right to apply for summary judgment within seven days after the defendant has entered an appearance to defend. A plea is not mentioned in Order 15 and there is nothing in the words of the provisions of the Order to suggest that an application for sumary judgment cannot be made after a plea has been delivered. As a right has been created and conferred on the plaintiff by the provisions of Order 15, it can only be



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taken away in clear words. Order 16, which gives the defendant a right to deliver a plea within seven days after an entry of an appearance to defend, does not contain a provision that takes from the plaintiff the right to apply for summary judgment under Order 15. The absence of clear words expressing the intention of the legislature to bar a plaintiff from applying for summary judgment after the delivery of a plea by the defendant means that the intention of the legislature is that the right conferred on the plaintiff under Order 15 should remain.

This is clear, when regard is had to the provisions of Order 15 r 2(1)*(c)*, to the effect that the defendant can avoid summary judgment by satisfying the court by affidavit which may be supported by *viva voce* evidence that he has a *bona fide* defence to the action. The court still has to hear the application and determine whether the affidavit or the *viva voce* evidence discloses a *bona fide* defence to the action. The provisions of Order 15 r 2(1)*(c)* would serve no purpose if the legislature gave the defendant the power to bar the application for summary judgment by delivering a plea simultaneously with an entry of an appearance to defend. The defendant would not have to depose to an affidavit or adduce *viva voce* evidence to satisfy the court that he had a *bona fide* defence to the action.

The legislature gave a plaintiff the discretion under Order 15 not to apply for summary judgment. A plaintiff can therefore waive the right to apply for summary judgment under Order 15. A plea delivered simultaneously with an entry of appearance to defend would then contain information which a plaintiff would have to take into account and consider in the exercise of his discretion in deciding whether or not to apply for summary judgment. It is in this regard that the practice has developed whereby plaintiffs invariably do not apply for summary judgment after plea.

A practice should not, however, be elevated to a rigid rule.

No authority was cited in support of the proposition of law advanced by the second respondent's legal practitioner and erroneously accepted by the magistrate. There was, however, authority for the construction placed on the provisions of Orders 15 and 16 by the applicant's legal practitioner.

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In *Khan v SA Oil & Fat Industries Ltd* (1923) 44 NLR 99 the plaintiff applied for summary judgment under Order XIV (similar to our Order 15) of the South Africa Magistrates Court Rules, after the defendant had delivered a plea. The defendant, without complying with any of the rules under Order



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XIV (our Order 15 rule 2(1)), resisted the application on the ground that it could not be made after delivery of the plea.

The magistrate granted the application and the defendant appealed.

Dismissing the argument by the defendant on appeal, Dove-Wilson JP said at 100-101:

> "The simple question raised by this appeal is whether an application under Order XIV for summary judgment is ever competent after plea has been filed. For the appellant it is contended that after plea it never is. But I am unable to find that that contention is warranted by anything in the wording of the Order, or any other Order which we have been referred to. And it appears to me that if it were well founded, nothing would be easier than for defendants, in the very circumstances which Order XIV is designed to strike at, to render the order nugatory by simply filing some sort of plea at the same time as they enter appearance. And indeed it may quite well be that the nature of the plea and the time and circumstances of its being filed may themselves afford good ground for application by the plaintiff under Order XIV. Now the Order no doubt provides a drastic remedy, but the means of preventing it from operating harshly or unwarrantably are simple. All that the defendant has got to do to avoid having judgment given against him under Order XIV is, either to pay into court, to abide the result of the action, the sum sued for or to give security to satisfy any judgment which may be given, or to satisfy the court by affidavit then filed, which may be supported by *viva voce* evidence or otherwise, that he has a good *prima facie* defence to the action ... In the ordinary case no doubt it is not contemplated that summary judgment shall be applied for after plea is filed, and I must not be taken as suggesting that such a proceeding can be defended in all cases. All that I say is that it is not incompetent, and that there may be cases of which this is an example in which it may well be entertained. The case of *McLardy v Slateum* (1890) 24 QBD 504 is an authority in support of the view which I have stated."

Referring to r 14(1) of the South Africa's Magistrates Court Rules, Jones & Buckle *The Civil Practice of the Magistrates Courts in South Africa* Vol 11 3 ed p 97 state thus:

> "It has been held that although it is not contemplated that as a rule application should be made for summary judgment after a plea has been



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> delivered, still such an application is not prohibited in suitable cases. Normally the plea will disclose that a defendant has a *bona fide* defence. In some cases, however, this may not be so: but in such cases it is, in terms of the decision referred to, still open to plaintiff to apply for summary judgment."

The learned authors refer in the footnote to the decision in *Khan v SA Oil & Fat Industries Ltd supra*. They go on to summarise the decision in the case as follows:

> "The court suggested that circumstances in which an application for summary judgment might be made after delivery of plea were, for example, where the defendant had delivered the plea before the expiry of the usual time for the very purpose of defeating an application for summary judgment or where the plea itself discloses facts

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which made an application for summary judgment right and proper.

In *McLardy v Slateum* 24 QBD 504 an application for summary judgment was successfully made one month after delivery of the plea. The court laid down that it was clear that a plaintiff might apply for summary judgment in case where the defendant sought to prevent him from proceeding under Order 14 by putting in a sham defence at or soon after the date of entry of appearance."

In *Vesta Estate Agency v Schlom* 1991 (1) SA 593 (C) the plaintiff applied for summary judgment in the sum of R15 000 together with interest and costs. The defendant opposed the application and filed an affidavit in which he averred that he had a *bona fide* defence to the action. At the commencement of the hearing of the application for summary judgment in which the court was to determine whether or not the defendant had a b*ona fide* defence he took a point *in limine* that, having filed and delivered a plea before plaintiff delivered to him the application for summary judgment, the plaintiff was precluded from obtaining this form of relief. The defendant relied, for the contention he raised, on the wording of the Cape Provincial Division Rule of Court 32(1) and (2) (similar to Order 15 of the Magistrates Court (Civil) Rules 1980).

Dismissing the point *in limine,* Tebbutt J said at 595C-H:

"An application for summary judgment is an extraordinary remedy. It enables a plaintiff to obtain judgment against a defendant without a trial



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where the defendant has no defence to the plaintiff's claim. By means of this procedure a defence of no substance can be disposed of without putting the plaintiff to the expense of a trial. I can see no reason why this procedure should still not be open to a plaintiff even after the defendant has filed his plea. There is nothing in the wording of rule 32 to preclude it. It is true that the words used in the rule refer to the notice of intention to defend and do not refer as well to a plea but, on the other hand, they do not exclude an application for summary judgment after plea. If it were not so, nothing would be easier for a defendant with a spurious, or no defence to a plaintiff's claim to file some sort of plea at the same time as he gives notice of an intention to defend in order to defeat the plaintiff's right to obtain summary judgment. Indeed, the nature of the plea and the time and circumstances of its filing may afford good ground for an application for summary judgment under the rule. The rule requires a defendant who is faced with an application for summary judgment either to provide security for any judgment including costs that may be given or to deliver an affidavit which must set out the material facts to satisfy the court that he has a *bona fide* defence to the action and disclose fully the nature and grounds of such defence. A defendant with no or a spurious defence could, if the point *in limine* is sound, avoid this by filing a plea at the same time as, or shortly after, he gives notice of intention to defend. I do not think that that can be correct. In *Khan v SA Oil & Fat Industries Ltd* 1923 NPD 199 a full bench of the Natal Provincial Division, dealing with Order XIV which was similar to Rule 32, held that summary judgment could be applied for and obtained even after a plea had been filed. In England, where there was a similar rule, an application for summary judgment was made one month after delivery of the plea (see *McLardy* v *Slateum* (1890) 24 QBD 504 (CA) and see also Jones and Buckle *The Civil Practice of the Magistrates Courts in South Africa* 7 ed vol 2 at 97). I therefore find that the delivery of a plea is no bar to a subsequent application for summary judgment."

Neither counsel could refer to any decision within our jurisdiction on the question whether or not a plaintiff can make an application for summary judgment under Order 15 of the Magistrates Court (Civil) Rules after the delivery of a plea by the defendant. My own research failed to produce such authority. I am, however, satisfied that the construction I placed on the provisions of Orders 15 and 16 is the correct declaration of the law the magistrate ought to have applied in

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this case. The construction is supported by the persuasive authority of decisions of the Cape Provincial Division, the Natal Provincial Division and the English Courts. No authority was cited in



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support of the interpretation placed on the provisions of Order 15 and 16 by the second respondent's legal practitioner and adopted by the magistrate. It was a wrong construction.

There is no doubt that the magistrate committed an error *of* law as opposed to an error *in* law. The next question is whether or not the decision he arrived at is reviewable on the ground of error of law. Mr *Nkiwane* said it is not reviewable. The contention is that where an inferior court refuses, on a misinterpretation of statutory provisions giving it the power to do so, to hear and determine an application on its merits, the aggrieved party cannot seek the relief of having the decision set aside by way of judicial review. According to the contention, unless he appeals, the aggrieved party is for ever bound by what the inferior court says is the law on its own construction of its rules of procedure even if, on the true construction, it ought to have heard and determined the application.

Mr *Nkiwane* cited *Doyle v Shenker & Co Ltd* 1915 AD 233 as authority for the proposition that not every error of law is reviewable. The facts in *Doyle*'s case were that Doyle got injured in the course of his employment with the respondent company. He drew half-pay from his employer for a period of six weeks. At the expiration of that time Doyle signed a document in terms of which he released the employer from all claims and damages he made or would make thereafter as compensation for the injury in consideration of £9 which he had received. Thereafter Doyle was discharged.

He instituted proceedings in the magistrate's court of Cape Town, under s 24 of the Workman's Compensation Act 1905, to recover £300 as damages for the injury. The company raised the document of release as a defence against the action on the ground that it constituted a complete discharge from any claim. Section 37 of the statute provided that a contract whereby a workman relinquished any right to compensation from an employer for personal injury arising out of and in the course of his employment would be null and void.

The magistrate, without expressing any opinion upon the merits of the claim, found that the document had been signed by the plaintiff with full knowledge of its contents and with the intention that it should operate as a compete discharge. He therefore dismissed the action. Before the Cape Provincial Division it was contended that the magistrate had misdirected himself because the document of release relied upon by the company was, in terms of s 37, null and void. The Provincial Division assumed that the magistrate



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would have committed an irregularity if s 37 applied to the claim and he had disregarded it. It however ruled that s 37 did not prohibit a compromise or release in respect of a claim already

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accrued. It ruled that there was no irregularity in the magistrate's decision.

Before the Appellate Division, it was contended for the respondent that, even if the magistrate committed a mistake of law in failing to consider the provisions of s 37, that was not a gross irregularity in the proceedings founding a ground for review by the Provincial Division.

Innes CJ then delivered himself of the following at pp 236-237:

> "The 32nd section of the Charter of Justice conferred upon the Cape Supreme Court authority to review the proceedings of all inferior courts of justice in the Colony, and if necessary to set aside or correct the same. But the grounds on which this power was to be exercised was specifically set out in Order 40 of 1828 (s 5) and in Order 73 (s 3). It is unnecessary to enumerate them here because in effect only one of them is relied upon and that is the occurrence of gross irregularity in the proceedings. There is no need to attempt a definition of that expression: it must be allowed to speak for itself. The question is whether it can be applied to the matter before us. Now a mistake of law in adjudicating upon a suit which the magistrate has jurisdiction to try cannot be called an irregularity in the proceedings. Otherwise a review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review, so carefully drawn by statute and observed in practice, would largely disappear. Yet in this case it is a mistake of law alone which is relied upon as constituting gross irregularity. There is neither allegation nor suggestion that the magistrate, his attention having been drawn to s 37, deliberately refused to apply his mind to it, or to consider it. The position if the section means what the applicant contends is that the magistrate either honestly misinterpreted or completely overlooked it. In either event it would not, I am afraid, be the first occasion on which a court of law has misread a statutory provision or overlooked one not brought to its notice at the trial. Whichever supposition were the correct one, the result would be (still assuming the correctness of the applicant's interpretation) an unfortunate error of law which, but for the special prohibition of the statute would afford good ground for an appeal. But there would be no gross irregularity in the proceedings and therefore no justification for a review."



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*Doyle*'s case followed the decision in *Msingeleli v Edward & Mashasha* 1913 CPD 23 where Buchanan J had said at p 27:

> "The magistrates are the judges of both the facts and of the law. In this case the only irregularity which is alleged is that the Chief Magistrate when dealing with the case has gone wrong in the law. If he did so that is a matter for appeal and not for review. If the alleged irregularity is confined to the opinion of the magistrate, there is no ground of review ... In this case, in my opinion, there is nothing we can lay our hands on which would amount to an irregularity. The fact that a judgment is bad in law does not make it irregular."

The *ratio decidendi* in *Doyle*'s case has been applied in many subsequent cases, notably the following: *Mbiza v Puza* 1918 TPD 1 at 3-4; *Makalima v Gubanxa* 1918 CPD 58 at 61-62; *Groenewald v Minister of Finance* 1927 TPD 679 at 686-687; *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A) at 825; *van Rensburg NO v Board of Trustees of the Mining Industry Pension Fund* 1979 RLR 131 (G) at 133F-G. It finds its validity from the narrow set of facts similar to those that pertained to that case. There was no evidence in fact that the magistrate in *Doyle*'s case had disregarded or misread s 37 of the Workman's Compensation Act. The Provincial Division had proceeded on the basis of an assumption that the magistrate had disregarded or misread s 37. The magistrate did not apparently commit an error of law in *Doyle*'s case. That was not established as a fact. He seems to have asked himself the right question of law and applied his mind to the matters raised by the legal issues before arriving at the decision sought to be reviewed. If he had committed an error it would have

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been an error in law relating to a wrong conclusion in the application of law.

In *Goldfields Investment Ltd & Anor v City Council of Johannesburg & Anor* 1938 TPD 551 at 559 Greenberg JP made the observation that -

> "In *Doyle*'s case the magistrate did direct his mind to the question whether the workman was entitled to receive payment of compensation from the employer and came to the conclusion that he was not so entitled; the issue which was before him in the proceedings was considered by him."

The same observation was made by Murray J (as he then was) in *SA Broadcasting Corp v Transvaal Townnships Bd* 1953 (4) SA 169 (T) where the learned judge said at 177A-C:

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> "The learned judge relied strongly on the decision in *Doyle v Shenker & Co Ltd* 1915 AD 233, for the view that a mistake of law is not a reviewable irregularity. But as pointed out by Greenberg JP in the *Goldfields Investment* case (*supra* at p 559) the magistrate in *Doyle*'s case did direct his mind to the question he was required by law to consider, even though he gave a decision which was bad in law owing to his misreading a certain statutory provision. In the *Goldfields* case - as here - the position is that an erroneous view of the law induced the body brought into review to fail to direct his or its mind at all to the matter which in law it was incumbent on him or it to consider."

It is not sufficient to allege mere mistake of law in order to found a ground for review as was done in *Doyle*'s case. As was said by Feetham J in *Groenewald*'s case (*supra*) at p 687:

> "In order to constitute gross irregularity' or clear illegality' within the meaning of the rule already quoted there must be something more than this - a deliberate refusal to consider the provision of a statute, not a mere failure to apply it correctly."

The view that the *ratio decidendi* in *Doyle*'s case was intended by Innes CJ to be applied to a narrow set of facts similar to those pertaining to that case is supported by the fact that in 1903 the Chief Justice had declared that an error of law would in an appropriate case found a ground for review. This was in the case of *Johannesburg Consolidated Investment Co* v *Johannesburg Town Council* 1903 TS 111 at 115, where he said:

> "Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute or is guilty of gross irregularity or clear illegality in the performance of the duty, this court may be asked to review the proceedings complained of and set aside or correct them."

Under s 27 of the High Court Act [*Chapter 7:06*] the High Court has power to review the decision of any inferior court on the ground of error of law if the error amounts to a "gross irregularity" in the proceedings or decision. As was said by Innes CJ in *Doyle*'s case there is no need for a definition of "gross irregularity". Each case will depend on its own facts. Although the phrase may have sinister connotations of *mala fides*, the error of law does not have to be intentional, "high-handed" or *mala fide* to quality for "gross irregularity". It may be perfectly *bona fide*. It just needs to be substantial, material, or

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manifest in the form of its consequences that have the effect of causing a miscarriage of justice.

In *Goldfields Investment Ltd* (*supra*) Schreiner J (as he then was) said at 560:

> "It seems to me that gross irregularities fall broadly into two classes, those that take place openly as part of the conduct of the trial - they might be called patent irregularities - and those that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given by him and which might be called latent. Of course, even the first class are only material in as much as they prevent, or are deemed to prevent, the magistrate's mind from being properly prepared for the giving of a correct decision. But unlike the second they admit of objective treatment, according to the nature of the conduct. Neither in the case of latent nor in the case of patent irregularities need there be any intentional arbitrariness of conduct or any conscious denial of justice. The law as stated in *Ellis v Morgan* (*supra*) has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to gross irregularity."

In the same case Greenberg JP delivered the following at p 557:

> "The ground which is alleged in the summons is that there has been a gross irregularity in the proceedings. This phrase, in its ordinary meaning, has a somewhat sinister connotation, which is not justified by the cases which have been held to be instances of gross irregularity. There are cases where it has been held that there was gross irregularity where the only mistake which the party said to have been guilty of gross irregularity has committed is that he has taken a wrong view or what appears to the appeal court to be a wrong view, of a section in a statute or of the law - quite possibly a question on which there is ample room for two opinions. But it may well be that a wrong view of this kind, if it has the consequences to which I shall presently refer, may constitute a gross irregularity."

In the same case Greenberg JP delivered the following at p 557:

> "The ground which is alleged in the summons is that there has been a gross



> irregularity in the summons is that there has been a gross irregularity in the proceedings. This phrase, in its ordinary meaning, has a somewhat sinister connotation, which is not justified by the cases which have been held to be instances of gross irregularity. There are cases where it has been held that there was gross irregularity where the only mistake which the party said to have been guilty of gross irregularity has committed is that he has taken a wrong view, of a section in a statute or of the law - quite possibly a question on which there is ample room for two opinions. But it may well be that a wrong view of this kind, if it has the consequences to which I shall presently refer, may constitute a gross irregularity."

The High Court does not have to concern itself with the correctness or otherwise of the decision itself. A review of a decision involves going behind it and tracing the route taken by the inferior court leading up to the decision. In the performance of its review powers to see whether the inferior court followed the correct path; defined for itself the correct legal issues; adopted the correct interpretation of the provision of the statute and based its decision to exercise its jurisdiction on legitimate grounds; the High Court is concerned with establishing the validity of the decision. In so doing, it does not have to be fastidious. It must be accommodative of minor mistakes because setting aside a decision of another court should be done when it is absolutely

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necessary in the interests of justice.

An examination of decided cases shows that an error of law is likely to constitute a gross irregularity when committed in the following circumstances, taken individually or cumulatively (the list is not exhaustive):

*(a)* where a wrong question of law is asked by the inferior court or tribunal causing it to misunderstand the nature of the whole inquiry and misdirecting its mind to wrong matters: *SA Broadcasting Corp v Transvaal Township Bd supra* at 176H-177G; *Lee v Showmen's Guild of Great Britain* 1952 (1) All ER 1175; *Anisminic Ltd* v *Foreign Compensation Commission & Anor* [1969] 1 All ER 208 (HL) at 213I - 214A; *Community Development Board* v *Revision Court, Durban Central* 1971 (1) SA 557 (N) at 563H - 564; *Computer Investors Group Inc & Anor* v *Min of Finance* 1979 (1) SA 879 at 894H-895D; *McKelvey* v *Abrahams & Anor* 1989 (2) ZLR 251 (S) at 262D-E; *Cone Textiles (Pvt) Ltd* v *Commercial Union Fire, Marine & General Insurance Co Ltd* 1989 (2) ZLR (S) at 155E-F.

In the *Community Development* case (*supra*) Harcourt J said at pp 563H-564A:

"It is clear that this variety of intervention is competent and appropriate



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where the body in question fails to appreciate the nature of the matter for decision by misreading important statutory provisions governing its procedure and decision, see *Union Government* v *Union Steel Corporation (SA) Ltd* 1928 AD 220 at 235; *Touriel* v *Min of Internal Affairs, Southern Rhodesia* 1946 AD 535 at 547 and *Goldfields Investments Ltd* v *City Council of Johannesburg* 1938 TPD 551 at pp 560-1 where it was said:

> ... if mistake leads to the court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the enquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that, the losing party has not had a fair trial."

*(b)* Where the error of law causes in the inferior court or tribunal the failure to appreciate the nature of the discretionary powers vested in it by the statute. Where the construction of the provisions of the statute is a matter within its discretion the misinterpretation of the provisions resulting in a wrong decision shows that the inferior court has failed to appreciate the nature of its discretionary powers.

In *Union Government* v *Union Steel Corporation Ltd* 1928 AD 220 at 234-235 Stratford JA (as he then was) stated the principle thus:

" If a discretion is conferred by statute upon an individual and he fails to appreciate the nature of the discretion through misreading of the Act which confers it, he cannot and does not properly exercise that discretion. In such a case a court of law will correct him and order him to direct his mind to the true question which has been left to his decision."

See also *Touriel* v *Min of Internal Affairs, Southern Rhodesia* (*supra*) at 547; *L & B Holdings (Pvt) Ltd* v *Mashonaland Rent Appeal Bd and Ors* 1959 (1) 490 R & N at 496E; *Computer Investors Group* v *Min of Finance* (*supra*) at 895 B.

*(c)* where the misconstruction of the provisions of a statute causes in the inferior court or

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tribunal a misconception of the width and length of its jurisdiction, for example, interpreting statutory provisions in a manner that limits its jurisdiction, resulting in it declaring it incompetent: *Lee v Showmens Guild of Great Britain* (*supra*) at 1182C-D; *Mabasa & Ors* v *Native Commissioner, Ladysmith* 1958 (1) SA 130 (N) at 134C-D.



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In *Anisminic Ltd* v *Foreign Compensation Commission & Anor* (*supra*) at 216D-E Lord Reid said:

"It cannot be for the commission to determine the limits of their powers. Of course, if one party submits to a tribunal that is powers are wider than in fact they are, then the tribunal must deal with the submission. But if they reach a wrong conclusion as to the width of their powers the court must be able to correct that - not because the tribunal has made an error of law, but because as a result of making an error of law they have dealt with and based their decision on a matter with which, one a true construction of their powers, they had no right to deal."

*(d)* where the decision was dependent on the error of law or was substantially or manifestly influenced by it. In other words, the error of law must be the *raison d'étre* of the decision.

In *Pearlman* v *Harrow School* [1979] 1 All ER 365 (CA) at 372C-D Lord Denning had this to say:

"The High Court has, and should have, jurisdiction to control the proceedings of inferior courts and tribunals by way of judicial review. When they go wrong in law the High Court should have power to put them right. Not only in the instant case to do justice to the complainant, but also so as to secure that allw courts and tribunals, when faced with the same point of law, should decide it in the same way. It is intolerable that a citizen's rights in point of law should depend on which judge tries his case, or in what court it is heard. The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and *certiorari* will lie to correct it."

In *Hira & Anor* v *Booysen & Anor* 1992 (4) SA 69 (A) at 93G-I, Corbett CJ said:

"Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (ie where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned) renders the decision invalid depends upon its materiality. If for instance the facts found by the tribunal are such as to justify its



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decision even on a correct interpretation of the statutory criterion, then normally (ie in the absence of some other review ground) there would be no ground for interference. *Aliter*, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its error of law the tribunal asked itself the wrong question' or applied the wrong test' or based its decision on some matter not prescribed for its decision' or failed to apply its mind to the relevant issues in accordance with the behests of the statutes'; and that as a result its decision should be set aside on review."

See also *Laurence* v *Verhoef & Ors NNO* 1993 (2) SA (W) 328 at 335H-336B.

*(e)* Where the error of law on a point *in limine* or a preliminary inquiry causes the inferior court or tribunal to erroneously refuse or decline jurisdiction on the merits of the application. In such a case the applicant is deprived of his right to have the application considered in

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accordance with the law.

In *Goldfields Investment Ltd & Anor* v *City Council of Johannesburg & Anor* (*supra*) at p 557-558 Greenberg JP said:

> "The plaintiff's contention is that a mistake of law *per se* is not an irregularity, for instance, where a magistrate, through misreading a section, refuses to the aggrieved party a hearing to which he is entitled. Initially the error arises from a mistake of law, but before relief by way of review is granted one has to consider the consequences."

In *SA Broadcasting Corp* v *Transvaal Townships Bd* (*supra*) at pp 176 (H)-177A Murray J held that the result that the Board declined to consider and decide the application by the applicant on its merits amounted to an irregularity reviewable by a court of law.

JM Evans in *de Smith's Judicial Review of Administrative Action* 4 ed at pp 123-124 states:

> "A tribunal does not decline jurisdiction by making an erroneous decision on the merits of a case, but it does decline jurisdiction if it refuses to enter into the merits because it holds that it has no power to do so."

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See also Re *Racal Communications Ltd* [1980] 1 All ER 284 (CA) at 286 E-F.

Applying these principles to the decision of the magistrate in this case, it is clear that he asked himself a wrong question of law and misunderstood the legal issues that were for his consideration. He asked himself whether a defendant had a right to deliver a plea simultaneously with an entry of appearance to defend for the purpose of defeating an application for summary judgment. Because of the wrong question of law, he directed his inquiry at matters he should not have considered, and failed to apply his mind to the matters in issue. He clearly misinterpreted the provisions of Orders 15 and 16 and also wrote into the rules words to the effect that it was the intention of the legislature that a plaintiff should be barred by the delivery of a plea by the defendant from applying for summary judgment. The misconstruction of the statutory provisions was the main cause of the magistrate's wrong decision by which he upheld the point *in limine*. The decision was therefore depended on the error of law. As a result of the misconstruction of the provisions of Orders 15 and 16, the magistrate erroneously refused to hear and determine the application for summary judgment on its merits, when, on a correct interpretation of the provisions of the Orders, he had the jurisdiction to hear and determine the application. The applicant was deprived of the right to have its application hear and determined on its merits.

My conclusion is that the applicant is entitled to the relief its seeks by way of review. The decision of the magistrate is set aside. There is no need now to remit the matter to the magistrate to hear and determine the application.

It is therefore ordered as follows:

(1) The decision of the first respondent on the point *in limine* be and is hereby set aside.

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(2) The second respondent is to pay the costs for both applications in the magistrates court and the High Court.

*Danziger & Partners,* applicant's legal practitioners

*Wilmot & Bennett,* second respondent's legal practitioners



## S v NHIDZA 1996 (1) ZLR 565 (HC)

**Court** **High Court, Bulawayo**

Chatikobo J

Criminal review

17 May 1996 Judgment No. HB-32-96

### Flynote

Criminal law - common law offences - abortion - use of drugs to induce abortion - need for medical evidence to establish that drug taken by woman caused abortion - whether common law on abortion has been replaced by Termination of Pregnancy Act [Chapter 15:10]

### Headnote

A young woman admitted that she had taken some anti-malarial tablets in order to induce an abortion. She subsequently aborted her three-month-old foetus. The woman admitted that the tablets had caused an abortion. However, the State did not lead any expert medical evidence to show that these tablets could actually induce an abortion. In the absence of proof that the tablets could cause an abortion, the accused could only be convicted of attempted abortion.

The Termination of Pregnancy Act [*Chapter 15:10*] has not replaced the common law on abortion. The common law crime of abortion continues to co-exist with the legislation. The primary intention of the Act was to provide for the circumstances in which an abortion can be lawfully terminated by medical practitioners. It was not the intention of Parliament to supplant or codify the common law. Cases such as *S v Mapuranga* HB- 242-86 and *S v Chiunye* HH-153-94 in which judges had decided that the Act had been replaced the common law are incorrect.

Cases cited:

*S v Chiunye* HH-153-94

*S v Collop* 1979 (4) SA 381 (C); 1981 (1) SA 150 (A)

*S v Kaboko* HH-232-88



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*S v Kruger* 1976 (3) SA 290 (O)

*S v Maposa* HH-147-94

*S v Mapuranga* HH-242-86

The following statutes were referred to:

Abortion and Sterilization Act 2 of 1975 (SA), s 10(1)*(a)*

Termination of Pregnancy Act [*Chapter 15:10*], ss 2, 3, 4 and 5

## Judgment

**Chatikobo J:** The accused was convicted by a provincial magistrate on her own guilty plea of the crime of abortion. She was sentenced to eight months' imprisonment with labour, half of which was suspended on condition of future good behaviour and the other half was suspended on condition she performs community service for 180 hours.

The accused is a school drop out who was made pregnant by a married man. When she was three months pregnant, her flippant boyfriend persuaded her to terminate her pregnancy. He gave her four Norolon anti-malarial tablets which she took in order to induce an abortion. She subsequently aborted the three month old foetus and together with her boyfriend they concealed the foetus. The offence soon came to light and she was arrested and charged.

Although she admitted that the abortion was caused by the Norolon tablets which she took, the State did not lead any medical evidence to show that Norolon tablets can induce an abortion. An admission by a lay person that the foetus was expelled as a result of taking Norolon tablets does not constitute proof that the expulsion of the foetus was not spontaneous. There should be evidence of a medical or scientific nature to show that Norolon tablets can induce an abortion. See *S v Kaboko* HH-232-88; *S v Chiunye* HH-153-94.

In the absence of proof that Norolon tablets can induce an abortion the accused could only have been convicted of attempted abortion. There would be no prejudice to the accused if I were to substitute a conviction for attempted abortion. But before doing so, I feel duty bound to deal, regrettably somewhat superficially, with the question whether or not the common law offence of abortion still exists.

In *S v Mapuranga* HB-242-86 Manyarara J (as he then was) ventured the view, without giving reasons therefor, that the law relating to abortion has been changed by the Termination of Pregnancy Act [*Chapter 15:10*] (the Act) and consequently that a person who terminates a pregnancy otherwise than in accordance with the Act should be charged under the Act and not with





the common law offence of abortion. As far as I am aware this judgment was only followed by Garwe J in *S v Chiunye supra*. Again no reasons were given for this view. Before the decision in

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*Chiunye* (*supra*) Adam J had hinted, in an *obiter dictum*, in *S v Maposa* HH-147-94, that it may not be correct to say that the Act had codified the law relating to abortion.

Section 3 of the Act provides that:

> "No person may terminate a pregnancy otherwise than in accordance with the provisions of this Act."

Section 2 of the Act defines pregnancy as meaning an intra-uterine pregnancy and the word "foetus" is defined as including an embryo. Section 4 of the Act sets out three situations where a pregnancy may be lawfully terminated. Section 5 goes on to provide that such lawful termination can only be carried out by a medical practitioner in a designated institution with the written permission of the superintendent of that institution.

The South African equivalent of our Act is the Abortion and Sterilisation Act 2 of 1975. Section 10(1)*(a)* of the South African Act makes it an offence for any person who is not a medical practitioner to procure an abortion. Abortion is in turn defined as the "abortion of a live foetus of a woman with intent to kill such foetus." Hunt *South African Criminal Law and Procedure* Vol 2, 2 ed, says of these provisions that:

> "The effect of these provisions of the Act, it has been held, is to establish that the common law relating to abortion has been repealed by the Act whose provisions are substituted therefor as a form of codification of the law in this regard.
>
> In the result then it is the case that the common-law crime of abortion has been repealed by the Act which substitutes therefor a statutory form of criminal abortion."

The correctness of this statement depends in turn upon the correctness of the decisions upon which reliance is placed by the learned authors.

The first such decision is to be found in the judgment of Erasmus J in *S v Kruger* 1976 (3) SA 290 (O). The headnote of the report of that decision (the judgment is in Afrikaans) simply says that the common law crime of abortion has been replaced by the Abortion and Sterilisation Act. The second such



decision is that of van Winsen J in *S v Collop* 1979 (4) SA 381 (C). In this case it was contended on behalf of the appellant that, on a proper interpretation of "abortion" in terms of the Act, the appellant would not have procured the abortion of a live foetus unless the pregnancy had reached a certain stage of development. In other words, counsel's contention was that there is a period after the fertilisation of the ovum by the sperm before the embryo develops into a foetus, when it would be lawful to terminate a pregnancy. The learned judge rejected this contention and held that an unlawful abortion can be procured at any time after conception. The learned judge however went on to state that the Act disclosed an intention to codify the common law of abortion. His conclusion appears clearly from the passage at p 389E:

> "The intention to alter the common law must appear from the express provisions of the statute and in the present case the Act provides for an explicit and wide ranging departure from the common law in many respects. However, nowhere does it appear in explicit terms that the departure includes the legalising of abortion up to a

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> certain stage of the development of the fertilised ovum. The absence of such a provision can rightly be said to point to an intention to abide by the terms of the common law."

The learned judge accepted that the common law penalised the procurement of abortion at any stage of development of the foetus and held that the Abortion and Sterilization Act did the same. The explicit and wide ranging departure from the common law referred to by the learned judge seems to be a reference to the provisions in the South African Act which provide for circumstances when an abortion can be lawfully terminated. The viewpoint expressed by the learned judge that the Act had set out to codify the common law was clearly *obiter*. All that the learned judge was asked to decide was whether the Act provided, as did the common law, that an abortion can be procured at any time after the fertilisation of the ovum.

The decision of van Winsen J was taken on appeal and Diemont JA, who delivered the judgment of the court in *S v Collop* 1981 (1) SA 150 (A) rejected the view held by van Winsen J at first instance in these terms (at p 164C-E):

> "In the judgment of the court *a quo* it was stated that the Act set out to codify' what up until its enactment was the common law offence of procuring abortion. I hesitate to accept the word codify' as apposite since there was a divergence of opinion among the writers of the

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> seventeenth and eighteenth centuries both as to the nature of the offence and as to the manner in which it should be punished. That abortion was a crime in the Roman Dutch law is clear. The aborting of offspring is described by Voet 47.11.3 (Gane's trans, Vol VII at 255 in the title dealing with extraordinary crimes). He defines the crime as:
>
> > ... the untimely forcing out or getting rid of an embryo which has been conceived, as when either a girl is anxious to conceal stolen loves and a conception which has ensued from them, or she has been bribed to inflict violence on her inward parts by substitutes or by those who hope for succession in intestacy and others like them who have an interest in posthumous child being born; or she grudges progeny to a husband whom she is leaving and thus brings it about that she will not bear a son to a husband who is already at enmity with her. It does not matter in what way the abortion is procured provided that the guileful purpose of aborting the offspring is present.'"

I share this view. I consider it sound to say that if one endeavours, as one must, to construe our Act in conformity with the common law rather than against it one is forced to the conclusion that its primary purpose was to provide as it does in s 4 thereof, for circumstances when, for eugenic, health and social reasons, a pregnancy can be lawfully terminated. It was not the intendment of Parliament to supplant, or codify the common law.

I see nothing anomalous in the Act existing side by side with the common law. In *Craies on Statute Law* 17 ed p 346 one finds this passage:

> "... although the rule is certain that where a statute creates a new offence by prohibiting something that was lawful before, and appoints a specific remedy against such new offence by a particular method of proceeding that particular method of proceeding must be pursued and no other, yet nevertheless if an offence was antecedently punishable at common law, and a statute is passed which prescribes a particular remedy by a summary proceeding, either method of proceeding may be pursued, because there the methods of proceeding is cumulative, and does not exclude the common law punishment."

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Devenish in his work *Interpretation of Statutes* says at p 159:

> "It is of fundamental importance to comprehend that the jurisprudential phenomenon of legislation differs from that of codification. Authentic codification involves an unqualified supplanting of the ancient common



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> law, whereas legislation does not supplant the common law, although it may change or abolish parts of it. In this regard Paton observes that:
>
> > statutes are a gloss written around the common law, and hence we can regard the common law as primary except in so far as it is specifically altered by legislation.'"

I respectfully associate myself with these sentiments and come to the conclusion that the common law crime of abortion has not been replaced by the Termination of Pregnancy Act [*Chapter 15:10*].

In coming to this conclusion I have not been oblivious to the argument put forward in *Collop*'s case (*supra*), concerning the use of intra-uterine contraceptive devices (IUD), commonly called the loop. The argument was that this device does not stop conception. It merely prevents the fertilised ovum from establishing itself. Therefore, if the crime of abortion can be committed at any stage after the fertilisation of the ovum by the sperm, it would be illegal for a woman to use the loop as she would be doing so in order to terminate a pregnancy after the fertilisation of the ovum. There can be little doubt that as an exercise in casuistry this argument is so sublime as to endear the hearts and minds of those who do not believe in the use of birth control methods. It is equally arguable that if abortion is committed at any stage after the fertilisation of the egg then the use of the loop to prevent the newly conceived embryo from implanting itself in the uterus may be contrary to the provisions of the Act as well as the common law. Whether or not that is so is happily not a matter that flaws the conclusion to which I have come. I say so because both in terms of the Act and the common law it is an offence to terminate a pregnancy at any stage after conception. A person who uses a loop would - if this argument is sound - be guilty of abortion anyway. It is therefore not an argument which supports the conclusion that the common law has been supplanted by the Act. As this argument is not germane to the issue at hand I express no opinion on it.

In conclusion therefore I will set aside the conviction for abortion and substitute one for attempted abortion.

As far as sentence is concerned I consider that even for an attempt the sentence imposed by the magistrate is appropriate.

Malaba J agrees.



**BRAIMAH v BRAIMAH 1996 (1) ZLR 571 (HC)**

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**Court** **High Court, Harare**

Smith J

Divorce action

15 & 22 May 1996 Judgment No. HH-66-96

## Flynote

Family law - divorce - jurisdiction - domicile - Zimbabwean woman married to foreign man - wife employed and ordinarily resident in Ethiopia - no evidence that husband ever acquired domicile of choice in Zimbabwe - no jurisdiction in Zimbabwean court

## Headnote

The plaintiff, a Zimbabwean woman, married the defendant, a Nigerian citizen, in Harare in 1990. A few months after the marriage, the plaintiff obtained a job in Addis Ababa and remained there. At the time of the action, the defendant was resident and employed in Botswana. He filed a special plea in bar, claiming that the Zimbabwean courts had no jurisdiction.

Where the wife is the plaintiff in a divorce action, the Zimbabwean courts have jurisdiction in terms of s 3(1) of the Matrimonial Causes Act [*Chapter 5:13*] in the following situations:

*(a)* where the wife was deserted by the husband, he was domiciled in Zimbabwe immediately before the desertion; or

*(b)* where the marriage took place in Zimbabwe, the wife was resident in Zimbabwe for at least two years immediately before the action began and was still so residing; or

*(c)* the wife was a citizen of Zimbabwe at the date of commencement of the action and immediately before that date had been ordinarily resident in Zimbabwe for at least two years and was still so residing.

Held, that there was no proof that the husband was, at the time of the desertion or any other time, domiciled in Zimbabwe. The fact that he got a job and married in Zimbabwe did not *ipso facto* indicate a fixed and deliberate



intention to settle permanently. Without evidence as to how long he lived and worked here, there was not even a *prima facie* case that he had acquired domicile, so he could not be made to come to court and be cross-examined on the matter.

Held, further, that the wife had been resident in Ethiopia since shortly after the marriage and was still resident there, in the sense that Ethiopia was where she was to be found daily.

Held, further, that although it is possible for a person to be "resident" in one country but "ordinarily resident" in another, in order to be "ordinarily resident" in Zimbabwe she would have to be here on more than a casual and intermittent basis. Ethiopia was where she regularly,

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normally or customarily lived.

Held, therefore, that the court did not have jurisdiction and that the plaintiff would have to institute proceedings in Botswana.

Cases cited:

*Banubhai v Chief Immigration Officer Natal* (1913) 34 NLR 251

Ex p *Breull*; in re *Bowie* (1880) 16 ChD 484 (CA); [1874-80] All ER Rep 646

*Eilon v Eilon* 1965 (1) SA 703 (A)

*Kanjee Dava* v *Immigrants Appeal Bd* (1915) 35 NLR 267

*Kennedy v Kennedy* 1978 RLR 58 (G)

*Lewis v Lewis* [1956] 1 All ER 375 (PDA)

*Stransky v Stransky* [1954] 2 All ER 536 (PDA)

Statutes referred to:

Matrimonial Causes Act [*Chapter 5:13*], s 3(1)

*A Ebrahim*, for the plaintiff

Miss *T G Moyana*, for the defendant

## Judgment

**Smith J:** The plaintiff (hereinafter referred to as "Elizabeth") was married to the defendant (hereinafter referred to as "Aaron") in Harare, Zimbabwe, on 2 July 1990. The marriage still subsists. Elizabeth has been employed by the Organisation of African Unity in Addis Ababa, Ethiopia, since November, 1990 and is still so employed. She is a citizen of Zimbabwe. Aaron was born in Nigeria and is a citizen of Nigeria. He has always regarded Nigeria as his permanent home but he is presently resident in Botswana where he is employed. Elizabeth has instituted proceedings against Aaron in order to obtain a divorce, custody of the two minor children of the marriage and maintenance. Aaron has filed a special plea in bar claiming that this court



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does not have jurisdiction. Elizabeth initially claimed that this court had jurisdiction in terms of paras *(a)* and *(c)* of s 3 (1) of the Matrimonial Causes Act [*Chapter 5:13*] (hereinafter referred to as Chapter 5:13). In her replication to the plea in bar she claimed that para *(b)* of s 3 (1) of Chapter 5:13 also conferred jurisdiction. I will deal with each paragraph separately.

Paragraph *(a)* of s 3 (1) of Chapter 5:13 confers jurisdiction where the wife has been deserted by her husband and, immediately before the desertion, was domiciled in Zimbabwe. There is no

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dispute at this stage concerning the allegation that Aaron deserted Elizabeth. Elizabeth alleges that although Aaron's domicile of origin is Nigeria, when he came to live in Zimbabwe, worked here and married her in Zimbabwe, this country became his domicile of choice. In order to acquire a domicile of choice, there must be an intention to remain permanently in the country concerned and make that one's home - see *Barubhai v Chief Immigration Officer* Natal (1913) 34 NLR 251 at 264 and *Kanjee Dava* v *Immigrants Appeal Board* (1915) 35 NLR 267 at 272. In *Eilon* v *Eilon* 1965 (1) SA 703 (A) at 719 Potgieter AJA said:

> "The onus of proving a domicile of choice is discharged once physical presence is proved and it is further proved that the *de cujus* had at the relevant time a fixed and deliberate intention to abandon his previous domicile, and to settle permanently in the country of choice."

The fact that Aaron got a job and married in this country does not, in itself, indicate a fixed and deliberate intention to settle permanently in Zimbabwe. Accordingly, there is no proof that Aaron was at the time of the desertion, or indeed at any time, domiciled in Zimbabwe. Mr *Ebrahim* submitted that Aaron must come to court and give *viva voce* evidence as to his domicile so that he may be cross-examined. However, before that can be done the court must be satisfied that there is a *prima facie* case that he has acquired a domicile of choice here. There is no evidence as to how long he lived and worked in this country. There is no allegation that he, at any stage, said that he wanted to make his home here or did anything to manifest such an intention. As there is no evidence that Aaron acquired a domicile of choice here, para *(a)* of s 3 (1) of Chapter 5:13 does not accord jurisdiction in this case.

Paragraph *(b)* of s 3(1) of Chapter 5:13 confers jurisdiction where the marriage was celebrated in Zimbabwe and the wife has resided in Zimbabwe for a period of two years immediately preceding the date of commencement of the action and is still so residing, even if the husband has never been domiciled in Zimbabwe. In this case the marriage was celebrated in Zimbabwe



but it appears that Elizabeth has been resident in Ethiopia since November 1990 and still resides there. In her reply to Aaron's request for further particulars, she claims that she is ordinarily resident in Zimbabwe but she admits that she has been working in Addis Ababa from November 1990 to the present time. It seems clear to me that she must be residing in Ethiopia and has been residing there since she started working for the Organisation of African Unity. As James LJ said in Ex p *Breull*; in re *Bowie* (1880) 16 ChD 468 (CA); [1874-80] All ER Rep 646 at 647:

> "I am of opinion that a man may fairly be said to reside where he is found daily."

In his heads of argument, Mr *Ebrahim* conceded that Elizabeth is currently residing in Ethiopia. Therefore para *(b)* of s 3(1) of Chapter 5:13 does not accord jurisdiction in this case.

Paragraph *(c)* of s 3 (1) of Chapter 5:13 confers jurisdiction where, at the date of commencement of the action, the wife is a citizen of Zimbabwe and, immediately before that date, she has been ordinarily resident in Zimbabwe for a period of not less than two years and is still so residing. In *Kennedy* v *Kennedy* 1978 RLR 58 (G); 1978 (2) SA 698 (R) Gubbay J (as

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he then was) concluded that a person may be residing in one country but be ordinarily resident in another. At p 61-62 (700A-H) the learned judge said:

> "The meaning of the words ordinarily resident' and resident' has been the subject of much judicial consideration. There are stray *dicta* to the effect that the word ordinarily' lends no added meaning to the word resident' - See *Hopkins v Hopkins* [1950] 2 All ER 1035 at pp 1038H-1039A. But the better view is that the two expressions do have different meanings. It is to be observed that s 12 (1) [now s 3(1)] of the Matrimonial Causes Act use the word resided' in para *(b)* and the words ordinarily resident' in para *(c)*. I have no doubt that the use of the two terms is not accidental, and that the legislature intended each to bear a different signification. The section was amended in 1970 by the addition of para *(c)*. The legislature must be presumed to have known at that time that the courts had differentiated in meaning between the terms resident' and ordinarily resident'. The rule is well expressed by Lord Coleridge CJ in *Barlow & Anor v Teale* (1885) 15 QBD 403 at p 405 thus:
>
> > Where ... Acts of Parliament use those forms of words which have



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> > received judicial construction, in the absence of anything in the Acts showing that the legislative did not mean to use the words in the sense attributed to them by the Courts, the presumption is that Parliament did so use them.'
>
> See also *S* v *Cuddington* 1974 (1) RLR 251 (A) at 265; 1974 (3) SA 371(RA) at 376F.
>
> It seems to me that in para *(c)* the qualifying adverb "ordinarily" was intended to indicate that the residence required, though it need not necessarily be continuous and may be broken by a temporary absence, has to be 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. In *Cohen* v *Commissioner for Inland Revenue* 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.'
>
> The word resided' in para *(b)* of [s 3(1)] denotes physical presence of some degree of permanence. It may be equated to actually resided'. A person is actually resident in the country in which he is in fact living. See *Biro* v *Minister of the Interior* 1957 (1) SA 234 (T) at 240F- G). Thus, a wife may actually reside in one country although be 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. Instances of this are to be found in *Stransky v Stransky supra,* and *Lewis v Lewis* [1956] 1 All ER 375. So in *Cohen v CIR supra,* the taxpayer was ordinarily resident in South Africa where his home was even though he had resided outside that country for more than a year."

The learned judge went on to refer to *Stransky v Stransky* [1954] 2 ALL ER 536 (PDA) and *Lewis v Lewis* [1956] 1 ALL ER 375 (PDA) where the courts had held that the wife's temporary residence in one country had not prevented her from being regarded as having been ordinarily resident in another. In the *Stransky* case, the wife had spent 15 months in Germany but kept a flat and most of her possession in London. In the *Lewis* case, the wife had spent 6 months in Australia but left a flat and her furniture in London.



SMITH J

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Therefore para *(c)* of s 3(1) of Chapter 5:13 does not accord jurisdiction in this case.

For the reasons set out above, the defendant's plea in bar is upheld. This court has no jurisdiction to hear this case. The plaintiff will have to institute proceedings in Botswana.

The plaintiff is ordered to pay the defendant's costs.

*Ali Ebrahim,* plaintiff's legal practitioners

*Atherstone & Cook,* defendant's legal practitioners



## S v NCUBE 1996 (1) ZLR 577 (HC)

**Court** **High Court, Bulawayo**

Malaba J & Cheda J

Criminal appeal

24 May 1996 Judgment No. HB-35-96

### Flynote

Criminal procedure (sentence) - common law offences - theft - female first offender stealing large amount of money from employer when subjected to sudden temptation - accused four months pregnant when sentenced - whether imprisonment appropriate sentence

### Headnote

A female first offender stole $25 000 in cash. She had been faced with sudden temptation as a fellow employee had negligently left the money lying around. She was four months pregnant at the time she was originally sentenced to an effective prison term of one and a half years' imprisonment. She had made full restitution prior to conviction.

On appeal against sentence, the appeal court found that the magistrate had misdirected himself in finding that there had been no sudden temptation. In deciding that the sentence should be altered to a fine and suspended prison sentence, the court took into account these facts:

*(a)* there had been sudden temptation and the lack of premeditation;

*(b)* the accused was a first offender and had made full restitution, thereby showing genuine contrition and making efforts to repair the damage;

*(c)* imprisonment for female first offenders impacts more heavily than on their male counterparts;

*(d)* she was four months pregnant at the time of sentence.

These factors, taken together, tilted the scales in favour of a decision to grant her the option of a

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fine.

Cases cited:

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



*S v Mpofu* HB-81-92

*S v Ncube* HB-20-91

*S* v *Ndhlovu* HB-11-95

*S* v *Nxumalo* HB-126-93

*S v Paulo & Ors* 1971 (1) RLR 251 (A)

*S v Samuel* 1976 (1) RLR 222 (G)

*S v Vherukayi & Ano*r HH-420-87

*S v Zindoga* 1988 (2) ZLR 86 (S)

## Judgment

**Malaba J:** On 22 June 1995 the appellant was convicted on her own plea of guilty of theft of $25 000. She was sentenced to three and half years imprisonment with labour of which 2 years was suspended for 5 years on the usual conditions of good behaviour.

Dissatisfied with the sentence she appealed on the grounds that it was manifestly excessive and that the magistrate misdirected himself in failing to consider the imposition of a fine. She had served 72 days of the imprisonment sentence by the time she was released on bail pending appeal.

The facts of the case are these. The appellant was employed by Central Africa Building Society (CABS) as a teller carrying out her duties at the branch situated at the corner of 12th Avenue and Lobengula Street. On 26 November 1995 she was on relief at the Jason Moyo Street branch. At about 10.45 am one of the tellers who had been working from a compartment next to that used by the appellant was instructed to go and work at the automatic teller machine.

The appellant's colleague took all the cash she had in her custody to the controller who counted it and found a sum of $201 398.52. She was instructed to place the money in her compartment's safe. As she put the money into the safe she inadvertently left a bundle of fifty dollar notes amounting to $25 000 out of the safe. When she left her compartment the accused saw the money and took it. She hid the money within the building until the close of business for the day at 11.30 am.

On leaving her work place the appellant took the $25 000 and later used it to buy grocery and pay her debts. She was arrested on 19 May 1995 and confessed her misdeed. She paid full

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restitution with the help of her relatives before conviction.

The appellant was a first offender aged 27, married with one child. At the time of her conviction and sentence she was four months pregnant. She told the



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Court *a quo* that she was having financial problems at the time she stole the money. She had also lost her job.

In sentencing the appellant the regional magistrate said she had premeditated the theft. He reasoned that as she had financial problems she had been desirous all along to steal money but lacked the opportunity to do so. The occasion presented her with the opportunity she had been looking for. He opined further that hers was not a case of sudden temptation. She always had theft in mind but what became sudden was the opportunity to do what she had always wanted to do - to steal. The regional magistrate scoffed at the suggestion of sudden temptation made by the appellant's legal practitioner.

The appellant's legal practitioner had compared the facts in *S v Nxumalo* HB-126-93 to those of the appellant's case. He then said:

> "The judge further emphasised to take into account that in Nxumalo's case there was sudden temptation. Your worship although Nxumalo had stolen on several occasions, the judge considered that as sudden temptation. What more therefore your worship is sudden temptation which is applicable to the accused person in this particular case where she merely saw this money and took the money. At that particular instance there was no premeditation at all."

The magistrate assessed the appellant's sentence on the basis that she premeditated the offence and was not faced with a sudden temptation as submitted by her legal representative. The facts do not support the magistrate's conclusions. We agree with Mr *Sibanda*'s submission that the trial magistrate misdirected himself on the facts and took a more serious view of the appellant's degree of moral blameworthiness than was warranted by the facts. As a result of the misdirection the magistrate imposed a sentence that is manifestly excessive as to induce a sense of shock. We therefore considered ourselves at large in the assessment of an appropriate sentence.

This was a serious offence of theft involving a breach of trust. Although the money was in the custody of her workmate it belonged to the appellant's employer. The appellant was under a general duty to deal with the money honestly. The amount misappropriated is of considerable value. She gained from the crime in that she used the money to buy grocery and alleviate her financial problems by paying off her debts. It is also obvious that her conduct put her colleague's job on the line. She lost her job. It is not clear



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however whether she lost her job before or after the appellant's arrest. If she lost her job after

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the appellant's arrest it would probably be because a view was held that it was her negligence that had led to the theft of the money.

There was however no premeditation and careful planning that preceded the theft. The appellant was clearly faced with a sudden temptation. In S v *Paulo & Ors* 1971 (1) RLR 251 (A) Paulo was employed in the capacity of a domestic servant by the complainant a company known as S Polwarth & Co (Pvt) Ltd which carried on business *inter alia* as auctioneers. On 28 July 1971 there was a cattle sale held at Senga in Buhera. A representative of the company, one Davey, attended the sale. He had in his possession $30 000 in cash made up in six bundles of $5 000 each, in the form of $10 notes. He dealt with the money by having it in bundles on the ground next to him. At the end of the sale he inadvertently left $15 000 in three bundles of $5 000. This was the money he had not used in conducting the company's business. Paulo noticed that Davey had forgotten the money when he saw it lying on the ground. He succumbed to temptation and took the money which he hid in a bush. Someone else who knew about the money went and removed $5 400 from the hidden amount. Paulo later invited a friend of his to participate in the use of the money. They found the balance of $9 600 which they converted to their own use. Paulo pleaded guilty to theft and was sentenced to 5 years' imprisonment with labour of which two years was suspended for three years on certain conditions.

Lewis AJP held that although the magistrate had properly taken account of the great temptation to which Paulo had been subjected, he had not placed sufficient weight on that factor. The learned Acting Judge President said at 254A-F:

> "It is true that in the ordinary way, the greater the sum of money stolen or the greater the value of the property stolen, the more justification there is for a heavy sentence, but this is simply because in the ordinary run of cases, where the offence is planned in advance, the value of the property stolen or the large amount of money stolen, as the case may be, is something which is contemplated by the thief, when he embarks on his crime of theft. An extreme example which comes to mind immediately is the Great Train Robbery' which took place in England a few years ago. It resulted in over £1 000 000 being stolen and this was a result which was anticipated and for which there had been careful planning by those participating in the crime. Very heavy sentences of imprisonment



MALABA J

> were accordingly imposed in that case. In the instant case, however, the fact that this was a very large sum of cash which was stolen, does not operate in my view as an aggravating feature. There can be no doubt that these large sums of money were so casually handled in the course of the sale as to create in the mind of an unsophisticated person, such as the appellant, Paulo, an impression that, whereas to him this was a fortune which was being left lying around in this manner during the course of the day, to the owners of the money it was a matter of little consequence. When he found, at the end of the day that his employer's representative had been so incredibly careless as to go off leaving this vast sum of money just lying there on the ground, as if it did not matter, he must have been subjected to tremendous temptation in deciding on the spur of the moment to take it for himself."

Had the appellant not been subjected to the sudden and tremendous temptation to take the money negligently left by her work mate she would not have committed the offence. She succumbed to temptation and ended up doing something out of character. This is an understandable human failing which greatly reduces her moral blameworthiness: *S v Vherukayi*

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*& Anor* HH-420-87; *S v Ncube* HB-20-91.

The weight one would have placed in aggravation of sentence on the fact that a large sum of money was stolen is not only reduced by the lack of premeditation and careful planning. It is also greatly reduced by the full restitution paid by the appellant before conviction. The complainant has been restored to the position it was in before the theft in so far as the ownership of the money is concerned. Restitution was a practical expression of contrition on the part of the appellant. Considering the circumstances of the commission of the offence it cannot be doubted that restitution was a sign of genuine contrition rather than an attempt at buying the court's leniency in the assessment of sentence.

In *S v Mpofu* 1985 (1) ZLR 285 (H) at 293E Reynolds J said:

> "The restitution of stolen property has always been regarded as a mitigating factor (*R v Zindoga* 1980 RLR 86 (A)). It is the complainant after all who is primarily concerned with the loss of his property, and he who benefits from its recovery. Furthermore, it is in the interest of society as well if the restitution takes place in that the complainant is content; the accused is making effort to redeem himself and part of the affront against the social order has been repaired."



MALABA J

In *S v Zindoga* 1988 (2) ZLR 86 (S) at 89F Gubbay JA (as he then was) said that "full restitution in crimes such as theft, particularly in the case of a first offender, is rightly regarded as a weighty mitigating factor."

Add to the scales of justice in the assessment of an appropriate sentence the personal circumstances of the appellant and the scales tilt against imprisonment as an appropriate sentence for her. She was a female first offender aged 27; married with one child. Although being female is not *per se* a factor on which an offender is entitled to rely in persuading the court to grant her an option of a fine a court has still to take into account the fact that imprisonment impacts more heavily on female first offenders than it does on their male counterparts and where all other things are equal the fact that an offender is a female should tilt the scales against imprisonment for her: *S v Ndhlovu* HB-11-95. The factor that also tilts the scales in her favour towards a decision to grant her an option of a fine is that she was four months pregnant at the time she was sentenced to imprisonment.

In *S v Samuel* 1976 (1) RLR 222 (G) at 233C Goldin J said:

> "It appears that at the time of the conviction the accused, who is an African woman, was pregnant. The learned magistrate who tried the case informs me that if he had not overlooked that fact he would not have had her imprisoned while she was pregnant. I agree that it is highly undesirable to imprison a pregnant woman."

This principle which a court has to take into account in the assessment of sentence for a pregnant woman was stated once more by Blackie J in the case of *S v Mpofu* HB-81-92 where the learned judge said at pp 2-3:

> "The magistrate further misdirected himself by paying no regard to the fact that the appellant was pregnant. It is not desirable to imprison a pregnant woman even where a term of imprisonment might otherwise be imposed. Because of the woman's condition, the suspension of any otherwise justifiable sentence of imprisonment is usually

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rendered just and necessary."

The magistrate had not placed much weight on the condition of pregnancy as a factor in mitigation of sentence.

It does not of course always follow that imprisonment is an inappropriate sentence where the accused is a female first offender who has pleaded guilty



MALABA J

and paid full restitution before conviction. Mr *Takuva* properly referred to cases where female first offenders have been sentenced to imprisonment for theft of amounts of money equivalent to that stolen by the appellant. He however conceded that on the peculiar circumstances of this case the sentence imposed by the magistrate was too severe. In most of the cases he cited there was premeditation and repetition of the dishonest conduct. Each case must in the final analysis stand on its own facts.

Mr *Sibanda* argued that the appellant had been sufficiently punished for what she did by the period of 72 days she spent in prison. I do not think so. It would be trivialising the appellant's crime, if a sentence of 72 days' imprisonment with labour were held to be sufficient punishment for what she did.

The sentence imposed by the magistrate is set aside and in its place substituted the following sentence:

> "The accused is to pay a fine of $6 000 or in default of payment 18 months' imprisonment with labour. In addition 12 months' imprisonment with labour suspended for 3 years on condition the accused does not within this period commit any offence involving dishonesty for which she is sentenced to imprisonment without the option of a fine."

Cheda J: I agree.

*S K M Sibanda and Partners*, appellant's legal practitioners

*Attorney-General's Office*, respondent's legal practitioners



## OMARSHAH v KARASA 1996 (1) ZLR 584 (HC)

**Court** **High Court, Harare**

Gillespie J

Action for ejectment

28 May 1996 Judgment No. HH-73-96

**Flynote**

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Practice and procedure - summary judgment - evidence - affidavit - affidavit by plaintiff in reply to notice and affidavit of opposition to application - when may be adduced

Landlord and tenant - lease - sub-lease - expiry of main lease - whether sub-lessee may continue in occupation - lien - ius retentionis - whether lessee has such in respect of improvements

Costs - de bonis propriis - legal practitioner - principles

## Headnote

In terms of r 67 of the High Court Rules, no evidence may be led in support of an application for summary judgment otherwise than by the founding affidavit. Summary judgment is given only to an unanswerable claim, and the plaintiff is expected, given his awareness of the facts and correspondence, to anticipate in his application the defence that is relied on. A further affidavit may be filed by the plaintiff, with the leave of the court, to traverse new matter raised in opposition, but only where the opposing papers advance matter which could not reasonably have been anticipated at the time of the application. The further affidavit in this situation is not a reply, in the usual sense.

Where there has been a sub-lease of fixed property, the rights of a sub-tenant as against the landlord are co-terminous with those of the lessee. No greater rights may be acquired by a sub-tenant than those enjoyed by the head tenant. A sub-tenant does not, where the head tenant has surrendered his right of occupation, enjoy the protection of a statutory tenant. *A*



*fortiori*, he cannot remain in occupation of the premises in defiance of the landlord on the grounds that the head tenant (sub-lessor) did not give sufficient notice of termination or breached the sub-lease.

A tenant who has effected improvements has no *ius retentionis* in respect of the leased property. His right is limited to claiming compensation only after the property has been vacated.

An order for costs *de bonis propriis* against a legal practitioner is an exceptional measure and may be made in order to penalise the practitioner where he conducts the case in a manner involving neglect or impropriety by himself. Although the courts are always more or less displeased when practitioners take points that cannot be reasonably supposed to be tenable or even arguable, it must be accepted that there may be a considerable divergence of views as to what may or may not be arguable. The courts should not discourage ingenuity in the taking of points, since it is in no small measure that the law develops by means of such inventiveness. It is only when the defences raised can be said to be vexatious or their argument to constitute or involve an abuse of process that sterner measures of judicial displeasure should be invoked.

Cases cited:

*Bright v Triumph Garage (Pty) Ltd* 1949 (3) SA 352 (C)

*de Beers Consol Mines v London & SA Exploration Co* (1893) 10 SC 359

*Hamza v Bailen* 1949 (1) SA 993 (C)

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*Katz v Reading & Anor* 1944 CPD 197

*Lincoln Court (Pvt) Ltd v Axis International (Pvt) Ltd* HH-54-94

*Majuru v Maposa* S-172-91

*Masama v Borehole Drilling (Pvt) Ltd* 1993 (1) ZLR 116 (S)

*Moses v Hewat* 1921 CPD 573

*Pedzisa v Chikonyora* 1992 (2) ZLR 445 (S)

*Richmaster Leaf Tobacco Co (Pvt) Ltd v Nyathi Imhenyi Trade Corp (Pvt) Ltd* HH-208-92

*Syfrets Participation Bond Managers Ltd v Est & Co-op Wine Distributors (Pty) Ltd* 1989 (1) SA 106 (W)

*Wankie Motors (Pvt) Ltd v Wankie Colliery Ltd & Anor* HB-36-93

The following rules of court were referred to:

High Court Rules 1971 (RGN 1047/1971), rr 13 and 67

Miss *S Omarshah* for the plaintiff

*P Nherere* for the defendant



## Judgment

**Gillespie J:** The plaintiff has instituted a trial action against the defendant claiming her ejectment from certain urban commercial premises together with damages for holding over and ancillary relief. The plaintiff is not the owner of the property but has entered an agreement of lease with the *dominus*, the Embassy of the Republic of Angola. At the time of commencement of the proceedings, that is in December last year, he had not yet taken occupation of the premises.

The defendant has been in occupation of the premises for some time, having entered an agreement of lease in respect of the premises with a previous occupant, a Miss Yasmin Fazilahmed. Miss Fazilahmed had been in occupation of the property in accordance with a lease agreed between herself and the owner. This sub-lease had entitled the defendant to occupy a portion of the premises let by Miss Fazilahmed from the owner and in fact involved an arrangement whereby these two people shared the rooms. I have no information on the question of whether or not this sub-lease was entered into in accordance with or contrary to the terms of the head lease.

The sub-lease, it is acknowledged by the defendant, was terminated by the landlord at the end of November 1995. Miss Fazilahmed did not contest the validity of this termination and vacated the premises. She had, through her attorneys, already given the defendant three months' notice to vacate the premises, which notice constituted compliance with the terms of the sub-lease and

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which had in addition expired by the time of the termination of the head lease. Confusingly, the sub-lessor had also, through different attorneys and during the currency of the period of notice, advised the defendant that the sub-lease, which had been valid for a period of one year until 7 March 1996, would not be renewed upon its expiry. In addition, a dispute appears to exist between the defendant and Miss Fazilahmed concerning both the validity of the termination of the sub-lease and also the question of compensation for improvements to the premises.

The action was instituted by summons endorsed in terms of r 13 of the High Court Rules with particulars of the claim. The particulars are full and disclose, in addition to the salient facts summarised above, the averment that the landlord has ceded to the plaintiff its rights of action against the defendant. Thereafter was filed a declaration, repeating the averments in the particulars of claim and attaching the lease between the plaintiff and the landlord. Upon entry of appearance to defend summary judgment was applied for and has been opposed by the defendant.

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GILLESPIE J

The first issue to address is an application by the plaintiff for leave to adduce a further affidavit in response to the notice and affidavit of opposition. By r 67 of the Rules of this Court no evidence may be led in support of an application for summary judgment otherwise than by the founding affidavit. The opportunity which is afforded by para *(c)* of the proviso to this rule, namely, the filing with leave of an affidavit to traverse new matter raised in the opposition, is one which is expressly limited to the circumstance where the opposing papers advance matter which could not reasonably have been anticipated at the time of the application. In *Lincoln Court (Pvt) Ltd v Axis International (Pvt) Ltd* HH-54-94 it has been explained that the purpose of this provision is not to enable a reply in the usual sense to the opposing affidavit. It remains the policy to limit the evidence adduced for the plaintiff to that which is in the founding affidavit. The purpose of this is to maintain the distinction properly drawn between summary judgment and other opposed proceedings on application. The latter frequently permit of a robust approach which is anathema to the concept of summary relief given only to an unanswerable claim. The deponent of this affidavit is expected, given his awareness of the facts and of correspondence between the parties relating to the issue, to anticipate in his application the defence that is relied upon and to show why it is untenable. Only where the opposition contains a departure which could not have been reasonably expected is he entitled to seek leave to respond. It is in addition axiomatic that the leave is only to be given where it is necessary to file the further papers.

*In casu* the further affidavit tendered by the plaintiff consists largely of argument on the minutiae of various facts asserted by the defendant. These trivialities revolve around allegations by the defendant of breach of contract by Miss Fazilahmed; disputation as to the *quantum* of damages for holding over; debate as to the question of improvements effected by the defendant; and legal submissions on the issue whether a tenant has a *ius retentionis* over the leased premises in respect of compensation for improvements. It must be apparent from this very general description of the contents of the affidavit that no matter how satisfying it may be to the deponent to expand upon his case, it is by no means edifying to the court to peruse this

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expanse. The debate of fact is immaterial; the issue of *quantum* is inconclusive; the question of improvements is irrelevant; and the argument on law out of place. I therefore refuse the application to adduce the further affidavit.

The defences that have raised themselves on the papers, and are adequately addressed without recourse to a new affidavit, are these: that the defendant



GILLESPIE J

has had insufficient notice to quit; that she has a right to retain the premises pending compensation for improvements effected by herself; that the plaintiff should look to the landlord for its remedy; that it has no recourse against the defendant; and that the damages for holding over are excessive. She asserts a right to remain in occupation and tenders an amount of $2300 monthly by way of rent for the premises.

The first of these defences is untenable. The rights of a sub-tenant as against a landlord are co-terminous with those of the lessee. No greater rights may be acquired by her than those enjoyed by the lessee under the head lease. See *Bright v Triumph Garage (Pty) Ltd* 1949 (3) SA 352 (C) at 359. This proposition is applied in our law to the extent that a sub-lessee does not enjoy the protection of a statutory tenant where the lessee has surrendered any right of occupation under the head lease. This protection, it is said,

> "could never have been intended to apply when there never was any *vinculum juris*, either contractual or quasi-contractual, between an owner and a person whom he is seeking to eject from his premises":

*per* Steyn J (as he then was) in *Hamza* v *Bailen* 1949 (1) SA 993 (C) at 1001. To the same effect are *Moses v Hewatt* 1922 CPD 573 and *Katz v Reading & Anor* 1944 CPD 197. This proposition has been accepted in this jurisdiction in the unreported judgments of Chidyausiku J in *Richmaster Leaf Tobacco Co Ltd v Nyathi Imhenyi Trade Corp (Pvt) Ltd* HH-208-92, at p 2 and Muchechetere J (as he then was) in *Wankie Motors (Pvt) Ltd* v *Wankie Colliery Ltd & Anor* HB-36-93 at p 15. Although the defendant does not presently claim any relief as a statutory tenant, these authorities are all most relevant in that they demonstrate the extent to which the principle of lack of privity between landlord and sub-tenant is taken. If the sub-lessee cannot enforce a statutory tenancy in the circumstances of the precedents cited, then *a fortiori* he cannot remain in occupation of the premises in defiance of the landlord on the grounds that the sub-lessor did not give sufficient notice to quit or has breached the sub-lease.

In this case, as I have recited, it is common cause that the head lease terminated. The tenant surrendered occupation. As against the landlord, therefore the defendant, as sub-lessee, has no right whatsoever to remain in occupation of the premises. Whatever claim it may have relating to the termination of the sub-lease against the sub-lessor, Miss Fazilahmed, is of no import to the landlord's claim for vacant possession of the premises and provides no continued right of occupation of the premises.



GILLESPIE J

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The next defence may be dealt with even more shortly. It is that the defendant may persist in occupation of the property in order to enforce a claim for compensation against the landlord. Assuming in the defendant's favour, although it is by no means clearly established on the papers, that the defendant effected improvements for which he is entitled to compensation, nevertheless he may not hold over in occupation. On this point of law I can do no better than to refer with respect, and to adopt with diffidence, the statement of law expounded by van Zyl J in *Syfrets Participation Bond Managers Ltd v Estate & Co-op Wine Distributors (Pty) Ltd* 1989 (1) SA 106 (W). From 109H to 111B the learned judge embarked upon a thorough discourse of the jurisprudential basis of a *ius retentionis* and the extent to which such a lien has been recognised as enforceable by lessees according to the Roman-Dutch law.

His treatment of the subject can leave one in no doubt that such a right of retention, which might on first principles otherwise have been available to lessees as *bona fide* possessors of the property concerned, was removed from them by the *Placaat van die Staten van Hollandt, techens die Pachters ende Bruyckers van de Lande*. This measure limited the lessee's right to claim compensation to a claim to be brought only after the property had been vacated by the lessee, thus removing the right of retention. The learned judge noted the reception of this law into South Africa, as acknowledged in the matter of *de Beers Consolidated Mines v London and South African Exploration Co* (1893) 10 SC 359 at 368-9 (and thence into the law of Zimbabwe) and found (at 112B) that the law applies equally to rural and urban tenements.

The effect of this law is unequivocally that a lessee, and consequently the defendant, has no right of retention of occupation of leased property after the termination of the lease as a lien against compensation for improvements. The second defence therefore also fails.

The third defence, that the plaintiff should look to the landlord for his remedy, is completely misplaced. It might have been a point of some substance but for the averment in the particulars of claim that the plaintiff is proceeding upon a cause of action ceded by the landlord to himself. It is well-established law, and recently enunciated in the case of *Majuru v Maposa* S-172-91, that a lessee to whom occupation has not yet been given has no *locus standi* to sue for the ejectment of a trespasser. It cannot be said in this case that the landlord has given the plaintiff vacant possession. Compare *Pedzisa* v *Chikonyora* 1992 (2) ZLR 445 (S). But for the cession the plaintiff would have been given



merely the personal right as against the landlord to claim vacant possession. The uncontested averment of the cession of actions, however, removes this argument from the defendant, and entitles it to enforce eviction in the landlord's name.

Mr *Nherere*, who has appeared of counsel for the defendant, to his credit has not sought to advance argument in support of these various supposed defences in law. He has confined his attack to the relief sought by way of damages. It is unsatisfactory that this wise course did not commend itself sooner to the defendant or her attorneys. In consequence, the defendant has not shown a good defence to the cause for ejectment.

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Finally, addressing the question of damages for holding over, one discovers at last a point that can be made for the defendant. The premises in issue are a portion of the premises let to the plaintiff by the landlord. Its occupation of them prevented the plaintiff from taking occupation at all to begin with. During the pendency of proceedings, however, the plaintiff, in order to mitigate its damages, has taken occupation of that portion of the premises not actually being used by the defendant. He has assessed his damages for holding over on the basis of the actual rental payable by himself in respect of the whole premises. The defendant, while attempting to continue in occupation, has effectively tendered payment, as rental, of an amount allegedly proportional to the amount of space occupied by itself. The plaintiff, purporting to accept this tender, moves summary judgment for damages in the amount tendered for the number of months during which the holding over has persisted.

I am not satisfied that this approach is correct. It appears defective first, and in general, because there is no proof of loss in the amount claimed. Second, and more particularly, the amount offered is not offered as admitted loss suffered by the plaintiff, but as a fair rental for occupation of the premises. It does not follow that such a rental for a portion of premises is in fact comparable to the amount of the loss. Third, and as a matter of principle, I do not consider that the plaintiff can accept the tender of the amount at issue while not itself allowing the defendant to remain in occupation - that being the basis upon which the tender is made. *In fine*, although I am satisfied that the occupation is wrongful and that some loss must have been suffered by the plaintiff, for which loss the defendant is probably liable, I cannot make any finding as to the amount of the loss. I say probably liable in deference to a point made by Mr *Nherere* that the cession of actions covers only the right to evict and not a right to claim damages for failure to vacate. For myself I would have thought that the greater includes the lesser. However, I will avoid



prejudging that issue and will leave the parties to pursue the matter (although I hope that it will be sensibly settled).

On the question of costs I consider that the costs ought to follow the event, save in respect of the unnecessary proceedings elating to the application to file a further affidavit. Substantial success has been achieved by the plaintiff in obtaining its order of eviction, the issue that occupied far the greater portion of the papers, and was, or so I judge, the main reason for bringing these proceedings. A claim has been made for a punitive order of costs. Costs are claimed on the attorney and client scale and are in addition claimed against the defendant's attorneys *de bonis propriis*. One is always more or less displeased with parties or practitioners who take points that cannot be reasonably be supposed to be tenable or even arguable. Since there can, however, be considerable divergence of views as to what may or may not be arguable I think it a mistake to be too free with punitive orders as to costs merely because one considers points not to have been reasonably available. One does not wish unduly to discourage ingenuity in the taking of points since it is in no small measure by means of such inventiveness that the law develops. Only where the defences raised can be said to be vexatious or their argument to constitute or to involve an abuse of process should sterner

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measures than an expression, *in mediis rebus*, of judicial displeasure be invoked. Had the plaintiff enjoyed complete success in this matter, I might well have been inclined to accede to the request for costs on the higher scale, since it does not seem to me that the points in opposition to the claim for damages could properly have been taken. Since the defendant has achieved some measure of success on the point of damages, however, and to that extent has justified opposition in principle, I consider it appropriate not to order costs on the attorney and client scale.

As for punishment of the defendant's attorneys, again I prefer not to take action beyond the reproof administered in court. Costs *de bonis propriis* will be awarded against a lawyer as an exceptional measure and in order to penalise him for the conduct of the case where it has been conducted in a manner involving neglect or impropriety by himself. Mr *Nherere* cited in support of this proposition the case of *Masama v Borehole Drilling (Pvt) Ltd* 1993 (1) ZLR 116 (S) at 120. Since I have already said that I do not consider the conduct to be deplorable to that degree, it follows that a special order against the attorney is not warranted here. Similarly I do not know whether these points are taken with or contrary to the advice of the defendant's legal representative, an important point if he is to be blamed for them. That therefore remains a matter between the defendant and the attorney.



GILLESPIE J

In the event, the application succeeds to the extent that there will be summary judgment for the plaintiff in these terms:

*(a)* the Deputy Sheriff is directed to eject from the premises, being shop number 3 Doncaster House situate at 26 Speke Avenue, Harare, the defendant, trading as Lifestyles, and any other persons occupying the premises under her;

*(b)* the defendant shall pay the costs of this application, save that these costs shall not include any costs relating to the application by the plaintiff to adduce a further affidavit in reply to the opposing affidavit.

*(c)* leave is given to the defendant to defend the claim for damages for holding over.

*Surgey, Pittman & Kerswell*, plaintiff's legal practitioners

*Jakachira & Co*, defendant's legal practitioners



## MARUFU *v* MAWONA & ORS 1996 (1) ZLR 593 (HC)

**Court** **High Court, Harare**

Smith J

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Civil action

13 March & 29 May 1996 Judgment No. HH-69-96

## Flynote

Damages - assessment - principles - pain and suffering - motor accident - young man suffering severe injuries - 40% disability and much pain - interest on damages - date from which interest should run

Interest - on damages - date from which interest should run

## Headnote

The plaintiff, who was aged 29, was badly injured in a motor accident. For some time after the accident he experienced great pain and he would experience periodic pain in the future. His degree of permanent disability was 40%. He had lost his job. He had been a keen sportsman prior to the accident but was no longer able to participate in any sporting activity. The court awarded general damages in the amount of $50 000.

As regards interest, the court stated that the phrase *a tempore morae* should not be used in a court order; rather, the date from which the interest was to run should be specified. The court was empowered by s 6 of the Prescribed Rate of Interest Act [*Chapter 8:10*] to order that interest should run from a date prior to the date of judgment unless the court considered that date of judgment was appropriate in the circumstances. The court ordered interest to run from the date of service of the summons.

Cases cited:

*Bhebhe & Anor v Mukhomi & Anor* HB-9-93

*Chamunorwa v Soweto & Anor* HH-212-93

*Mabvoro & Anor v Muza* HH-199-90

*Min of Defence & Anor v Jackson* 1990 (2) ZLR 1 (S)

*Mkhiza v Gumede* HB-110-91



Statutes referred to:

Prescribed Rate of Interest Act [*Chapter 8:10*], s 6

*T L Biti* for the plaintiff

## Judgment

**Smith J:** The plaintiff was injured in an accident which occurred on 29 November l993. He was riding a motor cycle which collided with a motor vehicle that was being driven by the first defendant whilst acting within the scope of his employment with the second defendant. The third defendant was the insurer of the motor vehicle at the time. The plaintiff alleges that the accident

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was caused by the sole negligence of the first defendant. The plaintiff suffered comminuted fractures of the tibia and fibia of both legs, a comminuted fracture of the right femur, swelling of both lower legs and ankles and massive bruising of both ankles. He issued summons against all three defendants claiming general damages for pain, shock and suffering, disability, loss of amenities in life and loss of earning capacity in the sum of $80 000. The first and second defendants entered appearance to defend but the third defendant did not. The plaintiff has applied for default judgment against the third defendant.

The plaintiff filed an affidavit in which he made the following statements. Immediately after the accident both his lower legs and the right femur were broken. The bones protruded. He was taken to hospital and put on traction. He was given analgesics and antibiotics. He was taken into the operating theatre for debridement of both legs and then put in traction. He experienced excruciating pain when his wounds were dressed. Pins were inserted in both legs and in the right femur. He was discharged from hospital on 29 March, l994. On his return home he experienced severe pain and was readmitted to hospital on l April where it was found that his right femur had refractured. He was again put in traction and remained in hospital until 2 June l994. He still experiences great pain, with much discomfort in the right femur, and has a damaged nerve in his right leg. His right leg is shorter than the other and he has to wear special shoes. He has lost his job and cannot participate in any sporting activity. Before the accident he was a keen soccer player. He cannot walk long distances and has become moody because of his disability. In cold and cloudy weather he experiences pains in his legs.

A report from a consultant orthopaedic surgeon was also filed which contained the following statements. The plaintiff was admitted to hospital with fractures of the tibia and fibia of both legs and the right femur. He was sent to the theatre for debridement of both legs and had pins inserted in both



legs and the femur. His wounds were dressed daily until they healed. After about 5 months the pins were removed from his legs. His legs were encased in plaster of Paris below the knees and he had to walk with crutches. A caliper was fitted to his right leg. He was discharged on 29 March l994 and readmitted on l April because his right femur had refractured. He was finally discharged on 2 June, having been in hospital for 6 months. He was told to wear calipers at home. The consultant said that the plaintiff had experienced severe pain and there was malunion of the tibia in both legs. He suffers a lot of discomfort in the right femur. There is nerve damage in the right leg. The plaintiff will experience pain from time to time and discomfort for the rest of his life. He was 28 years old when the report was made in August l995. He has a 40% degree of permanent disability.

In *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 (S) Gubbay JA (as he then was) enunciated the broad principles to be followed in determining the amount of damages to be awarded for general damages. He prefaced the list of principles by saying:

> "It must be recognised that translating personal injuries into money is equating the incommensurable; money cannot replace a physical frame that has been permanently injured. The task therefore of assessing damages for

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personal injury is one of the most perplexing a court has to discharge".

Mr *Biti* referred to a number of cases to support the claim for $80 000. In *Mabvoro & Anor v Muza* HH 199-85 the two plaintiffs had been injured in a motor accident. The husband, who was about 30 years old, had a fracture of the left leg below the knee and of the right wrist. He sustained serious cuts and bruises and was unconscious for some hours. He was in hospital for over two weeks. He was awarded damages in the sum of $15 000 for pain and suffering, loss of amenities and disfigurement. His wife, who was 24 years old, had fractures in both legs above the knees. There was malunion of the bone in the right leg which was three-quarters of an inch shorter than the left. She needed assistance in household chores and would have recurrent pains in her leg for the rest of her life. She was awarded damages in the sum of $20 000 for pain and suffering, loss of amenities and disfigurement. In *Chamunorwa* v *Soweto & Anor* HH-212-93 a 50 year old man who was injured in a bus accident and sustained a 40% degree of disability was awarded damages in the sum of $15 000 for shock, pain and suffering and loss of amenities. In *Mkhiza v Gumede* HB-110-91 the plaintiff had been assaulted. He sustained severe pain and shock, paralysis of the left arm and



fingers and disability of his left leg and was unable to work. He was awarded damages in the sum of $20 000. In *Bhebhe & Anor v Mukhomi & Anor* HB-9-93, where the plaintiffs had been injured in an accident and sustained permanent disabilities with an estimated degree of 7.5% and 6% respectively, they were awarded damages in the sum of $13 500 and $14 000.

In this case the injuries suffered by the plaintiff were severe. He must have been in great pain immediately after the accident. He was in hospital for six months, during which he experienced much pain and suffering. He has a 40% degree of permanent disability which means that he will not be able to enjoy life to the full in future. He is only 29 years old now. The court must have regard to all these factors as well as to the fact that the value of the Zimbabwe dollar has depreciated over the past few years. In the circumstances I consider that an award of $50 000 for general damages is appropriate.

The plaintiff, in his summons, claimed interest *a tempore morae* and then, in the draft order filed, claimed interest *a tempore morae* with effect from 20 September l995 to date of payment. It is obvious that many legal practitioners think that "*a tempore morae*" refers to the rate of interest. I have seen many draft orders filed which do not refer to the rate of interest but use the phrase *a tempore morae* and then also specify the date from which interest is to run. I consider that the phrase *a tempore morae* should not be used in a court order - the actual date should be specified. Section 6 of the Prescribed Rate of Interest Act [*Chapter 8:10*] provides that every debt arising out of an unliquidated claim shall bear interest at the prescribed rate on the amount of the debt from the date when the cause of action arose unless the court, in terms of subs (2) thereof, otherwise directs. The court is empowered by subs (2) to direct otherwise where it considers it fair and just in the circumstances to do so. In this case, the accident occurred on 29 November l993, so that was when the cause of action arose. All the pain and suffering experienced by the plaintiff occurred after that date. The summons was served on the third defendant on 20 December l995. I have assessed the damages suffered by the plaintiff on the

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basis of the value of the Zimbabwe dollar as at March l996 when the application was made. In the circumstances, I do not think it would be fair and just if interest were to run from 24 November l993. Prior to the enactment of Act 2 of l994, which inserted s 6 in the Prescribed Rate of Interest Act [*Chapter 8:10*], interest ran on debts arising out of an unliquidated claim with effect from the date of judgment. The legislature changed that by introducing s 6 into the Act [*Chapter 8:10*]. From the amendment it is clear that the legislature considered that interest should run from a date prior to the date of judgment unless the court considered that such date was appropriate



SMITH J

in the circumstances. It seems to me that in this case the date of service of the summons on the third defendant would be a reasonable date from which interest should run.

It is ordered that-

1. The third defendant pay the plaintiff as general damages $50 000, with interest thereon at 25% *per annum* from 20 December l995 to date of payment.

2. The third defendant pay the plaintiff's costs.

*Honey & Blanckenberg*, plaintiff's legal practitioners



## KADIR & SONS (PVT) LTD v PANGANAI & ANOR 1996 (1) ZLR 598 (SC)

**Court** **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

13 & 30 May 1996 Judgment No. S-79-96

### Flynote

Practice and procedure - review - time within which to be noted - failure to comply with time limit - condonation - relief sought in form of declaratory order - no extension of time limit required

Employment - contract - termination - retrenchment - approval by Minister of retrenchment - whether can be given retrospectively

### Headnote

In March 1993, the Minister of Labour, Public Service and Social Welfare, purportedly acting in terms of s 5 of the Labour Relations (Retrenchment) Regulations 1990, gave retrospective approval to the first respondent's being retrenched, along with other employees, by the

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appellant company in September 1992. The National Employees Council's retrenchment committee had only been prepared to accept retrenchment if the appellant agreed to eight months' severance pay. The appellant retrenched the employees and paid two months' severance pay.

The first respondent only became aware in May 1994, when so advised by her legal practitioners, that such retrospective approval was *ultra vires*. She brought the Minister's action on review in the High Court. The judge *a quo* condoned the first respondent's non- compliance with the provisions of r 259 of the High Court Rules 1971, which requires that a decision should be brought on review within 8 weeks of having been made.

Held, that as the relief sought by the first respondent was in the form of a declaratory order, no extension of time was required. In any event, the first respondent, until advised otherwise, thought the Minister's decision was valid. She had not remained supine in the knowledge of her rights. The reason for her delay was understandable.

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Held, further, that the Regulations made it clear that the Minister could only approve a recommendation for a *proposed* retrenchment submitted to him by the retrenchment committee. The Minister has no power to approve a retrenchment retrospectively. Until the Minister's decision has been reached, the employees must remain on the payroll. If the Minister does approve the retrenchment, the employer may then give one month's notice. The fact that the employer ceases business does not remove his obligation to pay wages and the first respondent and the other employees remained on the payroll until one month after the Minister's approval had been given.

Cases cited:

*Barclays Bank of Zimbabwe Ltd v Binga Products (Pvt) Ltd* 1984 (2) ZLR 76 (S)

*Bayat & Ors v Hansa & Anor* 1955 (3) SA 547 (N)

*Musara v ZINATHA* 1992 (1) ZLR 9 (H)

*Patel v Contr of C & E* 1982 (2) ZLR 82 (H)

*Victoria's Secret Inc v Edgars Stores Ltd* 1994 (3) SA 739 (A)

*Vrystaat Ests (Pvt) Ltd v President, Administrative Court & Ors* 1991 (1) ZLR 323 (S)

The following regulations and rules of court were referred to:

High Court Rules 1971 (RGN 1047/1971), r 259

Labour Relations (Retrenchment) Regulations 1990 (SI 404/1990), ss 3, 5, 6, 7, 8A and 9(1)

*AP de Bourbon SC* for the appellant

*PC Paul* for the first respondent

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No appearance for the second respondent

## Judgment

**Gubbay CJ**: On 9 June 1994 the first respondent instituted proceedings in the High Court against the appellant and the second respondent, the Minister of Labour, Public Service and Social Welfare ("the Minister"). She sought a review of the Minister's decision of 8 March 1993 in which his approval of her retrenchment from the employment of the appellant was back-dated to 4 September 1992. In addition she applied for an order declaring:

*(a)* the decision of the Minister to be invalid insofar as it purported to back-date the retrenchment to 4 September 1992;

*(b)* that she had remained in the employ of the appellant until 8 April 1993; and



*(c)* that the appellant was obliged to pay her one month's salary in lieu of notice, which notice could not have been given prior to 8 March 1993.

Notwithstanding the appellant's spirited opposition to the application, the learned judge, so far as he found it necessary to do so, condoned the failure of the first respondent to bring the Minister's decision on review within the eight week period prescribed by r 259 of the High Court of Zimbabwe Rules 1971. He granted, with costs to be paid by the appellant, an order substantially in the terms prayed by the first respondent.

Although there was debate before this Court as to whether the learned judge was justified in condoning the first respondent's non-compliance with the provisions of r 259, it seems to me that, as the relief sought was effectively the issue of a declaratory order, no extension of the time period for the lodging of the application was required in the particular circumstances. See *Bayat & Ors v Hansa & Anor* 1955 (3) SA 547 (N) at 552C-D, approved by Robinson J in *Musara v ZINATHA* 1992 (1) ZLR 9 (H) at 14H-15G.

In any event, I am not persuaded that the exercise by the learned judge of his discretion to grant the indulgence is open to interference at this stage of the matter. It was only during the first half of May 1994 that the first respondent was advised by her legal practitioner that the back-dating by the Minister of his approval to her retrenchment was *ultra vires* his powers. That was an important factor. It explained why the first respondent had not acted within eight weeks of being informed of the Minister's decision. Simply put, until apprised to the contrary, she believed the decision to be valid. She remained ignorant of the infringement of her rights. There was no supine lack of action by her. See *Vrystaat Estates (Pvt) Ltd* v *President, Administrative Court & Ors* 1991 (1) ZLR 323 (S) at 331G. Assuming against the first respondent that she became aware of the Minister's decision soon after it was made, the consequent delay of twelve months was certainly inordinate. Nevertheless, the reason proffered therefor was understandable. Upon becoming aware of her rights, and after the written demand to pay her salary to April 1993 had been rejected by the appellant, the application was launched with reasonable expedition.

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To my mind, the learned judge took rather too strict an approach in holding that the explanation for the delay was unreasonable. But he rightly considered the prospects of success to be good.

I turn now to the background that gave rise to the dispute between the parties.

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GUBBAY CJ

The first respondent and twenty others were employed by the appellant at its textile factory in Harare. In about June 1992 a recession struck the industry. The appellant's financial viability was affected. For two months it struggled on with a three day working week. As its cash flow problems did not improve, a decision was taken to cease operating the business. To this end, a meeting was held by the appellant on the afternoon of 5 August 1992 with the works council, the National Employment Council for the Clothing Industry and the Trade Union for the Clothing Industry. The appellant gave oral notice of its intention to close the factory on 4 September 1992, with the twenty-one employees being retrenched on two months' severance pay. The first respondent was one of the members of the works council who attended the meeting. The works council was only agreeable to the closure of the factory and the retrenchment of the employees concerned, provided they received eight months' severance pay. This condition was totally unacceptable to the appellant.

Further meetings were held on 19 and 27 August 1992. At each the works council expressed reservations about the appellant's professed inability to continue operating the factory. A request was made to inspect the financial records of the business. It was granted and duly undertaken. Still the works council remained unconvinced that it was beyond the appellant's control to carry on with the factory. Its members strongly contested the need to retrench the employees. This attitude was confirmed by the first respondent in her letter of 31 August 1992 to the retrenchment committee.

The National Employees Council, as "the authority", was entrusted by s 3(5) of the Labour Relations (Retrenchment) Regulations 1990 (SI 404 of 1990) ("the Regulations") with the duty to secure an agreement between the appellant and the employees represented by the works council. When it failed to do so, it referred the matter to the retrenchment committee on 3 September 1992, pursuant to s 3(6) of the Regulations. In completing form LRR2 the secretary to the authority intimated that the issues upon which agreement had not been reached were *(i)* notice and (ii) severance pay. However, it was made clear to the retrenchment committee in an accompanying letter that the authority had not been satisfied by the appellant that the financial problems it was experiencing were such as to warrant the closure of the factory and the retrenchment of the twenty-one employees.

On 4 September 1992 the appellant closed the factory. Thereafter on 8 March 1993 the Minister notified the appellant and the employees in form LRR3 of his decision. It was an approval of the proposed retrenchment on condition

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GUBBAY CJ

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that the employees received two months' wages as severance pay, the approval being back-dated to 4 September 1992.

The appellant deliberately declined to comply with the condition. It was only some twelve months later, when compelled by further legal process issued at the instance of the first respondent, that the two months severance pay was met. At that time the first respondent had not been advised of any invalidity attaching to the Minister's decision. So the prior recourse to litigation cannot be taken as a waiver of her right to challenge the decision. See *Patel v Controller of Customs & Excise* 1982 (2) ZLR 82 (H) at 88D-H; *Barclays Bank of Zimbabwe Ltd* v *Binga Products (Pvt) Ltd* 1984 (2) ZLR 76 (S) at 85E-H.

It is, I think, apparent from the facts I have recounted that there is scant support for the submission advanced on behalf of the appellant that the works council did not dispute the need for retrenchment of the employees. Plainly the works council was only prepared to accept retrenchment if the appellant agreed to eight months' severance pay. If not, the necessity to retrench the employees remained in contention.

The question therefore is whether, in the absence of agreement that the employees concerned were to be retrenched on 4 September 1992, it was permissible for the Minister to order their retrenchment to take effect from that date. The answer will emerge from an examination of the following provisions of the Regulations.

Under s 5 the retrenchment committee is enjoined, within two weeks of the matter being referred to it, to -

> "... recommend to the Minister in writing whether or not the *proposed* retrenchment should be permitted and, if so, the terms and conditions upon which it should be effected" (emphasis added).

If it fails to make a recommendation, the Minister must call for all the documents in the matter and give his decision.

Section 6 reads:

> "The Minister shall consider without delay any recommendation submitted to him by the retrenchment committee in terms of subsection (1) of section 5 and, having regard to the factors referred to in section 7, shall within two weeks-



GUBBAY CJ

> *(a)* approve the *proposed* retrenchment, subject to such terms and conditions as he may consider necessary or desirable to impose; or
>
> *(b)* refuse to approve the *proposed* retrenchment;
>
> and shall cause the retrenchment committee, the authority, the employer and the employees concerned to be notified in writing in form LRR3 of his decision in the matter" (emphasis added).

The factors specified in s 7 to which the Minister is to have regard in coming to his decision include the effect of the *proposed* retrenchment upon the employees involved, especially, *(i)* their prospects of finding alternative employment; and (ii) the terminal benefits to which they will

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become entitled.

Finally, s 9(1) (as amended on 28 August 1992 by SI 252 of 1992) mandates that-

> "No employer shall retrench any employee unless-
>
> *(a)* he has given the employee concerned not less than one month's written notice of the retrenchment; and
>
> *(b)* the retrenchment has been approved in terms of these regulations; and
>
> *(c)* the retrenchment is effected in accordance with the terms and conditions of any such approval."

It is to be noted that where the authority has been unable to secure an agreement to the retrenchment of the employees concerned, as *in casu,* what the Minister has to decide is whether the retrenchment *proposed* by the employer, but rejected by the works council on behalf of the employees, should be approved or rejected.

Under s 3(1) of the Regulations the employer must give written notice of his *intention* to retrench. He is not obliged to give one month's notice but merely to afford the works council and the authority reasonable time so as to be able to deliberate meaningfully on the matter. The requisite one month's notice of the retrenchment required by ss 8A and 9(1) takes effect from the date when either the authority secured agreement on the retrenchment or approval to the proposed retrenchment was granted by the Minister. This period of notice has nothing to do with the notice referred to in s 3(1).

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GUBBAY CJ

If no agreement is secured by the authority the retrenchment proposed by the employer falls to be considered by the Minister for approval or refusal. The word "proposed" signifies "something proffered"; "the communication by one person to another of what is sought"; "to put a suggestion before another's mind". See *Black's Law Dictionary* Abridged 5 ed at p 637; *Victoria's Secret Inc v Edgars Stores Ltd* 1994 (3) SA 739 (A) at 745A-B.

It is clear to me that until the critical stage of the Minister's decision has been reached, the employees whom the employer proposes to retrench remain on the pay-roll. They have not been retrenched. The fact that in the interim period the employer may have ceased to operate the business does not rid him of the legal obligation to pay the employees their wages. That this is so is underscored by the use of the phrase "proposed retrenchment" in ss 5, 6 and 7 of the Regulations, as well as by the necessity for the Minister in reaching his decision to take account of the prospects of the employees finding employment in the future and the terminal benefits to which upon approval of the proposed retrenchment they *will* become entitled.

Of course, the Minister may order that his approval of the retrenchment takes effect from a date in the future. The Regulations do not disable him from doing so. But to back-date the retrenchment conflicts with the intendment of the Regulations. A contrary view would cause an injustice to employees who, awaiting the Minister's decision on whether or not they were to be retrenched, are obliged not to seek and obtain other employment.

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It is in the light of this construction that the learned judge held that the retrenchment of the first respondent was approved on 8 March 1993 and became operative on 8 April 1993 after the expiration of one month's notice. He rightly declared therefore that the first respondent remained in the employment of the appellant until 8 April 1993.

In the result I order that the appeal be dismissed with costs.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

*Kantor & Immerman*, appellant's legal practitioners

*Winterton, Holmes & Hill,* first respondent's legal practitioners

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## KEAVNEY & ANOR *v* MSABAEKA BUS SERVICES (PVT) LTD 1996 (1) ZLR 605 (SC)

**Court** **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

16 & 30 May 1996 Judgment No. S-80-96

### Flynote

Practice and procedure - pleadings - purpose of - impropriety of raising defence that has not been pleaded

Evidence - res ipsa loquitur - motor accident caused when defendant's vehicle came onto its wrong side of the road - situation where doctrine applied - evidential onus resting on defendant - duty upon defendant to call expert evidence to support purely hypothetical suggestion that there had been sudden and unforeseeable failure of steering mechanism

### Headnote

The purpose of pleadings is to define the issues and to enable the other party to know what case he has to meet. It is improper conduct therefore for a legal practitioner to advance a defence different from that pleaded. The legal practitioner had advanced a defence of confession and avoidance, whereas he had pleaded the defence of denial. The failure to plead the real defence suggests one or other of three possible explanations:

*(a)* sheer idleness and incompetence on the part of the pleader;

*(b)* a deliberate and unconscionable attempt to avoiding attracting the onus of adducing evidence; or

*(c)* the defence was an afterthought.

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The defendant's bus had strayed onto its wrong side of the road and had hit the plaintiffs' vehicle, causing them injuries. This was a situation where



the *res ipsa loquitur* doctrine applied and *prima facie* the facts pointed to negligence by the defendant or his driver. There was thus an inference of negligence and the evidential onus rested on the defendant to introduce sufficient evidence to explain away the *prima facie* inference of negligence. The defendant had advanced the suggestion that there had been a sudden and unforeseeable failure of the steering mechanism. Such evidence as there was tended to show that the steering problem was the result of wear over a long period.

Held, that the defendant company had failed to discharge its evidential onus by calling expert evidence to support its purely hypothetical suggestion that there had been a sudden and unexpected failure of the steering. The trial court had been wrong in concluding on the evidence that the plaintiffs had failed to discharge the onus of proving negligence on the part of the defendant.

Cases cited:

*Arthur* v *Bezuidenhout & Mieny* 1962 (2) SA 566 (A)

*DD Tpt (Pvt) Ltd v Abbot* 1988 (2) ZLR 92 (S)

*Freelance Contracting (Pvt) Ltd v de Clerk* 1982 (1) ZLR 193 (SC)

*Kali v Inc Gen Ins Ltd* 1976 (2) SA 179 (D)

*Madyosi & Anor* v *SA Eagle Ins Co Ltd* 1989 (3) SA 178 (C)

*Mutimwinyi* v *Mutimwinyi* S-192-95

*Nieuwoudt v Joubert* 1988 (3) SA 84 (C)

*Ntsala v Mutual & Federal Ins Co Ltd* 1996 (2) SA 184 (T)

*Pocock v AFC* 1995 (2) ZLR 365 (S)

*Rankisson & Son v Springfield Omnibus Svcs (Pty) Ltd* 1964 (1) SA 609 (D)

*A M Donagher*, for the appellants

*G S Wernberg*, for the respondent

## Judgment

**McNally JA:** At lunch time on 30 April 1992, Mr Keavney was driving his wife home from Mutare to the Bvumba in their left-hand drive Mercedes Benz. The road was winding and hilly. At about the 67 km peg they saw a bus coming towards them. It seemed to be moving fast, coming down a hill and around a fairly sharp left-hand bend. They were alarmed because it seemed to be out of control. Mr Keavney braked sharply, pulled over to his left, on to the hard

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shoulder, and stopped.

The bus, however, now clearly out of control came around the corner, encroached on to the wrong side of the road and hit their Mercedes head on,



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driving it backwards about fifteen metres. The car was extensively damaged and Mr and Mrs Keavney were rendered unconscious. Both of them were seriously injured, her injuries being very extensive.

They sued the bus company for damages, alleging negligence both by the company and by the bus driver, acting within the course and scope of his employment with the company.

The particulars of negligence alleged were as follows:

1. They allowed the bus to be used when to the knowledge of the company and its driver the steering mechanism and the brakes were wholly inadequate.

2. The driver drove the bus at an excessive speed and was unable to maintain proper control of the vehicle.

3. The driver drove the bus on the wrong side of the road.

4. The driver failed to take reasonable steps to avoid a collision when it was imminent.

The defendant, in its plea, simply denied each of these allegations. It maintained that stance at the pre-trial conference.

When the matter came to trial in the High Court, Mr and Mrs Keavney gave evidence and they called their lawyer's partner who had gone to the scene at about 5.30 on the day of the accident to make and record observations.

Their evidence as to what took place, by and large, was not disputed. The quantum of damages was put in issue. For reasons which will appear later, I do not propose to deal with quantum.

It became clear, from cross-examination of the plaintiffs, that the defence was not at all what had been pleaded. There was a denial of excessive speeding (though the vehicle inspection report showed that the bus' speedometer was missing), but it was admitted that the bus had gone over to the wrong side of the road. The defence was that this had been due to a sudden and unforeseen collapse of the steering mechanism for which neither the driver nor the bus company were responsible.



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It must be stated in the clearest possible terms that to plead a denial when the true plea is

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confession and avoidance is improper conduct on the part of a legal practitioner if he knows or should have known the correct facts. To say "I deny I was on the wrong side of the road" when you mean "I admit I was on the wrong side of the road, but it was not my fault" is dishonest.

"A pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial attempt to canvass another", as Milne J ( as he then was) put it in *Kali v Incorporated General Insurance Ltd* 1976 (2) SA 179 (D) at 182 A.

"The purpose of pleadings is to define the issues, and to enable the other party to know what case he has to meet" (*per* Mullins J in *Nieuwoudt* v *Joubert* 1988 (3) SA 84 (C). See also *DD Transport (Pvt) Ltd v Abbot* 1988 (2) ZLR 92 (S) at 101F-G.

The failure, in this case, to plead the real defence, suggests one or other of three possible explanations:

1. Sheer idleness and incompetence on the part of the pleader.

2. A deliberate and unconscionable attempt to avoid attracting an *onus* or "burden of adducing evidence".

3. That the defence was an afterthought on the part of the defendant.

The learned judge who heard the matter made no comment on all this.

I turn next to the question of the *onus* of proof and the so-called "burden of adducing evidence". This was also not dealt with by the learned judge.

This was clearly (not on the pleadings, but on the evidence) a *res ipsa loquitur* situation. A driver who is on the wrong side of the road, and who hits another driver proceeding lawfully about his business, may be said to be *prima facie* in the wrong. He must adduce evidence - or in this case his employer must - sufficient to show that what was on the face of it his fault, was not really his fault.

While the *onus* of proving his claim rests always on the plaintiff, the evidential burden of providing an excuse rests on the defendant in such circumstances. There is an inference - not a presumption - of negligence

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on his part, which he must explain away. See *Arthur v Bezuidenhout & Mieny* 1962 (2) SA 566 (A) at 574 *et seq*; *Rankisson & Son* v *Springfield Omnibus Services* 1964 (1) SA 609 (D) at 615H-616E; *Freelance Contracting (Pvt) Ltd v de Clerk* 1982 (1) ZLR 193 (S) at 197F *et seq*; *Madyosi & Anor v SA Eagle Insurance Company Ltd* 1989 (3) SA 178 (C) at 184H *et seq*; and *Ntsala v Mutual & Federal Insurance Co Ltd* 1996 (2) SA 184 (T) at 190E-191F.

It is, as Comrie AJ said in *Madyosi*'s case, *supra,* the sufficiency of the explanation which in general becomes all-important.

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What was the explanation?

The driver of the bus said, as one might expect, that he was driving normally and at about 60 km/h when, going around the corner, his steering inexplicably failed and he was unable to stop or control his bus thereafter. He said that up to the time of the accident his steering was normal. Suddenly it became loose and would not turn the vehicle. He said there was a speedometer, but it must have dropped off at the time of the collision. This is why it was reported "missing" in the Notice Prohibiting Use of Vehicle issued by the VID on 4 May 1992. He also said for good measure the approaching Mercedes was speeding.

Mr Msabaeka, a director of the bus company, then gave evidence. He said the bus was regularly checked and serviced and complaints rectified. He was in Chipinge on the day of the accident, so he did not know if the bus was checked on that day. He produced a book to show that this bus had been checked on 26 April, four days before the accident. He had on that occasion supervised the mechanic who did the work. When he tested the bus "it could not pull" and the headlamp "could not be switched on to bright". Presumably he meant that everything else was in order, though he did not say so. In any event he had no expert qualification.

He produced as Exhibit 9 a Vehicle Examination Report. The copy on the record seems incomplete, since there is nothing about the brakes or the engine in it. It describes the steering as "damaged".

In cross-examination this witness was confronted with the remarks in Exhibit 10, the Notice Prohibiting Use of Vehicle. The first two of these remarks were: 1. Steering wheel loose; 2. Splines w/out (presumably "worn out").

Mr Msabaeka simply did not give any answer when this was put to him. Nor,

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astonishingly, did anyone ask or explain what "splines" are. Had they done so it would have become obvious that the problem with the steering was *prima facie* not a sudden development, but the result of deterioration over a period. In short, inadequate maintenance.

That was the defendant's case. It seems to me beyond any shadow of doubt that it failed to adduce sufficient evidence to explain away the *prima facie* negligence involved in being on the wrong side of the road. Miller J in *Rankisson*'s case *supra* made the point in the following passages at p 615-6:

> "In *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566, the Appellate Division had occasion to consider the question of *onus* in a case where, *prima facie*, and saving an explanation by the defendant, his negligence would be inferred because *res ipsa loquitur*. It was held that the *onus* was on the plaintiff to establish, on a balance of probabilities, that the collision was caused by the defendant's negligence, and that, although the defendant might fail to establish, by proof on a balance of probabilities, the innocent explanation which he tendered, such explanation had nevertheless to be considered at the end of the case, and, depending on its cogency and the facts of the case, could be sufficient to rebut the inference which but for the explanation would be drawn against the defendant."

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But he then went on:

> "In discussing how far the defendant needed to go, short of discharging an *onus* by proof on a balance of probabilities, to displace the inference of negligence arising from proof of the occurrence, the learned judge pointed out that each case would be decided on its own facts but that generally mere theories or hypothetical suggestions will of course not avail the defendant.' A defendant who wishes to avoid an adverse inference in such circumstances must generally do more than merely show that his explanation may reasonably possibly be true. There must be some substantial foundation in fact for his explanation."

In the present case the reverse is true. Such evidence as there is tends to show the opposite of that for which the defendant is contending. It tends to show that the steering problem was the result of wear over a long period rather than sudden and unforeseeable failure.

The plaintiffs, in their pleadings, have taken care to avoid the trap which



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caught the plaintiff in *Madyosi*'s case *supra*. Madyosi's particulars of negligence were all directed at the driver. In this case the first particular of negligence alleges a negligent failure of the company to maintain the steering mechanism.

In the circumstances the duty lay on the defendant company to call expert evidence to support the purely hypothetical suggestion that the steering failure was unforeseeable and thus not blameworthy.

This was so particularly, as I have said, because the indications point precisely in the opposite direction. Taking that fact together with the total failure to plead the defence eventually relied upon, I am satisfied that the learned judge was wrong in concluding that the *onus* of proof which lay on the plaintiff in regard to negligence had not been discharged.

The appellants' counsel suggested that this court should, if we found in his favour, go on to assess the quantum of damages. In our view this is undesirable. It is for the trial judge to make an assessment. There is a practice, which is to be encouraged, whereby trial judges, even if they dismiss a claim such as this for lack of proof of negligence, go on to assess quantum. This often enables an appeal court, if it reverses the decision on negligence, to go on and dispose of the question of quantum as well.

In this case, however, we consider the evidence on quantum was inadequately presented and unsatisfactorily tested. We have spoken before of undue reliance on the new Civil Evidence Act, in particular where it permits the use of documentary evidence. See *Mutimwinyi v Mutimwinyi* S-192-95 and *Pocock v AFC* 1995 (2) ZLR 365 (S). In this case it enabled the defendant to cast doubt on the causal link between the accident and the pneumonia suffered by Mr Keavney as described in para 5 of Mr Kitcat's affidavit.

We would suggest that an effort be made to settle the quantum, failing which it will have to be dealt with at a further hearing in the High Court.

Accordingly the following order is made:

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1. The appeal is allowed with costs.

2. The order of the High Court is set aside.

3. The matter is remitted solely for an assessment of the quantum of damages based on a finding that the accident was due entirely to the negligence of the defendant and or its driver.



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4. Leave is given to both sides to adduce such further evidence as to damages suffered by the plaintiffs as may be considered appropriate.

GUBBAY CJ: I agree

MUCHECHETERE JA: I agree

*Henning Lock Donagher & Winter*, appellants' legal practitioners

*Bere & Associates*, respondent's legal practitioners



## CARGO CARRIERS (PVT) LTD v ZAMBEZI & ORS 1996 (1) ZLR 613 (SC)

**Court** **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

16 May & 3 June 1996 Judgment No. S-82-96

### Flynote

Administrative law - review - whether domestic remedies must be exhausted before review may be entertained by High Court - court's discretion

Employment - contract - termination - disciplinary action under code of conduct - code envisaging treatment of employees on individual basis - whether code could be used to lock out large group of striking workers

Employment - Labour Relations Act - [Chapter 28:01] - Minister's powers to issue "show cause" order in respect of lock-out or strike - whether may be delegated to official in Ministry

Statutes - delegation of powers - powers granted to Minister under Act - extent to which such powers may be delegated to officials

### Headnote

The respondents were truck drivers employed by the appellant company, which carried on the

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business of haulage and hauliers. In 1995 complaints were levelled by the drivers at the driver controller, who was accused by them of being insensitive to their problems and of being racist. The company undertook to suspend the controller while the grievances were investigated and resolved. A few days later, the respondents were told that the controller was to resume work, but in an administrative position which would not involve him dealing with the drivers. The drivers regarded the controller's reinstatement as a breach of the agreement reached. They resorted to collective job action. When officials of the Ministry of Labour intervened, the drivers accepted a directive to return



to work; but when they did so, they found they had been locked out. The company's management claimed that they were faced with an unlawful strike and, in the absence of a "show cause" order by the Minister, commenced disciplinary action, purporting to act under the code of conduct applicable to the industry, and dismissed the drivers.

The drivers contested the propriety of the dismissals. A show cause order was made by a labour relations officer, who a few days later made a "disposal order", directing that the lock-out be terminated and that the controller be transferred to another department. The company disputed the validity of the officer's show cause order on the grounds that it should have been issued by the Minister. The High Court (Bartlett J) ordered the reinstatement of the respondents.

On appeal, the issues raised were:

(1) whether the High Court should have declined jurisdiction on the grounds that the High Court was not the appropriate forum for grant of the relief sought;

(2) the lawfulness of the dismissals in terms of the code of conduct; and

(3) whether the Minister's discretionary power under s 106(1) of the Labour Relations Act [*Chapter 28:01*] to issue a disposal order to resolve a lock-out could be delegated to an official in his Ministry.

Held, that an aggrieved party may approach the High Court for relief even where the remedies provided under the Act have not been exhausted. The judge *a quo* had a discretion, which he had exercised judicially; and there were special features in the case that permitted the court to hear the matter: the questions of the inapplicability of the code of conduct and the validity of the show cause order.

Held, further, that the provisions of the code of conduct clearly envisaged that each person being subjected to disciplinary action should be dealt with on an individual basis, with the right to be heard, the right to representation and the right to present his case. It was not permissible to hold a mass trial and impose the same penalty on all of them. The company should have waited for the issue of a show cause order and, if none was issued, to have appealed to the Labour Relations Tribunal. Alternatively, it could have suspended the drivers without pay and applied for an order terminating the contract of employment of each. The dismissal was, accordingly, unlawful and the appellants were entitled to their reinstatement.

Held, further, that while it is normal for Ministers, to whom statutory powers and duties are

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given, to delegate the exercise of those powers and duties to responsible officials in their departments, this does not apply where the Minister is given responsibility of exercising a discretion which nature of the subject matter and the language of the Act show can only



be properly exercised in a judicial spirit. An examination of ss 106 and 107 of the Act showed that a distinction was drawn between the Minister and an "appropriate authority" (that is, a labour relations officer) and gave different roles to each. When a show cause order was issued, an appropriate authority had to be nominated, which meant that an official could not issue a show cause order and nominate himself to deal with the issue of a disposal order. Labour relations officers were given wide powers under s 93 of the Act, and it would have been reasonable to expect the power to issue a show cause order to be listed there, if the legislature had intended to give such powers to those officers.

Cases cited:

*Art Printers Ltd v Regional Hearing Officer & Anor* HH-168-87

*Carltona Ltd v Commrs of Works & Ors* [1943] 2 All ER 560 (CA)

*Commrs of C & E v Cure & Deeley Ltd* [1961] 3 All ER 641 (QBD)

*Fisher & Ors v Air Zimbabwe Corp* HH-306-88

*Kensington Ests (Pvt) Ltd v Min of Justice & Internal Affairs* 1957 R & N 92; 1956 (3) SA 468 (SR)

*Metropolitan Borough & Town Clerk of Lewisham v Roberts* [1949] 2 KB 608 (CA)

*Musandu v Chairperson, Cresta Lodge Disciplinary & Grievance Cttee* HH-115-94

*Shidiack v Union Govt (Min of the Interior)* 1912 AD 642

*Tutani v Min of Labour & Ors* 1987 (2) ZLR 88 (H)

Statutes and regulations referred to:

Collective Bargaining Agreement: Transport Operating Industry (SI 94/1995), paras 1, 3 and 7

Labour Relations Act [*Chapter 28:01*], ss 93(1), 102, 106, 107 and 110

Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371/1985), s 3

## Judgment

**Gubbay CJ:** The appellant is a private company which carries on the business of haulage and hauliers from premises situated in the industrial area of Harare. Its operation necessitates the employment of a large work force. This numbered at the relevant time some 678 employees. Of these 322 were engaged as truck drivers.

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Early in August 1995 the relationship between the drivers and the appellant, which up to then had been satisfactory, took a serious turn for the worst. Various complaints were levelled at a Mr Robert Collett, the driver controller



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and managerial employee of the appellant. He was accused of being insensitive to their problems with management and prone to making racial aspersions about black people when his assistance was sought. Those drivers directly affected by Mr Collett's behaviour found it very difficult to work in an environment of which he played a part. In consequence several meetings were convened with the appellant. They culminated, on 9 August 1995, in the appellant undertaking to suspend Mr Collett until the grievances were investigated and resolved.

However, on 18 August 1995 the first respondent, Robert Zambezi, as chairman of the workers' committee, received a memorandum from the appellant informing that Mr Collett was to resume his duties three days hence under a system which would not involve the drivers having to deal directly with him. He was to handle only the administrative side of driver control.

The reinstatement of Mr Collett on 21 August 1995 was regarded by the drivers as a breach by the appellant of its agreement of 9 August 1995. It led to the eight respondents and 314 other employees resorting to collective job action and, ultimately, to the institution of proceedings before the High Court.

It was alleged by the respondents in their affidavits that when the Ministry of Labour, Manpower Planning and Social Welfare intervened on or about 21 August 1995 the drivers accepted the directive that they resume their duties despite their protestations at the reinstatement of Mr Collett. But when, a day or two later, they attempted to return to work they found the gates of the premises chained and padlocked, with notices posted advising of pending disciplinary action.

The appellant, on the other hand, in the opposing affidavit of its administration manager, Mr Hermanus Leonard, denied that the respondents, or any of the other 314 employees, had indicated an intention to return to work. It was alleged that, faced with what was considered to be an unlawful strike and the failure of the Minister to issue a show cause order in terms of s 106(1) of the Labour Relations Act [*Chapter 28:01*], the appellant was left with no option but to convene disciplinary proceedings against the 322 employees in terms of its registered code of conduct. And on 25 August 1995 it lawfully dismissed all 322 employees.

The propriety of these dismissals was strongly disputed by the respondents.



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On 31 August 1995 a show cause order was issued by a labour relations officer, Mrs Memory Matanda. Thereafter, on 5 September 1995, a disposal order was made by her directing that *(i)* the lock-out be terminated and the employees be allowed to resume work immediately; and (ii),

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the driver controller, the subject of the dispute, be transferred to another department pending the outcome of the investigation.

The appellant attacked the validity of the show cause order on the ground that it had not been issued by the Minister himself; consequently the disposal order which followed upon it was likewise bad in law. It contended that, in any event, at the date of issue the 322 employees had already been lawfully dismissed.

On the undisputed facts I have outlined and the arguments presented to him, Bartlett J, who presided, ruled that:

*(i)* the disciplinary action taken against the eight respondents and the remaining 314 employees under the Code of Conduct was not lawful;

(ii) the show cause order had been validly issued by the labour relations officer, Mrs Matanda;

(iii) the disposal order should have been complied with by the appellant;

(iv) as the dismissals were unlawful, the eight respondents who were before him were to be reinstated in employment; and,

*(v)* the appellant was to pay the costs of the application.

Those determinations, and one other, denote the essential issues which arise in this appeal. It is to them that I now turn.

*Whether the learned judge should have declined jurisdiction on the ground that the High Court was not the appropriate forum for the grant of the relief sought*

In addressing argument, counsel for the appellant was correct to acknowledge that the principle has been established that an aggrieved party may have *locus standi* to approach the High Court for relief even though the remedies provided under the Labour Relations Act have not been exhausted. See *Art Printers Ltd* v *Regional Hearing Officer & Anor* HH-168-87; *Tutani* v *Min*



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*of Labour & Ors* 1987 (2) ZLR 88 (H) at 94 A-D; *Fisher & Ors* v *Air Zimbabwe Corporation* HH-306-88; *Musanda* v *Chairperson of Cresta Lodge Disciplinary & Grievance Committee* HH-115-94. He urged, however, that in this case there were no features that excused the respondents from doing so.

In considering the cogency of the submission, what should not be overlooked is that Bartlett J exercised a discretion to hear the matter. That he did so is a significant factor at this stage of the proceedings. Unless it can be found that no reasonable judge would have acted other than to decline jurisdiction - certainly a length to which I am not prepared to go - the decision made is plainly beyond interference by this court.

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This apart, I am of the view that special features indeed existed. In the first place, the complaint raised by the respondents in the founding and answering affidavits was not merely the irregularity of the procedure adopted by the appellant under the Code of Conduct; it related as well to its inapplicability to the taking of disciplinary proceedings against as many as 322 employees. Second, there was the opposing contention raised on the papers by the appellant, that the show cause action was invalid as not having been made by the Minister himself; thus the disposal order with its directives was similarly tainted. The combination of these two features, to my mind, fully justified the exercise by the learned judge of his discretion to entertain the proceedings.

*Were the dismissals lawful under the Code of Conduct set out in the Sixth Schedule to the Collective Bargaining Agreement: Transport Operating Industry (SI 94 of 1995)?*

Bartlett J dealt with whether the code of conduct comprehended a situation in which 322 employees were to be subjected to disciplinary proceedings. He expressed the opinion that it did not in these words:

> "I accept that one of the specific offences is taking part in unlawful industrial action but to my mind the provisions of the code were simply dwarfed by the enormity of the problem facing the respondent company. I do not think that the code envisaged dealing with such a large scale industrial action and indeed such large scale industrial action is normally dealt with in terms of the appropriate sections 105 to 107 of the Labour Relations Act ...
>
> A careful reading of the procedures in regard to dismissal, to my mind,



> makes it very difficult for those proceedings to be applied to the massive unlawful strike which the company was facing; for example, the dismissal procedure requires that the dismissal be with the authority of the general manager or chief executive and the assistant to the personnel manager and after consultation with at least three members of the workers' committee. My understanding of the papers is that amongst the persons being dismissed were the members of the workers' committee. It accordingly was not possible to have consultations with three members of the workers' committee since those members of the workers' committee were all subject to the dismissal proceedings. It is, to my mind, nonsensical to expect to be able to consult with members of the workers' committee to decide whether dismissal should be ordered when in fact the persons you are discussing with are the persons who are being dismissed.
>
> I appreciate the enormity of the problem with which the company was faced, but to my mind it is not possible to put a round plug into a square hole and that the code of conduct was simply not drafted to take into account the problem facing the company."

In considering the applicability of the code of conduct to the mass collective job action resorted to by 322 employees in an essential industry with national implications, it is clear to me that the provisions of the Labour Relations Act, headed "Collective Job Action", were designed to deal with precisely the situation that confronted the appellant. It should have waited for the issue of a show cause order. If the Minister had refused to grant it, the appellant, as a person aggrieved, could have appealed to the Labour Relations Tribunal pursuant to s 110(1)*(a)* of the Act. Had the Minister issued it, the appropriate authority on the return day would have been empowered to dismiss as many of the 322 employees as found warranted.

Alternatively, it was open to the appellant, rather than accepting, as it did, the perceived

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difficulties of proceeding under the code of conduct, to have suspended the 322 employees without pay on the ground specified in either subs *(a)* or *(b)* of s 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985), and applied to a labour relations officer for an order or determination terminating the contract of employment of each of them.

In sum, there was no realistic way in which the appellant could convene a form of mass trial of the 322 employees and stay within the parameters of the code of conduct. This proposition is amply demonstrated by reference to





what occurred when such an attempt was made. I can do no better than to quote again the remarks of Bartlett J:

> "The document put on the gate at 1750 hours on 23 August quite clearly indicated the intention to institute proceedings to dismiss the workers. Reference was made to the workers having ignored numerous calls to return to work between 9 and 23 August, that the workers were required to respond in writing to the allegations by 12 o'clock the next day.
>
> It is clear that this starting document only reached the attention of the persons for whom it was directed at 7.30 on the morning of 24 August and the requirement was that the workers comply with the requirement of responding in writing by 12 o'clock that day, which gave them some four-and-a-half hours in which to act. The proceedings then moved fairly rapidly after that through 24 August to 25 August, with an attempt being made to comply with the dismissal requirement of the consultation with three members of the workers' committee. In fact, five members of the workers' committee did attend the meeting requested. They were all apparently persons who were subject to the dismissal proceedings.
>
> It is also clear from the annexures that the personnel officer, for example, and the officer administering discipline purported to consider individually all the 300 plus cases and decide on an appropriate punishment in respect of each of them. It is to my mind most unlikely that anything but the most cursory assessment could have been done in such a short period of time, in view of the very large number of cases involved. To my mind, the proceedings in terms of the code of conduct were encapsulated into such a short period of time that it was not possible for any proper consideration to be given to individual matters. One would consider that there surely would be individual considerations from the company's point of view. There must have been a number of employees whom it regarded as persons responsible for the industrial disorder and whom it would regard as particularly appropriate to be dismissed; and there would presumably have been a large category of other employees who may have been regarded as not actively involved in the matter. There is no indication if there was any consideration at all given to individual matters. That was made not possible by the decision to require responses in writing within a few hours and then to deal with the matters without affording any reasonable prospect of any meaningful hearing."

I would merely reinforce the sound reasoning of the learned judge by





pointing to the failure of the appellant to comply with the following provisions of the Code of Conduct:

First, para 1 of that part of the Code of Conduct headed "Principles in Administering Disciplinary

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Action" requires that-

> "The background and circumstances of each case must be taken into consideration and where there are good reasons for different treatment, the punishment should reflect this."

In dealing with the 322 employees *en masse* and in imposing the same penalty upon all of them, there could hardly have been the measured individual assessment of each employee which this paragraph envisages. There must be every doubt, for example, as to whether any regard was paid to the disciplinary record and service record of each employee, the possible consequences to him or her of the offence and the comments of the workers' committee representative, as enjoined by paras 3 *(a)*, *(e)* and *(f)* of the "Procedure" part of the code of conduct.

Second, it is stated in para 7*(a)* of the "Principles in Administering Disciplinary Action" that anyone alleged to have committed an offence "shall have the right to *hear* the allegations against him/her" (emphasis added). This implies, to my mind, the right to an oral hearing, which is underscored by the right given in subpara *(c)* to be *represented* by a member of the workers' committee or trade union in the initial stages of the enquiry. Paragraph 1*(b)* under "Procedure" also confirms that the person alleged to have committed an act of misconduct must be afforded the opportunity of "*representing his case before the responsible official*" (emphasis added). No oral hearing was offered by the appellant to the eight respondents or to any of the remaining 314 employees.

Thus I share the view of the learned judge that the eight respondents were not lawfully dismissed by the appellant under the code of conduct.

*Whether the discretionary power vested in the Minister under s 106(1) of the Labour Regulations Act permits of delegation*

Section 106 of the Act provides:

> "(1) Whenever a collective job action or lock-out is threatened, anticipated, in force, or, in the case of an unlawful collective job action or lock-out, has taken place, *the Minister*, acting on his own



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> initiative or upon the application of any person affected or likely to be affected by the collective job action or lock-out, may issue an order calling upon any party to the dispute concerned to show cause why a disposal order should not be made in relation thereto.
>
> (2) A show cause order -
>
> *(a)* shall specify-
>
> *(i)* the date, time and place at which, and the *appropriate authority* before which, the party to whom the order is issued in terms of subsection (1) must appear to show cause why a disposal order should not be made; and
>
> (ii) the order or action desired or proposed;
>
> *(b)* may direct that pending the determination of the dispute by the *appropriate authority*, the collective

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job action concerned be terminated, postponed, suspended or reduced in scope;

*(c)* may direct that pending the determination of the dispute by the *appropriate authority*, the lock-out concerned be terminated" (emphasis added).

And s 107 (1) and (2), where relevant, reads:

"(1) On the return day of a show cause order the *appropriate authority* concerned shall, at the time and place specified in the order, inquire into the matter and shall afford the parties concerned an opportunity of making representations in the matter.

(2) After conducting an inquiry in terms of subsection (1), the *appropriate authority* may issue a disposal order directing that-

*(a)* ...

*(b)* ..." (emphasis added).

The term "appropriate authority" is defined in s 102 of the Act to mean "a labour relations officer".

Bartlett J held that s 106(1) properly construed does not require the



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Minister to issue the show cause order himself; and that Mrs Matanda, a labour relations officer, was entitled, in the exercise of her discretion, to issue it, nominate herself as the appropriate authority and thereafter issue the disposal order. She had acted within the law. He referred to the English cases of *Carltona Ltd v Commissioners of Works and Ors* [1943] 2 All ER 560 (CA) at 563A-C, *Metropolitan Borough & Town Clerk of Lewisham* v *Roberts* [1949] 2 KB 608 (CA) at 617, and *Commissioners of Customs & Excise* v *Cure & Deeley Ltd* [1961] 3 All ER 641 (QBD) at 660B-C, in support of the proposition that duties imposed upon Ministers and powers given to them are normally exercised under their authority by responsible officials of the Department; for otherwise public business could not be carried out. In particular, he cited the words of Beadle J (as he then was) in *Kensington Estates (Pvt) Ltd* v *Min of Justice & Internal Affairs* 1957 R&N 92 at 96; 1956 (3) SA 468 (SR) at 471C-F, to this effect:

> "The Minister is normally the head of the Government Department administering the Act, and as such takes responsibility for the acts of his Department. No Minister can possibly have the time at his disposal to investigate in detail all the problems which this Act alone raises, nor can he be expected to apply his mind to them in the same thorough manner as, for example, an officer charged specifically with the duty of investigating a particular problem. The Minister usually lays down the broad framework of the policy of his Department, but within the framework of that policy he can never be expected to give more than cursory consideration to the numerous points of detail which arise in the course of administration. *He may not perhaps be permitted to delegate his powers,* but in matters of administrative detail he must rely very largely on the advice of the officers of his Department" (emphasis added).

Adopting this approach, the learned judge considered that the decision to issue a show cause order was simply one of the multifarious functions of the Minister under the Labour Relations Act which can be carried out on his behalf by an official of his Department.

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It is on this aspect of an otherwise impressive *ex tempore* judgment that I consider the learned judge fell into error. As Innes ACJ (as he then was) was careful to point out in *Shidiack* v *Union Government (Minister of the Interior)* 1912 AD 642 at 648:

> "... where the legislature places upon any official the responsibility of exercising a discretion which the nature of the subject matter and the



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> language of the section show can only be properly exercised in a judicial spirit, then that responsibility cannot be vicariously discharged."

An examination of ss 106 and 107 indicates firmly to me that the legislature did not intend that the discretion in relation to a show cause order - the power to make the decision whether to grant or refuse such order - should vest in anyone other than the Minister. I come to this conclusion for the following reasons.

First, s 106(1) deliberately uses the word "Minister" in contra-distinction to "appropriate authority" in s 107. If it was the intention to repose the discretion to issue or refuse a show cause order as well as make a disposal order in the appropriate authority, there would have been no need to refer to "the Minister" in s 106(1). The lawmaker was careful to draw a distinction between the Minister on the one hand and the appropriate authority on the other - what each has to do.

Second, in terms of s 106(2), the show cause order when issued must specify the appropriate authority before whom such cause is to be shown. This cannot mean that it was intended that a labour relations officer as the appropriate authority could nominate himself or herself as the appropriate authority, as Mrs Matanda did.

Third, a contrary interpretation of s 106(1) implies that both the Minister and a labour relations officer are empowered to issue or refuse to issue a show cause order. This could lead to a situation in which a labour relations officer issued or refused to issue a show cause order without consulting the Minister and, as it later turned out, against his wishes.

Fourth, if the legislature had intended to vest the discretionary power under s 106(1) in a labour relations officer, the likelihood is that it would have mentioned it in the comprehensive list of powers in s 193(1) which that official may exercise acting on his or her own initiative.

It follows that a disposal order may only be made by the appropriate authority provided the Minister himself has issued a show cause order and has specified the appropriate authority who is to conduct the enquiry on the return day. It is the Minister himself who must set in motion the procedures leading to the hearing of the enquiry relating to a disposal order under s 107.

In the result, I am satisfied that *in casu* the whole process was fatally flawed and that both the show cause order and the disposal order were invalid.



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What then is the consequence of these determinations?

I am unable to perceive of any basis upon which to deny the eight respondents their reinstatement in employment. Technically the remaining 314 employees, who were not joined in the High Court proceedings, are not entitled to this relief. Realistically, however, they too should be reinstated, for there is no difference between their positions and those of the respondents.

Since the question of whether any or all of the 322 employees were guilty of misconduct justifying dismissal still has to be resolved, it is open to the appellant, should it be so advised, to utilise the available procedures under the Labour Relations legislation to bring that about.

Finally, with regard to costs, I consider that the respondents have achieved substantial success in this appeal. The order made by the learned judge has not been disturbed, though possibly any reinstatement may be of short duration. The appellant, on the other hand, has failed on its main contention, that the dismissals under the code of conduct were lawful.

Accordingly, I would dismiss the appeal with costs.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

*Kantor & Immerman,* appellant's legal practitioners

*Muskwe & Associates,* respondents' legal practitioners



## MORFOPOULOS v ZIMBABWE BANKING CORPORATION LTD & ORS 1996 (1) ZLR 626 (HC)

**Court** **High Court, Harare**

Gillespie J

Civil application

28 May & 12 June 1996 Judgment No. HH-76-96

### Flynote

Practice and procedure - execution - sale - balance between rights of debtors and creditors - setting aside of sale in execution on basis that price achieved unreasonably low - onus on debtor to rebut inference of regularity attaching to sale

### Headnote

The rules that have evolved concerning the sale of properties in execution are designed to find

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a balance, on the one hand, between the need to protect a judgment debtor who may unfairly be hounded to insolvency and homelessness and, on the other hand, the need to ensure that the judgment creditor, forced to go to court to obtain satisfaction of his debts, is provided with just relief. A further and major factor that is taken into account is the requirement that the reliability and efficacy of sales in execution be upheld.

The onus is on the debtor to prove one of the three grounds for interference specified in the Rules of Court: that the sale is improperly conducted; that the price realised at the sale in execution is unreasonably low; or any other good ground. A litigant wishing to discharge this burden must take care to place before the court evidence establishing the cause for rescission relied upon. In particular, he must adduce proof of any irregularity relied upon; he must produce properly supported valuations of the property under consideration, reflecting the upper and lower limits of the suggested market price; or proof of some other equitable basis for interference.



*Held*, that the debtor had failed to discharge this onus.

Cases cited:

*Conradie v Jones* 1917 OPD 112

*Lalla v Bhura* 1973 (2) RLR 280 (G)

*Lange & Ors v Liesching & Ors* (1880) Ford 55

*Mapedzamombe v Commercial Bank of Zimbabwe & Anor* 1996 (1) ZLR 257 (S)

*Mbewe* v *Central African Bldg Soc* HH-83-92

*Smith & Anor v Acting Sheriff & Anor* 1995 (1) ZLR 158 (S)

*Sookdeyi & Ors v Sahadeo & Ors* 1952 (4) SA 568 (A)

*SA Association v van Staden* (1892) 9 SC 95

*Zvirawa v Makoni & Anor* 1988 (2) ZLR 15 (S)

Rules of court referred to:

High Court Rules 1971 (RGN 1074/1971), rr 351, 352, 353, 354, 355, 356, 359 and 360

*W T Manase* for the applicant

*G Musariri* for the third respondent

## Judgment

**Gillespie J:** The question of the setting aside of sales in execution of property is one that has received considerable attention in recent times. The administration of justice has not been without criticism, unjustified in my view, of insensitivity to the plight of judgment debtors who

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face the possible loss of immovable property, including residential accommodation, in satisfaction of a judgment debt. The rules that have evolved concerning the sale of properties in execution are designed to find a balance, on the one hand, between the need to protect a judgment debtor who is unfairly being hounded to insolvency and homelessness and, on the other, the imperative to ensure that the judgment creditor, forced to go to court to obtain satisfaction of his debts, is provided with his just relief. A further factor has been given additional consideration: that is the requirement that the reliability and efficacy of sales in execution be upheld. It is already the case that a forced sale, for market reasons, is properly regarded as generally tending to result in a lower price for property disposed of than a private and elective transaction. Should it become the situation that sales in execution are regarded by the public at large as fraught with difficulties and uncertain in their performance and fulfilment, then the attendance at such sales and the prices bid on auction are likely to decrease thus causing a corresponding increase in prejudice to judgment creditor and judgment debtor.

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**1996 (1) ZLR p628**

GILLESPIE J

This is a case where the applicant, a judgment debtor, wishes to set aside the sale in execution of his residential property. The asset was sold by public auction to the third party for the sum of $220 000. The proceeds are to be applied in satisfaction of a judgment debt of $482 528,17 due to the first respondent. The sale occurred on 4 August 1995. On 10 August the applicant wrote a letter to the second respondent stating:

> "The purpose of this letter, therefore, is to object to the sale and to appeal to you not to confirm it on the grounds that the price on the basis of the highest bid fell far below any reasonable person could accept."

On 25 August the second respondent issued a notice in these terms:

> "I refer to the sale in the above matter and advise that no objections were received and on the 25/8/95 the sheriff declared and confirmed that the highest bidder W F MASHAYAMOMBE the purchaser at a sum of $220 000."

On 1 September this application was instituted. It suffered the defect that the purchaser of the property was not joined as a party. The flaw was rectified by the purchaser himself, however, who on 15 September sought and was granted leave to intervene as a party. The grounds upon which this application is based are that the purchase price is unreasonably low. The papers disclose that the applicant has obtained an offer for the purchase of the property at a price of $350 000. He wishes an order setting aside the sale in execution and in effect authorising the sale of the property by private treaty to this offeror. The first respondent, naturally, does not oppose the relief which would redound to its benefit. The second respondent has submitted his report which discloses that he accepted the successful bid and subsequently confirmed the sale upon the auctioneer's report that the bid was reasonable but otherwise has no objection to the relief sought. The third respondent opposes the application. He deposes that he has raised a necessary deposit of $55 000; has obtained from his building society a loan for the balance of the purchase price; and he has adduced certain evidence as to the value of the property.

By the common law an owner of property which has been sold in execution but not yet transferred may seek an order of *restitutio in integrum* setting aside the sale *on good cause shown.* Voet, in his *Commentarius ad Pandectas* at 4.6.10 (Gane's translation is cited) places

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this action on the following footing:



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> "Nor are majors less to be assisted by restitution when their properties have been openly sold off as belonging to third parties and have under decree of a judge been knocked down and delivered to buyers after the formalities of sale by auction, they themselves being ignorant by reason of absence or other justifiable cause."

The respected commentator remarks in the following words that this constitutes a justifiable diminution in the authority and finality of the judicial process of execution:

> "It is true that the power of the Treasury's spear is not slight, especially by the customs of the present day, and that confidence in it ought not readily to be destroyed. Still it is not going of itself to weigh so heavily that therefore a true owner, who from reasonable ignorance does not interfere at the selling off of his own properties and thus is put beyond blame, would remain stripped of his ownership of his own properties which have been publicly knocked down to another."

This availability of the cause for restitution and this need to uphold the efficacy of sales *ex decreto judicis* were acknowledged in the modern law in *Conradie v Jones* 1917 OPD 112 at 122. The importance to be attached to the principle of finality in judicial sales is exemplified at an early date in *Lange & Ors v Liesching & Ors* (1880) Foord 55 at 59 and in *SA Association v van Staden* (1892) 9 SC 95 at 98.

Despite the potency of the formal sale in execution, however, the notion of rescission on the grounds of an inadequate price was by no means unknown to the old authorities. Groenewegen *De Legibus Abrogatis* ad C IV.44.16 notes (in my translation):

> "Many consider that public sales under the authority of the spear may be rescinded on account of injury beyond half of the fair price, this opinion has been accepted in practice in Sabaudia and Frisia. But since today forced sales are conducted with utmost care and formality, thus the reliability of the fiscal spear ought not to be easily overthrown, for this reason the contrary is held by Gallic customs and by our own. Accordingly it has thus been held in the Supreme Court of Holland according to Neostad. On the other hand, if something is indeed sold by judicial decree but without all the formality and procedure of the spear it may be the subject of an application for restitution on the grounds of injury."



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This passage shows the authority of the judicial process, properly executed, being held in Holland superior to any claim in respect of loss because of the inadequacy of the price.

Once transfer had occurred, however, even this limited remedy was not available in the absence of knowledge on the part of the purchaser of defects in title or other fraud. This appears from Voet at 6.1.13, approved in *Sookdeyi & Ors v Sahadio & Ors* 1952 (4) SA 568 (A) at 571H-572F. The point was recently reaffirmed in the Supreme Court of Zimbabwe in *Mapedzamombe v Commercial Bank of Zimbabwe & Anor* 1996 (1) ZLR 257 (S).

The present Rules of the High Court add to this law. They provide a structured method of valuing, advertising and selling the property and of confirming that sale after allowing an

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opportunity for interested parties to make objection. The procedure to be followed in connection with the sale in execution of immovable property is set out clearly in the rules of court. Starting with r 351, there is a sadly underutilised provision entitling the Sheriff to obtain a valuation of the property to be sold. It seems to me that were this rule to be followed in advance of a sale it might provide the Sheriff and the auctioneer with valuable assistance in the determination of an appropriate price and conduct of the sale. Rule 352 provides for formalities attaching to the public advertisement of the sale and of giving notice to holders of a mortgage over the property. The sale is to be by public auction without reserve (r 354) on conditions previously set by the Sheriff (r 353) and, by r 355, is to be held in the presence of a commissioner responsible for certifying to the Sheriff as to the proper conduct of the sale. Upon conclusion of the sale, the sheriff is enjoined by r 356 to consider the property market, the report of his commissioner and, no doubt, any prior valuation he has obtained, and to exercise a discretion as to whether or not to declare the highest bidder the purchaser. Once the declaration is made, then, if these procedures have all been complied with, the sale will be a formally correct and valid conditional sale which the law, by ancient and modern authority, inclines towards upholding.

Consequent upon the sale, there are various provisions designed to bring about confirmation of the sale and to afford an interested party the opportunity of objecting to it. By r 359, a sale may be set aside on application, notice of which is given to the Sheriff, objecting to the confirmation of the sale and showing that the sale was improperly conducted, or that the price was unreasonably low, or any other good ground. This rule obviously adds to the common law grounds of rescission. Rule 360 provides for the confirmation



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by the Sheriff of the sale in the absence of objection by any interested party within 7 days of the sale. Upon confirmation of the sale there follows the distribution of the purchase price according to plan of distribution formulated in accordance with the rules of court.

The application in terms of rule 359 is one which is to be made to the court, and not to the Sheriff. If made to the Sheriff then he has no power to determine the objection but must refer it to the court through the registrar. This was made clear by McNally JA who upheld this proposition even in the peculiar circumstances of *Smith & Anor v Acting Sheriff & Anor* 1995 (1) ZLR 158 (S), where the learned Judge of Appeal remarked at 160:

> "It is somewhat ironical that in order to lodge an objection with the court one has to lodge it with the Registrar of the Court. At that time the Acting Registrar and that Acting Sheriff were one and the same person."

In that case the objection was made to the Acting Sheriff who purported to determine it himself, thus prompting the learned Judge of Appeal to observe at p 161:

> "In this case the error by [the objector] was compounded by the Acting Sheriff who should have referred the matter at once to his *alter ego*, the Acting Registrar."

The reason the Sheriff has no power to have cognizance of an objection of which he is aware but which is not before the court is because r 360 obliges that officer to confirm the sale if no objection is made to the court within seven days of his having declared the highest bidder to be

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the purchaser.

It is the circumstance that this rule expands rather than curtails the common law which justifies the proposition that the court has a wide discretion as to what constitutes a good ground for setting aside the sale under this rule. See for instance the well-known case of *Lalla v Bhura* 1973 (2) RLR 280 (G) 283E-284B. The enlargement of the common law is achieved not only by the widening of the grounds upon which relief may be given but also by the provision of an intermediate stage between the conclusion of the sale and the confirmation thereof by the Sheriff, in which period the sale is to be seen as a conditional one and somewhat the more subject to rescission than after confirmation: *Lalla v Bhura* (*supra*) 283A-C. The sale is even at this early stage, however, not readily to be set aside and after confirmation the courts are so much the more reluctant to interfere, as was made clear by Gubbay CJ in *Madzamombe v Commercial Bank of Zimbabwe & Anor* (*supra*).

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GILLESPIE J

There is, nevertheless, no time limit for the bringing of an application in terms of r 359 (see *Mbewe v Central Africa Building Society* HH-83-92), provided, of course, that it comes before transfer. The fact of the confirmation, moreover, does not prevent an application being made in terms of r 359, nor does it prevent an application under the common law. Where the application is made under r 359 after confirmation, then the fact of the confirmation, and its effect upon the contractual status of the sale, and any action taken by the purchaser to his potential prejudice in consequence of that confirmation, is a further circumstance to be taken into account in the determination as to whether good cause has been shown.

The grounds upon which the sale may be set aside under r 359 are threefold: that the sale was improperly conducted; that the property was sold for an unreasonably low sum; or for any other good ground. The sale is susceptible to a finding of impropriety in its conduct where any of the rules mentioned above have not been complied with. It is fundamental to the respect and finality accorded to judicial sales that they be formally executed. As the above references show, it is peculiarly the care and solemnity with which these proceedings should be vested which justify them overriding other considerations relating to injury to the person whose property is sold.

*Smith*'s case (*supra*) is an example of irregularities in the advertisement of the sale and inadequacies in the report to the Sheriff being relied upon in themselves as justifying a refusal to confirm a sale.

A person wishing to challenge a sale in execution, and particularly one who wishes to base his attack upon irregularity, must take care to place before the court evidence pertaining to compliance or otherwise with the rules. He would be well advised to produce the conditions of sale, advertisements, any prior valuations and the commissioner's report. In the absence of challenge properly supported, what else will the court hearing the challenge do but assume that all has been conducted in accordance with laid down procedures?

The complaint that the price realised is unreasonably low is by far the most common ground of attack. The principles to consider in this issue commence with the proposition a recognition that

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prices at a forced auction sale will tend to be lower than those realised otherwise - see for instance the words of Manyarara JA in *Zvirawa v Makoni & Anor* 1988 (2) ZLR 15 (S) at 18C. McNally JA has put this inevitable circumstance thus:

> "There is no reason why the courts should not take account of the fact



GILLESPIE J

> that forced sales generally realise a lower price than ordinary sales, and that the judgment debtor's interests rank low in the scale of priorities in these sales."

Acknowledging that the best price will not be achieved at a sale in execution, the courts nevertheless uniformly adopt the stance that -

> "in general one must hesitate before one accepts the theoretical evidence of a valuator against the specific evidence of a price offered in open competition at an auction sale, properly advertised and properly conducted."

(*per* Davies J (as he then was) in *Lalla* (*supra*) at 285A). The price achieved is therefore itself taken as a reliable indication of value. For these reasons there is recognised an onus upon the challenger to prove that the price so achieved is unreasonably low.

A litigant wishing to discharge this burden must be fully prepared with properly supported valuations of the property under consideration. These valuations must reflect the upper and lower limits of the suggested market price, so that the court might make a proper determination whether the price achieved is unreasonable, that is to say, that it is substantially lower than would reasonably be anticipated, given the expected range of prices. See *Zvirawa* (*supra*) at 17D-E. The valuations that are commonly produced in such matters frequently tend nowadays to essay an assessment of a forced sale value. This is itself of some assistance to the court, in that one is by such an opinion assisted towards a finding as to whether or not the price achieved is what one would expect on a forced sale or unacceptably disproportionate even to such lowered expectations. The fact that the forced sale value is said to be equivalent to the price realised may be a fair indication that the highest bid is not unreasonably low, but this conclusion does not inevitably follow: the price achieved may equate with the assessed forced sale value, but still be found in the appropriate circumstances to be unreasonably low.

I comment finally on the third ground of interference - the equitable provision permitting action on "any other good ground". It is sufficient to point once again to Davies J in *Lalla* (*supra*) where at 283F the learned judge observed that this basis of relief is such that the court "can and should properly have regard to equitable grounds" other than irregularity in the sale or deficiency in the price obtained. Perhaps one may remark in passing that in this ground may exist as a response to the following said by McNally JA in *Mapedzamombe* at p 4:



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> "The evolution of the Roman-Dutch law in the spirit of our customary law is an on-going process - a process of indigenisation.

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> Current public concern over the fate of people who lose their houses because of economic misfortune is a good example of the clash between the stricter Western legal mentality and the gentler, more compromising, customary law outlook. We must be careful not to drift into maudlin sentimentality and excessive sympathy for hard luck stories. If we do, we undermine the very efficient and effective mechanisms by which housing is funded."

I am not of the persuasion that this is an example of a divergence of approach between the established law and the customary law - described rather romantically, if I may say so with respect, by the learned Judge of Appeal. The dichotomy of principle is, as these authorities have shown, well known to the settled law and our own rules of court give an indication of a desire to allow somewhat more latitude to the judgment debtor. The opportunity in particular of intervening for any good cause shown permits a court to extend relief where circumstances permit. All too frequently, however, the debtor finds himself in an invidious position relating to the loss of his home precisely because of his own failure to address the problem efficiently at an early stage. Where his own tardiness or evasion has contributed to his problems, a debtor cannot hope to persuade a court that equitable relief is his due.

Turning at last to a resolution of the specific issue in this matter, I find that the applicant has placed himself at an enormous disadvantage. Faced with the onus which I have described to rebut an inference of regularity attaching to the sale; to show the price achieved to be unreasonably low; or to adduce some other circumstance of equity, not being a situation brought about or contributed to by his own fault, the applicant has done very little to attempt to discharge it. The founding affidavit is adduced by the applicant who describes the house as his house and values it, by his own *ipse dixit*, at $500 000. He makes no allegation of irregularity in the sale nor does he rely on any ground other than the alleged low price as the basis of his claim for relief.

In response to this, the third respondent adduces, as I have said, two written estimates of value of the property: these reflect the unsworn opinion of two estate agents. The first speaks to a value of between $260 000 to $280 000; the second suggests a value of between $220 000 and $250 000, with a forced sale value of between $165 000 and $187 500. The third party avers also that a comparable property in the same area was sold privately for $190 000.

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GILLESPIE J

It is only in the replying affidavit that the applicant adduces evidence of the alleged private offer for the purchase of the property. This replying affidavit is not deposed by the applicant but by one Papatheocharous. He is a co-director of the applicant in a company, the debts of which were guaranteed by the directors personally; it is this debt evidently led to the attachment and sale of the property in question. Papatheocharous too describes the property as his house and refers to his objection to the confirmation and his founding affidavit. This reflects either mendacity by himself or the applicant or great carelessness by the legal practitioner responsible for drafting the affidavits.

The full extent of the alleged evidence of value is the following deposition:

> "Already we have got a buyer of the property for the sum of $350 000."

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This is lamentably wanting as evidence with which to support the submission that the existence of this offer is proof of a market value of the house such as outweighs the inference arising from the auction sale and the assessments adduced by the third respondent. Even if I attach only slight weight to the assessments in themselves - for the reason that they are unsworn - they are still sufficiently supported by the price achieved at a sale of unchallenged regularity to cause me to prefer these circumstances as being the better indications of value of the property.

In any event, acceptance of the very brief assertion that the offer alleged was indeed given does not of itself justify the inference that the offer corresponds with the market value. There is no statement that the offer does reflect that value. There is no attempt to identify the offeror or to state that the offer is a genuine one rather than an accommodation to avoid the execution. There is no answer to the evidence of sale at a lower price of a comparable property.

I have not been asked to approach this application as if the sale were not confirmed. Two circumstances might have made this a faintly arguable proposition. They are that the Sheriff's letter of confirmation seems to involve a contemporaneous declaration of purchaser. If there were not an earlier declaration of purchaser then the confirmation, which may only follow seven days after the declaration, would be invalid. Even were the sale to be regarded as unconfirmed I would still feel obliged to dismiss the application.

The awe and finality with which the law seeks to invest the process of execution cannot be disturbed by such ill-refined and non-specific averments





as these. The rights which the third respondent has acquired cannot be denied him save upon sufficient proof that it is not fair that he should continue to enjoy them. The application is accordingly dismissed with costs.

*Gula-Ndebele & Manase*, applicant's legal practitioners

*Gill Godlonton & Gerrans,* first respondent's legal practitioners

*Musariri & Co*, third respondent's legal practitioners



## CHAIRMAN, PUBLIC SERVICE COMMISSION & ORS *v* ZIMBABWE TEACHERS' ASSOCIATION & ORS 1996 (1) ZLR 637 (SC)

**Court** **Supreme Court, Harare**

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

Constitutional appeal

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13 & 14 March & 20 June 1996 Judgment No. S-70-96

## Flynote

Administrative law - tribunals and officials - Public Service Commission - whether courts may review exercise of powers of Commission on the basis of gross unreasonableness

Constitutional law - Constitution of Zimbabwe 1980 - Public Service Commission - powers of Commission - whether Commission had acted intra vires its powers in terms of the Constitutution in cancelling the bonus payable to public servants - whether cancellation of bonus amounted to retrospective legislation - nature of relationship between public servants and their employer - whether Commission had entered into contract to pay bonus and whether had breached contract - s 16(1) - protection against compulsory acquisition of property - cancellation of bonus payable to public servants - not an acquisition of anything by the State

Public service - Public Service Commission - legislative powers of - nature of such powers - whether Commission empowered to reduce or cancel bonus payable to public servants - public servant - contract of employment - nature of contract between public servant and employer

Real rights - vested and contingent rights - distinction between

## Headnote

Since 1974 public servants had been receiving an annual bonus. Only six



weeks before the annual bonus was due to be paid in 1995, it was cancelled by the Public Service Commission (PSC). The bonus had been provided for in terms of s 31(1) of the Public Service (Grade, Salary and Allowances) Regulations 1992 (SI 126 of 1992), which reads:

> "a person who is serving ... on 1 January in any year shall, if his service in that year is continuous, be paid the annual bonus at the same time as he is paid his salary for the month of November in that year."

However, in 1995 the PSC passed SI 241A of 1995 which inserted a new provision in the 1992 Regulations, allowing the PSC, after consultation with Minister of Finance, to direct that the annual bonus in any particular year be postponed, reduced or withheld. Subsection (3) provided that no bonus was to be paid for 1995.

The respondents argued in the High Court that the PSC had acted *ultra vires* its powers in cancelling the bonus. The High Court (Chidyausiku J) decided that this action was *ultra vires* and declared the PSC's action to be of no force and effect. The appellants then appealed against this decision.

Held (*per* Gubbay CJ, Korsah JA & Ebrahim JA), allowing the appeal, that the Government is the master of its own finances and the allocation of its funds between the competing demands for those funds is a matter of Government policy. The courts cannot in general interfere with the Government's prerogative as to the allocation of funds. Only the electorate is able to express its dissatisfaction by voting out the Government. It is not generally the function of the courts to oblige the Government to spend funds here rather than there.

Held, further, that the courts cannot compel the Government to pay money to anyone. The court could rule that the State is in law obliged to pay, but there is no legal process whereby the court

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can enforce execution of such a judgment.

Held, further, that a bonus which is payable is by statutory provision part of overall remuneration, but not part of the salary. Such bonus can be reduced or eliminated, provided it is done in proper form. The relationship between a public servant and his employer is governed by common law, unless there is a statutory provision to the contrary. Under the common law, the State has the power to dismiss its servants at its pleasure except insofar as this power has been modified by statute. The power to dismiss must include the lesser power to reduce emoluments such as a bonus. There is a constitutional restriction preventing the reduction of a public servant's salary but there is no restriction relating to the reduction of



bonuses. Bonuses may, therefore, be reduced by appropriate legislation.

Held, further, that the PSC, at the time it acted, had direct legislative powers. This power was neither original, subordinate or delegated subordinate legislative power. It was simply a constitutional legislative power that had to be exercised in conformity with the Constitution.

Held, further, that the PSC had not passed retrospective legislation as the bonus only vests at the date the salary is paid in November and not before. The bonus was a gift which is given *ex gratia* and is not a right that the servant has a contractual right to obtain. It had not vested at the time it was taken away but was merely a contingent right. When the PSC removed the bonus, therefore, it was acting prospectively and not retrospectively.

Held, further, that as the legislative authority of the PSC was given to it by the Constitution and not delegated by Parliament, the court has no power and authority to enquire into the reasonableness of the legislation passed by the PSC. It is immaterial that the legislative measures may be unreasonable, impolitic or retrospective, or that it impinges on existing rights. If the legislation passed is within the scope of the power conferred and violates no restriction on that power, it must be upheld. The court is not concerned with reasonableness but with constitutionality. However, unlike Parliament, the PSC was not an elected and representative body. It was merely a creature of the Constitution. Its powers were specified in the Constition and it could do precisely what the Constitutution permitted and nothing more.

Held, further, that the legislation passed by the PSC was neither in form or content outside the powers of the PSC as laid down in the Constitution. These powers contained neither express restrictions or restrictions by necessary implication that disallowed the PSC from doing what it did. It had therefore acted within its legislative competence.

Held, further, that the action of the PSC did not violate s 16(1) of the Constitution. There was no compulsory acquisition of any property or interest or right therein. To "acquire" means to transfer a thing from one party to another. A gift such as a bonus cannot be acquired until it vests and may therefore be extinguished before it vests. The State had been relieved of the burden of paying the 1995 bonus but this did not result in the transfer to or acquisition by the State of any right or interest that it did not possess before. A salary earned was different, as it had already accrued.

Held (*per* McNally JA & Muchechetere JA, dissenting), that the legislation dealing with bonuses

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makes it clear that a public servant who had served continuously during the year shall be paid an annual bonus. The bonus



was therefore a contractual and not a gratuitous one. The State had contracted by statute to pay the bonus. At the time when the bonus was cancelled the public servant had earned most of his bonus. The contract provided that on retirement or death before September, the officer or his estate would receive the proportion due to the officer but if the officer resigned before September he would get nothing. The right to a bonus under the contract was more than a contingent right; it was clearly laid down and had vested although the amount might be contingent upon events such as death or retirement before the date upon which he would receive the full bonus. The Constitution protected public servants' salaries but not bonuses. What this means is that in the next year the Government may reduce the bonus but not the salary which was constitutionally protected against reduction.

Held, further, that the Commission had thus breached the contract by taking away an existing contractual right. The Commission was given no power to breach a contract entered into with public servants; it could not unilaterally to reduce the amount payable for services already rendered. Under s 2 of the State Liabilities Act [*Chapter 8:14*], a person can claim against the State arising out of any contract entered into on behalf of the State.

Held, further, that while it was preferable for the minority to reserve its position relating to s 16(1) of Constitution, it seemed that there had been a breach of this provision. Extinguishing a salary is acquisition, and the same applies to a bonus that a person is contractually bound to pay. What is compulsorily acquired without compensation is the value of the services rendered. It was not like a cancellation of a debt gratuitously assumed by the State.

Appeal allowed.

Cases cited:

*Acting Min of Industry & Anor v Tanaka Power (Pvt) Ltd* 1990 (2) ZLR 208 (S)

*Anning v Colonial Secretary* 1931 SR 95

*Blackburn v Blackburn* 1920 CPD 13

*Bramdaw v Union Govt* 1931 NPD 57

*Commr of Police v Wilson* 1981 ZLR 451 (S); 1881 (4) SA 726 (ZA)

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

*Crossley v Union Gvt* 1921 NPD 114

*Davis v Colonial Secretary* 1933 SR 94

*Dhanser & Ors v Nugshoes (Pty) Ltd* 1996 (2) SA 424 (N)

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*Durban City Council v Assn of Bldg Socs* 1942 AD 27

*Fotofil & Ors* v *Siale* [1988] LRC Const 102

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

*Joyce & McGregor Ltd v Cape Administration* 1946 AD 658

*Mhora & Anor v Min of Home Affairs & Anor* 1990 (2) ZLR 236 (H)

*Middelburg Municipality v Gertzen* 1914 AD 544

*Min of Natural Resources* v *FC Hume (Pvt) Ltd* 1989 (3) ZLR 55 (S)

*Mutasa & Ors v Greenfield NO* 1959 (3) SA 42 (FC)

*National Grindlays Bank Ltd v Nestel* 1961 (3) SA 327 (W)

*Picken & Ors v Lord Balfour of Burleigh & Ors* [1945] 1 Ch 90 (CA)

*R v Burah* (1878) 3 AC 899

*R v Reilly* [1934] AC 176 (PC); [1933] All ER Rep 179 (PC)

*Schierhout v Min of Justice* 1925 AD 417; 1926 AD 99

*Selby* v *Whittaker* (1877) 6 Ch D 239

*Shelford v Mosey* [1917] 1 KB 154

*Smith* v *Mutasa NO & Anor* 1989 (3) ZLR 183 (S); 1990 (3) SA 756 (ZS)

*Sutton* v *A-G* (1923) 39 TLR 294 (HL)

Statutes and regulations referred to:

Constitution of Zimbabwe 1980, ss 16(1) and (3), 32, 75, 76(15), 88(2), 109(7), 113(5)*(d)* and 114(1a)

Public Service (Grade, Salary and Allowances) Regulations 1992 (SI 126/1992), ss 31(1), 37A

Public Service (Grade, Salary and Allowances) (Amendment) Regulations 1995 (SI 241A/1995)

State Liabilities Act [*Chapter 8:14*], s 2

*B Patel,* with him *S Mavangira,* for the appellants

*S Moyo,* with him *G V Mamvura,* for the respondents

**Judgment**

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**Gubbay CJ, Korsah JA & Ebrahim JA:**

**INTRODUCTION**

Every year since 1974 public servants have been paid a bonus in November. It is colloquially known as "the thirteenth cheque". It is a substantial amount. The first $1 100 is now tax free. It comes in time for the extra expenses of Christmas. It helps with next year's school fees.

In September 1995 it was announced that the 1995 bonus would not be paid. Statutory Instrument 241A of 1995, the Public Service (Grade, Salary and

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GUBBAY CJ, KORSAH JA & EBRAHIM JA:

Allowances) (Amendment) Regulations, 1995 (No. 2), was promulgated in a Government *Gazette Extraordinary* dated 15 September 1995. It confirmed the cancellation of the 1995 bonus.

This Statutory Instrument inserted a new s 37A into the Public Service (Grade, Salary and Allowances) Regulations 1992 (SI 126 of 1992). It permits the Public Service Commission ("the Commission"), after consultation with the Minister responsible for finance, to direct that the annual bonus in any particular year be postponed, reduced or withheld. Subsection (3) reads:

> "Notwithstanding any other provision of this Part, no annual bonus shall be paid to any officer or employee in respect of the year 1995."

The respondents refused to accept this directive and applied to the High Court for an order that it was unlawful and, in particular, that the Commission was not empowered to alter the provisions of SI 126 of 1992 in such a way as to take away the 1995 bonus.

Although strictly the respondents are the Zimbabwe Teachers' Association, two teachers and an education officer, they speak in effect for the public service as a whole. We will therefore use the phrases "the public service" or "public servants" in the course of this judgment to denote the respondents, unless it is necessary to be more specific.

The public service was successful in the application. The Commission's decision to withhold the 1995 bonus was set aside with costs. The Commission now appeals.

**THE PUBLIC SERVANTS' CASE**

The points made in the affidavits supporting the application were these:

1. The decision contravenes s 31(1) of SI 126 of 1992 which provides that:

   > "A person who is serving ... on the 1st of January in any year shall, if his service in that year is continuous, be paid the annual bonus at the same time as he is paid his salary for the month of November in that year."

2. The decision is manifestly unreasonable because:

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GUBBAY CJ, KORSAH JA & EBRAHIM JA:

a. Bonuses have been an integral part of public servants' remuneration since 1979 (in fact, since 1974).

b. The decision was made only six weeks before the due date of payment.

c. *Pro rata* bonus payments had already been paid to those leaving the service during the course of the year.

d. To cancel the bonuses in order to pay enhanced salaries is to negate the enhancement.

e. Some public servants, relying on the legitimate expectation that they would receive bonuses, had already entered into contractual commitments and would be seriously embarrassed by the cancellation.

f. Some public servants may have delayed their resignations in order to benefit from the bonuses, and would have been prejudiced.

g. There had been no consultation, in breach of natural justice.

h. Government had awarded huge increases to the President, Vice-Presidents, Ministers and Deputies, Speaker and Deputy, and Parliamentarians, ranging from 116% to 134%.

**THE COMMISSION'S CASE**

1. Statutory Instrument 126 of 1992 had been properly and lawfully amended by SI 241A of 1995.
2. Section 75 of the Constitution allowed the Commission to legislate in that way.
3. The legal privilege to receive a bonus had thus been lawfully removed.
4. It had been gratuitously given and gratuitously taken away.
5. The denial of the bonus was not unreasonable; alternatively, the Commission's power to legislate was not subject to scrutiny on the grounds of unreasonableness.



GUBBAY CJ, KORSAH JA & EBRAHIM JA:

6. A bonus is not part of a public servant's remuneration in the same sense as his salary is.
7. The lateness of the decision was unfortunate, but was due to delays in the job evaluation exercise. As a result of that exercise, greatly increased salaries would be payable, backdated to 1 July 1995.

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8. Those who had retired, or died, would have had their *pro rata* bonuses, but they also would not have benefited from the job evaluation exercise and subsequent salary increases.

9. The cancellation of bonuses had to be seen in perspective. The increases proposed as a result of the job evaluation exercise would cost (in round terms) one-and-a-half billion dollars. The Treasury could provide only one billion dollars, partly because of the costs arising from the drought. There was a shortfall of half a billion dollars ($492 998 107). Implementation was therefore only possible if the bonuses were not paid.

10. The Commission had met the objection about the loss of the tax free portion of the bonuses by persuading Treasury to exempt the first $1 100 of back-pay from tax.

11. Any public servant who had over-committed himself in anticipation of the bonus could not blame the Commission for that.

12. Consultation was not necessary.

13. The Commission has nothing to do with the remuneration of Parliamentarians and Ministers. Their increments were not decided by the Commission.

**THE EQUITIES**

We were not given information as to the date on which public servants received the accumulated arrears of the increment which was backdated to 1 July 1995. But if we assume that they received the extra amount with their October 1995 pay cheques, and we assume that they received the tax exemption promised on the first $1 100, then they probably received in October somewhat less than they would have had in November by way of bonus.

Of course, their point is that the whole impact of the supposed increment was



GUBBAY CJ, KORSAH JA & EBRAHIM JA:

effectively postponed. If they were considered deserving of an increment from 1 July 1995 why take away their bonus in order to grant the increment? So ran the public servants' argument.

The matter was certainly handled with scant regard for the feelings of a very large number of people who were admittedly being seriously underpaid according to the report which was accepted by Government and by the Commission. To pay lip service to their plight by granting an increment with the one hand while taking away the bonus with the other was an approach likely to arouse resentment.

On the other hand, one must bear in mind that Government is the master of its own finances. The allocation of its funds between the competing demands for those funds is a matter of Government policy.

Statutory Instrument 241A of 1995 itself contains a statement that the bonus may be postponed, reduced or cancelled "if it appears to the Commission, after consultation with the Minister responsible for finance, that the payment of an annual bonus in terms of this Part will place an

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undue strain on the financial resources of the Government". Oddly enough, it does not go on to say that there has been such consultation in respect of the 1995 bonus.

The courts cannot in general interfere with the Government's prerogative as to the allocation of funds. The electorate puts its confidence in the decisions of the Government and it is for the electorate to decide, when the time comes for voting, whether or not it wishes to continue to repose that confidence in the ruling party. It is not generally the function of the courts to say to Government "spend money here rather than there". It must also be appreciated that the courts cannot compel the State to pay money to anyone. We can rule that the State is in law obliged to pay. But we have no process whereby we can enforce execution of such a judgment. See generally *Acting Minister of Industry & Anor v Tanaka Power (Pvt) Ltd* 1990 (2) ZLR 208 (S) at 217F e*t seq.* All in all, and given the sparse information before us, we do not think there is an argument either way based on the equities. The matter is one which has to be decided on the law.

**THE DECISION IN THE COURT *A QUO***

In the High Court, Chidyausiku J held that the old English common law situation whereby public servants held office at the pleasure of the State, and could be dismissed, demoted or deprived of salary at will, had been replaced



by statutory provisions. Thus where the State contracts by statute to pay a bonus the right to that bonus can be enforced at law.

He went on to hold that the Commission did not have original but only delegated authority to legislate. Thus its legislative power was subject to review by the courts.

In undertaking the review, the learned judge decided that the Commission had acted retrospectively in cancelling rights which had already accrued. This, he ruled, the Commission had no power to do. Therefore s 37A(3) of the amending Regulations, inserted by SI 241A of 1995, was *ultra vires* and of no force and effect.

**THE COMMISSION'S ARGUMENT ON APPEAL**

Mr *Patel,* who appeared for the appellants, set out his submissions under five heads:

1. Can the payment of a bonus under statute be reduced or extinguished by statute?
2. Was the Commission's legislative competence merely that of a subordinate body exercising delegated authority, or had it original legislative competence including the authority to legislate retrospectively?
3. Did the impugned provision operate retrospectively, to extinguish vested rights, or prospectively, to extinguish contingent rights?
4. If the Commission had original legislative authority, did the question of unreasonableness

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arise at all? If it had only delegated authority was its decision unreasonable?

5. Did the action of the Commission contravene s 16(1) of the Constitution which deals with protection from deprivation of property?

We propose to consider these submissions in turn, taking into account Mr *Moyo*'s counter-arguments.

**1. CAN THE PAYMENT OF A BONUS BE CANCELLED?**

It is necessary first of all to define what we mean by "bonus" in the present



context. In its simplest form a "bonus" is defined in the Oxford English Dictionary as:

> "A boon or gift over and above what is normally due as remuneration to the receiver, and which is therefore something wholly to the good'.
>
> a. Money or its equivalent, given as a premium, or as an extra or irregular remuneration, in consideration of offices performed, or to encourage their performance; sometimes merely a euphemism for *(a) douceur* (or) bribe;
>
> b. An extra dividend paid to shareholders ...;
>
> c. A gratuity paid to workmen, masters of vessels, etc., over and above their stated salary."

So it is clearly something different from "salary", something given over and above "salary", which is given as a consideration which may be contractual or not. See *Crossley* v *Union Government* 1921 NPD 114 at 123 i*n fine; Blackburn v Blackburn* 1920 CPD 13 at 17. Yet it may be indistinguishable from a wage, as was the case in *Picken & Ors v Lord Balfour of Burleigh & Ors* [1945] 1 Ch 90 (CA), where Lord Greene MR said at 98:

> "This war bonus appears to me to be in every true sense a wage",

or in *Shelford v Mosey* [1917] 1 KB 154 at 158, and *Sutton v Attorney-General* (1923) 39 TLR 294 (HL) at 297.

In the present case we think it is clear that there is a distinction between "salary" and "bonus" on several grounds:

First, there is the obvious distinction that bonuses were introduced in 1974 as a form of perquisite over and above salaries. Whereas salaries were "pensionable emoluments", bonuses were not, as is evident from reading the definition of "pensionable emoluments" in Government Service (Pensions) (Public Service) Regulations 1971 (RGN 531 of 1971), incorporated by reference in the new s 26 of RGN 526 of 1971. "Pensionable emoluments" in relation to an officer or senior employee was there defined to mean:

> "his annual salary, excluding any allowance, fee, honorarium or bonus whatsoever paid to him or the value of any benefit enjoyed by him unless

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> such is declared by the Minister, on the recommendation of the Board, to be pensionable for the purposes of these regulations".

No such declaration has been made, and the distinction remained in the successive provisions, namely s 26 of SI 625 of 1979 as read with s 2 of RGN 312 of 1976; the amended s 26 in SI 135 of 1990 as read with the definition of pensionable emoluments in SI 849 of 1980; and the new s 29 in SI 126 of 1992 as read with the definition of pensionable emoluments in SI 124 of 1992.

Second, a special provision has been introduced whereby the first $1 100 of the bonus is tax free. Only the balance is taxable income. So a bonus is again treated differently from a salary.

Third, the salary is payable monthly, the bonus annually.

And finally, of course, the use of different words implies a different meaning.

Thus the bonus payable is, by statutory provision, a part of a public servant's overall remuneration, but not a part of salary.

Can a bonus then be reduced or eliminated? The answer must be that it can, provided that the reduction or elimination is done in proper form, and further provided that there is no provision preventing it in the Constitution or elsewhere. See *Schierhout v Minister of Justice* 1926 AD 99 at 108; *Bramdaw v Union Government* 1931 NPD 57 at 73; *Reilly v R* [1934] AC 176 (PC) at 180; [1933] All ER Rep 179 (PC) at 181E-F.

This is so because the common law applies to the relationship between a public servant and his employer unless there is statutory provision to the contrary. As Bisset CJ said in *Anning v Colonial Secretary* 1931 SR 95 at 105:

> "The power of the Crown to dismiss its servants at pleasure, save insofar as such power may have been modified or cut down by statute, is too well recognised to be open to dispute."

The power to dismiss must include the lesser power to reduce emoluments. See Beinart "The Legal Relationship between the Government and its Employees" 1955 *Butterworths SA Law Review* at 63; Hogg *Liability of the Crown* at 150; Marshall "The Legal Relationship between State and Servants" 1966 *International & Comparative Law Quarterly* at 170-172. The same



principle was stated, from the opposite point of view, by Russell CJ in *Davis* v *Colonial Secretary* 1933 SR 94 at 98:

> "When Parliament has passed an Act like this, categorically dealing with the grounds of discharge, the common law right of the Crown to dismiss its servants at pleasure must be regarded as abrogated."

It was again recognised in *Commissioner of Police* v *Wilson* 1981 ZLR 451 (S); 1981 (4) SA 726 (ZA) that "the common law power to dismiss or reduce in rank" could be limited by

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regulations made under the Constitution (see at 465D and 733C). And Baron JA, in a dissenting judgment, made the same point even more forcefully at 469H (736H):

> "Unless therefore there is something in that Act (the Police Act) or elsewhere which restricts the power to reduce a police officer in rank, the person or authority vested with the power of reduction may exercise it in his or its absolute discretion."

The answer to the first question must therefore be that, in general, the right to a bonus may be reduced or extinguished by legislation unless that power is in some way restricted.

There is, of course, the restriction provided in s 109(7) of the Constitution:

> "No law shall provide for or permit a reduction in the fixed salary or salary scale applicable to any member of the Public Service ..."

That restriction is to be contrasted with the immediately preceding provisions in s 109(6)*(a)* of the Constitution, which provide:

> "No law may increase or authorise an increase in -
>
> *(i)* the fixed salary or salary scale applicable to any post, grade or rank in the Public Service ...
>
> (ii) the bonuses or allowances payable to ... members of any such Service ...
>
> unless the Minister for the time being responsible for finance ... has agreed thereto."

The contrast makes it clear that whereas *salaries* may not be *reduced,* neither



*salaries* nor *bonuses* may be *increased* without the consent of the Minister. In short, the omission of bonuses from s 109(7) is quite deliberate. It is not unconstitutional to reduce bonuses. The same is evident from the provisions of the Public Service (Grade, Salary and Allowances) Regulations, from s 5(4) of the 1971 Regulations (SI 529/71) to s 5(3) of the 1992 Regulations (SI 126/92 as amended by SI 181/95). One may also refer, by way of contrast, to the provisions of s 88(2) and s 76(15) of the Constitution in relation to judges, the Attorney-General or a Deputy Attorney-General. Where s 109(7) protects public servants from a reduction in salary, ss 88(2) and 76(15) protect judges, the Attorney-General or a Deputy Attorney-General from a reduction in salary *and allowances* payable to them.

On the first point of law therefore, we conclude that bonuses for public servants may be reduced or eliminated by appropriate legislation.

**2. THE COMMISSION'S LEGISLATIVE COMPETENCE**

The provisions of s 75 of the Constitution which are applicable in this case have been repealed by s 8 of the Constitution of Zimbabwe Amendment (No. 12) Act, 1993. The repeal came into effect only on 15 March 1996 in terms of SI 35/96. So we are dealing with a situation which no longer exists.

The Constitution granted to and adopted by Zimbabwe on independence in 1980 contained

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somewhat unusual provisions in that certain legislative powers were given to the Public Service Commission. The general effect of s 8 of Amendment No. 12 is to make the Commission subject to Parliament. But before that amendment came into operation, the Commission had power to, and did, legislate. This is apparent from the many statutory instruments having the force of law which are listed in the "Index to Legislation in Force in Zimbabwe" under the rubric "Constitution of Zimbabwe". These statutory instruments routinely are introduced with the words:

> "It is hereby notified that the Public Service Commission has, in terms of s 75 of the Constitution, made the following regulations:".

There was considerable argument before us as to whether, in the exercise of its powers under s 75 of the Constitution, the Commission was exercising original subordinate legislative powers or delegated subordinate legislative powers. It was urged that as an unelected and thus undemocratic body the Commission should be treated as exercising only delegated powers, ie powers delegated to it by Parliament. Otherwise, it was suggested,



parliamentary sovereignty would be undermined and the principle of separation of powers would be flouted.

We consider that this argument fails to take into account the fact that Zimbabwe, unlike Great Britain, is not a parliamentary democracy. It is a constitutional democracy. The centre-piece of our democracy is not a sovereign parliament but a supreme law (the Constitution). See *Smith* v *Mutasa N O & Anor* 1989 (3) ZLR 183 (S) at 192 G-H; 1990 (3) SA 756 (ZS) at 761I-762A.

The Tonga Privy Council Court of Appeal in *Fotofili and Ors v Siale* [1988] LRC (Const) 102 at 106b put the point succinctly in these words:

> "... any parliamentary body based on a written constitution does not have the privilege of supremacy over the courts enjoyed in the United Kingdom."

Similarly the principle of the separation of powers is a broad but flexible principle. The fact that certain powers, for an interim period, are given to a body other than the Executive, the Legislature or the Judiciary, should be seen as a variation rather than a negation of the principle. And, of course, the legislature retained the power, which it has now exercised, to reclaim from the Commission the functions it exercised under the Constitution. But it had to do so by amending the Constitution, by following the procedures required. The legislature could not, by the ordinary process of passing an Act by a simple majority, have ousted the authority of the Commission.

In our view, therefore, the legislative authority of the Commission prior to 15 March 1996 is not to be seen either as original subordinate or delegated subordinate legislative power. It was simply a constitutional legislative power which had to be exercised in conformity with the Constitution. Whether or not it has been exercised in conformity with the Constitution is a matter for this Court to determine.

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**3. DID THE COMMISSION'S POWER, PRIOR TO 15 MARCH 1996, TO CANCEL BONUSES, INCLUDE THE POWER TO CANCEL THIS PARTICULAR BONUS IN THIS PARTICULAR WAY?**

We have stated the question rather more widely than it was stated by Mr *Patel,* because the Court's duty to ensure that all powers are exercised constitutionally is not limited to one enquiry - in this case the enquiry as to





whether the right to the bonus had vested or remained merely contingent. The Court's role must be seen in the wide perspective of constitutionality.

With that *caveat,* we proceed to consider the question - was the right of public servants to a bonus in November 1995 a vested or a contingent right as at 15 September 1995?

Legal rights and interests do not exist *in vacuo.* They must vest in legal persons who can petition the courts for their enforcement or enjoyment. When a person petitions for the enforcement or enjoyment of a legal right or interest, the court must, of necessity, enquire into the nature of the right or interest claimed in order to determine whether, and when, the entitlement to the enjoyment of such right or interest, if any, is due.

If a person is entitled to an actual existing right of present enjoyment, he is said to be vested in possession. If, on the other hand, he is entitled "to a present fixed right of future enjoyment, as reversions, vested remainders, such executory devices, future uses, conditional limitations, and other future interests, *the present right of which is not referred to, or made to depend on, a period or event that is uncertain, although the period of enjoyment may be uncertain or conditional",* (emphasis added), "he is said to be vested in interest". See *Wharton's Law Lexicon* 14 ed at 1043.

In all cases where a person is vested in interest, and not in possession, his interest is dependent upon a contingency. Such contingency may relate to the disposal of a fund, or it may relate to the position or existence of the beneficiary.

The word "vest" in both South African and English law has always been held to refer *prima facie* to vesting in interest or transmissibility, and not to vesting in possession or indefeasibility. It is true that where there is a clear gift, an additional direction to pay when the legatee or recipient attains a given age, will not postpone the vesting of the gift. Thus, a gift to A payable at twenty-one, vests A with immediate interest though the enjoyment of it is postponed. But where the interests of legatees are expressed to vest at the age of twenty-one or on a specified date, a gift over upon death of the legatee under twenty-one, or upon death before the time of vesting will not be effective to transfer any interest, since nothing has yet passed to the legatee to be transferred to anyone. The legatee acquired nothing, and from him nothing can be acquired.

This view was succinctly expressed by Jessel MR in *Selby v Whittaker* (1877) 6 Ch D 239 at 247-8, thus:

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GUBBAY CJ, KORSAH JA & EBRAHIM JA

> "Now there can be nothing better than that when a testator directs that an interest is to be vested at one time, he means that it is not to be vested at any other time. That is the literal meaning of the words, and we should do violence to their meaning if we held that the interests were vested at any other time.
>
> But it is said that the words do not mean vested in the strict sense, but that the children are to be entitled in possession at that time. That cannot be so, because they are not necessarily entitled in possession at the death of the tenant for life. They are not to be entitled in possession until they attain twenty-one, that is, to take possession as distinguished from being entitled in right or interest. Then it is said that the words mean indefeasibly vested'. No doubt they do. Absolutely vested and indefeasibly vested are the same thing. But where is the defeasance? You have to manufacture a defeasance by construction in order to apply these words to it. There is no defeasance, as I read it, and therefore there is no possibility of saying that the word vested' has any other than its literal meaning."

See also the remarks of Watermeyer JA in *Durban City Council* v *Association of Building Societies* 1942 AD 27 at 33.

"The classification of rights into vested and contingent", said Galgut J in *National Grindlays Bank Ltd* v *Nestel* 1961 (3) SA 327 (N) at 334 *in fine* "is usually made for the purpose of describing the nature of someone's title to the rights in question."

We now turn to the application of these principles to the legislation giving rise to the controversy to determine whether the right to a bonus had vested in the sense of vested with immediate interest with the enjoyment of the interest postponed.

Section 31(1) of SI 126 of 1992 reads:

> "A person who is serving ... on the lst of January in any year shall, if his service in that year is continuous, be paid the annual bonus at the same time as he is paid his salary for the month of November in that year."

The extent, if at all, to which this provision has been affected by the new s 37A(3) of SI 241A of 1995, falls to be considered. Section 37A(3) declares that:



GUBBAY CJ, KORSAH JA & EBRAHIM JA

> "Notwithstanding any other provision of this part, no annual bonus shall be paid to any officer or employee in respect of the year 1995."

It is common cause that bonuses have been an integral part of public servant's remuneration since 1974. However, as earlier mentioned, a distinction has always been maintained between salary and bonus. Whereas s 109(7) of the Constitution safeguards a public servant's salary from reduction, neither the Constitution nor any law affords similar specific protection to bonuses. The only legal claim a public servant may lay to a bonus, since the coming into force of SI 241A of 1995, is by proving that he has acquired an interest in it and is, therefore, protected under s 16 of the Constitution.

A careful reading of s 31(1) of SI 126 of 1992 discloses that the right to the payment of a bonus vests at the date the salary is paid for November in that year and not before. A bonus is,

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clearly, an additional payment beyond a salary or wages. Although it is dependent, as is in the case of salary, upon continuance in service, the right to payment of a portion of it does not vest monthly, as with a salary. The elaborate provisions in SI 126 of 1992 for payment of a *pro rata* bonus to those who died or retired before the November pay day or, being aged sixty years or over, resigned or were discharged, are supportive of the argument that a bonus vests by operation of law on the date and in the circumstances specified, and not in any other way.

"A bonus", declared Dove-Wilson JP in *Crossley v Union Government supra* at 123-124, "after all is what its name implies, a gift. It is nothing which the servant has a contractual right to obtain, it is given *ex gratia* in consideration of a temporary stress of circumstances, and it is intended that at most it shall not be continued longer than the circumstances remain exceptional."

The fact that those who retired, died, resigned or were discharged before the promulgation of SI 241A of 1995 received their bonuses, had nothing to do with the vesting of any rights to bonuses in the remainder of public servants. There is no rule of law that where there is a gift to a class upon a contingent event the time of the happening of the contingency in respect of one or more of the class determines the rights of the individuals composing the class. If, for example, property is bequeathed to a class of children upon their attainment of twenty-one years of age, the property does not vest in all of them upon the attainment of that age by one of them. Those of that class of children who do not reach that age do not qualify to receive anything and acquire no transmissible interest in the property.



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A gift vests either absolutely or upon a contingency. There is no rule relating to presumptive or substantial vesting of gifts. Statutory Instrument 126 of 1992 clearly states the circumstances and times when public servants were to receive their bonuses. Those in the public service at the time of the promulgation of SI 241A of 1995 who were the objects of the bounty would have been vested in possession of their bonuses on pay day in November 1995. Until then, they were vested in right of the whole of their bonuses upon that contingency. Thus SI 241A, in our view, was prospective and not retroactive. That, however, does not conclude the matter.

**4. IF THE COMMISSIONER HAD ORIGINAL LEGISLATIVE AUTHORITY, DOES THE QUESTION OF UNREASONABLENESS ARISE AT ALL?**

Since we have already concluded that the legislative authority of the Commission was given to it by the Constitution and not delegated by Parliament, we have re-phrased the question to read: Has the court the power and authority to enquire into the reasonableness or otherwise of the act of a body carrying out a function allocated to it under the Constitution?

Generally the answer is "no". As was said in *Commissioner of Taxes* v *(W) (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 370F; 1990 (2) SA 245 (ZS) at 266D:

> "Ordinarily, where a court is called upon to adjudicate on the effect of a legislative measure, it is concerned only with the validity of the measure and its application. It is not concerned with the wisdom or even its

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reasonableness. These are normally matters solely within the legislative domain."

See also *Middleburg Municipality* v *Gertzen* 1914 AD 544 at 554; *Joyce & McGregor Ltd v Cape Administration* 1946 AD 658 at 669.

It is immaterial that the legislative measure may be unreasonable, impolitic or retrospective, or that it impinges on existing rights. If that which is passed into law is within the scope of the power conferred and violates no restriction on that power, it must be upheld whatever a court may think of it. See Seervai *Constitutional Law of India* 3 ed Vol I at 122.

In the present matter, therefore, we are not concerned with reasonableness but with constitutionality.

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GUBBAY CJ, KORSAH JA & EBRAHIM JA

The Supreme Court, as guardian of the Constitution, can always intervene if an organ of the State acts unconstitutionally. It is a decision which it has authority to make. See *Smith v Mutasa NO supra.*

In considering whether or not the Commission acted unconstitutionally, we must point to one major difference between its power to legislate and Parliament's corresponding power.

Parliament is an elected and representative body. It derives its authority directly from the Constitution but indirectly from the people and from historical and democratic tradition. Its authority is extremely widely described rather than defined in s 32 of the Constitution, where it is said:

> "The legislative authority of Zimbabwe shall vest in the Legislature which shall consist of the President and Parliament."

The Commission's legislative power, on the other hand, was (but no longer since 15 March 1996) merely a creature of the Constitution. Where Parliament's powers are "described" the limits of the Commission's functions were specified; it could do precisely what the Constitution permitted and no more. It could not seek to extend its functions (defined as including "powers and duties") by, for instance, calling in aid the doctrines of State necessity, the prerogative power or parliamentary privilege. To echo the words of Lord Selborne LC in *R* v *Burah* (1878) 3 AC 899 at 905:

> "If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited ... it is not for any court of justice to inquire further, or to enlarge constructively those conditions or restrictions."

See also *Mutasa & Ors v Greenfield NO* 1959 (3) SA 42 (FS) at 50 *in fine*-51D, *per* Briggs FJ.

The real issue then is whether in enacting s 37A, and in particular subs (3) under SI 241A of 1995, the Commission went beyond its legislative competence.

By s 75(1) of the Constitution, prior to amendment, the functions granted the Commission were,

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*inter alia*:

"*(a)* to regulate and control the general organisation of the Public Service ...;



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*(e)* to ensure the general *well-being and good administration of the Public Service ...* and the maintenance thereof in a high state of efficiency;

*(f)* to make regulations for the purposes stated in para *(e)* and *for the conditions of service of members of the Public Service ...*" (emphasis added).

These powers and duties were amplified in certain respects by s 113(5)*(d)* of the Constitution, which dealt with the fixing and variation of the conditions of service, including remuneration, of a person appointed to any public office; and by s 114(1a) with regard to the exercise of powers which are reasonably necessary or incidental to a power conferred by the Constitution. Significantly, the Commission's autonomy was affirmed by s 109(1) of the Constitution.

These constitutional provisions, in our view, neither expressly nor by implication, restrict or violate the form or content of s 37A of SI 241A of 1995. Its enactment fell clearly within the Commission's legislative competence.

**5. DID THE ACTION OF THE COMMISSION CONTRAVENE SECTION 16(1) OF THE CONSTITUTION?**

Section 16(1)*(a)*(ii) of the Constitution provides that:

"No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that requires, in the case of any property ... that the acquisition is reasonably necessary in the interest of the public generally."

Section 16(3) on the other hand stipulates that:

"Where any person by virtue of a law, contract or scheme relating to the payment of *pensions benefits,* has a right, *whether vested or contingent,* to the payment of pensions benefits or any commutation thereof or a refund of contributions, with or without interest, payable in terms of such law, contract or scheme, any law which thereafter provides for the *extinction of* or a diminution in such a right shall be regarded for the purposes of subsection (2) as a law providing for the acquisition of a right in property."



GUBBAY CJ, KORSAH JA & EBRAHIM JA

Without careful analysis, it would appear that SI 241A of 1995, in so far as it extinguished the contingent right of public servants to their bonuses, is caught by subs (1).

Section 16(1) speaks of the compulsory acquisition of any description or interest or rights therein. To our minds, the word "acquire" connotes the transfer of a thing from one party to another who receives it, even if such transfer be only passive or symbolic. There can be no transfer of property, or interest or right therein that has not vested in possession, or vested in interest in the sense that the enjoyment of it is merely postponed and not dependent on a

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contingency, simply because there would be nothing to transfer and nothing to receive. In respect of contingent rights and interests, being incapable of acquisition, they can only be extinguished, and not acquired, because they have not yet come into existence.

As stated earlier, the right of public servants to receive their bonuses was dependent upon their remaining public servants at the time they were paid their salaries for the month of November 1995. This meant that if and when that contingency happened then the right would be created. The right sought to be enforced must be vested and not merely contingent upon a future happening.

Section 16(3), in contrast to s 16(1) gives specific protection to contingent interests in relation to pension benefits. Had it been the intention of the framers of the Constitution to accord similar protection to a contingent interest or right falling under s 16(1)*(a)* they would no doubt have said so by enacting that -

> "No property of any description or interest or right therein *whether vested or contingent* shall be compulsorily acquired or *extinguished* except under the authority of a law ..." (emphasis added).

The omission of these words from s 16(1) can only mean that contingent interests do not fall within the purview of that section and are not protected by it. The protection afforded pension benefits, whereof bonuses do not form a part, underscores the contingent nature of a bonus. As a gift, it cannot be acquired until it vests and it may be extinguished before it vests. Surely, if a bonus is a donation to be paid on a certain date, then the donor can withdraw from making the donation before the arrival of that date, without being compelled to pay it.

It is manifest that such are the attributes of a bonus under the Constitution that





it cannot be elevated to the status of a salary; for it is nothing more than an unrecompensed benefit; if withdrawn by the donor before vesting, no action can lie to enforce its payment.

We have no difficulty in accepting the correctness of Mr *Patel*'s submission that upon a proper consideration of the legal effect of SI 241A of 1995, the contingent obligation created by s 31(1) of SI 126 of 1992 was extinguished. In consequence of this extinction the State gained a corresponding benefit. It was relieved of the burden to pay the 1995 bonus. This, however, was not the result of a transfer of any right to the State, and so there was no acquisition by the State of any right or interest which it did not before possess. See *Hewlett* v *Minister of Finance & Anor* 1981 ZLR 571 (S) at 590E, 594E, 596A, 597C-598C and 598H-599A; 1982 (1) SA 490 (ZS) at 503B, 506D, 507F, 508F-509D and 509H-510A. In *Mhora & Anor v Min of Home Affairs & Anor* 1990 (2) ZLR 236 (H) at 249C Gibson J was considering the extinguishing of a *salary earned,* the right to which had accrued, and not a bonus the accrual of which was contingent upon the arrival of a certain date.

Even though the public servants were deprived of their bonuses, the interest in, or right to the bonuses had not vested in them and was not acquired by the State. The State did not pay itself a bonus. The juristic position created by SI 241A of 1995 was to relieve the State of the burden

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of paying bonuses. The State did not receive anything into its possession and therefore could not have acquired any interest, vested or contingent, in any property of the respondents.

**THE ORDER**

For the reasons aforegoing the appeal is to be allowed and the order of the court a *quo* altered to read: "The application is dismissed".

In line with the approach to costs adopted in constitutional issues of national significance, the respondents are not to be penalised because a decision adverse to them has been given. The issue they raised was controversial and of much importance, and the proceedings instituted have led to its resolution. In the circumstances there will be no order as to costs, either in this court or below.

McNALLY JA & MUCHECHETERE JA: We are in agreement with a great deal that the majority judgment contains. In particular we agree that the



payment of a bonus may be cancelled provided that it is done in proper form and that there is no provision preventing it in the Constitution or elsewhere.

Our point of departure lies in our perception of this particular bonus as a contractual or remuneratory bonus rather than a purely gratuitous one - "a gift" or "unrecompensed benefit", as it is described in the majority judgment. The wording of the legislation made it clear that a public servant "serving on the 1st of January in any year *shall,* if his service in that year is continuous, be paid the annual bonus (in November)". This is quite different from the bonus dealt with in *Crossley* v *Union Government* 1931 NPD 114 at 123-4, relied upon in the majority judgment. That was a gratuitous bonus. This bonus is contractual, like the bonus in *Dhanser & Ors* v *Nugshoes (Pty) Ltd* 1996 (2) SA 424 (N) at 429G-J.

A public servant still working in September 1995, and with no intention of resigning, had earned most of his bonus, just as by 20 January 1995 he had earned most of his January pay cheque. It was part of his contractual remuneration. If he retired at any time between January and September 1995 he got his due proportion of it. If he died at any time between January and September 1995 his estate got his due proportion of it. If he resigned during 1995 he did not get it, but that was because that was an agreed condition of the contract. If you resigned, you forfeited your bonus.

So a public servant, on 1 January 1995, knew exactly where he stood, contractually, in relation to his bonus eleven months later. That is our view. It is not the majority view.

We think there are dangers in using terms of art such as "vested and contingent rights" in this context when they are more commonly and properly used in the law of succession. We are dealing with the law of contract. A public servant working for the Government in 1995 was promised a remuneration package - a monthly salary and an annual bonus. The refusal, in

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September, to honour the bonus part of the agreement, was a unilateral breach of contract.

If we are to use the language of vested and contingent rights, we would call this right a right "vested in interest but not in possession". (See the *Durban City Council* case *supra)*. It is more than a mere contingent right, because the contractual position of the public servant was absolutely clear. Thus a public servant on 1 January 1995 or on 1 September 1995, could say to himself:



GUBBAY CJ, KORSAH JA & EBRAHIM JA

1. If I serve until the November pay-day I will get my bonus;
2. If I reach retiring age before then I will get my due proportion of it;
3. If I die before then my estate will get my due proportion of it;
4. If I resign before then I will abandon the whole of it.

Those were his contractual rights. Nothing was left to chance or contingency. Perhaps our point is more clearly made by saying that his rights *under the bonus contract* were clear and vested, though his right *to a particular number of dollars* might be contingent upon events. If he resigned he was knowingly abandoning his rights. But there is a world of difference between a person abandoning his *rights* under a contract, and a person abandoning his *obligations* under a contract. The former is permissible and lawful. The latter is not.

It is, of course, true that the Constitution protects the salary of public servants but not their bonus. But all that that means is this - the Commission or the Government may say to public servants "*Next year* we will reduce your bonus". But it may not say "Next year we will reduce your salary". The bonus contract is on an annual basis, and it is no breach, either of contract or of the Constitution, to reduce or eliminate it *in the future.*

It follows that, in our view, the Commission acted in breach of contract. It took away an existing contractual right - compare *Min of Natural Resources* v *F C Hume (Pvt) Ltd* 1989 (3) ZLR 55 (S) at 59E.

We see no difference in principle between this breach of contract and, for example, a case where the Government employs a contractor to supply food to schools, or to build a bridge, and at the end of the contract says "We have decided to pay you less for your work than we originally agreed". The ordinary law of contract applies in such situations.

We consider, too, that the legislative competence of the Commission did not extend to allowing it to act in breach of its contract with public servants. It had no power or authority to break the law, or to pay its employees a lower remuneration than that agreed upon in respect of work already done and a period already entered upon. The Commission was a creature of statute, and could do only what the statute (ie the Constitution) authorised. It was not authorised to break contracts.

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GUBBAY CJ, KORSAH JA & EBRAHIM JA

In the light of our finding we do not consider that s 16(1) of the Constitution comes into consideration. We are concerned with breach of a contract of employment rather than deprivation of property.

We would, however, prefer to reserve our position in respect of s 16(1) of the Constitution. We note that in *Hewlett* v *Min of Finance & Anor supra* the then Chief Justice was careful to limit his finding to the cancellation of a debt "voluntarily (by which he clearly meant "gratuitously") assumed by the State". In other words, a debt *gratuitously* assumed by the State could be extinguished lawfully by the State without contravention of s 16(1) of the Constitution. But, as we have been at pains to point out, the present case does not involve a debt gratuitously assumed by the State. It was a debt contractually assumed by the State in remunerative exchange for services rendered.

It is to be noted that after the *Hewlett* judgment the Constitution was amended, by Act 30 of 1990, by the insertion of subs (9a) into s 16. The amendment confirmed that obligations gratuitously assumed might lawfully be extinguished. It did not say that obligations assumed contractually and for a consideration could be gratuitously extinguished.

Given our view that this particular bonus was remuneration just as a salary is remuneration, we consider that the decision in *Mhora & Anor* v *Min of Home Affairs supra* is consistent with our view. The learned judge's remark that -

> "Extinguishing a salary earned is acquisition, and is prevented by s 16 of the Constitution"

is equally applicable to a contractual bonus earned. We would prefer to say that what was compulsorily acquired without compensation was the value of the services rendered, rather than the reward for those services.

We would use the words used in *Min of Natural Resources* v *FC Hume (Pvt) Ltd supra:*

> "... the court is declaring that a valid and binding contract has been entered into ... and (is) requiring (the Commission) to carry out its obligations under that contract."

We would rely upon the provisions of s 2 of the State Liabilities Act [C*hapter 8:14*], which reads:



GUBBAY CJ, KORSAH JA & EBRAHIM JA

> "Any claim against the State which would, if that claim had arisen against a private person, be the ground of an action in any competent court, shall be cognizable by any such court, *whether such claim arises or has arisen out of any contract lawfully entered into on behalf of the State,* or out of any wrong committed by any officer or employee of the State ..." (our underlining).

In the result we would have dismissed the appeal with costs.

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

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*Scanlen & Holderness,* respondents' legal practitioners



## HAMA v NATIONAL RAILWAYS OF ZIMBABWE 1996 (1) ZLR 664 (SC)

**Court** **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

28 March & 27 June 1996 Judgment No. S-96-96

### Flynote

Appeal - notice of appeal - defective - amendment - appeal from decision of Labour Relations Tribunal other than on a question of law - fatally defective and incapable of amendment - factual findings by trial court - interference - irrationality of trial court's findings - when appeal court may interfere on grounds of irrationality

Court - jurisdiction - jurisdiction dependent on prior compliance with statutory requirement - whether court may hear matter where statute not complied with

Employment - employee - suspension pending application to dismiss - power of labour relations officer - not limited to ordering termination or reinstatement - must make an assessment of damages as an alternative to reinstatement

Interpretation of statutes - common law - presumption against amendment of - whether subordinate legislation can effect alteration to the common law

### Headnote

In terms of s 92 (2) of the Labour Relations Act [*Chapter 28:01*], an appeal from a decision of the Labour Relations Tribunal to the Supreme Court lies only in respect of a question of law. A notice of appeal which raises no issue of law for resolution is fatally defective so as to constitute a nullity and is thus incapable of condonation or amendment.

Where an act or thing required by a statute is a condition precedent to the



jurisdiction of a court, compliance with the statutory requirement cannot be dispensed with. On the other hand, where the order sought is governed by rules of court, such as an application to appeal outside the prescribed time limits, the court may, in its discretion, grant the application, subject to the usual considerations governing such applications.

Although a decision of the Labour Relations Tribunal can only be brought on appeal on a question of law, its decision on questions of fact can be attacked if there is a serious misdirection on the facts, amounting to a misdirection in law. For an appellant to avail himself of a misdirection as to the evidence, the nature and circumstances of the case must be such that it is reasonably probable that the Tribunal would not have determined as it did had there been

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no misdirection. In other words, the decision must have been irrational, in the sense of being so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question could have arrived at such a conclusion.

The appellant was a security guard employed by the Railways. In early 1991 he was suspended from duty without pay, and an application made for permission to terminate his employment. The grounds were that he had unlawfully sublet a Railway-owned house and made a financial gain from it. The other was that he had failed to comply with orders from his superiors requesting him to submit a report in respect of the sublease. The house had been occupied in 1988 by an employee of the Ministry of Agriculture. This person claimed that he believed he was leasing the house on a "lease to buy" arrangement with the Government. When he was transferred away from Harare, the appellant, his nephew, purported to act as caretaker and sublet the house to other tenants. Although the NRZ management believed that the appellant knew that the property belonged to the NRZ, there was in existence an internal memorandum from the NRZ Estate Office to the effect that the appellant's uncle was leasing the house and that payments were being made through the appellant.

The matter was finally heard by the Labour Relations Tribunal, which decided that the appellant's role in subletting the house was not tainted by illegality and that, as a consequence, the order to supply a report had no basis. It also held that, because the demand for the report had come from someone who had bad relations with the appellant and as a result the appellant was suspicious of the genuineness of the demand, his refusal to comply was reasonable. Thirdly, the appellant reasonably believed that such profit, if any, as he made was not at the expense of the NRZ. Consequently, there was no wilful disobedience to the order. The Tribunal ordered that the respondent should pay $15 000 as an alternative



to reinstatement. It was argued, on behalf of the NRZ, that if the Tribunal's finding - that the suspension was unjustified - was upheld, the Tribunal had a discretion to award damages.

Held, that on the facts before the Tribunal, it could not be said that the Tribunal's determination was unreasonably wrong.

Held, further, that there was a presumption against alteration in the common law by statute law, unless the words of the statute are plain and unambiguous and an intention to alter the common law is evident from the wording of the enactment. The principle, that an employer is not to be compelled to keep in his employment a person with whom the relationship has soured beyond reconciliation, is deep-seated in the common law. The common law principle is "reinstatement or damages". It was clear, when examining s 96(1)*(c)* of the Labour Relations Act, that the common law principle was preserved. The fact that s 3(2) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations did not refer to damages did not affect the matter. It was dubious whether subsidiary legislation could be employed to effect an alteration to the common law. Nowhere in the parent Act was an intention expressed to alter the common law, so the Regulations could not be interpreted to have that effect.

Held, further, that the statement in *United Bottlers (Pvt) Ltd v Murwisi* 1995 (1) ZLR 246 (S), to

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the effect that a labour relations officer had only two choices, dismissal or reinstatement, was incorrect. He also was obliged to make an assessment of damages as an alternative to reinstatement.

Held, further, that although the Tribunal was obliged to make an assessment of damages, it had fixed an arbitrary amount and the matter should be remitted so that the amount could be re-assessed.

Cases referred to:

*Aberdare Cables Ltd v SAR&H* 1959 (2) SA 406 (C)

*Bank of Credit & Commerce Zimbabwe Ltd v Chigwada* S-116-95

*Bitcon v Rosenberg* 1936 AD 380

*Casserley v Stubbs* 1916 TPD 310

*Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344 (S)

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

*Dhanabakium* v *Subramanian & Anor* 1943 AD 160

*George Wimpey & Co Ltd v BOAC* [1955] AC 169

*Halting v Pienaar* 1977 (2) SA 812 (O)

*Jackson v Smith* 1928 TPD 580

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



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

*Mugumbate v Dorowa Minerals Ltd* S-134-94

*National Foods Ltd v Magadza* S-105-95

*PF-ZAPU v Min of Justice (2)* 1985 (1) ZLR 305 (S)

*Sec of State for Education & Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665 (CA)

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

*Winterton, Holmes & Hill v Paterson* 1995 (2) ZLR 68 (S)

The following enactments and rules of court were referred to:

Labour Relations Act [*Chapter 28:01*], ss 2, 92(2), 93, 95(2)*(b)* and 96(1)*(c)*

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Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations (SI 371/1985), s 3

Supreme Court Rules 1964 (RGN 380/1964), r 31(3)

*P Nherere*, for the appellant

*JC Andersen SC,* for the respondent

## Judgment

**Korsah JA:** At the hearing of this matter, leave of the court was sought by counsel for the respondent to amend the respondent's grounds of cross-appeal by the deletion of the whole and the substitution therefor of fresh grounds of appeal. The original cross-appeal was filed on 20 October 1994. In it was alleged no question of law.

In terms of s 92(2) of the Labour Relations Act, [*Chapter 28:01*] (the Act), an appeal from a decision of the Labour Relations Tribunal to the Supreme Court lies only in respect of a question of law.

Mr *Nherere* strenuously opposed the application for amendment of the grounds of cross-appeal on the basis that the original grounds of cross-appeal, by raising no issue of law for resolution by this court, were so fatally defective as to constitute a nullity. The application was thus incurably bad and could not be amended: *Jensen v Acavalos* 1993 (1) ZLR 216 (S) at 220; *Muzumbate v Dorowa Minerals Ltd* S-134-94 (unreported) at p 3.

The application to amend the fatally defective and void cross-appeal was lodged in this court on 12 January 1996, almost fifteen months after the filing of the original cross-appeal. There was no application for extension of time within which to comply with the relevant rule. A fatally defective compliance



KORSAH JA

with the rules regarding the filing of appeals cannot be condoned or amended: *Halting* v *Pienaar* 1977 (2) SA 812 (O) at 183.

That should have been the end of the matter, but both parties are dissatisfied with the decision of the Tribunal. And Mr *Andersen*, while conceding that the original cross-appeal was totally defective, applied for condonation to file the fresh cross-appeal out of time. He contended that in cases of non-compliance with the rules the court should have regard to the principles governing applications for condonation: viz, the extent of the delay; the reasonableness of the explanation proffered for the delay; and the prospects of success of the appeal. If the cross-appeal is without merit then it would fail.

It seems to me that the point must be made at this stage that since Mr *Andersen* concedes that the original grounds were fatally flawed, what he is asking for is not an amendment of what in law was non-existent, but condonation to note a cross-appeal out of time.

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Rule 31(3) of the Rules of the Supreme Court 1964 (RGN 380 of 1964), which governs such applications recites that-

> "An application for extension of time in which to appeal shall have attached to it a notice of appeal containing the matters required in subrule (1) of rule 29 and an affidavit setting out the reasons why the appeal was not entered in time ..."

Although there was no affidavit setting out the reasons why the appeal was not entered in time, the reason suggests itself. It was due to an oversight of the amendment to s 92(2) of the Act.

There is some authority for the proposition that where the act or thing required by a statute is a condition precedent to the jurisdiction of the court, compliance cannot be dispensed with: *Jackson* v *Smith* 1928 TPD 580; but where the order sought is governed by the Rules of Court, as is this application to appeal outside the time limited by the rules, then the court may in its discretion, grant the application, subject of course to the above-mentioned considerations.

The issues raised in the belated cross-appeal (I prefer the term "belated" to "amended" because there was no cross-appeal to amend) are matters of misdirection by the Tribunal upon which the Tribunal depended to reach its decision. It was alleged in the belated cross-appeal that-

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KORSAH JA

> "1. There were no facts on which the Tribunal's finding that Munhangu was the owner of property could be reasonably based.
>
> 2. There were no facts on which the Tribunal's finding that Munhangu was entitled to sublet the property could be reasonably based.
>
> 3. The Tribunal misdirected itself by failing to consider whether if Munhangu was entitled to sublet the property he was entitled to do so at a profit.
>
> 4. The Tribunal ought to have found that the appellant's conduct in assisting Munhangu to sublet the property unlawfully at a profit was inconsistent with his conditions of employment and warranted his dismissal.
>
> 5. Alternatively, there was no reasonable basis on which the Tribunal was entitled to fix arbitrary figure it did for compensation."

The last ground in the respondent's belated cross-appeal is a common ground of criticism by both parties against the Tribunal's determination, save that the appellant complains that-

> "The Tribunal erred in law in purporting to award to the appellant, in lieu of reinstatement, compensation, when neither party to the proceedings had prayed any such relief."

Mr *Andersen* submitted that since the Tribunal reached its decision by reliance upon the misdirections alluded to in the belated cross-appeal the conclusions arrived at by the Tribunal were unreasonable and should not be allowed to stand. In support of his assertion Mr *Andersen* relied on *National Foods Limited* v *Magadza* S-105-95 where Ebrahim JA commented that-

> "It is true that this court only has jurisdiction to hear an appeal from the Tribunal on a point of law. But clearly if there is a serious misdirection on the facts it amounts to a misdirection in law. The giving of reasons that are bad in law constitute a failure to hear and determine according to law."

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See also *Bank of Credit & Commerce Zimbabwe Ltd v Chigwada* S-116-95 (unreported).



KORSAH JA

I whole-heartedly agree with the above observation; for a misdirection is nothing more than an error in law made by a judge in his charge to a jury. I must, however, add this rider: there can be *misdirection as to the law* applicable to the case being tried; and there can be *misdirection as to the evidence* in the case. For an appellant to avail himself of a misdirection as to the evidence, the nature and the circumstances of the case must be such that it is reasonably probable that the Tribunal would not have determined as it did had there been no misdirection; in other words, that the determination was irrational. That, I believe, *was* the basis of the attack by Mr *Andersen* on the Tribunal's determination. For the grounds upon which administrative action is subject to control see *CCSU* v *Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 950h.

The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion: *Bitcon v Rosenberg* 1936 AD 380 at 395-7; *Secretary of State for Education & Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665 (CA) at 671E-H; *CCSU* v *Min for the Civil Service supra* at 951A-B; *PF-ZAPU* v *Min of Justice (2)* 1985 (1) ZLR 305 (S) at 326E-G.

I wish to draw particular attention to the following remarks by Lord Diplock in the *CCSU* case *supra* that-

> "Whether a decision falls within the category of irrationality is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes) v Bairstow* [1953] 3 All ER 48, [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision maker. Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review."

Having set the parameters within which this matter ought to be determined, I now turn to the evidence giving rise to the impugned determination of the Tribunal.



KORSAH JA

The appellant was employed by the respondent (NRZ) as a security guard in 1962. By November 1990 the appellant had attained the position of a Senior Security Guard.

On 4 November 1990, the Senior Security Officer for the Mashonaland sub-unit of NRZ operations, by a memorandum addressed to the appellant, suspended the appellant from duty for alleged misconduct. The appellant, however, refused to acknowledge receipt of the

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memorandum.

By a letter dated 22 January 1991, the NRZ Security Officer for its Eastern Operations suspended the appellant from employment without pay on the same allegations of misconduct. On the same day, the NRZ lodged an application in terms of s 3(1)*(a)* of the Labour Relations (General Conditions of Employment)(Termination of Employment) Regulations (SI 371 of 1985) (the Regulations), for permission to terminate the appellant's employment.

The NRZ alleged as grounds for the appellant's dismissal that-

1. The appellant had defrauded the NRZ by being instrumental in subletting house No. 3 Mahogany Drive, Lochinvar, Harare, the property of NRZ, and by so doing wrongfully making some financial gain.

2. The appellant had failed to comply, on two occasions, with lawful orders from his superior requesting him to submit a report with regard to his role in the alleged unlawful subletting of the house and to disclose the profit, if any, which he derived from such unlawful subletting.

At previous hearings, the labour relations officer and the regional hearing officer had ordered the dismissal of the appellant. The Labour Relations Board reversed the determination of these officers and ordered that the appellant be reinstated with effect from 22 January 1991, being the date of suspension, up to October 1991.

The NRZ appealed to the Labour Relations Tribunal against the Board's determination that the appellant be reinstated. The appellant, dissatisfied with the order of the Board, also noted a cross-appeal to the Tribunal on the ground that the month of October 1991, did not relate to any event in the history of the controversy between the parties and the determination of the Board was, therefore, incompetent.

The events giving rise to the dispute between the parties were that the NRZ



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was the owner of house No. 3 Mahogany Drive. In or around May to June 1988, the house was occupied by one Terifanos Munhangu who was employed, not by the NRZ, but by the Ministry of Agriculture in its Technical and Extension Services (Agritex) in Harare.

Munhangu, according to the Tribunal, believed that he was leasing the house on a "rent to buy" basis in terms of an alleged lease entered into between him and the Government in 1979. That lease was never produced by Munhangu in support of his assertion.

Some time in 1988, Munhangu was transferred to the Nharira Branch of Agritex in the Chivhu District. It was common cause that from the time of Munhangu's transfer until 1990, the appellant, a nephew to Munhangu, purported to act as caretaker/agent for Munhangu in respect of house No 3 Mahogany Drive and sublet the property to a number of tenants.

NRZ management believed that the appellant knew that the property belonged to NRZ and that the appellant benefited financially by pocketing the difference between the amount due to NRZ

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as lease rent and the actual rent paid by the tenants to whom the premises were let.

NRZ management twice ordered the appellant to submit a report on his role in the alleged unlawful subletting of its property and to declare the profits, if any, that had accrued to him as a result. The appellant flatly refused, on each occasion, to comply with the orders to make disclosure.

The appellant alleged that he was informed by Munhangu, and he so believed, that the property belonged to Munhangu, who was purchasing it on a "rent to buy basis" and, as such, Munhangu was free to do what he pleased with the property without let or hindrance by NRZ.

The Tribunal, in concluding that the appellant's mind was free from vice, relied on a memorandum dated 18 October 1990, dispatched from the NRZ Estate Office by F Mapfumo, F/District Civil Engineer, to the NRZ Area Security Officer, informing the latter that-

> "This is to confirm that the above-mentioned house is leased to Mr F Munhangu at a monthly rental of $125.
>
> However, all rental payments are made on his behalf by Security Guard, Constable G Hama and the last payment was made yesterday, 17 October 1990."



KORSAH JA

The Tribunal reasoned thus:

> "In our view, as well as being justified in disputing the alleged illegality of the subletting of the house on the basis that the house belonged to Munhangu, the respondent was also justified to rely on the estate officer's knowledge of the subletting of the house and its tacit approval of or acquiescence to the same."

In other words, if the subletting was illegal, why did the estate office of the NRZ, responsible for NRZ property, condone it?

While, having regard to the respondent's knowledge that NRZ had taken steps to repossess all of its properties from occupiers who were not employed by NRZ, inclusive of No. 3 Mahogany Drive, and that those occupiers were resisting being evicted, I would have arrived at a conclusion different from that of the Tribunal, I am unable to say that the determination by the Tribunal, in the consideration of the evidence placed before it, was "so outrageous in its defiance of logic ... that no sensible person who had applied his mind to the question to be decided could have arrived at it", or that the Tribunal was "unreasonably wrong".

Mr *Nherere* for the appellant argued that the contention by the NRZ that there was no reasonable basis for the finding by the Tribunal that No. 3 Mahogany Drive was owned by the appellant's uncle was unmeritorious, because the Tribunal did not make such a finding. He submitted that the Tribunal, in stating that "the house belonged to Munhangu" was not using the word "belonged" to denote legal ownership. It was patent that the appellant was paying rent to NRZ on behalf of Munhangu. There was no suggestion that such payments were instalments towards the purchase price for the house. If Munhangu was paying rent to NRZ then the Tribunal could not have found that the legal ownership vested in Munhangu. Despite the appellant's belief, it was a question of fact that Munhangu was the legitimate lessee, and not

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that Munhangu was the legal owner of the house.

According to the appellant, and this was not denied, before leaving Harare in 1988, Munhangu introduced the appellant to Mr Mapfumo, who is the NRZ estate officer and author of the letter earlier referred to, and informed Mr Mapfumo that the appellant would be paying rent on his behalf in respect of 3 Mahogany Drive, in his absence. It was therefore patently reasonable for the Tribunal to conclude that the appellant, on good ground, believed that Munhangu was entitled to sublet and that everything was above board. Thus



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all references to ownership in the heads of argument for NRZ must be understood in the light that both the appellant and NRZ were, at all times, aware that the appellant was paying rent for and on behalf of Munhangu.

At para 11 of NRZ's heads of argument it was submitted that the appellant was well aware that it was unlawful for the property to be sub-leased. It was submitted by Mr *Nherere* that the *onus* was on the respondent to prove that the lease precluded subletting, but the lease was not produced and that issue could not be resolved in favour of the respondent. The conduct complained of herein occurred before November 1990 at a time when the rights of the parties, if any, were unclear. The issue for resolution then was the contractual relationship between Munhangu and NRZ, and not any relationship between the appellant and NRZ.

Regarding the statement which the appellant refused to record, Mr *Nherere* submitted that the findings of the Tribunal were justifiable and not such as a reasonable tribunal applying its mind to the evidence before it would not have arrived at.

The Tribunal reasoned that the appellant's alleged failure to comply with a lawful order was in consequence of a perceived unlawful subletting of 3 Mahogany Drive and cannot stand alone. Thus, having found that the appellant's role in subletting the house was untainted with illegality, there was no basis for the request to make a statement. Secondly, the Tribunal held that as there was bad blood between Lunga and the appellant, he found it difficult to believe that the instruction to disclose his role in subletting the house, coming from Lunga, was genuine. Had the request emanated directly from NRZ, the appellant explained, he would have complied with it. It was reasonable, in those circumstances, to refuse to comply with the instruction by Lunga to make the requested statement. Thirdly, the Tribunal found that it was reasonable for the appellant to take the stand, having been introduced to Mr Mapfumo by Munhangu as his agent responsible for the payment of rent in respect of the house, that what transpired between him and Munhangu was something between the two of them and had nothing to do with the NRZ. The profit, if any, made by the appellant, was not at the expense of NRZ.

The Tribunal was of the view, given the above circumstances, that the appellant did not appreciate that he was acting wrongfully and so there was no wilful disobedience on the part of the appellant, because he proffered a reasonable explanation, or gave a good reason, for his refusal to comply with the instruction to furnish a statement regarding his role in subletting 3

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Mahogany Drive: *Matereke v CT Bowring & Associates (Pvt) Ltd* 1987 (1) ZLR 206 (S) at 211G; *Aberdare Cables Ltd v SA Railways & Harbours* 1959 (2) SA 406 (C) at 409H.

From the foregoing it would be appreciated that even if the application for condonation to note a cross-appeal out of time were granted, it would not profit the respondent since it cannot be said the Tribunal's determination was such as "no sensible person who had applied his mind to the question to be decided could have arrived at it". Accordingly the application must be disallowed with costs.

Upon concluding that the appellant's dismissal was wrongful, the Tribunal, regardless of the fact that the appellant sought only the remedy of reinstatement, in terms of s 3(2)*(b)* of the Regulations ordered the respondent to pay the appellant compensation in the sum of $15 000 as an alternative to reinstatement and other benefits.

In para 21 of the respondent's heads of argument Mr *Andersen* suggested that in the event of holding that the appellant's suspension and subsequent termination of employment were not justified, and that the determination by the Tribunal was unassailable, the Tribunal, in terms of s 96 (1)*(c)* of the Act, which recites that-

> "(1) Without derogation from the generality of sections *ninety-three* and *ninety-five*, a determination made in terms of those sections *may* provide for
>
> *(a)* ...
>
> *(b)* ...
>
> *(c)* reinstatement or employment in a job;
>
> Provided that any such determination shall specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement or employment" (my emphasis).

had a discretion to award damages and correctly exercised such discretion in awarding damages.

Mr *Andersen* invited the court to revisit the decision in *United Bottlers (Pvt)*



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*Ltd* v *Murwisi* 1995 (1) ZLR 246 (S) wherein this court held that "in an application under s 3 of the Regulations the Labour Relations Officer has only two choices: dismiss or reinstate. Neither the Tribunal nor this court can do any more than reverse, in a proper case, the decision of the LRO."

Mr *Andersen* submitted that s 3(2) of the Regulations became *ultra vires* to the extent that it is inconsistent with s 96 of the Act.

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The question may well be asked as to whether it was ever intended that the common law principle of "reinstatement or damages" was to be displaced by s 3(2) of the Regulations. There is a presumption against alteration in the common law by statute law unless the words of the statute are plain and unambiguous and an intention to alter the common law is evident from the wording of the enactment: *Casserley v Stubbs* 1916 TPD 310 at 312; *Dhanabakium v Subramanian & Anor* 1943 AD 160 at 167.

In *George Wimpey & Co Ltd v BOAC* [1955] AC 169 at 191 Lord Reid said:

> "If the arguments on a question of interpretation are fairly evenly balanced, that interpretation should be adopted which involves the least alteration of the common law."

It seems to me the principle that an employer is not to be compelled to keep a person he does not want in his employ, because the relationship between employer and employee has soured beyond reconciliation, is deep seated in the common law: *Commercial Careers College (1980) (Pvt) Ltd v Jarvi*s 1989 (1) ZLR 344 (S) at 349E-G; *Winterton, Holmes & Hill* v *Paterson* 1995 (2) ZLR 68 (S). I think if it is to be overturned, it must be so done by a clear, definite and positive enactment which manifests such an intent by Parliament and not an ambiguous one such as s 3(2) of the Regulations which merely omits a reference to damages. I very much doubt that subordinate legislation can be employed to effect an alteration in the common law.

The Regulations are no more than subsidiary legislation which owe their very existence only to the parent Act. They cannot transcend the ambit of the enabling Act that gave them birth and from which they draw breath. Nowhere in the parent Act is an intention expressed that the common law in this respect has been altered. There is nothing in the parent Act from which an intention to change the common law in this regard can be inferred. The Regulations cannot, therefore, be interpreted in such a way as to amplify the intention of the law giver as expressed in the parent Act. As the parent Act expresses no



KORSAH JA

intention whatsoever of effecting an alteration in the common law principle of "reinstatement or damages", the Regulations cannot be interpreted to have that effect.

It stands to reason that it is not s 3(2)*(b)* of the Regulations that is *ultra vires* the Act, but rather the interpretation hitherto given to that section by the courts which is not in accord with the intention of the law maker as expressed in the parent Act.

The proviso to s 96(1)*(c)* of the Act, requiring the determining officer to specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement or employment, recognised not only that the Regulations had not altered the common law, but also the possible impracticality that might result by a strict adherence to the letter of the section, and sought to rectify it. But even without this amendment the parent Act was at all times devoid of an intent to alter the common law principle.

Mr *Nherere* contended that the Regulations contemplate applications to terminate employment and not in the alternative damages as at common law; that, in construing the Act together with

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the Regulations, due regard must be had to the preamble in s 17 of the Act to the protection of employment - that is, to protect the right of the worker to work. He submitted that an alternative to damages would not be consistent with the objective of the Act.

Attractive as this argument is, there is no clear, definite and positive expression of intention evident from the wording of the legislation manifesting an alteration in the common law.

With the question of interpretation equipoised, and having regard to the proviso to s 96(1)*(c)* of the Act, that interpretation should be adopted which involves the least violence to the common law.

Mr *Nherere* on the other hand submitted that the appellant, before the Tribunal, did not seek that alternative remedy. NRZ applied for termination of the appellant's contract of employment. At no stage did the NRZ contend that in the event that it was not entitled to termination of the appellant's contract then it should be allowed to grant compensation.

Mr *Nherere* submitted that it was not competent for the Tribunal to grant a remedy that had not been sought and for which no evidence had been adduced.

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GUBBAY CJ

As submitted by counsel for the parties, the Tribunal was wholly wrong in fixing a totally arbitrary amount as compensation.

Mr *Andersen* contended that where a discretion has been conferred on a tribunal, even if there is no relief sought in terms of that discretionary power, the discretion must be exercised notwithstanding the absence of a prayer. Without making any pronouncement on the issue, I am of the view that the peremptory wording of the proviso to s 96(1)*(c)* leaves no room for doubt that the labour relations officer in his determination is duty bound to make an assessment of damages as an alternative to reinstatement.

I am of the view that, since we are compelled to interfere with the determination of the Tribunal for non-compliance with s 96(1)*(c)* of the Act, in that it furnished no basis for its assessment of damages, the matter must be remitted to the Tribunal for such an exercise to be undertaken.

In the result I would make the following orders:

1. The appeal succeeds to the extent that the Tribunal's determination in respect of damages is hereby set aside.

2. The cross-appeal is dismissed with costs.

3. The matter is remitted to the Tribunal for assessment of damages as an alternative to reinstatement.

4. The appellant is awarded the costs of this appeal.

**Gubbay CJ:** I have had the advantage of reading the judgment prepared by my brother Korsah.

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I am in respectful agreement with the terms of the order he proposes as well as the reasons therefor.

As the effect of the judgment is to overrule this Court's decision in *United Bottlers (Pvt) Ltd* v *Murwisi* 1995 (1) ZLR 246 (S), I consider it appropriate in that regard to add some brief observations of my own.

In *United Bottlers* a distinction was drawn between an application by an employer for written approval to terminate a contract of employment under s 2(1) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371) of 1985, and a dispute brought under Part XII of the Labour Relations Act (now



McNALLY JA

[*Chapter 28:01*]). Such distinction leads to an anomaly. An employer who suspends his employee by resorting to the Regulations is compelled to reinstate him in employment, with no alternative award of damages, should the determination of the misconduct he alleges go against him; whereas an employer who wrongfully dismisses his employee may find that in terms of s 96(1)*(c)* of the Act he is ordered to pay an amount of damages as an alternative to reinstatement. On the face of it this could hardly have been the intention of the law-maker.

Part XII of the Act, which comprises ss 93 to 101, deals with the determination of disputes and unfair labour practices. The word "dispute", which is defined in s 2 as "a dispute relating to *any matter concerning employment* which is governed by the Act" (emphasis added), in my view is sufficiently wide to embrace a dispute between an employer and employee resulting in suspension and an application for approval to dismiss under the Regulations. It is also significant that s 95(2)*(b)*, which is concerned with disputes involving the suspension and dismissal of an employee, makes no distinction between these two procedures in respect to the issue of an interim determination by a senior labour relations officer. Finally, and of much importance, s 96(1) sets out what it is that determinations made under ss 93 and 95 may specify. In terms of sub-para *(c)* thereof "reinstatement or employment in a job" may be ordered. And the proviso thereto states that *any* such determination *shall* specify an amount of damages to be awarded to the employee as an alternative to his reinstatement or employment.

This examination of the provisions of Part XII of the Act I have mentioned satisfies me that service of a determination or order on an employer to reinstate an employee in terms of s 3(2)*(b)* of the Regulations must carry with it, as an alternative, an award of damages.

I am authorised by Ebrahim JA and Muchechetere JA, who did not take part in the hearing of this appeal, to state that they now agree that the decision in *United Bottlers (Pvt) Ltd v Murwisi supra* should no longer be regarded as correctly enunciating the law in relation to reinstatement of employees.

**McNally JA**: I also agree with the judgment of my brother Korsah. Had our attention in the *Murwisi* judgment *supra* been focused specifically on the peremptory proviso to what is now s 96(1)*(c)* of the Act, I do not think we could have escaped the conclusion that s 3(2)*(b)* of the Regulations must, at least since 1 January 1993, be read subject to the proviso if it is to be

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*intra vires* the Act.



McNALLY J

What the position was, or would have been, prior to the amendment, is a matter on which I do not find it necessary to express an opinion.

*Stumbles & Rowe*, appellant's legal practitioners

*Webb, Low & Barry,* respondent's legal practitioners



## DAVIES & ORS v MINISTER OF LANDS, AGRICULTURE & WATER DEVELOPMENT 1996 (1) ZLR 681 (SC)

**Court** **Supreme Court, Harare**

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

Constitutional appeal

30 May & 27 June 1996 Judgment No. S-93-96

### Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - ss 11 and 16 - right to property and protection against compulsory acquisition without compensation - whether Part IV of Land Acquisition Act [Chapter 20:10] is ultra vires the provisions of the Constitution - whether designation of land without compensation constitutes acquisition

### Headnote

The appellants' farms had been designated by the Minister of Lands, Agriculture and Water Development in terms of s 12(1) of the Land Acquisition Act [*Chapter 20:10*]. The appellants brought an application in the High Court for an order declaring that the provisions in the Land Acquisition Act allowing for the designation of land, namely ss 12 to 15, are *ultra vires* ss 11 and 16 of the Constitution. Sections 11 and 16 of the Constitution require the payment of compensation whenever property or an interest in property is compulsorily acquired. The application was dismissed by the High Court. On appeal:

Held, that the terms "compulsory acquisition of property" and "property compulsorily acquired" in ss 11*(c)* and 16(1) of the Constitution signify the transfer of property or any interest or right therein to the State, in the sense of parting with ownership or possession to the State.

Held, further, that although the designation of land by the Minister in terms of the Land Acquisition Act deprives the owners of the exclusive or absolute right to sell, lease or otherwise dispose of their rural land, the State does not, upon designation of land, acquire the right of

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which the



owners have been deprived, because designation does not result in the transfer of the right to the State to sell, lease or otherwise dispose of the rural land that has been designated. Although it could well be true that designation has the effect of lowering the value of the land and interferes with its marketability, the designation of land is still not a compensatable taking.

Held, therefore, that the provisions of Land Acquisition Act in relation to designation of land do not violate the provisions of ss 11 and 16(1) of the Constitution.

Held, further, that s 13 of the Land Acquisition Act does not violate the right of a designee to a fair hearing by an independent and impartial adjudicating authority as mandated by s 18(9) of the Constitution. Although the designee only has a right to object to the designation to the same Minister who had in the first place designated the land, there was no reason to assume that the Minister would be incapable of dealing with the objection with the degree of impartiality and objectivity demanded of an adjudicating authority. Moreover, the Minister's decision is still subject to the control of the High Court under its powers of judicial review.

*Held, obiter*, that the review by the Administrative Court of the level of assessment by the Compensation Committee provided for in s 23 of the Land Acquisition Act is not confined to procedural irregularities but extends to the merits of the Compensation Committee's assessment in accordance with the principles and considerations prescribed in ss 19 and 21 of the First Schedule to the Land Acquisition Act.

Cases cited:

*Agnis v City of Tiburon* 447 US 255 (1970)

*Britz NO* v *Sniegocki & Ors* 1989 (4) SA 372 (D)

*Cayon v City of Chicopee & Anor* 360 Mass 606 (1971) (Supreme Judicial Court of Massachusetts)

*Chrmn, PSC & Ors v Zimbabwe Teachers' Assn & Ors* 1996 (1) ZLR 637 (S)

*City of Houston v Ross Biggers et al* 380 SW 2d 700 (1964) (Court of Civil Appeals of Texas)

*Danforth v US* 308 US 271 (1939)

*Davies & Ors v Min of Lands* 1994 (2) ZLR 294 (H); 1995 (1) BCLR 83 (Z)

Ex p *de Jager* (1926) 47 NLR 413

*Flood v Central District of Maricopa County* 104 Ariz 566 (1969) (Supreme Court of Arizona)

*Government of Malaysia & Anor v Selangor Pilot Assn* [1978] AC 337 (PC)

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

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*La Compagnie Sucrière de Bel Ombre Ltée & Ors v Government of Mauritius* PC Appeal 46/1995

*Lorentz v Melle & Ors* 1978 (3) SA 1044 (T)

*Marietta Realty Inc* et al v *Springfield Redevelopment Authority* et al 902 F Supp 310 (1995)(District Court for the District of Massachusetts)

In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S)

*PF-ZAPU* v *Min of Justice (2)* 1985 (1) ZLR 305 (S)

*R v Stein* 1947 (2) SA 442 (T)

*Rattigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S); 1995 (1) BCLR 1 (ZS)

*Sec for Tpt & Anor v Makwavarara* 1991 (1) ZLR 18 (S)

*Société United Docks & Ors* v *Government of Mauritius* [1985] AC 585 (PC)

*Sorbino & Ors v City of New Brunswick* 43 N J Super 554 (1957) (Court of New Jersey)

*State of West Bengal v Subodh Gopal & Ors* [1954] SCR 578

*Transvaal Invstm Co Ltd v Springs Municipality* 1922 AD 337

Statutes referred to:

Constitution of India, art 31(1) and (2)

Constitution of Mauritius, ss 3(1)*(c)* and 8(1)

Constitution of Zimbabwe 1980, ss 11, 16(1) and 18(9)

European Convention on Human Rights, Protocol, art 1

High Court Act [*Chapter 7:06*], s 26

Interim Constitution of South Africa 1994, s 28(2) and (3)

Land Acquisition Act [*Chapter 20:10*], ss 12, 13, 14, 15, 19 and 23

*A P de Bourbon SC,* for the appellants

*P Chinamasa,* with him *B Patel,* for the respondent

## Judgment

**GUBBAY CJ**: Part II of the Land Acquisition Act [*Chapter 20:10*] ("the Act"), which contains ss 3 and 4, grants the President the right to acquire land compulsorily for certain specified purposes. Part III of the Act, comprising sections 5 to 11, sets out the procedure to be followed

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for compulsory acquisition of land. Part IV, in which are included ss 12 to 15, deals with the designation of rural land for resettlement and other purposes. It does not confer on the President any right to acquire land.

Section 12 allows the Minister of Lands, Agriculture and Rural Resettlement, or any other Minister to whom the President may from time to time assign the administration of the Act ("the Minister"), to designate any area or piece of





rural land as land that will be acquired for any purpose referred to in Part II of the Act. When designating any such land the Minister is required to specify by a notice published in the Gazette: *(a)* the purpose for which it is intended to acquire the land; *(b)* the acquiring authority (this will usually be the President); and *(c)* the period, not exceeding ten years, within which it is intended to acquire the land.

The five appellants are commercial farmers. In late April 1993 they were notified that the farms of which they are the registered owners had been designated by the Minister as rural land to be acquired by the President, as the acquiring authority, for the purpose of resettling persons. Once their written objections had failed to persuade the Minister to revoke the designations, the appellants brought a joint application before the High Court. What they sought was the grant, with costs, of an order declaring the designations of the six farms in violation of their constitutional rights and, consequently, of no legal validity.

The application, which was opposed, was heard by Chidyausiku J and, ultimately, dismissed with costs. The judgment has been reported as *Davies & Ors v Minister of Lands, Agriculture &Water Development* 1994 (2) ZLR 294 (H); 1995 (1) BCLR 83 (Z).

The crux of the dispute, as I perceive it, is whether or not the act or effect of designation amounts to a compulsory acquisition of property or interest or right therein in contravention of ss 11*(c)* and 16(1) of the Constitution of Zimbabwe.

Section 11 of the Constitution sets out that every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, amongst which is-

> "*(c)* protection for the privacy of his home and other property and from the compulsory acquisition of property without compensation".

While s 16(1) explicitly provides that-

> "No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that-
>
> ...
>
> *(c)* subject to the provisions of subsection (2), requires the acquiring



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GUBBAY CJ

> authority to pay fair compensation for the acquisition before or within a reasonable time after acquiring the property, interest or right".

This Court has held in Re *Munhumeso & Ors* 1994 (1) ZLR 49 (S) at 55B-D, 1995 (2) BCLR 125 (ZS) at 128 H-I, that s 11 is not a mere preamble or introduction, but rather "the key or umbrella provision" in the Declaration of Rights under which all rights and freedoms must be subsumed; that it encapsulates the sum total of the individual rights and freedoms in general terms, which may be expanded upon in the expository, elaborating or limiting ensuing ss 12 to 23. See also *Rattigan & Ors* v *Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S) at 59 B-F; 1995 (1) BCLR 1 (ZS) at 5H-I; and the remarks of Lord Templeman in *Société United Docks & Ors* v *Government of Mauritius* [1985] AC 585 (PC) at 599 F-H. Pertinently put, s 11*(c)* expresses the principle that property may not be compulsorily acquired without compensation. It recognises the sovereign power of eminent domain, well known in Roman-Dutch law, that property may be expropriated by the State for use by the public or for the benefit of the public, against payment of compensation; the eminent domain power being exercised to meet a State obligation to the people and, by implication, providing an immunity against expropriation without compensation. See *LAWSA* Vol 10 at paras 3 and 10 No. 1; Murphy 1993 *THR-HR* at 630.

Subsection (1) of s 16 of the Constitution details what is required to be contained in any law authorising compulsory acquisition of property of any description or any interest or right therein. Subsection (2) permits of a law which provides for the compulsory acquisition of *land* or any interest or right therein in compliance with subs (1), to specify the principles on which and the manner in which compensation is to be determined and paid; to fix the amount of such compensation and the period within which it is to be paid.

Insofar therefore as the acquisition of property is concerned, s 11*(c)* gives no additional protection to that expressed in s 16(1). In particular, it does not afford protection against deprivation of property by the State where the act of deprivation falls short of compulsory acquisition or expropriation. No compensation is thus required for such deprivation of rights in property. Compare, for instance, the different wording in ss 3(1)*(c)* and 8(1) of the Constitution of Mauritius; articles 31(1) and 31(2) of the Constitution of India (prior to the Fourth Amendment thereto in 1955); ss 28(2) and 28(3) of the South African Interim Constitution; and article 1 to the Protocol of the European Convention on Human Rights.



GUBBAY CJ

In *Hewlett* v *Min of Finance & Anor* 1981 ZLR 571 (S), 1982 (1) SA 490 (ZS) this court considered the significance of the word "acquire" in the context of ss 11*(c)* and 16(1) of the Constitution. After referring to the ordinary meaning of the word in the Oxford English Dictionary as "to gain, obtain, or get as one's own, to gain ownership of, to come into possession of", Fieldsend CJ at 589D or 502C approved the following *dictum* of Innes CJ in *Transvaal Investment Co Ltd* v *Springs Municipality* 1922 AD 337 at 341:

> "Now, juristically, the word acquire' connotes ownership; the ordinary legal meaning implies the acquisition of *dominium.* To acquire a thing is to become the owner of it. No doubt it may be used in a wider sense so as to

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include the acquisition of a right to obtain the *dominium;* but the narrower meaning is the accurate and more obvious one."

He continued, at 589F-590B or 502 D-H:

"It is true, too, that compulsory acquisition' is used in both English and Roman-Dutch law to denote the expropriation of property by an authority - whether state, local or public utility - usually for some public purpose, most commonly in relation to land. It is, of course, common cause that property in s 16 is not limited to land.

Cases relied upon by Mr *Kentridge* clearly establish that it is not every deprivation of a right which amounts to a compulsory acquisition of property, as for example regulation of a landlord's rights which in effect diminished his rights (*Singh* v *United Provinces* [1946] AC 327 (PC)), regulations which limited an owner's right to build above a certain height on his land (*Belfast Corporation* v *OD Cars Ltd* [1960] AC 490; [1960] 1 All ER 65 (HL)), and legislation allowing licensed pilots to provide pilotage only if they were employed by the port authority (*Government of Malaysia v Selangor Pilot Association)*.

It is perhaps of some significance to note that in almost all the post-colonial constitutions granted by Britain in Africa the section reciting the fundamental freedoms protected refer to the right not to be *deprived* of property without compensation whereas the sections giving actual protection provide that no property of any description shall be *compulsorily taken possession of* and no interest or right over property of any description shall be *compulsorily acquired* except on certain conditions, including compensation. This is clear recognition that there



is a distinction between deprivation and acquisition, and also an indication that not every deprivation of property must carry compensation with it. Indeed government could be made virtually impossible if every deprivation of property required compensation."

At 594E or 506D the learned Chief Justice observed that -

"... the limitation imposed on the legislature by s 16(1) is that it shall not pass a law compulsorily acquiring property without compensation, not that it shall not pass a law depriving a person of property without compensation."

Later at 595 A-G or 506H-507C he stated:

"In interpreting the protection given by s 16(1) one cannot lose sight of the provisions of s 16(3). It is convenient to set out its words again:

(3) Where any person, by virtue of a law, contract or scheme relating to the payment of pensions benefits, has a right, whether vested or contingent, to the payment of pensions benefits or any commutation thereof or a refund of contributions, with or without interest, payable in terms of such law, contract or scheme, any law which thereafter provides for the extinction of or diminution in such a right shall be regarded for the purposes of subsection (1) as a law providing for the acquisition of a right in property.'

This, Mr *Kentridge* submitted, is a deeming provision intended to bring into the protected class something which would otherwise fall outside it. From this he argued that subs (3) was a clear indication that but for the deeming provision the extinction or diminution of any vested or contingent right to a pension, would not be regarded as acquisition.

Mr *Andersen's* counter to this argument was that the principle *expressio unius est exclusio alterius* was one of limited application to be applied with great caution. This is, of course, true but where as here something which is not on the face of it acquisition is specifically stated so to be, there is a strong indication that acquisition is otherwise to be given its ordinary meaning. In my view this is not a case of a deeming provision - which is clearly what subs (3) is - being put in for the avoidance of doubt or for greater clarity. In my view subs (3) is a strong and

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almost



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> irresistible pointer to the conclusion that the extinction or diminution of a right in property is not of itself acquisition of property. To reach such a conclusion in this way is not in my view to be guilty of resorting to the austerity of tabulated legalism'; it is merely to rely on the ordinary meaning of the words used."

In distinguishing between an act of deprivation and an act of acquisition, Fieldsend CJ was fortified in his view by the decision of the Privy Council in *Government of Malaysia & Anor v Selangor Pilot Association* [1978] AC 337 (PC) - a case which concerned art 13(2) of the Constitution of Malaysia. He cited the following extracts from the majority opinion of Viscount Dilhorne:

> "Their Lordships agree that a person may be deprived of his property by a mere negative or restrictive provision but it does not follow that such a provision which leads to deprivation also leads to compulsory acquisition or use." (at 347H-348A);
>
> "In relation to art 13(2) the question to be answered is: Was any property of the association compulsorily acquired or used by the port authority? Only if there was, could there have been a failure to comply with art 13(2) ... Even if the right of the association to employ licensed pilots which was destroyed by the amending Act can be regarded as a right of property, in the view of the majority of their Lordships the association's right to employ pilots was not acquired or used by the port authority. Its right to employ them was given to it and acquired by it from the legislature.
>
> It may be that the association by its enjoyment over a considerable period of time of a monopoly in the provision of pilotage services had acquired a goodwill, the value of which would be reflected on a sale by it of its business and of which it was deprived by the amending Act. But if that were so, it does not follow that the goodwill was acquired by the port authority from the association and in the opinion of the majority of their Lordships it was not" (at 348B-D).

And proceeded to point out, at 594 A-B or 506A, that -

> "Even Lord Salmon in his dissenting judgment held that the legislation contravened art 13(2) only because it provided indirectly but inevitably for the compulsory acquisition without compensation of the association's property, namely the goodwill by the Authority."



GUBBAY CJ

Baron JA, in a concurring judgment, illustrated his understanding of the meaning of acquisition as comprehending a transfer of property or of a right in property from the owner to another person so that the latter stands in the shoes of the previous owner. He said at 597C-E or 508F-G:

> "There is, I think, a fundamental conceptual difference between G extinguishing a debt which it owes to C, and G directing that a debt owed by D to C be paid, not to C, but to G. In this latter case G has acquired *from* C precisely what C had, namely, the right to receive payment from D; C's rights, which are property in his hands, have been transferred to G. But in the former case G has relieved itself of an obligation to pay C; there is no transfer of a right, only its extinction. G does not acquire the debt owed to C."

In *Chairman, Public Service Commission & Ors* v *Zimbabwe Teachers Association & Ors* 1996

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(1) ZLR 637 this court recently had occasion to reconsider the meaning of the word "acquired" in s 16(1) of the Constitution. In the judgment of the majority it was said:

> "To our minds the word acquire' connotes the transfer of a thing from one party to another who receives it, even if such transfer be only passive or symbolic."

Applying the reasoning in *Hewlett* we held that although a provision of SI 241A of 1995 had relieved the State from paying to public servants their annual bonuses for the year 1995, it did not result in the State receiving anything into its possession. It had not therefore acquired an interest or right in the property of public servants.

It necessarily follows that I am quite unable to accept the submission advanced by Mr *de Bourbon,* who appeared for the appellants, (grounded as it was on the lead judgment of the Supreme Court of India in *State of West Bengal* v *Subodh Gopal Bose & Ors* [1954] SCR 587, but with a powerful dissent by Das J at 638-639) that the concept of deprivation of property is no different from compulsory acquisition or expropriation of property; and that to the extent the cases of *Hewlett* and *Selangor Pilot Association supra* had decided otherwise, they were wrong.

Quite apart from the distinction between deprivation and compulsory acquisition of property having been reaffirmed by the Privy Council in *Société United Docks &Ors* v *Government of Mauritius supra* at 608B-C and

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GUBBAY CJ

*La Compagnie Sucriére de Bel Ombre Ltée &Ors* v *Government of Mauritius,* Privy Council Appeal No. 46 of 1995 (not yet reported), there is strong support from South African academics for maintaining it.

In his article "Interpreting the property clause in the Constitution Act of 1993", published in 1995 *SA Public Law* 107, Professor Murphy expresses the opinion that expropriation comprehends those situations in which title is taken out of the owner without his or her consent. At p 116 he provides telling examples where State deprivation of rights in property lacks the characteristics of expropriation:

> "Take the case of a statute compelling all banks to make a contribution based on average daily deposits for the purpose of creating a guarantee fund to secure the full repayment of deposits to all depositors in the event of the bank's being wound up. Such a law clearly deprives the banks of rights in property but is arguably not an expropriation. Similarly, rent control legislation usually deprives the landlord of the right to use the fruits of his or her asset as well as the right to occupy, but his or her title remains intact and the government appropriates nothing. Another example would be a statutory provision requiring institutional investors to invest in prescribed assets. These kinds of intervention are described as regulatory interferences or as acts of police power. They differ from expropriation in that they do not involve a vesting of the appropriated resources in the state but limit rights between citizens in relation to their property."

In the same volume of this journal Professor van der Walt writes at 310:

> "The main difference between the two categories is that a normal' deprivation, such as a building regulation, health regulation or environmental conservation provision, only places a limitation on the exercise of an individual property right, whereas an expropriation actually takes the property away."

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See also Matthew Chaskalson 1994 *South African Journal of Human Rights* 131 at 134-135; and *Constitutional Law of South Africa,* ed Chaskalson *et al* (1996) at para 31:6.

Holding firmly as I do that the terms "compulsory acquisition of property" and "property compulsorily acquired" in ss 11*(c)* and 16(1) of the Constitution signify the transfer of property or any interest or right therein to the State in



GUBBAY CJ

the sense of a parting with ownership or possession, it remains to determine whether the action in designating the appellants' land had that effect.

The purpose of designating rural land under Part IV of the Act is essentially twofold: First, to identify specific tracts of rural land for intended acquisition. Second, to restrict the owner's power of disposal of the land so identified, *(i)* pending the decision of the acquiring authority whether to acquire it; or (ii) prior to the expiration of the specified period of the designation; or (iii) prior to revocation of the designation by the Minister with the consent of the owner.

The effect of s 14 of the Act, in the event of the Minister's written permission being withheld, is to impose a prohibition upon the right of the owner of designated rural land or the holder of a registered real right therein ("the designee") "to sell, lease or otherwise dispose of any designated land". These persons may not mortgage designated rural land, see Ex p *de Jager* (1926) 47 NLR 413 at 414; Ex p *Mather NO &Ors* 1971 (3) SA 38 (D) at 385F; *Britz NO* v *Sniegocki & Ors* 1989 (4) SA 372 (D) at 382H-383C; or make a bequest of such land, or any right or interest therein; or grant a servitude thereover, see *Lorentz v Melle & Ors* 1978 (3) SA 1044 (T) at 1049C. Any such acts would amount to a disposal. See *R* v *Stein* 1947 (2) SA 442 (T) at 455. In all other respects, the designee is at liberty to exercise the normal rights of ownership over the land, including the important elements of use and occupation. For s 15(2)*(a)* of the Act expressly provides that, pending the issue in terms of s 5 of a preliminary notice to acquire, designation under s 12 shall not "affect the rights of the owner of the designated land or the holder of any registered real right to use and occupy the land".

It is also clear that neither the President nor any other person may exercise the right to sell, lease or otherwise dispose of the designated rural land while it remains so designated. During that period those rights continue to vest in the owner, albeit subject to the necessity of obtaining Ministerial permission before undertaking any sale, lease or disposal. The attendant restriction does not result in their acquisition. Moreover, in terms of s 14(4) of the Act should the Minister refuse to allow the exercise of any such right, the owner may by notice call upon the acquiring authority to acquire the land. This the authority will then be enjoined forthwith to do.

Section 15(1) of the Act does not make it obligatory for the acquiring authority to acquire rural land that has been designated by the Minister. But if the decision reached is to acquire, it must then be implemented within the



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period of designation specified by the Minister in terms of s 12(2)*(c)* when he designated the land, or any extension of that specified period granted by him under proviso *(b)* to s 12(5).

Counsel for the appellants urged that publication of notice of designation by the Minister confers upon the acquiring authority a *jus in personam ad rem acquirendam.* Put otherwise, that at the moment of designation the acquiring authority is vested with a personal right of *dominium* over the rural land, with only transfer delayed. I do not agree. The State always enjoyed the power of eminent domain. The act of designation did not grant it that power. At all times it had the right to acquire compulsorily subject to compensation. And this, in essence, is what Chidyausiku J conveyed in the passage of the judgment at 303H-304C or 90I-91B.

It seems to me beyond argument that designation has deprived the appellants of the exclusive or absolute right to sell, lease or otherwise dispose of their rural land. Certainly, the acquiring authority has not acquired the right of which the appellants have been deprived. For the fact of designation does not transfer the right to the acquiring authority to sell, lease or otherwise dispose of the rural land.

In sum, it is my view that there has been no compulsory acquisition of the appellants' rural lands or interest or right therein, by the action of the Minister in designating them. There has been a deprivation of the right of the appellants freely to sell, lease or otherwise dispose of their rural lands to whomsoever they wish. But that right has not passed to the acquiring authority. Compulsory acquisition at the stage of designation does not occur, even though designation may be a prelude thereto.

It could well be true, as the appellants protest, that designation has had the effect of lowering the value of their lands and interfered with their marketability. However much that circumstance is to be regretted, it is not to be considered a compensable "taking". The fact that at some future time land might be taken under eminent domain, even where the threatened acquisition is imminent, is merely one of the conditions upon which an owner holds property. It is an incident of ownership, as American case law shows. See *Danforth* v *United States* 308 US 271 (1939) at 285; *Sorbino & Ors* v *City of New Brunswick* 43 NJ Super 554 (1957) (Court of New Jersey) at 568; *City of Houston* v *Ross Biggers* et al 380 SW 2d 700 (1964) (Court of Civil Appeals of Texas) at 704; *Flood* v *Central District of Maricopa County* 104 Ariz 566 (1969) (Supreme Court of Arizona) at 568; *Agnis* v *City of Tiburon*





447 US 255 (1970) at 263 n 9; *Cayon* v *City of Chicopee & Anor* 360 Mass 606 (1971) (Supreme Judicial Court of Massachusetts) at 607; *Marietta Realty Inc* et al v *Springfield Redevelopment Authority* et al 902 F Supp 310 (1995) (District Court for the District of Massachusetts) at 311-312.

Mr *de Bourbon* raised a two-part subsidiary argument which must now be considered. In the first place, he submitted that the procedure laid down in Part IV of the Act infringed the right of the

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designee to be afforded a fair hearing by an independent and impartial adjudicating authority, as mandated by s 18(9) of the Constitution.

Section 13 of the Act gives the designee the right to make written representations to the Minister setting out the reasons for his objection to the designation of rural land. Upon receipt of the representations the Minister may make such investigation into the matter as he thinks necessary. In addition, he may afford the designee the opportunity to make further representations. After completing the investigation, if any, and considering the representations addressed to him the Minister, in his absolute discretion, may confirm, amend or revoke the notice designating the rural land. His decision in that regard is final. But revocation of the designation will not prevent an acquiring authority from compulsorily acquiring the rural land concerned under the provisions of Part III of the Act. This the acquiring authority may do at any stage, even while the Minister is still considering the representations made to him by the designee.

There is no warrant to assume, as counsel would have this Court do, that because it is the Minister who personally designates rural land he is incapable, on receipt of an objection to such designation, to extend to it the degree of impartiality and objectivity demanded of an adjudicating authority.

Moreover, the finality of the Minister's decision does not oust the control of the High Court over administrative action by judicial review. See s 26 of the High Court Act [*Chapter 7:06*]. If the designee is able to establish one of the recognised grounds of illegality, irrationality or procedural impropriety, he will succeed in having the decision set aside or corrected. See *PF-ZAPU* v *Min of Justice (2)* 1985 (1) ZLR 305 (S) at 325H-327C, 1986 (1) SA 532 (ZSC) at 548C-549A; *Secretary for Transport &Anor* v *Makwavarara* 1991 (1) ZLR 18 (S) at 20A-D. And an appeal against the decision refusing redress will lie as of right to this Court.

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GUBBAY CJ

I remain unpersuaded that the procedure outlined in Part IV of the Act runs foul of s 18(9) of the Constitution.

The second procedure to come under attack was that under Part V of the Act relating to the payment of compensation once designated rural land has been acquired.

In my opinion the submissions made were outside the scope of the appeal. It was the consequence of designation of their rural lands, before any decision had been taken to acquire them, that formed the basis of the appellants' complaint to the High Court. In those proceedings the appellants were designees not expropriatees. They are still to be so regarded. This Court is not therefore concerned with the method of assessing compensation for designated rural land or the manner and period of payment specified. These are matters falling within s 19 of the Act. Nor are we concerned with whether the right of the expropriatee under s 23 of the Act to refer the assessment of the Compensation Committee to the Administrative Court for review satisfies the constitutional requirement of a fair hearing before an independent and impartial adjudicating authority.

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I venture to think, however, that the review envisaged in s 23 is not confined to procedural irregularities. It extends to the merits of the Compensation Committee's assessment in accordance with the principles and considerations prescribed in ss 19 and 21 and the First Schedule to the Act.

For the reasons aforegoing, the appeal is to be dismissed.

I would not have quarrelled with the learned judge had he decided, in dismissing the application, not to grant costs against the appellants. The matter before him was in the nature of a "test case" which raised an important and controversial issue involving all rural land owners. Nonetheless I am not prepared to interfere with his discretionary order for costs which, in any event, was not made a specific ground of appeal.

With regard to the costs of the appeal itself, it is apparent that, having failed in the court below, the appellants deliberately undertook the substantial risk of not succeeding on appeal. Their situation is not analogous to that of the respondents in the *Zimbabwe Teachers' Association* case *supra,* in which a decision favourable to them, and one of national importance, was reversed on appeal without carrying an award of costs.

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GUBBAY CJ

I conclude that there is no warrant to deprive the Minister of his costs.

McNALLY JA: I agree.

KORSAH JA: I agree.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

*Atherstone & Cook,* appellants' legal practitioners

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

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## SWM ELECTRICAL (PVT) LTD v ELECTRICAL & PULLEY COMPONENT SUPPLIERS (PVT) LTD 1996 (1) ZLR 696 (SC)

**Court** **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

18 & 27 June 1996 Judgment No. S-104-96

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## Flynote

Appeal - right of - from High Court - order refusing to grant judgment after offer of settlement and referral of matter to trial - no right of appeal against referral of matter to trial, but appeal as of right against refusal to grant judgment

## Headnote

The appellant sued the respondent in the High Court for some $280 000, plus interest, arising out of the alleged breach of an agreement of sale whereby it had sold the respondent the goodwill of its business, the fixtures, fittings and stock for $320 000. Of that sum, only $40 000 had been paid. The respondent disputed the claim, asserting that the appellant had fraudulently misrepresented that the stock was new, whereas most was second-hand, and that the agreement was an instalment sale agreement, governed by the Hire Purchase Act. It then stated that, because most of the stock was second hand, it would not have agreed to pay more than $150 000 and therefore consented to judgment being entered in that sum. It prayed that, in respect of the rest of claim, judgment be entered in its favour.

At the hearing, the appellant's counsel applied for judgment in the sum of $150 000, with the dispute over the balance to be referred to trial. The judge declined to so order, on the grounds that the respondent had made an offer of settlement, and referred the entire claim for trial. The appellant appealed, although no application for leave to appeal was made.

Held, that an order referring a matter for trial was not a "judgment" in terms



of s 2 of the High Court Act [*Chapter 7:06*] and that portion of the judge's order was not appealable. However, the portion of his order refusing to grant judgment in the sum of $150 000 was a final order, which was subject to appeal as of right.

Held, further, that although the final portion of the respondent's affidavit, in which the offer of settlement was made, was not in compliance with r 54 of the High Court Rules, r 185 would have permitted the appellant to have obtained judgment by consent, as the document would have been an admission made in a pleading "or otherwise in writing". Rule 185 apart, the High Court could, under its inherent jurisdiction, grant relief.

Held, further, that where there is a confession of indebtedness in respect of portion of a claim based on a single cause of action, and judgment is granted pursuant to it, the defendant will become entitled to raise the defence of *res judicata*. The appellant was fortunate that the judge *a quo* had refused to enter judgment by consent.

Cases cited:

*Blaikie-Johnstone v P Hollingworth (Pty) Ltd* 1974 (3) SA 392 (D)

*Garaj v Singh* 1957 (4) SA 556 (D)

*Jesse v Chioza* 1996 (1) ZLR 341 (S)

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*Mothle v Mathole* 1951 (1) SA 785 (T)

*Neal v Neal* 1959 (1) SA 828 (N)

*Royce Kincaid (Pty) Ltd v Wylfred Gardens (Pty) Ltd & Anor* 1974 (2) SA 554 (D)

*van Zyl v Niemann* 1964 (4) SA 661 (A)

The following statutes and rules of court were referred to:

High Court Act [*Chapter 7:06*], ss 2 and 43(1)

High Court Rules 1971 (RGN 1047/1971), rr 54 and 185

*GS Wernberg*, for the appellant

*PC Paul,* for the respondent

## Judgment

**Gubbay CJ:** The appellant sued the respondent in the High Court for payment of the sum of $280 466,70 with annual interest at the rate of thirty *per centum* from 1 January 1995 to date of payment, and costs of suit. It did so by way of court application, with a founding affidavit deposed to by its principal director Mr Stanley Mandondo. The single cause of action was based upon an alleged breach of a written agreement of sale entered into with the respondent under which it sold the goodwill of its business, the fixtures



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and fittings and all the stock on hand, for a total price of $320 466,70. Of this amount the respondent had paid only $40 000.

In opposing the application, the respondent, in the affidavit of the managing director Mr Takawira Zembe, raised two defences. In the first place, it was asserted that the appellant had fraudulently and materially represented that the stock it was selling was new, whereas to its knowledge the major value of such stock was second-hand; a fact only discovered by the respondent a month or so after the signing of the written agreement. The second defence was that the written agreement, by its very form and nature, was an "instalment sale agreement" as defined in the Hire Purchase Act [*Chapter 14:09*]; and as it did not comply with the requirements of the Act, the stock was deemed to have been sold on credit at a price twenty-five *per centum* less than the stipulated purchase price. Then followed the final paragraph of the affidavit, the meaning of which gave rise to the present issue between the parties. It read:

> "Because the major 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 the applicant. I therefore consent to judgment being entered in the sum of $150 000. But in respect of the remainder of the applicant's claim, I pray for judgment in my favour plus costs of suit."

At the hearing before Robinson J, counsel for the appellant applied for judgment in the sum of

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$150 000, as being a confessed indebtedness by the respondent, with the dispute over the balance of $130 466,70 to be referred to trial. The learned judge declined to make the order sought. He considered that in the context of the affidavit of Mr Zembe, read as a whole, the agreement to pay $150 000 was conditional upon judgment being granted in the respondent's favour for the remainder of the claim together with costs; and not on the basis of an amount unequivocally admitted as being due and payable. Stated differently, the agreement to pay $150 000 was simply an offer of settlement which, as it happened, was not acceptable to the appellant. His Lordship also drew attention to the anomaly that although the $150 000 was expressed to be "for all the items sold" it did not take into account the payment of $40 000 which the respondent had already made.

In the result the appellant's claim in its entirety was referred to trial for the hearing of oral evidence. The "order" does not reflect, however, what provision was made in relation to costs.



GUBBAY CJ

The immediate question is whether an appeal lies to this Court. Certainly no application was made to the learned judge for leave to appeal.

Recently, in *Jesse* v *Chioza* S-53-96 (not yet reported),*(6) it was held by this court, after a close examination of the authorities, that an "order" referring a matter to trial for the hearing of oral evidence does not amount to a "judgment" (defined in s 2 of the Act to include "a decision or order"). It is merely a ruling or directive as to the manner in which the case is to proceed. Consequently, and by virtue of s 43(1) of the High Court Act [*Chapter 7:06*], it is not appealable.

It is my view that the referral by the learned judge did not encompass the interpretation of the final paragraph of the opposing affidavit. That issue had been argued and finally disposed of. It had not been the contention of either party, and plainly was not envisaged by the learned judge, that *viva voce* evidence was necessary in order to resolve the meaning of Mr Zembe's words. If this is correct, as I perceive it to be, the matters on which it was directed that oral testimony was required, related to the defences set up by the respondent. More especially, to whether Mr Mandondo had fraudulently represented that all the stock the appellant was selling was new.

Thus, in the somewhat exceptional situation of this case, I think there was both a final order refusing the grant of judgment in the sum of $150 000 as well as a referral on the factual dispute as to whether the appellant was due payment in the sum of $280 466,70.

In the result an appeal as of right lay against the refusal to grant judgment by consent in the sum of $150 000.

It is clear that the final paragraph of the opposing affidavit does not comply with r 54 of the Rules of the High Court. Although signed by Mr Zembe, the signature was not verified by an affidavit made by someone other than himself, or by the signature of the legal practitioner acting for him. Of course, this does not mean that if a distinct claim is admitted, either in a plea or in an opposing affidavit filed in a court application, that the plaintiff or the applicant may not obtain judgment by consent in respect thereto. Rule 185 deals with an admission made in a pleading

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"or otherwise in writing" of the whole or any part of the case of the other party. I am satisfied that this rule



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authorises the procedure of obtaining judgment on a confession of liability that does not meet the requirements of r 54.

Rule 185 apart, I consider that under its inherent jurisdiction the High Court may grant relief in a proper case even though the Rules of Court make no specific provision therefor. See *Neal* v *Neal* 1959 (1) SA 828 (N) at 832H- 833C; *Royce Kincaid (Pty) Ltd* v *Wylfred Gardens (Pty) Ltd & Anor* 1974 (2) SA 554 (D) at 556E.

The appellant's counsel conceded that at best the respondent had consented to judgment only in an amount of $110 000. This was because it was common cause that the appellant had been paid $40 000 for the stock, *all* of which was valued by the respondent at $150 000.

I remain unpersuaded that the learned judge erred in holding that there was no explicit confession of indebtedness by the respondent. The payment was conditional on the appellant accepting the amount of $110 000 in full and final settlement of its claim. It was an offer of compromise. If accepted it would have had the same effect as *"res judicata"* and constituted an absolute bar to proceedings on the original cause of action. See *Mothle v Mathole* 1951 (1) SA 785 (T) at 790D; *van Zyl* v *Niemann* 1964 (4) SA 661 (A) at 669H-670A. That this is so is absolutely clear. For the defence of fraud, if established, would enable the respondent to resile from the written agreement. In other words, what is asserted in the affidavit was that the respondent had a complete defence to the claim - it owed nothing to the appellant. But should it fail to prove the fraudulent representation it was still due a reduction of the purchase price by reason of non-compliance with the provisions of the Hire Purchase Act.

The appellant is indeed fortunate that the learned judge refused to enter judgment by consent and that this court has upheld his decision. It ought to have appreciated that where there is a confession of indebtedness in respect of portion of a claim based on a single cause of action, as *in casu*, and judgment is granted pursuant to it, the defendant will become entitled to raise the defence of *res judicata*. In *Blaikie-Johnstone* v *P Hollingsworth (Pty) Ltd* 1974 (3) SA 392 (D) Howard J (as he then was) correctly stated the law at 395A-C as follows:

> "Even if the judgment on confession did not have the effect of a novation I am satisfied that once it was granted the entire claim contained in the summons became *res judicata*. See Grotius 3.49.1-3; Hoffmann *South*



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> *African Law of Evidence* 2 ed at p 239; Caney *Law of Novation* 2 ed at p 76; and *Custom Credit Corporation (Pty) Ltd* v *Shembe* 1972 (3) SA 462 (A) at p 472A-B, where van Winsen AJA said:
>
> > The law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause. This is the *ratio* underlying the rule that, if a cause of action has previously been finally litigated between parties, then a subsequent attempt by the one to

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proceed against the other on the same cause for the same relief can be met by an *exceptio rei judicatae vel litis finitae*'.

The same applies, I think, to a case such as the present in which the plaintiff with a single cause of action takes a final judgment for part of the claim and then attempts to proceed with the same action for a judgment in respect of the balance of the claim."

Compare *Garaj* v *Singh* 1957 (4) SA 556 (N) at 557E-F; *Royce Kincaid (Pty) Ltd* v *Wylfred Gardens (Pty) Ltd supra* at 555D-E.

The appeal is accordingly dismissed with costs.

KORSAH JA: I agree.

EBRAHIM JA: I agree.

*McNaught Wickwar*, appellant's legal practitioners

*Winterton, Holmes & Hill,* respondent's legal practitioners



## S *v* CHIKUKUTU 1996 (1) ZLR 702 (SC)

**Court** **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Criminal appeal

17 & 28 June 1996 Judgment No. S-112-96

### Flynote

Court - judicial officer - duties - unrepresented accused - interruption of cross- examination

Criminal law - common law offences - attempted murder - intent - constructive intent - what must be shown

Criminal procedure - arrest - killing to effect arrest or prevent escape - when justified - use of firearms - correct procedure

Criminal procedure - trial - unrepresented accused - correct method of getting accused to give evidence in chief

Evidence - affidavit - production - by consent - unrepresented accused - warning to be given to accused

### Headnote

Where an accused person is unrepresented, he should not, when the time comes for him to present his case, simply be asked if he adheres to the defence outline and confirm that he has nothing to add. This method might be convenient to the court, but it is unsatisfactory and is bound to lead to confusion and accusations that he has omitted things. It is also improper for the judicial officer to interrupt the accused's cross-examination to the extent that the accused

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gives up his cross-examination or to browbeat the accused into not calling witnesses whom he has indicated that he wishes to call.

While affidavits may be handed in by consent, such consent from an



unrepresented accused person is hardly likely to be informed consent. The consent should be treated in the same way as an admission by such an accused: he should be warned that he is not obliged to give his consent and should be told what the effect is of giving consent.

The appellant was convicted of attempted murder. He was a farm guard who had shot a trespasser on the farm who was cutting down trees on the farm and stealing the wood. The weapon used was a shotgun. On appeal against conviction and sentence,

Held, that because the suspected offence was listed in the First Schedule to the Criminal Procedure and Evidence Act [*Chapter 9:07*], the appellant would have been authorised to arrest the trespasser and the other persons concerned without a warrant. He would also have been entitled to use reasonable force to prevent the escape of the trespasser; if the use of reasonable force had resulted in death, such a killing would be lawful.

Held, further, that a firearm should be used only if there is no other way to catch the suspect. An oral warning should be given first, followed by a warning shot into the ground or air. If it is still necessary to shoot the suspect, the person effecting the arrest should try to shoot the suspect in the legs.

Held, further, that while mere negligence cannot found an intent to kill and that to constitute constructive intent there must be even more than gross negligence, the facts of the case showed an intent to do grievous bodily harm, and the appellant should be convicted of that lesser offence.

Cases cited:

*Matlou v Makhubedu* 1978 (1) SA 946 (A)

*Ntsomi v Min of Law & Order* 1990 (1) SA 512 (C)

*S v Gumbi* 1994 (2) ZLR 323 (S)

*S v Henderson* S-17-84

*R v Karombe & Another* 1958 R & N 469 (SR)

*R v Koning* 1953 (3) SA 220 (T)

*S v Ndlovu* S-134-90

Statutes referred to:

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 27(1), 30, 42, 278(11) and 314(3)

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*D T Mandudzo*, for the appellant

Miss *B Hammond*, for the respondent

**Judgment**

**Ebrahim JA:** The appellant was convicted of attempted murder. He was



EBRAHIM JA

a farm guard who had shot a trespasser on the farm who was cutting down trees on the farm and stealing the wood. The weapon used was a shotgun. For this, the appellant was sentenced to five years' imprisonment of which one year was suspended on conditions.

The manner in which this case was conducted leaves a great deal to be desired.

The medical evidence is scanty. It consists only of the affidavit from the medical practitioner who examined the complainant. The doctor was not called to give evidence in person, the affidavit being handed in by "consent", in terms of s 278 (11) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. I put the word "consent" in inverted commas, because it was hardly informed consent. In my view, such consent should be treated in the same way as an admission by an unrepresented accused person: the accused should be warned that he is not obliged to give his consent and told what the effect of giving consent is. Compare s 314(3) of the Criminal Procedure and Evidence Act.

The doctor stated that on 1 May 1992, the date of the alleged offence, he examined the complainant and found the following injuries:

> "Shotgun blast from behind to [left] arm. At least seven entry wounds. Fractured mid shaft [left] humerus."

The report states that-

> "These injuries were most likely to have been caused by shotgun blast at close range".

The degree of force said to have been necessary was "severe". As to the possibility of permanent injury, the report states:

> "Possible but only moderate".

Quite what this means is not explained. Does he mean that there was a "moderate" possibility (whatever that is) of permanent injury, or does he mean that there was a possibility of permanent injury but that the injury would only have been moderate? As the doctor was not called, this was not cleared up.

It is also unclear what the doctor meant when he said that the shot came from "close" range. How close? This is not explained.



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EBRAHIM JA

It is difficult, on the basis of the doctor's report, to know how the magistrate could have concluded that-

> "There is no doubt that complainant could easily have met his death as a result of accused's conduct. The bleeding on the part of the complainant alone could have led to the loss of life."

There is simply no basis for such a conclusion.

It is also relevant that there was no evidence as to the firearm used or the type of shot used in it. The appellant talked about the "bullets" (he means the cartridges) being filled with salt but it is not clear whether he is saying that this was what was used on the day in question. His employer could and should have been called to say what sort of cartridges were issued and some expert evidence given as to the inherent dangers or lack of them of the different types of ammunition. Bird shot, for instance, is far less dangerous than buck shot, but some evidence would have been essential.

The magistrate's attitude to the appellant seems to have been hostile and overbearing throughout. He interrupted cross-examination to an unnecessary degree, effectively ending the cross-examination, and he browbeat the appellant into declining to call his employer as a witness, although the appellant had at first intimated that he wished to call his employer. His method of letting the appellant give his examination-in-chief was simply to ask if he adhered to the defence outline and confirm that he had nothing to add to it. This might be convenient for the court, but is not a satisfactory way of allowing an unrepresented accused conduct his defence. It is bound to lead to confusion and accusations of omitting things, as indeed happened here. The magistrate appears also not to have complied with the requirements of s 198(6) of the Criminal Procedure and Evidence Act.

Having said all that, though, and disregarding the obvious untruths and inconsistencies in the appellant's evidence, there is no doubt that he fired a potentially lethal weapon at the complainant, who was running away after having been caught in the act of stealing firewood. There is also a possibility that the complainant and his party had been cutting down trees. Certainly the appellant heard other people cutting trees down. He formed the entirely reasonable suspicion that the complainant and his party were committing acts which constituted two common law offences, malicious injury to property and theft. Common law offences, with some exceptions which do not apply here, are included in the First Schedule to the Criminal Procedure and





Evidence Act. He would thus have been authorised under ss 27(1) and 30 of the Criminal Procedure and Evidence Act to arrest the complainant and the other persons concerned without warrant. In terms of s 42(1), if-

> "the person whose arrest is attempted ... flees when it is clear that an attempt to arrest him is being made ..., the person attempting the arrest may, in order to effect the arrest, use such force as is reasonably justifiable in the

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> circumstances of the case ... to prevent the person from escaping."

If the person whose arrest is attempted is killed as a result of the use of reasonably justifiable force, the killing is lawful if the person was to have been arrested in respect of a First Schedule offence (s 42(2)).

There seems little dispute that the appellant was attempting to arrest the complainant. There is no other reason for him to act as he did. He was entitled to use "reasonable force", and if the complainant had been killed by the use of reasonable force, the killing would have been lawful. The remaining question is: was reasonable force used or was it excessive force? The test is objective: was it reasonably necessary for a person in the appellant's position to act as he did? In deciding on the lawfulness or otherwise of the means employed in effecting an arrest the court must, as far as possible, put itself in the position of the person making the arrest, avoiding an armchair perspective: *Ntsomi* v *Min of Law & Order* 1990 (1) SA 512 (C) at 530 *per* van Deventer AJ. It should not examine his conduct in the cold, impartial way of an outside observer: *R* v *Karombe & Anor* 1958 R & N 469 (SR) at 474, *per* Qu net J (as he then was).

A police officer - and presumably any other person entitled to effect an arrest - should resort to using a firearm only if there is no other way at all to capture the suspect. He should, if circumstances permit, give an oral warning to the suspect ("Stop or I will shoot"). He should then fire a warning shot into the ground or the air. After that, if he still must shoot, he should try to shoot the suspect in the legs: *Matlou v Makhubedu* 1978 (1) SA 946 (A) at 958A. If the suspect is killed and the killing is found to have been as a result of excessive force, the person attempting the arrest may be prosecuted for culpable homicide (or even for murder if the excess of force was unreasonable or immoderate): *R v Koning* 1953 (3) SA 220 (T) at 232-3.

I also make reference to the case of *S* v *Gumbi* 1994 (2) ZLR 323 (S), a case in which the appellant was charged with and convicted of attempted murder

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by the trial court. Gumbi was a farm guard armed with a 12-bore shotgun loaded with buck shot. He came across three poachers with dogs on the farm. He asked them to stop and they heard him but decided to run away. He fired two shots, both well to one side of the fleeing poachers. Subsequently one of them was found to have been hit.

My brother McNally and I sat on that case and at p 325A-C of the judgment McNally JA made the following observations:

> "The regional magistrate found a constructive intention to kill. But we have had a problem with this conclusion partly because of the inadequate presentation of the evidence.
>
> Two recent cases are relevant. In *S* v *Kware* S-85-93 Korsah JA dealt with the case of a farm guard shooting and injuring an escaping maize thief. And in *S* v *Fraser* S-110-94 I dealt with the case of a farmer shooting at a poacher's dog (lawfully - see s 50 of Act 14 of 1975) and, without knowing it, hitting a poacher. The charge in the first case was common assault and in the second culpable homicide.
>
> In these cases commonly two questions arise. The first relates to the intent of the person shooting. The second relates to the justification for shooting at or towards or near to or in the general direction of persons refusing to

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stop when found involved in unlawful activity."

At p 327E-H the learned Judge of Appeal said:

"The point, in essence, is that there must be more than negligence and even more than gross negligence to constitute that form of recklessness which amounts to constructive intent or *dolus eventualis*. As was said by Beadle AJ (as he then was, having retired as Chief Justice) in *R* v *Kadongoro* 1980 ZLR 54 (G) at 55B:

> It seemed to me that the magistrate was clearly wrong in confusing *dolus eventualis* with gross negligence ...'

There must be in the mind of the accused person, what has been called a volitional component'. See the judgment of Jansen JA in *S* v *Ngubane* 1985 (3) SA 677 (A) at 684D. In other words he must, in effect, say to himself I know I may kill this person if I shoot. But I am going to shoot anyway'. As Jansen JA went on to say:



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> Our cases often speak of the agent being reckless' of that consequence, but in this context it means consenting', reconciling' or taking into the bargain', and not the recklessness' of the Anglo-American systems, nor an aggravated degree of negligence.'"

It seems to me that applying these tests to the facts of this case the appellant cannot escape total liability for his conduct.

I will look at each factor which, in my view, lead me to this conclusion:

1. A gun was used.
2. The distance from which it was fired was no more than fifteen metres.
3. The shot was fired at about waist height.
4. He had instructions not to shoot at people.
5. He fired no warning shots.
6. He did not shout a warning at the complainant saying that if he did not stop he would shoot.

Against the background of these facts I am of the opinion that his conduct merits a finding of an actual intent to do grievous bodily harm. In his warn and caution statement he stated:

"On this day I was patrolling the farm when I noticed that the boundary wire had been lowered down. I followed the spoor until I got where the complainant and three others were. When they saw me they started running away and I thought these people were stealing cattle. I fired the first shot but no-one stopped. I then fired the second shot and I shot him. He kept on running until he got tired and I arrested him. He had two axes."

This passage serves to emphasise that he acted in a deliberate manner and therefore justified the verdict I consider appropriate.

I am aware that there are authorities which have held that mere negligence cannot found an intent to kill. Compare *S v Ndlovu* S-134-90 (not reported); *S* v *Henderson* S-17-84 and *S* v *Gumbi supra*. I would also reiterate what was said by McNally JA in *S v Gumbi supra* at p 328E:

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EBRAHIM JA

> "I think he was guilty of negligent wounding with a firearm, and I think that the legislature might wish to consider creating such a crime by statute, as has been done in other countries. I do not consider it has been shown that he had a constructive intent to kill, or to assault - see *S* v *Frazer supra*."

Be that as it may, I am satisfied that on the facts of this case (the deliberate nature of his actions) a proper verdict would be one of an assault with intent to do grievous bodily harm for the reasons I have outlined above and it is on that basis that the conviction of attempted murder is set aside and substituted with a verdict of assault with intent to do grievous bodily harm.

I turn now to consider the question of sentence. The sentence imposed on the appellant, even had the conviction been one of attempted murder, induces a sense of shock. The complainant was not killed, yet the sentence imposed was more appropriate for an actual killing. The complainant was a trespasser who was committing an offence. The appellant was doing his job protecting the farm. It is true that he exercised excessive force and it is on that basis that he now stands convicted. He has been in custody since the date of his conviction, which was on 4 June 1995, and I take this into account in considering what an appropriate sentence should be. This is also a factor which renders it inappropriate to have a suspended sentence hanging over his head.

Taking all these factors into account the appeal is allowed to the extent that the conviction of attempted murder is set aside and substituted with a verdict of assault with intent to do grievous bodily harm. The sentence imposed by the trial court is also set aside and is substituted with a sentence of twelve months' imprisonment with labour.

GUBBAY CJ: I agree.

KORSAH JA: I agree.

*Honey & Blanckenberg*, appellant's legal practitioners

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## Endnotes

**1 (Popup - Popup)**

This judgment was made available too late to be included in the 1995 Law Reports

**2 (Popup - Popup)**

This judgment was made available too late to be included in the 1995 Law Reports.

**3 (Popup - Popup)**

This judgment was received too late to be included in the 1995 Law Reports.

**4 (Popup - Popup)**

This judgment was approved too late to be included in the 1995 Law Reports.

**5 (Popup - Popup)**

See ante at p134 of this volume - *Editor*

**6 (Popup - Popup)**

See ante at p341 of this volume - Editor

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